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OFFICE OF REGIONAL COUNSEL

REGION IV

U.S. ENVIRONMENTAL PROTECTION AGENCY

VOLUME II

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PRE-REFFERALS

MINILIT(PRN) REPORT

RD/RA NEGOTIATIONS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

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PRE-REFERRAL LITIGATION REPORT
BYPASS 601 GROUNDWATER CONTAMINATION SITE
Cabarrus County, North Carolina

I. BACKGROUND

A. Site History

The Bypass 601 Groundwater Contamination Site (the Site) is defined as an area located on the western edge of Concord, North Carolina, in which groundwater is contaminated by multiple sources. The City of Concord is the county seat for Cabarrus County. U.S. Highway 29/Route 601 Bypass provides access to the cities of Kannapolis, approximately six (6) miles north, and Charlotte, approximately twenty-one (21) miles southwest of the Site.

The Site consists of the Martin Scrap Recycling (MSR) facility, an inactive battery salvage and recycling operation, as well as ten (10) additional source areas which have contributed to groundwater contamination (Exhibit A). These ten additional source areas include private residences, as well as private operating and non-operating small businesses.

The MSR facility began battery recycling operations in 1967 under the ownership and operation of Oliver Martin (although the property was co-owned by Oliver's wife, Carrie Martin). From 1955-1966, Oliver Martin operated a similar enterprise under the name of Oliver Martin Battery Salvage. Oliver Martin Battery Salvage was located on a piece of property just across the street from the present MSR facility. Oliver Martin closed the business in 1966, and sold the property, which is now one of the ten (10) additional source areas included in the Site description (See Source area 2, Site Features Map, Exhibit A).

Oliver Martin operated the current MSR facility from 1967 to 1979. In 1979, Oliver sold the assets and operation of MSR to his son, Bill Martin, who operated the facility as a scrap metal and lead battery recycling facility until it closed in 1986. At the time of its closing, MSR filed for bankruptcy.

B. MSR's Operations

The MSR facility (as well as the old Oliver Martin Battery Salvage Company), derived revenue from the recovery of several

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types of scrap metal, most notably lead, which was recovered from scrap vehicle batteries. The batteries were "cracked" by sawing off the tops with an electric saw. The acid from the batteries was drained, and lead plates were then removed for sale as scrap metal. The wastes from the batteries and battery casings included sulfuric acid and lead.

C. Releases of Hazardous Substances

During the period of 1966 through 1979, when Oliver Martin owned and operated the MSR facility, hazardous substances were released through the battery recycling process. A surface impoundment on the property received the waste sulfuric acid from the batteries, which was neutralized with soda ash. Overflow from the surface impoundment would runoff into the Irish Buffalo Creek, which flows along the eastern boundary of the MSR property (Exhibit A). To divert this waste discharge from the creek, a subsurface drain was installed downgradient from the surface impoundment. After the drain was installed, overflow percolated into the ground.

The used battery casings were crushed, mixed with gravel, and deposited on MSR's property as fill material. Additional evidence indicates that these casings were also used as fill material (as a regular practice) at several of the other ten (10) source areas during this period.

In 1979, Oliver Martin sold the assets of the MSR facility to his son, Bill Martin. Bill Martin continued the lead reclamation operations, but no longer buried the battery casings on-site. Instead, Bill Martin disposed of the chipped battery casings at the Cabarrus County Sanitary Landfill until 1982. The Cabarrus County Sanitary Landfill is not one of the ten (10) other source areas which make up the Site.

In 1982, MSR discontinued use of the on-site surface impoundment. Hazardous wastes, including sulfuric acid and lead from batteries, was gravity-fed to two stainless steel holding tanks. Lead particles settled out and the sulfuric acid was pumped to tanker trucks and shipped to a buyer for resale. In 1982, Bill Martin began to rinse the chipped plastic casings with water to remove the lead residue, store the chips temporarily on-site, and then sell the chips for off-site recycling.

D. Associated Cleanup Activities

During the 1970's, contamination problems at the MSR facility came to the attention of the State of North Carolina (North Carolina). When North Carolina discovered heavy metals in surface water on MSR's property and found the water to be highly acidic, North Carolina instructed MSR to dispose of spent battery casings at the Cabarrus County Sanitary Landfill in 1979. North Carolina also required MSR to cover, compact, seed, and properly

neutralize the area of MSR property where the battery casings had been disposed.

In early 1981, MSR was fined $13,000 for various Occupational Safety and Health Act (OSHA) violations, the most serious of which involved employee exposure to lead in the workplace.

In late 1981, MSR was inspected by the North Carolina Division of Environmental Management (NCDEM), and the North Carolina Division of Health Services (NCDHS). In February, 1982, NCDHS conducted a follow-up inspection and found that the MSR facility was selling all hazardous by-products of the battery recycling operation.

NCDHS also discovered that the MSR facility had discontinued disposal of battery acid into the surface impoundment, which was filled with sediment and sludge, and was storing battery acid in steel holding tanks until the acid was recycled or sold. Additionally, two (2) to six (6) inches of topsoil from around the plant operations buildings were removed and sold.

E. Past CERCLA-Related Activities

Throughout 1983 and 1984, NCDEM and NCDHS continued sampling surface water and sediment from areas surrounding the MSR facility. These samples indicated the presence of lead and other heavy metals in excess of Federal standards for drinking water.

North Carolina referred the Site to EPA, and as a result, EPA completed an extensive site investigation report for the MSR facility in 1984. EPA sampling of monitoring wells, private wells, surface water, and sediment, both on and off-site, detected elevated concentrations of lead, arsenic, cadmium, and chromium contamination in both the soils and the groundwater.

On October 1, 1984, EPA formally proposed the Site for listing on the National Priorities List (NPL) (40 C.F.R., Part 300, Appendix B). The Site was finalized on the NPL by publication in the Federal Register on June 10, 1986, 51 Fed. Reg. 21070, with a Hazard Ranking System (HRS) score of 37.93.

In July 1985, EPA conducted an interim potentially responsible party (PRP) search, a title search, and industrial survey (Exhibit B). The PRP search identified current and former property owners of the MSR facility and also identified industries located within a one-half mile radius of the MSR facility that could be potential contributors to Site contamination. Based on property ownership information, EPA issued general notice letters and information requests under CERCLA Section 104(e), 42 U.S.C. § 9604(e) to three (3) PRPs on October 28, 1985.

EPA conducted a fund-lead remedial investigation (RI) in 1989, and the final RI report was completed on April 1, 1990. During the investigation, several locations where battery casings had been dumped were discovered within 1.5 miles of the MSR facility.

Due to the complexity of the Site contamination problem, the Site was divided into three (3) operable units (OU). OU#1 addressed soil contamination on the MSR facility, OU#2 addresses soil contamination at the additional source areas, and OU#3 addresses the groundwater contamination at the entire Site.

On August 31, 1990, EPA issued a Record of Decision (ROD) for OU#1 (Exhibit C). The ROD presented an interim remedial action for addressing an estimated 57,000 cubic yards of contaminated soil at the MSR facility. A temporary cap was proposed for the facility to prevent human and environmental exposure to the contaminants and to minimize the generation and transport of leachate to the groundwater. This interim remedy, however, was never implemented due to the fact that the State has no approved Capacity Assurance Plan (CAP). In the absence of an approved CAP, EPA is unable to undertake fund-lead remedial actions.

On November 27, 1990, EPA sent additional general notice letters under CERCLA Section 104, 42 U.S.C. § 9604 to the three (3) identified PRPs notifying them of their potential liability and requesting their participation in the remedial design/remedial action (RD/RA) phase at the Site. The PRPs declined to participate.

In early 1992, EPA conducted a removal action on source areas 1, 2, 9, and 10 (Exhibit A). This action removed approximately 9,500 tons of battery casings and soil heavily contaminated with lead. All of the excavated material was transported to the MSR facility and covered to prevent human and environmental exposure.

The Proposed Plan (the Plan) for the Site was issued on December 17, 1992 (Exhibit D), as required by CERCLA Section 117(a), 42 U.S.C. § 9617. The Plan proposed to combine the contaminated soils from the MSR facility with the contaminated soils from the additional source areas. The combined soils will be treated on-site by solidification/stabilization, then removed off-site for disposal. In addition, the Plan proposed a scheme for groundwater remediation across the entire Site through complete groundwater extraction, on-site treatment, and discharge to a Publicly Owned Treatment Works (POTW).

II. THE PRPs AND THE EVIDENCE

On December 15, 1991, PRC Environmental Management, Inc., (PRC) began a second PRP search based on business records collected from the MSR facility. The final PRP search document is expected to be released in early February, 1993, and a copy will be

forwarded when received. The business records consisted of invoices for scrap material (including batteries) made by the MSR facility for the years 1980 through 1986. Due to the MSR facility record retention policy, no documents exist prior to 1980.

The second PRP search uncovered approximately 1,500 entities who sent batteries and lead to the Site from 1980 to 1986. Out of the possible 1,500 entities identified, only 251 have been located to date. EPA does not anticipate locating the remaining identified PRPs, however, the PRPs that have been located have indicated a willingness to assist in locating other PRPs.

On August 28, 1992, general notice letters and information requests issued under CERCLA Section 107(a), 42 U.S.C. § 9607(a), and CERCLA Section 104(e), 42 U.S.C. § 9604(e), were sent to all 251 entities who were located by PRC (Exhibit E). A brief description of the PRP groups is set out below.

A. Property Owners

1. Oliver and Carrie Martin

Oliver and Carrie Martin are liable as current joint owners of the MSR facility, where there has been a release of a hazardous substance. A financial statement (as of December 11, 1990) provided by Oliver and Carrie Martin in response to the November 27, 1990 notice letter sent by EPA, shows the couple to be financially viable (Exhibit F). Oliver Martin, however, has recently undergone surgery, and has been diagnosed with terminal cancer. He is not expected to live much longer. As a result, Oliver Martin should probably not be named as a PRP. Due to the discovery of Oliver Martin's business records, it may be unnecessary to pursue Carrie Martin as a PRP either.

2. Property Owners of the Additional Source Areas

The owners of the property at which contamination was discovered (batteries were buried) are liable as owners of a facility at which there has been a release of a hazardous substance.

Due to the fact that these property owners would be unable to finance the necessary cleanup, as well as the fact that Oliver Martin's business records have yielded many viable PRPs who seem willing to do the cleanup, it is unlikely that these property owners should be named as PRPs.

B. Parties Who Operated the MSR Facility

Both Oliver and Bill Martin are liable as operators of the MSR facility, where hazardous substances have been released. For the reasons stated above, Oliver Martin should probably not be named

as a PRP. Due to Bill Martin's poor financial standing, as evidenced by his recent bankruptcy, it is unlikely that Bill Martin should be pursued as a PRP either.

C. Parties Who Sold Batteries to the MSR Facility Between 1980-1986

Based on 1980-1986 business receipts of the MSR facility, all parties who sent batteries to the MSR facility are liable as persons who generated waste for disposal at the Site. None of the parties dispute the business records which link them to the Site.

These parties have begun the process of forming a steering committee, and have expressed an early intention to work with EPA in carrying out the remedial action phase at the Site. Accordingly, these parties should be named as PRPs.

III. LEGAL DEFENSES AND EQUITABLE CONSIDERATIONS

A. Legal Defenses

1. Oliver and Carrie Martin

The liability of both Oliver and Carrie Martin is straightforward. Evidence exists showing Oliver and Carrie Martin as owners of the MSR facility at the time the battery casings were "cracked" and buried at the additional source areas. As a result, neither Oliver nor Carrie Martin have a viable defense to CERCLA liability.

2. Property Owners of the Additional Source Areas

The liability of those landowners who requested that battery casings be used as fill material on their property is uncontested. For those property owners who were unaware, or took possession with no knowledge, of the contamination, the "innocent landowner" defense may be available, as set out in Section 107(b) of CERCLA, 42 U.S.C. § 9607(b). Responses to CERCLA Section 104(e), 42 U.S.C. § 9604(e), letters show that several of the property owners took possession of their property without knowledge of the buried battery casings located on their land. However, it is unlikely that these landowners would prevail under this defense, as they failed to make proper inquiry or conduct environmental audits, as caselaw currently seems to require. At this time no property owner has raised this affirmative defense.

3. Parties Who Operated the MSR Facility

The liability of both Oliver and Bill Martin is straightforward. Evidence exists showing Oliver and Bill Martin as operators of

the MSR facility at the time the battery casings were "cracked" and buried at the additional source areas. As a result, neither Oliver nor Bill Martin have a viable defense to CERCLA liability.

4. Parties Who Sold Batteries to the MSR Facility Between 1980-1986

The liability of those parties who sold batteries to the MSR facility is fairly straightforward. MSR's business receipts show these PRPs generated lead batteries and lead for disposal at the MSR facility. As a result, these PRPs have no viable defense to CERCLA liability, subject to the equitable considerations below.

B. Equitable Considerations

Requiring those parties who sold batteries to the MSR facility during the period of 1980 to 1986 to finance the entire Site cleanup may present some difficulty, as divisibility may be raised. These parties may argue that the only evidence linking them to contamination at the Site are the receipts of the MSR facility, which are dated 1980 to 1986. Because the evidence could point to the conclusion that the contamination of the ten additional source areas occurred prior to 1980 (due to the fact that in 1980, the MSR facility stopped burying their battery casings off-site, and began dumping them at the Cabarrus County Sanitary Landfill), these parties may argue that their responsibility for the ten additional source areas is divisible from their liability regarding the actual MSR facility (where contamination was ongoing until operations ceased in 1986). The vast majority of these parties (through responses to Information Requests) claim that the transactions memorialized in the 1980 to 1986 business receipts are the only transactions that took place between the parties and the MSR facility.

One possible argument against this theory is that the business records from 1980 to 1986 only provide a "snap-shot" of the transactions that took place during the period of time that the MSR facility was in operation (1956 to 1986). It seems unlikely that all of these parties, who represent most of the businesses that would require battery disposal within the geographical area, would suddenly start to do business with the MSR facility, the only such facility in the area, in 1980. Business records prior to 1980 do not exist, however, and Oliver Martin seems to have no recollection as to which of the parties from after 1980 transacted business with the MSR facility before 1980. As a result, the only evidence linking these parties to the Site after 1980 is an assumption that these parties had to be disposing of their batteries someplace prior to 1980, and the most likely place would be the only facility in the area, MSR.

At this time, however, divisibility has not been raised by these parties. A steering committee has been formed, representing a large group of viable parties who have indicated a strong interest early in the proceedings to participate in the cleanup at the Site. As a result, further communications regarding the liability of the Martins and the owners of the ten additional source areas have not been pursued at this point.

IV. STATUTE OF LIMITATIONS

The statute of limitations is not an issue in this case, as response actions are currently ongoing.

V. RESPONSE COSTS

A preliminary Itemized Cost Summary Report has been prepared, which shows past costs at the Site to be at least $2,912,167.52, as of December 21, 1992. (Exhibit G). The Region IV Cost Recovery Division estimates that this figure is not static, and will probably be much higher. A full cost documentation has been requested, and will be forwarded when received.

VI. THE ADMINISTRATIVE RECORD

EPA compiled an Administrative Record (the Record) for this Site, and released it for public review and comment on December 17, 1992. The Record is located in EPA-Region IV's Library in Atlanta, Georgia, and a copy was sent to the Charles A. Cannon Memorial Library on Union Street in Concord, North Carolina. Due to the length of the Record, it is not being made an exhibit to this litigation package; however, the index to the Record is attached as Exhibit H.

VII. THE REMEDIAL ACTION

EPA plans to negotiate a consent decree with the parties who sold batteries to the MSR facility to finance and perform the RD/RA portion of the response action. The Record of Decision (ROD), which the Region anticipates to be final by the second quarter of fiscal year 1993, will most likely provide for the treatment of contaminated soil and contaminated groundwater (See Proposed Plan, Exhibit D). The contaminated soil from all source areas will be excavated and contaminated sediment from stream locations will be dredged. This material will be consolidated and staged at a central location at the MSR facility. Solidification and stabilization may be used to treat the contaminated material, with off-site disposal of the fixed material at an industrial landfill.

Contaminated groundwater will be contained and treated using extraction wells at all of the source areas of contamination. The contaminated water from these extraction wells will be

treated with air strippers to remove the volatile organic compounds. The treated water will be discharged to a Publicly Owned Treatment Works.

The remedy selected will most likely include the demolition and off-site disposal of the abandoned flea market at source area #4 (See Exhibit A), as well as any standing buildings at the MSR facility. In addition, one (1) trailer home at source area #3 will probably be relocated (See exhibit A). Testing will also be required to assess the effectiveness of the remedy, and administrative requirements for air emission limitations, water quality discharge requirements, and requirements for off-site disposal of hazardous waste must be met.

EPA anticipates that the preferred remedial action for this Site may be controversial. Though the preferred remedy is strongly supported by the Feasibility Study prepared for the Site, the cost of the remedy is estimated to exceed $50 million. As the comment period for the Proposed Plan has not been closed, it is hard to predict the tone of the comments EPA might receive. The seemingly high cost of the cleanup may cause active opposition to the proposed remedy by the many PRPs who may be required to finance the cleanup.

A copy of the Final ROD will be forwarded to EPA Headquarters (HQ) and the United States Department of Justice (DOJ) as soon as it becomes available.

VIII. NATURAL RESOURCE TRUSTEES

Both the United States Department of the Interior (DOI) and the State of North Carolina were contacted prior to the beginning of any remedial action at the Site. Both the State and DOI will be notified of negotiations with potentially responsible parties (PRPs) regarding the implementation of the remedial design and remedial action for the Site.

IX. RELATED CRIMINAL INVESTIGATIONS, PROSECUTIONS, OR CIVIL ACTIONS

There are no other related proceedings relevant to this Site.

X. PRE-REFERRAL SETTLEMENT STRATEGY

A. Timetable

The following schedule details the proposed milestones for the negotiation of a consent decree for this Site:

Event	Date
Proposed Plan released	December 17, 1992

Pre-referral Litigation Report to DOJ/HQ	Early January, 1993
ROD finalized and signed by Region IV	March, 1993
RD/RA Notice Letters issued	April/May, 1993
RD/RA good faith offer due	June/July, 1993
RD/RA negotiations conclude, Decree lodged	August, 1993

B. Alternative Types of Settlements

Due to the large number of PRPs identified for this Site, the PRPs may request EPA to enter into an early de minimis settlement. EPA does not anticipate accepting such a proposal due to the data contained in the most current volumetric ranking (Exhibit I). The volumetric data ranks all 1,500 PRPs according to the amount (in pounds) of batteries delivered to the MSR facility. According to the data, only the top fourteen (14) contributors out of 1,500 have contributed more than one-percent (1%) of the total volume of batteries delivered to the Site. Additionally, only ten (10) of these fourteen (14) contributors have been located. All ten (10) of these contributors are small local businesses who will not be capable of raising the funds necessary to conduct the estimated $50 million remedy.

EPA has already decided not to name the truly small generators to this Site when it decided to rank only the 1,500 parties who sent more than ten (10) batteries (or 320 pounds at the conversion ratio of thirty-two (32) pounds per battery, as stated by The Handbook of Batteries and Fuel Cells, McGraw-Hill, Inc., 1984), instead of all parties who might have sent one (1) or two (2) batteries to the Site.

The group of approximately 250 identified generators collectively appears to have sufficient funds to undertake the RD/RA and pay for past costs, and has indicated a willingness to enter into negotiations. Only the Martins and the owners of the ten (10) additional source areas have made claims regarding inability to pay for cleanup actions.

C. Proposed Draft Consent Decree

The Region intends to issue Special Notice Letters under CERCLA Section 107, 42 U.S.C. § 9607 and use the national Model CERCLA RD/RA Consent Decree (OSWER Directive #9835.17) to initiate negotiations. A draft Consent Decree, modified as much as possible for this Site, is included as Exhibit J. A copy of the regional draft model SOW that will be the basis for the draft SOW

for this Site is included as Exhibit K. A site-specific draft SOW will be forwarded to HQ and DOJ as soon as it is available.

XI. LEGAL, POLICY, AND STRATEGIC CONSIDERATIONS

As discussed above, the PRP group that is being most actively pursued is the large group of parties who contributed batteries to the Site from 1980 to 1986. Because this group is financially viable, and because the group has already expressed a willingness to undertake or finance activities at the Site, it is possible that the issue of divisibility (as discussed above in the Equitable Consideration Section) will never arise. This group has also expressed an interest in helping EPA locate other parties ranked on the volumetric that EPA couldn't locate. If these PRPs finance the entire response action, EPA derives no benefit from pursuing the Martins or the additional source area property owners as responsible parties.

One issue that EPA expects the PRPs to raise is that EPA has proposed the demolition of the buildings on the MSR facility and a building on one (1) of the source areas. This action may result in a taking without just compensation. HQ has been notified of this possibility, and believes that this argument will fail, as the value of the property free from contaminants far outweighs the burden of demolishing these structures.

XII. EPA HEADQUARTERS AND REGIONAL SUPPORT

Since the Region does not anticipate any issues of national significance to arise in this case, Region IV will take the lead in negotiating this Consent Decree. The DOJ's resources should not be necessary beyond those normally expended when assisting a Region during negotiations. According to the memorandum "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E," OSWER Directive No. 9012.10-a, June 17, 1988, the Region anticipates that this settlement will not require HQ concurrence pursuant to Waiver of Concurrence Requirements A.1. The Region requests HQ consultation, if necessary, during the negotiations.

XIII. REGIONAL CONTACTS

The Regional Attorney assigned to the Site is Seth Bruckner (404) 347-2641, ext. 2268. The Remedial Project Manager for the Site is Giezelle Bennett (404) 347-7791.

LIST OF EXHIBITS

A. Site Features Map

B. Interim PRP Search and Title Search

C. Record of Decision, Operable Unit #1, dated August 31, 1990

D. Proposed Plan, Operable Units #2 and #3, dated December 17, 1992

E. General Notice Letter and Information Request, dated August 28, 1992

F. Financial Statement of Oliver and Carrie Martin, dated December 11, 1990

G. Itemized Cost Summary Report, dated December 21, 1992

H. Index to Administrative Record, Operable Units #2 and #3

I. Draft Volumetric Ranking of Waste Contributors, as of November 14, 1992

J. Draft CERCLA RD/RA Consent Decree to be enclosed with notice letters

K. Draft Statement of Work to be enclosed with notice letters

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUN 14 1993

John C. Cruden, Chief
Environmental Enforcement Section
United States Department of Justice
Environment and Natural Resources Division
1425 New York Avenue
Room 13037
Washington, D.C. 20005

Re: Helena Chemical Company Site
Fairfax, Allendale County, South Carolina

Dear Mr. Cruden:

The purpose of this letter is to transmit to you the RD/RA pre-referral litigation report and draft consent decree for the above-referenced site, in accordance with the "Pre-Referral Negotiation Procedures for Superfund Enforcement Cases" memorandum, dated October 12, 1990. EPA intends to have a signed Record of Decision by August 30, 1993. If you need any further information at this time, please contact Rich Glaze, Assistant Regional Counsel, at 404-347-2641, ext. 2274, or Bernie Hayes, Remedial Project Manager, at 404-347-7791.

Sincerely,

John R. Barker
Regional Counsel

Joseph R. Franzmathes
Director
Waste Management Division

Enclosure

cc: William A. White, Enforcement Counsel (w/encl.)
Superfund Division, OE

Sally S. Mansbach, Director (w/encl.)
CERCLA Enforcement Division, OWPE

Robert R. Homiak (w/encl.)
Environmental Enforcement Section, DOJ

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PRE-REFERRAL LITIGATION REPORT
HELENA CHEMICAL SITE

I. SITE DESCRIPTION AND GENERAL SITE HISTORY

The Helena Chemical Company Site (the "Site") is located on Highway 321 South, approximately one mile south of Fairfax, South Carolina (Pop. 2247) in Allendale County. The Site is a 13.5 acre tract owned by Helena Chemical Company, bordered on the north by a wooded wetland, on the east by a railroad track, on the south by a plywood veneer plant and on the west by property containing a municipal water supply well.

The Site is currently used as a distribution center for prepackaged pesticides. Between 1971 and 1978, Helena used the Site for formulating and distributing liquid and dry agricultural insecticides. Blue Chemical Company owned and operated the Site for the formulation and sale of pesticides from the mid 1960's until 1971. From the mid-1950's until the mid 1960's, Atlas Chemical Company owned and operated the Site as a pesticide sale and formulation business. Before the 1950's the Site property was undeveloped.

The Site contains three standing buildings, a burned out house, open land and an area once used as a landfill for wastes disposed of on-Site. The northernmost building, currently used as a warehouse, was once used to formulate liquid insecticides. It is currently used to store various prepackaged pesticides and fertilizers that are sold to farmers. The southernmost building was used to mix dry insecticides and is no longer being used. The center building is a sales office and has historically been used as such.

The Site formerly contained two 20,000 gallon solvent tanks and several other tanks that were used to store pesticide compounds. The solvent tanks were filled by pumping the solvents through lines running under the northern formulation building to the tanks.

Before 1978, the following chemicals were formulated at the facility at various times: DDT, aldrin, dieldrin, chlordane, benzene hexachloride (BHC), ethoprop (Mocap), toxaphene, methyl parathion, ethyl p-nitrophenyl thionobenzene-phosphonate (EPN), and disulfoton. To produce the insecticides, raw chemicals were mixed with other ingredients, including diesel fuel, solvents,

and clays. On-Site formulation ceased in 1978.

Pesticides, chlorinated solvents and other contaminants have been found in on-Site soils and in the ground water beneath the Site. The highest levels of contamination were found in the vicinity of the building now used as a warehouse, near the old landfill, and near the southernmost building in an area where materials were formerly off-loaded from railroad cars. Pesticides and other contaminants have also been found in on-Site surface waters and in a wooded wetland area north of the landfill. A more detailed description of the Site is set forth in the Proposed Plan Fact Sheet dated May 1993 ("Proposed Plan"). See Exhibit 1, p. 2.

II. PAST AND PROJECTED RESPONSE ACTION

In November 1980, the South Carolina Department of Health and Environmental Control (DHEC) investigated the Site. DHEC collected and analyzed soil samples that were found to contain high levels of various pesticides. DHEC issued a Notice of Violation to Helena in July 1981 for operating a waste disposal facility in violation of South Carolina law. Helena and DHEC entered into Administrative Consent Order No. 81-05-SW on October 1, 1981 (hereinafter, "DHEC Consent Order"), which required Helena to submit a plan for the environmental evaluation and remediation of the Site. The DHEC Consent Order and amendments are attached as Exhibit 2.

Studies Helena conducted in compliance with the Consent Order indicated that surface soils were heavily contaminated with pesticides. Ground water analyses conducted as part of this investigation did not confirm contamination discovered in earlier sampling. Surface water samples, taken from water standing in the wetland areas in the northern portion of the Site, showed that the wetland was contaminated by Site-related pesticides.

Under the terms of an amendment to the Consent Order dated March 12, 1984, Helena performed further remediation, which consisted primarily of removing contaminated soil and disposing of it in a permitted hazardous waste landfill. See Exhibit 2.

EPA completed a Hazard Ranking System analysis for the Site in June 1987. Based on an aggregate HRS score of 50.2, EPA listed the Site on the NPL. See 55 Fed. Reg. 6161 (February 21, 1990).

In December 1988, EPA sent special notice letters to five PRPs, inviting offers to participate in performing the RI/FS.[1] See Exhibit 3. Of the PRPs to whom EPA sent special notice letters, only Helena offered to negotiate concerning performance of the RI/FS.

In April 1989, EPA and Helena entered into an Administrative Order by Consent (AOC), under which Helena agreed to conduct a Remedial Investigation (RI) and Feasibility Study (FS) under EPA oversight and to pay EPA oversight costs. See Exhibit 4. RI field activity began in May 1989 and was completed in April 1992. The FS was completed in December 1992. Summaries of the RI and FS are set forth in the Executive Summaries of the RI and the FS, See Exhibit 5, and in the Proposed Plan. See Exhibit 1, pp. 3-15.

In April 1992, Helena removed approximately one thousand cubic yards of contaminated soil from the Site. The removal was not ordered by EPA, but was done at Helena's initiative in order to avoid RCRA land disposal restrictions, which were to become effective the following May.

The RI/FS documented the need for remedial action to be taken to address contamination in soils and ground water and in sediments found in an on-Site wetland. As described in the Proposed Plan, EPA's preferred remedial alternative consists of i) demolition of formulation buildings, ii) excavation of contaminated soils iii) treatment on-Site of soils with a combination of hydrolytic/photolytic dechlorination and biological treatment, iv) ground water extraction, treatment and disposal, and v) mitigation for damage to the wetland. See Exhibit 1, p. 15.

Wetland mitigation will be undertaken in accordance with Section 404 of the Clean Water Act, 42 U.S.C. § 1344 ("CWA"), and the regulations promulgated under the statute.[2] The statute and

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[1]These included Helena and corporations identified in the PRP search as either current or former parent corporations of Helena and their affiliates. Several individuals identified in the PRP search as former owners and operators did not receive special notice letters because they were not able to be found, not considered liable, or were otherwise considered nonviable. See the "The PRPs," below.

[2] Fill material is a "pollutant" under Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Section 404 of the CWA requires a permit for the discharge of fill material into waters of the United States, which include wetlands. See 40 C.F.R. 230.3(s). Subpart B of 40 C.F.R. § 230 requires, as a prerequisite to issuing a permit, that appropriate and practicable mitigation measures be

regulations have been determined by Region IV to be relevant and appropriate for the Site. Region IV made this determination because of the existence of a landfill on the Site that had been placed in the wetland and subsequently abandoned in the 1960s. Although Section 404 did not exist at the time of the fill, the statute was determined to be "well suited" to the conditions created by the fill, as required by the NCP.[3] Because it is possible that landfill soils in the wetland must be removed to achieve soil cleanup levels, the resultant disturbance of the soil may create new fill in the wetland during performance of the remedy. Because of this possibility, Section 404 requirements are, arguably, applicable.[4] See Exhibit 1, p. 9.

Shortly after issuance of the proposed plan, EPA intends either to negotiate an Administrative Order on Consent with Helena or to issue a Unilateral Administrative Order to the company for further soil removal in specific highly contaminated areas. The removal is needed to address the threat the soil poses to Helena employees currently working on-Site. Although such soils would ultimately be removed in the remedial action, EPA believes the risks posed to workers on the Site justifies the immediate removal of the contaminated media. The removal order will be consistent with the remedial alternative selected in the Proposed Plan, as required by the NCP. See 40 C.F.R. § 300.415(c).

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undertaken to minimize potential adverse effects on the aquatic ecosystem. 40 C.F.R. § 230.10(d). Subpart H, 40 C.F.R. § 230.70 et seq., sets forth optional, nonexclusive mitigation options for the harm caused by dredge and fill activities. These mitigation requirements are also triggered for "after-the-fact" permits, which are required when unpermitted fill has already been discharged into a wetland at the time the permit is sought.

[3] "Relevant and appropriate" requirements are defined in the NCP as those that "while not 'applicable' to a . . . remedial action . . . or other circumstance at a site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." 40 C.F.R. § 300.5

[4] The NCP defines "applicable requirements" as "substantive requirements . . . that specifically address a hazardous substance, pollutant, contaminant, remedial action . . . or other circumstance found at a CERCLA site." 40 C.F.R. § 300.5. Thus, since fill may be placed in the Site wetland during the implementation of the remedy, the mitigation requirements of Section 404 are triggered.

III. THE PRPs

The PRP search conducted for EPA by CDM Federal Programs Corporation identified Helena as the current owner and operator of the Site. Therefore, Helena is a liable party under Section 107(a)(1) of CERCLA, 42 U.S.C. 9607(a)(1). It also named as possible PRPs i) the current and former parent corporations of Helena and their affiliates,[5] ii) former corporate owners and operators of the Site,[6] and iii) non-corporate former owners of Site property. See Exhibit 6, pp. 15-22.

Evidence collected in the PRP search and in 104(e) responses shows that most of the remaining initially identified PRPs are either financially nonviable, not liable, or no longer exist. For example, evidence shows that i) Atlas Chemical Company no longer exists, ii) the affiliates and former affiliates of Helena are not liable under current rules regarding parent/subsidiary liability, (see "Defenses and other Considerations," below), and iii) prior owners Bertha and W.F. Barnes owned the Site before pesticides were formulated there. See, generally, Exhibit 6.

EPA currently intends to pursue only Helena in enforcing remediation at the Site because the evidence strongly supports Helena's liability for all response costs as the current owner and operator of the Site. See CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1). Evidence supporting Helena's liability includes: investigations conducted at the Site by DHEC, EPA and Helena (see "Past and Projected Response Action," above); Helena's response to EPA's 104(e) information request (see Exhibit 7, in which the Company admitted ownership and operation of the Company from 1970 to the present and admitted that it manufactured pesticides using hazardous substances); and evidence collected for the PRP search, such as records of real property ownership and corporate status. See, generally, Exhibit 6. This evidence confirms Helena's status as owner of the Site and operator of the business conducted at the Site since 1971.

Region IV believes, based on past experience, that Helena will be willing to perform the entire RD/RA and to pay past costs and oversight costs. If it becomes evident that EPA will be unable to fully recover response costs from Helena, the Region will attempt to involve other PRPs, if possible.

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[5]These included Marubeni American Corporation and its parent and Bayer USA Corporation and two affiliates. See Exhibit 6, pp. 17-18.

[6]Mitchell Insecticide Company, Atlas Chemical Company and Blue Chemical Company.

IV. DEFENSES AND OTHER CONSIDERATIONS

There is no evidence in the record that the current or former corporate affiliates of Helena and their affiliates exercised control over the management and operations of Helena to the extent necessary to make them owners or operators under CERCLA. Absent evidence of such control, EPA would be unable to establish a prima facie case against these PRPs. See, e.g., U.S. v. Kayser-Roth Corporation, 724 F. Supp. 15 (D.R.I. 1989).

V. STATUTES OF LIMITATION/BANKRUPTCY COURT DEADLINES

These considerations do not apply in this case.

VI. RESPONSE COSTS

Total costs incurred at the Site as of February 28, 1993 were $303,253.65. Of this amount, Helena has paid $74,498 in response to EPA demands for reimbursement of costs of overseeing removal activities at the Site. The most recent EPA computer generated cost summaries for the Site are attached as Exhibit 8. EPA is currently reviewing the supporting cost documentation.

VII. ADMINISTRATIVE RECORD

EPA has compiled an Administrative Record file for this Site. The record is located in EPA Region IV's library in Atlanta, Georgia and at City Hall in Fairfax, South Carolina. An index of the Administrative Record is attached as Exhibit 9.

VIII. DESIRED SCOPE OF RELIEF

EPA intends to negotiate a consent decree with the PRPs that will provide for them to perform the RD/RA for the Site and to pay all of EPA's past and future response costs for the Site.

IX. NATURAL RESOURCE DAMAGE TRUSTEES

EPA has contacted the trustees for the U.S. Department of the Interior (DOI), the U.S. Department of Commerce/NOAA, DHEC, and the South Carolina Wildlife and Marine Resources Department (SCWMRD). DOI, DHEC and SCWMRD have expressed concern regarding a wetland area on the Site. EPA has considered the comments of the trustees in the preparation of the RI/FS and has invited their participation in negotiation of an RD/RA consent decree with Helena.

X. RELATED CRIMINAL INVESTIGATION, PROSECUTIONS OR CIVIL ACTIONS

There are no other actions or investigations involving this Site.

XI. PROPOSED PREREFERRAL STRATEGY

Region IV anticipates that the ROD will be completed and signed by August 30, 1993. Following signing of the ROD, negotiations will begin with the PRPs. The following schedule shows proposed milestones for the negotiation of a consent decree for RD/RA:

Public Meeting	May 27, 1993
End of Public Comment Period	June 3, 1993
Pre-Referral Litigation Report to HQ and DOJ	June 4, 1993
Draft Statement of Work Completed	July 15, 1993
ROD finalized and signed by Region IV	August 30, 1993
Special notice letters issued	September 7, 1993
Good faith offer due	November 6, 1993
RD/RA Negotiation period concludes	January 5, 1993

A draft consent decree (including a draft Statement of Work) (hereinafter, "Consent Decree") is attached for review by EPA Headquarters and the Department of Justice. See Exhibit 10. This draft is based on the national "Model RD/RA Consent Decree." Region IV requests that any comments be sent to the regional attorney in sufficient time for Region IV to send the Consent Decree to the PRPs with the Special Notice Letters.

XII. HQ AND DOJ SUPPORT

The Region requests that DOJ and EPA Headquarters participate in the negotiation of the Consent Decree. Since the Region does not anticipate issues of national significance, the Region requests Headquarters' concurrence with this pre-referral litigation strategy. The Region is prepared to take the lead in negotiating the Consent Decree.

For Exhibits themselves, please refer to Site File.

LIST OF EXHIBITS

Exhibit 1. Proposed Plan Fact Sheet

Exhibit 2. DHEC consent decree

Exhibit 3. Special notice letter for RI/FS

Exhibit 4. Administrative order on consent for RI/FS

Exhibit 5. Executive summaries of RI and FS

Exhibit 6. PRP search report

Exhibit 7. EPA 104(e) request and Helena's reply

Exhibit 8. Cost Summaries

Exhibit 9. Administrative record index

Exhibit 10. Draft RD/RA consent decree

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUL 01 1993

4RC

YELLOW

John C. Cruden, Chief
Environmental Enforcement Section
United States Department of Justice
Environment and Natural Resources Division
1425 New York Avenue
Room 13073
Washington, D.C. 20005

Re: Kalama Specialty Chemicals, Inc., Superfund Site
Beaufort, Beaufort County, South Carolina
Pre-Referral Litigation Report

Dear Mr. Cruden:

The purpose of this letter is to transmit to you the RD/RA pre-referral litigation report for the above-referenced Site, in accordance with the "Pre-Referral Negotiation Procedures for Superfund Enforcement Cases" memorandum, dated October 12, 1990. EPA is expected to sign a Record of Decision for this Site in August, 1993. If there is any additional information you need at this time, please contact Seth Bruckner, Assistant Regional Counsel, at 404-347-2641, ext. 2268, or Steve Sandler, Remedial Project Manager, at 404-347-7791.

Sincerely,

John R. Barker
Regional Counsel

Joseph R. Franzmathes
Director
Waste Management Division

Enclosure

cc: William A. White, Enforcement Counsel (w/encl.)
Superfund Division, OE

Sally S. Mansbach, Director (w/encl.)
CERCLA Enforcement Division, OWPE

Karen Dworkin (w/encl.)
Environmental Enforcement Section, DOJ

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PRE-REFERRAL LITIGATION REPORT
KALAMA SPECIALTY CHEMICALS, INC., SITE
Beaufort County, South Carolina

I. BACKGROUND

A. Site History

The Kalama Specialty Chemicals, Inc., Site (the Site) is located on Port Royal Island in the Low Country area of South Carolina, approximately four miles north of the city of Beaufort, South Carolina, where groundwater is contaminated by surface soils and sediments. The western edge of the Site is bordered by US Highway 21, and the eastern edge is bordered by the Seaboard Coast Line Railroad. Across US Highway 21 from the Site is the U.S. Marine Corps Air Station (MCAS) Beaufort.

The Site consists of two parcels of property, both currently owned by Kalama Specialty Chemicals, Inc., (KSCI), which is owned by its parent company, Kalama Chemical, Inc. (KCI). The first parcel of property is a sixteen (16) acre tract of land that was used for chemical manufacturing and repackaging activities. The second parcel of property is a vacant thirty-four (34) acre tract of land, adjacent to the first tract, previously operated as a mobile home park known as the Benton Trailer Park, but later purchased by KSCI in 1980 when contamination was discovered there.

Operations began at the Site in 1973 by a chemical company known as Vega Chemicals (Vega), who leased the sixteen (16) acre tract from the Beaufort County Development Corporation. Vega spent approximately two years constructing its operating facilities at the Site, and began full scale operations in 1975.

In 1976, KSCI purchased a financial interest in Vega, and later purchased the balance of the company in 1978. KSCI purchased the sixteen (16) acre tract in 1979 from the Beaufort County Development Corporation. KSCI continued to operate at the Site until 1983, when it closed its operations. The Site remained inactive until 1986, when KSCI leased the sixteen (16) acre tract to a local contractor, Floyd Sears Construction, who used the Site for the storage and staging of heavy equipment, as well as a variety of materials, such as preserved timbers (telephone poles), old oil tanks, construction debris, and concrete from the

MCAS Beaufort. Floyd Sears Construction leased the property until 1989, at which point the Site was abandoned.

The former operations area of the Site has been fenced, with "No Trespassing" signs posted identifying the property as a Superfund site. The fencing is currently inspected regularly by a local security company.

B. Operations at the Site

The Site was operated by both Vega, and later KSCI, primarily in the production of specialty chemicals (a wide range of chemicals produced in small, special-order batches that manufacturing firms or larger chemical producers utilize in their own production systems). The principal product manufactured at the Site was known as Krenite, an herbicide made under contract from the DuPont Company. The wastes from the Site included wastewater, comprised of cooling water, runoff, boiler blowdown, and pump seal leakage and spillage, which was disposed of on-site, and other non-aqueous and organic wastes, which were disposed of at approved off-site incineration or disposal facilities.

C. Releases of Hazardous Substances

During the period of 1973 through 1975, wastewater from the facility was discharged from the production area of the facility to a small depression in the land, where the wastewater then percolated into the ground. Between 1976 and 1979, the wastewater was treated on-site by a land application system consisting of an aerated, bentonite-lined, thirty-three (33) foot holding pond and tile field (Exhibit A). A lift station pumped this wastewater from the operations area to the holding pond via an underground six (6) inch diameter PVC pipe. The wastewater was stabilized in the pond and discharged to a large tile field, in an attempt to percolate stabilized wastewater to the water table aquifer in order to prevent its migration to surface waters off-site.

In addition to release of wastewater at the Site, other releases may have occurred because of on-site incineration which took place at the Site during the 1970s. Non-chemical solid waste material (cardboard, pallets, and fiber containers) was periodically burned in a depressed location beyond the fence line west of the operations area. Additionally, a methanol/ethanol waste stream, possibly containing trace amounts of ethyl chloride from the Krenite manufacturing process, was burned in a bentonite-lined pit on-site. The pit was also later used by Kalama for fire-fighting training during this period. The location of the pit, which was reportedly filled in January, 1979, has not been precisely determined.

In January 1979, there was an explosion and fire at the Site which resulted from a laboratory experiment (Exhibit B). The explosion and fire damaged a number of reactors and vessels containing raw materials, intermediates and products associated with other processes, which ran off the reactor pad principally to the west and northwest (See Exhibit A). It was estimated that over 200,000 gallons of water and fire control foam were used to fight the fire on the pad, and this fire water, contaminated with organics from the ruptured vessels, also ran off the operations area and pooled in low areas west and northwest of the reactor pad (See Exhibit A). The majority of the pooled fire water (contained by an earthen dam) was recovered, and pending off-site disposal, was held in tanks, pools, and tankers. An effort was made to hold some of the material in the wastewater holding pond, but due to a plug failure, this material seeped into the tile field.

Following the explosion and fire, use of the wastewater treatment system was curtailed during plant rebuilding and start-up. Any washdown or wastewater sent to the pond was held and pumped into tankers for off-site disposal. In 1980, following abandonment of the original bentonite-lined pond and tile field, KSCI constructed a larger, plastic-lined holding lagoon. This pond had no discharge; wastewater was held for off-site disposal. This pond was utilized until 1983, when KSCI closed its operations.

Soils at the Site were analyzed by the State of South Carolina, and were found to be contaminated with benzene, toluene, ethylbenzene and xylenes, 1,2-dichloroethane, acetone, methylene chloride, lead, nickel, and mercury, with especially high concentrations detected in areas which received substantial runoff from the fire and explosion in January 1979. Groundwater contamination at the Site, which has the potential of affecting the Floridan aquifer, consists of ethylbenzene and xylenes, 1,2-dichloroethane, acetone, and methylene chloride.

D. Associated Cleanup Activities

During the 1970s, contamination problems at the Site came to the attention of the State of South Carolina (the State), and were investigated by the South Carolina Department of Health and Environmental Controls (SCDHEC), which ordered KSCI to install a wastewater treatment system. Early inspections at the Site led to the initiation of a groundwater monitoring program in 1976, and the discovery of buried drums at the Site in 1979. Further inspections led to the decommission of the inadequate pond and tile field system in 1980 (all sludge and contaminant structures from these areas were sampled and disposed of in an approved landfill, and are no longer evident), and the decommission of the larger wastewater lagoon in 1983.

In 1980, a Consent Order issued by SCDHEC as a result of frequent releases of wastewater into the soils, required the characterization of soil and groundwater quality at the Site, and called for a cleanup of all identified contaminated areas. This Consent Order was later amended to require KSCI to perform studies on the extent to which soil and groundwater contamination had occurred and to design plans to clean up the contamination.

Due to the presence of contaminants in soils and shallow groundwater, and the potential impact of these contaminants on an important primary aquifer, EPA formally proposed the Site for listing on the National Priorities List (NPL) (40 C.F.R., Part 300, Appendix B), on September 8, 1983. The Site was finalized on the NPL by publication in the Federal Register on September 21, 1984, 49 Fed. Reg. 37083, with a Hazard Ranking System (HRS) score of 59.9.

EPA and the State agreed that SCDHEC would have lead responsibility for the disposition of the Site. From 1983 to 1986, SCDHEC pursued the necessary studies and remedial activities with KSCI under the SCDHEC Consent Order. Overall, however, KSCI experienced difficulty in meeting schedules and completing work assignments. In an attempt to resolve these difficulties, the State turned the lead for the Site over to EPA's Superfund Enforcement Branch in late 1986.

After reviewing the work done previously by KSCI under the SCDHEC Consent Order, EPA determined that further study was needed to determine the nature and volume of the waste, pathways by which contaminants would move or present the risk of exposure to human health and the environment, and the hydrologic relationship between the upper shallow layer of groundwater and the deeper aquifer. As a result of this determination, EPA entered into an Administrative Order on Consent (AOC) (Exhibit C) with KSCI to perform a Remedial Investigation/Feasibility Study (RI/FS) at the Site under EPA's oversight on January 13, 1988. KSCI provided EPA with its final RI report in January, 1993.

During the entire RI/FS process (a span of approximately five (5) years), EPA has experienced difficulties in receiving approvable documents from KSCI's contractor Post, Buckley, Schuh and Jernigan, Inc., (PBS&J). Numerous submissions arrived late, or arrived in piecemeal fashion. Additionally, in all reports received prior to the final submission, PBS&J had claimed the existence of a continuous clay confining layer between the soils and deeper aquifer, the existence of which was disputed by both the State and EPA. As a result, each revision submitted during this long period, though somewhat more improved than the previous, suffered from a fatal flaw due to the characterization of the supposed clay layer.

On December 14, 1992, EPA sent KSCI a letter informing it that EPA would be taking back the Site, pursuant to the AOC, to complete the RI/FS process due to the failure of KSCI to address comments and concerns of both EPA and the State (Exhibit D). Concurrently with the letter, KSCI was informed that, as part of "Dispute Resolutions" section of the AOC, KSCI would be given the opportunity to submit one final revised set of RI/FS documents for EPA review within the twenty-eight (28) day period set forth in the AOC. If this final set of documents was not approvable, EPA would immediately begin work at the Site.

Because KSCI did not wish for EPA to take over Site activities, it retained an additional consultant and new counsel in order to address any State or EPA concerns. KSCI was able submit its final revision of the documents on schedule, and has removed or reworded the language regarding a confining clay layer to EPA and State satisfaction. As a result, EPA and the State have finally approved the documents, and are working toward the issuance of a Record of Decision (ROD).

The Proposed Plan (the Plan) for the Site is expected to be issued in June, 1993, as required by CERCLA Section 117(a), 42 U.S.C. § 9617. A copy of the Proposed Plan will be forwarded as soon as it becomes available. The Plan will propose to cleanup Site soils contaminated with volatile organic contaminants (VOCs) and metals by excavation, volatilization, and solidification, followed by replacement of the soils into the excavation. In addition, the Plan will propose a scheme for groundwater remediation through complete groundwater extraction and treatment to Maximum Contaminant Levels (MCLs).

II. THE PRP AND THE EVIDENCE

The primary PRP at the Site is Kalama Specialty Chemicals, Inc., (KSCI), which is wholly owned by Kalama Chemicals, Inc., (KCI). Pursuant to Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), KSCI is liable as the owner of a facility at which there has been a release of a hazardous substance, and under CERCLA Section 107(a)(2), 42 U.S.C. § 9607(a)(2), KSCI is liable as an operator of a facility at the time of disposal of hazardous substances. KSCI's willingness to conduct the RI/FS, general cooperation (notwithstanding the actions of their contractors), and indications signalling its intention to carry out the remedial action phase suggest that there will not be a dispute regarding CERCLA liability.

A consolidated financial statement (as of June 30, 1991) provided by KCI shows the company to be viable, and capable of financing the entire cleanup (Exhibit E).

III. LEGAL DEFENSES AND EQUITABLE CONSIDERATIONS

A. Legal Defenses

The liability of KSCI (and KCI) is straightforward. Evidence exists showing KSCI as an operator at the Site at the time of the release of hazardous substances (not simply through the facilities operation, but also because of the fire and explosions, and the resulting releases), and as the present owner of the Site from which there have been documented releases of hazardous substances. Neither KSCI nor KCI have ever contested their CERLCA liability.

B. Equitable Considerations

There are no significant equitable considerations for this Site.

IV. STATUTE OF LIMITATIONS

The statute of limitations is not an issue in this case, due to the ongoing enforcement actions at the Site. EPA has not expended any resources in addition to the oversight costs included in the January 13, 1988, Administrative Order on Consent, therefore, even if the Statute were tolling, all past costs have been addressed through the AOC.

V. RESPONSE COSTS

According to the most recent cost documentation, EPA has expended a total of $539,251.89 through April 30, 1993 (Exhibit F) at the Site. Pursuant to the Administrative Order on Consent (AOC) for RI/FS entered into in this case, KSCI agreed to pay EPA and EPA contractor oversight costs incurred prior to, and in connection with, the AOC. The Region has repeatedly billed KSCI, and has had some difficulty in receiving payment in a timely manner. To date, EPA has recovered $224,245.20, plus an additional $4,695.60 in interest, leaving an outstanding balance of $315,006.69. The Region will either bill KSCI for this amount after the end of the fiscal year, or reimbursement will be addressed during the RD/RA negotiations.

VI. THE ADMINISTRATIVE RECORD

EPA has compiled an Administrative Record (the Record) for the Site, and will release it for public comment and review concurrently with the Proposed Plan. The Record will be located in EPA-Region IV's Library in Atlanta, Georgia, and a copy will be sent to Beaufort County Library, 710 Craven Street, Beaufort, South Carolina, 29902. Due to the length of the Record, it is not being made an exhibit to this litigation package; however the index to the Record is attached (Exhibit G).

VII. THE REMEDIAL ACTION

EPA plans to negotiate a consent decree with KSCI to finance and perform the RD/RA portion of the response action. The Record of Decision (ROD), which the Region anticipates to be final by the fourth quarter of fiscal year 1993, will most likely provide for the treatment of soils contaminated with VOCs and metals by excavation, volatization, and solidification, followed by replacement of the soils into the excavation.

Contaminated groundwater will be contained and treated using extraction wells across the source areas of contamination. The contaminated water from these extraction wells will be treated with a combination of chemical precipitation/filtration, air stripping, and activated carbon technology, and the treated water will be discharged to either an on-site sprayfield, an infiltration gallery, or to a ditch on-site.

EPA anticipates that the preferred remedial action for this Site will not be controversial. The preferred remedy is strongly supported by the Feasibility Study, and is of moderate cost compared to the other alternatives. Based on the comments received to date, EPA also does not anticipate any opposition to the remedy by the residents of the community or the general public.

A copy of the Final ROD will be forwarded to EPA Headquarters (HQ) and the United States Department of Justice (DOJ) as soon as it becomes available.

VIII. NATURAL RESOURCE TRUSTEES

Both the United States Department of the Interior (DOI) and the State of South Carolina were contacted prior to the beginning of any remedial action at the Site. Both the State and DOI will be notified of negotiations with potentially responsible parties (PRPs) regarding the implementation of the remedial design and remedial action for the Site.

IX. RELATED CRIMINAL INVESTIGATIONS, PROSECUTIONS, OR CIVIL ACTIONS

There are no other related proceedings relevant to this Site.

X. PRE-REFERRAL SETTLEMENT STRATEGY

A. Timetable

The following schedule details the proposed milestones for the negotiation of a consent decree for this Site:

Event	Date
Proposed Plan released	June 18, 1993
Pre-referral Litigation Report to DOJ/HQ	Mid-June, 1993
ROD finalized and signed by Region IV	September, 1993
RD/RA Notice Letters issued	September, 1993
RD/RA good faith offer due	November, 1993
RD/RA negotiations conclude, Decree lodged	January, 1994

B. Alternative Types of Settlements

Because only one PRP has been identified with the Site, a de minimis settlement is not anticipated. EPA also does not anticipate entering into any discussions with the PRPs regarding a mixed funding type of settlement. KSCI, and their parent company KCI, appears to have sufficient funds to undertake the RD/RA and, to date, has made no claims regarding inability to pay for the cleanup action.

C. Proposed Draft Consent Decree

The Region intends to issue Special Notice Letters under CERCLA Section 107, 42 U.S.C. § 9607, and use the national Model CERCLA RD/RA Consent Decree (OSWER DIRECTIVE #9835.17) to initiate negotiations. A draft Consent Decree, modified as much as possible for this Site, is included in this package (Exhibit H). A copy of the regional draft Model Statement of Work (SOW) that will be the basis for the draft SOW for this Site, is also attached (Exhibit I). A site-specific draft SOW will be forwarded to HQ and DOJ as soon as it is available.

XI. LEGAL, POLICY, AND STRATEGIC CONSIDERATIONS

As mentioned above, the Region has had some past difficulty in working with the contractors hired by the PRP, and to some degree, with the PRP itself. These difficulties have ranged from failure to timely and adequately submit documents and payments, to failure to adequately address EPA and State concerns and comments. It should be noted, however, that the PRP, when faced with a strong enforcement threat to take the Site back, reaffirmed its commitment to cleaning up the Site by retaining additional consultants and counsel, and used these new resources to address all EPA's concerns.

As a result, it is important to stress the requirement of stiff stipulated penalties in any proposed settlement, in order to prevent any future needless delays, which have plagued this Site in the past. The AOC governing the RI/FS failed to include stiff penalties, and therefore only the threat of taking the Site back was adequate to insure compliance.

Additionally, it may be necessary to require the PRP to retain a different contracting group for any RD/RA work, because of PBS&J's prior performance.

XII. EPA HEADQUARTERS AND REGIONAL SUPPORT

Since the Region does not anticipate any issues of national significance to arise in this case, Region IV will take the lead in negotiating this Consent Decree. The DOJ's resources should not be necessary beyond those normally expended when assisting a Region during negotiations. According to the memorandum "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E," OSWER Directive No. 9012.10-a, June 17, 1988, the Region anticipates that this settlement will not require HQ concurrence pursuant to Waiver of Concurrence Requirements A.1. The Region requests HQ consultation, if necessary, during the negotiations.

XIII. REGIONAL CONTACTS

The Regional Attorney assigned to the Site is Seth Bruckner (404) 347-2641, ext. 2268. The Remedial Project Manager for the Site is Steve Sandler (404) 347-7791.

LIST OF EXHIBITS

A. Study Area Map Showing Operational Features of Kalama Specialty Chemical, Inc., while the facility was in operation (1979).

B. Reproduction of photograph showing efforts to extinguish the fire and explosions which took place at Kalama Specialty Chemicals, Inc., (January, 1979).

C. Administrative Order On Consent entered into between U.S. EPA and Kalama Specialty Chemicals, Inc., regarding the performance of the Remedial Investigation and Feasibility Study (January 13, 1988).

D. Letter from Joseph Franzmathes, Director, Waste Management Division, U.S. EPA Region IV, informing Kalama Specialty Chemicals, Inc., of EPA's intention to complete RI/FS work at the Site (December 14, 1992).

E. Consolidated Financial Statements for Kalama Chemical, Inc., (June 30, 1991).

F. Superfund Cost Documentation for the Kalama Specialty Chemical Inc., Site (May 16, 1993).

G. Administrative Record Index for the Kalama Specialty Chemical Inc., Site (June 9, 1993).

H. Draft RD/RA Consent Decree without appendices.

I. Draft Statement of Work.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

4RC

JUL 02 1993

John C. Cruden, Chief
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Re: Rochester Property Superfund Site, Travelers Rest, Greenville County, South Carolina, Pre-Litigation Report

Dear Mr. Cruden:

The purpose of this letter is to transmit the enclosed RD/RA pre-referral litigation report for the above-referenced Site, in accordance with the memorandum "Pre-Referral Negotiation Procedures for Superfund Enforcement Cases," dated October 12, 1990. A draft Consent Decree, based upon the June 21, 1991, National Model RD/RA Consent Decree, is included. Also, the Model Regional Statement of Work (SOW) is included.

If any additional information is needed at this time, please contact Mark M. Davis, Assistant Regional Counsel, at (404) 347-2641, extension 2271, and/or Sheri Panabaker, Remedial Project Manager, at (404) 347-7791.

Sincerely,

John R. Barker
Regional Counsel

Joseph R. Franzmathes
Director
Waste Management Division

Enclosures

cc: William A. White, Enforcement Counsel (w/encl.)
Superfund Division, OE

Sally S. Mansbach, Director (w/encl.)
CERCLA Enforcement Division, OWPE

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Karen Dworkin (w/encl.)
Environmental Enforcement Section, DOJ

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUN 28 1993

John C. Cruden, Chief
Environmental Enforcement Section
United States Department of Justice
Environment and Natural Resources Division
1425 New York Avenue
Room 13037
Washington, D.C. 20005

Re: Stauffer Chemical Cold Creek and LeMoyne NPL Sites
Operable Unit 3, Cold Creek Swamp
Mobile County, Alabama

Dear Mr. Cruden:

The purpose of this letter is to transmit to you the RD/RA pre-referral litigation report and draft consent decree for the above-referenced sites, in accordance with the "Pre-Referral Negotiation Procedures for Superfund Enforcement Cases" memorandum, dated October 12, 1990. EPA intends to have a signed Record of Decision by August 15, 1993. If you need any further information at this time, please contact Andrew J. Harrison, Jr., Assistant Regional Counsel, at (404) 347-2641, extension 2264, or Joanne Benante, Remedial Project Manager, at (404) 347-2643.

Sincerely,

JBarker

John R. Barker
Regional Counsel

YELLOW

Joe R. Franzmathes

Joseph R. Franzmathes
Director
Waste Management Division

Enclosure

cc: William A. White, Enforcement Counsel (w/encl.)
Superfund Division, Office of Enforcement

Sally S. Mansbach, Director (w/encl.)
CERCLA Enforcement Division, OWPE

Robert R. Homiak (w/encl.)
Environmental Enforcement Section, DOJ

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ATTORNEY/CLIENT PRIVILEGED
DO NOT RELEASE

PRE-REFERRAL LITIGATION REPORT
ROCHESTER PROPERTY SUPERFUND SITE
Travelers Rest, Greenville County, South Carolina

I. BACKGROUND

A. Description

The Rochester Property Superfund Site (the Site), is located on a piece of residential property in Travelers Rest, Greenville County, South Carolina, a small town approximately ten (10) miles northwest of the city of Greenville, South Carolina.

The Site is approximately 300 feet north of County Road 268 (also known as Ledbetter Road) and approximately one-quarter mile east of County Road 102. The Site property itself is approximately 4.5 acres within which, waste was disposed into four (4) separate trenches located inside a 0.6 acre fenced area. The northern portion of the Site is a pine and deciduous forest, while the southern portion of the Site is a former open field that has been planted with pine trees (Exhibit A, Figure 1-1).

The Site is located on a hill between two (2) small streams. An unnamed tributary that flows eastward and leads to Armstrong Creek borders the Site to the north and east (Exhibit A, Figure 1-1).

Another small stream borders the Site to the south. This small stream flows eastward and discharges into the unnamed tributary that leads to Armstrong Creek approximately 400 feet east of the Site (Exhibit A, Figure 1-1). Site surface elevations range from 1010 feet above mean sea level (MSL) at the east end of the Site, to 1047 feet above MSL at the west end of the Site (Exhibit A, page 3).

B. Site History

In September 1971, Thomas J. Rochester, the original owner of the Site (now deceased), underwent a back operation that left him in poor health and unable to work for an extended period of time. During this period, Steve Blackwell, an occasional truck repairman for Polymer Industries, Inc. (Polymer Industries), was approached by Polymer Industries employees regarding wastes the company needed to dispose of. Polymer Industries, an adhesive manufacturing company, was owned by Philip Morris Industrial, Inc. (Philip Morris), through its subsidiary Colonial Heights Packaging Inc. (Colonial Heights).

Mr. Blackwell had no land on which to bury the wastes, but through his brother-in-law, Joe Ledbetter, Mr. Blackwell discovered that Thomas J. Rochester had land he was not using. At the time, Joe Ledbetter was starting a backhoe business, and, as a neighbor of Thomas J. Rochester, knew that Mr. Rochester was in need of money due to his inability to work. Thomas J. Rochester reached an agreement with Polymer Industries to allow the waste to be buried on his land (Exhibit F, page 8).

In March 1972, Mr. Ledbetter dug four (4) trenches on the Rochester property with his backhoe into which Polymer Industries disposed of wood glue, print binders, powder materials, natural guar gums, adhesive for food packages, and adhesive restick for envelopes. Each of the four (4) trenches had dimensions of approximately forty (40) feet long, by three (3) feet wide, by ten (10) feet deep. After Polymer Industries concluded its one-time disposal, Mr. Ledbetter covered the four (4) trenches with dirt using his backhoe (Exhibit F, page 8).

C. Releases of Hazardous Substances

The South Carolina Department of Health and Environmental Control (SCDHEC) began site investigations on June 12, 1984, with initial sampling on the Rochester Property (Exhibit F, Appendix A-3). On November 9, 1984, SCDHEC performed a site inspection that included sampling of the waste, the surface and subsurface soils, the surface water, and the groundwater in the area (Exhibit F, Appendix A-4). Additional investigations were performed in August 1987, and February 1988, by Colonial Height's consultant, RMT, Inc., and by EPA's contractor, NUS Corporation, in June 1988 (Exhibit A, page 3).

Based on the analysis of the waste collected by SCDHEC, EPA ranked the Site and included it on the National Priorities List Proposed Update in the Federal Register, Vol. 51, No. 111, on Tuesday, June 10, 1986. The Site was added to the National Priorities List, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, on October 4, 1989, with a Hazard Ranking Score of 41.34 (Exhibit C, page 5).

Pursuant to an Administrative Order on Consent for a Removal Action signed by EPA and Colonial Heights, the parent company of Polymer Industries, Docket Number 89-09-C, on June 5, 1989, Colonial Heights excavated the buried waste and disposed of it off-site at a secure hazardous waste landfill in January 1990 (Exhibit D).

Other than Polymer Industries' one-time waste disposal into the four (4) trenches on the Rochester Property, no other wastes are known to have been disposed at the Site (Exhibit E).

D. Associated Cleanup Activities

An Administrative Order on Consent for a Remedial Investigation and Feasibility Study (RI/FS) between EPA and Colonial Heights, Docket Number 92-04-C, was signed by the Waste Management Division Director on February 19, 1992 (Exhibit C).

The RI investigated the nature and extent of contamination on and near the Site, and defined the potential risks to human health and the environment posed by the Site. A total of forty-three (43) soil, twenty-nine (29) groundwater, eleven (11) surface water, and five (5) sediment samples were collected at the Site (Exhibit A, page 5).

Three (3) contaminants of concern, trichloroethene (TCE) manganese, and bis(2-ethylhexyl) phthalate, were detected in the groundwater in the shallow portion of the aquifer. TCE levels ranged from the detection limit (normally 0.010 mg/l), to 0.180 mg/l. Manganese levels ranged from the detection limit, to 1.39 mg/l. TCE concentrations detected during all the sampling events in three (3) of the thirteen (13) wells, violated the Maximum Contaminant Levels (MCLs) for this contaminant. The manganese levels in five (5) out of thirteen (13) wells, exceeded the risk number that was established in the Baseline Risk Assessment (Appendix A, page 5).

Bis(2-ethylhexyl) phthalate was detected in two (2) wells during the first sampling event; 0.033 mg/l (though the duplicate was 0.013 mg/l) in one well, and 0.013 mg/l in the other well. During the second sampling event, bis(2-ethylhexyl) phthalate was detected in only one well at 0.009 mg/l. It was not detected in any wells during the third sampling event, and was detected in the blanks for all the sampling events. The MCL for bis(2-ethylhexyl) phthalate is 0.005 mg/l.

Groundwater flows toward the northeast and the unnamed creek located north of the Site. It is believed that the surficial groundwater discharges to the unnamed creek (Exhibit A, page 5). Surface water samples from the unnamed creek, located northeast of the Site, showed TCE levels at 0.016 mg/l at one location, and 0.005 mg/l at a second location. Extremely low levels of two (2) other volatile organic compounds, below 0.005 mg/l, were detected in one location each. The TCE level is below the Federal Surface Water Criteria of 21.9 mg/l. No other types of contaminants were detected in the creeks (Exhibit A, page 5).

Insignificant levels of various substances were detected in the surface soil and sediment samples. The Baseline Risk Assessment determined that there was no current or future risk from the compounds detected in these media, because the levels did not exceed background levels for the inorganics, and were primarily below 0.5 mg/l for the organics (Exhibit A, page 5).

The Baseline Risk Assessment described the risks to human health and the environment which would result if the contamination present at the Site is not cleaned up. The Baseline Risk Assessment considered the present and future population living on the Site (in this case, there are no current residents living on-site), plus visitors to the Site (nonresidents). The Baseline Risk Assessment determined that the only pathway present at the Site, from the likely future use scenario, consists of exposure through ingestion of the contaminated groundwater (Exhibit A, page 6).

Carcinogenic risk and noncarcinogenic Hazard Index (HI) values were calculated for both the current land use scenario, with residents on and near the Site, and the anticipated future land use scenario, which is residential use. The Baseline Risk Assessment determined that the total cancer risk (using Reasonable Maximum Exposure) for the current residential scenario was less than 1×10^{-6}. Therefore, the Site does not pose an unacceptable cancer risk under the current exposure scenario. The total HI for the current resident was 0.038. This HI is well below the 1 value level of concern for noncarcinogens and demonstrates that the Site does not pose an unacceptable non-carcinogenic risk under the current exposure scenario evaluated in the Baseline Risk Assessment (Exhibit A, page 6).

The Baseline Risk Assessment also determined that the total cancer risk for the future residential scenario was 6.8×10^{-5}. This risk level is within the EPA acceptable risk range (1×10^{-4} to 1×10^{-6}). However, EPA determined that a baseline risk level less than 10^{-4} (i.e., a risk between 10^{-4} and 10^{-6}) is unacceptable due to Site-specific conditions, and that remedial action is warranted (Exhibit A, page 6).

EPA determined that Remedial Action was warranted because the future land use will probably be residential, and because MCLs were exceeded for two (2) organic contaminants. The HI for the future residential scenario was 8.9 for an adult. This level exceeds the acceptable HI of 1.0. The majority of the non-carcinogenic risk is attributable to the ingestion of manganese in the groundwater (Exhibit A, page 7).

II. IDENTITY AND LIABILITY OF THE POTENTIALLY RESPONSIBLE PARTIES (PRPs)

Liability under the Comprehensive Environmental Response Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq., as amended, is based upon the establishment of the following elements: (1) a release or threatened release of a hazardous substance has occurred; (2) the release or threatened release was from a facility; and (3) the defendants are potentially responsible parties (PRPs) as defined by CERCLA Section 107(a), 42 U.S.C. § 9607(a).

Studies have documented the release of hazardous substances at the Site. The RI/FS indicated the presence of trichloroethene (TCE), bis(2-ethylhexyl) phthalate, and manganese in the groundwater at the Site (Exhibit A, page 5). Each of these contaminants is a hazardous substance as that term is defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

Section 101(9) of CERCLA defines a "facility" as, ". . . any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." 42 U.S.C. § 9601(9). In March 1972, Thomas J. Rochester, now deceased, gave permission to Polymer Industries to dispose of the adhesive wastes into the four (4) trenches on his property. Therefore, the Rochester Property Site is a facility as that term is defined in CERCLA Section 101(9), 42 U.S.C. § 9601(9).

Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), potentially responsible parties include: (1) current owners or operators of a facility; (2) past owners or operators who owned or operated the facility at the time hazardous substance were disposed at the facility; (3) persons who arranged for the disposal of hazardous substances (usually known as generators); and (4) persons who transported hazardous substances and selected the site for disposal.

The following discussion addresses the identity and liability of the PRPs.

A. Current Owner

1. Colonial Heights Packaging, Inc., a subsidiary of Philip Morris Industrial, Inc.

Contact: Ms. Nancy K. Peterson
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4497
(414) 277-5517

At the time of the adhesive waste disposal in 1972, Colonial Heights, a subsidiary of Philip Morris Industrial, Inc. (Philip Morris), owned Polymer Industries. On August 2, 1982, Colonial Heights sold Polymer Industries to Morton Thiokol, Inc. (Morton Thiokol).

Colonial Heights, acquired the Site property on March 19, 1991, when Frederick and Reta Richards sold the property to its subsidiary, Carolina Properties, Inc., of Greenville, South Carolina, for $13,000.00 (Exhibit E, page 2).

According to the attorney for Colonial Heights, who was contacted by Region IV attorney Wayne Lee, Carolina Properties, Inc., was set up by Colonial Heights as a subsidiary for the sole purpose of purchasing the Site property (Exhibit E, page 2). Carolina

Properties, Inc., was incorporated on October 19, 1990, however, there is no telephone listing for Carolina Properties in Greenville, South Carolina (Exhibit E, page 2).

Colonial Heights, as the parent company of Carolina Properties, is the current owner of the Site property, and under CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1), is jointly and severally liable for all the response costs at the Site.

In addition, Colonial Heights, owned Polymer Industries in March 1972, when Polymer Industries arranged for the disposal of its adhesive waste into the four (4) separate trenches on the Rochester Property. Polymer Industries is a generator under CERCLA Section 107(a)(3), 42 U.S.C. § 9607(a)(3), therefore, Colonial Heights, as the parent company of Polymer Industries, is liable for the waste that Polymer Industries dumped into the four trenches on the Rochester Property as a generator of hazardous waste pursuant to CERCLA Section 107(a)(3), 42 U.S.C. § 9607(a)(3).

For these reasons, Region IV recommends that a CERCLA Section 122(e), 42 U.S.C. § 9622(e), special notice letter be issued to Colonial Heights, a subsidiary of Philip Morris, requesting that Colonial Heights participate in negotiating a Consent Decree with EPA and DOJ to perform or finance RD/RA activities, and pay EPA for all past and future response costs at the Site. Colonial Heights has not previously contested its liability and has indicated that it will submit a good faith offer to participate in RD/RA Consent Decree negotiations.

B. Past Owners

1. Thomas J. and Mary Lou Rochester
Keeler Mill Road, Route 2
Marietta, South Carolina
(803) 834-8760

Thomas J. and Mary Lou Rochester are the past owners of the land on which the Site is located. Mr. Rochester, an industrial laborer, died on January 12, 1990 (Exhibit E, page 1). According to the PRP search report dated June 1986, Thomas J. Rochester had a back operation in late 1971 that left him unable to work and without any source of income (Exhibit F, page 10). For this reason, he entered into the waste burial transaction with the unidentified representatives from Polymer Industries.

According to the PRP search report, it is estimated that Mr. Rochester received approximately three hundred dollars in exchange for allowing Polymer Industries to bury the wastes on his property (Exhibit F, pages 11 and 12).

Region IV does not recommend that CERCLA Section 122(e), 42 U.S.C. § 9622(e), special notice letters be issued to Mary Lou Rochester, the surviving spouse of Thomas J. Rochester and the

joint owner of the Site property at the time of the waste disposal in 1972, because from current evidence, it appears that Mary Lou Rochester is not viable to perform or finance the RD/RA activities at the Site.

2. Thomas L. "Larry" Rochester
(Address unknown)

On June 18, 1981, Thomas J. Rochester, the owner of the property when Polymer Industries disposed of its adhesives waste at the Site, transferred the property to his son, Thomas L. Rochester. On June 3, 1982, Thomas L. Rochester transferred the property to his sister and brother-in-law, Reta and Frederick Richards (Exhibit F, page 5). EPA has no evidence that hazardous waste was disposed at the Site at any time during Thomas L. Rochester's ownership.

Region IV does not recommend issuing special notice letters for the RD/RA pursuant to CERCLA Section 122(e), 42 U.S.C. § 9622(e), to Thomas L. Rochester because it has not found any evidence that hazardous waste was disposed while Thomas L. Rochester owned the property.

3. Frederick and Reta Richards
31B Pinecroft Drive
Taylors, South Carolina 29687
(803) 268-0798

On June 3, 1982, Thomas L. Rochester, sold the Site property to Frederick and Reta Richards, his brother-in-law and sister (Exhibit F, Appendix E-2). On March 19, 1991, Frederick and Reta Richards sold the property to Carolina Properties, Inc., of Greenville, South Carolina, for $13,000.00 (Exhibit E, page 2). EPA has no evidence that hazardous waste was disposed at the Site at any time during Frederick and Reta Richards ownership.

Region IV does not recommend issuing special notice letters for the RD/RA pursuant to CERCLA Section 122(e), 42 U.S.C. § 9622(e), to Frederick and Reta Richards because it has not found any evidence that hazardous waste was disposed while Frederick and Reta Richards owned the property.

C. Generator

1. Polymer Industries, Inc.
A subsidiary of Morton Thiokol, Inc.
2 North Riverside Plaza
Chicago, Illinois 60606
(312) 621-5350

In March 1972, Polymer Industries, a former subsidiary of Colonial Heights and a current subsidiary of Morton Thiokol, disposed of wood glue, print binders, powder materials, natural guar gums, adhesive for food packages, and adhesive restick for

envelopes wastes, into four (4) separate trenches on the Rochester property (Exhibit F, page 8).

Pursuant to CERCLA Section 107(a)(3), 42 U.S.C. 9607(a)(3), Polymer Industries is liable as the generator of the hazardous wastes currently present at the Site. At the time of the waste disposal, however, Polymer Industries was owned by Phillip Morris, through its subsidiary Colonial Heights. In all of its dealings with EPA regarding the Site, Colonial Heights has accepted responsibility for its former subsidiary Polymer Industries and has not requested that EPA name Polymer Industries or its parent company, Morton Thiokol, as a potentially responsible party.

Region IV does not recommend that a CERCLA Section 122(e), 42 U.S.C. § 9622(e), special notice letter be issued to Polymer Industries due to the fact that it was owned by Colonial Heights at the time of disposal. Colonial Heights has accepted the responsibility for Polymer Industries' disposal of the hazardous waste currently present at the Site.

D. Parties Associated with the Site

1. Morton Thiokol, Inc.
   110 North Wacker Drive
   Chicago, Illinois 60606
   (312) 621-5200

On August 2, 1982, Philip Morris, through its subsidiary Colonial Heights, sold Polymer Industries, to Morton Thiokol, Inc. (Morton Thiokol).

In a letter from Jack Axelrood, Vice President of Legal Affairs for Morton Thiokol, to James R. Kieckhefer, an employee of Philip Morris Industrial, Incorporated, dated September 5, 1984, Morton Thiokol stated that pursuant to the "Purchase and Sale Agreement" between Morton Thiokol and Philip Morris, Philip Morris retained the liability for all past actions of Polymer Industries, and therefore, Morton Thiokol was not liable for the contamination at the Site (Exhibit F, Appendix B-8).

Region IV has not reviewed the Purchase and Sale Agreement between Philip Morris and Morton Thiokol with respect to the transfer of Polymer Industries from Philip Morris to Morton Thiokol, and has not presently made a determination as to whether or not Morton Thiokol assumed any liabilities when it purchased Polymer Industries from Philip Morris.

Region IV is continuing to seek further information pertaining to Morton Thiokol's potential liability for the Site. However, Colonial Heights, has in the past, and continues to date, to fully fund and undertake all response activities at the Site.

In addition, Colonial Heights has never contested its liability for the release of hazardous waste at the Site, has not initiated any contribution action against Morton Thiokol, and has not requested EPA to name Morton Thiokol as a potentially responsible party. Morton Thiokol did not own Polymer Industries at the time of the hazardous waste disposal and has denied liability for the contamination at the Site. For these reasons, Region IV does not recommend that CERCLA Section 122(e), 42 U.S.C. § 9622(e), special notice letters be issued to Morton Thiokol at this time.

2. Steven C. Blackwell
   Ledbetter Road
   Travelers Rest, South Carolina 29690
   (803) 834-8640

Steven C. Blackwell was an occasional truck repairman for Polymer, Industries. In late 1971 or early 1972, Mr. Blackwell became aware that Polymer Industries had some wastes that it wanted to bury. Mr. Blackwell had no land to bury the waste, but through his brother-in-law, Joe Ledbetter, a neighbor of the Rochesters, notified Thomas J. Rochester that Polymer Industries had some waste that it wanted to bury.

Due to Mr. Blackwell's limited involvement in the disposal of Polymer Industries' waste at the Rochester Site, Region IV does not recommend that CERCLA Section 122(e), 42 U.S.C. § 9622(e), special notice letters be issued to Mr. Blackwell. Region IV has not found any evidence that Mr. Blackwell did anything other than contact Thomas J. Rochester through his brother-in-law, Joe Ledbetter.

3. Joe Ledbetter
   963 Tubbs Mountain Road
   Travelers Rest, South Carolina 29690
   (803) 834-7380

Joe Ledbetter, brother-in-law of Steve Blackwell and neighbor of Thomas J. Rochester at the time of disposal, was starting a backhoe business when he was approached by Steve Blackwell in 1971. Mr. Blackwell told Mr. Ledbetter that Polymer Industries had some dried up glue that it wanted to dispose on someone's property.

Mr. Ledbetter knew that Thomas J. Rochester was out of work, that Mr. Rochester needed money, and that Mr. Rochester had extra land. The evidence is unclear as to who approached Thomas J. Rochester with Polymer Industries' desire to dispose of its waste, but Thomas J. Rochester and Polymer Industries made an oral agreement allowing Polymer Industries to dispose of its waste onto Thomas J. Rochester's property.

Mr. Ledbetter dug the trenches for the waste with his backhoe and covered the trenches with dirt after the wastes were deposited

into the four (4) trenches by Polymer Industries (Exhibit F, Appendix D).

Region IV has not found any evidence that Mr. Blackwell did anything more than dig the four (4) trenches with his backhoe and cover the trenches with his backhoe after Polymer Industries had dump its waste into the four (4) trenches.

Due to Mr. Ledbetter's limited involvement in the disposal of Polymer Industries' waste at the Rochester Site, Region IV does not recommend that CERCLA Section 122(e), 42 U.S.C. § 9622(e), special notice letters be issued Mr. Ledbetter.

III. SIGNIFICANT LEGAL DEFENSES AND EQUITABLE CONSIDERATIONS

CERCLA Section 107(b), 42 U.S.C. § 9607(b), sets forth the only defenses to liability available to potentially responsible parties. These defenses include: (1) an act of God; (2) an act of war; or (3) an act of a third party (under certain conditions). Region IV is not aware of any information which would establish a defense on behalf of Colonial Heights, the only potentially responsible party that Region IV recommends be issued a CERCLA Section 122(e), 42 U.S.C. § 9622(e), special notice letter.

A. Legal Defenses

As the current owner of the Site (through its subsidiary Carolina Properties, Inc.), the former operator of the Site, and the former owner of Polymer Industries, the sole generator of the hazardous waste that was disposed into the four (4) trenches at the Site, Colonial Heights, is liable for all EPA response activities at the Site.

Region IV is not aware of any defenses which would establish a defense on behalf of Colonial Heights. In addition, Colonial Heights has funded all of the cleanup activities at the Site to date and Region IV does not anticipate that Colonial Heights will raise any legal defenses as to its liability during the RD/RA Consent Decree negotiations.

B. Equitable Considerations

Region IV does not recommend that CERCLA Section 122(e), 42 U.S.C. § 9622(e), special notice letters be issued to Mary Lou Rochester, the surviving spouse of Thomas J. Rochester and the joint owner of the Site property at the time of the waste disposal in 1972, because from current evidence, it appears that Mary Lou Rochester is not viable to perform or finance the RD/RA activities at the Site.

IV. STATUTE OF LIMITATIONS

There is no statute of limitations problem in this case due to the fact that, pursuant to CERCLA Section 113 (g)(2)(B), 42 U.S.C. § 9613(g)(2)(B), physical on-site construction of the remedial action has not been initiated at this Site.

V. RESPONSE COSTS

According to the most recent cost documentation, EPA has expended a total of $313,753.64 through April 30, 1993, at the Site (Exhibit B). A certain amount of these costs represents oversight costs for the removal action performed by Colonial Heights pursuant to a Removal Action Administrative Order by Consent (AOC), Docket Number 89-09-C, dated June 5, 1989 (Exhibit D). The Region IV cost recovery staff will provide the cost documentation for each action and will supplement this report accordingly.

These oversight costs will be addressed, initially, during the RD/RA negotiations. However, if negotiations are not fruitful, the PRP will be billed for these costs separately from the negotiation process.

The response cost figure will be updated before negotiations are concluded.

VI. THE ADMINISTRATIVE RECORD

EPA has compiled an Administrative Record for the Site, and released it for public comment and review concurrently with the June 14, 1993, Proposed Plan for this Site (Exhibit A). The Administrative Record is available at EPA, Region IV, Records Center and the Travelers Rest Library, 315 South Main Street, Travelers Rest, South Carolina 29690. In that the Administrative Record is over 300 pages long, EPA did not make an exhibit to this litigation package. However, the index to the Administrative Record is attached (Exhibit G).

VII. THE REMEDIAL ACTION

EPA plans to negotiate a consent decree with the PRP, Colonial Heights, to finance and perform the RD/RA activities. The Record of Decision (ROD), which the Region anticipates will be final by the fourth quarter of fiscal year 1993, will most likely provide for in-situ air sparging which would be accomplished by pumping air or nitrogen through wells or trenches in the saturated zone, creating a steady flow of gas, or bubbles, that rise through the aquifer. Air sparging creates a crude air stripper in the subsurface. The rising bubbles contact the dissolved contaminant and allow the TCE to volatilize. In addition to stripping the TCE, the addition of oxygen to the groundwater should promote biodegradation of bis(2-ethylhexyl) phthalate and oxidation of soluble manganese to its insoluble form. The insoluble manganese

should then precipitate and be re-deposited in the soils, where it is already naturally occurring.

All TCE contamination detected at the Site has been found in the shallow water table wells. Therefore, horizontal air sparging well(s) (or trench(es)) would be installed at a depth below the water table. The trench would be dug, perforated pipe would be placed, and the trench would be backfilled with gravel. The air would be sparged below the water table, volatilizing the TCE. The vapors would travel through the gravel and through the topsoil layer on top of the gravel (Exhibit A, page 11).

Alternately, vent pipes could be placed through the top soil to facilitate vapor discharge. The estimated amount of TCE that would volatilize to the atmosphere is extremely low, about 1.5 pounds per year. The air sparging trench would be supplemented with bedrock air sparging wells, if necessary, to oxygenate the groundwater near observed high concentrations of manganese (Exhibit A, page 11).

In addition to the extraction wells and treatment processes described above, this alternative would include implementation of institutional controls and groundwater monitoring to monitor the effectiveness of the alternative and limiting future use of groundwater until clean-up goals are achieved (Exhibit A, page 11).

The present worth cost of the preferred remedial action for this Site is estimated to be $2.7 million and is estimated to take four (4) to five (5) years to complete. However, this cost estimate includes thirty (30) years of groundwater monitoring at an estimated present worth cost of $1.9 million (Exhibit A, page 11).

EPA anticipates that the preferred remedial action for this Site will not be controversial. The preferred remedy is strongly supported by the Feasibility Study, and is of moderate cost compared to the other alternatives discussed in the FS and Proposed Plan. Based on the comments received to date, EPA does not anticipate any opposition to the preferred remedy by the residents of the community or the general public.

A copy of the final ROD will be forwarded to EPA Headquarters (HQ) and the United States Department of Justice (DOJ) as soon as it becomes available.

VIII. NATURAL RESOURCE TRUSTEES

Both the United States Department of the Interior (DOI) and the State of South Carolina were contacted prior to EPA's distribution of the Proposed Plan to the public on June 14, 1993 (Exhibit A). Both the State of South Carolina and DOI will be notified prior to the RD/RA Consent Decree negotiations with Colonial Heights.

IX. RELATED CRIMINAL INVESTIGATIONS, PROSECUTIONS, OR CIVIL ACTIONS

There are no other related proceedings relevant to this Site.

X. PRE-REFERRAL SETTLEMENT STRATEGY

A. Timetable

The following schedule details the proposed milestones for the negotiation of an RD/RA Consent Decree for this Site:

EVENT	DATE
ROD Finalized and signed by Region IV	August, 1993
RD/RA Special Notice Letter issued	August, 1993
RD/RA Good Faith Offer deadline	October, 1993
RD/RA Consent Decree lodged	December, 1993

B. Alternative Types of Settlements

Because only one PRP has been identified with the Site, a de minimis settlement is not anticipated. Region IV does not anticipate entering into any discussion with Colonial Heights regarding a mixed funding type of settlement. Colonial Heights appears to have sufficient funds to undertake the RD/RA and, to date, has made no claims regarding inability to pay for the cleanup action.

C. Proposed Draft Consent Decree

Region IV intends to utilize the Section 122(e), 42 U.S.C. § 9622(e), moratorium procedures to negotiate the RD/RA Consent Decree with Colonial Heights for the Site.

Region IV plans to issue a Section 122(e), 42 U.S.C. § 9622(e), notice letter with a draft Consent Decree and a draft Scope of Work to Colonial Heights after the Regional Administrator has signed the ROD. The notice letter will express the schedule for negotiations as a strict one to which adherence is expected, and the negotiating team will work diligently to achieve settlement within the 120-day time frame, if at all possible. If negotiations fail, Region IV may issue a Unilateral Administrative Order for the RD/RA to Colonial Heights.

Region IV will use the national Model CERCLA RD/RA Consent Decree (OSWER Directive Number 9835.17) to initiate negotiations. A draft Consent Decree tailored, as much as is possible at this time, to the Site is attached to this document (Attachment 1).

Attached to the Consent Decree is a site-specific Scope of Work developed in accordance with the Model Statement of Work agreed to between Region IV and DOJ.

The goal of negotiations is for EPA to obtain reimbursement of EPA's past costs and an agreement by Colonial Heights to perform or finance the RD/RA for the Site.

XI. LEGAL, POLICY, AND STRATEGIC CONSIDERATIONS

There are no unique legal, policy, or strategic considerations to report at this time.

XII. EPA HEADQUARTERS AND DEPARTMENT OF JUSTICE SUPPORT

Region IV does not anticipate any issues of national significance to arise in this case, and therefore, will take the lead in negotiating the Consent Decree. The DOJ's resources should not be necessary beyond those normally expended when assisting a Region during negotiations. According to the memorandum entitled, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E," OSWER Directive Number 9012.10-a, dated June 17, 1988, Region IV anticipates that this settlement will not require headquarter concurrence pursuant to Waiver of Concurrence Requirements A.1. Region IV, however, requests that headquarters be available for consultation, during the RD/RA Consent Decree negotiations.

XIII. REGIONAL CONTACTS

The regional attorney assigned to this matter is Mark M. Davis (404) 347-2641, extension 2271. The Remedial Project Manager for the Site is Sheri Panabaker (404) 347-7791. The cost recovery section contact at this time is Ron Wilson (404) 347-5059.

LIST OF EXHIBITS

Exhibit A. Superfund Proposed Plan Fact Sheet For The Rochester Property Site in Travelers Rest, Greenville County, South Carolina, dated June 1993.

Exhibit B. EPA Response Cost Documentation from October 1, 1969, through April 30, 1993.

Exhibit C. Administrative Order By Consent For Remedial Action and Feasibility Study For the Rochester Property Site, dated February 19, 1992.

Exhibit D. Administrative Order On Consent For Removal at the Rochester Property Site, dated June 5, 1989.

Exhibit E. Memo To File by Carolyn Thompson, Cost Recovery Section, dated June 19, 1991, entitled, "Updated PRP List for Rochester Property Site, Travelers Rest, Greenville County, South Carolina.

Exhibit F. Draft PRP Search, Title Search, and Financial Assessment for the Rochester Property Site, Travelers Rest, Greenville County, South Carolina.

Exhibit G. Index to the Administrative Record for the Rochester Property Site in Travelers Rest, Greenville County, South Carolina.

Rochester Property Superfund Site
Pre-referral Litigation Report

RECOMMENDED NEGOTIATION SCHEDULE

1) Thirty-seven (37) days from the date of the Special Notice Letter, the PRP will send EPA its written initial comments on the draft consent decree.

2) EPA will respond in writing to the PRP's initial comments within ten (10) days of receipt of said comments.

3) The PRP will consider the above responses by EPA in providing a response to the draft consent order, which is required as part of the PRP's good faith offer.

4) Within two (2) weeks of EPA's receipt of the PRP's good faith offer, a meeting will be held between the PRP and EPA to negotiate the terms of the Consent Decree, with further negotiations to be held as necessary.

5) Within ninety-seven (97) days of the date of the Special Notice Letter, the PRP will sign the negotiated Consent Decree or advise EPA of its decision not to sign.

6) Notwithstanding the above recommended schedule for negotiations, EPA is amenable to suggestions of other similar scheduling that is mutually convenient to the PRP and EPA, including earlier meetings.

PRE-REFERRAL LITIGATION REPORT

FOR THE

STAUFFER CHEMICAL COLD CREEK AND LEMOYNE NPL SITES, OPERABLE UNIT 3, COLD CREEK SWAMP

MOBILE COUNTY, ALABAMA

ENFORCEMENT CONFIDENTIAL

REGION IV

Regional Contacts

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ENFORCEMENT CONFIDENTIAL

PRE-REFERRAL LITIGATION REPORT
STAUFFER CHEMICAL COLD CREEK AND LEMOYNE NPL SITES
OPERABLE UNIT 3, COLD CREEK SWAMP

I. SITE DESCRIPTION AND GENERAL SITE HISTORY

A. Site Location and Description

The Stauffer Chemical Cold Creek and LeMoyne National Priority List (NPL) Sites (hereinafter referred to collectively as the Sites) are located approximately twenty-five (25) miles north of Mobile, Alabama, on U.S. Highway 43, near the towns of Axis and Bucks, in Mobile County. (See, Exhibit 1, Figure 1). The Sites consist of two active manufacturing complexes (the Cold Creek and LeMoyne plants), the adjoining wetlands, and that portion of the Mobile/Tombigbee Rivers which extends from just north of the Ciba-Geigy Site in McIntosh, Alabama, to just south of the Sites in Bucks, Alabama. The land area of the Sites is bounded on the north and northeast by the Alabama Power Barry Steam Generating Plant and its Discharge Canal, on the east by the east bank of the Mobile River, on the south by the Courtaulds of North America Plant, and on the west by the Hoechst Celanese Corporation Plant and U.S. Highway 43. The Stauffer Chemical Cold Creek Site consists of the Cold Creek plant, the wetlands, and the Mobile River. The Stauffer Chemical LeMoyne Site comprises the LeMoyne plant, the wetlands, and the Mobile River.

The remedial activities to be conducted in the wetlands (Cold Creek Swamp or the swamp) are the subject of this report. Cold Creek Swamp is designated as Operable Unit 3 (OU3) for both Sites and comprises some 650 acres of wetlands, including bottomland hardwoods, located in the northeast section of the land area at the Sites. (See Exhibit 1, Figure 2). Cold Creek Swamp is located approximately ten (10) miles south of the confluence of the Tombigbee and Alabama rivers and twenty (20) miles north of Mobile Bay. The boundaries of the swamp include the Alabama Power Company Barry Steam Generating Plant Discharge Canal on the northeast, the Mobile River on the east, and the manufacturing plants to the south and west. (See Exhibit 1, Figure 2). Cold Creek drains the swamp and ultimately discharges into the Mobile River. The area surrounding the swamp is sparsely populated and is comprised primarily of bottomland hardwoods and other wetlands. Land use in the immediate vicinity, especially to the south and west, is predominately industrial, including chemical manufacturing and electric power generation. However, some small residential communities are located within a three mile radius.

The proposed remedial action will be conducted in a twenty-five (25) acre area in the uppermost portion of the Upper Swamp and in a twenty-five (25) acre area in the Middle/Lower Swamp. EPA designated these areas as the Upper Arm Swamp Zone and the Transition Zone, respectively. (See Exhibit 1, Figure 3).

The Upper Swamp which includes the Upper Arm Swamp Zone is located on the Cold Creek plant properties and is owned by Zeneca, Inc. (previously, ICI Americas, Inc.). The area is drained by an unnamed tributary of Cold Creek. It is characterized by nearly level to undulating topography with several pools and minimal stream flow through most of the year. The Upper Arm Swamp Zone contains open water, emergent vegetation, and forested wetlands.

The Transition Zone is located on property owned by Alabama Power Company and is drained by Cold Creek. This area receives surface water flow and sediment deposition from the Upper Swamp. A portion of the Transition Zone is a powerline right-of-way and is composed of an emergent marsh typical of disturbed habitats. Beyond the powerline right-of-way, the Transition Zone becomes a wooded wetland dominated by deciduous hardwoods, particularly red maple and water tupelo. Within the Transition Zone, Cold Creek exists primarily as a series of interconnected areas of standing water.

B. Site History

Stauffer Chemical Company (Stauffer) previously owned and operated a multi-product chemical manufacturing plant (at the Stauffer Chemical LeMoyne Site) and an agricultural chemical facility (at the Stauffer Chemical Cold Creek Site), each of which are adjacent to the Cold Creek Swamp.

Stauffer began operations at the Cold Creek plant in 1966. ICI Americas, Inc., purchased both the Cold Creek and LeMoyne plants from Stauffer in 1987 and shortly thereafter sold the LeMoyne plant to Akzo Chemie America. ICI Americas, Inc., has since been renamed Zeneca, Inc. (Zeneca). Over the past twenty (20) years, the Cold Creek plant produced a variety of agricultural chemicals, including thiocarbamates. This production process continues today.

Stauffer commenced operations at the LeMoyne plant in 1953 with a retort carbon disulfide (CS_2) plant followed by a reactor CS_2 plant in 1956. Other production facilities were subsequently added, including a sulfuric acid plant in 1957, a carbon tetrachloride plant in 1963, a caustic/chlorine plant in 1964, and a Crystex (a proprietary sulfur compound) plant in 1974. Akzo Chemie America, presently Akzo Chemicals, Inc. (Akzo), acquired the LeMoyne plant in 1987 and continued to operate it as a chemical manufacturing plant. The caustic/chlorine process has since been discontinued and the plant is now dismantled; however, Akzo continues to operate all of the other manufacturing processes as stated above.

Halby Chemical Company (HCC) also operated a facility on a leased portion of the Stauffer Chemical LeMoyne Site from approximately

1965 to 1974. Argus Chemical Corporation (Argus), a subsidiary of Witco Chemical Corporation and successor by merger to HCC, purchased the HCC facility in 1974 and continued to operate the plant until approximately 1979 when the buildings were razed. Waste products and effluents, including thiocyanates, were reported to have been discharged to a pond (the Halby Pond) on the property. The Halby Pond has since been closed and filled.

Previously, wastewaters from the Stauffer processes were temporarily held in clay-lined lagoons and discharged to Cold Creek Swamp which received wastewaters from the LeMoyne and Cold Creek plants and from HCC/Argus until approximately 1975. As part of the caustic/chlorine process, the LeMoyne plant discharged wastewaters which contained mercury. Neutralized waste brine was discharged from the Cold Creek plant into the swamp during the late 1960's. Discharges of waste products and effluents from the Halby Chemical plant may have included thiocyanates and metal-contaminated wastewater. The discharges to the swamp ceased in 1975 as the result of the construction of a pipeline designed to discharge wastewater directly into the Mobile River in accordance with National Pollutant Discharge Elimination System (NPDES) permits held by Akzo and Zeneca.

C. Enforcement History

Stauffer and ADEM discovered groundwater contamination in both on-site and off-site wells in the early 1970's. To monitor contamination in groundwater, Stauffer installed twenty-one monitoring wells in 1973. By 1977, water quality had deteriorated substantially and seven observation wells were placed at the southern property line of the LeMoyne plant. The Alabama Water Improvement Commission (AWIC), predecessor to today's Alabama Department of Environmental Management (ADEM), approved the installation of three interceptor wells accompanied by an air stripper on the LeMoyne property in late 1980.

Over the years, several improvements and waste-handling modifications were made including the construction of lined wastewater ponds and the closure of some old unlined ponds. In 1975, the unlined landfill located one mile east of the LeMoyne plant containing 11,000 to 12,000 tons of brine muds, plant refuse, used samples, and absorption oil was closed using an impermeable membrane cap and side-wall liner under the direction of AWIC. Improvements made at the Cold Creek plant in 1974 included closure of the Cold Creek North and South Landfills with geomembrane caps and side-wall liners. These landfills contained a variety of herbicides and pesticides.

Several wastewater ponds were closed under the direction of AWIC, and the use of clay-lined ponds has ceased. Several membrane-lined ponds which are currently active were installed during the 1970's to replace the clay-lined ponds.

At present, the Sites contain ten (10) closed or inactive wastewater ponds and four active ponds near the swamp. The four (4) active ponds are membrane-lined and monitored regularly. Of the ten (10) inactive ponds, six (6) are closed and covered. A wastewater treatment pond associated with the old carbon tetrachloride plant is lined and contains approximately 1900 yd^3 of sulfur sludge. A brine mud pond associated with the chlorine plant was originally a RCRA facility, but the contents have since been delisted from status as a hazardous waste and the pond has been closed. A newer brine mud pond which was permitted in conformance with RCRA standards was recently closed and closure documentation has been submitted to ADEM for approval.

The Alabama Department of Public Health conducted an assessment of the Site in 1982 in response to submissions made by Stauffer to the House Committee on Interstate Commerce (the Eckhardt Study). Additional monitoring wells were installed around the LeMoyne Landfill based on the advice of ADPH. Data obtained from these wells formed the basis for the NPL listing of both Sites in September of 1983. The Hazard Ranking Score (HRS) for the Stauffer Chemical Cold Creek Site was 46.77. (Exhibit 2). Application of EPA's HRS to the Stauffer Chemical LeMoyne Site yielded a score of 32.34. (Exhibit 3).

On November 21, 1984, EPA issued a Notice Letter and Information Request to Stauffer for the execution of a Remedial Investigation/Feasibility Study (RI/FS) at the Stauffer Chemical Cold Creek Site. (Exhibit 4). On November 23, 1984, EPA issued to Stauffer a Notice Letter and Information Request for the preparation of a RI/FS at the Stauffer Chemical LeMoyne Site. (Exhibit 4). Stauffer expressed its interest in conducting the RI/FS in a letter dated December 21, 1984. (Exhibit 5). Under a contract with EPA, Camp, Dresser, and McKee, Inc., performed preliminary sampling in May 1985 to assist in preparing a work plan for the RI/FS. Stauffer and EPA entered into an Administrative Order on Consent (AOC), Docket No. 86-04-C, on January 21, 1986. (Exhibit 6). Pursuant to the AOC, Stauffer agreed to conduct the RI/FS at both Sites and to reimburse EPA for all costs of response and oversight incurred by the United States. Subsequent to the effective date of the AOC, ICI Americas, Inc. (presently, Zeneca), purchased the LeMoyne and Cold Creek plants. Shortly thereafter, Akzo Chemie America (presently, Akzo) purchased the LeMoyne plant from ICI Americas, Inc. Akzo and ICI Americas, Inc., continued the RI/FS to completion. These potentially responsible parties (PRPs) completed the RI in July 1988 and the FS in January 1989.

On July 11, 1989, EPA issued a Proposed Plan for remedial activities which would address groundwater contamination at the Sites. (Exhibit 7). EPA then issued Special Notice Letters to Akzo and ICI Americas, Inc., on July 20, 1989, relating to the Remedial Design/Remedial Action (RD/RA) for groundwater

remediation. (Exhibit 8). EPA executed a Record of Decision (ROD) on September 27, 1989. (Exhibit 9). Under the provisions of the ROD, EPA established three Operable Units. Operable Unit 1 (OU1) addresses groundwater and contaminant sources, Operable Unit 2 (OU2) addresses source units, and Operable Unit 3 (OU3) refers to the Cold Creek Swamp. The Consent Decree (CD) for the conduct of the RD/RA for OU1 was lodged on April 25, 1990. (Exhibit 10). At present, the PRPs are operating a groundwater recovery and treatment system which includes interceptor wells with flow rates from 325 to 420 gallons per minute (gpm).

The on-site sources of contamination at both Sites are designated as OU2. The September 27, 1989, ROD for OU2 identified nine (9) Solid Waste Management Unit Areas. These Solid Waste Management Areas include twelve (12) separate Solid Waste Management Units (SWMUs). Subsequently, in March 1991, Region IV's RCRA Branch conducted a RCRA Facility Assessment at the Akzo facility (the LeMoyne plant) and identified a total of 139 SWMUs and fourteen (14) Areas of Concern (AOCs). Of the 139 SWMUs, EPA only identified eight (8) as requiring a full investigation. (Exhibit 11). During a meeting on March 13, 1992, and in a letter dated May 1, 1992, EPA informed the PRPs that a RI/FS must be conducted for OU2 (on-site sources). (Exhibit 12). EPA's authority to require this RI/FS was based on Section VI, Paragraph 1 of the AOC. Akzo and ICI Americas, Inc. (Zeneca), requested that EPA include less than the entire 139 SWMUs in OU2 and that EPA handle the remaining SWMUs under the Corrective Action portion of Akzo's RCRA permit. (Exhibit 13). Based on an agreement between the CERCLA and RCRA branches, Region IV included six (6) additional SWMUs in OU2. The addition of these six (6) SWMUs to the twelve (12) SWMUs identified in the ROD for OU2 brings the total number of SWMUs in OU2 to be handled under CERCLA to eighteen (18). (Exhibits 11, 16).

An August 6, 1992, EPA letter documents a concensus reached between EPA and the PRPs for a three-phased approach which has been implemented for the RI/FS Work Plan for OU2. (Exhibit 14). On December 29, 1992, EPA conditionally approved a Decision Document which was prepared to assess available information on eighteen (18) SWMUs in OU2, to determine the appropriate course of action at these SWMUs, and to make recommendations for addressing source contamination. (Exhibit 15).

In a letter dated May 4, 1990, EPA notified the PRPs that a determination had been made that pursuant to Section VI, Paragraph I of the AOC, supplemental investigatory work and/or engineering evaluation was necessary for OU3. (Exhibit 16). Akzo and Zeneca responded in a May 22, 1990, letter stating that the PRPs were willing to conduct the supplementary work. (Exhibit 17). The additional study (RI/FS) was conducted to better define the nature and extent of contamination and potential human health and ecological risk existing in the swamp.

In addition to identification of the hazardous substances present in sediments and surface water and the characterization of risk posed by the presence of these contaminants, the additional study also included extensive biological sampling, including finfish, herptiles, and invertebrates, from the swamp and other locations determined to represent background, and an analysis of these organisms for whole-body mercury tissue concentration.

On May 25, 1993, EPA issued a "Notice of Decision Not To Use Special Notice Procedures" to the potentially responsible parties (PRPs) for the Stauffer Sites, Akzo and Zeneca, to the PRP for the Ciba-Geigy Site, Ciba-Geigy Corporation, and to the PRP for the Olin Corporation Site, Olin Corporation. (Exhibit 18). The notice letter informed the PRPs, including those for the Stauffer Sites, of the designation of a length of the Mobile/Tombigbee river system from just north of the Ciba-Geigy Site to just south of the Stauffer Chemical LeMoyne Site as Operable Unit 4 for the Stauffer Sites, Operable Unit 5 for the Ciba-Geigy Site, and Operable Unit 3 for the Olin Corporation Site. EPA intends to conduct an initial, yet comprehensive, RI to determine the areal extent of contamination in the river system due to the release of hazardous substances and pollutants or contaminants from the four NPL Sites. EPA Region IV's Environmental Services Division is preparing a draft Work Plan which is due in several weeks.

D. Present Site Conditions/Proposed Plan/Stauffer Chemical Cold Creek Site, Operable Unit 3, Cold Creek Swamp

The RI for OU3 was approved with caveat on July 15, 1992. (Exhibit 19). EPA required the preparation of a FS which was approved with caveat on June 3, 1993, and is summarized in the Proposed Plan. (Exhibit 20). The only critical contaminant of concern found in the swamp was mercury. Other potential contaminants of concern which were identified included thiocarbamates, aluminum, cadmium, copper, and zinc.

The Baseline Ecological Risk Evaluation indicated that levels of mercury in Cold Creek Swamp sediments pose a potential risk to receptor organisms.[1] Mercury levels found in sediments were well above Regional ecological screening values of 0.15 parts per million (ppm) for potential effects and 1.3 ppm for probable ecological effects. Mercury concentrations in receptor organisms, including carnivorous fish and predatory herptiles, displayed elevated levels above the recommended safe limit of

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[1]Although the Baseline Human Health Risk Assessment indicated that human health exposure did not present unacceptable health risks based on the anticipated exposure pathways, the Mobile County Department of Health nevertheless issued a "Fish Consumption Advisory" on Cold Creek Swamp on May 7, 1992, based on the findings of the RI.

0.1 ppm for ingestion by sensitive species of birds. Mercury was previously detected in all four of the finfish samples within the Swamp during the initial round of biota sampling. Mercury concentrations ranged from 0.59 mg/kg to 3.1 mg/kg. Mercury was detected in sixteen (16) of twenty-three (23) finfish samples, five (5) of seven (7) crayfish samples, and four (4) of seven (7) worm samples. Highest mercury levels observed in predatory type fish were 1.9 mg/kg, 1.2 mg/kg in crayfish, and 2.5 mg/kg in worms. Sampling also demonstrated mercury levels in other finfish as high as 2.8 mg/kg, in reptiles as high as 1.9 mg/kg, and in amphibians as high as 1.6 mg/kg. The Proposed Plan concludes that based on these findings, mercury contaminated sediments in Cold Creek Swamp present an unacceptable ecological risk.

The two areas of greatest concern wherein sediments exhibit elevated levels of mercury are the Upper Arm Swamp Zone and the Transition Zone. (Exhibit 1, Figure 3). Mercury concentrations in sediments and soil ranged as high as 1600 ppm in the top twelve (12) inches of sediments and up to 7560 ppm at depths of twelve (12) to twenty-four (24) inches in the Upper Arm Swamp Zone. Mercury was present at levels as high as 632 ppm in the top twelve (12) inches of sediment in the Transition Zone.

The purposes of the proposed remedial action are (1) to reduce/eliminate exposure of organisms to bioavailable mercury which in turn would reduce mercury levels in biota and (2) to reduce the migration of contaminants within and from Cold Creek Swamp. EPA's preferred alternative chosen to achieve these goals includes multi-layer capping and containment of contaminated soils in the Upper Arm Swamp Zone accompanied by surface water diversion and creation of wetlands along the new waterway. The preferred alternative for the Transition Zone is excavation of contaminated soils to a depth of two (2) feet and placement of these soils in the Upper Arm Swamp Zone for capping followed by backfilling of the Transition Zone with clean fill. The Transition Zone will be revegetated with identical plant species which are presently found in the wetland. In addition, the levees presently existing along the Mobile River bank would be raised to limit the exchange of contaminants from Cold Creek Swamp to the Mobile River. Institutional controls will include a prohibition on fishing and hunting in Cold Creek and prevention of trespass. The estimated cost of the entire project is $17,740,000.

II. IDENTITY AND LIABILITY OF POTENTIALLY RESPONSIBLE PARTIES (PRPs)

The hazardous substances present in the Cold Creek Swamp were discharged from manufacturing operations at the Cold Creek and LeMoyne plants. Three entities owned the Sites upon which these plants are located during the relevant time period. The

owner/operators included Stauffer Chemical Company, Akzo Chemicals, Inc., and Zeneca, Inc. Additionally, Halby Chemical Company and Argus Chemical Corporation are known to have operated a portion of the Stauffer LeMoyne Site. An analysis of the liability of each entity is presented below.

CERCLA liability is based upon the establishment of the following elements: (1) a release or threatened release of a hazardous substance has occurred; (2) the release or threatened release was from a facility; and (3) the defendants are potentially responsible parties as defined by CERCLA § 107(a). 42 U.S.C. § 9607(a).

Studies have documented the release of hazardous substances at the Sites. The RI/FS for OU3 indicated the presence of mercury, aluminum, cadmium, copper, and zinc in sediments. Each of these is a hazardous substance as that term is defined in Section 101(14). 42 U.S.C. § 9601(14). Thiocarbamates, which are pollutants or contaminants as defined in § 101(33), were also found in the sediments. 42 U.S.C. § 9601(33). A "facility" includes "any Site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . ." 42 U.S.C. § 9601(9). The Stauffer Cold Creek and LeMoyne Plant Sites which include OU3 are "facilities" as that term is defined in Section 101(9). 42 U.S.C. § 9601(9).

Potentially responsible parties include current owners or operators of a facility, past owners or operators who owned the facility at the time of disposal, persons who arranged for the disposal of hazardous substances, and persons who transported hazardous substances and selected the Site for disposal. 42 U.S.C. § 9607(a)(1)-(4). The following discussion addresses the classification of the identified persons as PRPs.

A. Current Owner/Operators

1. Akzo Chemicals, Inc.

Akzo Chemie America, the predecessor to Akzo Chemicals, Inc., purchased the LeMoyne plant, a portion of the Stauffer Chemical LeMoyne Site, in 1987 and continues to own and operate the plant today.

Present owners and operators of a facility are potentially liable parties under CERCLA § 107(a)(1). 42 U.S.C. § 9607(a)(1). The term "owner or operator" is defined in Section 101(20)(A) to include any person owning or operating a "facility." "Person" is defined to include corporations. 42 U.S.C. § 9601(21). Akzo is a person and although it does not own the swamp area comprising OU3, this operable unit is a portion of the Stauffer Chemical LeMoyne Site, a part of which Akzo owns and operates. Further, the presence of mercury in the swamp is believed to be primarily

the result of discharges from the LeMoyne plant. Having established that the LeMoyne plant is a facility, Akzo is a potentially responsible party as a person who owns/operates a facility at which there has been a release or threatened release of hazardous substances.

2. Zeneca, Inc.

Zeneca (previously ICI Americas, Inc.) owns and operates the Cold Creek plant which is located on the Stauffer Chemical Cold Creek Site. Zeneca also owns a portion of the swamp area comprising OU3 which is a portion of the Stauffer Chemical Cold Creek Site at which a release or threatened release of hazardous substances has occurred. Therefore, Zeneca is also a person who owns and operates a facility, and as a result, it is a liable party under Section 107(a)(1). 42 U.S.C. § 9607(a)(1).

Zeneca previously owned the LeMoyne plant also. Zeneca purchased the LeMoyne plant from Stauffer in 1987 and later sold it to Akzo. Thus, Zeneca is also a past owner/operator of the Stauffer Chemical LeMoyne Site. It is believed that Zeneca owned the plant during the period of time when hazardous substances were released. As a result, Zeneca also fits the classification of a past owner/operator. 42 U.S.C. § 9607(a)(2).

B. Other Persons

Stauffer Chemical Company owned and operated both the Cold Creek and LeMoyne plants during the time of disposal of hazardous substances. Region IV has limited information at present pertaining to Stauffer. Stauffer is believed to have entered bankruptcy proceedings followed by distribution of the assets which included the sale of these two plants for the purpose of recouping funds owed by Stauffer. Region IV will seek further information pertaining to Stauffer's status; however, the presently named PRPs have in the past and continue today to fund the Superfund activities at the Sites. Based on these facts, further discussion pertaining to Stauffer is unwarranted.

Halby Chemical Company (HCC) operated a portion of the LeMoyne plant during the years beginning in 1965 and ending in 1974. Argus Chemical Corporation (Argus), a subsidiary of Witco Chemical Corporation and successor by merger to HCC, purchased the Halby Chemical Company operation in 1974 and continued to manufacture dye chemicals, including sodium hydrosulfide, until 1979. Thiocyanate contamination is believed to be the result of the operations of Halby Chemical Company and Argus. The Region is preparing an Information Request to be issued to Argus. The response should assist the Region in determining whether the thiocyanate contamination is the result of these operations and whether Witco should be designated as a PRP and asked to participate in the negotiations for the RD/RA for OU3.

Alabama Power Company owns a substantial portion of the swamp area comprising OU3, including the Transition Zone, wherein remedial activities will be conducted. As an owner, Alabama Power Company falls within one of the classes of persons which are potentially liable for response costs. 42 U.S.C. § 9607(a). However, based on the information presently in EPA's possession, Alabama Power Company may be in a good position to assert the third-party defense. Alabama Power Company's potential defense is discussed below.

III. DEFENSES

CERCLA Section 107(b) sets forth the only defenses to liability available to owners or operators. These defenses include (1) an act of God, (2) an act of war, or (3) the act of a third party (under certain conditions). 42 U.S.C. § 9607(b)(1)-(3). The Region is not aware of any information which would establish a defense on behalf of Akzo or Zeneca.

Alabama Power Company, if named as a PRP, certainly would assert that the statutory third-party defense of CERCLA Section 107(b)(3) provides a shield from liability for response costs in OU3. The defense requires that the release of hazardous substances and the damages resulting therefrom be caused solely by "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . with the defendant . . ." 42 U.S.C. § 9607(b)(3). Clearly, the release of hazardous substances associated with OU3 did not occur as the result of an act or omission of Alabama Power Company or its employees or agents. Further, Region IV does not possess any information which indicates that the releases occurred as the result of a "contractual relationship," as that term is defined in Section 101(35)(A), 42 U.S.C. § 9601(35)(A), with Akzo, Zeneca, Stauffer, Argus, or HCC. Thus, it appears that there was not an association between Alabama Power Company and the releases.

In addition to the above requirement, to prevail upon the third-party defense, a defendant generally must also demonstrate that (a) it exercised due care with respect to the hazardous substance concerned and (b) it took precautions against the foreseeable acts of the third-party. 42 U.S.C. § 9607(b)(3)(a) and (b). Whether Alabama Power Company can establish by a preponderance of the evidence that it complied with these two elements is questionable. To fully evaluate this question, additional information must be obtained. For the present, however, the two "polluters" who caused the releases are funding the Superfund activities at the Site; therefore, based on Alabama Power Company's potential defense and because the cleanup activities are continuing, Region IV does not intend to pursue the question of potential liability further.

IV. STATUTE OF LIMITATIONS/BANKRUPTCY COURT DEADLINES

These considerations do not apply in this case.

V. SUMMARY OF RESPONSE COSTS INCURRED/OPERABLE UNIT 3

EPA has incurred response costs for OU3 totalling $107,268.58 through June 10, 1993. (Exhibit 21). On November 4, 1991, EPA demanded payment of oversight costs incurred at OU3 during fiscal year 1990 from Akzo and ICI Americas, Inc., in the amount of $1,880.60. Remittance of the entire sum was complete in December 1991. (Exhibit 22)

EPA later demanded payment of oversight costs for OU3 incurred during fiscal year 1991 in the amount of $31,847.72. The same parties shared payment of the outstanding costs and remittance reached the full sum due during December 1992. (Exhibit 23).

Costs which remain outstanding total $69,817.26. (Exhibit 21). Region IV intends to demand payment of the outstanding balance as a component of the Special Notice Letters to be mailed August 15, 1993.

VI. ADMINISTRATIVE RECORD

The administrative record, through the Proposed Plan, was compiled and sent to the Saraland Public Library, 111 Saraland Loop, Saraland, Alabama 36571. The administrative record is also located in EPA Region IV's library in Atlanta, Georgia. An index to the administrative is attached as Exhibit 24.

VII. DESIRED SCOPE OF RELIEF

EPA intends to negotiate a consent decree with the PRPs that will require them to perform the RD/RA for OU3 and to pay all past and future response costs for OU3.

VIII. NATURAL RESOURCE DAMAGE TRUSTEES

EPA contacted the trustees for the U.S. Department of Interior (DOI), the U.S. Department of Commerce/National Oceanic and Atmospheric Administration (NOAA), ADEM, the Alabama Department of Conservation and Natural Resources, and the Alabama Oil and Gas Board. The following paragraphs exemplify the level of participation and interest of the Natural Resource Trustees.

NOAA initially provided a Preliminary Natural Resource Survey (PNRS) on August 29, 1990. (Exhibit 25). In a memorandum dated February 2, 1992, NOAA expressed its concerns about the potential for unremediated mercury to accumulate in resident biota and about potential migration of mercury into the Mobile River. (Exhibit 26). On October 23, 1992, NOAA expressed a number of

concerns primarily related to the threat of contaminated sediments in Cold Creek and the potential for migration of these sediments into the Mobile River. (Exhibit 27). NOAA and the United States Fish and Wildlife Service (FWS) reviewed the draft Work Plan for the upcoming Mobile River Study and provided input on the plan.

The DOI provided a PNRS for the Stauffer Chemical Cold Creek Site on January 16, 1987. (Exhibit 28). A PNRS for the Stauffer Chemical LeMoyne Site was mailed to EPA on January 27, 1987. (Exhibit 29). In a letter dated February 12, 1988, the FWS contested Stauffer's position that mercury is not bioavailable in the swamp. (Exhibit 30). On May 3, 1990, the FWS provided further comment and stated again that the data indicates mercury is bioavailable in the swamp. In the same letter, the FWS set forth several recommendations, one of which included conducting a study of the Mobile River. (Exhibit 31). The Office of the Secretary, DOI, reviewed the RI, but provided no comments. (Exhibit 32). On July 8, 1992, the FWS stated that insufficient data existed to make a determination of the damages to trust resources and that it is working with the industries to obtain such information. However, the FWS strongly encouraged execution of a comprehensive study to evaluate the impacts of the entire industrial corridor adjacent to the river system and the downstream Mobile Bay estuary. (Exhibit 33). On November 6, 1992, the same office presented general comments pertaining to the high levels of mercury found in the soil and to the levels of mercury found in the biota of Cold Creek Swamp based on the draft FS. (Exhibit 34).

On May 7, 1992, an Environmental Toxicologist employed by the Mobile County Department of Health (MCDH) recommended placement of a fish advisory on the Cold Creek Swamp based on the RI supplied to MCDH by ADEM. (Exhibit 35). A fish advisory was later issued.

The Alabama Department of Conservation and Natural Resources, Game and Fish Division (ADCNR/GFD) recommended that a study be conducted of the effects of the Stauffer Sites on the Mobile River. (Exhibit 36). On April 13, 1992, ADCNR/GFD also expressed concerns about risk to humans based on consumption of contaminated fish, contamination of off-site biota, and the potential for migration of contaminated sediments. Finally, the ADCNR/GFD again recommended a separate investigation of the Mobile River based on the exchange between the swamp and the river. (Exhibit 37).

IX. RELATED CRIMINAL INVESTIGATION, PROSECUTIONS OR CIVIL ACTIONS

No actions or investigations are involved at this Site. Only the Consent Decree related to RD/RA for OU1 and the associated

Complaint have been submitted to the United States District Court for the Southern District of Alabama.

X. PROPOSED PRE-REFERRAL STRATEGY

Region IV anticipates that the ROD will be finalized and signed by August 15, 1993. Special notice letters should be issued shortly thereafter. Although EPA anticipates submission of a good faith offer by the PRPs, some past and recent discussions between the RPM and PRP technical personnel serve to present the possibility that a good faith offer may not be forthcoming. If the offer is not made, Region IV will have to determine whether to issue a Unilateral Administrative Order or to conduct a fund-lead RD/RA.

EPA will use the model RD/RA Consent Decree (Exhibit 38) and model Scope of Work (Exhibit 39) as a basis for attaining an agreement for the performance of the RD/RA, for payment of past costs, and for payment of future costs. There are no plans for mixed funding or de minimis settlements in this case.

The following schedule details the proposed milestones for the negotiation of a Consent Decree for this Site:

Proposed Plan Completed and Issued by Region IV	June 15, 1993
Beginning of Public Comment Period	June 15, 1993
Pre-Referral Litigation Report to HQ and DOJ	June 24, 1993
Public Meeting	June 29, 1993
ROD Finalized and Signed by Region IV	August 15, 1993
RD/RA Special Notice Letters Issued	August 23, 1993
Good Faith Offer Due	Oct. 29, 1993
RD/RA Negotiations Conclude	Dec. 29, 1993

XI. LEGAL, POLICY, OR OTHER ISSUES OF PRIMARY IMPORTANCE

The remedial activities to be conducted in OU3 will require the discharge of dredged and fill material. Activities which include the discharge of fill material into waters of the United States, including most wetlands, are typically regulated by Clean Water Act Section 404. 33 U.S.C. § 1344. Thus, CWA Section 404 is applicable to the proposed remedy and has been designated as an applicable or relevant and appropriate requirement (ARAR). Although a CWA § 404 permit is not required to conduct the remedy, EPA is nonetheless obligated to fulfill the substantive

requirements of CWA § 404 and the § 404(b)(1) guidelines which are included in 40 C.F.R. § 230.4. Although no discharge in a wetland shall be allowed when there is a practicable alternative, the necessity to address contamination in the Cold Creek Swamp leaves no practicable alternative. 40 C.F.R. § 230.10(a).

Since a discharge is to be undertaken, all appropriate and practicable steps must be taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem. 40 C.F.R. § 230.10(d). Subpart H of 40 C.F.R. Part 230 sets forth the steps which can be taken to minimize the effects of fill activities. Section 230.75(d) states that habitat development and restoration techniques may be used to minimize adverse impacts and to compensate for destroyed habitat. These techniques include wetland restoration, enhancement, and/or creation.

Since fill activities are unavoidable in order to conduct the remedial actions in Cold Creek Swamp, mitigation will be required. The "Memorandum of Agreement between the U.S. Army Corps of Engineers and the EPA Concerning the Determination of Mitigation Under the 404(b)(1) Guidelines" (MOA) states that mitigation includes wetland restoration (the favored alternative), enhancement, and/or creation. The evaluation of the appropriate level of mitigation requires a case-specific determination and is based solely on the values and functions of the aquatic resource that will be impacted. According to the MOA, mitigation should provide at a minimum one for one functional replacement with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan. The MOA considers as a reasonable surrogate a minimum of one to one acreage replacement for no net loss of functions and values. However, the ratio may be greater when the functional values of the area impacted are demonstrably high and the replacement wetlands are of lower functional values or the likelihood of success is low. Conversely, the ratio may be less than one to one when functional values associated with the impacted area are demonstrably low and the likelihood of success of the mitigation project is high.

The Proposed Plan sets forth restoration as the mitigation methodology to be undertaken in the Transition Zone and creation of wetlands adjacent to the diverted waterway as the mitigation methodology in the Upper Arm Swamp Zone. The determination of the appropriate level of mitigation will be made in the Record of Decision. One comment provided by the Alabama Department of Conservation and Natural Resources, Game and Fish Division (ADCNR/GFD) has already been submitted pertaining to the level of mitigation necessary to compensate for the loss of wetlands due to the remedial activities. The ADCNR/FGD requested mitigation be required at a minimum replacement ratio of 2:1. (Exhibit 37).

EPA may also be required to mitigate the loss of wetlands under 40 C.F.R. Part 6, Appendix A, implementing Executive Orders 11988 ("Floodplain Management") and 11990 ("Protection of Wetlands"). Executive Order 11988 requires federal agencies to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains. Executive Order 11990 mandates that federal agencies minimize the destruction, loss, or degradation of wetlands, and preserve and enhance the natural and beneficial values of wetlands. Appendix A to 40 C.F.R. Part 6 sets forth Agency policy and guidance for carrying out the provisions of the Executive Orders. The Executive Orders apply to activities of federal agencies "providing Federally . . . assisted construction and improvements . . . and federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities." 40 C.F.R. Part 6, Appx. A, Section 5a.

Pursuant to Appendix A and EPA policy issued on August 6, 1985, Superfund actions must meet the substantive requirements of the Executive Orders. Memorandum, "Policy on Floodplains and Wetland Assessments for CERCLA Actions," from William N. Hedeman, Director, OSWER, and Gene Lucero, Director, OWPE, to Toxic and Waste Management Division Directors, Regions I-X, August 6, 1985. The memorandum states that "[f]or remedial actions, a floodplain/wetlands assessment must be incorporated into the analysis conducted during the planning of the remedial action." Hedeman at p. 1. A Region IV memorandum dated June 8, 1993, lists the four components of a Floodplain/Wetland Assessment and indicates which documents in the Administrative Record serve to fulfill the substantive requirements of 40 C.F.R. Part 6, Appendix A. (Exhibit 40).

An additional subject which warrants attention is the Corrective Action Management Unit (CAMU) Rule, 58 Fed. Reg. 8657 (Feb. 16, 1993), which is an ARAR at these Sites. Region IV intends for the Regional Administrator to designate a CAMU for OU3 pursuant to his authority under 40 C.F.R. § 264.552(a). Designation of a CAMU at these Sites achieves the policy objectives of EPA in promulgating the CAMU Rule, most notably, "providing remedial decisionmakers with an added measure of flexibility in order to expedite and improve remedial decisions" which result in effective, protective, and cost-effective remedies and to "override any regulatory disincentive against a given remedy" as the result of Resource Conservation and Recovery Act (RCRA) Subtitle C requirements. 58 Fed. Reg. 8659-60 (Feb. 16, 1993).

Pursuant to the CAMU Rule, placement of remediation wastes within a CAMU is not land disposal under Section 3004(k) of RCRA. 42 U.S.C. § 6924(k); 40 C.F.R. § 264.552(a)(1). Therefore, placement of remediation wastes within a CAMU does not trigger

either the Land Disposal Requirements (LDRs) or the Minimum Technology Requirements (MTRs). 40 C.F.R. § 264.552(a)(1) and (2).

"Remediation wastes" are defined as "all solid and hazardous wastes, and all media (including ground water, surface water, soils and sediments) and debris that contain listed hazardous wastes, or which themselves exhibit a hazardous waste characteristic, that are managed at a facility . . ." 40 C.F.R. § 260.10. The term refers to wastes which originate from remedial activities at the facility or wastes originally located at the facility, but which were associated with a release that migrated beyond the facility boundary. 58 Fed. Reg. 8664 (Feb. 16, 1993). Sediments to be excavated in the Transition Zone and which exhibit a hazardous waste characteristic constitute "remediation wastes."

Thus, placement of the contaminated sediments to be excavated from the Transition Zone into the Upper Arm Swamp Zone, also a contaminated area, does not trigger the LDRs or MTRs because placement of remediation wastes into a CAMU is not land disposal under RCRA Section 3004(k). 42 U.S.C. § 6924(k). The Regional Administrator will establish the CAMU and its requirements in the Record of Decision.

It is important to note that two challenges to the CAMU Rule have been filed in the United States Court of Appeals for the District of Columbia Circuit. The actions are styled Environmental Defense Fund v. EPA, No. 93-1316, and Sharon Steel Co. v. EPA, No. 93-1322. Judgments have not yet been rendered. However, the outcome of this litigation may be important to the upcoming negotiations as the PRPs may be less willing to conduct the remedy if the challenge to the CAMU Rule is upheld.

XII. HQ AND DOJ SUPPORT

The Region requests that DOJ and EPA Headquarters participate in the negotiation of the Consent Decree. The Region further requests Headquarter's comments on this pre-referral litigation strategy. The Region intends to take the lead in negotiating a Consent Decree.

APPENDIX A

LIST OF EXHIBITS

1. Superfund Proposed Plan Fact Sheet, Stauffer Chemical Superfund Sites, Cold Creek Swamp, June 15, 1993

2. Hazardous Ranking Scoring Package for Stauffer Chemical Cold Creek Site, July 19, 1983.

3. Hazardous Ranking Scoring Package for Stauffer Chemical LeMoyne Site, June 3, 1983.

4. Notice Letters to Stauffer Chemical Company, November 21 and 23, 1984

5. Stauffer Chemical Company's Response to EPA's Notice Letters, December 21, 1984

6. Administrative Order on Consent for the RI/FS at the Stauffer Chemical Cold Creek and LeMoyne Sites, January 21, 1986

7. EPA's Proposed Plan for Operable Unit 1 at the Stauffer Chemical Cold Creek and LeMoyne Sites

8. Special Notice Letters issued to Akzo Chemicals, Inc., and Zeneca, Inc., for RD/RA for Operable Unit 1, July 20, 1989

9. Record of Decision, Operable Unit 1, September 27, 1989

10. Consent Decree, United States v. Akzo Chemicals, Inc., and ICI Americas, Inc., for RD/RA for Operable Unit 1, April 25, 1990 (excluding Exhibit A which is included herein as Exhibit 7)

11. EPA letter to Mariam Tehrani, Akzo Chemicals, Inc., and Lee Erickson, ICI Americas, Inc., indicating Solid Waste Management Units (SWMUs) to be handled under CERCLA in OU2.

12. Notice Letters for RI/FS for Operable Unit 2, May 1, 1992

13. Letter from Mariam Tehrani, Akzo Chemicals, Inc., and Lee Erickson, ICI Americas, Inc., to EPA requesting that EPA handle SWMUs under Akzo Chemical, Inc.'s, RCRA permit

14. EPA Letter Documenting Three-Phase Approach for the RI/FS for Operable Unit 2, August 6, 1992

15. EPA's Approval of the Decision Document for Operable Unit 2, December 29, 1992

16. EPA letter notifying the PRPs of the need for a RI/FS at Stauffer Cold Creek Site OU3, May 4, 1990

17. Notification of the PRPs' Willingness to Conduct RI/FS for Operable Unit 3, Cold Creek Swamp, May 22, 1990

18. Notice Letters for Mobile River Study, Initial Phase Remedial Investigation, May 25, 1993

19. Approval of RI for Operable Unit 3 with Caveat, July 15, 1992

20. Approval of FS for Operable Unit 3 with Caveat, June 3, 1993

21. Summary of EPA Response Costs for Operable Unit 3 Incurred Through June 10, 1993

22. Demand for Payment of Past Costs Incurred During Fiscal Year 1990, November 4, 1991, and Letters Remitting Payment, November 21, 1991 (Akzo Chemicals, Inc.) and December 3, 1991 (ICI Americas, Inc.)

23. Demand for Payment of Past Costs Incurred During Fiscal Year 1991, October 22, 1992, and Copies of Payment

24. Administrative Record Index for Stauffer Chemical Cold Creek Site, Operable Unit 3, June 9, 1993

25. Comments of National Oceanic and Atmospheric Administration (NOAA), August 29, 1990

26. Comments of NOAA, February 2, 1992

27. Comments of NOAA, October 23, 1992

28. Preliminary Natural Resources Survey for the Stauffer Cold Creek Site of United States Department of Interior (DOI), January 16, 1987

29. Preliminary Natural Resources Survey for the Stauffer LeMoyne Site of DOI, January 27, 1987

30. Comments of United States DOI, Fish and Wildlife Service (FWS), February 12, 1988

31. Comments of FWS, May 3, 1990

32. Comments of DOI, March 27, 1992

33. Comments of FWS, July 8, 1992

34. Comments of DOI, November 6, 1992

35. Comments of Alabama Department of Health, May 7, 1992

36. Comments of Alabama Department of Conservation and Natural Resources, Game and Fish Division (ADCNR/GFD), October 7, 1992

37. Comments of ADCNR/GFD, April 13, 1992

38. Draft Consent Decree for Operable Unit 3, United States v. Akzo Chemicals, Inc., and Zeneca, Inc.

39. Draft Scope of Work for Operable Unit 3

40. Region IV Memorandum listing four components of Floodplain/Wetland Assessment, June 8, 1993

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

AUG 17 1992
4RC

BY FEDERAL EXPRESS

John C. Cruden
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: South Marble Top Road Landfill Superfund Site
Walker County, Georgia
Pre-referral Litigation Report

Dear Mr. Cruden:

The purpose of this letter is to transmit to you the RD/RA pre-referral litigation report for the above-referenced Site, in accordance with the draft "Pre-Referral Negotiation Procedures for Superfund Enforcement Cases" memorandum, dated October 12, 1990. EPA issued a Proposed Plan for this Site on July 30, 1992. EPA anticipates that the Record of Decision will be signed for this Site by September 30, 1992. If there is any additional information you need at this time, please contact Paul Schwartz, Assistant Regional Counsel, at (404) 347-2641, ext. 2282, or Jane Spann, Remedial Project Manager, at (404) 347-2643.

Sincerely,

for John R. Barker
Regional Counsel

James D. Kutzman for
Joseph R. Franzmathes
Director
Waste Management Division

Enclosure

cc: William A. White (w/encl.)
Enforcement Counsel for Superfund Enforcement, OE

Sally Mansbach, Director (w/encl.)
CERCLA Enforcement Division

Karen Dworkin (w/encl.)
Environmental Enforcement Section, DOJ

Printed on Recycled Paper

Pre-Referral Litigation Report

SOUTH MARBLE TOP ROAD LANDFILL SITE

I. Site Description and Summary of Site History

The South Marble Top Road Landfill NPL Site (the "Site") is located about 0.6 miles south of Highway 136 and 0.2 miles east of South Marble Top Road in Walker County, Georgia. The general Site area consists of about 10 acres of undeveloped, forested land and is situated on a topographic knoll at an elevation of about 976 feet above sea level. Drainage valleys are present to the north and south of the Site, each containing an intermittent stream during prolonged rainfall events. Vegetation is present over the once-cleared portions of the Site and includes various grasses and pine trees. Approximately 1.25 acres of the Site were once cleared for landfill operations. The Site includes three distinct disposal areas within the formerly cleared 1.25 acres, comprising approximately 56,000 square feet with an estimated volume of waste and cover soils of approximately 25,000 cubic yards. An estimated 3,000 drums of dicamba and 5,000 drums of benzonitrile, both CERCLA hazardous substances, have been disposed of at the Site. The former disposal areas include two trenched disposal areas and one remnant disposal pit. The remnant pit is now partially filled with water. The general land use of the surrounding vicinity consists primarily of sparse residential dwellings with associated small-scale farming and livestock raising. (See Exhibit G for Map of Area and Site.)

Mose and Sidney Mathis, the owner/operators of the Site (the "Mathis Brothers"), began operating the Site as a landfill in early 1974. The Mathis Brothers were required to halt operations at the Shavers' Farm Landfill site[1], also in Walker County, at the end of 1973, due to the proximity of the Shavers' Farm Landfill to a sinkhole. The Mathis Brothers then shifted their landfilling operations to the Site. The Mathis Brothers disposed of latex wastes from ALC, Inc. ("ALC") and GAF Corporation ("GAF"), dry carpet wastes from E. T. Barwick Industries, Inc., and benzonitrille waste and dicamba waste from Velsicol Chemical Corporation ("Velsicol") at the Site. The benzonitrile waste is a black thermo-plastic polymer and tar generated from the distillation of benzonitrile. Dicamba is a herbicide. A significant number of drums of 1,4-dichlorobenzene from an unknown generator have also been disposed of at the Site.[2]

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[1]The Shavers' Farm site has been the subject of a CERCLA removal action, and is presently being evaluated for inclusion on the NPL.

[2]The RI indicates that seven drums were opened in "Area C" of the Site. Area C contains approximately 4,000 drums, based on visual inspection and estimate. The seven drums opened appeared to contain the same material. One of the drums was sampled and it

The Mathis Brothers applied for a Solid Waste Disposal Permit for the Site on January 28, 1974. The Environmental Protection Division of the Georgia Department of Natural Resources (EPD) had already inspected the Site and given verbal approval to the disposal of all types of solid wastes at the Site. In a letter to the Mathis Brothers dated February 26, 1974, EPD ordered the Mathis Brothers to discontinue the disposal of latex wastes at the Site because a milky fluid was observed leaching from the Site into a nearby stream. The letter also authorized the Mathis Brothers to continue placing dry carpet wastes at the Site.

In a letter of the same date to Velsicol, a copy of which was sent to the Mathis brothers, EPD ordered Velsicol to discontinue disposing of its solid wastes in Georgia until EPD finalized its revised guidelines for disposal of hazardous wastes, and until Velsicol made arrangements for the disposal of its solid wastes at an official State-approved hazardous waste site. In April 1974, EPD authorized the disposal of non-hazardous waste at the Site. On November 26, 1974, EPD issued a letter approving the disposal of benzonitrile wastes from Velsicol at the Site. On September 15, 1975, EPD issued a Solid Waste Handling Permit to the Mathis brothers for the Site. Landfill operations continued at the Site until 1980, when the state required closure after concluding that the Site did not conform to more stringent waste disposal regulations about to take effect pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA) and Georgia's Hazardous Waste Management Act.

During a Site visit in January of 1980, EPD officials noted an area of distressed vegetation downslope from the northwest section of the landfill. EPD then notified the Mathis Brothers and Velsicol that dumping at the Site would have to be stopped immediately until an analysis could be run on the waste. On March 11, 1980, EPD officials met with Mr. Mose Mathis at the Site and reviewed closure requirements with him.

The Mathis Brothers and Velsicol entered into negotiations for financing the proper closure of the Site. These negotiations apparently were unsuccessful, and the Site was not properly closed. EPD conducted periodic Site inspections. After one inspection, in April 1983, EPD noted wastes, including some drums, remaining in a man-made pond (remnant disposal pit) approximately 75 feet in diameter. EPD also noted household garbage in the pond and on the bank, and cardboard tubes and pieces of latex on the ground. All of these wastes were without

contained relatively pure 1,4-dichlorobenzene. The RI seems to imply that all 4,000 drums in Area C are likely to contain 1,4-dichlorobenzene, but this inference does not appear to be justified, except as speculation. The Mathis Brothers' do not recall this waste or its source.

the soil cover required by the Mathis Brothers' permit. EPD sent a letter to Mr. Mose Mathis on April 7, 1983, requiring that improvements be made to bring the Site into compliance with the requirements of the Permit. In subsequent inspections, EPD found the Site to be abandoned. In response to an additional letter from EPD, the Mathis brothers placed a 10 inch to 2 feet layer of soil over the landfill. The pond (remnant pit) remained unfilled.

In January 1984, the EPD requested that the Site be included on the Georgia State Superfund Program listing. In June 1984, EPA conducted a preliminary assessment at the Site. A Hazard Ranking System (HRS) evaluation was also performed at the Site, which resulted in a score of 30.78. The Site was proposed to the NPL on January 22, 1987, and its listing on the NPL became final in February of 1989.

EPA Region IV issued an Adminstrative Order on Consent (the "Consent Order") to Velsicol Chemical Corporation on November 2, 1988, requiring Velsicol to conduct the Remedial Investigation/Feasibility Study (RI/FS) for the Site. A copy of the Consent Order is attached hereto as Exhibit H. During the conduct of the RI/FS, Velsicol failed to address adequately EPA comments on the draft Remedial Investigation Report submitted to EPA for review, in violation of the Consent Order. In addition, a lab retained by Velsicol failed to comply with EPA quality control requirements established in the Consent Order. EPA assessed stipulated penalties for both of these violations of the RI/FS Consent Order and accepted partial payment of assessed stipulated penalties as settlement during the dispute resolution process, which was invoked by Velsicol. The final RI Report submitted by Velsicol was accepted by EPA on February 4, 1992, but EPA issued a Memorandum indicating that EPA disagreed with certain conclusions in the RI Report relating to vertical migration of the groundwater from the upper water bearing zone towards the underlying Knox bedrock aquifer[3]. This memorandum is attached hereto as Exhibit I. Velsicol then failed to address adequately EPA comments on the draft Feasibility Study Report, and EPA assumed responsibility for completion of the Feasibility Study, in accordance with its authority under the Consent Order. The Feasibility Study was completed on July 27, 1992. On July 30, 1992, a Proposed Plan, outlining EPA's preferred plan for Site remediation, was issued, a copy of which is attached hereto as Exhibit A. A 30-day public comment period on the Proposed Plan began on July 30, 1992. Velsicol has requested a 30-day

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[3]Velsicol's consultant concluded in the RI Report that groundwater contamination migrates primarily horizontally beneath the Site. EPA contends, based on data in the RI Report, that there is at least equal, or possibly greater, potential for vertical migration of groundwater contamination.

extension. Therefore, the public comment period will run until September 28, 1992. A public meeting was held on August 6, 1992.

II. The PRPs; Liability Issues

Five Potentially Responsible Parties (PRPs) have been identified at this Site. The owner/operators at the time of disposal and the current owners of the South Marble Top Road Landfill (and a number of other Walker County landfills) are Mr. Mose Mathis, Route 4, Box 70, Chickamauga, Georgia 30707, and his brother, Mr. Sidney Mathis, Route 4, Box 40A, Kensington, Georgia 30727. The Mathis Brothers also acted as transporters, hauling wastes to the landfills they owned and/or operated. Three generators have been identified as PRPs: Velsicol Chemical Corporation, 4902 Central Avenue, Chattanooga, Tennessee; GAF Corporation, 1361 Alps Road, Wayne, New Jersey 07470; and Mydrin, Inc. (successor by merger to ALC), 129 Nance Road, NE, P.O. Box 128, Calhoun, Georgia 30703-0128. All of these PRPs have been sent notice letters regarding their potential liablility. Copies of the notice letters will be provided to OE or DOJ upon request.

According to the Mathis Brothers, most of the wastes at the Site are from Velsicol. An unspecified quantity of latex wastes from GAF and ALC was disposed of at the Site during the Site's first year of operation as a landfill. A significant number of drums of 1,4-dichlorobenzene from an unknown source were also disposed of at the Site (See footnote 1 above). In addition, dry carpet wastes from E. T. Barwick, a bankrupt carpet manufacturer, were also disposed of at the Site. All of the PRPs and the liability issues relating to the individual PRPs are discussed separately below.

A. The Mathis Brothers

With respect to the Mathis Brothers, there are no legal or equitable defenses or difficulties in establishing liability. The Mathis Brothers have been adjudicated liable parties at the Site under CERCLA in a private party lawsuit relating to the Site, Mathis v. Velsicol Chemical Corporation, Civ. Action 4:91-cv-24-HLM (N.D. Ga. Dec. 30, 1991). Collateral estoppel should apply so that EPA will not be required to prove the Mathis Brothers' liability in court. Even if EPA were required to prove the Mathis Brothers are liable parties under CERCLA, their liability could be established without difficulty based on their status as former owner/operators of the Site at the time of disposal operations and as the current owners of the Site. However, the Mathis Brothers' resources appear to be limited. Financial information for the Mathis Brothers has been requested pursuant to EPA's authority under Section 104(e) of CERCLA, but has not yet been received.

The Mathis Brothers have been deposed in the private litigation

between Velsicol and the Mathis Brothers. Copies of the deposition transcripts will be provided upon request. The Mathis Brothers have been interviewed informally by various EPA personnel, including Mary Hutson, Region IV Cost Recovery Section, and Paul Schwartz and Chuck Mikalian, both from the Office of Regional Counsel, ORC. The Mathis Brothers' recollections are muddled, and they have tended to stress that everything they did was pursuant to permits, which they believe is the only relevant fact. Sidney Mathis in particular has tended to lose his temper when the issue of the Mathis Brothers' liability under CERCLA is explained to him.

B. Generators

1. Velsicol Chemical Corporation

With respect to Velsicol, there are no legal or equitable defenses or difficulties in establishing liability. Documentary evidence from EPD's files, Velsicol's response to EPA's Section 104(e) Information Request, and deposition testimony clearly establishes that Velsicol sent a large volume of benzonitrile and dicamba wastes to the Site during a period from 1974 to 1980. These documents can be provided upon request. Benzonitrile and dicamba are both CERCLA hazardous substances. Velsicol's wastes constitute the bulk of wastes at the Site. Velsicol may raise an argument that the latex and carpet wastes at the Site are divisible from Velsicol's wastes so that joint and several liability does not apply to the Site as a whole, and therefore that Velsicol cannot be compelled to address those wastes. EPA's response to this argument is that, even if the latex wastes were buried in different trenches than the trenches used for Velsicol wastes, the hazardous constituents of both wastes have been released into the environment so that the environmental problem is not divisible.

Velsicol executed an Administrative Order by Consent for conducting the RI/FS, but has stated in the past that its corporate position is to refuse to sign the Agency's new national model Consent Decree. At another site in Region IV where Velsicol is a PRP (Hardemann County), Velsicol is conducting the RD/RA pursuant to a UAO. In an effort to avoid wasting resources on negotiations which could not succeed, EPA Region IV inquired whether Velsicol had already decided that it would not sign a Consent Decree consistent with the EPA national model. Velsicol denied that it would in all circumstances refuse to sign the model Consent Decree. Velsicol expressed a preference for participating in CERCLA Section 122(e) special notice negotiation procedures in the hope that other PRPs would also participate, reducing Velsicol's ultimate costs for cleaning up the Site.

2. Latex Generators

The two other generator PRPs identified for the Site, Mydrin and GAF, have both argued that the latex wastes they sent to the Site were not "hazardous", and therefore that they have not "arranged for the disposal of hazardous substances" within the meaning of CERCLA Section 107. The latex wastes are not classified as hazardous under RCRA. Both Mydrin and GAF sent latex wastes to the Site, reportedly in both solid and liquid form. Hazardous constituents of latex wastes have been found in the environment at the Site, including styrene (in surface water and groundwater), vinyl chloride (in soil and sediments) and Bis(2-ethylhexyl)phthalate (in soil, sediments, groundwater and surface water). These constituents are CERCLA hazardous substances and are contaminants of concern at the Site.

Caselaw addressing whether the disposal of wastes which are composed of hazardous constituents but are claimed to be not hazardous in the compound form in which they are disposed holds that arranging for disposal of such wastes constitutes arranging for the disposal of hazardous substances under CERCLA only if the waste materials will, under normal Site conditions, release their hazardous constituents into the environment. This case law appears to apply to latex wastes. To make the liability case with respect to the latex wastes disposed of at the Site, it would be necessary to introduce expert testimony (or results from TCLP tests) demonstrating that the latex wastes would release their hazardous constituents into the environment under normal site conditions. See U. S. v. New Castle County, 33 E.R.C. 1746 (D. Del. 1991); United States v. Serafini, 750 F.Supp. 168, 170-71 (M.D.Pa. 1990).

The New Castle County case distinguishes between "mixtures" containing hazardous constituents, which can be presumed to release their hazardous constituents (e.g., lead based paints are mixtures containing lead, and the lead is easily released from such mixtures), and "compounds" containing hazardous constituents, which must be shown to release their hazardous constituents under normal Site conditions (e.g., polyvinyl chloride is a compound that would release the hazardous constituent vinyl chloride only in the event of a chemical reaction; therefore, expert testimony would be required to establish that this would occur under normal site conditions in a particular case). The fact that hazardous constituents of the latex have been found in the environment at the Site suggests that the latex wastes have released and will continue to release their hazardous constituents under normal conditions, and this will bolster any expert testimony offered. However, expert testimony will still likely be necessary, because the latex generators can argue that the constituents in the environment are attributable to some other source, or that they are attributable to the other latex generator's waste (which may have different

properties), or that the release of latex constituents is attributable to a reaction caused by abnormal, unforseeable Site conditions.

It seems probable that latex in liquid form would more easily release its hazardous constituents, and both latex generators at the Site reportedly sent wastes in liquid form (rinse-out from tanks and trucks). However, expert testimony and/or TCLP results would be required to establish that the liquid latex wastes will leach their hazardous constituents.

The Proposed Plan for the Site provides for latex and dry carpet wastes to be stockpiled upon excavation, and sampled to determine whether they contain CERCLA hazardous substances, pollutants or contaminants and to determine appropriate disposal options. If these wastes do not contain hazardous substances, pollutants or contaminants, they will remain at the Site, covered by a cap. Otherwise they will be incinerated, or disposed of off-site. It may be necessary to retain an expert to assess whether the various latex wastes and the carpet wastes will release their hazardous constituents under normal site conditions. Thus, a conclusive determination of the liability of latex generators cannot be made until the RD/RA is in process, when the actual wastes have been excavated and analyzed. At this time, in light of the presence of hazardous constituents of latex in the environment, EPA's position is that the latex wastes contain CERLCA hazardous substances. Accordingly, EPA intends to include the latex generators on the list of special notice recipients.

a. Mydrin, Inc.

According to the Mathis Brothers, latex wastes from ALC, Inc. were disposed of at the Site. Mydrin, Inc. ("Mydrin") is the successor, through a series of mergers described in Mydrin's response to an EPA Information Request, to the liabilities of ALC, Inc. In its response to the Information Request, Mydrin, Inc. acknowledged that ALC, Inc. sent latex wastes to the Mathis Brothers from July 1973 until August 1974 (as with other Information Request responses referenced in this report, copies will be provided upon request). Although Mydrin's Information Request response did not specify which Mathis Brothers' landfill its wastes were sent to, the time span includes the period after the Mathis Brothers stopped sending wastes to Shavers' Farm

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[4]The recollections of the Mathis Brothers are generally muddled. The Mathis Brothers sometimes recall disposing of wastes from ALC, Inc. and GAF Corporation (the latex generators) at the Site, but at other times they will leave these generators out of a recital of generators whose wastes are at the Site. They tend to ramble and be confused when recounting the Site history.

Landfill (12/73) and started using the South Marble Top Landfill (1/74). In addition, the state file on South Marble Top documents the disposal of latex wastes at the Site during this period. Accordingly, EPA has a substantial basis for believing the Mydrin/ALC wastes were disposed of at the Site. Mydrin has argued that, notwithstanding disposal at the Site, its wastes are not hazardous and therefore it did not incur CERCLA liability.

Mydrin's Information Request response indicates that it generated approximately 10 drums of waste water per month from rinsing of mixing tanks; the waste water contained up to 8% suspended solids. The solids consisted of latex (natural, neoprene, and styrene-butadiene), calcium carbonate and clay (Kaolin), and trace amounts of other materials. As noted above, styrene is one of the hazardous substances that has been found in the environment at the Site. Mydrin manufactures latex foam compound for carpet backings, and water-based adhesives.

b. GAF Corporation

According to the Mathis Brothers, latex wastes from GAF Corporation were also disposed of at the Site. GAF has acknowledged that it sent a "non-hazardous rubber latex scrap" from its former Chattanooga plant to the Mathis Brothers from 1970 until mid-1974. This would include a period (1974) that the Mathis Brothers were disposing of latex wastes at the Site. There is a reference in a GAF document submitted in response to the Information Request to a decision by the State of Georgia in March 1974 to halt the landfilling of GAF's wastes at the Mathis Brothers landfill. This is consistent with action taken by EPD at the Site in early 1974 to halt latex disposal at the Site because a milky fluid had been observed leaching into a nearby stream. In other GAF documents, the GAF waste is referred to variously as "solid and semi-solid" and "coagulated latex waste", and as drums containing a "fluid/solid mixture" that could be dumped from the drum. There are documents reflecting a dispute between the Mathis Brothers and GAF when the Mathis Brothers were upset because GAF was not honoring a "commitment" to continue to use the Mathis Brothers disposal services in 1975. Waste disposal questionaires completed by GAF for an industry survey indicate "Mathis Landfill, Walker County, Georgia" as the destination for disposal of 800 tons of waste disposed of from 1970 to 1974. A handwritten note on one copy of the form indicates "handled in drums and dumped & drums returned to GAF".

GAF's Information Request response lists styrene as one of the components of its latex waste. Styrene, as noted above, is one of the hazardous substances that has been found in the environment at the Site. Other elements contained in the waste, in trace amounts, include phthalate esters "at less than 1%" (phthalate esters are a listed CERCLA hazardous substance) and PVC. GAF indicates that its waste streams included solid rubber

particles which contaminated a latex emulsion and were filtered out to produce a waste called "crum." Also, solid latex rubber which coated the piping, filters and storage tanks was frequently required to by scraped from the equipment and disposed. The drums picked up by the Mathis Brothers contained a fluid/solid mixture because they would be filled with "crum" and, upon standing, an inch or so of liquid latex emulsion would come to the top of the solid "crum." In addition, GAF, like ALC/Mydrin generated a waste when it rinsed out storage tanks, pumps and piping with water. GAF does not indicate, however, that the rinseout was picked up by the Mathis Brothers. Latex manufactured by GAF was, like Mydrin's, for use as a carpet backing material.

3. Carpet Wastes (E. T. Barwick Industries, Inc.)

The generator of carpet wastes at the Site, E.T. Barwick Industries, Inc., is a defunct, bankrupt corporation. At present EPA has no basis for claiming that the carpet wastes contain CERCLA hazardous substances, pollutants or contaminants. These wastes will be analyzed during the remedial action to determine their status under CERLCA and to determine disposal options. In particular, EPA will conduct further inquiries to determine if hazardous metals found in carpet dyes are being released from the carpet wastes. The carpet wastes are carpet trimmings, which were generated when manufactured carpet was cut, and scraps and strips of carpet resulted which were picked up by the Mathis Brothers.

4. 1,4-Dichlorobenzene

There are a significant number of drums of 1,4-dichlorobenzene that have been disposed of at the Site by an unknown generator (see footnote 2, above). Velsicol has denied disposing of this material. The material is almost pure product, so it may be off-spec product that has been disposed, rather than a process waste. This substance is reportedly used in carpet dyeing processes, so it is may be attributable to a carpet industry manufacturer in the area, but no generator has been identified at this time.

C. Projected Remedial Action

EPA has taken Velsicol's final Feasibility Study (FS), which was not approved, and EPA completed the FS and submitted proposed remedies for the environmental problem at the Site. Notice of the Feasibility Study and the Proposed Plan for the Record of Decision was published in a Walker County newspaper on July 30, 1992. These two documents have been placed in the Administrative Record at Region IV and in an information repository in the Chickamauga Public Library, at 100 Gordon Street, Chickamauga, Georgia. These repositories also include the RI Reports and other appropriate documents relating to selection of a remedy at

the Site. The public comment period, as extended pursuant to a request by Velsicol, runs through September 28, 1992. The EPA held a public meeting on August 6, 1992, to present this information to the public and answer any questions. EPA will place a transcript or tape of the public meeting in the administrative record for the Site, in accordance with the requirements of the NCP.

EPA's preferred remedial alternative, as identified in the Proposed Plan, provides for:

- surface water diversion;
- excavation of landfill wastes;
- analysis of latex and carpet wastes to determine if they contain CERCLA hazardous substances, pollutants or contaminants;
- incineration of landfill wastes found to contain CERCLA hazardous substances, pollutants or contaminants (if the carpet wastes are determined to contain unacceptable levels of metals, the carpet wastes will be disposed of off-site in a RCRA Subtitle C landfill instead of incinerated);
- incineration of soils which can not be separated from the incinerated landfill wastes, including approximately 4,000 cubic yards of landfill soil associated with the drums and spillage during drum removal;
- bioremediation of approximately 140,000 cubic yards of subsurface soils (with incineration of these soils to occur if bioremediation is not successful);
- installation of interceptor trench for groundwater collection with on-site storage and either onsite discharge (if clean-up levels met) or off-site treatment and disposal; and
- institutional controls.

The estimated total cost of the Preferred Alternative outlined above is $17,500,000.

After peer review of the Draft ROD, and consideration of comments to the Proposed Plan, EPA Region IV will select a remedy and issue a final ROD for the Site. The draft ROD is attached hereto as Exhibt J. The final version of the ROD for the Site will address contamination of soils and groundwater at the Site and is intended to constitute a final clean-up for the Site.

D. Statute of Limitations and Bankruptcy Court Deadlines

At present, there are no statute of limitation considerations that apply to the past or present actions at this Site. No PRPs identified for the Site are presently petitioners in any bankruptcy proceeding. E. T. Barwick Industries, Inc. sent dry carpet wastes to the Site and declared bankruptcy years ago. The bankruptcy proceeding is apparently closed and the company liquidated. However, no determination has been made that the dry carpet wastes sent by this company contain CERCLA hazardous substances, pollutants or contaminants.

E. Summary of Response Costs

The Region estimates that total unrecovered past costs (contracts, travel, payroll, indirects) incurred by the government as of July 31, 1992, are $263,652.66, which includes $87,439.90 in as yet unbilled RI/FS oversight costs, and 176,212.76 in other past response costs. Attached hereto as Exhibit D is the most recent cost summary for the Site. Pursuant to the Consent Order, Velsicol agreed to pay oversight costs incurred in connection with the RI/FS. Velsicol has been billed annually for RI/FS oversight costs, but the 1992 oversight costs have not yet been billed.

F. Administrative Record

The Administrative Record for this Site has been compiled and indexed. The Administrative Record will be updated periodically as additional documents are available. The Administrative Record has been placed in the repository at Region IV, in Atlanta, Georgia and in the Chickamauga Public Library, at 100 Gordon Street, Chickamauga, Walker County, Georgia. A copy of the Administrative Record Index for this Site is included as Appendix E.

H. Contact with Natural Resource Trustees

Pursuant to CERCLA §122(j)(1), EPA will notify the Federal Natural Resource Trustee, the United States Department of the Interior, of upcoming negotiations with the PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under the trusteeship of the Federal Trustee. EPA will also notify the State of Georgia Natural Resource Trustee, the Georgia Department of Natural Resources.

I. Related Civil Actions

The Mathis Brothers and Velsicol have been involved in a private party civil action related to the Site. The Mathis Brothers sued Velsicol for a variety of tort and contract claims (alleging that Velsicol misrepresented to the Mathis Brothers that its wastes

were nonhazardous) and Velsicol counterclaimed with a private-party CERCLA cost recovery action. The Court has granted Velsicol's motion for partial summary judgment, holding that the Mathis Brothers are liable parties for response costs at the Site under Section 107 of CERCLA.

J. Proposed Pre-referral Strategy

The following schedule details the proposed milestones for the negotiations of a Consent Decree for this Site.

Pre-referral Litigation Report to HQ and DOJ 8-17-92

§122(e) Notice Letters issued 9-30-92

Good Faith Offer Due 11-30-92

RD/RA Negotiation Period Concludes 1-30-93

The Region anticipates issuing notice letters pursuant to Section 122(e) whereby the Region will inform the PRPs that the standard 120-day moratorium period will be used for negotiating a Consent Decree.

EPA's goal in negotiations will be to obtain 100% reimbursement of past costs and an agreement to perform or finance the RD/RA, and pay EPA's oversight costs. The draft Consent Decree, which is based on the national model, without any significant deviations, is attached hereto as Exhibit F. A draft Statement of Work, based on a Regional Model, is attached hereto as Exhibit K.

Based on Velsicol's prior record in RD/RA negotiations using the new national model, the Region believes it is unlikely that Velsicol will sign a Consent Decree. At another site in Region IV (Hardemann County), Velsicol refused to sign a Consent Decree consistent with the national model and is instead conducting the RD/RA pursuant to a Unilateral Administrative Order. Velsicol has stated in the past that its corporate position is to refuse to sign the model Consent Decree. However, in response to an inquiry from the Region, Velsicol has indicated its desire to follow Section 122(e) special notice procedures in an attempt to negotiate a Consent Decree which would include other PRPs.

K. Legal, Policy or Other Issues or Strategic Considerations

Based on the facts of this case, one significant legal/policy issue is the status of latex wastes under CERCLA. Although different latex wastes probably vary substantially in their

properties, EPA should develop a consistent approach for determining whether to treat generators of latex wastes at Superfund sites as liable parties.

A significant strategic consideration in this case is the fact that Velsicol has previously demonstrated its unwillingness to sign the new Model Consent Decree. Accordingly, EPA must develop a strategy for motivating settlement by Velsicol and for making a Unilateral Adminstrative Order for RD/RA seem unattractive. EPA should also be on guard to prevent RD/RA negotiations from becoming simply a mechanism for Velsicol to delay the clean-up of the Site. Delay has seemed at times to be Velsicol's strategy for minimizing its own costs. Any "good faith offer" submitted by Velsicol should be scrutinized carefully, and commitments on certain basic issues that EPA would require in any settlement should be obtained before going forward with negotiations.

L. Special Needs for Headquarters and DOJ support

At present, there are no special needs for support beyond what is normally required under Pre-referral Negotiation procedures.

M. Regional Contacts

The Regional attorney assigned to the Site is Paul Schwartz (404)347-2641, ext. 2282. The Remedial Project Manager for the Site is Jane Spann, (404) 347-2643.

LIST OF EXHIBITS

Exhibit A ..... Proposed Plan Fact Sheet dated July 1992.

Exhibit B ..... Executive Summary for the Remedial Investigation Report.

Exhibit C ..... Executive Summary for the Feasibility Study.

Exhibit D ..... Cost Summary

Exhibit E ..... Administrative Record Index

Exhibt F ..... Draft CERCLA RD/RA Consent Decree to be enclosed with notice letters.

Exhibit G ..... Map of Site

Exhibit H ..... Administrative Order on Consent for RI/FS

Exhibit I ..... EPA Memorandum of Feb. 4, 1992 re: RI Report

Exhibit J ..... Draft Record of Decision

Exhibit K ..... Draft Statement of Work to be enclosed with notice letters.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

4RC SEP 30 1992

BY FEDERAL EXPRESS

John C. Cruden
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: T H Agriculture & Nutrition Co. Superfund Site
Albany, Dougherty County, Georgia
Operable Unit 1
Pre-referral Litigation Report

Dear Mr. Cruden:

The purpose of this letter is to transmit to you the RD/RA pre-referral litigation report for the above-referenced Site, in accordance with the draft "Pre-Referral Negotiation Procedures for Superfund Enforcement Cases" Memorandum, dated October 12, 1990. EPA issued a Proposed Plan for this Site on September 14, 1992. EPA expects to sign a Record of Decision for the Site in November of 1992. If there is any additional information you need at this time, please contact Paul Schwartz, Assistant Regional Counsel, at (404) 347-2641, ext. 2282 or Alan Yarbrough, Remedial Project Manager, at (404) 347-2643.

Sincerely,

John R. Barker
Regional Counsel

Joseph R. Franzmathes, Director
Waste Management Division

Enclosure

cc: William A. White (w/encl.)
Enforcement Counsel for Superfund Enforcement, OE

Sally Mansbach, Director (w/encl.)
CERCLA Enforcement Division, OWPE

Karen Dworkin (w/encl.)
Environmental Enforcement Section, DOJ

Printed on Recycled Paper

Pre-Referral Litigation Report

T H AGRICULTURE & NUTRITION CO. SITE
Operable Unit 1

I. Site Description and Summary of Site History

The T H Agriculture & Nutrition Site (hereinafter, the "Site") is located at 1401 and 1359 Schley Avenue in Albany, Georgia. For an area location map and general Site map, see Exhibit G. The Site consists of two adjacent former agricultural chemical formulation facilities where various liquid and dry pesticides and other agricultural chemical compounds were forumulated and handled for a period of approximately thirty years. The Site includes property currently owned by T H Agriculture & Nutrition Company, Inc. ("THAN") at 1401 Schley Avenue (the "THAN Property") and property currently owned by Mr. Larry Jones at 1359 Schley Avenue (the "Jones Property"). The THAN Property, the western portion of the Site, consists of approximately seven acres. There are presently no active business operations on the THAN Property. The Jones Property, the eastern portion of the Site, consists of approximately five acres, and contains an active welding supply store.

The Site is bordered on the east by residences, on the south by Schley Avenue, on the west by a Seaboard Coastline Railway line, and on the north by a construction company (Spillman Brick Company). To the west and northwest are lightly populated residential areas. Several motels are within a one mile radius of the Site. Located approximately 300 feet south of the Site is an elevated expressway and further south, a large commercial section of Albany.

The THAN Property was used as a formulation and packaging plant for agricultural chemicals from the 1950's until 1982. It appears that the handling of agricultural chemicals commenced at the THAN Property while it was owned by Walker Fertilizer Company, from 1956 to 1958. Pesticide formulation operations were then conducted by a succession of owners until business operations at the THAN Property ceased in 1982. The various owners of the THAN Property are listed below:

Owner	Dates	Current Status
Walker Fertilizer Company	1956-58	Unknown
Albany Chemical Co./ Taylor Chemical Co.	1958-63	Changed name to Taylor Chemical Co., dissolved

Planters Chemical Co.	1963-67	merged into Thompson-Hayward Chemical Co. in 1967
Thompson Hayward Chemical Co.	1967-81	merged into THAN
THAN	1981-present	current owner

Pesticides handled at the THAN Property include lindane, DDT, toxaphene, methyl parathion, malathion, and parathion. All of these pesticides are CERCLA hazardous substances. Dry pesticides were formulated on the THAN Property during the 1960s and 1970s (and possibly during the 1950s). Liquid pesticides were formulated on the THAN Property from approximately 1973 until approximately 1978. During liquid formulation operations, the blending tank was rinsed between batches with xylene, which was then discharged into a drainage ditch on the property. Wettable powder began replacing liquid pesticides in approximately 1976. Very little pesticide formulating took place after 1978. Business operations on the THAN Property ceased in 1982.

The Jones Property has a similar history. The Jones Property was used as a formulation and packaging plant for agricultural chemicals from 1964 until 1981. It appears that the handling of agricultural chemicals commenced at the Jones Property when it was purchased by Southeastern Liquid Fertilizer Company, Inc., in 1964. Pesticide formulation operations (dry and liquid) were then conducted by a succession of owners until 1973. In 1973, the Jones Property was purchased by Gold Kist, Inc., which discontinued pesticide formulation activities on the property, but continued fertilizer blending and fertilizer and pesticide retail sales until 1981. The various owners of the Jones Property are listed below:

Owner	Dates	Current Status
Southeastern Liquid Fertilizer Co.	1964-?	Merged into Escambia Chemical Co.
Escambia Chemical Co.	?-April 1969	?-was owned by EBASCO, which merged into Boise Cascade Co.
Eschemco Corporation	April 1969-Dec. 1969	changed name to Escambia Chemical Co., merged into Air Products and Chemicals, Inc.

Custom Farm Services, Inc.	1969-73	dissolved, was owned by Cities Service, Inc., which changed name to CanadianOXY Offshore Production Co.
Gold Kist, Inc.	1973-85	ongoing concern
Larry Jones	1985-present	current owner, owns welding supply business

THAN conducted a removal on the THAN Property in 1984 to remove surficial soils in accordance with a cleanup plan approved by the Environmental Protection Division of the Georgia Department of Natural Resources (EPD). The EPD-approved clean-up plan provided for the removal of identified areas of soil contamination exceeding clean-up criteria established by EPD. Removal activities conducted with EPD oversight included demolition of several buildings, excavation of selected surface soils and subsurface disposal areas, installation of a perimeter fence, and establishment of a vegetative cover. Excavated soils and debris were disposed off-site in a permitted hazardous waste landfill.

The Site was listed on the NPL on March 31, 1989. The original listing was based solely on the release of hazardous substances from the THAN Property. THAN agreed to conduct the RI/FS pursuant to an Administrative Order By Consent dated July 6, 1990. A copy of the Administrative Order is attached as Exhibit H. In the course of the Remedial Investigation, sampling on the Jones Property established that the groundwater contamination plume extends underneath the Jones Property and that there is significant source contamination on the Jones Property. Accordingly, EPA noticed the former and current owner/operators of the Jones Property as PRPs at the Site. In addition, EPA divided the Site into Operable Units: Operable Unit 1 addresses soil contamination on the THAN Property and groundwater contamination for the entire Site. Operable Unit 2 addresses soil contamination on the Jones Property, which was not fully characterized in the RI/FS for Operable Unit 1. This mini-lit relates to the RD/RA for Operable Unit 1 only. Special notice letters have been sent to the PRPs connected with the Jones Property (Larry Jones, Boise Cascade Corporation, Air Products and Chemicals, Inc., Hercules Incorporated, CanadianOXY Offshore Production Company and Gold Kist, Inc.) to commence RI/FS negotiations for Operable Unit 2, and a good faith offer to conduct that RI/FS was due on September 16, 1992. No good faith offer was received before the deadline, and the Region is planning to initiate a fund-led RI/FS for Operable Unit 2 in 1st quarter, 1993. The Executive Summaries for the Final RI Report for Operable Unit 1 and for the Final Feasibility Study for Operable Unit 1 are attached as Exhibits B and C, respectively.

A second removal was conducted at the THAN Property pursuant to a Unilateral Adminstrative Order (UAO) issued to THAN by EPA in March of 1992. A copy of the UAO is attached as Exhibit J. That removal action is currently ongoing. The second removal was intitially proposed to EPA by THAN while THAN was conducting the RI/FS for Operable Unit 1 at the Site. THAN sought EPA's approval to conduct a removal so that THAN could minimize clean-up costs by removing contaminated soil and disposing of it in a permitted hazardous waste landfill before a national capacity variance allowing land disposal of "Third Third wastes" expired on May 8, 1992. EPA's Emergency Response Branch evaluated THAN's proposal and determined that a removal was necessary in light of the discovery during the RI/FS of a disposal pit containing pure product and high concentrations of contamination under the former wet mix building on the THAN Property. THAN then refused to sign a removal consent order because THAN did not agree with EPA's subsurface soil action levels. Accordingly, EPA issued a UAO for a removal on the THAN Property.

Pursuant to the UAO, THAN has demolished and removed several on-site structures, excavated and removed the first foot of soil in areas of contamination, and excavated and removed contaminated subsurface soil and debris to an action level for subsurface soils of 100 ppm for total pesticides. Over 24,700 tons of soil have been removed and shipped to a permitted hazardous waste landfill. The UAO also requires THAN to backfill excavated areas and place a uniform engineered clay cover over the removal area. THAN has proposed to conduct on-site thermal desorption of approximately 3,000 tons of excavated soil which contains greater than 1,000 ppm of total pesticides. These soils have been stockpiled and were not landfilled because they were not covered by the national capacity variance noted above due to the high concentrations of pesticides. The removal branch is reviewing THAN's proposal.

Post-removal confirmation samples show that levels of contamination in the soil on the THAN Property have been reduced from greater than 1,000 ppm total pesticides in some locations to levels of less than 25 ppm total pesticides. The top foot of soil has been removed at approximately six of the seven acres on the THAN Property, with specific areas being excavated to seven feet below the surface.

II. The PRPs and the Evidence; Liability Issues

All of the PRPs for the Site are potentially liable because of their status as current or former owner/operators. The PRPs generally can be broken down into those who are owner/operators in connection with the THAN Property and those who are owner/operators in connection with the Jones Property.

Except as otherwise indicated below, those PRPs who are potentially liable in connection with the THAN Property can not be held liable for the source contamination on the Jones Property, and vice versa. The two source areas are divisible, with soil contamination decreasing to nondetect approaching the property line in either direction, and increasing again beyond the property line.

All of the PRPs can be held jointly and severally liable for the groundwater contamination underlying the entire Site, however, because there is a commingled plume underlying both properties, and there is no way to divide the contamination attributable to the source areas on the two properties. However, groundwater flow is from the THAN to the Jones Property, and the majority of the contamination in the groundwater plume appears to be attributable to the THAN Property as a source. In addition, a non-aqueous phase liquid (NAPL) of pure product, consisting of xylene and various pesticides, floats above the groundwater at the Site and constitutes the Site's most serious environemental problem. The NAPL will be addressed by the same means as the groundwater remedy and is attributable solely to operations on the THAN Property. The strategy implications of these circumstances are discussed in Section X, below. A discussion of each PRP individually follows:

A. <u>THAN Property</u>

1. T H Agriculture & Nutrition Co., Inc.

THAN is potentially responsible as the current owner of the THAN Property and as the owner/operator at the time of the disposal of hazardous substances on the THAN Property. Hazardous substances handled by THAN and its corporate predecessors on the THAN Property include, among others, lindane, toxaphene, DDT and xylene, all of which have been found in soil and groundwater at the Site. There are no legal issues or known defenses affecting THAN's status as a liable party.

2. North American Phillips Corporation (NAPC)

NAPC is the parent company of THAN. NAPC was also the parent company of Planters Chemical Co. and Thompson-Hayward Chemical Co., former owner/operators and predecessors by merger to THAN. Although THAN (and its predecessors) was at one time a viable business entity, THAN at present is essentially a shell corporation which exists only to own contaminated property and carry out clean-up activities on property at which THAN or NAPC has environmental liability. THAN's assets appear to be limited; therefore it is important to evaluate NAPC's possible parent corporation liability at the Site. NAPC has previously indicated that it had no involvement in the day to day operations of THAN while operations were active at the Site. However, NAPC

apparently exercises substantial control over and finances THAN's current operations, and therefore may be liable as a current owner. In connection with another site owned by THAN in Region IV, EPA has issued a CERCLA Section 104(e) Information Request to NAPC to develop information relevent to NAPC's "parent" liability. This information will be evaluated when received. In the meantime, the Region intends to send special notice to NAPC when RD/RA negotiations are commenced for Operable Unit 1 at the Site.

3. Mr. J. M. Taylor

Mr. Taylor is potentially liable as a former owner/operator based on his former status as majority owner and President of Taylor Chemical Co., a now-dissolved former owner/operator of the THAN Property. Mr. Taylor's status as a liable party would depend on the extent of his involvement and control in the operations of Taylor Chemical Co. at the THAN Property. Mr. Taylor has denied having significant involvement in those operations; however, EPA suspects that Mr. Taylor's involvement in operations at the THAN Property may have been greater than he has admitted. Mr. Taylor is a PRP at the Aberdeen NPL site in North Carolina in connection with a former North Carolina pesticide company that was affiliated with the plant on the THAN Property. Mr. Taylor is elderly (about 90), has no assets (as determined in depositions in connection with the Aberdeen site), and is in poor health. Accordingly, the Region does not anticipate pursuing enforcement against Mr. Taylor.

4. Hercules Incorporated ("Hercules")

Herucules owned toxaphene tanks on both the THAN and Jones Properties. In response to a CERCLA Section 104(e) Information Request, Hercules has confirmed that it sold toxaphene to owner/operators of the THAN Property during the 1960s and 1970s. Under Hercules' standard consignment agreement, which was entered into with respect to the tanks on the Jones and THAN Properties, Hercules maintained ownership of tanks on both properties and maintained ownership of toxaphene in the tanks until the customers withdrew the toxaphene from the tanks. Accordingly, Hercules was the owner/operator of a "facility" (the tanks) from which releases occurred at the Site. Significant toxaphene contamination is present in the soils on both properties in the areas where the toxaphene tanks were located. Attorneys for Hercules have represented that former employees at the Site have stated that Hercules delivered toxaphene to these tanks in bulk tank trucks, transferring the toxaphene to the tanks through a hose. When the hose was disconnected, the truck operator reportedly drained the slough onto the ground. This arguably constitutes arranging for disposal so as to make Hercules liable under a generator theory as well as an owner/operator theory. Toxaphene has been found in both soil and groundwater at the

Site. Copies of consignment agreements entered into by Hercules with respect to the THAN and Jones Properties are attached as Exhibit I.

The Hercules standard consignment agreement also contains indemnification provisions making the consignee/purchaser liable for damages resulting from loading or unloading of toxaphene. This provision would be effective against THAN but would not effect EPA's ability to treat Hercules as a PRP.

5. Other PRPs Connected to the THAN Property

Other former owner/operators include Walker Fertilizer Company, and Albany Chemical Company, but it appears that these companies no longer exist. Mr. Harry Blanton, a former plant manager, may be liable as a former owner/operator in light of his involvement in Site operations during Taylor Chemical Co.'s operation of the THAN Property, but his current status is unknown. THAN has represented that it can document that certain pesticides were custom formulated on the THAN Property for larger companies (e.g. Mobil Chemical Co., U.S.S. Agriculture Co., Swift Agricultural Chemicals and Estech Corporation.), such that those companies could have incurred generator liability under an Aceto theory. See United States v. Aceto Agricultural Chemical Corp., 872 F2d 1373 (8th Cir. 1989). The Region indicated that it would be willing to review documentation of such arrangements, but THAN has not yet provided such documentation.

B. Jones Property

1. Larry Jones

Mr. Jones is the current owner of the Jones Property. EPA anticipates that Mr. Jones will raise an innocent landowner defense. Mr. Jones has stated that he did not know that hazardous substances were disposed of at the Site when he bought his property. There will be an issue as to whether Mr. Jones "had reason to know of the disposal of hazardous substances on his property" at the time he purchased it. Under §101(35)(B) of CERCLA, Mr. Jones would have to demonstrate that he undertook, at the time of purchase, "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." THAN had already conducted removal activities on the adjacent THAN Property when Mr. Jones purchased his property, and there reportedly were monitoring wells visible on the adjacent THAN Property. An inquiry into the prior owners activities on the Jones Property would have revealed that pesticide formulation operations had taken place. There is some question whether, in 1985, it would have been customary to determine the environmental and operations history of the property. The immediately preceding owner, Gold Kist, Inc., did not formulate pesticides on

the Jones Property. Mr. Jones did obtain from Gold Kist a promise to indemnify Mr. Jones against environmental liabilities attributable to Gold Kist's operations (most of the contamination at the Jones Property is attributable to owner/operators that preceded Gold Kist).

In addition to his possible status as an innocent landowner, it also appears likely that Mr. Jones's resources are limited. Mr. Jones's potential status as an innocent landowner, together with his financial status, may justify treating him as a candidate for de minimis landowner settlement. Any de minimis or other settlement with Mr. Jones should include provisions obligating Mr. Jones to provide access to the Jones Property as necessary to effectuate future CERCLA response actions.

2. Gold Kist, Inc. ("Gold Kist")

Gold Kist owned the Jones Property from April of 1973 until 1985. Pesticide formulation operations were discontinued before Gold Kist bought the property; however, fertilizer blending, and retail sales of pesticides and fertilizers continued until 1981, while Gold Kist operated a farm supply store. According to interviews conducted by THAN and THAN's attorneys with a former employee, Gold Kist sold dry, wettable powders and liquid pesticides from the store, and also herbicides and fungicides. According to the former employee, John Albritten, the liquid pesticides were stored in metal containers which, on occasion, were damaged or punctured during loading or unloading, and minor spills resulted, which were contained. Also, bags containing dry pesticides occasionally broke and spilled product. In addition, a fish kill reportedly occurred when washout from fertilizer tanks migrated from ditches on the property into a nearby creek. Gold Kist has indicated in its response to a §104(e) Information Request that in some instances spilled pesticides may have been swept off of a loading dock. While these occurences have not contributed greatly to the environmental problem at the property, they do constitute the "disposal" of hazardous substances, and they create a basis for imposing CERCLA joint and several liability. According to John Albritten, the specific pesticides and herbicides handled by Gold Kist included toxaphene, a hazardous substance which has been found in soil and groundwater at the Site, and methyl parathion, malathion, ethyl parathion, and diazinon, all of which are hazardous substances that have been found in soil at the Site. Gold Kist indicated in its §104(e) response that it had "no records identifying the specific pre-packaged pesticides" it sold, but that it never handled DDT.

Gold Kist has requested consideration for resolving its liability in a de minimis settlement. De minimis treatment of Gold Kist would increase the difficulty of obtaining a 100% settlement, as there are liability problems affecting EPA's ability to recover from some of the other PRPs, as discussed below, and all of the

PRPs connected to the Jones Property have, like Gold Kist, downplayed their respective contributions to Site contamination. In addition, the de minimis authority seems to apply to small generators and innocent landowners, not owner/operators. The de minimis statute language, however, does not preclude consideration of owner/operators under the de minimis generator alternative. The relevant requirements for de minimis generator treatment are as follows:

> Both of the following are minimal in comparison to other hazardous substances at the facility:
>
> > (i) The amount of the hazardous substances contributed by that party to the facility.
> >
> > (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

CERCLA §122(g)(1)(A).

The farm supply store was closed by Gold Kist in 1981, and Gold Kist tried without success to sell the property for two years. In 1983 Gold Kist opened a garden supply store on the property ("Golden Bell"), which served residential customers. In 1985, Gold Kist sold the property to Larry Jones.

3. CanadianOXY Offshore Production Company ("CanadianOXY")

CanadianOXY is potentially liable in connection with its former ownership (under the name Cities Service Co.) of Custom Farm Services, Inc. Custom Farm Services, Inc., owned the Jones Property from December 1969 until April 1973, and, according to former employees of Custom Farm Services interviewed by THAN, pesticide formulation operations were active during this period, but discontinued sometime before the property was sold to Gold Kist in 1973. These employees have indicated specifically what pesticides were formulated during Custom Farm Service's ownership of the Jones Property. The employees have indicated that washout from formulation equipment was released into a "wash ditch" on the property, and that spills occurred from time time.

Custom Farm Services, Inc. dissolved in 1977. CanadianOXY, which did not own the Jones Property directly, is potentially liable only under a parent corporation liability theory. Parent liability attaches under CERCLA only if the parent is so involved in the activities of the subsidiary as to qualify as an "owner/operator", or if a "piercing the corporate veil" case can be made. At present, EPA does not have information to support a parent liability case. Information provided by CanadianOXY in response to an Information Request generally negates a parent liability case, but is sketchy due to the lack of records and/or

lack of recollection. However, interviews with former employees might lead to information that would support a parent liability case, if such employees can be located. Notwithstanding the limited information presently available, EPA recommends that CanadianOXY be included among special notice recipients. One of the other PRPs, Boise Cascade Corporation, has expressed interest in helping to develop a parent liability case against CanadianOXY, and the Region has indicated its willingness to work cooperatively with the PRP in that effort (e.g. by issuing additional Information Requests).

4. Air Products and Chemicals, Inc. ("Air Products")

Air Products is potentially liable in connection with its former ownership of Eschemco Corporation/Escambia Chemical Co. ("Escambia 2"). Escambia 2 acquired the Jones Property from Escambia Chemical Co. ("Escambia 1") in April of 1969 and immediately changed its name to Escambia Chemical Corporation. Escambia 2 operated the facility until December 1969 when it sold the property to Custom Farm Services, Inc. According to former employees of Escambia 2 who were interviewed by THAN, pesticide formulation operations were active during this period (April to December of 1969). These employees have not specifically identified which pesticides were formulated on the Jones Property during the period that Escambia 2 owned the property.

After Escambia 2 sold the property to Custom Farm Services, Inc., Escambia 2 merged into Air Products in June of 1971. Accordingly, Air Products acquired the liabilities of Escambia 2 in the merger, and can be held directly liable as a former owner/operator of the Jones Property. Air Products has stressed the brief ownership period of only eight months as a justification for keeping its participation in a settlement to a small percentage.

There exists some basis for seeking to impose successor liability on Air Products for the liability of Escambia 1, the immediately preceding owner of the Jones Property. When Escambia 2 acquired the property, it kept the same name and the same employees, and continued substantially the same operations as Escambia 1. Successor liability can sometimes be imposed when a company holds itself out as merely continuing the preexisting operations under the "mere continuation" or "continuing business enterprise" theory that has been applied by some courts. See United States v. Distler, 31 E.R.C. 1092 (BNA) (W.D.Ky. 1990). Air Products has voiced strong objections to this approach, arguing that it should not apply because Air Products intended to sell this business even before it was purchased and because of the brief ownership period involved.

5. Boise Cascade Corporation ("Boise Cascade")

Boise Cascade is potentially liable in connection with its former ownership (through its predecessor by merger, Electric Bond and Share Company ("Ebasco")) of Escambia Chemical Corporation ("Escambia 1"), which owned the Jones Property from May 18, 1964, when the property was acquired by Escambia 1's predecessor by merger, Southeastern Liquid Fertilizer Company, Inc. ("SELFCO"), until April 11, 1969, when the property was sold by Escambia 1 to Escambia 2. According to former employees of Escambia 1 who were interviewed by THAN, pesticide formulation operations were active during this period (1964-69). These employees have identified ethylene dibromide ("EDB"), endrin, toxaphene and DDT as pesticides formulated, and xylene as a "carrier" for the pesticide formulations. All of these are CERCLA hazardous substances that have been found in soil and groundwater at the Site.

As explained below, Escambia 1 eventually dissolved. Boise Cascade, which did not own the Jones Property directly, is potentially liable only under a parent corporation liability theory. Parent liability attaches under CERCLA only if the parent is so involved in the activities of the subsidiary as to qualify as an "owner/operator", or if a "piercing the corporate veil" case can be made. EPA does not have any information indicating that Boise Cascade or its predecessor by merger, Ebasco, were involved in the operations of Escambia 2. Ebasco functioned as a holding company, so it is unlikely that it was involved in Escambia's operations to an extent that owner/operator liability could be imposed. However, the corporate history of Escambia 1 after the sale of assets to Escambia 2 may provide a basis for "piercing the corporate veil" and imposing liability on Boise Cascade.

In response to an informal inquiry from EPA, Boise Cascade has indicated that Escambia 1 changed its name to Esca Rosa Development Corporation ("Esca Rosa") immediately following the sale of its assets to Escambia 2 in April of 1969. As Esca Rosa, Escambia 1 changed its business to that of a real estate holding and development company. After Ebasco, the direct parent of Escambia 1, merged into Boise Cascade on August 31, 1969, Esca Rosa continued to exist as a direct subsidiary of Boise Cascade, operating as a real estate development company. Esca Rosa then liquidated its assets on December 31, 1972, but did not dissolve until December 26, 1973. Accordingly, there was a one year period from December 31, 1972 to December 26, 1973 when Esca Rosa was a shell corporation, having a corporate existence but no assets or business. This one-year shell period arguably justifies the imposition of parent liability against Boise Cascade under a "piercing the corporate veil" theory. Under corporate law, factors which support piercing the corporate veil include (1) when the parent completely dominates the subsidiary's

activities, (2) when the subsidiary is inadequately capitalized, e.g., when liabilities grossly exceed assets, (3) when the parent disregards the corporate separateness of the subsidiary, e.g., by failing to follow corporate formalities, etc. These factors apparently were present during the year when Esca Rosa existed as a shell corporation. A chart reflecting the corporate history of Escambia 1 is attached as Exhibit K.

Boise Cascade has been the most cooperative PRP connected with the Jones Property and has demonstrated a desire to contribute substantially to a PRP-led RI/FS and clean-up. It appears, therefore, that Boise Cascade has recognized the viable "veil piercing" case that could be made with respect to its ownership of Escambia 1.

6. Hercules Incorporated

As noted above, Herucules owned toxaphene tanks on both the THAN and Jones Properties. In response to a CERCLA Section 104(e) Information Request, Hercules has confirmed that it sold Toxaphene and various herbicides to Escambia Chemical Corporation from 1964 to 1968. Under Hercules' standard consignment agreement, which was entered into with respect to the tanks on the Jones and THAN Properties, Hercules maintained ownership of tanks on both properties, and maintained ownership of toxaphene in the tanks until the customers withdrew the toxaphene from the tanks. Accordingly, Hercules was the owner/operator of a "facility" (the tanks) from which releases occurred at the Site. Significant toxaphene contamination is present in the soils on both properties in the areas where the toxaphene tanks were located. Toxaphene has also been found at low levels in the groundwater under the Site. Attorneys for Hercules have represented the former employees at the Site have stated that Hercules toxaphene to these tanks in bulk tank trucks, transferring the toxaphene to the tanks through a hose. When the hose was disconnected, the truck operator reportedly drained the slough onto the ground. This arguably constitutes arranging for disposal so as to make Hercules liable under a generator theory as well as an owner/operator theory. Copies of Hercules' consignment agreements relating to the THAN and Jones properties are attached as Exhibit I.

The Hercules standard consignment agreement also contains indemnification provisions making the consignee/purchaser liable for damages resulting from loading or unloading of toxaphene. This provision would be effective against customers of Hercules but would not effect EPA's ability to treat Hercules as a PRP.

III. Statute of Limitations/Bankruptcy Proceedings

There is no statute of limitations problem in this case. EPA has

not received notice that any of the identified PRPs have filed for bankruptcy.

IV. Response Costs

The Region has estimated that total past costs (contracts, payroll, travel and indirects) incurred by the government in connection with Operable Unit 1 at the Site as of June 30, 1992, were $202,846.82. Attached hereto as Exhibit D is the most recent cost summary for Operable Unit 1 at the Site. This amount includes RI/FS oversight costs that THAN has already agreed to pay pursuant to the Administrative Order By Consent for RI/FS entered into by and EPA. THAN has not yet been billed for RI/FS oversight costs.

V. Administrative Record

EPA has compiled the Administrative Record for this Site. The record is located in EPA-Region IV's library in Atlanta, Georgia and in the Dougherty Public Library at 300 Pine Avenue, in Albany, Georgia 31701-2533. A copy of the Administrative Record Index is attached as Exhibit E.

VI. The Remedial Action

The major components of the remedy identified as the preferred alternative in the Proposed Plan are:

(1) Fencing of the Site and treatment facility;

(2) Extraction and on-site treatment of groundwater. If proven effective during treatability studies, treatment of contaminated groundwater will be by ultraviolet/oxidation treatment with granulated carbon adsorption as a polishing step if needed;

(3) Extraction and off-site incineration of NAPL;

(4) Vegetative cover over contaminated area and drainage contraols to devert runoff from site; and

(5) Institutional controls, such as deed and land-use restrictions.

The present worth cost of this alternative is estimated at $4,100,000. No action is proposed with respect to soils present on the THAN Property because the removal has reduced contamination in the soil to acceptable levels. A copy of the Proposed Plan for Operable Unit 1 at the Site is attached as Exhibit A.

VII. Natural Resource Damage Trustees

The Region will notify the Department of Interior, National Oceanic and Atmospheric Administration, and the Georgia Department of Natural Resources of the anticipated RD/RA negotiations and activities. The Region will invite the trustees to participate in negotiations pursuant to §122(j) at the time notice letters are issued.

VIII. Related Criminal Investigations or Civil Actions

EPA is not aware of any criminal investigations or criminal or civil actions relating to the Site.

IX. Proposed Pre-Referral Strategy

The following schedule details the proposed milestones for the negotiation of a Consent Decree for Operable Unit 1 at the Site.

Pre-Referral Litigation Report to HQ and DOJ: 9-25-92

§122(e) Special Notice Letter to PRPs 11-25-92

Good Faith Offer Due 1-25-92

RD/RA Negotiation Period Concludes 3-25-93

The Region anticipates following the standard Special Notice procedures established in §122(e), providing for a 120-day moratorium period for negotiations.

The goal of negotiations will be for EPA to obtain 100% reimbursement of past costs and an agreement to perform or finance the RD/RA. A copy of the draft Consent Decree to be mailed with special notice letters is attached as Exhibit F. The Consent Decree is based on the National Model. A draft Statement of Work, based on a Regional Model, will be forwarded when completed by the Remedial Project Manager for the Site. The PRPs will be expected to engage in negotiations to reach an acceptable allocation. However, there is a significant possibility that the PRPs will request that EPA assume a role in allocating responsibility, both within the Jones Group PRPs and between the Jones Group and THAN.

A de minimis landowner settlement may be justified with respect to Larry Jones, the current owner of the Jones Property, who claims he is entitled to an innocent landowner defense. Larry Jones is currently unrepresented by counsel. He was represented by Arnall, Golden and Gregory, but was unable to afford continued representation.

X. Legal, Policy and Strategic Considerations

In addition to the liability issues noted in Section II above, a number of allocation issues are anticipated by EPA. THAN is likely to seek a significant contribution toward the groundwater clean-up from the PRPs connected with the Jones Property because the Jones Property is a significant source to groundwater contamination. The PRPs connected to the Jones Property (the "Jones Group"), however, argue that the groundwater contamination is almost completely due to source contamination on the THAN Property, and has been migrating towards the Jones Property. It is true that the groundwater flow is from the THAN to the Jones Property, but the plume for certain contaminants appears to be centered under, and attributable to source areas on, the Jones Property. In particular, the DDT plume is centered underneath the Jones Property, where high concentrations of DDT are present in the subsurface soil at deep levels.[1] The NAPL, however, which is located almost entirely on the THAN Property, appears to be solely attributable to THAN Property sources, and is the most serious environmental problem at the Site. The NAPL will be the most costly aspect of the groundwater pump and treat program called for in the Proposed Plan and draft ROD, because treatability studies have indicated that only a very slow recovery of the NAPL is possible. The Region estimates that 90% of the groundwater remediation costs could fairly be allocated to THAN.

If may be difficult to obtain a fair Jones Group contribution to the costs of the groundwater remedy, not only because the Jones Group has downplayed the Jones Property as a source to groundwater, but also because the Jones Group has had difficulty in coming up with an allocation internally among the Jones Group PRPs for costs borne by the Jones Group alone (e.g. Jones Property RI/FS costs). The issues outlined in §II(B) above (difficulty of establishing parent liability cases, brief ownership periods of certain PRPs, differences in uses of the property among PRPs, etc.) have complicated Jones Group negotiations. Without equitable participation by the Jones Group in the groundwater remedy, THAN may be reluctant to settle.

Another legal issue which may arise during RD/RA negotiations is the objection of some of the Jones Group PRPs to EPA's decision to address the Jones Property as part of the T H Agriculture and Nutrition Co. NPL Site. The Jones Property was in the Pre-remedial site assessment stage before the Jones Group was noticed

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[1]The Jones Group has also argued that the subsurface soil contamination on the Jones Property resulted when contaminated groundwater migrated to the Jones Property and deposited contamination in soil when the groundwater table rose and fell. EPA does not agree.

as PRPs for the THAN Site, but no HRS score had been developed. The Jones Group PRPs have contended that aggregation of the sites is inappropriate because they are in different stages of investigation and remediation, and combining them will make remediation less efficient (the opposite is probably true). These PRPs claim that the different operations and histories on the two properties justifies keeping them separate for investigation and remediation purposes. The PRPs also argued that there is no evidence that the Jones Property soil contamination has contributed to the groundwater contamination.

EPA disagrees with these comments. It is EPA's position that no "aggregation" of sites has occured. EPA has simply identified the areal extent of contamination from the THAN Site during the RI/FS. When an NPL site is listed, the listing does not establish geographical boundaries. Geographical boundaries are developed during the investigation of the Site. The CERCLA definition of a "facility" includes any area where a hazardous substance release "has come to be located." Here, the RI/FS revealed that the groundwater plume extends from the THAN Property under the Jones Property. In addition, the soil contamination on the Jones Property is a source to this groundwater plume. Therefore the Jones Property is part of the Site. No "aggregation" has occured; the Site boundaries have simply been developed through investigation.

An additional legal issue that will arise during negotiations is the scope of the covenant not to sue to be provided to THAN, on one hand, and those PRPs connected with the Jones Property, on the other. Paragraph 79 of the draft Consent Decree attached as Exhibit F grants to THAN the full Covenant Not to Sue that is applicable to final remedial actions at sites; the PRPs who have liability in connection with contamination on the Jones Property, however, are granted only the Operable Unit Covenant Not to Sue. This is appropriate because Operable Unit 2, which will be addressed in a later consent decree, addresses contamination for which the Jones Property PRPs bear full responsibility, and THAN has no responsibility. Accordingly, a full Covenant Not to Sue is appropriate for THAN but not for the Jones Property PRPs.

XI. HQ and DOJ Support

The Region does not anticipate any extraordinary needs for HQ or DOJ support beyond those normally provided pursuant to Pre-referral negotiation procedures.

XII. Regional Contacts

The Regional staff attorney assigned to the Site is Paul Schwartz, (404) 347-2641, ext. 2282. The Remedial Project Manager for the Site is Alan Yarbrough, (404) 347-2643.

LIST OF EXHIBITS

Exhibit A	Proposed Plan
Exhibit B	Executive Summary for the Final Remedial Investigation Report
Exhibit C	Executive Summary for the Final Feasibility Study
Exhibit D	Cost Summary
Exhibit E	Adminstrative Record Index
Exhibit F	Proposed Consent Decree
Exhibit G	Map of Site and Site Area
Exhibit H	RI/FS Administrative Order By Consent
Exhibit I	Hercules' Consignment Agreements for Toxaphene
Exhibit J	Removal UAO
Exhibit K	Corporate History of Escambia 1
Exhibit L	Draft Record of Decision

REFERRALS

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YELLOW FILE COPY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET N.E.
ATLANTA, GEORGIA 30365

MAR 3 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Douglas E. Martin
Legal Department
BASF Corporation
100 Cherry Hill Road
Parsippany, New Jersey 07054

Re: Golden Strip Septic Tank Superfund Site,
Simpsonville, South Carolina

Dear Mr. Martin:

The purpose of this letter is to inform you, as the Chairman of the Golden Strip Septic Tank Steering Committee, (the "Committee") that BASF Corporation, Carolina Plating and Stamping Corporation, Colonial Heights Packaging Inc., E-Systems, Inc., Metal Products Corp., and Sterling Winthrop Inc., (the "Settling Defendants") are in violation of the terms of the Remedial Design and Remedial Action Consent Decree for the Golden Strip Septic Tank Superfund Site, C.A. No. 6:92-3056-20 ("Consent Decree"). Accordingly, stipulated and statutory penalties are accruing against the Settling Defendants.

Pursuant to Section XVII (Reimbursement of Response Costs), the Settling Defendants are required to remit payment to the United States for Past Response Costs in the sum of $71,569.41, within thirty (30) days of the effective date of the Consent Decree. Pursuant to Section XXVIII (Effective Date), the effective date of the Consent Decree is the date upon which the Consent Decree is entered by the Court. The Consent Decree was entered on January 5, 1993. Thus, the Settling Defendants payment of the Past Response Costs was due to the United States on or before February 4, 1993. Pursuant to Section XXI, stipulated penalties began to accrue on February 5, 1993. As of March 1, 1993, the stipulated penalties total $53,000.

Pursuant to Section XXI, the United States may also seek statutory penalties under Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9609. Pursuant to Section 109(a)(1)(E) of CERCLA, a civil penalty of not more than $25,000 per violation may be assessed for the failure of the Settling Defendants to comply with the terms of the Consent Decree. In addition, the

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United States may seek any other remedies or sanctions available by virtue of the Settling Defendants' violation of the Consent Decree.

Penalties will continue to accrue as set forth in Section XXI of the Consent Decree until the Settling Defendants remit payment for the Past Response Costs in full compliance with Section XVII and all other terms of the Consent Decree.

The United States considers the Settling Defendants' failure to remit payment for the Past Response Costs as a flagrant disregard of the terms of the Consent Decree. If the United States does not receive payment from the Settling Defendants for the Past Response Costs within ten days of your receipt of this letter, EPA will consider initiating an enforcement action against the Settling Defendants to recover the Past Response Costs and seek the maximum penalties and sanctions allowed by law.

If you should have any questions, please contact Teresa Harris Atkins in the Office of Regional Counsel at (404) 347-2641, extension 2281. Your prompt attention to this matter is appreciated.

Sincerely yours,

James D. Kutzman for

Joseph S. Franzmathes
Director
Waste Management Division

cc: Craig Zeller, EPA

Teresa Harris Atkins, EPA

Robert A. DeHoll
Leatherwood, Walker, Todd & Mann
100 East Coffee Street
P.O. Box 87
Greenville, South Carolina 29602

Arthur A. Vogel Jr.
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, Wisconsin 5302-4497

James W. Crowley
Vice President, Secretary and General Counsel
P.O. Box 660248
Dallas, Texas 75266-0248

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CONSENT DECREE TRANSMITTAL LETTERS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

MAR 31 1993

Memo referring CD & complaint (indirect referral seeking HQ's conc.)

4RC

MEMORANDUM

SUBJECT: Ciba-Geigy Corporation Superfund Site;
McIntosh, Washington County, Alabama;

Consent Decree For Remedial Design/Remedial Action (RD/RA)-Operable Unit 4;

Amendment to Consent Decree for Remedial Design/Remedial Action-Operable Unit 2;

FROM: Patrick M. Tobin Patrick M Tobin
Acting Regional Administrator

TO: C. Scott Fulton
Acting Assistant Administrator for Enforcement

The purpose of this memorandum is to formally request Headquarters' concurrence on the above-referenced matter. The Record of Decision issued by Region IV on July 14, 1992, selected a remedy for Operable Unit 4 at the Site that is expected to cost $25 million. In combination with the cost of other Operable Units at the Site, the cost of remedial work at the Site will exceed the amount of $60 million in response costs. Pursuant to the June 17, 1988, memorandum entitled "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegation 14-13-B and 14-14-E", OSWER Directive 9012.10-A, Headquarters' concurrence is required for all RD/RA Consent Decrees at Sites that require response activities exceeding $60 million.

Attached you will find a copy of the Consent Decree, the "Ten Point Settlement Analysis" required by the Agency's procedures and a copy of the draft Complaint that will be used to file the civil action required to lodge the Consent Decree in Court. The original of the Consent Decree, including the signature pages, has been sent to Ms. Karen Harrison, the Office of Enforcement's staff attorney that participated in the RD/RA negotiations related to this case.

Also enclosed is an Amendment to the Consent Decree for Operable Unit 2. The Operable Unit 2 Consent Decree was entered on November 18, 1992. The Amendment allows Ciba-Geigy to reduce the amount of their financial assurance to reflect recent revised cost estimates that have been approved by Region IV.

For the reasons provided in the "Ten Point Settlement Analysis", the Region requests Headquarters' concurrence and approval of the

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attached Consent Decree and Amendment. Once the concurrence has been granted, please refer the Consent Decree and Amendment to the Department of Justice for the filing of a civil action, the lodging of the Consent Decree and the filing of the Amendment in the U.S. District Court for the Southern District of Alabama, Southern Division. Any inquiry related to this case may be addressed to Mr. Paul Schwartz, staff attorney in the Office of the Regional Counsel, FTS 347-2641, extension 2282.

Your prompt consideration of this matter is appreciated.

Attachments

cc: Myles E. Flint, Acting Assistant
Attorney General (w/o enclosures)
Karen Dworkin, Senior Attorney, DOJ (w/o enclosures)
Lawrence Puckett, Staff Attorney, DOJ
Bruce Diamond, OWPE (w/o enclosures)
William White, OE (w/o enclosures)
Karen Harrison, OE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

AUG 26 1994.

MEMORANDUM

SUBJECT: Revised CERCLA Referral Document Distribution

FROM: Phyllis P. Harris, Chief
CERCLA Branch

TO: All ORC Employees

The purpose of this memorandum is to provide a reference for ORC attorneys who have CERCLA cases that require direct or indirect referrals to the U.S. Department of Justice and the Office of Enforcement and Compliance Assurance (OECA). It has been revised to reflect OECA reorganization, and supersedes the original memorandum on this subject dated May 5, 1994. Included are instructions on which document to copy to whom, along with necessary titles and addresses. Additionally, model letters are provided for each of the four principal categories of referrals.

A reference copy of this listing has been placed in the library. Please see Tom Hernandez regarding any changes that may occur in the future.

Attachment

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I. Direct Civil Referrals for Cost Recovery

A. BY REGULAR MAIL TO DOJ (We get credit when this leaves Region IV)

Original Letter from Regional Administrator to:

Lois Schiffer
Acting Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
10th & Pennsylvania Ave., NW
Room 2143
Washington, DC 20530

cc(w/enclosures): DOJ Senior Attorney
[Robert Homiak for MS, NC, SC, FL; Karen Dworkin for TN, KY, AL, GA]
U.S. Department of Justice
Environmental Enforcement Section
Environment and Natural Resources Division
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044

B. BY PRIORITY POUCH MAIL TO HQ

cc(w/o enclosures):
Bruce M. Diamond, Director (5501)
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

cc(w/enclosures):
Bruce R. Kulpan, Chief (2244)
Regions 3, 4 & 8 Branch, Regional Support Division
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

II. Pre-Referrals (PRN's or "Mini-Lits") for RD/RA

A. BY REGULAR MAIL TO DOJ (We get credit when this leaves Region IV)

Original Letter and Original PRN from **Regional Counsel** and **Director, Waste Mgt. Division** to:

Joel M. Gross, **Chief**
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044-7611

cc(w/enclosures): **DOJ Senior Attorney** (See Section I(A))

B. BY PRIORITY POUCH MAIL TO HQ

Same instructions as in Section I(B)

III. Transmittal of Signed CD's with "Ten-Points" (RD/RA or Cost Recovery) for Cases Directly Referred to DOJ

A. BY REGULAR MAIL TO DOJ (We get credit when this leaves Region IV)

Original Letter from **Regional Administrator** with copies of (1) "Ten-Point"; (2) Draft Complaint; and (3) CD to:

Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
10th & Pennsylvania Ave., NW
Room 2143
Washington, DC 20530

cc: letter & original of all documents to:
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044
Attention: George J. Schubert
Case Management Unit
Room 13077

cc(w/o enclosures): **DOJ Senior Attorney** (See Section I(A))

cc(w/o enclosures): DOJ Staff Attorney

B. BY PRIORITY POUCH MAIL TO HQ

Same instructions as in Section I(B), with one addition:

cc(w/o enclosures): OSRE Staff Attorney

IV. Indirect Referrals of Cost Recovery Actions and Transmittal of CD's with "Ten-Points" (RD/RA or Cost Recovery) Where Concurrence Authority Is Retained by HQ Pursuant to Delegation

A. BY PRIORITY POUCH MAIL TO HQ

Original Memorandum from Regional Administrator, with original of "Ten-Point", plus copies of CD and draft Complaint to:

Steven A. Herman (2211)
Assistant Administrator for Enforcement
and Compliance Assurance
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

cc(w/attachments; receives original of CD): OSRE Staff Attorney

cc(w/o attachments):
Bruce M. Diamond, Director (5501)
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

cc(w/o attachments):
Bruce R. Kulpan, Chief (2244)
Regions 3, 4 & 8 Branch, Regional Support Division
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

B. COURTESY COPIES BY REGULAR MAIL TO DOJ (We get credit when this leaves HQ)

cc(w/o attachments): DOJ Staff Attorney

cc(w/o attachments): DOJ Senior Attorney (see Section I(A))

cc(w/o attachments):
Lois Schiffer
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
10th & Pennsylvania Ave., NW
Room 2143
Washington, DC 20530

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

SEP 01 1994

4RC

Lois Schiffer
Acting Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
10th & Pennsylvania Ave., NW
Room 2143
Washington, DC 20530

SUBJ: Civil Referral - Cost Recovery
XYZ Superfund Site
XYZ, XYZ County, Georgia

Dear Ms. Schiffer:

The purpose of the enclosed referral is to request that the Department of Justice file a civil action pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. § 9601 et seq., to obtain reimbursement for removal expenditures incurred by the Environmental Protection Agency at the XYZ Site near XYZ, Georgia. [This referral also requests that the Department of Justice seek punitive damages under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3).]

The Region IV attorney assigned to this case is ----------, (404) 347-2641, ext. ----, and the Region IV enforcement officer assigned to this case is ----------, (404) 347-5059.

Sincerely,

John H. Hankinson, Jr.
Regional Administrator

Enclosures (Need to List)

cc: Bruce R. Kulpan, EPA/OSRE (w/enclosures)
Bruce M. Diamond, EPA/OSRE (w/o enclosures)
[DOJ Senior Attorney], DOJ/EES (w/enclosures)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

4RC

Joel M. Gross, Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044-7611

SUBJ: Pre-Referral Litigation Report
[XYZ] Superfund Site
[City], **[----]** County, **[State]**

Dear Mr. Gross:

The purpose of this letter is to transmit to you the RD/RA Pre-Referral Litigation Report for the above-referenced Site, in accordance with the "Pre-Referral Negotiation Procedures for Superfund Cases" memorandum, dated October 12, 1990. EPA-Region 4 expects to sign a Record of Decision for this Site by -------- --, 1996.

If there is any additional information you need at this time, please contact ----------, Assistant Regional Counsel, at (404) 347-**[xxxx]**, ext. ----, or the Remedial Project Manager, ----------, at (404) 347-**[xxxx]**.

Sincerely,

William D. Anderson
Acting Regional Counsel

Richard D. Green
Acting Director
Waste Management Division

Enclosure

cc: Gerald M. Clifford, EPA/OSRE (w/o enclosure)
Bruce R. Kulpan, EPA/OSRE (w/enclosure)
[DOJ Senior Attorney], DOJ/EES (w/enclosure)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

AUG 26 1994

4RC

Lois Schiffer
Acting Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
10th & Pennsylvania Ave., NW
Room 2143
Washington, DC 20530

SUBJ: CERCLA §§ 106 and 107 Consent Decree for RD/RA
XYZ Superfund Site
XYZ, XYZ County, Georgia

Dear Ms. Schiffer:

The purpose of this letter is to refer the above-referenced matter for the filing of a Complaint and the lodging of the Consent Decree for entry in the -------- District of the State of -------. The Decree has been executed by the Defendants and by Region IV.

Enclosed for your review are copies of: (1) the Consent Decree; (2) the "Ten-Point" Settlement Analysis assessing the proposed settlement; and (3) the draft Complaint. The originals of these documents have been sent to Mr. George Schubert of your staff to be logged into the EES Tracking System and delivered to the DOJ Trial Attorney.

----------, of the Environmental Enforcement Section, is the DOJ Trial Attorney assigned to this case. The Region IV attorney assigned to this case is ----------. He/she can be contacted at (404) 347-2641, ext.----.

Sincerely,

John H. Hankinson, Jr.
Regional Administrator

Enclosures

cc: Bruce R. Kulpan, EPA/OSRE (w/enclosures)
Bruce M. Diamond, EPA/OSRE (w/o enclosures)
[OSRE Staff Attorney], EPA/OSRE (w/o enclosures)
[DOJ Senior Attorney], DOJ/EES (w/o enclosures)
[DOJ Staff Attorney], DOJ/EES (w/o enclosures)
George J. Schubert, DOJ/CMU (w/original CD)

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

AUG 26 1994

4RC

MEMORANDUM

SUBJECT: Consent Decree for Remedial Design/Remedial Action (RD/RA) - Operable Unit --

XYZ Superfund Site
XYZ, XYZ County, Georgia

FROM: John H. Hankinson, Jr.
Regional Administrator

TO: Steven A. Herman
Assistant Administrator for Enforcement
and Compliance Assurance

The purpose of this memorandum is to formally request Headquarter's concurrence on the above-referenced matter. The Record of Decision issued by Region IV on ----, --, 1994, selected a remedy for Operable Unit -- at the Site that is expected to cost $-- million. In combination with the cost of other Operable Units at the Site, the cost of remedial work at the Site will exceed the amount of $60 million in response costs. Pursuant to the June 17, 1988, memorandum entitled "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegation 14-13-B and 14-14-E", OSWER Directive 9012.10-A, Headquarters' concurrence is required for all RD/RA Consent Decrees at Sites that require response activities exceeding $60 million.

Attached you will find the original of the "Ten-Point" Settlement Analysis required by the Agency's procedures, and copies of the Consent Decree and the draft Complaint that will be used to file the civil action required to lodge the Consent Decree in Court. The original of the Consent Decree, including the signature pages, has been sent to ----------, the Office of Enforcement's staff attorney that participated in the RD/RA negotiations related to this case.

For the reasons provided in the "Ten-Point" Settlement Analysis, the Region requests Headquarters' concurrence and approval of the attached Consent Decree. Once the concurrence has been granted, please refer the Consent Decree to the Department of Justice for the filing of a civil action, and the lodging of the Consent Decree in the U.S. District Court for the ------- District of the State of --------, ------ Division.

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Any inquiry related to this case may be addressed to --------, staff attorney in the Office of the Regional Counsel. He/she can be contacted at (404) 347-2641, ext. ----.

Your prompt consideration of this matter is appreciated.

Attachments

cc: Lois Schiffer, DOJ/ENR (w/o attachments)
[DOJ Senior Attorney], DOJ/EES (w/o attachments)
[DOJ Staff Attorney], DOJ/EES (w/o attachments)
Bruce M. Diamond, EPA/OSRE (w/o attachments)
Bruce R. Kulpan, EPA/OSRE (w/o attachments)
[OSRE Staff Attorney], EPA/OSRE (w/attachments)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

SEP 19 1991

4RC

Honorable Barry M. Hartman
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
10th and Constitution, N.W.
Room 2603
Washington, D.C. 20530

Re: Civil Referral
Basket Creek Drum Disposal Site
Douglas County, Georgia

Dear Mr. Hartman:

The purpose of this letter is to request that the Department of Justice file a civil action pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §9601, et seq., to obtain reimbursement for removal expenditures incurred by EPA at the Basket Creek Drum Disposal Site in Douglas County, Georgia, and to recover penalties and punitive damages for refusal to comply with an Order issued pursuant to Section 106 of CERCLA. This case is referred pursuant to EPA's Non-Complier/Non-Settlor Initiative.

The Regional Attorney assigned to this case is Paul Schwartz, (FTS) 257-2641 and the Regional technical person assigned to this case is Tex Ann Reid, (FTS) 257-5059.

Sincerely,

Patrick M. Tobin, Deputy for

Greer C. Tidwell
Regional Administrator

Enclosures

cc: William White
Bruce M. Diamond
Robert Homiak

Direct referral
Cover ltr &
Litigation report

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CIVIL LITIGATION REPORT
Region IV

Basket Creek Drum Disposal Site
Douglas County, Georgia
EPA ID Number GAD-980843833

Action: CERCLA Sections 106 and 107
42 U.S.C. Sections 9606 and 9607

Jurisdiction: Northern District of Georgia
Atlanta Division

Defendant:

1. Young Refining Corporation
   7982 Huey Road
   Douglasville, Georgia 30134

Regional Contacts:

Paul Schwartz
Office of Regional Counsel
Hazardous Waste Law Branch
EPA, Region IV
FTS 257-2641, ext. 2269

Tex Ann Reid
Waste Programs Branch
South Cost Recovery Unit
EPA, Region IV
FTS 257-5059

DATA SHEET

I. Statutory Basis

Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, CERCLA, 42 U.S.C. §9607, as amended, is the statutory authority upon which the recovery of costs and punitive damages in this matter is based. Section 106(b) of CERCLA, 42 U.S.C. § 9606(b) is the statutory authority upon which the recovery of penalties in this matter is based.

II. Defendants

The Region issued a Section 106 removal order to four (4) potentially responsible parties (PRPs), of which one is proposed as a defendant in this action. The proposed defendant is Young Refining Corporation (a generator), which arranged for the disposal of hazardous substances that were disposed at the Site. Two of the PRPs named in the Order, Chem-Nuclear Services, Inc., and Continental Trading Company (both generators) indicated that they would comply with the Order. Chem-Nuclear Services, Inc. is conducting the removal as ordered, without contribution from any other PRPs. Continental Trading Company is apparently willing to contribute a small portion of clean-up costs, but has not reached an agreement with Chem-Nuclear. Two PRPs refused to comply with the Order: Young Refining Corporation (the proposed defendant) and Bartlett B. Hulsey (a transporter). Hulsey does not appear to have significant assets. The Site owner, Mrs. Harriet Foster, is a residential landowner who did not contribute to the release or threat of release at the Site. Therefore, the Region has not taken enforcement action against her pursuant to EPA's "Policy Towards Owners of Residential Property at Superfund Sites."

III. Basis of Action

The proposed defendant, Young Refining Corporation ("Young Refining"), refused without sufficient cause to comply with a Unilateral Administrative Order which directed it to conduct a removal action at the Site. The Defendant is therefore subject to penalties of up to $25,000 for each day of noncompliance, pursuant to CERCLA Section 106(b). The Defendant may also be subject to punitive damages in an amount at least equal to, and not more than

three times, the amount of any costs incurred by the Fund as a result of such refusal to comply with the Order, pursuant to CERCLA Section 107(c)(3). This may apply to EPA's enforcement costs, which arguably resulted from the Defendant's refusal to comply. In addition, the United States has incurred oversight and other response costs as a result of the release or threatened release of hazardous substances at the Site. The Defendant is liable for these costs under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

IV. Relief Sought

This referral requests that a civil action be initiated to recover penalties under CERCLA Section 106(b) against Young Refining for its failure to comply with the CERCLA Section 106 Administrative Order issued by EPA on April 11, 1991. This referral also requests that the civil action seek treble damages under CERCLA Section 107(c)(3) for the failure to comply with the Section 106 Order. In addition, this referral requests that the civil action seek to recover oversight and other response costs incurred by EPA in response to the release of hazardous substances at the Site. As of September 11, 1991, such costs plus interest totalled $47,357.98, and such costs are increasing as EPA continues to oversee removal work at the Site (removal work commenced on September 9, 1991) and as the enforcement costs of this referral accrue.

V. Contacts with Proposed Defendant

In early 1991, EPA identified Young Refining as a PRP and began informal discussions with Young Refining. In a meeting at EPA on February 1, 1991, and in a written response to an informal information request, representatives of Young Refining acknowledged that it arranged for the disposal of hazardous substances which were dumped at the Site.

On April 11, 1991, EPA Region IV issued a Unilateral Administrative Order under Section 106 of CERCLA to Young Refining and three other PRP's for the removal of hazardous substances located at the Site. Young Refining submitted a written response to the Order, raising various objections to the Order and indicating that it did not intend to comply. One of the PRP's, Chem-Nuclear Systems, Inc. (a subsidiary of Chemical Waste Management, Inc), agreed to conduct the removal in compliance with the Order, under the direction of EPA. Removal work commenced on September 9, 1991.

On May 15, 1991, EPA issued an Information Request to the Young Refining pursuant to Section 104(e) of CERCLA. On June 22, 1991, EPA received Young Refining's response to EPA's May 15 Information Request. In its response, the Defendant stated, inter alia, that its "previous alleged admissions of responsiblity, if any, regarding the alleged incident of disposal were made in error." A follow-up Information Request was mailed by EPA in August 1991 seeking supplemental financial information.

On May 29, 1991, EPA sent a letter to the Defendant addressing the various objections raised by the Defendant in its response to the Unilateral Administrative Order. EPA informed Young Refining that it did not find any of its objections to the Order to have merit, or to constitute "sufficient cause" for noncompliance with the Order. EPA further informed Young Refining that its noncompliance could therefore subject the Defendant to penalties and treble damages. On September 13, 1991, EPA received a supplemental response to the Order from Young Refining restating its objections to the Order.

VI. National or Precedential Issues

This case presents the issue whether EPA can jointly order multiple PRPs to perform a response action under CERCLA without specifying the acts to be performed individually by each PRP. In its response to the Unilateral Administrative Order, Young Refining raised, as one of the grounds for noncompliance, the ground that the Order was invalid because PRPs cannot be jointly and severally ordered to perform a response action. Young Refining cited as support for this position United States v. Stringfellow, 20 E.R.C. 1905, 1910 (BNA) (C.D. Cal. 1984), which does support the Defendant's position. Stringfellow held that CERCLA joint and several liability does not apply in Section 106 injunctive actions. Rather, under Stringfellow, when more than one respondent is named in a Section 106 order, the order must specify the individual actions to be taken by each respondent; the respondents cannot be ordered as a group to perform a response action. No other cases directly addressing this issue have been identified, although Section 106 orders are regularly issued to multiple PRPs by EPA and have been enforced in the courts. It would benefit the Agency to have a court opinion directly overruling the Stringfellow holding so that PRP's wishing to avoid compliance cannot assert this ground in the future.

In addition to the correctness of the Stringfellow holding, this case also raises the issue whether Young

Refining's reliance on the Stringfellow decision as a basis for non-compliance with the Order constitutes "sufficient cause" so as to defeat a penalty or treble damage action. Young Refining could argue that, even if Stringfellow is wrong, Young Refining's reliance on what it perceived to be sound authority was a reasonable ground for not complying.

This case also presents the issue whether EPA can recover penalties under Section 106(b) of CERCLA based on non-compliance with a Section 106(a) order when it is not also seeking in the court action to compel compliance with the terms of the order. Section 106(b) authorizes penalties "in an action ... to enforce such order." This language could be read in two ways: (1) that an action "to enforce" the order only includes actions seeking to compel performance, or (2) that an action "to enforce" the order also includes actions seeking solely to penalize a respondent for noncompliance. EPA Draft Enforcement Guidance contemplates "penalties alone" actions under Section 106(b), but there is little precedent on this issue. In a recent case, penalties were awarded to EPA in a "penalties alone" action under Section 106(b) where the work the defendant had been ordered to perform was performed by other, cooperative PRPs which had also been named in the order. See United States v. Lecarreaux, Civ. No. 90-1672 (HLS) (D.N.J. July 30, 1991).

This case also presents the issue of what costs may be trebled in a treble damage claim under Section 107(c)(3) of CERCLA. Section 107(c)(3) provides for punitive damages of up to three times "the amount of any costs incurred by the Fund as a result of such failure to take proper action" when a PRP fails to comply with a Section 106 order. In this case, another PRP carried out the removal in compliance with the Order, and EPA's oversight costs cannot be trebled because they would have been incurred even if Young Refining had complied with the order. EPA can argue, however, that its enforcement costs may be trebled because EPA would not have had to bring the penalty action if Young Refining had complied with the Order.

VII. Date of Receipt of Evidence

On March 18, 1976, Douglas Daniell, a Douglas County Health Department official reported to the Georgia Department of Natural Resources, Environmental Protection Division (EPD) the illegal dumping of 80 drums into a ravine at the Site. Mr. Daniell had discovered the dumping in progress on the night of March 17, 1976. When

Mr. Daniell arrived in response to'a citizen's complaint, there were two tractor-trailers at the Site . One trailer contained 80 drums which persons were preparing to dump into the ravine; Mr. Daniell prevented the dumping of these drums. The other trailer had been emptied of its contents (approximately 80 drums). A bulldozer was covering the dumped drums with dirt. The next day EPD officials sampled two of the drums remaining on the trailer, and one sample contained 50% orthochlorophenol. Acetone, isopropanol, chloroform, tetrachloroethane, phenol and dichlorophenol were also present in these samples. Soupy conditions prevented sampling of the drums in the ravine. The two EPD officials who did the sampling suffered clinical effects from exposure to the liquid wastes in the disposal area. One of the men, Dan Hull, suffered respiratory distress the evening of the sampling, while swimming. Mr. Hull's shoes were saturated with the liquid waste and were still emitting strong vapors one week later, and he was advised to discard the shoes. The other EPD official, James Benson.felt ill for two or three days, and the odor of the vapors was still being emitted from his skin twenty-four hours after the sampling.

State records from the EPD investigation of the dumping, together with records and information provided to EPA in early 1991 by Young Refining and Continental Trading Company, form the basis for EPA's identification of Young Refining as a PRP. In addition, an affadavit obtained from Mr. Daniell identifies Young Refining as a PRP. Based on records identifying substances shipped to Young Refining prior to the illegal dumping, and based on EPD sampling of drums which persons were preparing to dump at the Site when Douglas Daniell interrupted them, there is evidence that the buried drums may contain the following hazardous substances:

2,4-dinitrophenol
sulfuric acid
dodecylbenzenesulfonic acid
1,1,1-trichloroethane
orthochlorophenol
tetrachloroethane

A Sampling Investigation was conducted in March of 1990 for EPA Region IV by Roy F. Weston, Inc., Technical Assistance Team. The consistent presence of drums prevented the taking of subsurface soil samples in the Drum Disposal Area. Trichloroethene was detected in the landowner's well at 5 ug/kg, which is the Maximum Contaminant Level (MCL) under drinking water standards. Additional sampling of the landowner's well in 1991 confirmed the presence of trichloroethene at a level of 5 ug/kg, and also noted the presence of 1,2-dichloroethene at a level of 2 ug/kg.

Additional sampling is being conducted during removal activities by Chemical Waste Management, Inc. Such removal activities commenced on September 9, 1991, and results should be available shortly.

VIII. Date Support Documents Received

Intermediate cost documentation has been ordered for costs incurred through July 31, 1991, and will be forwarded when it is received by the Region. A summary of costs incurred through September 11, 1991, is included as Exhibit 29 to this referral. Cost documentation will be updated and forwarded as costs continue to accrue.

IX. Referral Date

September 19, 1991

X. Other Significant Case Aspects

This case is referred as part of the Agency's Non-complier/Non-settlor Initiative. The proposed defendant admitted facts establishing its liability until, in response to a Unilateral Administrative Order, it denied that it was a PRP and refused to comply with the Order. Another PRP, Chem-Nuclear Services, Inc., has conducted the removal as directed, and is not proposed as a defendant. Accordingly, EPA's costs are relatively low, and the primary monetary recovery sought is in penalties. There has been a lot of media and community attention focused on this case, and it is therefore a good vehicle for EPA to send the message to the general public and PRP community that non-compliers will be aggressively pursued.

XI. Lead Regional Personnel

Paul Schwartz
Office of Regional Counsel
Hazardous Waste Law Branch
FTS/257-2641, ext. 2269

Tex Ann Reid
Waste Management Division
Waste Programs Branch
FTS/257-5059

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I. SYNOPSIS OF THE CASE

This referral requests that a civil action be filed pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9606 and 9607, as amended, in order to recover penalties and trebled damages from the Defendant for failure to comply with a CERCLA Section 106 removal order. This referral also requests that the civil action seek reimbursement of approximately $47,358.88 (subject to increase) in oversight and other costs incurred by the United States Environmental Protection Agency (EPA) in responding to the release and threatened release of hazardous substances at the Basket Creek Drum Disposal Site (hereinafter "the Site") in Douglas County, Georgia.

On March 17, 1976, Douglas Daniell, a Douglas County Health Department official responding to a citizen's complaint, discovered the illegal dumping of approximately eighty (80) drums containing industrial wastes in a ravine along Basket Creek Road, in a rural area of Douglas County, Georgia. When Mr. Daniell arrived at the Site, he observed two tractor trailers; one had been emptied of approximately eighty (80) drums, which a bulldozer was covering with dirt. The other trailer still held approximately eighty (80) drums which persons were preparing to unload. Mr. Daniell prevented the dumping of these additional eighty (80) drums. (Exhibit 23).

Mr. Daniell reported the illegal dumping to the Georgia Environmental Protection Division (EPD). EPD officials inspected the Site and sampled drums remaining on the trailer. One of the samples contained 50% orthochlorophenol, and acetone, isopropanol, chloroform, tetrachloroethane, phenol, and dichlorophenol were also present in these samples. (Exhibit 2, pages 111, 114-23).

Mr. Daniell recorded the tag numbers of the tractor trailers, which he later determined were registered to Bartlet B. Hulsey, a transporter and general contractor. Mr. Daniell had observed Mr. Hulsey at the Site during the dumping (Mr. Hulsey gave Mr. Daniell his business card). The day after the dumping, Dr. C. B. F. Young, President of the proposed defendant, Young Refining Corporation ("Young Refining"), called Mr. Daniell and informed him that the drums dumped at the Site had come from Young Refining. Dr. Young told Mr. Daniell that he had contracted with Bartlett B. Hulsey to haul and dispose of the drums, but did not know where Mr. Hulsey was going to take them. (Exhibit 23).

Records and information provided to the Region by Young Refining and Continental Trading Company, a chemicals broker, ("Continental"), show that Young Refining and Continental participated during the early 1970s in a waste recycling venture which obtained industrial wastes from a variety of sources. The joint venture intended to either recondition and sell the wastes as usable product or burn the wastes as supplementary fuels in Young Refining's burner. The joint venture accumulated a substantial number of drums containing wastes that could not be reconditioned or burned, and the joint venture arranged for disposal of these drums, which were stored at the Young Refining facility in Douglasville, Georgia. (Exhibit 3).

A substantial portion of the wastes handled by the joint venture were obtained from Chem-Nuclear Systems, Inc., a waste disposal firm ("Chem-Nuclear"). Shipping records indicate that Chem-Nuclear shipped approximately 1,880 drums to the joint venture in approximately 32 shipments during 1973 and 1974. Records identifying substances shipped from Chem-Nuclear to the joint venture indicate that the drums buried at the Site may include chlorinated phenols, chlorinated solvents, acids, and pesticides. Hazardous substances documented as being shipped from Chem-Nuclear to the Defendant's facility include 2,4-dinitrophenol, sulfuric acid, dodecylbenzenesulfonic acid, 1,1,1-trichloroethane and tetrachloroethane. (Exhibit 3, pages 1-21,46,53-64 of Attachment; Exhibit 15, pages 14-19).

At the time of the Section 106 removal Order, the Site presented an imminent and substantial endangerment to public health and the environment due principally to the possibility that the contents of the drums would be released and migrate through soil to contaminate the groundwater. In the area of the Site, groundwater is the sole source of drinking water for residents. Ten drinking water wells are located within a one-half mile radius of the Site. A residence is located at the Site, only 250 feet from the drum disposal area, and a drinking water well serving this home is located at the Site (the residents are presently drinking bottled water). Additionally, groundwater discharges to surface water are common in this area. The Site also presented a threat that contaminants migrating from the drum disposal area would impact a small stream adjacent to the Site. That stream flows into the Chattahoochee River less than a mile downstream from the Site. (Exhibit 2, pages 1-8; Exhibit 4, Exhibit 32).

A Sampling Investigation was conducted in March of 1990 for EPA Region IV by Roy F. Weston, Inc., Technical Assistance Team. The consistent presence of drums prevented the sampling of subsurface soil in the Drum Disposal Area. Trichloroethene was detected in the landowner's well at 5 ug/kg, which is the Maximum Contaminant Level (MCL) under drinking water standards. (Exhibit 2, pages 1-8, 169-239).

On April 11, 1991, EPA issued a Section 106 Unilateral Administrative Order to four PRPs, requiring them to remove the buried drums and contaminated soil at the Site. The four PRP's included Young Refining, its joint venture partner, Continental, Chem-Nuclear, and the transporter who was identified at the Site at the time of the dumping, Bartlett B. Hulsey. (Exhibit 4).

In their responses to the Order, Chem-Nuclear and Continental indicated that they intended to comply. (Exhibits 9 and 11). Young Refining and Hulsey both denied responsibility and indicated that they did not intend to comply. (Exhibits 8 and 10.) Chem-Nuclear is conducting the removal as directed in the Order, without assistance or contribution from any other PRP. Continental is apparently willing to contribute a small portion of clean-up costs, but has not reached an agreement with Chem-Nuclear as to amount. The status of negotiations between Chem-Nuclear and Continental will be monitored and Continental may be added as a defendant if it does not appear that Continental is complying with the Order in good faith.

Removal work was commenced by Chem-Nuclear on September 9, 1991. The approved Removal Action Plan calls for the excavation of overlying soil and removal of buried drums. The drums and contaminated soil will then be sampled. The samples are to be analyzed and proper disposal of drums and proper treatment and/or removal and disposal of contaminated soil is to be arranged. Treatment and/or removal of contaminated soil will be conducted to meet clean-up levels set by EPA in consultation with ATSDR, in light of drum and soil sampling results. The Site will then be restored by backfilling, grading, and seeding. (Exhibit 28). The removal is expected to be completed in late October or early November, 1991. Total EPA costs to date are approximately $47,358.88. (Exhibit 29). No further removal or remedial action is contemplated by EPA after completion of the present removal. The State EPD has expressed interest in directing the PRPs to assess groundwater at the Site at the close of the removal.

A surface impoundment located 1,000 feet north of the drum disposal area has been the subject of an on-going fund-led removal. EPA has been unable to obtain evidence establishing the liability of Young Refining or any other PRPs for that site; however, given the proximity to the Site it seems likely that some of the same parties may be involved with both Sites.

The Site is owned by Ms. Harriet Foster. She did not own the Site at the time of the drum burial. There is evidence that drums were visible at the Site at the time Ms. Foster purchased the property (Exhibit 24); however, consistent with EPA's "Policy Towards Owners of Residential Property at Superfund Sites," EPA has not initiated any enforcement action against Ms. Foster because she is a residential landowner who did not contribute to the release or threat of release at the Site. At

the time of the drum dumping, the Site was owned by Mr. Lee Wallace, now deceased, who apparently permitted the dumping. (Exhibit 2, pages 109-144).

II. SIGNIFICANCE OF THE REFERRAL

This referral is submitted as part of the Superfund Non-Settlor/Non-Complier Enforcement Initiative. The facts and equities that exist in this case, along with the media attention generated by the case, make it a good vehicle for demonstrating EPA's commitment to a fair and aggressive CERCLA enforcement program. The proposed Defendant, Young Refining, is a PRP who is responsible for the illegal dumping of drums containing hazardous substances at a removal site and refused to comply with a Section 106 removal order. Chem-Nuclear Systems, Inc., a less culpable PRP, is conducting the removal in compliance with the Order. Because the removal has been conducted by another PRP, costs are limited primarily to Site investigation and inspection, removal oversight and enforcement costs, and probably will be less than $100,000. Therefore, the primary significance of the referral will be the recovery of penalties and trebled enforcement costs, and as a vehicle for sending the message that noncompliers will be aggressively pursued.

There are several significant precedential issues presented in this case. The case presents the precedential issue of whether multiple PRP's can be ordered jointly and severally to conduct a response action. In addition, this case presents the issue of what constitutes "sufficient cause" for noncompliance with Section 106 orders. Also presented is the issue whether Section 106(b) authorizes an action for penalties for noncompliance with a Section 106 order when the penalty claim is not brought in the context of an action to compel performance of the requirements of the order. In addition, this case presents the issue of what costs can be trebled in an action under Section 107(c)(3). All of these issues are discussed fully in Section VII of this Litigation Report.

III. STATUTORY BASIS OF REFERRAL/LEGAL THEORY OF CASE

A. Applicable Statutes

1. Authority to Conduct Site Investigation

Section 104(b) of CERCLA, 42 U.S.C. Section 9604(b), as amended, authorizes the President to conduct site investigations whenever cause exists to believe that a release of a hazardous substance occurred or may be occurring. Section 104(b) provides as follows:

> ...whenever the President has reason to believe that a release has occurred or is about to occur,... he may undertake such investigations, monitoring, surveys, testing and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapater.

2. Removal Authority

Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1), as amended, which gives the President the authority to respond to the release or threatened release of hazardous substances, provides:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. ...

3. Authority to Issue Order

The removal order which EPA issued to Young Refining and three other PRP's is authorized by Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), as amended, which provides:

> In addition to any other action taken by a State or local government, when the President detemines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous

> substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat.... The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

4. Authority for Penalty

Civil penalties in this action are authorized by Section 106(b)(1) of CERCLA, which provides:

> Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more that $25,000 for each day in which such violation occurs or such failure to comply continues.

5. Liability

Section 107(a) of CERCLA, as amended, establishes liability for funds expended pursuant to Section 104(a)(1) of the Act. This section provides as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-
>
> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for-

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, or destruction of, or a loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.
>
> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

6. Punitive Damages

Punitive damages are authorized in this referral pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), as amended, which provides:

> If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys

received by the United States pursuant to this subsection shall be deposited in the Fund.

Section VII of this referral reviews the prima facie case elements and describes the proposed defendant.

B. Jurisdiction and Venue

Section 113(b) of CERCLA, 42 U.S.C. § 9613(b) provides that the United States District Court shall have exclusive original jurisdiction over all controversies arising under the Act. Venue shall be in any district in which the release or damages occurred or in which the defendant resides, may be found, or has his principal office. In this case, the release and damages occurred in Douglas County, Georgia, and that is also where the proposed defendant has its principal office. Douglas County is located in the Northern District of Georgia, Atlanta Division.

C. Cross-media Coordination

Coordination across media has not occurred in the instant case. There do not appear to be any cross-media claims.

VI. DESCRIPTION AND HISTORY OF THE SITE

A. Site Location

The Basket Creek Drum Disposal Site (EPA ID Number: GAD-980843833) is located east of Basket Creek Road, approximately 0.4 miles from the intersection of Capps Ferry Road and Basket Creek Road, in a rural area of Douglas County, Georgia. (Exhibit 2, page 90). The drum disposal site is located about 250 feet east of the home of Mrs. Harriet Foster at 7840 Basket Creek Road. The Site consists of an open ravine of scrub vegetation and briar patches along Basket Creek Road, bordered on the north and south by hardwood trees. The approximate dimensions of the drum burial area, based on geophysical survey data, are 45 feet by 330 feet. (Exhibit 28).

B. Site History/Facility Processes

On the night of March 17, 1976, approximately 80 55-gallon drums of industrial wastes were illegally dumped at the Site. A Douglas County Health Department official responding to a citizen's complaint discovered the dumping in progress. When the county official, Douglas Daniell, arrived on the scene he noted two tractor trailers pulled up next to a ravine adjacent to Basket Creek Road. One of the trailers had dumped 80 drums into the ravine and a bulldozer was covering them with fill. Mr. Daniell prevented the persons at the Site from dumping additional drums (approximately 80) remaining on the second trailer. (Exhibit 23).

Mr. Daniell reported the illegal dumping to the Georgia EPD. Two Georgia EPD officials visited the Site the day after the dumping and collected half gallon samples from two of the drums remaining on the tractor trailer. One of the samples contained 50% orthochlorophenol. Acetone, isopropanol, chloroform, tetrachloroethane, phenol and dichlorophenol were also present in these samples. The EPD officials were prevented by soupy conditions from sampling the dumped drums in the ravine. Both of the EPD officials suffered clinical effects from exposure to the liquid wastes in the disposal area. One of the men, Dan Hull, suffered respiratory distress the evening of the sampling, while swimming. Mr. Hull's shoes were saturated with the liquid waste and were still emitting strong vapors one week later, and he was advised to discard the shoes. The other EPD official, James Benson, felt ill for two or three days, and the odor of the vapors was still being emitted from his skin twenty-four hours after the sampling. (Exhibit 2, pages 111, 114-23).

Mr. Daniell obtained a business card from one of the persons at the Site: Bartlet B. Hulsey. Mr. Daniell also recorded the tag numbers of the two trailers, which were registered to Hulsey. On March 18, 1976, the day after the dumping, Dr. C. B. F. Young, President of Young Refining, called Mr. Daniell and informed him that the dumped drums had come from Young Refining Corporation. Dr. Young indicated that he had contracted with Hulsey to haul and dispose of the drums, but had not known where Hulsey was going to take them. (Exhibit 23).

The buried drums had been held at the Young Refining facility pursuant to a joint venture in which Young Refining participated with Continental Trading Company. The joint venture sought to make money by accepting industrial wastes from a variety of sources, and either burning the wastes as supplementary fuels in the Young Refining burner or reconditioning and selling the wastes as usable product. (Exhibit 3; Exhibit 15, pages 18-19). The materials in the buried drums were not suitable for burning or resale, and therefore were buried at the Site. (Exhibit 3, pages 1-4 of cover letter, 52-60 and 96-101 of Attachment; Exhibit 6; Exhibit 15, page 22).

A substantial portion of the drums acquired by the joint venture were obtained from the Chem-Nuclear Systems, Inc. facility in Barnwell, South Carolina. Approximately 1,880 drums were shipped from Chem-Nuclear in 32 shipments during 1973 and 1974. Materials shipped by Chem-Nuclear to the joint venture included chlorinated phenols, chlorinated solvents, acids, and

pesticides. Specific hazardous substances documented as being shipped from Chem-Nuclear to Young Refining include the following:

2,4-dinitrophenol
sulfuric acid
dodecylbenzenesulfonic acid
1,1,1-trichloroethane
tetrachloroethane

(Exhibit 3, pages 1-21,46,53-64 of Attachment; Exhibit 15, pages 14-22).

At the time of the drum burial, the Site was owned by Mr. Lee Wallace, now deceased, who permitted the drum burial. (Exhibit 2, pages 109-42). The current owner, Ms. Harriet Foster, bought the property in 1987 from Lee Wallace's widow. Mrs. Foster states that she did not know that drums were buried on the Site when she purchased it. (Exhibit 2, pages 27-28). Ms. Foster built her home approximately 225 feet from the drum burial area. (Exhibit 1, page 3).

In the area of the Site, groundwater is the source of drinking water for residents. (Exhibit 2, page 150). Approximately thirteen private wells are located within a one mile radius of the Site. (Exhibit 32, page 2).

A geophysical survey of the drum disposal area was conducted in March, 1990 by the Roy Weston, Inc., Technical Assistance Team (TAT). The results of the magnetic survey indicated two large positive magnetic anomalies that probably represent buried materials. The approximate dimensions of the drum burial area are 45 feet by 330 feet. (Exhibit 2, pages 4-5, 33-35; Exhibit 28).

A Sampling Investigation was conducted in March of 1990 for EPA by TAT. The consistent presence of drums prevented the taking of subsurface soil samples in the Drum Disposal Area. Trichloroethene was detected in the landowner's well at 5 ug/kg, which is the Maximum Contaminant Level (MCL) under drinking water standards. Mercury was also detected in the well at a concentration of 1.54 ug/kg, which is just below the MCL. Low levels of mercury were also detected in the sediment and surface water samples collected downgradient of the drum disposal area. A number of other metals were also detected in the downgradient sediment sample as well as trace amounts of several solvents. (Exhibit 2, page 5; Exhibit 32).

C. Ranking of the Site on the NPL

Presently, the Site is not ranked on the National Priorities List (NPL). In May of 1989, NUS Corporation conducted Phase I of a Screening Site Inspection at the Site. This inspection was limited to a review of existing file material, completion of a target survey and an offsite reconaissance of the Site. The Site did not score high enough using the hazard ranking system to merit sampling, and the Site was given a NFRAP (no further remedial action planned) designation. (Exhibit 1). The offsite reconnaisance revealed that a home had been built next to the drum disposal area and that the resident was obtaining drinking water from a private well. Due to the waste characteristics and the proximity of the residence to the disposal area, it was recommended that the Emergency Response and Removal Branch of EPA evaluate this Site. (Exhibit 2, page 3).

D. Environmental Problem Posed by the Site

On April 11, 1991, EPA ordered Young Refining and three other PRPs to conduct an emergency removal action. (Exhibit 4). EPA determined that the Site presented an immediate threat to human health and the environment. At the time of the Order, the Site presented an imminent and substantial endangerment to public health and the environment due principally to the possibility that the contents of the drums would be released and migrate through soil to contaminate the groundwater. In the area of the Site, groundwater is the sole source of drinking water for residents. Ten drinking water wells are located within a one-half mile radius of the Site. A residence is located at the Site only 250 feet from the drum burial area, which residence is served by a drinking water well at the Site (presently the residents are drinking bottled water). Additionally, groundwater discharges to surface water are common in this area. Contaminants migrating from the drum disposal area also could impact a small stream adjacent to the Site. That stream flows into the Chattahoochee River less than a mile downstream from the Site. (Exhibit 1; Exhibit 2, pages 1-8).

Records identifying substances shipped from Chem-Nuclear to the joint venture which handled the drums dumped at the Site indicate that the drums buried at the Site may include chlorinated phenols, chlorinated solvents, acids, and pesticides. Hazardous substances documented as being shipped from Chem-Nuclear to Young Refining's facility include 2,4-dinitrophenol, sulfuric acid, dodecylbenzenesulfonic acid, 1,1,1-trichloroethane and tetrachloroethane. (Exhibit 3, pages 1-21 and 61-63 of Attachment). In addition, sampling established that orthochlorophenol, acetone, isopropanol,

chloroform, tetrachloroethane, phenol and dichlorophenol were contained in drums that persons had been preparing to dump at the Site when the Douglas County Health Department official arrived. (Exhibit 2, pages 111, 114-17).

V. STATUS OF THE CLEANUP PROCESS

A. Cleanup Activities by Parties Other than EPA

On April 11, 1991, EPA issued a Unilateral Section 106 Administrative Order to Young Refining and three other PRP's, requiring that they conduct a removal action at the Site. (Exhibit 4). Young Refining refused to comply with the Order. (Exhibit 8). One of the PRPs, Chem-Nuclear Systems, Inc., is presently conducting the removal in compliance with the Order, without participation from any other PRPs. Removal work is being performed by Chem-Nuclear's affiliate, Chemical Waste Management, Inc. ("Chem-Waste").

1. Description of the Removal Action

In response to the Section 106 Order, Chem-Nuclear agreed to conduct the removal, and submitted a Removal Action Plan on May 16, 1991, which was approved by EPA on May 21, 1991. Amendments to the Removal Action Plan made to accomodate the Site owner were also approved by EPA. The final approved work plan is attached as Exhibit 28.

On-site work commenced on September 9, 1991. This date reflects a delay attributable to negotiations between Chem-Nuclear and the Site owner for an access agreement. Removal work is being overseen by On-Scene Coordinator Don Rigger. The approved Removal Action Plan calls for Chem-Waste to clear and improve the Site work area. The area of suspected buried materials is to be located and staked out. Temporary run-on control structures will be constructed to divert storm water away from the excavation area. After completion of site-preparation activities, excavation and waste material removal will commence. Contaminated materials will be staged at accessible loading locations and loaded into transport vehicles or containers. Drums will be staged, sampled, identified and labled. Leaking drums or drums in poor condition will be overpacked. Soil will be sampled and contaminated soil will be staged in roll-off containers. Excavation and removal will continue until clean-up levels established by EPA in consultation with ATSDR are met. Proper off-site disposal of wastes will be arranged in accordance with sample analysis. Chem-Waste will use its own network of disposal facilities to dispose of wastes. At the close of the removal, the excavation

area will be backfilled, topsoil will be spread and vegetation will be restored. (Exhibit 28). Removal activities are scheduled to be completed in late October 1991. EPA is currently planning no further removal or remedial work at the Site.

2. Community Relations

EPA participated in two public meetings relating to the Site and other sites in Douglas County. EPA representatives attended a Douglas County Commission meeting pursuant to an invitation from the County Commision. At the meeting, EPA representatives provided information about the Site and answered question from Douglas County residents. At another public meeting organized by Congressman Newt Gingrich, EPA representatives attended and again provided information about the Site and answered questions from Douglas County residents. EPA representatives met individually with residents in the area of the Site on September 5, 1991, and held an informal availability session on September 9, 1991. No other community relations activities occurred for this Site. However, the Region has compiled the administrative record for the Site, and it was mailed to a local repository on May 15, 1991.

3. ATSDR Evaluation

On May 15, 1990, EPA requested that ATSDR review data on well water and soil samples from the Foster residence at the Site. ATSDR was asked to determine the public health threat posed by levels of contamination present in the Foster's well. In a memo dated May 15, 1990, ATSDR indicated that the levels of trichloroethene and mercury found in the well "in themselves do not constitute a serious public health threat." However, this memo assumed, as was stated in the request from EPA, that "the residents were not utilizing the water for drinking purposes, but were relying on bottled water." ATSDR "recommended that the owners of this well continue to utilize bottled water until additional samples are obtained and analyzed." (Exhibit 5).

ATSDR also conducted a health consultation at the Site in response to requests from Douglas County citizens, EPA, and Representative Newt Gingrich. After reviewing sampling data and other information from the Site file, ATSDR concluded that the current levels of contamination did not pose a public health threat, but that the potential future threat posed by contaminant migration and possible human exposure could not be determined without a better characterization of area groundwater, and that a potential threat to human health may exist from direct dermal exposure to contaminated soils and from inhalation of contaminants. ATSDR recommended, among other steps, that the source of groundwater contamination be mitigated. (Exhibit 32).

4. Status of the Administrative Record

The Region has recently compiled the administrative record for this Site. A list of the contents of the the administrative record is included as Exhibit 31 to this referral. The Region mailed the administrative record to a local repository on May 15, 1991.

VI. NATURAL RESOURCE DAMAGE CLAIMS

The OSC identified no natural resource damages at this Site.

VII. PRIMA FACIE CASE, LIABILITY AND DESCRIPTION OF PROPOSED DEFENDANT, AND MISCELLANEOUS ISSUES REGARDING LIABILITY AND COST RECOVERY

A. Prima Facie Case

1. Release or Threatened Release of Hazardous Substances

There was a release, as defined in § 101(22) of CERCLA, and/or threatened release at the Site. Douglas Daniell, a Douglas County Health Department official, observed the dumping of approximately 80 55-gallon drums at the Site in 1976. (Exhibit 23, page 1). Georgia EPD officials sampled the contents of two of the drums which persons at the Site had been preparing to dump when Mr. Daniell arrived. Sampling established that one of the drums contained 50% orthochlorophenol, a hazardous substance. Other hazardous substances contained in these samples included acetone, isopropanol, chloroform, tetrachloroethane, phenol and dichlorophenol (Exhibit 2, page 114). Records document that other wastes handled by the Young Refining/Continental joint venture before Young Refining arranged for disposal of the drums at the Site included the following hazardous substances: 2,4-dinitrophenol, sulfuric acid, dodecylbenzenesulfonic acid, 1,1,1-trichloroethane and tetrachloroethane. (Exhibit 3, pages 1-21, 46, 53-64 of Attachment; Exhibit 15, pages 14-19). A Sampling Investigation was conducted in March of 1990 for EPA by TAT. The consistent presence of drums prevented the taking of subsurface soil samples in the Drum Disposal Area. Trichloroethene was detected in the landowner's well at 5 ug/kg, which is the Maximum Contaminant Level (MCL) under drinking water standards. (Exhibit 2, pages 1-8).

The leaking or escaping of hazardous substances from drums at the Site and the past, present and/or potential migration of hazardous substances from the Site constitutes an actual or threatened release as defined in Section 101(22) of CERCLA. Liquid wastes released from the drums may have migrated, and potentially could migrate, downward through soil to reach the groundwater. Groundwater discharges to surface water are common in the area of the Site. Additionally, migrating wastes could impact a small stream adjacent to the Site. This stream flows into the Chattahoochee River less than a mile downstream from the Site. (Exhibit 1; Exhibit 2, pages 1-8).

2. From a Facility

The Site is a facility, as defined in Section 101(9) of CERCLA. The definition of facility in Section 101(9) specifically includes "any area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."

B. Liability and Description of Proposed Defendant

1. Young Refining Corporation

a. Description/Basis for Liability

Young Refining Corporation ("Young Refining") is liable pursuant to Section 107(a)(3) of CERCLA, for having arranged for disposal of hazardous substances which were dumped at the Site.

Young Refining Corporation is a petroleum refining facility in Douglasville, Georgia. From 1973 to 1976 Young Refining participated in a waste recycling venture with Continental Trading Company, a chemicals broker in Atlanta, Georgia. The joint venture obtained industrial wastes from a number of sources and sought to make a profit by either reconditioning and selling the wastes as usable product to customers of Continental Trading Company, or burning the wastes as supplementary fuels in the Young Refining burner. (Exhibit 3, pages 1-4 of cover letter, pages 53-55 of Attachment; Exhibit 15, pages 10-25). An area at the Young Refining facility was graded for storage of drums handled by the joint venture. (Exhibit 3, page 23 of Attachment). Over time, a substantial quantity of drums were accumulated at the Young Refining facility which presented a disposal problem because they were not suitable for resale or burning. (Exhibit 3, pages 46-60 of Attachment). In part, this problem was created by the shipment of approximately 160 drums identified as containing "unknowns" from Chem-Nuclear Systems, Inc., to the joint venture. (Exhibit 3, page 57 of Attachment). On September 26, 1974, Continental Trading Company

made a payment of $10,000.00 to Young Refining as an advance to cover expenses for the disposal of waste chemicals accumulated by the joint venture. (Exhibit 3, page 101 of Attachment). Young Refining intended to dispose of the waste chemicals at Metals Recycling, Inc., a facility owned by Young Refining in Borden Springs, Alabama. (Exhibit 3, page 100 of Attachment).

In February of 1976, a substantial number of drums were shipped from Metals Recycling, Inc. to Young Refining, in Douglasville, Georgia. Young Refining had been prohibited from disposing of the drums as planned in Alabama, and Alabama officials directed Young Refining to remove the drums from the Alabama facility. (Exhibit 2, pages 109,112; Exhibit 3, pages 100-101, 113).

On March 17, 1976, Douglas Daniell, a Douglas County Health Department official responding to a citizen's complaint, discovered the illegal dumping of approximately eighty (80) drums containing industrial wastes in a ravine along Basket Creek Road, in a rural area of Douglas County, Georgia. When Mr. Daniell arrived at the Site, he observed two tractor trailers; one had been emptied of approximately eighty (80) drums, which a bulldozer was covering with dirt. The other trailer still held approximately eighty (80) drums which persons were preparing to unload. Mr. Daniell prevented the dumping of the additional eighty (80) drums. (Exhibit 23).

Mr. Daniell reported the illegal dumping to the Georgia Environmental Protection Division (EPD). EPD officials inspected the Site the day after the dumping and sampled drums remaining on the trailer. One of the samples contained 50% orthochlorophenol. (Exhibit 2, pages 109-120).

Mr. Daniell recorded the tag numbers of the trailers, which he later determined were registered to Bartlett B. Hulsey, a transporter and general contractor. Mr. Daniell also observed Mr. Hulsey at the Site during the dumping; Mr. Hulsey had given Mr. Daniell his business card. The day after the dumping, Dr. C. B. F. Young, President of the Defendant, Young Refining Corporation, called Mr. Daniell and informed him that the drums dumped at the Site had come from Young Refining Corporation. Dr. Young told Mr. Daniell that he had contracted with Bartlett B. Hulsey to haul and dispose of the drums, but did not know where Mr. Hulsey was going to take them. (Exhibit 23).

Dr. C. B. F. Young, President of Young Refining, has stated to EPA in the person of Assistant Regional Counsel David Harbin, On-Scene Coordinator Don Rigger, and Bill Steiner that he received a call and went to the Site the night of the dumping where he observed Hulsey and Mr. Lee Wallace, owner of the Site, burying the drums. (Exhibit 3, page 3 of cover letter; Exhibit 6, page 1).

b. State of Incorporation/Principal Place of Business

Young Refining Corporation is a Delaware corporation. Its principal place of business is at 7982 Huey Road, Douglasville, Georgia 30133.

c. Agent for Service of Process

Young Refining Corporation's registered agent in Georgia is David L. Smallwood, 6624 E. Broad St. Douglasville, Georgia 30134.

d. Legal Counsel

Young Refining is represented by Stephen E. O'Day and Mark W. Kinzer of the law firm Smith, Gambrell & Russell, First Atlanta Tower, Suite 2400, 2 Peachtree St., N.W., Atlanta, Georgia 30383-2501, telephone # (404) 656-1800.

e. Ownership/Parent Corporation

All of the Common Stock of Young Refining Corporation is owned by Bass Pecan Company. (Exhibit 15, page 8). Bass Pecan Co. also holds $2,500,000 in long term debt of Young Refining Corporation. (Exhibit 15c). Bass Pecan Company is a Mississippi corporation which is not qualified to do business in Georgia. Bass Pecan Company has sold crude oil to Young Refining for a number of years. 6,050 shares of non-voting preferred stock of Young Refining are held in varying amounts by eight individuals and one company. Five hundred of these shares are held by Dr. Young and his wife. (Exhibit 15, page 8). Common stock accounts for $11,666.00 of paid in stockholder equity; preferred stock accounts for $605,000.00 of paid in equity. (Exhibit 15c).

f. Financial Viability

Pursuant to a Section 104(e) information request, Young Refining has submitted federal tax returns for the years 1984-1988 and balance sheets prepared from May 31, 1989 through April 30, 1991. (Exhibit 15c and 15d). A follow-up letter requests 1989 and 1990 tax returns, which would have been responsive to EPA's initial request. (Exhibit 19). Young Refining's balance sheet for April 30, 1991 reflects total assets of over ten million dollars. Young Refining's balance sheets (unaudited) and consolidated tax returns (without schedules) reflect losses year after year. (Exhibit 15c). In its response to the Section 106 Order, Young Refining indicated that it lacked the financial resources to comply with the Order. Copies of insurance policies held by Young Refining Corporation are attached as Exhibit 15e.

Financial information provided to EPA by Young Refining was forwarded to NEIC for financial analysis on August 14, 1991, and NEIC's evaluation will be forwarded to DOJ upon receipt. John Mahan at NEIC (FTS 776-2396) has verbally indicated that the losses reflected in Young Refining's unaudited balance sheet and tax returns do not mesh with Dun & Bradstreet reports which reflect that Young Refining is making its payments under loans and continues to receive credit. John Mahan has indicated that audited balance sheets and credit applications, as well as complete tax returns (including schedules and attachments from all related entities) would be necessary to fully assess Young Refining's financial status. He indicated that in the unaudited balance sheets and consolidated tax returns it would be easy to hide where the corporate revenues are going, particulary in this case, which involves a number of related and closely held corporations. Mr. Mahan indicated that he would discount the unaudited financials, and would require more complete financial information (which he felt would disclose significant resources). The Region intends to send another 104(e) Information Request seeking such information.

g. Personal Liability Issues

Federal courts have established that a corporate officer who participates in, or is responsible for, the disposal of hazardous substances can be individually liable under CERCLA. U.S. v. Northeastern Pharmaceutical and Chemical Company, (NEPACCO), 810 F.2d 726 (8th Cir. 1986). Dr. C. B. F. Young is the President and Chairman of the Board of Young Refining Corporation, and Dr. Young personally arranged for the disposal of the hazardous substances that were dumped at the Site. The Section 106 Order, however, was not issued to Dr. Young individually. Therefore, Dr. Young has liability only for costs, and not for noncompliance with the Section 106 Order. Dr. Young is not proposed as a defendant because the focus of this case is as part of the Non-complier/ Non-settlor Initiative, and the monetary focus of the case is penalties and punitive damages for noncompliance, rather than costs. EPA will consult with DOJ concerning the possibility of naming Dr. Young individually as a defendant.

h. Transporter

The person who transported the drums to the Site is Bartlett B. Hulsey. Hulsey was identified at the Site by Douglas Daniell, the Douglas County Health Department official who interrupted the dumping. Mr. Daniell also recorded the tag numbers of the trailers from which drums were being dumped; both were registered to Hulsey. (Exhibit 23, page 2). EPA does not know who owned the trucks that transported the trailers to the Site. Dr. Young has stated to EPA that he was called the night

of the dumping and went to the Site, where he saw Hulsey and the former Site owner, Mr. Lee Wallace, burying drums. Dr. Young has also stated that the dumped drums came from his facility. Shortly before the drums were dumped, Hulsey had approached Dr. Young offering to dispose of the drums for Young Refining Corporation, and Dr. Young accepted Hulsey's offer. However, Dr. Young has stated that he did not know where Hulsey was going to take them. (Exhibit 3, cover letter; Exhibit 6; Exhibit 23).

Hulsey was named as a Respondent in the Section 106 order. In his response, Hulsey denied any responsiblity for dumping drums at the Site. Hulsey stated that he transported drums to the Site for Young Refining Corporation, but that a government official prevented him from dumping any drums. Hulsey's response to the order also alleges that Lee Wallace had told him he could bring drums from Young Refining to the Site. (Exhibit 10). In a subsequent response to a Section 104(e) information request, Hulsey changed his story. In the 104(e) response, Hulsey denied that he even transported any drums to the Site. Hulsey's 104(e) response states that he was at the Site covering tires for Lee Wallace when a shipment of drums arrived. The 104(e) response further states that Hulsey then sent the shipment of drums away because he "did not want the drums dumped where I was working to cover the tires." (Exhibit 18). Hulsey's inconsistent statements lack credibility. However, they are the basis for Dr. Young's conclusion that his prior admissions of responsibility were erroneous. See Exhibit 8, page 1; Exhibit 15, page 27-28.

Hulsey is not proposed as a defendant because he is old, has cancer and apparently lacks resources. His culpability is high, however, and his 104(e) response is incomplete and inconsistent with his response to the Section 106 order. A follow-up 104(e) request has been sent to Hulsey to confirm his financial status. (Exhibit 21).

i. Potential CERCLA § 107(b) Defenses

There are no known CERCLA Section 107(b) defenses available to Young Refining. Initially, Dr. Young stated that Hulsey selected the Site without the knowledge of Young Refining. However, Hulsey was disposing of the drums pursuant to a contractual relationship (verbal) with Young Refining, and therefore Section 107(b)(3) is not applicable. Moreover, Young Refining did not exercise due care with respect to disposition of the drums, or take reasonable precautions against forseeable acts of Hulsey. Additionally, Dr. Young visited the Site the night of the dumping and did nothing to remove the drums. Therefore, even if there were no contractual relationship with Hulsey, Section 107(b)(3) would not apply.

j. Ability to Recover Costs/NCP Issues

Young Refining raised a number of objections to the order as justification for its noncompliance. First, Young Refining stated that there is insufficient evidence that it is a PRP. (Exhibit 8). Young Refining bases its evidentiary argument primarily on Hulsey's statement that he did not bury any drums at the Site. Hulsey's statement, however, has no credibility: he has made inconsistent statements which are at odds with eyewitness accounts. These eyewitness accounts include the account of Douglas Daniell, the Douglas County Health Department official who discovered the dumping and witnessed Hulsey helping to bury the drums (Exhibit 23); and the account of Dr. Young himself, who has stated that he went to the Site on the night of the dumping where he saw Hulsey and Lee Wallace burying drums. (Exhibit 3, cover letter; Exhibit 6). Evidence against Young Refining Corporation is summarized in Section VII(B)(1)(a), above.

Young Refining also argued in its response to the order that EPA failed to establish an imminent and substantial endangerment. (Exhibit 8). The basis for finding an imminent and substantial endangerment to justify the Section 106 order is summarized in Sections I and IV(D), above.

Young Refining alleged in its response to the Order that the Section 106 Order was inconsistent with the NCP in two respects. (Exhibit 8). First, Young Refining argued that EPA acted improperly in failing to conduct an engineering evaluation/cost analysis (EE/CA), as called for under 40 C.F.R. 300.415(b)(4). An EE/CA is only required "when a planning period of at least six months exists before on-site activities must be initiated." EPA considered the Basket Creek removal to be time-critical, and therefore an EE/CA was not appropritate. Under 40 C.F.R. 300.415(b)(3), "removal actions shall, as appropriate, begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare or the environment." Prompt removal action was required to address an imminent and substantial endangerment.

Young Refining also argued that the Order was inconsistent with the NCP in that all known PRP's were not included as Respondents in the Order, as required by 40 C.F.R. 300.415(2). That section, however, only provides that "where the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly." Here, EPA issued an Order to four PRP's against whom EPA determined the evidence was strong enough to justify proceeding. It was not practicable to delay a time-critical

removal while attempting to identify and assemble evidence against other potential PRP's, and EPA properly exercised its enforcement discretion in issuing the Order to the four Respondents.

k. Ability to Recover Penalties/Punitive Damages

Young Refining also asserted that the Section 106 Order was invalid because it attempted to impose on each Respondent a joint and several obligation to conduct a clean-up action. Young Refining relied on United States v. Stringfellow, 20 E.R.C. 1905 (BNA) (C.D. Cal 1984). Stringfellow does hold that Section 106 orders issued to multiple PRPs must precribe with specificity the participation of each Respondent or they are unenforceable in court. However, no other case has followed Stringfellow, and Section 106 orders are regularly enforced against multiple PRPs. No case has been identified which directly overrules Stringfellow, however, and it would be helpful to EPA to obtain a court opinion overruling this aspect of Stringfellow. This argument, even if successful, would not have any impact on Young Refining's liability for costs.

Even if a court overrules the holding in Stringfellow, Young Refining could argue that penalties and punitive damages should not be imposed because it was relying on what it considered sound authority, and upon the advice of counsel, in not complying with the Order. In other words, Young Refining could argue that its reliance on Stringfellow in not complying with the Order was reasonable and constituted "sufficient cause" so as to defeat any attempt to recover penalties or punitive damages. EPA's position would be that Stringfellow is not controlling authority in the Eleventh Circuit and that it was unreasonable for Young Refining to rely on it because the enforceability of Section 106 orders issued jointly to multiple PRPs is widely accepted. Moreover, because a Stringfellow argument has no relationship to liability, it is not a very sympathetic one. EPA could have issued the Order to Young Refining alone and mooted the Stringfellow argument. It seems unlikely that a court would reward noncompliance, arguably from the most culpable PRP, when based on such an unsympathetic argument.

Young Refining also stated in its reponse to the Order that it was financially unable to pay for the ordered clean-up, and that inability to pay constituted "sufficient cause" for non-compliance. Young Refining could argue that penalties and punitive damages should not be applicable on this ground. However, Young Refining's financial inability claim has not been established with the incomplete financial information submitted by Young Refining to EPA. In addition, United States v. Parsons, 723 F.2d 757, 763-64 (N.D.Ga. 1989), held that

financial inability to pay for a clean-up is not "sufficient cause" for noncompliance. In Parsons, EPA obtained a treble damage award from a PRP who had argued that financial inability to pay was "sufficient cause" for noncompliance. The Region is planning to obtain more complete financial information from Young Refining with a supplemental Information Request.

This case also presents the issue whether EPA can recover penalties under Section 106(b) of CERCLA based on non-compliance with a Section 106(a) order when it is not also seeking in the court action to compel compliance with the terms of the order. Section 106(b) authorizes penalties "in an action ... to enforce such order." This language could be read in two ways: (1) that an action "to enforce" the order only includes actions seeking to compel performance, or (2) that an action "to enforce" the order also includes actions seeking solely to penalize a respondent for noncompliance. Young Refining is likely to argue that penalties are only recoverable in an action to compel performance of the requirements of the Order, and therefore that no penalties are recoverable in this action. EPA Enforcement Guidance contemplates "penalties alone" actions under Section 106(b), but there is little precedent on this issue. In a recent case penalties were awarded to EPA under Section 106(b) in a "penalties alone" case where other PRPs performed the response action which the defendant had been ordered to perform. See United States v. Lecarreaux, Civ. No. 90-1672 (HLS) (D.N.J. July 30, 1991).

From a policy perspective, EPA's interpretation of Section 106(b) is more reasonable because if penalties are only recoverable in an injunctive setting, noncooperative PRPs would have no incentive to comply with an order and contribute to the performance of a response action whenever another PRP will comply with the order and perform the ordered response action.

Section 113(h) of CERCLA provides additional support to EPA's interpretation of Section 106(b). Section 113(h) enumerates the types of actions in which a federal court can review a challenge to a response action. The list includes "an action to enforce an order issued under Section 9606(a) or to recover a penalty for violation of such order." (Emphasis added). This language suggests that an action can be brought solely to recover penalties for the violation of a Section 106 order. EPA's interpretation is further supported by the principle that an Agency's interpretation of the statute it is charged with enforcing will be upheld if it represents a reasonable accomodation of conflicting policies. Bethlehem Steel v. Bush, 736 F. Supp. 945 (N.D. Ind. 1989).

This case also presents the issue of what costs may be

trebled in a treble damage claim under Section 107(c)(3) of CERCLA. Section 107(c)(3) provides for punitive damages of up to three times "the amount of any costs incurred by the Fund as a result of such failure to take proper action" when a PRP fails to comply with a Section 106 order. In this case, another PRP carried out the removal in compliance with the Order, and EPA's oversight costs cannot be trebled because they would have been incurred even if Young Refining had complied with the Order. EPA can argue, however, that its enforcement costs may be trebled because EPA would not have had to bring the penalty action if Young Refining had complied with the Order.

2. PRP's EPA Does Not Propose to Sue

Chem-Nuclear is not proposed as a defendant because Chem-Nuclear has complied with the Order and is carrying out the removal as ordered. This case is referred pursuant to EPA's Non-complier/Non-settlor Initiative, a purpose of which is to penalize non-compliers and reward cooperative PRPs, and improve the Agency's reputation for aggressively and equitably enforcing CERCLA. Therefore, the focus of the case is on penalties rather than cost-recovery, and Young Refining, a non-complier, has been singled out for enforcement action.

Continental is not proposed as a defendant because it also has indicated its intention to comply with the Order. However, to date Chem-Nuclear has conducted the response action without contribution from Continental. Continental has not yet reached agreement with Chem-Nuclear (whom it agreed to indemnify when the hazardous materials were accepted) as to the amount of its contribution to response costs. The status of Continental's cooperation and participation will be monitored, and Continental may be included as a defendant if it appears that it is not complying with the Order in good faith.

Bartlett B. Hulsey is not proposed as a defendant solely because it does not appear that he has assets. In response to the Order Hulsey denied responsibility and stated that he is disabled and lacks money. (Exhibit 10). According to his 104(e) response, his only asset is his residence which is in his wife's name. (Exhibit 18). In reponse to a request for his tax returns as part of the 104(e) request, Hulsey responded "n/a." The Region sent a follow up 104(e) to obtain additional financial information to confirm his financial status. (Exhibit 21). At a September 18 interview at Mr. Hulsey's residence by EPA investigator Herb Miller, Mr. Hulsey refused to provide supplemental financial information. (Exhibit 22) However, it did not appear to Mr. Miller that Hulsey had significant assets. EPA will consult with DOJ about the possibility of including Mr. Hulsey as a defendant.

There is evidence against certain other PRPs who are not proposed as defendants because of evidentiary weaknesses and/or because these defendants were not named in the Order and the focus of this case is penalties and punitive damages for noncompliance. Costs are relatively small. Those potential PRPs include:

(i) Arivec Chemicals, Inc.---A former (disgruntled) employee of Arivec Chemicals has stated that he transported and dumped a substantial number of drums containing "paint bottoms" at the Site for Arivec over a several year period before the Young Refining drums were dumped at the Site. (Exhibit 25). According to the employee (Bobby Nunnaly), Lee Wallace, the owner of the Site at the time (now deceased), permitted the dumping. In response to a 104(e) request, Arivec denied ever dumping any materials at the Site. (Exhibit 27). EPA's investigation of Arivec will continue. Materials discovered during the removal may provide additional evidence against Arivec.

(ii) Jennat Corporation---Shipping records show that the Young Refining/Continental joint venture accepted hundreds of drums containing industrial wastes from Jennat Corporation (a subsidiary of Union Carbide), of Tucker, Georgia. Substances shipped by Jennat include 6 drums of styrene monomer, 5 drums of ethyl acrylate, 3 drums of acrylonitrile, 2 drums of vinyl acetate, 22 drums of ethyl acrylate mixture, 90 drums of amine-glycol mixture & ethyl acrylate mixtures, 82 drums of glycol amine water mixture and ethyl acrylate mixture and 67 drums of ethyl acrylate mixture and glycol amine water mixture. (Exhibit 3, pages 78-84 of Attachment). The volume of drums shipped by Chem-Nuclear was much greater (approximately 1,880 drums) and EPA lacked evidence that any of the substances shipped by Jennat were present at the Site. Accordingly, EPA did not include Jennat as a Respondent in the Section 106 Order. At present, EPA is proposing only Young Refining as a Defendant because the primary basis for this referral is to penalize Young Refining for non-compliance as part of the Agency's Non-complier/Non-settlor Initiative.

(iii) Monsanto Corporation---Shipping records reflect that Monsanto Textiles Company, in Greenwood, South Carolina, shipped approximately 78 drums to the Young Refining/Continental joint venture in August and September of 1973: 8 drums of acid, phenol, methanol plus dissolved nylon; 28 drums 1,1,1-trichloroethane and 36 drums of "wax"? [waste solvent?]. (Exhibit 3, pages 31-38 of Attachment). Monsanto was not named in the Order because of the relatively small number of drums shipped. Monsanto is not proposed as a defendant for that reason and because the focus of this case is as part of the Non-complier/Non-settlor Initiative.

(iv) Ms. Harriet Foster---Ms. Harriet Foster is the current owner of the Site. Some witnesses have indicated that drums were visible on the property when she purchased it. (Exhibit 24). However, Mrs. Foster is a residential landowner and no enforcement action is contemplated against her pursuant to the Agency's "Policy Towards Owners of Residential Property at Superfund Sites."

VIII. Enforcement History: Contacts with the Potential Defendants

Approximately 80 drums containing industrial wastes were dumped at the Site on the night of March 17, 1976. Douglas Daniell, a Douglas County Health Department official responding to a citizen's complaint, discovered the dumping in progress and prevented the dumping of an additional 80 drums. (Exhibit 23). One PRP, the transporter, Bartlett B. Hulsey, was identified at the Site by Mr. Daniell. The next day, Dr. C. B. F. Young, President of Young Refining, called Mr. Daniell and said the drums had come from Young Refining's facility in Douglasville, Georgia. He said that he had contracted with Hulsey to dispose of the drums but had not known where he was going to take them. (Exhibit 23). Mr. Daniell reported the dumping to the Georgia EPD. The EPD fined Hulsey and the property owner who permitted the dumping, Lee Wallace, $750.00 each, but did not require them to remove the drums. (Exhibit 2, pages 130-42). The EPD issued an Emergency Order to Young Refining requiring it to provide information as to the source and nature of the substances dumped at the Site, and ordering Young Refining not to remove any more wastes from its facility. Young Refining did not comply with the EPD Order, which was referred for legal action to the Georgia Department of Law. (Exhibit 2, pages 133-34).

In early 1991, EPA verbally notified the four PRP's that were ultimately named as Respondents in the Section 106 Order that EPA was planning to conduct a removal action at the Site, and that they were considered to be PRPs. On February 1, 1991, Young Refining's President and Chairman of the Board, Dr. C. B. F. Young, and attorneys for Young Refining, came to EPA's offices in Atlanta and discussed the case. Dr. Young gave a factual account of the dumping and events leading up to the dumping (this factual account confirmed the liability of the PRPs named in the order). (Exhibit 6). On February 12, 1991, Young Refining submitted a written response to an informal request for information by EPA. Young Refining's response included numerous joint venture records that had been saved by Continental Trading Company, and a factual admission of liability. (Exhibit 3). Also in early 1991, Mr. Fred Liu, owner of Continental Trading Company, came to EPA's offices and gave a factual account of the waste recycling joint venture

involving Young Refining and Continental. (Exhibit 7). Mr. Liu submitted to EPA a large volume of records documenting wastes received and handled by the joint venture. During the same period, EPA made verbal contact with B. B. Hulsey, who denied knowledge about and responsibilty for the Site. On February 27, 1991, Assistant Regional Counsel David Harbin discussed the case on the telephone with in-house counsel for Chem-Nuclear, including the basis for identifying Chem-Nuclear as a PRP. Except for Hulsey, all of the PRPs named in the Order were at some point provided documents in EPA's file in response to FOIA requests.

On April 11, 1991, EPA Region IV issued a Unilateral Administrative Order under Section 106 of CERCLA to Young Refining, Hulsey, Continental, and Chem-Nuclear for the removal of hazardous substances located at the Site. (Exhibit 4). Young Refining submitted a written response to the Order indicating that it did not intend to comply, and asserting various objections to the order. (Exhibit 8). Chem-Nuclear submitted a response indicating that it would comply with the Order (Exhibit 9). Chem-Nuclear is now conducting the removal in compliance with the Order, under the direction of EPA, and without assistance or contribution from any other PRPs. Continental indicated that it intended to comply, (Exhibit 11), and is apparently willing to contribute a portion of clean-up costs, but has not reached agreement with Chem-Nuclear as to amount. Hulsey denied responsibilty and indicated that he does not have assets to pay for the clean-up. (Exhibit 10). On-site removal work commenced on September 9, 1991, and is expected to be completed in late October 1991.

On May 15, 1991, EPA issued Information Requests to Young Refining and Hulsey pursuant to Section 104(e) of CERCLA. (Exhibits 14 and 17). On June 22, 1991, EPA received Young Refining's response to EPA's May 15 Information Request. (Exhibit 15). In its response, the Defendant stated, inter alia, that its "previous alleged admissions of responsiblity, if any, regarding the alleged incident of disposal were made in error." Young Refining's basis for concluding that its previous admissions were in error was the denial by Hulsey that he buried any drums at the Site. (Exhibit 15, pages 27-28). EPA also received a response to the 104(e) request issued to Hulsey. Hulsey denied responsibility and denied that he had any assets. (Exhibit 18). Hulsey's 104(e) response, however, was evasive and inconsistent with his response to the Order. In response to the Order, Hulsey had said that he transported drums to the Site for Young Refining but was prevented from dumping them by a government official. (Exhibit 10). In his 104(e) response, Hulsey denied transporting any drums to the Site; rather, he states that he was at the Site only to cover tires with dirt for the Site owner, and when drums from an unknown source arrived

Hulsey sent the trucks away. (Exhibit 18). Neither of Hulsey's accounts are credible because Douglas Daniell observed him dumping the drums. (Exhibit 23). In addition, Dr. Young's prior statements include a statement that he observed Hulsey and Lee Wallace burying the drums. (Exhibit 3, cover letter; Exhibit 6).

On May 29, 1991, EPA sent a letter to Young Refining addressing the various objections raised by Young Refining in its response to the Unilateral Administrative Order. EPA informed Young Refining that it did not find any of its objections to the Order to have merit, or to constitute "sufficient cause" for noncompliance with the Order. EPA further informed Young Refining that its noncompliance could therefore subject the Defendant to penalties and treble damages. (Exhibit 16). Young Refining responded to this letter with a letter dated September 11, 1991, in which Young Refining restated its objections to the Order. (Exhibit 34).

On June 14, 1991, EPA issued a 104(e) information request to Arivec Chemicals, Inc. (Exhibit 26), based on a statement from a former (disgruntled) employee of Arivec that he had dumped drums containing "paint bottoms" at the Site for Arivec during a several year period. (Exhibit 25). Arivec, in its response, denied ever dumping anything at the Site. (Exhibit 27).

In August 1991, EPA sent a follow-up 104(e) Request to Young Refining (seeking 1989 and 1990 tax returns, which had been sought but not obtained in the prior request), and to Hulsey (seeking additional financial information). (Exhibits 19 and 21). Also in August 1991, financial information received from Young Refining was sent to NEIC in Denver for evaluation of Young Refining's ability to pay substantial penalties.

IX. COST RECOVERY

EPA's past costs at the Site are estimated to be approximately $47,358.88 as of September 11, 1991. (Exhibit 29). These costs will increase as further EPA time is devoted to removal oversight and cost recovery efforts at the Site. In addition, interest should be added to past costs, interest to run from the date a demand letter is issued. Complete cost documentation has been ordered for costs incurred through August 31, 1991. Updated documentation will be provided as soon as it is available.

Chem-Nuclear is presently conducting the removal at the Site, and EPA anticipates taking no further response actions at the Site after the removal is completed.

EPA can recover punitive damages in this case of up to three times the amount of any costs incurred by the Fund as a result of Young Refining's failure without sufficient cause to take the ordered removal action, pursuant to Section 107(c)(3) of CERCLA. Costs attributable to Young Refining's failure to comply with the Order would be limited to enforcement/cost recovery costs because Chem-Nuclear carried out the requirements of the Order. Oversight and other response costs would have been incurred even if Young Refining had complied with the Order. EPA will segregate enforcement costs to support a treble damage claim. All of DOJ's costs will fit into this "enforcement" category.

EPA anticipates no problems with the costs incurred or the documentation of those costs.

X. PENALTIES AND PUNITIVE DAMAGES

Section 106(b)(1) of CERCLA provides that:

> any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

In addition, Section 107(c) of CERCLA provides that:

> If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

As discussed previously in this referral, EPA issued a Unilateral Administrative Order to Young Refining and three other PRPs under CERCLA Section 106(a) on April 11, 1991. Young Refining failed to comply with the Order. One of the other PRPs, Chem-Nuclear, is completing the removal in compliance with the Order. EPA believes that Young Refining's failure to comply with the Order was without sufficient cause and that treble damages, and penalties of up to $25,000 per day of non-compliance, are both authorized and appropriate. Treble damgages would apply to EPA's enforcement costs only; EPA's

other costs (e.g., oversight costs) are not attributable to Young Refining's non-compliance. Penalties are authorized from April 25, 1991 until removal work is completed (removal work is expected to be completed in late October, 1991). At a rate of $25,000 per day, penalties of up to $4,500,000 may be sought in the Complaint (based on 180 days of noncompliance).

Young Refining could argue that penalties should not accrue beyond the date that Chem-Nuclear's work plan was approved, or the date that work actually commenced, because at that time performance by Young Refining became impossible. EPA's position would be that penalties continue until work is completed, because Young Refining could have complied at any time simply by indicating its intent to comply and entering into and consummating negotiations with Chem-Nuclear for contribution to the clean-up effort.

Young Refining raised a number of objections to the Order as justification for its noncompliance. It does not appear that any of them constitute "sufficient cause" for noncompliance. However, Young Refining is likely to make a "sufficient cause" argument. Young Refining's objections to the Order, and various other legal issues that may affect EPA's ability to recover penalties and punitive damages are fully discussed in Section VII(B)(1)(j) and (k) of this referral, supra pages 19-22.

Note that under Tull v. United States, 481 U.S. 412 (1987), Young Refining has a right to a jury trial to determine liability for penalties, although once liability is determined the amount of penalties is fixed by the judge. Note also that penalties and trebled damages would be recoverable against Hulsey, who also refused to comply with the Order. It appears that Hulsey is without resources, however, and therefore he is not proposed as a defendant.

XI. OTHER LEGAL ISSUES

Except for those legal issues discussed above, the Region does not expect other legal issues to arise in this matter.

XII. LITIGATION/SETTLEMENT STRATEGY

A. Settlement Negotiations and Cost Recovery Strategy

To date, no settlement negotiations have been conducted concerning cost recovery or penalties/punitive damages.

The focus of this case, as part of the Agency's Non-complier/Non-settlor Initiative, is on penalties and punitive damages. Therefore, any settlement should include a substantial penalty in addition to all of EPA's outstanding costs.

No groundwater monitoring or treatment was ordered as part of the removal. The Site did not score high enough to be placed on the NPL, and EPA anticipates no further EPA-directed response activity at the Site. The state has expressed interest, however, in ordering the PRP's to assess and, possibly, remediate groundwater. This possible response action should be kept in mind because settlement could be conditioned on Young Refining's agreement to comply with orders issued by the state with respect to groundwater monitoring and remediation.

B. Discovery

The proposed defendant has based its refusal to comply with the Section 106 Order in part on "insufficient evidence that Young Refining is a PRP". Even though current evidence is substantial, discovery may be helpful to further develop the case for liability.

In order to further develop EPA's case for liability, it may be worthwhile to depose Hulsey (who thus far has been an uncooperative witness and has given inconsistent accounts of the dumping incident), Dr. Young, and a number of Young Refining employees who may have some knowledge of the dumping. It may also be worthwhile to depose Douglas Daniell to flesh out his account of the dumping. Additionally, Georgia EPD officials who investigated the dumping in 1976 could be deposed. The names of EPD officials who participated in the investigation are in EPA's Site file. (Exhibit 2, pages 109-144). Fred Liu, the owner of Continental, could be deposed to obtain information about the Young Refining/Continental joint venture, and the accumulation of wastes which presented a disposal problem. Further discovery may also be necessary to assess the financial ability of Young Refining to pay substantial penalties.

XIII. WITNESSES

The following witnesses would be expected to testify if this matter went to trial:

1. Don Rigger
   On-Scene Coordinator
   U. S. EPA Region IV
   345 Courtland Street, N.E.
   Atlanta, Georgia 30365
   (FTS) 257-3931

Mr. Rigger would testify as to the conditions at the Site prior to the removal conducted by Chem-Nuclear, the release or threatened release of hazardous substances at the Site, and the removal action conducted by Chem-Nuclear and overseen by EPA. In addition, Mr. Rigger will testify as to the conditions at the

Site which led to the issuance of the § 106 order in April, 1991, and the consistency of actions taken at the Site with the National Contingency Plan. Mr. Rigger could also testify as to Dr. Young's in-person statement made at EPA's offices on February 1, 1991. In the factual account related by Dr. Young at that meeting, Dr. Young acknowledged that the drums dumped at the Site came from Young Refining.

2. Douglas Daniell
   Supervisor, Environmental Health
   Douglas County Board of Health
   6704 E. Church Street
   Douglasville, Georgia 30134
   (404) 920-7311

Mr. Daniell would testify as to the dumping of eighty 55-gallon drums at the Site in 1976, which he observed after going to the Site in response to a citizen's complaint. Mr. Daniell will testify that when he went to the Site he saw the transporter, Bartlett B. Hulsey, engaged in dumping the drums; that Dr. Young, President of Young Refining, called Mr. Daniell the next day and stated that the drums had come from Young Refining and that Dr. Young had arranged with Hulsey to dispose of the drums. Mr. Daniell's affadavit is on file. (Exhibit 23).

3. Tex Ann Reid
   Waste Programs Branch
   South Cost Recovery Unit
   U.S. EPA Region IV
   345 Courtland Street, N.E.
   Atlanta, Georgia 30365
   (FTS) 257-5059

4. Financial Management Office
   U.S. EPA Region IV
   345 Courtland Street, N.E.
   Atlanta, Georgia 30365
   (FTS) 257-3278

Ms. Reid and the appropriate official from the Financial Management Office would testify in support of EPA's past costs, including payroll, travel and contract costs as well as indirect costs, enforcement costs and interest.

5. Fred Liu
   Continental Trading Company
   792 Windsor Street, S.W.
   Atlanta, Georgia 30315
   (404) 524-6744

Mr. Liu would testify about a waste recycling joint venture in which Mr. Liu's business, Continental Trading Company, and Young

Refining participated in the early 1970's. Mr. Liu will describe the activities of the joint venture and how the joint venture accumulated a substantial number of 55-gallon drums containing industrial wastes on Young Refining's property, which drums presented a disposal problem to the joint venture. Mr. Liu will also testify as to his payment of $10,000 to Young Refining to pay for the costs of disposing of accumulated drums. No statement of Mr. Liu's is on file, although Assistant Regional Counsel David Harbin's notes of an interview with Liu are in the file. (Exhibit 7).

6. Dr. C. B. F. Young
   Young Refining Corporation
   7982 Huey Road
   Douglasville, Georgia 30134

Dr. Young would be an adverse witness, but much of his testimony would be helpful to EPA. Dr. Young would testify as to the activities of the joint venture described above, the accumulation of drums which presented a disposal problem, and his arrangement with Bartlett B. Hulsey to dispose of drums. Until recently, Dr. Young has admitted that the drums at the Site were from Young Refining. However, based on Hulsey's recent statement that he did not dump any drums at the Site, Dr. Young no longer admits that Young Refining's drums were dumped at the Site. A written account submitted by Young Refining's attorneys, which purports to be a summary of Dr. Young's recollection of the dumping incident, is in the file. (Exhibit 3, cover letter). Also, Assistant Regional Counsel David Harbin's notes of an interview with Dr. Young are in the file (Exhibit 6). Both the notes and the written summary admit that the drums buried at the Site came from Young Refining.

7. David Harbin
   Assistant Regional Counsel
   U. S. EPA Region IV
   345 Courtland Street, N.E.
   Atlanta, Georgia 30365
   (FTS) 257-2335

Mr. Harbin attended the February 1, 1991 meeting at EPA's offices at which Dr. Young gave a factual account of the dumping at the Site. Dr. Young admitted that the drums dumped at the Site came from Young Refining in that account. Mr. Harbin's notes of this meeting are in the file, and are attached as Exhibit 6 to this referral.

8. Bartlett B. Hulsey
   1970 Britt Road
   Douglasville, Georgia 30134

Mr. Hulsey is an adverse witness whose credibility will be so easily attacked that his testimony will be helpful to EPA. Mr. Hulsey transported drums to the Site. Douglas Daniell observed Hulsey at the Site burying drums, and according to Dr. Young's previous statement, Dr. Young observed him burying drums at the Site also. Dr. Young, by his own admission, arranged with Hulsey to dispose of drums. In a written response to the Order, Hulsey stated that he took drums to the Site for Young Refining but was prevented from dumping any drums by a government official. In response to a subsequent 104(e) request, Hulsey stated that he did not take any drums to the Site. Instead, he stated that he was at the Site covering tires with dirt for the property owner when trucks carrying drums to the Site arrived from some unknown location, and Hulsey sent them away because he did not want drums dumped where he was engaged in covering tires with dirt. EPA cannot predict what Hulsey would say on the stand. A thorough deposition will be needed if we are to use Hulsey as a witness.

APPENDIX A - LIST OF EXHIBITS

Exhibit		Date
1.	Site Screening Inspection Report	May 24, 1989
2.	Technical Assistance Team, Final Report, Basket Creek Drum Disposal Site	May 2, 1990
3.	Response of Young Refining to Informal Information Request	February 12, 1991
4.	EPA Section 106 Administrative Order	April 11, 1991
5.	Memo from ATSDR	May 15, 1990
6.	Meeting Notes, Statement of Dr. Young	undated
7.	Meeting Notes, Statement of Fred Liu	undated
8.	Young Refining Response to § 106 order	April 25, 1991
9.	Chem-Nuclear Response to § 106 order	April 26, 1991
10.	B. B. Hulsey Response to § 106 order	April 17, 1991
11.	Continental Response to § 106 order	April 22, 1991
12.	Supplemental Continental Response to § 106 order	April 24, 1991
13.	Letter from Continental's counsel to EPA	May 10, 1991
14.	Request for Information to Young Refining	May 15, 1991
15.	Response of Young Refining to Information Request	June 21, 1991
16.	EPA Letter to Young Refining re: Objections to Order	May 29, 1991
17.	Request for Information to B. B. Hulsey	May 15, 1991
18.	Response of B. B. Hulsey to Information Request	June 18, 1991
19.	Follow-up Information Request to Young Refining	Undated
20.	Young Refining Response to Follow-up Information Request	Sept. 11, 1991
21.	Follow-up Information Request to B. B. Hulsey	August 28,1991
22.	Memo of interview with B. B. Hulsey	Sept. 19, 1991
23.	Affadavit of Douglas W. Daniell	May 30, 1991
24.	EPA Interim Investigative Report, Interview Summaries	May 3, 1991
25.	Statement of Bobby Nunnaly, Former Arivec Chemicals, Inc. Employee	April 23, 1991
26.	Request for Information to Arivec Chemicals, Inc.	June 14, 1991
27.	Response of Arivec Chemicals to Information Request	Undated
28.	Removal Action Plan	July 12, 1991
29.	Cost Summary	Sept. 11, 1991
30.	Cost Documentation	to be forwarded
31.	List of Administrative Record Contents	undated
32.	ATSDR Memorandum (Health Consultation)	August 8, 1991
33.	EPA letter to Ms. Harriet Foster (transmitting results of well sampling)	undated
34.	Supplemental Response to Order from Young Refining	Sept. 11, 1991

I. SYNOPSIS OF THE CASE

This referral requests that a civil action be filed pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, as amended, for the reimbursement of removal response costs incurred by EPA in responding to the release or threatened release of hazardous substances at the Shaver's Farm site (the "Site") near Kensington, Georgia. This referral also requests that the civil action seek punitive damages under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), for Velsicol's failure to comply with the Adminstrative Order on Consent (AOC) in effect for this Site.

The Site is located on rural property in Walker County, Georgia. When hazardous substances were disposed at the Site, the Site was owned by Nancy Shaver Nation. In 1972, her father, Harold Shaver, entered into an agreement with Mose and Sidney Mathis, commonly referred to as the Mathis brothers, to allow the disposal of industrial waste on the property. Between 1972 and 1974 the Mathis brothers arranged for companies to dispose of waste at the Site and transported the wastes from the companies to the Site. Companies disposing of waste at the Site included Velsicol Chemical Corporation ("Velsicol"), GAF, Inc. ("GAF") and American Latex Company ("ALC"). Velsicol sent herbicide wastes and benzonitrile to the Site. GAF sent solidified and liquid latex wastes, and ALC sent rinsewaters from its latex manufacturing process.

The U.S. Environmental Protection Agency ("EPA") first conducted sampling at the Site in 1984 after learning of the Site from the Georgia Department of Natural Resources. Based on conditions at the Site, and focusing on wastes sent to the Site by Velsicol, EPA determined that a removal action was necessary and issued notice letters and unilateral adminstrative orders to potentially responsible parties ("PRPs") in 1987. These PRPs included Velsicol, Mose and Sidney Mathis, and Harold and Eretta Shaver. In 1988, EPA entered into an administrative order on consent ("AOC") under Section 106 of CERCLA, 42 U.S.C. § 9606, with Velsicol to perform the removal. The parties amended this AOC in 1989.

The AOC, as amended, required the excavation of contaminated soils at the Site and the treatment or off-site disposal of the contaminated soils. Velsicol began excavating soils and drums at the Site. Velsicol staged these soils and drums in a manner which did not comply with the AOC or workplans approved thereunder. In the excavation of the contaminated soils, Velsicol opened numerous trenches which flooded in the fall and winter of 1989. In conducting these activities, Velsicol committed numerous violations of worker health and safety regulations, in violation of the National Contingency Plan and the AOC. These conditions resulted in the release of hazardous substances or increased the likelihood of a release of hazardous

substances. For these reasons, EPA took the Site back from Velsicol in February 1990.

In April 1990, EPA executed an action memorandum authorizing the expenditure of $5,782,150 for removal activities at the Site. This action memorandum contained an exemption under Section 104(c) of CERCLA, 42 U.S.C. § 9604(c), from the $2,000,000 spending limitation on removals found in Section 104. In the removal, EPA excavated and placed into on-site storage cells approximately 60,000 cubic yards of contaminated soils. Pursuant to the action memorandum, EPA also constructed a wastewater treatment system to treat contaminated water in the excavation trenches. In October 1990, EPA completed the removal action. EPA's reported costs, as of August 8, 1992, total $5,474,266.95.

EPA issued a cost recovery demand letter to Velsicol on June 26, 1992, in the amount of $5,460,836.71 and issued an updated cost recovery demand letter to Velsicol on March 17, 1993, for the amount of past costs and accrued interest sought in this referral. EPA has attempted to negotiate a settlement of this matter with Velsicol. To date, these negotiations have been unsuccessful. EPA issued cost recovery demand letters to the Mathis brothers on July 17, 1992, and issued updated cost recovery demand letters to them on March 17, 1993, but they have simply denied liability and no negotiations have occurred with them. EPA issued cost recovery demand letters to GAF and Mydrin on February 23, 1993. Both of those parties have responded by indicating that they will review the matter prior to issuing a reply. EPA has not yet received those replies.

Running from the date of the initial cost recovery demand letter to Velsicol, interest has accrued in the amount of $142,410.58 as of January 22, 1993. Because the demand letters to the Mathis brothers, GAF and Mydrin were issued at later dates, interest accrued on those demand letters is lower. EPA will update the interest calculations prior to the filing of the complaint.

The primary defendant in this case is Velsicol, as a generator of hazardous substances disposed of at the Site. ALC, whose successor in interest is Mydrin, and GAF are also generators of hazardous substances disposed of at the Site. The Mathis brothers are potentially liable as operators of the Site and as tranporters of hazardous substances to the Site, but may be financially unable to reimburse EPA's past costs. Eretta Shaver and Nancy Shaver Nation are potentially liable as the current and past owners of the Site, but have potential defenses to liability. Nancy Shaver Nation is financially unable to reimburse any substantial portion of EPA's past costs or performing further work at the Site. Harold Shaver is deceased.

II. SIGNIFICANCE OF THE REFERRAL

A. This referral seeks recovery of $5,474,266.95 in past costs incurred through October 7, 1992, plus interest in the amount of $142,410.58, and a declaratory judgment for future costs. Additionally, this referral seeks the imposition of $13,906,876.86 in punitive damages under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), for Velsicol's failure to comply with the AOC.

B. This referral is not part of a special EPA initiative.

III. STATUTORY BASIS OF REFERRAL/LEGAL BASIS OF CASE

A. Applicable Statutes

1. Removal Authority

Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1), as amended, which gives the President authority to respond to the release or threatened release of hazardous substances, provides:

> whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment...

2. Liability for Past Costs

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), as amended, establishes liability for reimbursement of funds expended pursuant to Section 104(a)(1) of CERCLA. This Section provides as follows:

> Section 107(a). Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -
>
> (1) the owner and operator of a vessel or facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at

which such hazardous substances were disposed of, (3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under Subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of Chapter 98 of Title 26.

3. Liability for Punitive Damages

Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), provides:

If any person who is liable for a release or threat of a release of a hazardous substance fails without

> sufficient cause to properly provide removal or remedial action upon order of the President pursuant to Section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

B. Jurisdiction and Venue

Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), provides that the United States district courts shall have exclusive jurisdiction over all controversies arising under CERCLA. Section 113(b) further provides that venue shall in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has its principal office. In this case, the release or threatened release occurred at the Site in Walker County, Georgia, which is located in the Rome Division of the Northern District of Georgia. Eretta Shaver and the Mathis brothers are residents of Walker County. Both Velsicol and GAF are corporations incorporated in the State of Delaware, located in the District of Delaware. Mydrin is a corporation incorporated in the State of Georgia. Because the Site is located in Walker County, and because Mrs. Shaver and the Mathis brothers reside there, venue most appropriately lies in the Rome Division of the Northern District of Georgia.

IV. DESCRIPTION AND HISTORY OF THE SITE

A. Site Location and Description

The Site is located in Walker County, Georgia on property which is generally referred to as "Shaver's Farm". This property actually consists of three separate disposal areas which EPA refers to as "Shaver's I", "Shaver's II", and the "Chickamauga Road Landfill." The response costs for which EPA seeks reimbursement in this referral were expended solely on the area referred to as "Shaver's I", and for purposes of this referral, "Site" shall refer solely to Shaver's I. References to Shaver's II and the Chickamauga Road Landfill are included as necessary for purposes of clarification.

The Site lies on approximately 120 acres of relatively flat land located 5 miles north of LaFayette, Georgia and approximately one quarter mile east of Chickamauga Road. The land is mixed open fields and woodland. The geology at the Site is primarily highly fractured karst terrain. A stream runs through the Site and several springs and sinkholes are located near the Site. The population within one mile of the Site is 83 people, and the population within 4 miles of the Site is 3,786 people. The Kensington Water Service is the only public water supply in the

area, having 1,300 connections. Another 95 public wells are in use within four (4) miles of the Site.

Disposal at the Site occurred on approximately five (5) acres, much of which was subject to soil excavation during the removal. The excavated areas have been backfilled, and the Site now contains the two soil containment cells constructed by EPA, as well as a leachate storage, treatment and disposal system, a drum storage area and miscellaneous structures.

B. Site History

1. Ownership

At the time of disposal of hazardous substances at the Site between 1972 and 1974, the Site was owned by Nancy Shaver Nation (Ex. 81). She obtained title to the property in 1944, when her father, Harold Shaver, purportedly purchased the property in her name. (Ex. 41, 43, 44). Ms. Nation sold the property to William F. and Shelva Jean Morrisette in 1989. However, after learning of the Site contamination, the Morrisettes sued for rescission of the sale. In a consent judgment dated November 13, 1989, Harold Shaver and his wife Eretta took title to the Site. (Ex. 1). Apparently, they took title to the Site voluntarily and only out of a sense of familial responsibility, rather than because of any legal obligation. (Ex. 44). Mr. Shaver died on November 3, 1990, and Eretta Shaver remains the current owner of the Site. (Ex. 81). The current location of the Morrissettes is unknown.

2. Operation

Prior to 1973, Shaver's Farm had served as an unpermitted community dump. As early as 1972, the Mathis brothers were disposing of GAF and ALC waste at the Site. (Ex. 86). Pursuant to a 1973 agreement between Mr. Shaver and the Mathis brothers, the Mathis brothers transported wastes to the Site for disposal, and in return, the Mathis brothers paid Mr. Shaver $150 per month. From 1973 to January 1974, the Mathis brothers transported wastes generated by Velsicol, GAF and ALC to the Site for disposal (Ex. 63). Purportedly, neither Nancy Shaver Nation nor Eretta Shaver had any involvement whatsoever with the waste disposal arrangements. (Ex. 41, 43, 44). In addition to transporting the wastes to the Site, the Mathis brothers, assisted by their family members, conducted the actual waste disposal operations at the Site.

During and after the time that the Mathis brothers operated the Site, Mr. Shaver was also allowing the Standard Brands Chemical Company to dispose of waste in the Shaver's II area of Shaver's Farm. That waste included latex waste. The Mathis brothers were not involved with that operation, but documents from that time period often mention both facilities. In December 1973, the

State instructed the Mathis brothers to cease operations at the Site because the Mathis brothers' operations was coming too near a sinkhole on the Site. (Ex. 82, 85). By January 1974, the Mathis brothers had ceased operations at the Site. (Ex. 83).

3. Initial Response Activities

EPA first learned of the Site from the Georgia Department of Natural Resources 1984. Initial sampling performed by EPA between 1984 and 1987 confirmed the presence of hazardous substances in the soil and the springs at the Site. (Ex. 3, 4, 5, 6, 7). Based on this information, in 1987 Region IV issued a unilateral administrative order ("UAO") to Velsicol, Mr. and Mrs. Shaver, and the Mathis brothers requiring performance of a soil removal at the Site. (Ex. 9). However, because of apparently unworkable deadlines in the UAO, EPA agreed to forego enforcement of the UAO. (Ex. 52, 53, 54).

On March 30, 1988, Region IV and Velsicol entered into an administrative order on consent ("AOC") under which Velsicol would perform the removal. (Ex. 10). In January 1989, EPA began negotiations with Velsicol on amendments to the AOC. (Ex. 55). EPA later formally notified Velsicol that aditional work was necessary under the AOC. (Ex. 56). On November 8, 1989, the parties modified the AOC. (Ex. 11). This AOC, as modified, was the operative document under which Velsicol attempted to perform removal response actions at the Site.

C. NPL Status

Shaver's Farm is not currently on the National Priorities List (NPL). However, the Region IV Site Assessment Section is currently examining the entire Shaver's Farm property, including Shaver's I, Shaver's II and the Chickamauga Road Landfill, for purposes of inclusion on the NPL.

D. Environmental Problems at the Site

Numerous sampling events have occurred at this Site. The following is a summary of those sampling results, as well as a discussion of the environmental threats posed by the Site.

1. Sample Results Prior to Action Memo

By the time EPA signed the final action memorandum and Section 104(c) exemption, repeated sampling events had occurred at the Site. EPA's final action memorandum summarized the maximum concentrations which had been detected to date. (Ex. 21).

Results of sampling conducted prior to EPA's issuance of its final action memorandum are included with this referral. (Ex. 3, 4, 6, 105, 108, 109, 111, 112, 114, 115).

2. Sample Results After Action Memorandum

After EPA took the Site over in February 1990, EPA conducted extensive sampling. For example, EPA's contractors took numerous samples during the excavation of the contaminated soil. For convenience, these results have been summarized (Ex. 8). However, the sampling results and supporting documentation are voluminous and are therefore not included with this referral. Those results are available at EPA's offices in Atlanta. Other post-action memorandum samplin results are also included with this referral. (Ex. 110, 113).

3. Human Health and Environmental Threat

EPA's action memorandum summarizes the threat which this Site poses to human health and the environment. (Ex. 21). The primary threats were exposure to hazardous substances at or near the surface and a threat to groundwater.

V. DESCRIPTION OF RESPONSE ACTION

A. Response Activities Conducted by Defendants

The AOC, as modified, required Velsicol to excavate and stage bulk wastes and contaminated soils, to be followed by the treatment or disposal of those materials. While the AOC modification was being negotiated, Velsicol conducted certain sampling and geophysical surveys. EPA also conducted geophysical surveys. Beginning on November 7, 1989, Velsicol began excavating areas of the Site which the geophysical surveys had identified as likely past disposal areas.

Pursuant to the AOC modification, Velsicol was only responsible for the removal of hazardous substances attributable to Velsicol. As set forth in the AOC modification, these hazardous substances were:

benzonitrile
benzoic acid
dicamba
3,6 dichlorosalicyclic acid

Of these four hazardous substances, EPA focused primarily on dicamba and benzonitrile.

The AOC modification set forth the following clean-up criteria for those hazardous substances:

- combined soil concentrations of benzonitrile and benzoic acid equal to or less than 25 parts per million by weight (ppm)

- combined soil concentrations of dicamba and 3,6 dichlorosalicyclic acid equal to or less than 25 ppm

EPA documentation concerning these clean-up levels are included in the administrative record and as exhibits to this referral. (Ex. 12, 13). Velsicol agreed to the appropriateness of these clean-up levels. (Ex. 14).

Soil failing the clean-up criteria described above was staged at the Site. Velsicol excavated approximately 7,500 to 10,000 cubic yards of contaminated soil. Velsicol staged approximately 4,000 cubic yards of these soils without proper liners, without covers, and on or in close proximity to a nearby floodplain. Velsicol also excavated between 600 and 650 drums from the trenches. Velsicol overpacked these drums, but failed to adequately characterize the wastes in those drums. Velsicol also staged these drums on or in close proximity to the floodplain.

Unusually heavy rainfall occurred between November 1989 and February 1990. This precipitation, in conjunction with Velsicol's site management practices, resulted in the flooding of the numerous excavation trenches opened by Velsicol. This flooding, in conjunction with Velsicol's soil and waste staging activities, resulted in the Site posing an increased threat.

Pursuant to the AOC, as modified, EPA agreed to accept responsibility for wastes at the Site which were not attributable to Velsicol. These other wastes, primarily the latex wastes, were placed into a separate waste pile for which EPA took responsibility. EPA executed an action memorandum authorizing $692,000 to pay for the anticipated costs of handling these wastes. (Ex. 18).

B. Response Activities Conducted by EPA

1. Description of the Removal Action

a. General Description

On February 2, 1990, EPA mobilized to the Site in response to a release of a gas from an uncharacterized drum. After this event, EPA did not relinquish control of the Site. Because of the deterioration in Site conditions caused by Velsicol's mismanaged removal activities, EPA notified Velsicol that EPA was taking control of the Site by letter dated February 14, 1990. (Ex. 15). EPA and Velsicol met soon thereafter to discuss the Site. At that meeting, EPA presented Velsicol with a list of the reasons that EPA was assuming control of the Site. (Ex. 16). Although Velsicol did respond in writing to EPA's decision and comments, Velsicol did not invoke dispute resolution under the AOC or otherwise dispute EPA's decision. (Ex. 17).

EPA signed an action memorandum on February 21, 1990, authorizing the expenditure of $1,978,000 at the Site. (Ex. 19). It soon became apparent this amount would be insufficient to complete the work at the Site. By memorandum dated April 3, 1990, Region IV requested approval of a $5,782,150 action memorandum and exemption from the 12 month/$2,000,000 limitations on response actions contained in Section 104(c) of CERCLA, 42 U.S.C. § 9604(c). (Ex. 20). By memorandum dated April 12, 1990, EPA's Office of Solid Waste and Emergency Response approved the exemption and the action memorandum. (Ex. 21).

The removal primarily consisted of the excavation of contaminated soil and the placement of that soil into two on-site containment cells which EPA constructed. Dicamba and benzonitrile wastes were found loose in the soil as well as in deteriorated drums. EPA excavated and stored approximately 60,000 cubic yards of soil and waste in the cells. The cells have a synthetic liner and leachate collection system on the bottom. The cells are covered by another synthetic liner as well as a layer of dirt, and are seeded with grass.

During the soil excavation, bulk latex waste and drums of latex waste were excavated along with the dicamba and benzonitrile wastes. The bulk latex waste was usually solidified, while the drummed latex wastes included both solids and liquids. Bulk latex waste which did not appear to be commingled with the Velsicol wastes was generally placed back in the ground. If sampling indicated that latex wastes were contaminated with hazardous substances attributable to Velsicol at concentrations above clean-up levels set in the AOC, EPA placed those wastes into the storage vaults. If sampling indicated that drummed latex waste was not contaminated at levels above the clean-up criteria set forth in the AOC as modified, EPA overpacked the drums of latex waste, and stored the overpacks on Site. The overpacks of latex waste totalled 280 drums, all of which are still located at the drum storage area at the Site.

Material excavated by EPA consisted primarily of contaminated soils and bulk wastes, including trash. EPA conducted extensive sampling during the course of the removal to document the levels of contamination in the wastes and soils. The results of this sampling have been summarized for convenience (Ex. 8) and are available at EPA's offices in Atlanta.

EPA's removal also contained and treated the rainwater and surfacewater which had collected in the excavated trenches. The action memorandum estimated that, prior to EPA resuming control of the removal activities, the trenches contained 1,000,000 gallons of water.

EPA contractors designed the storage vaults to include leachate collection systems and a vent system. Leachate from the cells is

treated in the on-site treatment system and is then disposed of on the contaminated portion of the Shaver's II area.

After EPA assumed control of the removal, EPA's contractors prepared weekly summaries of site activities referred to as pollution reports. (Ex. 64). EPA also took aerial photographs during this time (Ex. 66). In addition, EPA's On-Scene Coordinators and Technical Assistance Team ("TAT") contractor kept daily log books throughout the entire removal (Ex. 65). EPA also made extensive photographic documention during the entire removal. (Ex. 67). This documentation provides the best detailed description available of response actions at the Site.

EPA concluded its work at the Site on or about October 4, 1990. Immediately thereafter, EPA allowed Velsicol to return to the Site to take over site operation and maintenance activities. Pursuant to a plan approved by the On-Scene Coordinator, these activities include periodic inspections, operation of the leachate collection and treatment system, and erosion control of the vault.

2. Community Relations

Because of low community interest, community relation activities have been limited to the issuance of press releases.

3. ATSDR Evaluation

On four occasions, ATSDR reviewed Site information and provided a written opinion to EPA. These written opinions are briefly summarized here.

By memorandum dated February 6, 1986, ATSDER stated that, based on data provided by EPA, dicamba was not present at levels of public health concern or in exposure pathways of concern. (Ex. 25).

By memorandum dated November 14, 1986, ATSDR stated that it did not have enough information to make an assessment. "Unless you can document high concentrations, or that drums are buried on Site, an assessment can not be made." (Ex. 26).

By memorandum dated April 29, 1988, ATSDR again stated that it did not have enough information to properly assess the threat which the Site posed. However, based on the presence of buried drums, ATSDR did recommend the implementation of source control measures to prohibit the migration of contaminants into the groundwater. (Ex. 27).

By memorandum dated April 6, 1990, ATSDR concluded that the Site did pose a threat to public health. ATSDR, noted, however, that

it could not assess the degree of threat with the data then available to it. (Ex. 28).

4. Status of the Administrative Record

The notice of availability of the administrative record file was published on January 31, 1992. (Ex. 22). The local repository is located at:

Lafayette Walker County Public Library
P.O. Box 707
Lafayette, Georgia 30728

Velsicol was the only person to file comments on the administrative record file. (Ex. 23). Those comments have been added to the administrative record file. Prior to certification of the administrative record, EPA will also generate a responsiveness summary for those comments. An index to the administrative record file is included as Exhibit 24 to this referral. The entire eleven (11) volume administrative record file will be forwarded upon request.

This removal did not fully comply with the community relation requirements of the NCP because the administrative record file was not made available within sixty days of initiation of on-site activities, as required by 40 C.F.R. § 300.415(m)(2)(i). However, this error does not serve to prejudice the defendants. Initially, it should be noted that public comment periods on removal administrative record files is discretionaly with the Agency. 40 C.F.R. 300.820(b)(2). Additionally, as stated above, a public comment period was provided and Velsicol did submit comments. Velsicol's comments will be part of the administrative record when it is certified to the court, and Velsicol therefore has the benefit of submitting those comments. Finally, even had the administrative record file been made available in a timely fashion, EPA's removal was already in full progress by the time that administrative record file would have been made public. Nothing that would have been submitted by commenters at that time would have altered EPA's response actions.

GAF and Mydrin and not been specifically notified of the removal action. Moreover, Mydrin had never received any notification of liability at the Site prior to the removal. Rather than face potential challenges to EPA's remedy selection based on inadequate opportunity to comment, the United States could grant a opportunity for public comment to GAF and Mydrin. In light of the fact that a public comment period was discretionary in this case, however, such a public comment period should be unnecessary.

VI. NATURAL RESOURCE DAMAGE CLAIMS

No assessment of natural resource damages has been made at this Site.

VII. PRIMA FACIE CASE, LIABILITY AND DESCRIPTION OF POTENTIAL DEFENDANTS

A. Prima Facie Case

1. Introduction

To establish a prima facie liability in a CERCLA cost recovery suit, a plaintiff must prove:

(1) that the site in question is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. §9601(19);

(2) that a release or threatened release of hazardous substances has occurred;

(3) that the release or threatened release has caused the plaintiff to incur response costs; and

(4) that the defendant is a responsible person under Section 107(a) of CERCLA, 42 U.S.C. §9607(a).

This subsection will discuss the first three elements identified above. The fourth element will be discussed in the portions of subsection B of this Section pertaining to each defendant.

1. The Site is a facility

Section 101(9) of CERCLA, 42 U.S.C. § 9601(19), defines "facility" to include landfills or "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." As described throughout this referral, hazardous substances are located at this Site. The Site is therefore a facility as that term is defined by CERCLA.

2. A Release or Threatened Release of Hazardous Substances has Occurred at the Facility

At the time EPA issued the final action memorandum and Section 104(c) exemption, there was a release, as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), or threatened release of hazardous substances at the Site. This release or threatened release is evidenced by the soil piles, hundreds of improperly staged drums, drums and wastes in the ground, and the contaminated water in the open trenches. Sampling results

confirming the presence and level of hazardous substances are described in Section IV(D) of this referral.

3. The Release or Threatened Release of Hazardous Substances has Caused the Plaintiff to Incur Response Costs

As set forth in EPA's action memorandum, EPA conducted the removal at the site as a result of the release or threatened release of hazardous substances at the Site. As indicated in the action memorandum, EPA's action was taken particularly in response to the release or threatened release of the hazardous substances attributable to Velsicol. (Ex. 21).

B. Liability and Description of Potential Defendants

1. Velsicol Chemical Company

a. Description.

Velsicol arranged for the disposal of hazardous substances at the Site. Velsicol is therefore potentially liable as a "generator" under Section 107(a)(3) of CERCLA, 42 U.S.C. §9607(a)(3).

Courts have held that in order to hold a defendant liable under Section 107(a)(3) of CERCLA, a plaintiff must establish that the defendant:

(1) disposed of its hazardous substances;

(2) at a facility which now contains hazardous substances of the sort disposed of by the generator; [and]

(3) that there is a release or threatened release of that or some other type of hazardous substance;

(4) which causes the incurrence of response costs.

New York v. Exxon Corporation, et al., 766 F.Supp. 177 (S.D.N.Y. 1991). Each of these four elements is satisfied with respect to Velsicol.

(i) Hazardous Substances

(aa) Hazardous Substances

Velsicol manufactured an herbicide known as Banvel at its plant in Chattanooga, Tennessee. In an October 9, 1984, response to a Section 104(e) information request, Velsicol provided an analytical description for the Banvel waste. (Ex. 31). In a letter to Tennessee authorities in 1974, Velsicol identified the active ingredient in BANVEL as 3,6 dichloro-0-anisic acid.

(Ex. 29). That compound is also referred to as dicamba and is a listed hazardous substance under CERCLA.

At its Chattanooga plant, Velsicol also generated a waste generally referred to as benzonitrile residue. This waste consisted of still bottoms from a benzene distillation unit. In letters to Georgia authorities in 1974 and 1977 regarding another Site, Velsicol provided an analytical description for the benzonitrile residue. (Ex. 30, 94). In the October 9, 1984, Section 104(e) response, Velsicol provided an analytical description of the benzonitrile waste consistent with the one above. (Ex. 31). Benzonitrile is a listed hazardous substance under CERCLA.

(bb) Disposal of Velsicol Waste at Site

The Mathis brothers transported the Banvel and benzonitrile wastes from Velsicol's Chattanooga plant to the Site for disposal from August 1973 until January 1974. In the October 9, 1984, Section 104(e) response, Velsicol indicated that it had disposed of 5,268 55-gallon metal drums of benzonitrile residue at Mathis brothers disposal facilities in Walker County. In that response, Velsicol indicated that it disposed of 3,073 41-gallon fiber drums of dicamba wastes at those disposal facilities. (Ex. 31).

Disposal facilities operated by the Mathis brothers included the Site, the Chickamauga Road Landfill, and a nearby facility known as the South Marble Top Road Landfill, a current NPL Site. They owned and operated those other sites, and transported waste from Velsicol, GAF and ALC to these sites for disposal. After ceasing operations at the Shaver's I area, the Mathis brothers received a permit to operate the South Marble Top site in April 1974. (Ex. 84). The Mathis brothers are currently suing Velsicol in regard to that Site. In 1974, after ceasing operations at the Site, the Mathis brothers also operated the Chickamauga Road Landfill.

Velsicol never clearly admitted that its wastes were disposed of at the Site. In a Section 104(e) response, Velsicol stated that the Mathis brothers disposed of Velsicol waste beginning in November 1973. (Ex. 96). In another Section 104(e) response, Velsicol only admitted that the Mathis brothers removed the wastes from the Chattanooga plant for disposal. (Ex. 43). Accounting documents provided by Velsicol in another Section 104(e) response confirm this. (Ex. 95). Statements made by the Mathis brothers to EPA personnel confirm that in late 1973 and early 1974, the Velsicol wastes went to the Site, as opposed to the other disposal areas. (Ex. 63). In a deposition for the private South Marble Top Road lawsuit, Sidney Mathis stated that the Mathis brothers took Velsicol waste to Shaver's Farm. (Ex. 98, p. 96, 116). This admission by Velsicol and these statements by the Mathis brothers are the primary evidence establishing that

the Velsicol waste went to this Site, as opposed to the other disposal sites operated by the Mathis brothers.

(ii) Presence of Velsicol Hazardous Substances at the Site

As described above, numerous sampling results confirm the presence of Velsicol's hazardous substances (dicamba and benzonitrile) at the Site. These included results of sampling taken prior to EPA assuming control of the removal (Ex. 6, 108), as well as results of sampling taken after EPA assumed control of the removal. (Ex. 8, 114, 115).

(iii) Release of Hazardous Substances

As described earlier in this referral, there was a release or threatened release of hazardous substances at the Site, satisfying this element of liability.

(iv) Which Causes the Incurrence of Response Costs

As described earlier in this referral, the release or threatened release of hazardous substances caused EPA to incur response costs, satisfying this element of liability. EPA's action memorandum explains the causal link between the release or threatened release and the incurrence of response costs. (Ex. 21).

b. Corporate History

This information indicated that Velsicol was a Delaware corporation in 1973. In 1976, Velsicol merged with Michigan Chemical Corporation, which was also a Delaware corporation. Michigan Chemical Corporation was the surviving corporation, and changed its name to Velsicol Chemical Corporation. (Ex. 100). Velsicol is still organized under the laws of the State of Delaware. (Ex. 99).

For much of the course of this project, Velsicol's technical representative on this Site has been Memphis Environmental Center ("MEC"). MEC is a corporate affiliate of Velsicol and performs consulting work for both Velsicol and other companies.

c. Contacts and Addresses

Velsicol is currently represented in this matter by:

Les Oakes
King & Spalding
191 Peachtree Street
Atlanta, Georgia 30303-1763

Phone: (404) 572-3314
Fax: (404) 572-5141

d. Financial Viability

According to a Dun & Bradstreet report obtained by EPA, Velsicol had assets of over $50,000,000. (Ex. 49). Based on these figures, it would appear that Velsicol is financially able to reimburse EPA for the past costs at this Site.

To date, Velsicol has not raised inability to pay as an issue.

e. Defenses

(i) Statutory Defenses

Velsicol has not asserted any of the statutory defenses contained in Section 107(b) of CERCLA, 42 U.S.C. § 9607(b). EPA is not aware that any of those defenses are available to Velsicol.

(ii) Inconsistency with the NCP

The only issue in the nature of a defense which Velsicol has raised pertains to whether EPA's costs were incurred in a manner not inconsistent with the NCP. Generally, Velsicol argues that EPA spent too much money on the containment vaults, which is only a temporary measure prior to final disposition of the contaminated materials. Because the containment vaults are much more sophisticated than the usual method in which wastes are "staged" pending final disposition, Velsicol hopes to incorporate those containment vaults into a permanent remedy, hopefully at a much lower cost than any other potential remedy which EPA may eventually select for the Site.

This "inconsistency" argument actually translates into an argument that EPA's costs were not reasonable. However, to be recoverable in a cost recovery action, EPA's costs need not be "reasonable". Under Section 107(a)(4)(A) of CERCLA, EPA may recover "all costs of removal or remedial action . . . not inconsistent with the national contingency plan." Costs which are not inconsistent with the national contingency plan are presumed to be reasonable. The defendant has the burden of proving that costs were incurred in a manner inconsistent with

the NCP. U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726 (8th Cir. 1986). In any judicial review of EPA's response actions, Section 113(j)(2) of CERCLA, 42 U.S.C. § 9613(j)(2), mandates that EPA's selection shall be upheld unless it is arbitrary and capricious or otherwise not in accordance with law.

To date, Velsicol has yet to identify any costs incurred in manner inconsistent with the NCP. Specific criticisms by Velsicol of EPA's response activities are contained in Velsicol's comments on the administrative record and in negotiation correspondence (Ex. 23, 97). To the extent these criticisms allege inconsistency, or that EPA's response action was arbitrary and capricious, they are without merit.

For example, Velsicol alleges in its comments that EPA designed the containment cells because of a concern over, but that little or no dioxin was found at the Site. Therefore, Velsicol alleges, EPA's design and construction of the cells was arbitrary and capricious and EPA can not recover any costs incurred as a result of designing for dioxin. However, EPA designed and built the sophisticated cells because of the vast amount of material being excavated. This volume, in conjunction with the great anticipated cost of arranging for final disposition, justified the storage of the material in such cells until such time and permanent disposition could be arranged.

(iii) Divisibility of Harm

In settlement negotiations, Velsicol has argued that certain of EPA's response costs were incurred solely because of the latex wastes, that the harm is therefore divisible and that Velsicol is therefore not responsible for those costs. In particular, Velsicol has argued that the size of the containment cells was increased by the presence of the latex wastes, and that some fraction of the costs of designing and constructing the cells is therefore attributable to the latex wastes.

Liability under CERCLA is joint and several. U.S. v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), ("R.W. Meyer"). To the extent that damages may be apportioned among multiple defendants, courts have typically held that a contribution action is the appropriate forum for such a determination. R.W. Meyer, supra. However, in at least one recent case, a court has held that a generator PRP is entitled to a determination on the issue of divisibility prior to judgment being entered in favor of the United States. U.S. v. Alcan Aluminum Corp., 964 F. 2d 252 (3rd Cir. 1992), ("Alcan"). That court held that if the harm at the Site is capable of reasonable apportionment, then a defendant should be held liable only for costs relating to the portion of the harm to which it contributed. Alcan, at 271. This decision in effect moves the divisibility determination to the initial

liability phase of a cost recovery action rather than a later contribution phase or a separate contribution action.

Under CERCLA, the defendants have the burden of proving the divisibility of harm and therefore damages. O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989). As part of establishing divisibility, the defendants must offer a reasonable basis for the apportioning of harm. Kramer, 757 F. Supp. 397. The Alcan court did not shift this burden, continuing to place the burden of proof on the defendant rather than the plaintiff. Alcan, at 271. In making this determination, the Alcan court noted that the analysis will require an assessment of the relative toxicity, migratory potential, and synergistic capacity of the hazardous waste at issue. Alcan, at 269.

As described above, EPA did place latex wastes into the containment cells. However, it is impossible to determine the amount of latex waste put into the cells, or the fraction of total cell volume attributable to the latex waste. The latex waste, as well as the Velsicol wastes, were generally commingled at the Site, and it was impossible to excavate the Velsicol wastes and contaminated soil without also excavating the latex wastes. Moreover, the overwhelming fraction of the material placed into the cells was contaminated soil, not bulk latex waste. For these reasons, EPA does not believe that costs can reasonably be apportioned based on proportional volume as suggested by Velsicol.

On a toxicity basis, apportionment would probably result in most or all costs being apportioned to Velsicol. As set forth in EPA's final action memorandum, EPA incurred response costs at the Site because of hazardous substances in Velsicol's wastes. If Velcisol wastes had not been present at the Site, EPA would not have conducted a removal. In addition, a great deal, although not all, of the GAF waste sent to the Site was solid latex, much of which EPA EPA left in the ground. Therefore, it is doubtful whether Velsicol can establish divisibility on a toxicity basis.

Velsicol may attempt to rely on the language of the AOC to support its claim that it is not liable for costs incurred because of the latex wastes. Paragraph 8 of the modification to the AOC states:

> 8. EPA shall assume responsibility for the transportation and disposal of all drums, related wastes, and contaminated soils which are not the responsibility of the Respondent pursuant to Sections 4, 5, 6, and 7 of this Modification. EPA agrees not to seek cost recovery from Respondent for the removal, transportation, and disposal of wastes which are not attributable to Respondent.

As described above, the Velsicol wastes and the latex wastes were generally commmingled at the Site. This provision of the AOC therefore has little application. Arguably, this provision would apply to the drums of latex which were found and stored separately at the Site, and the bulk latex which was uncovered, found to be uncontaminated, and placed back into the ground. EPA will make a final determination as to whether Velsicol is responsible for the drummed latex waste only after performing additional sampling to confirm that the drummed latex waste is not contaminated with dicamba or benzotrile. If and until such sampling is performed, even the drummed waste is the responsibility of Velsicol. In addition, the AOC is arguably is no longer operative due to Velsicol's violations, and Velsicol should not receive any benefit of the AOC.

2. Eretta Shaver

a. Description

Mrs. Shaver owned the Site during the time that EPA incurred most of its response costs and is the current owner of the Site. She is therefore potentially liable under Sections 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

Nancy Shaver Nation, the daughter of Mrs. Shaver, had owned the property since 1944. (Ex. 81). At that time, her parents, Harold and Eretta Shaver, purportedly purchased the property and put it in her name. On March 17, 1988, Nancy Shaver Nation sold the property to William F. Morrisette and Shelva Jean Morrisette. As a result of the Site contamination, the Morrisettes sued Nancy Shaver Nation for rescission of the sale. The parties entered into a consent judgment in which Eretta Shaver and her husband, Harold Shaver, took title to the property on November 13, 1989. (Ex. 1). Harold Shaver died on November 3, 1990.

To date, Mrs. Shaver has been cooperative, entering into an access agreement with EPA in 1990. On May 21, 1992, EPA sent a Section 104(e) information request to Eretta Shaver. (Ex. 42). She responded on July 8, 1992 and on September 2, 1992. (Ex. 43, 44).

b. Contact and Address

Mrs. Shaver is elderly and infirm. Her affairs are managed by her daughter, Vivian A. Compton. Mrs. Shaver can currently be contacted through Ms. Compton at:

Ms. Vivian A. Compton
Rt. 4 Box 80
Shaver Road
Chickamauga, Georgia 30707
(404) 375-4706

Eretta Shaver is currently represented in this matter by:

Brian Humphrey, Esq.
Miller & Martin
1000 Volunteer Building
832 Georgia Avenue
Chattanooga, Tennessee 37402
(615) 756-6600

c. Financial Viability

Based on her Section 104(e) response, Mrs. Shaver's annual income has averaged $47,800 over the past five years. The Section 104(e) response also indicates that Mrs. Shaver owns assets worth approximately $454,000. Of this amount, approximately $201,000 is in cash, certificates of deposits, and money market funds. This total also includes real estate appraised at $135,000.

d. Defenses

Eretta Shaver certainly knew of the contamination at the Site when she and Mr. Shaver acquired the Site in 1987. Therefore, she would not qualify for the "innocent landowner" defense, pursuant to Section 107(b)(3) and Section 101(35) of CERCLA, 42 U.S.C. § 9607(b)(3) and 9601(35). However, based on her lack of involvement at the Site, she may be able to establish a "third-party" defense solely under Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

Under Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), a PRP is not liable for response costs if the PRP can establish that:

(1) the release was solely caused by the acts or omissions of a third party;

(2) the third party was not an employee or agent of the PRP;

(3) the acts of omissions of the third party did not occur in connection with a contractual relationship existing directly or indirectly with the PRP;

(4) the PRP exercised due care with respect to the hazardous substances, and took precautions against the acts or omissions of the third party and consequences resulting from those acts or omissions.

Eretta Shaver had no involvement in the waste disposal activities which her husband arranged for on the property. In her Section 104(e) response, Mrs. Shaver stated that her husband handled the waste disposal matters himself and did not discuss those matters with her. (Ex. 43, 44). Therefore, she may be able to establish that the release was caused solely by a third party. There is

also no evidence that her husband was her employee or agent. Moreover, the waste disposal operations ceased long before she took title to the property, she apparently did nothing to aggravate the contamination at the Site, the U.S. had already begun its response activities when she took title to the property, and she was cooperative in granting access to the U.S. In light of these circumstances, she may be able to establish that she exercised the due care and took the precautions required to establish the defense.

Section 101(35) defines contractual relationship to include deeds or other instruments transferring title or possession. As Eretta and Harold Shaver voluntarily took title to the property as part of the settlement of the rescission suit, that transfer of title arguably constitutes a contractual relationship. However, assuming this to be true, Section 107(b)(3) states that only those contractual relationships of the PRP existing in connection with the acts or omissions of a third party which caused the release will defeat the defense (emphasis added).

At least one recent decision has addressed the "in connection with" language. Westwood Pharmaceuticals Inc. v. National Fuel Gas Corp., 964 F.2d 85, (2nd Cir. 1992) ("Westwood"). In Westwood, the Court interpreted the "in connection with" language to mean that only those contractual relationships bearing a relationship between the disposal or release activities and the defendant seeking to raise the defense will preclude use of the defense. In Westwood, the court found that a deed transferring title was a contractual relationship. The Westwood court held that a party seeking the defense was entitled to attempt to show that the deed was not a contractual relationship in connection with the disposal activities, and that the existence of the contractual relationship by itself did not entitle the plaintiff to summary judgment on the availability of the defense.

In Westwood, the defense was sought by the transferor of the property. Therefore, that factual situation is different from this case. In addition, no final liability decision has been issued in Westwood, so it remains to be seen what impact that decision will have. That decision appears to be inconsistent with EPA's position that taking title with knowledge of contamination precludes use of the defense. However, as the only contractual relationship at issue in this case is the transfer of title to Mrs. Shaver, a court could apply the same analysis as the Westwood court and find that the acts or omissions which caused the contamination were not performed in connection with a contractual relationship with Eretta Shaver, and that the defense is therefore available to her.

In light of the potential defense available to Mrs. Shaver, her apparent lack of culpability for conditions at the Site, the relatively small amount of consideration her husband received

from the Mathis brothers, and her relatively limited financial resources, Region IV does not recommend pursuing her for past costs.

3. Nancy Shaver Nation

a. Description

Nancy Shaver Nation owned the Site at the time of disposal of hazardous substances. She is therefore potentially liable under Section 107(a)(2) of CERCLA.

Ms. Nation is the daughter of Harold and Eretta Shaver. They purchased the property in her name in 1944. (Ex. 81). She owned the property until March 17, 1988, at which time she sold it to William F. Morrisette and Shelva Jean Morrisette. After the Morrisettes learned of the contamination on the property, they sued Nancy Shaver Nation for rescission of the sale. As part of the settlement of the matter, Eretta Shaver and Harold Shaver took title to the Site on November 13, 1989. (Ex. 1).

On May 21, 1992, EPA sent a Section 104(e) Information Request to Ms. Nation. (Ex. 40). She responded on June 11, 1992. (Ex. 41). In that response, Ms. Nation asserted that she never had any involvement with the Site.

b. Address and Contact

Ms. Nation can be contacted at:

Nancy Shaver Nation
33487 Perkins Road
Denham Springs, LA 70724

c. Financial Viability

Based on her June 11, 1992, response to the Section 104(e) Information Request, Ms. Nation is not financially viable as a defendant. (Ex. 41). Because she is not a financially viable defendants, Region IV does not recommend pursuing her for past costs.

d. Defenses

Ms. Nation has no statutory defenses available to her. Because she acquired title to the property prior to the disposal of hazardous substances, she does not qualify for the "innocent purchaser" defense under Sections 107(b)(3) and 101(35) of CERCLA, 42 U.S.C. §§ 9607(b)(3) and 9601(35).

In addition, it is unlikely that she can establish a "third-party" defense solely under Section 107(b)(3) of CERCLA,

42 U.S.C. §9607(b)(3). The elements of the third-party defense are discussed in the section of this referral pertaining to Mrs. Shaver. In light of the fact that Ms. Nation owned the property as an adult at the time the disposal occurred, it is doubtful whether she can establish that she took the requisite precautions and exercised the requisite due care to establish the defense. Further discovery would be necessary to ascertain the extent of knowledge and involvement which Ms. Nation had with regard to the Site.

4. Mose & Sidney Mathis

a. Description

The Mathis brothers transported hazardous substances from Velsicol, GAF and ALC to the Site. The Mathis brothers also operated the Site, arranging for the actual waste burial activities at the Site. They are therefore potentially liable under Sections 107(a)(1) and 107(a)(4), 42 U.S.C. §§ 9607(a)(1) and 9607(a)(4).

The Mathis brothers had selected this area for the disposal of those wastes, having entered into an agreement with Mr. Shaver. Under this agreement, the Mathis brothers paid Mr. Shaver $150 per month to dispose on the property between 1972 and 1974. (Ex. 63).

b. Addresses and Contacts

The Mathis brothers may be contacted at:

Mose Mathis	Sidney Mathis
Route 3, Box 15	Route 4, Box 495
Chickamauga, Ga. 30707	Chickamauga, Ga. 30707

In their suit against Velsicol over the South Marble Top Road Site, the Mathis brothers are currently represented by:

Charles Wright, Esq.
253 E. 11th Street
Chattanooga, Tennessee 37402
(615) 266-7074

For purposes of gathering information from the Mathis brothers, Region IV had recently worked through Mr. Wright. Mr. Wright has recently informed the Region, however, that he will no longer be representing the Mathis brothers for any matter other than the South Marble Top Road suit.

Region IV issued cost recovery demand letters to the Mathis brothers on July 17, 1992. (Ex. 71, 72). They replied individually on August 6, 1992. (Ex. 73, 74). In those replies,

both individuals denied liability. On March 17, 1993, EPA issued updated cost recovery demand letters to the Mathis brothers (Ex. 75, 76).

c. Financial Viability

On June 19, 1992, Region IV sent separate Section 104(e) Information Requests seeking financial information to Mose and Sidney Mathis. (Ex. 45, 46). By letter dated July 11, 1992, Sidney Mathis replied (Ex. 47). His reply, however, amounted only to a denial of liability and provided no financial information. Mose Mathis has not replied to the Information Request.

EPA investigators have determined that the Mathis brothers own three parcels of real property with a total value of $131,469. (Ex. 107). These properties include their private residences and the South Marble Top Road Landfill. In addition, it should also be noted that the property owned by Sidney Mathis is the location of an industrial waste dump. Therefore, the estimated value of those properties probably overstates their actual potential for generating funds available to EPA for reimbursment. Although this suggests an inability to pay past costs, EPA has yet to receive complete financial documentation. Until such information is obtained, EPA recommends pursuing the Mathis brothers in this action.

d. Defenses

The Mathis brothers have no known defenses available to them.

5. GAF, Inc.

a. Description

GAF arranged for the disposal of hazardous substances at the Site. GAF is therefore potentially liable as a "generator" under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

Courts have held that in order to hold a defendant liable under Section 107(a)(3) of CERCLA, a plaintiff must establish that the defendant:

(1) disposed of its hazardous substances;

(2) at a facility which now contains hazardous substances of the sort disposed of by the generator; [and]

(3) that there is a release or threatened release of that or some other type of hazardous substance;

(4) which causes the incurrence of response costs.

New York v. Exxon Corporation, et al., 766 F.Supp. 177 (S.D.N.Y. 1991). Each of these elements is satisfied with respect to GAF.

(i) Disposal of GAF Hazardous Substances

(aa) Hazardous Substances

GAF manufactured latex at its plant at 2120 Polymer Drive in Chattanooga, Tennessee for use in the local carpet industry. As part of the manufacturing process, GAF generated various latex wastes. Documents submitted by GAF as part of its Section 104(e) responses indicate that the Mathis brothers disposed of at least 800 tons of GAF wastes and variously describe the latex as solid or solid and/or liquid. (Ex. 36, 37). In their statements to EPA personnel, the Mathis brothers indicated that the latex wastes included liquids, sludges, and solids. (Ex. 63). GAF identified the waste as styrene-butadiene copolymer latex. (Ex. 35).

The GAF Section 104(e) responses do not provide any detailed chemical analysis of the GAF latex waste and do not therefore definitively identify any hazardous substances attributable to that waste. "Latex" is not itself a hazardous substance under 40 C.F.R. § 302.4. However, documents included in GAF's Section 104(e) responses do indicate that the latex contains hazardous substances.

In its Section 104(e) responses, GAF included a waste survey it prepared in 1979. (Ex. 37). This survey covered wastes produced at the Chattanooga Plant and the disposal sites which GAF used for that waste. The survey identifies the "Mathis Landfill" as a disposal site for GAF waste. In the portion of the survey pertaining to the Mathis Landfill, GAF describes its waste as consisting "... entirely of coagulated latex polymer from latex manufacturing and latex compounding. As indicated, traces of fillers, plasticizers, etc. may be present." The survey states that the latex waste contains various metals, including the hazardous substances antimony, arsenic, cadmium, copper, chromium, selenium and zinc. The survey also indicates that the latex waste contains certain classes of organic compounds, but does not specifically identify any of those compounds. Therefore, although the concentrations of these hazardous substances are not defined, these Section 104(e) responses indicate that the latex wastes contain hazardous substances.

In an attempt to better characterize the latex wastes at the Site, Region IV sampled five drums at the drum storage area at the Site. This sampling occurred on August 11, 1992. Each sampled drum contained a milky liquid, consistent with previous descriptions by the Mathis brothers of liquid latex wastes. The results of this sampling are included as Exhibit 61 to this referral. These hazardous substances include zinc, antimony and chromium, all of which GAF identified as components of its latex.

It is impossible to definitively attribute the wastes in the drums sampled by EPA to GAF. However, the material in the drums appears substantially different from the wastes attributable to Velsicol, and are consistent with the descriptions of the latex waste provided by the Mathis brothers. This, combined with the Mathis brothers' statement that only Velsicol, GAF and ALC waste went to the Site, create a strong inference that these wastes, and the hazardous substances contained therein, are attributable to GAF and/or ALC.

Because Mydrin asserts that its wastes were rinsewaters, (Ex. 39), any solid latex waste can be attributed to GAF. However, both ALC and GAF wastes included liquid. Therefore, it is impossible to definitively attribute any liquid latex wastes to GAF rather than ALC.

These results indicate that the latex waste contains hazardous substances, albeit in very low quantities. In should also be noted that the sampling results are not necessarily consistent with each other, as they each identify different hazardous substances attributable to the latex waste.

(bb) Disposal of GAF Hazardous Substances at the Site

In responses to Section 104(e) information requests, GAF admitted employing the Mathis brothers to transport latex wastes for disposal (Ex. 33, 34, 35). The GAF documents do not admit that GAF waste was disposed of at the Site. However, in statements which the Mathis brothers made to EPA personnel, the Mathis brothers indicated that they disposed of solid and liquid GAF latex wastes at the Site, rather than some other disposal facility, in 1973 and 1974. (Ex. 63). In addition, in its comments on the administrative record, Velsicol has presented to EPA documents which Velsicol contends it found at the Site. (Ex. 23). These documents are on GAF letterhead and confirm that at least some GAF materials were found at the Site, making it even more likely that GAF latex waste went to the Site.

(ii) Presence at Site of GAF Hazardous Substances at the Site

The GAF Section 104(e) responses identify hazardous substances in the GAF latex waste. (Ex. 37). As explained above, sampling results indicate that the drummed latex waste at the Site contained some of the same hazardous substances as identified by GAF. (Ex. 61). Other sampling of soil and surface water performed by EPA at the Site also indicate the presence of the same type of hazardous substances identified by GAF. These other sampling results are included with this referral. (Ex. 113).

(iii) Release of Hazardous Substances

As described earlier in this referral, there was a release or threatened release of hazardous substances at the Site, satisfying this element of liability.

(iv) Which Causes the Incurrence of Response Costs

As described earlier in this referral, the release or threatened release of hazardous substances caused EPA to incur response costs, satisfying this element of liability. EPA's action memorandum explains the causal link between the release or threatened release and the incurrence of response costs. (Ex. 21).

Admittedly, had Velsicol wastes not been present at the Site, EPA would not have required a removal at the Site and would not have incurred response costs at the Site. However, the Exxon court held that a plaintiff need not prove that a particular defendant's waste caused the incurrence of response costs in order to establish that defendant's liability under Section 107(a). Specifically, the court stated:

> The plain statutory language does not require a CERCLA plaintiff to establish that a particular defendant's waste caused the plaintiff to incur response costs. The statute requires only that there be "a" release of "a" hazardous substance. 42 U.S.C. §9607(a). It does not even require that there be a release of the defendant's waste. Thus, it is sufficient for the [plaintiff] to establish that there was a release of any hazardous substance at [the facility], causing the [plaintiff] to incur response costs.

Exxon, at 37. Citing approvingly to Exxon, the Alcan court noted that the "... Government must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs." Alcan, at 266. EPA incurred response costs as a result of the release or threatened release of other hazardous substances at the Site. Consistent with Exxon and Alcan, these conditions establish GAF's liability under Section 107(a).

EPA responded at the Site because of the Velsicol hazardous substances. However, the presence of the latex wastes, with the hazardous substances contained therein, did contribute to an increase in EPA's costs. EPA placed latex waste in the containment cells when that latex waste appeared to be contaminated with Velsicol wastes above clean-up levels. The presence of the latex wastes in the containment cells increased, by some unknown amount, the size and therefore the cost of the containment cells. Therefore, the latex wastes did, to some degree, cause EPA to incur response costs.

The Exxon and Alcan cases involved liability at facilities to which many generators sent waste and contributed to the "soup" of hazardous substances present. In recognition of the virtual impossibility of linking any specific generator with specific hazardous substances at a multi-generator, multi-hazardous substance site, the Exxon court and other courts have adopted the standard set forth in Exxon. Other courts, however, have adopted a more stringent standard of liability and have held that a defendant's waste must contain some threshhold amount of hazardous substances, for example, in excess of some promulgated standard, in order to cause the incurrence of response costs and in order for that defendant to be liable as a generator. Amoco v. Borden, 889 F. 2d 664 (5th Cir. 1989), ("Amoco"); Louisiana-Pacific Corp. v. Asarco, 735 F. Supp. 358 (W.D. Wash. 1990), ("Asarco").

The Amoco case did not involve multiple generators, and the "soup" problems inherent in such cases were not of concern there. Moreover, the Amoco court explicitly recognized the unique problems arising in the multiple-generator cases. The Exxon court noted the distinction and noted that the Amoco reasoning might merit more consideration if only a single generator were involved. As the Exxon case involved multiple generators, the Exxon court declined to follow the more stringent liability test. As described in Exxon, Asarco was a multiple-generator case in which the court apparently overlooked distinction between single- and multi-generator sites noted in the Amoco line of cases. The Alcan court respectfully disgreed with Asarco.

This case involves only three generators, one of which (Velsicol) contributed hazardous substances uniquely different from the other two generators. Under these conditions, a court could arguably find that the Amoco/Asarco rulings are controlling, rather than the Exxon line of cases.

b. Corporate History

According to a Dun & Bradstreet Report, GAF was purchased, effective March 29, 1989, in a management buyout effectuated through a purchasing corporation, "Newco Holdings, Inc." (Ex. 50). EPA was unable to obtain corporate information prior to that date. After the transaction, Newco Holdings Inc., changed its name to GAF Corporation. (Ex. 102). The structure and detail of this transaction are unclear. The predecessor GAF corporation was liquidated, and its assets and liabilities distributed to its subdivisions. (Ex. 50). GAF is currently incorporated in the State of Delaware. (Ex. 101).

c. Contacts and Addresses

EPA's most recent contact with GAF on this matter has been:

Leonard P. Pasculli
Senior Counsel
GAF Corporation
1361 Alps Road
Wayne, New Jersey 07470-3687
(201) 628-3546

EPA issued a cost recovery demand letter to GAF on February 23, 1993. (Ex. 77). Prior to that date, EPA had issued numerous Section 104(e) Information Requests to GAF, both prior to and after EPA's response actions. In a Section 104(e) Information Request dated August 14, 1984, EPA notified GAF of its potential liability at the Site. (Ex. 32).

d. Financial Viability

EPA obtained a Dun & Bradstreet report which indicates that GAF had total assets of $1,829,225,000 as of December 31, 1989. (Ex. 50). The report also indicates that GAF had sales of $771,647,000 in 1989. EPA therefore anticipates that GAF is financially able to particpate in the reimbursement of EPA's costs.

e. Defenses

(i) Statutory Defenses

EPA is not aware that GAF can establish any of the statutory defenses available in Section 107(b) of CERCLA, 42 U.S.C. §9607(b).

(ii) Divisibility

Based on the Alcan decision, GAF may attempt to argue that EPA's removal focused solely on the hazardous substances generated by Velsicol and that GAF hazardous substances therefore caused only a portion of the response costs incurred by EPA. As discussed in the Velsicol section of this referral, there is little or no basis to apportion the harm on a volumetric basis. On a toxicity basis, however, GAF may be able to argue successfully that the costs at the Site are attributable to the Velsicol wastes.

(iii) Third-Party

The Exxon court stated that an attempt to impose a causation requirement for cost recovery liability should more appropriately be treated as an attempt to establish an affirmative defense

under Section 107(b) of CERCLA, 42 U.S.C. §9607(b). These defenses incorporate the concept of causation. In particular, such an argument would be an attempt to establish a "third-party" defense under Section 107(b)(3). At this Site, GAF would be arguing that the only released substances that caused the incurrence of response costs were hazardous substances generated by a third party, i.e., Velsicol. In Exxon, the court assessed whether the defendant could establish a Section 107(b)(3) "third-party" defense to show that the response costs were caused only by other generators.

Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), provides that there shall be no cost recovery liability for a person who can establish by a preponderance of the evidence that the release or threat of release and damages resulting therefrom were caused solely by

> an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual relationship arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by the preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

In Exxon, the defendant claiming the third-party defense was a generator whose substances were disposed at the Site. That generator had a contractual arrangement with the hauler which transported the wastes to the Site and which was also a PRP. The Court held that the existence of that contractual arrangement was sufficient to preclude that defendant from successfully asserting the third-party defense.

At Shaver's Farm, GAF had an arrangement for the Mathis brothers for the disposal of GAF's latex wastes. The Mathis brothers are also PRPs at the Site, because they operated the Site and transported the Velsicol, GAF and ALC wastes to the Site. Therefore, as held in a similar situation in the Exxon case, GAF can not establish that the release or damages were caused solely by a third party other than one whose act occurred in connection with a contractual relationship with the defendant.

To establish the third-party defense, the defendant must also establish by a preponderance of the evidence that it took due care with respect to the hazardous substances and that it took precautions against foreseeable acts or omissions of third parties. As GAF arranged with the Mathis brothers for the disposal of the latex wastes, it is unlikely that GAF can establish that it took the appropriate precautions.

6. Mydrin, Inc.

a. Description

ALC arranged for the disposal of hazardous substances at the Site. Mydrin, Inc., ("Mydrin") is the successor in interest to ALC and is therefore potentially liable as a "generator" under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

Courts have held that in order to hold a defendant liable under Section 107(a)(3) of CERCLA, a plaintiff must establish that the defendant:

(1) disposed of its hazardous substances;

(2) at a facility which now contains hazardous substances of the sort disposed of by the generator; [and]

(3) that there is a release or threatened release of that or some other type of hazardous substance;

(4) which causes the incurrence of response costs.

New York v. Exxon Corporation, et al., 766 F. Supp. 177 (S.D.N.Y 1991). Each of these elements is satisfied with respect to Mydrin.

(i) Disposal of ALC Hazardous Substances

(aa) Hazardous Substances

Mydrin is the successor to the American Latex Corporation, Inc. ("ALC"). ALC generated wastewaters at its plant at 129 Nance Road in Calhoun, Georgia. At this facility, ALC used a batch process to produce latex products and adhesives. (Ex. 87).

In a 104(e) response, Mydrin describes the ALC wastes as being wastewaters generated when rinsing product mixing tanks. (Ex. 39). Both Mydrin and a former ALC officer describe the wastes as containing latex (natural, neoprene and styrene-butadiene), calcium carbonate and Kaolin clay, as well as trace amounts of surfactants, polyacrylate thickeners, methyl-cellulos and catalysts. (Ex. 39, 87).

Mydrin provided no detailed analytical description of its waste of its products. However, in a Section 104(e) response, Mydrin provided a Material Safety Data Sheet ("MSDS") for its current latex product. (Ex. 38). That MSDS describes the current Mydrin Product as a "natural latex/butadiene/styrene", and indicates that the product contains ammonia and zinc, both of which are CERCLA hazardous substances.

According to statements made by a former ALC officer, the production process at the facility had not changed in 20 years. (Ex. 87). Therefore, there is a high likelihood that the MSDS sheet provided by Mydrin in its Section 104(e) response accurately reflects the composition of the ALC wastes from 1972 to 1974. This would establish that the ALC wastes contained, at a minimum, ammonia and zinc.

(bb) Disposal of ALC Hazardous Substances at the Site

As early as 1972, the Mathis brothers were disposing of ALC wastes at the Site. (Ex. 86). In responses to a Section 104(e) information request, Mydrin admits that Mose Mathis disposed of approximately 52,000 pounds of ALC wastewaters from July 1973 to August 1974. (Ex. 39). However, in this Section 104(e) response, Mydrin does not identify the disposal facility (Ex. 38, 39). In statements which the Mathis brothers made to EPA personnel, the Mathis brothers indicated that they disposed of the ALC wastes at the Site, rather than some other facility (Ex. 63).

(ii) Presence of ALC Hazardous Substances at the Site

Various sampling results indicate the presence at the Site of the zinc, which was a hazardous substances identified by Mydrin in its Section 104(e) responses. Those sampling results are included with this referral. (Ex. 61, 113).

Exhibit 113 is results of leachate from the soil containment cells. Exhibit 61 is the result of drum sampling on August 11, 1991. Each sampled drum contained a milky liquid, consistent with previous descriptions by the Mathis brothers of liquid latex wastes.

The material in the drums appears substantially different from the wastes attributable to Velsicol, and are consistent with the descriptions of the latex waste provided by the Mathis brothers. This, combined with the Mathis brothers' statement that only Velsicol, GAF and ALC waste went to the Site, create a strong inference that these wastes, and the hazardous substances contained therein, are attributable to GAF and/or ALC. Because Mydrin asserts that its wastes were rinsewaters, (Ex. 39), any solid latex waste can be attributed to GAF with a fair degree of

certainty. However, both ALC and GAF wastes included liquid. Therefore, it is impossible to definitively attribute any liquid latex wastes to ALC rather than GAF.

(iii) Release of Hazardous Substances

As described earlier in this referral, there was a release or threatened release of hazardous substances at the Site, satisfying this element of liability.

(iv) Which Causes the Incurrence of Response Costs

As described elsewhere in this referral, this element is satisfied at this Site.

b. Corporate History

ALC, Inc., was a Tennessee corporation at the time of the disposal of the wastes at the Site. In 1982, ALC, Inc. merged into ALC Inc. of Georgia, a corporation organized under the laws of Georgia, with ALC Inc. of Georgia being the surviving corporation. (Ex. 103, pp. 10 - 15). ALC Inc. of Georgia later changed its name to ALC, Incorporated. (Ex. 103, pp. 6 - 9). Effective August 1, 1990, ALC, Incorporated was merged with Backings, Inc., another Georgia corporation, with the surviving corporation renamed Mydrin, Inc. (Ex. 104, pp. 7 - 12). Mydrin, Inc., is currently organized under the laws of the State of Georgia. (Ex. 104, p. 1).

c. Contacts and Addresses

EPA's most recent contact with Mydrin, successor to ALC, has been:

Martin B. Wasser
Phillips, Nizer, Benjamin, Krim & Ballon
31 West 52nd Street
New York, New York 10019-6167
Telephone: (212) 977-9700
Telecopier: (212) 262-5152

EPA issued a cost recovery demand letter to Mydrin on February 23, 1993. (Ex. 78). Prior to that date, Mydrin had received Section 104(e) Information Requests but had never been notified of potential liability at the Site.

d. Financial Viability

On November 14, 1991, EPA obtained a Dun & Bradstreet financial report on Mydrin. (Ex. 51). The report indicates the company has sales in the $40,000,000 to $50,000,000 range but provides no other information. Based on this information, it appears that

Mydrin is financially able to participate in the reimbursement of EPA's past costs.

e. Defenses

This defendant has no known statutory defenses. Because the removal at the Site focussed solely on Velsicol's wastes, Mydrin might raise the same "divisiblity, and "third-party" defenses as GAF.

VIII. ENFORCEMENT HISTORY AND CONTACTS WITH POTENTIAL DEFENDANTS

A. Administrative Orders

EPA issued a UAO to Velsicol, Harold and Eretta Shaver and the Mathis brothers on October 2, 1987. (Ex. 9). Because of apparently unworkable deadlines in the UAO, and after a meeting between EPA and Velsicol on October 15, 1987, EPA apparently agreed to forego enforcement of that UAO and entered into negotiations with Velsicol for an AOC. (Ex. 52, 53, 54). As a result of negotiations, EPA and Velsicol signed an AOC which became effective on March 30, 1988. (Ex. 10). EPA later formally notified Velsicol that additional work was needed at the Site. (Ex. 56). In January 1989, EPA and Velsicol began negotiations to modify the AOC. (Ex. 55). The parties modified the AOC effective November 8, 1989. (Ex. 11).

After responding to the gaseous release from a drum in early February, 1990, EPA decided to take the Site back. As described above, EPA notified Velsicol by letter dated February 14, 1990, that EPA was taking the Site back from Velsicol. (Ex. 15).

B. Other Contacts and Settlement Efforts

1. Velsicol

EPA approached Velsicol in mid-1991, concerning the actual treatment or disposal of the wastes in the containment cells. At that time, the parties discussed modifying the AOC to reflect the current Site conditions. This modification would have allowed Velsicol to attempt to implement Velsicol's proposed bioremediation plan for the Site. Negotiations were unsuccessful and were quickly dropped.

EPA has issued numerous Section 104(e) information requests to Velsicol. Velsicol has responded to these requests on the following dates: October 9, 1984 (Ex. 31); October 6, 1987 (Ex. 95); and January 15, 1991 (Ex. 96).

Region IV issued a cost recovery demand letter to Velsicol on June 26, 1992. (Ex. 69). EPA issued an updated cost recovery demand letter on March 17, 1993. (Ex. 70).

Region IV met with Velsicol on August 4, 1992. In that meeting, Velsicol indicated that it intended to argue that some fraction of EPA's costs were incurred because of the presence of the latex wastes and that Velsicol's settlement offer would exclude such costs. Additional information has since been exchanged by the parties. For example, EPA has provided Velsicol with a narrative description of the services provided by EPA's contractors. (Ex. 93). EPA has also shared the results of its August 1992, latex sampling with Velsicol. (Ex. 92).

Despite the continued exchange of information, Velsicol has yet to make a settlement offer to EPA. By letter dated February 19, 1993, Velsicol presented a list of issues regarding various aspects of EPA's removal. (Ex. 97). The parties met on March 17, 1993, to discuss the contents of that letter.

2. GAF

EPA issued Section 104(e) information requests to GAF on August 14, 1984 and January 15, 1991. (Ex. 32, 34). The first information request contained notified GAF that it may be a PRP at the Site. GAF responded to the 104(e) requests on October 1, 1984, and February 12, 1991. (Ex. 33, 35). EPA issued cost recovery demand letter to GAF on February 23, 1993. (Ex. 77). In its initial response, GAF has done nothing except deny liability and state that it will be in further contact.

3. Mydrin

EPA issued a Section 104(e) information request to Mydrin in Janaury, 1991. Mydrin responded on January 21, 1991, and January 22, 1991. (Ex. 38, 39). EPA issued a cost recovery demand letter to Mydrin on February 23, 1993. (Ex. 78). In its initial response, Mydrin has indicated that it intends to provide additional information pertaining to its manufacturing process.

Until the demand letters were issued, EPA had never notified Mydrin of potential liability at the Site.

4. Mathis Brothers

EPA issued Section 104(e) information requests to Mose and Sidney Mathis on June 19, 1992. (Ex. 45, 46). Sidney Mathis replied on July 11, 1992. (Ex. 47). EPA issued a follow-up Section 104(e) information request to Sidney Mathis on July 17, 1992. (Ex. 48).

EPA issued cost recovery demand letters to Mose and Sidney Mathis on July 17, 1992. (Ex. 71, 72). They responded, denying liability, on August 6, 1992. (Ex. 73, 74). EPA issued follow-up

cost recovery demand letters to the Mathis brothers on March 17, 1993. (Ex. 75, 76).

5. Eretta Shaver

EPA issued a Section 104(e) information request to Eretta Shaver on May 21, 1992. (Ex. 42). She responded on July 8, 1992, and provided a follow-up response on September 2, 1992. (Ex. 43, 44).

Eretta Shaver granted access to the site for purposes of the removal, and EPA has filed a CERCLA lien on the property (Ex. 57).

6. Nancy Shaver Nation

EPA issued a Section 104(e) information request to Nancy Shaver Nation on May 21, 1992. (Ex. 40). She responded on June 11, 1992. (Ex. 41).

IX. COST RECOVERY

A. EPA's Past Costs

1. Cost Totals

Based on a set of EPA's normal cost accounting summaries dated August 8, 1992, EPA's past costs at Shaver's Farm total $5,567,236.33. These costs break down as follows:

Regional Payroll	$135,367.13
Headquarters Payroll	26,799.51
Indirect Cost	293,302.50
Regional Travel	14,207.73
Headquarter's Travel	8,138.22
Contracts Total	5,077,869.40
ATSDR	11,551.84
	$5,567,236.33

EPA's standard cost documentation package is included as Exhibit 58 and Exhibit 106 to this referral. By letter dated November 16, 1992, DOJ requested that EPA include "work performed" documentation with cost recovery litigation referrals. In accordance with that request, EPA has included that documentation with this referral. (Ex. 59).

If even more detail is needed, EPA's contractors generated daily cost summary forms referred to as "1900-55's". These forms provide a breakdown of certain contractor time spent and costs incurred on a daily basis. The contractors began generating these forms in January, 1990, shortly before EPA took over work at the Site. EPA has a complete set of these documents at the

Region IV offices. Because of their bulk, these documents have not been included with this referral.

Region IV filed a CERCLA lien on the Site on May 4, 1990. This amount claimed on the lien was for "costs in excess of $2,000,000 plus interest and administrative expenses". (Ex. 57).

2. Costs Not Sought

By this referral, EPA is not seeking recovery of all costs identified in the cost documentation package. The costs for which EPA seeks recovery in this referral do not include costs incurred by EPA for purposes of including the Shaver's Farm (Shaver's I, II and Chickamauga Road Landfill) on the NPL. Recovery of those costs would require that other persons who are PRPs for purposes of the Shaver's II area and the Chickamauga Road Landfill, but not for the Site, be included in this cost recovery action. Because the Site is not yet even proposed for the NPL, and in light of the additional resources needed to collect these costs, EPA believes that it is more appropriate to attempt to recover these costs when the Site is included on the NPL. These costs total approximately $92,969.38. Exhibit 119 identifies the the specific costs excluded. After subtracting this amount from the total past cost figure identified in the cost documentation package, the total past costs sought in this referral are $5,474,266.95.

It should also be noted that EPA's files reference a 1987 removal at the Chickamauga Road Landfill. In this removal, EPA spent $39,574.88 to dispose of 40 drums containing lead wastes. These costs were tabulated separately and are not included in the cost documentation for this Site. Because Velsicol did not generate these wastes, EPA is not attempting to recover these drum removal costs. The costs for this removal are arguably unrecoverable as the three year removal statute of limitation contained in Section 113(g)(2)(A) of CERCLA, 42 U.S.C. § 9613(g)(2)(A), expired in 1990.

3. Contractor Description

The following is a description of the contractor costs which EPA is seeking to recover through this referral.

1. W80100 Westinghouse Haztech, Inc. $4,393,635.29

Westinghouse-Haztech ("Haztech") was EPA's Emergency Response Clean-up Services ("ERCS") contractor for this Site. Haztech provided the personnel and heavy equipment to excavate the buried drums, remove the contaminated soils, construct the soil containment cells, and transport the soil to the cells. Haztech constructed and operated a water treatment system to treat the rainwater that collected the trenches excavated by Velsicol.

Haztech also subcontracted to other companies to provide specialized services, such as surveyors to detail the size of the storage cells, engineers to develop a line for the cells, and an aerial surveying service to photograph the entire site.

2. 0068017456 ICF 3,151.96

ICF provided sample preparation and analysis services to EPA.

3. 68010135 ICF 1,329.12

4. 0068016864 UBTL 465.30

UBTL provided laboratory analysis of soil, waste and water samples taken at the Site.

5. 0068017367 Roy F. Weston 282,472.84
6. 0068W0036 Roy F. Weston 45,536.01

Roy F. Weston ("Weston") was EPA's technical assistance team contractor at this Site. Weston provided contractor oversight, documentation of Site activities, health and safety plans, sampling support and cost tracking. Weston conducted geophysical monitoring which helped identify likely areas of excavation. Weston compiled the weekly pollution reports on Site activities which are included as Exhibit 77 to this referral.

7. 0068D90135 Viar 52,082.50

Viar performed laboratory analysis of soil, waste, and water samples taken at the Site.

8. 0068033482 Roy F. Weston 237,826.75

Roy F. Weston was the Emergency Response Unit ("ERU") contractor at this Site for EPA's Emergency Response Team. In its role as ERU contractor, Weston performed analytical support services at the Site. These services included operation of the mobil laboratory which EPA used at the Site.

9. 1RO874NASA AAA Reporting Co. 90.00

This amount was paid to a court reported for the transcription of interview notes.

10. 9004DX0110 Walker County Clerk 13.00

This amount was paid to file the CERCLA lien on the Site.

B. Statute of Limitations

On October 4, 1990, EPA concluded the activities authorized by the April 12, 1990, action memorandum. EPA believes that additional work is required at the Site, namely for the ultimated disposition of the wastes interred in the cells. EPA does not therefore consider this removal complete. However, for purposes of determining when the statute of limitations (SOL) may expire, a conservative view requires that the removal be considered completed in October 1990. The three year SOL contained at Section 113(g)(2)(A) would therefore expire in October 1993.

C. Statutory Interest

EPA issued a cost recovery demand letter to Velsicol on June 26, 1992. In accordance with Section 107 of CERCLA, statutory interest began to accrue, at least in relation to Velsicol, on that date. As of January 22, 1993, that interest totals appoximately $142,410.58. Because EPA issued demand letters to the other PRPs at a later date, the total interest due from them is smaller. EPA will update the interest calculations prior to the filing of the complaint.

Velsicol disputes the accrual of interest. EPA initially provided an updated cost figure, including interest, to Velsicol on January 26, 1993. (Ex. 89). Upon receipt of this information, Velsicol asserted that EPA agreed, in the parties' August 4, 1992, meeting to toll the accrual of interest until such time that EPA provided an updated demand letter and updated cost documentation package. (Ex. 88). EPA replied, specifically denying Velsicol's assertion. (Ex. 90). Velsicol responded, merely reiterating its position. (91). EPA then issued the updated cost recovery demand letter. (Ex. 70). In the updated cost recovery demand letter, EPA identified the interest that had accrued since the issuance of the initial cost recovery demand letter as well as newly incurred costs.

None of the EPA personnel at the August 4, 1992, meeting remember the issue of pre-judgment interest arising, much less a statement by EPA personnel that the prejudgment interest would cease to accrue. None of the EPA personnel at that meeting had the authority to make such a statement.

X. TREBLE DAMAGES

A. Liability

To establish Velsicol's liability for punitive damages under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), EPA must show that Velsicol failed, without sufficient cause, to provide response actions required by the AOC, as modified.

1. Velsicol Failed to Properly Provide Removal Action

EPA assumed control of the removal in February 1990 because Velsicol committed numerous violations of it approved workplan (Ex. 79) and created an imminent and substantial endangerment at the Site. Velsicol's conduct prior to EPA's assuming control of the removal, and the performance of response actions by EPA rather than Velsicol, amount to a failure by Velsicol to properly provide the response actions required by the AOC. In a letter dated February 14, 1990, Region IV formally notified Velsicol that EPA was taking the Site back. (Ex. 15). This letter summarizes the reason EPA took control of the Site. The parties then met to discuss EPA's decision. At this meeting, EPA provided Velsicol with approximately thirty pages of notes which documented the various workplan violations which Velsicol committed and the environmental problems which Velsicol had created or aggravated at the Site. (Ex. 16). Velsicol responded in writing to EPA's comments, but did not invoke dispute resolution or otherwise challenge EPA's decision to take the Site back. (Ex. 17).

The specific reasons leading to EPA assuming control of the Site are contained in the comments provided to Velsicol. (Ex. 16). Further detail on the daily events at the Site leading to this decision are contained in the OSC log books (Ex. 65) and reports generated by EPA's contractors at the Site. (Ex. 67). For example, Velsicol committed violations of health and safety requirements by having workers without personal protectice equipment and working in trenches that were not properly shored up. Velsicol also committed violations of its workplan by improperly staging soils and using improper equipment.

In the typical Section 107(c)(3) case, EPA seeks treble damages because of a PRP's blatant refusal to perform response actions required by an order. This case, however, involves the inadequate performance of response actions rather than a refusal to perform. While it appears that no judicial decision addresses such a case of inadequate performance, the wording of Section 107(c)(3) seems applicable in either situation. EPA has recently circulated a draft interim guidance entitled "Interim Guidance on Enforcement of CERCLA Section 106(a) Administrative Orders through Section 107(c)(3) Treble Damages and Section 106(b)(1) Penalty Actions" ("Interim Guidance"). (Ex. 85). In the Interim Guidance, EPA promotes the use of Section 107(c)(3) damages in cases of inadequate performance of response actions. Specifically, the Interim Guidance states:

> Treble damages may be available to EPA if the PRP does not "properly provide removal or remedial action" pursuant to a Section 104 or 106(a) order. The Agency interprets this clause to require the PRP to perform the response activities in the manner required by and

> in full accordance with the terms of the EPA-issued order. Performance must be timely, according to the schedules and technical specifications contained in the order, and any deviation from any technical or time requirement of the 106(a) order, without prior approval by EPA pursuant to the terms of the order, gives rise to a "failure to properly provide" a removal or remedial action.
>
> Treble damages may also be sought in instances of partial noncompliance, i.e., where a PRP fails to comply with some, but not all, of the terms and conditions of an AO. In these situations of partial noncompliance, EPA will calculate its potential punitive damage claim by trebling the costs EPA incurred to perform any response action necessitated as a result of the PRP's failure to fully comply with the order.
>
> .
> .
> .
>
> Lastly, under Section 107(c)(3), and assessment of punitive damages need not be predicated on any degree of PRP willingness to violate the order. Mere failure to "properly provide removal or remedial action" is sufficient to give rise to liability for the assessment of the punitive damages.

Interim Guidance, pp. 11-12. Region IV believes that this draft Interim Guidance document supports its position that Velsicol failed to properly provide the response actions required by the ROD and that Velsicol is subject it to Section 107(c)(3) damages.

2. Velsicol's Failure was without Sufficient Cause

In EPA's opinion, Velsicol's failure to properly provide the response actions required by the AOC was without "sufficient cause." Section 107(c)(3) does not define "sufficient cause." In the context of a refusal to perform response actions, Courts have defined "sufficient cause" to mean an objectively reasonable, good faith belief that one has a defense to complying with an order. U.S. v. Parsons, et. al. ("Parsons"), 723 F.Supp. 757 (N.D. Ga. 1989). Because no courts have dealt with the issue in the context of inadequate performance of response actions, the term has not been interpreted in that context. However, by drawing by analogy to the Parsons standard, "sufficient cause" could be interpreted to mean an objectively reasonable, good faith reason to have failed to properly provided the required response action.

In this case, EPA does not believe that Velsicol had an objectively reasonable, good faith reason to have failed to properly provided the response actions. EPA's letter to Velsicol summarizes the problems leading to EPA's assumption of control of the removal (Ex. 15). The OSC log books and the pollution reports prepared by EPA contractors document in greater detail the repeated warnings and advice provided by EPA to Velsicol of violations and of problems at the Site. (Ex. 65, 64). Rather than be the result solely of inclement weather, the act of a third party, or some other force majeuere event, the problems at the site were caused primarily by Velsicol's mismanagement of the response activities.

B. Amount of Punitive Damages

Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), provides that punitive damages may be up to three times the costs incurred by EPA because of a Respondent's failure to provide those response actions. In this case, not all of EPA's costs were incurred because of Velsicol's failure.

In general, only those costs incurred at and after the time EPA assumed control of the Site will be considered for purposes of Section 107(c)(3) damages. By letter dated February 14, 1990, EPA assumed control of the Site. (Ex. 15). By October 4, 1990, EPA had completed its removal and allowed Velsicol to return to the Site for purposes of maintenance activities. Therefore, those costs which are trebled should, at a minimum, included those costs incurred between February 14, 1990, and October 4, 1990.

Arguably, costs incurred after October 4, 1990, should also be trebled. In large part, these costs consisted of EPA's attempts to investigate this matter, negotiate a settlement and prepare this referral. However, EPA would have incurred many if not all of these costs even had EPA not performed Fund-lead activities. For example, EPA would still have had past costs to recover. Therefore, it may not be appropriate to seek costs incurred after October 4, 1990. Those costs are therefore not included in the calculation of treble damages set forth below.

EPA incurred costs for its TAT contractor both prior to and after EPA assumed control of the removal. After February 14, 1990, EPA would have incurred costs for this contractor regardless of whether EPA assumed control of the removal. Velsicol may argue that the TAT costs should therefore not be trebled. Because Any attempt to define the increase in TAT costs incurred as a result of the removal being performed Fund-lead will be imprecise, the entire TAT costs are included in the calculation of treble damages set forth below.

Based on those assumptions, EPA's costs to be trebled are $4,635,625.62. These costs break down as follows:

Regional Payroll	$45,029.59
Headquarters Payroll	24,813.29
Regional Travel	8,611.29
Headquarters Travel	7,722.59
Indirect Costs	95,245.50
Westinghouse Haztech (ERCS Contract)	3,917,891.98
Roy F. Weston (TAT Contract)	280,465.55
Roy F. Weston (ERU Contract)	203,763.33
VIAR	52,082.50

Based on these costs, the amount of treble damages sought is $13,906,876.86.

A more detailed breakdown of the contractor costs is provided in Exhibit 15 to this referral. This exhibit lists, by date of work performance, each invoice on which the contractors billed for work performed at the Site. For purposes of calculating the contractor costs to be trebled, EPA considered the costs on those invoices which bill only for work performed after February 14, 1990, but prior to October 4, 1990. For each contractor, Exhibit 105 identifies this total. Those invoices are contained in the portions of the cost documentation package pertaining to each contractor. (Ex. 58).

Any invoice for work performed prior to February 14, 1990, or after October 4, 1990, was not considered. Similarly, invoices which billed for work performed both within and outside that period were not considered for purposes of calculating costs to be trebled. For such "overlapping" invoices, it is impossible to identify and separate, from the face of the invoice, the amount billed for work performed within, as opposed to outside, that period. Rather than use those invoices, EPA referred to the 1900-55 cost reports which cover the portions of the same time periods covered by those invoices. Because these 1900-55 reports identify costs incurred on a daily basis, EPA has used these 1900-55 reports to identify only those costs included on the "overlapping" invoices which were incurred on after February 14, 1990, or prior to October 4, 1990. These 1900-55 reports are included as Exhibit 60 to this referral.

A summary of payroll, travel and indirect costs incurred during this period is included as Exhibit 106 to this referral. For convenience, cost documentation material for these costs have been excerpted from the cost documentation package (Ex. 58) and have been reproduced in Exhibit 7.

XI. OTHER LEGAL ISSUES

Potential legal issues related to each PRP are discussed in Section VII of this referral.

XII. LITIGATION/SETTLEMENT STRATEGY

A. Settlement Negotiations and Cost Recovery Strategy

The three generator defendants have all received cost recovery demand letters. EPA has already begun negotiations with Velsicol, and is expecting to begin negotiations with GAF and Mydrin in the near future. Velsicol has indicated that these three defendants have also initiated discussions between themselves.

Velsicol is the primary defendant in this matter. Velsicol has taken the position that EPA's costs were at least in part caused by latex wastes. (Ex. 97). Velsicol has also stated that it is seeking contribution by GAF and Mydrin. In the absence of that contribution, Velsicol has indicated that it will make a settlement offer based on the purported divisibility of costs incurred in response to the latex waste.

It is EPA's position that Velsicol's wastes were commingled with virtually all other wastes and that Velsicol's wastes were the primary cause for the removal. Therefore, it is EPA's position that Velsicol is liable for all of EPA's costs at the Site. Therefore, it would be appropriate for the U.S. to seek 100% of the past costs from Velsicol and to not compromise costs against Velsicol based on the presence of non-Velsicol wastes.

One set of costs which the U.S. might consider compromising against Velsicol would be those costs related to the latex wastes which are drummed on Site. Under the AOC modification, EPA did agree to take responsibility for wastes not attributable to Velsicol. Costs attributable solely to those wastes, such as the costs of the drums, is relatively minimal.

During negotiations, Velsicol has also attempted to link the cost recovery to the future remediation of the site. Ideally, Velsicol would prefer that the containment cells be converted into a permanent remedy. This would obviously save much of the expense of any further soil remediation. It is EPA's position, however, that the cost recovery and the future remediation activities are unrelated. Moreover, the containment cells are designed to have only a 10-15 year life span. While this design was used to ensure that the Site would be stable until final remediation occurs, this design is not sufficient for turning the containment cells into a permanent remedy.

Velsicol has recently expressed interest in attempting bioremediation of the contaminated soils. Obviously, this would not allow the containment cells to be incorporated into a permanent remedy. However, if the soils were successfully bioremediated, Velsicol would then have the financial comfort of knowing that no more expensive remedy, such as incineration, was forthcoming. EPA expects to receive further inquiry from Velsicol on this issue in the near future. While EPA's position remains that cost recovery is not linked to future remediation activities, EPA is willing to continue to explore any action which would result in the final disposition of the contaminated soil.

GAF and Mydrin appear to be capable of making substantial financial contributions. However, the case against these generators poses different problems than the case against Velsicol. Proving that these generators sent hazardous substances to the Site will be difficult. The issue of divisibility of costs will likely be time consuming and difficult to overcome, with the likely result being a relatively small judgment against the latex generators. In light of these additional burdens, the United States may be best served by not including them in this cost recovery referral. In the event EPA does not sue the latex generators, Velsicol will, in all likelihood, file a third-party complaint against them. Because of the likely third-party complaint, it is unclear whether the suing only Velsicol will simplify the United States' case management burden.

Based on her Section 104(e) response, Nancy Shaver Nation lacks the resources to reimburse EPA's costs. Therefore, regardless of any possible third-party defense that may be available to her under Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), pursuit of Ms. Nation would likely require expenditure of more resources then could be recovered from her. Therefore, EPA does not recommend including her in this cost recovery action.

Eretta Shaver has approximately $454,000 in assets. This is obviously far in excess of any amounts she or her husband received from the Mathis brothers for disposal rights at the Site. In light of her possible "third-party" defense under Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), her liability is not certain. In view of her lack of culpability and advanced age, suing her would appear inequitable. Moreover, even if the United States declines to sue her, the CERCLA lien is already filed against her property. The United States may therefore want to consider offering to release the lien in exchange for some payment by her. Alternatively, as further work will eventually be performed at the Site, the United States may decline to act on the lien, reserving that issue to be dealt with after final remediation of the Site.

The Mathis brothers are clearly liable under Section 107 of CERCLA, 42 U.S.C. § 607, and EPA recommends including them in this lawsuit. However, EPA does not anticipate that they have significant resources with which to reimburse the past costs. EPA's investigation to date has only identified a total of $131,469 in real property holdings. However, as explained elsewhere in this referral, those properties include their private residences, a NPL site, and another industrial waste disposal site. Therefore, it does not appear that this real property could be the source of fund with which to reimburse the United States.

The Mathis brothers have refused to respond to Section 104(e) information requests pertaining to their financial status. Until the United States obtains complete financial information from the Mathis brothers, EPA recommends including them in this law suit. If they demonstrate an inability to pay, the United States should be willing to settle based on that inability to pay.

B. Discovery

The United States should depose Mose and Sidney Mathis concerning the waste disposal operations and the identity of the waste generators. These depositions should confirm that the Mathis brothers disposed of Velsicol, GAF and ALC wastes at the Site.

If the United States does decide to pursue its past costs against Mydrin and GAF, additional discovery will be necessary to attempt to identify the hazardous substances in the latex wastes. Martin Hendricks, a long time former officer of ALC, should be deposed to elicit information on that company's waste streams and disposal practices.

Discovery may also be need to clarify the effect of the 1989 and 1990 corporate structural transactions concerning GAF. In particular, documentation of the merger between the predecessor GAF and Newco Holdings, Inc., will have to be obtained. In addition, the reference in the Dun & Bradstreet Report to the distribution of liabilities to corporate subsidiaries will have to be explored.

C. Summary Judgment

The United States should move for partial summary judgment against the generators on the issue of liability as soon as possible. However, in light of the Alcan decision, it may be difficult if not impossible to avoid a trial on the issue of divisibility.

XIII. WITNESSES

The following witnesses would be expected to testify if this matter went to trial:

1. Charles K. Eger

Mr. Eger was the OSC for the removal at this Site. Mr. Eger was responsible for the oversight of Velsicol while that company was performing removal activities. He was also responsible for leading the removal activities which EPA conducted after resuming control at the Site. Mr. Eger will testify as to the necessity of the removal action, the oversight of Velsicol's actions, EPA's decision to resume control of the Site, EPA's conduct of removal activities, and the consistency of those costs with the National Contingency Plan.

Mr. Eger can be contacted by telephone at the Region IV office in Atlanta at (404) 347-3931.

2. Willard L. Waisner

Mr. Waisner will testify regarding the cost documentation package which supports EPA's past costs in this case. He will also testify concerning EPA's calculation of pre-judgment interest.

Mr. Waisner can be contacted by telephone at EPA's offices in Atlanta at (404) 347-3278.

3. William Cooke

Mr. Cooke is the Chief of the Cost Accounting and Reporting Section, Superfund Accounting Branch, Financial Management Division, Office of the Comptroller, Office of Administration and Public Resources, at EPA headquarters in Washington. Mr. Cooke will testify concerning the calculation of EPA's indirect cost rates.

4. Mose and Sidney Mathis

Mose and Sidney Mathis can testify regarding the disposal operations at the Site. As the defendants who operated the Site and transported the wastes to the Site, the Mathis brothers can identify the generators of the wastes they transported. The Mathis brothers can generally describe the wastes, the types of container those wastes were in, and can identify the approximate time periods during which they hauled those wastes. They will be unable to testify regarding the specific nature of the wastes. In addition, they can confirm that those wastes were in fact disposed of at the Site, rather than some other disposal facility. They will be able to testify in regard to the

contracts or other arrangements they had with Shaver and the generators.

It should be noted that the Mathis brothers read and write poorly, if at all. Moreover, they have no documentation of any of the relevant transactions or events. Their testimony is based on personal recollection. To date, they have been cooperative in providing information to EPA concerning their waste disposal operations.

APPENDIX A

LIST OF EXHIBITS

Exhibit		Date
1.	Consent Judgment	November 13, 1989
2.	Site Inspection Report	November 12, 1984
3.	QA/QC Sample Results from 6/18/85 Site Inspection Report (Organics)	July 16, 1986
4.	QA/QC Sample Results from 6/18/85 Site Inspection Report (Inorganics)	September, 1986
5.	Treble Damages Contractual Costs	
6.	Investigation and Sampling Report	February 5, 1987
7.	Treble Damages (Payroll, Travel)	
8.	Summaries of EPA Post-Action Memorandum Sampling	May 1, 1990
9.	Unilateral Administrative Order	October 2, 1987
10.	Administrative Order on Consent	March 30, 1988
11.	Modification to Administrative Order on Consent	November 8, 1989
12.	Rutherford Hayes Memo on Clean-Up Criteria	February 15, 1989
13.	Elmer Akins Memo on Clean-Up Criteria	May 25, 1989
14.	Velsicol Correspondence Concerning Clean-Up Levels	August 24, 1989
15.	Letter Notifying Velsicol that EPA was Assuming Control of Site	February 14, 1990
16.	EPA Reasons for Assuming Control of Site	February 14, 1990
17.	Velsicol Response to EPA taking Site Back	February 28, 1990
18.	Action Memorandum ($692,000)	October 30, 1989
19.	Action Memorandum ($1,978,000)	February 21, 1990

20.	EPA Request for Section 104(c) Exemption ($5,782,150)	April 3, 1990
21.	Final Action Memorandum and Section 104(c) Exemption	April 10, 1990
22.	Notice of Availability of Administrative Record	January 31, 1992
23.	Velsicol's Comments on Administrative Record	March 20, 1992
24.	Index to Administrative Record	December 19, 1991
25.	ATSDR Report	February 6, 1986
26.	ATSDR Report	November 14, 1986
27.	ATSDR Report	April 29, 1988
28.	ATSDR Report	April 6, 1990
29.	Letter from Velsicol to State of Tennessee	March 22, 1974
30.	Letter from Velsicol to State of Georgia	June 2, 1977
31.	Velsicol Section 104(e) Response	October 9, 1984
32.	Notice Letter and Section 104(e) Request to GAF	August 14, 1984
33.	GAF Section 104(e) Response	October 1, 1984
34.	Section 104(e) Request to GAF	January 15, 1991
35.	GAF Section 104(e) Response	February 12, 1991
36.	GAF Memo from Siegmann to Files	October 1, 1975
37.	GAF Memo Re: Waste Survey	August 3, 1979
38.	Mydrin Section 104(e) Response (Section 104(e) Request not Located)	January 21, 1991
39.	Mydrin Section 104(e) Response	January 22, 1991
40.	Section 104(e) Request to Nancy Shaver Nation	May 21, 1992
41.	Nancy Shaver Nation Section 104(e) Response	June 11, 1992

42.	Section 104(e) Request to Eretta Shaver	May 21, 1992
43.	Eretta Shaver Section 104(e) Response	July 8, 1992
44.	Eretta Shaver Follow-up 104(e) Response	September 2, 1992
45.	Section 104(e) Request to Moses Mathis	June 19, 1992
46.	Section 104(e) Request to Sidney Mathis	June 19, 1992
47.	104(e) Response from Sidney Mathis	July 11, 1992
48.	Follow-Up Section 104(e) Request to Sidney Mathis	July 17, 1992
49.	Dun & Bradstreet Report on Velsicol	April 29, 1991
50.	Dun & Bradstreet Report on GAF	October 12, 1990
51.	Dun & Bradstreet Report on Mydrin	November 14, 1991
52.	Letter from Reis to EPA	October 8, 1987
53.	Letter from Reis to EPA	October 26, 1987
54.	Letter from Reis to EPA	November 3, 1987
55.	Letter from EPA to Velsicol	February 21, 1989
56.	EPA Letter to Velsicol	March 23, 1989
57.	CERCLA Lien	May 4, 1990
58.	Financial Cost Documentation Package	October 6, 1992
59.	Work Performed Documentation	
60.	1900-55 Cost Reports	
61.	Latex Drum Sample Results	April 11, 1992
62.	Velsicol Transmittal of Latex Analysis to EPA	July 11, 1989
63.	Interview Notes with Mathis Brothers	April 14, 1992
64.	Pollution Reports (1-45)	1989 - 1990
65.	OSC Log Books	
66.	Aerial Photographs	
67.	Photo Books	

68.	Summary of Past Cost not Sought in Referral	
69.	Cost Recovery Demand Letter to Velsicol	June 26, 1992
70.	Updated Cost Recovery Demand Letter to Velsicol	March 17, 1993
71.	Cost Recovery Demand Letter to Sidney Mathis	July 17, 1992
72.	Cost Recovery Demand Letter to Moses Mathis	July 17, 1992
73.	Response of Sidney Mathis to Cost Recovery Demand Letter	August 6, 1992
74.	Response of Moses Mathis to Cost Recovery Demand Letter	August 6, 1992
75.	Follow-up Cost Recovery Demand Letter to Sidney Mathis	March 17, 1993
76.	Follow-up Cost Recovery Demand Letter to Moses Mathis	March 17, 1993
77.	Cost Recovery Demand Letter to GAF	February 23, 1993
78.	Cost Recovery Demand Letter to Mydrin	February 23, 1993
79.	Approved Velsicol Removal Workplan	October, 1989
80.	Draft Interim Section 107(c)(3) Guidance	January 26, 1993
81.	Title Search Report	December, 1992
82.	GaEPD Memo from Fehn to Taylor	January 18, 1974
83.	GaEPD Memo from Fehn to Taylor	January 21, 1974
84.	Permit for South Marble Top Road Landfill	April 11, 1974
85.	GaEPD Letter to Mathis Brothers	December 13, 1973
86.	GaEPD Inspection Memo	December 27, 1972
87.	Affidavit of Martin Hendricks	February 5, 1986
88.	Velsicol Letter to EPA concerning accrual of Interest	January 28, 1993

89.	EPA Letter to Velsicol concerning accrual of Interest	Janaury 26, 1993
90.	EPA Letter to Velsicol concerning accrual of Interest	January 29, 1993
91.	Velsicol Letter to Mikalian concerning accrual of Interest	February 5, 1993
92.	Transmittal of Latex Samples Results to Velsicol	October 27, 1992
93.	EPA Letter to Velsicol	August 27, 1992
94.	Velsicol Letter to Georgia	November 12, 1974
95.	Velsicol Section 104(e) Response	October 6, 1987
96.	Velsicol Section 104(e) Response	February 20, 1991
97.	Velsicol Letter to EPA	February 19, 1993
98.	Sidney Mathis Deposition	July 26, 1991
99.	Velsicol - Certificate of Corporate Existence in Delaware	February 22, 1993
100.	Michigan Chemical Corporation - Certificate of Merger with Velsicol and Name Change	December 27, 1976
101.	GAF - Certificate of Corporate Existence in Delaware	February 22, 1993
102.	Newco Holdings, Inc. - Name Change	April 11, 1989
103.	ALC, Incorporated - Corporate Documents	February 22, 1993
104.	Mydrin, Inc. - Corporate Documents	February 22, 1993
105.	Chain of Custody	
106.	Explanation of Calculation of Indirect Cost	
107.	Investigative Report	March 24, 1992
108.	Sampling Results	November 22, 1989
109.	Sampling Results	March 5, 1990
110.	Sampling Results	April 19, 1991

111. Sampling Results	July 15, 1986
112. Sampling Results	November 24, 1986
113. Sampling Results	March 5-18, 1991
114. Sampling Results	March 5, 1990
115. Sampling Results	March 5, 1990

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA Plaintiff v. GAF, INC., MOSES MATHIS, SIDNEY MATHIS, MYDRIN, INC., VELSICOL CHEMICAL CORPORATION Defendants	)	CIVIL ACTION NO.:

COMPLAINT

Plaintiff, United States of America, for and at the request of the Administrator of the United States Environmental Protection Agency ("EPA") alleges the following:

PRELIMINARY STATEMENT

1. This is a civil action brought pursuant to Sections 104(a), 106(a), 107(a) and 107(c)(3) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (hereinafter CERCLA), 42 U.S.C. §§ 9604(a), 9606(a), 9607(a) and 9607(c)(3), as amended by the Superfund Amendments and Reauthorization Act of 1986 (hereinafter "SARA"), Pub.L. No. 99-499, for recovery of response costs incurred by Plaintiff in response to the release and threatened release of hazardous substances from a facility located near Kensington, in Walker County, Georgia, for a declaratory judgment and for treble damages.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1345 and 42 U.S.C. §§ 9607 and 9613(b).

3. This action involves a release and threatened release of hazardous substances from the Shaver's Farm site (hereinafter Site) located near Kensington, in Walker County, Georgia, within the Northern District of Georgia. Venue is propoer in this Court pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

DEFENDANTS

4. Velsicol Chemical Corporation ("Velsicol") is a corporation established and existing under the lase of the State of Delaware. Velsicol arranged for the disposal of hazardous substances at the Site, or arranged for a transporter to transport the hazardous substances to the Site for disposal.

5. Moses Mathis transported hazardous substances to the Site for disposal and was the operator of the Site at the time of disposal of hazardous substances at the Site.

6. Sidney Mathis transported hazardous substances to the Site for disposal and was the operator of the Site at the time of disposal of hazardous substances at the Site.

7. GAF, Inc. ("GAF"), is a corporation established and existing under the laws of the State of Delaware. GAF arranged for the disposal of hazardous substances at the Site, or arranged with a transporter to transport the hazardous substances to the Site for disposal.

9. Mydrin, Inc. ("Mydrin"), is a corporation established under the laws of the State of Georgia. Mydrin is the corporate successor to a corporation which arranged for the

disposal of hazardous substances at the Site, or arranged with a transporter to transport the hazardous substances to the Site for disposal.

GENERAL ALLEGATIONS

10. The Site consists of approximately five (5) acres of open farmland which is owned by Eretta Shaver. In 1973, Ms. Shaver's husband entered into an agreement with Moses and Sidney Mathis. Under that agreement, her husband allowed Moses and Sidney Mathis to transport industrial waste to the Site and dispose of that waste on the Site.

11. Between 1972 and 1974, Moses and Sidney Mathis brought industrial wastes to the Site and disposed of those wastes in and on the ground at the Site.

12. At its plant in Chattanooga, Tennessee, Velsicol utilized and produced pesticides and other chemicals, including dicamba and benzonitrile.

13. Dicamba and benzonitrile are hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

14. Moses and Sidney Mathis transported wastes from the Velsicol plant and disposed of those wastes at the Site. Those wastes contained the hazardous substances dicamba and benzonitrile.

15. At its plant in Chattanooga, Tennessee, GAF produced latex for use in the carpet industry. Components of wastes from the latex production process included included antimony, arsenic, cadmium, chromium, selenium and zinc.

16. Antimony, arsenic, cadmium, chromium, selenium and zinc are hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

17. Moses and Sidney Mathis transported wastes from the GAF plant and disposed of those wastes at the Site. Those wastes included latex wastes and the hazardous substances antimony, aresenic, cadmium, chromium, selenium and zinc.

18. At its plant in Dalton, Georgia, the American Latex Company ("ALC") used and produced latex materials and adhesives. Components of wastes from the production of these materials included zinc and ammonia.

19. Zinc and ammonia are hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

20. Moses and Sidney Mathis transported wastes from the ALC plant to the Site and disposed of those wastes there. Those wastes included the hazardous substances zinc and ammonia.

21. Mydrin is the corporate successor to ALC.

22. As a result of those disposal of wastes by Velsicol, GAF and ALC at the Site, hazardous substances including dicamba, benzonitrile, zinc, antimony and chromium came to be located at the Site.

23. EPA and Velsicol entered into an Administrative Order on Consent effective on March 30, 1988.

24. Effective November 8, 1989, EPA and Velsicol entered into a modification to the Administrative Order on Consent.

25. By letter dated February 14, 1990, EPA notified Velsicol that EPA was retaking control of the Site and would conduct response activities. EPA's response consisted primarily of the containment and treatment of the contaminated water, the excavation of the remaining soils and wastes, the construction of two on-site temporary containment cells, and the placement of those excavated soils and wastes into the containment cells.

26. As of August 8, 1992, EPA had incurred $5,474,266.95 in response costs at the Site. EPA continues to incur adminstrative and enforcement expenses with regard to the Site.

27. EPA sent a demand letter to Velsicol on June 26, 1992. In that letter, EPA informed Velsicol of its liability for response costs at the Site and demanded that Velsicol reimburse EPA for $5,460,836.71. Velsicol has not paid these past costs o date.

28. EPA sent a demand letter to Moses Mathis on July 17, 1992. In that letter, EPA informed Moses Mathis of his liability for response costs at the Site and demanded that Moses Mathis reimburse EPA for $5,460,836.71. Moses Mathis has not paid these past costs to date.

29. EPA sent a demand letter to Sidney Mathis on July 17, 1992. In that letter, EPA informed Sidney Mathis of his liability for response costs at the Site and demanded that Sidney Mathis reimburse EPA for $5,460,836.71. Sidney Mathis has not paid these past costs to date.

30. EPA sent a demand letter to GAF on February 23, 1993. In that letter, EPA informed GAF of its liability for response costs at the Site and demanded that GAF reimburse EPA for $5,500,352.71. GAF has not paid these past costs to date.

31. EPA sent a demand letter to Mydrin on February 23, 1993. In that letter, EPA informed Mydrin of its liability for response costs at the Site and demanded that Mydrin reimburse EPA for $5,500,352.71. Mydrin has not paid these past costs to date.

32. Pre-judgment interest calculated on the base amount of past costs of $5,474,266.95 from June 26, 1992, to date, 1993, is $_____.

33. Pre-judgment interest calculated on the base amount of past costs of $5,474,266.95 from July 17, 1992, to date, 1993, is $_____.

34. Pre-judgment interest calculated on the base amount of past costs of $5,474,266.95 from February 23, 1993, to date, 1993, is $_____.

FIRST CLAIM FOR RELIEF
CERCLA §§ 104(a) and 107(a)

35. Pursuant to Section 104(a) and (b) of CERCLA, 42 U.S.C. §§ 9604(a) and (b), the President may arrange for the cleanup of hazardous substances or conduct whatever investigations and studies are necessary to determine the need for, and extent of, such a cleanup.

36. The President delegated his authority under Section 104 of CERCLA to the Administrator of the EPA pursuant to Executive Order, 46 Fed. Reg. 42238 (August 10, 1981).

37. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), authorizes the President to recover from responsible parties "all costs of removal and remedial action incurred by the United States government ... not inconsistent with the National contingency Plan.

38. Persons liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for costs incurred by the United States in cleaning up contaminated Site include, but are not limited to: (1) the current owner or operator of a facility (Section 107(a)(1), 42 U.S.C. § 9607(a)(1)), and (2) any person who owned or operated a facility at the time a hazardous substance was disposed of at such facility Section 107(a)(2), 42 U.S.C. § 9607(a)(2)), and (3) any person who arranged for disposal, or arranged with a transporter for transport for disposal, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances Section 107(a)(3), 42 U.S.C. § 9607(a)(3)), and (4) any person who accepts or accepted any hazardous substances for transport to disposal facilities selected by such person Section 107(a)(4), 42 U.S.C. § 9607(a)(4)).

39. The Shaver's Farm site is a "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

40. There were releases and threatened releases of hazardous substances into the environment at and from the Site

within the meaning of of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

41. Defendant Moses Mathis operated the Site at the time hazardous substances were disposed of at the Site, selected the Site for the disposal of those hazardous substances, and accepted hazardous substances for transport to the Site.

42. Defendant Sidney Mathis operated the Site at the time hazardous substances were disposed of at the Site, selected the Site for the disposal of those hazardous substances, and accepted hazardous substances for transport to the Site.

43. Defendant Velsicol arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances owned or possessed by Velsicol, at the Site, which contains such hazardous substances.

44. Defendant GAF arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances owned or possessed by GAF, at the Site, which contains such hazardous substances.

45. Defendant Mydrin arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances owned or possessed by Mydrin, at the Site, which contains such hazardous substances.

46. The response action undertaken at the Site was not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300.

47. The United States has satisfied all conditions precedent to a response action and to recovery of response costs under Section 107 of CERCLA, 42 U.S.C. § 9607.

48. The Defendants are jointly and severally liable for all of the response costs incurred by the United States at the Site, pursuant to Section 107(a)(1), (2), (3) and (4) of CERCLA, 42 U.S.C. § 9607(a)(1), (2), (3), and (4).

SECOND CLAIM FOR RELIEF
CERCLA § 107(c)(3)

49. The allegations in Paragraphs 1-40, 43, and 46-48 are realleged and incorporated herein by reference.

50. Under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), any person who is liable for a release or threat of a release of a hazardous substance and who fails without sufficient cause to properly provide response actions upon order of the President pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, may be held liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the United States as a result of such failure to take proper action. Under Section 107 (c)(3), the President, and his delagatee the Adminstrator of the EPA, are authorized to commence a civil action against any such person to recover punitive damages.

51. EPA and Velsicol entered into Administrative Order on Consent No. 88-10-C, with an effective date of March 30, 1988. EPA and Velsicol entered into this AOC pursuant to Section 106(a) of CERLCA, 42 U.S.C. § 9606(a).

52. Effective November 8, 1989, EPA and Velsicol entered into a modification of Adminstrative Order on Consent No. 88-10-C.

53. The Administrative Order on Consent (AOC), as modified, required Deena to undertake certain actions to protect public health, welfare and the environment.

54. The AOC was based on the imminent and substantial endangerment to the public health, welfare and the environment because of the release or threatened release of hazardous substances at the Site.

55. Paragraphs 4 and 5 of the modification to the AOC required Velsicol to perform certain activities, including the excavation and staging of all drums, related waste, and contaminated soils from an area referred to as the Suspected Drum Disposal Area until combined soil concentrations of benzonitrile and benzoic acid are equal to or less than 25 parts per million by weight (PPM) and the combined soil concentrations of dicamba and 3,6 dichlorosalicyclic acid are equal to or less than 25 PPM.

56. In attempting to comply with Paragraphs 4 and 5 of the modification to the AOC, Velsicol committed numerous violations of the AOC, as modified, and caused a imminent and substantial endangerment to public health, welfare and the environment. Because of these activities, EPA notified Velsicol in writing on February 14, 1990, that EPA was taking the Site back from Velsicol and that EPA would perform response activities.

57. Defendant Velsicol failed to comply with the AOC, as modified, and to properly provide the removal action required by that AOC, as modified. Pursuant to Section 107(c)(3), Defendant Velsicol is liable for punitive damages based on the response costs incurred by EPA.

58. Defendant Velsicol's failure to properly provide the response actions required by the AOC, as modified, was without sufficient cause.

59. As a result of Velsicol's failure to properly provide the response actions required by the AOC, as modified, EPA incurred costs totalling $4,635,625.62. For this amount, punitive damages under Section 107(c)(3) total $13,906,876.86.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, United States of America prays that this Court:

a) Enter judgment against the Defendants, jointly and severally, for all response costs which have been and will be incurred by the United States at and in conjunction with the Shaver's Farm Site, plus interest;

b) Enter judgment against Defendant Velsicol, for punitive damages in the amount of three times the costs incurred by the United States in conducting the response action at the Site;

c) Award Plaintiff attorney's fees and costs; and

d) Grant such further relief as the Court may deem appropriate.

Respectfully submitted,

Myles E. Flint
Assistant Attorney General
Environment and Natural
Resources Division
United States Department of Justice

name
Environmental Enforcement Section
Environment and Natural
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United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

OF COUNSEL:

Charles V. Mikalian, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	NO. 91-802-CIV-ORL-20
v.	:	
	:	
SHERWOOD MEDICAL COMPANY,	:	
	:	
Defendant.	:	
	:	
	:	

AMENDMENT TO CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), previously filed a Complaint in this matter pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., as amended (hereinafter "CERCLA").

B. On February 3, 1992, a Consent Decree was entered, in this matter, by the court.

C. The Consent Decree was intended to and did constitute the agreement for interim action at the Site, the implementation of which would expedite the remedial work, avoid prolonged and complicated litigation between the Parties and be in the public interest.

D. EPA and the Settling Defendant (hereinafter jointly referred to as "the Parties") agreed that the Settling Defendant

should perform an interim action prior to a final remedy determination to expedite remediation in the surficial aquifer.

E. Under the interim action, embodied in a Record of Decision executed on March 27, 1991 ("Interim Action ROD") the Settling Defendant agreed to design and construct a pump and treat system for the surficial aquifer.

F. In accordance with Section 121(d) of CERCLA, the parties agreed that the interim action plan adopted by EPA and embodied in the Consent Decree would attain a degree of cleanup which at a minimum would assure protection of human health and the environment at the Site.

G. The pump and treat remedy implemented under the Interim Action ROD continues to remediate the surficial aquifer. The Interim Action ROD, however, did not establish final performance standards for the surficial aquifer because the Remedial Investigation and Feasibility Study ("RI/FS") being conducted by the Settling Defendant was not complete at the time that the Interim Action ROD was issued.

H. The Settling Defendant has since completed the RI/FS and EPA has established the performance standards for the groundwater in the surficial aquifer, which standards are embodied in the final remedial action which EPA chose for the first operable unit at the Site.

I. EPA divided the response actions at the Site into three operable units. The first operable unit ("OU1") is the final remedy for the entire Site except for Lake Miller sediments. EPA

has delineated the response actions conducted under the Interim Action ROD as the second operable unit ("OU2"). At a later date, EPA will determine the final remedy, if any, for the sediments in Lake Miller, and that response action will be the third operable unit ("OU3").

J. On July 23, 1992, pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published a notice and brief analysis of the proposed final remedial action for OU1, embodied in a remedial plan, made the plan available to the public, and provided opportunity for public comment.

K. The final remedial action for the groundwater and soils in OU1 is embodied in a Record of Decision executed October 8, 1992, ("OU1 ROD") which was published and made available to the public on October 8, 1992. The State had a reasonable opportunity to review and comment on the OU1 ROD, and the State verbally concurred on October 6, 1992.

L. The OU1 ROD remedy is identical to the Interim Action ROD remedy in that it requires the Settling Defendant to continue operation of the pump and treat system constructed under the Interim Action ROD. However, the OU1 ROD also establishes the performance standards for the groundwater in the surficial aquifer.

M. The Settling Defendant has also been pumping and treating the water from its on-site Floridan Aquifer production wells, as that water is part of its industrial water supply.

EPA has determined that the Settling Defendant should continue to operate these water supply wells and treat the water from the Floridan Aquifer. EPA has included this requirement in the OU1 ROD, wherein EPA also requires the Settling Defendant to continue monitoring the groundwater from the Floridan Aquifer, as well as from the surficial aquifer.

N. The sampling analyses conducted during the RI indicated that exposed site soils required no additional remediation. However, if soils are excavated after Site remediation, EPA wanted to ensure proper disposal and that all environmental standards are met. The OU1 ROD, therefore, contains institutional controls which require the Settling Defendant to notify EPA and the State in the future of any plans to excavate soils and demolish buildings. The Settling Defendant must ensure either that the excavated soils are properly disposed off-site or, if the soils are to remain on-site, that such exposed soils meet Toxicity Characteristic criteria or contain less than 520 mg/kg of chromium.

O. While the OU1 ROD does not require additional remedial design or remedial construction, an amendment to the Consent Decree and the SOW is appropriate in order to incorporate the performance standards for groundwater, the institutional controls, and other requirements of the OU1 ROD, into the Consent Decree as enforceable requirements.

P. The parties acknowledge that the Consent Decree entered, including all terms, conditions, definitions and other

matters set forth therein, shall continue to be binding on the parties.

Q. In accordance with Section 121(d)(1) of CERCLA, EPA and Settling Defendant agree that the remedial action under the OU1 ROD embodied herein will attain a degree of cleanup which at a minimum assures protection of human health and the environment at OU1.

R. The parties recognize, and the Court by entering the Amendment to Consent Decree finds, that the implementation of this Amendment will further expedite the remedial work at OU1, will avoid prolonged litigation between the Parties, and that entry of this Amendment to Consent Decree is in the public interest.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED:

II. AMENDMENTS TO PROVISIONS OF CONSENT DECREE

Except as provided below, all provisions, terms and conditions of the Consent Decree shall remain unchanged. The Consent Decree is amended as follows:

1. Subsection G. of Section IV. (Definitions) is amended to include the OU1 ROD and the Amended SOW and shall read as follows:

> "'Operation and Maintenance' shall mean all operation and maintenance activities required by the Interim Action ROD, the OU1 ROD, the Interim Action SOW and the Amended SOW and the Final Operation and Maintenance Plan developed by Settling Defendant and approved by EPA."

2. Subsection L of Section IV. (Definitions) is amended to distinguish the Interim Action ROD from the OU1 ROD and shall read as follows:

> "'Interim Action ROD' shall mean the EPA Record of Decision relating to the Site which was signed on March 27, 1991, by the Regional Administrator, EPA Region IV, and all attachments thereto. 'OU1 ROD' shall mean the Record of Decision for the final remedy for Operable Unit #1, which Record of Decision was signed on October 8, 1992, by the Regional Administrator, EPA Region IV, and all attachments thereto. Both the Interim Action ROD and the OU1 ROD are attached as Appendix 1 to the Amendment to Consent Decree."

3. Subsection M. of Section IV. (Definitions) is amended to include the Amendment to Consent Decree, and the Amended SOW, and shall read as follows:

> "'Remedial Action' shall mean all property acquisition, excavation, transportation, construction, treatment or other similar activities required by the Interim Action SOW, the Amended SOW, and the Remedial Action Work Plans developed by Settling Defendant and approved by EPA pursuant to this Consent Decree, and the Amendment To Consent Decree, including any additional activities required by Sections VIII and IX of this Decree."

4. Subsection P. of Section IV. (Definitions) is amended to distinguish the Interim Action SOW from the Amended SOW and shall read as follows:

> "'Interim Action SOW' shall mean the scope of work for implementation of the interim action remedial design, remedial action, and operation and maintenance work at the Site. 'Amended SOW' shall mean the amendment to the Interim Action SOW for the implementation of the OU1 ROD. Both the Interim Action SOW and the Amended SOW are attached as Appendix 2 to the Amendment to Consent Decree."

5. Subsection S. of Section IV. (Definitions) is amended to distinguish Operable Unit #1 from Operable Unit #2 and shall read as follows:

> "'Site' shall mean the Sherwood Medical Company superfund Site, encompassing approximately 42 acres, located approximately three miles northeast of Deland, Volusia County, Florida, as described in the Interim Action ROD and depicted on the map attached as Appendix 3 to the Consent Decree. The Site is divided into three operable units for the purpose of remediation. Operable Unit #1 is the final remedy addressing the contamination of the entire Site, with the exception of Lake Miller sediments ("OU1"). Operable Unit #2 is all response actions conducted pursuant to the Interim Action ROD ("OU2"). Operable Unit #3 will be the final remedy, if any, chosen for the sediments in Lake Miller ("OU3").

6. Subsection E of Section VII. (Performance Standards) is amended to include the Amendment to Consent Decree and the OU1 ROD and shall read as follows

> "E. Performance Standards The Work performed by Settling Defendant pursuant to the Consent Decree and the Amendment to Consent Decree shall achieve the Performance Standards set forth in Section 10 of the OU1 ROD, which Performance Standards attain the ARARs set forth in the Interim Action ROD in Section 11.2."

7. Subsection A of Section VIII. (U.S. EPA Periodic Review To assure Protection Of Human Health and the Environment) shall be amended to require EPA to review the remedial action at the Site at least every five (5) years after the entry of the Amendment to Consent Decree.

8. Unless otherwise specified, all references in the Consent Decree to "ROD" or "SOW" shall be deemed a reference to both the "Interim Action ROD" and "OU1 ROD" and the "Interim Action SOW" and the "Amended SOW" where appropriate.

9. Unless otherwise specified, all references in the Consent Decree to "Consent Decree" shall be deemed a reference to both the "Consent Decree" and the "Amendment to Consent Decree" where appropriate.

10. Unless otherwise specified, all references in the Consent Decree to "Site" shall be deemed a reference to "OU1" unless otherwise appropriate.

III. AMENDMENT TO INTERIM ACTION SOW

This Amendment to Consent Decree provides an Amendment to the Interim Action SOW ("Amended SOW") for the completion of remedial action and operation and maintenance work at the Site. The Amended SOW shall supplement, further define and be an addition to the Interim Action SOW which was incorporated into and made a part of the Consent Decree. The Interim Action SOW is specifically incorporated herein by reference. The Amended SOW is attached as Appendix 2 to the Amendment to Consent Decree and is incorporated into and made an enforceable part of the Amendment to Consent Decree.

IV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

The Amendment to Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and announcement in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. §9622(d)(2), and 28 C.F.R. §50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Amendment to Consent Decree disclose

facts or considerations which indicate that the Amendment to Consent Decree is inappropriate, improper, or inadequate.

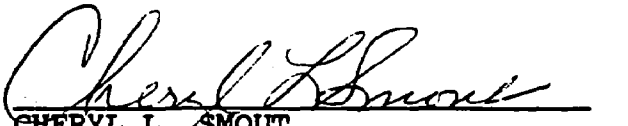
SO ORDERED THIS _____ day of _____, 1993.

_____
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree relating to the Sherwood Medical Company Superfund Site.

FOR THE UNITED STATES OF AMERICA

_____
MYLES E. FLINT
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice



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10-POINT SETTLEMENT ANALYSES

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TEN POINT SETTLEMENT ANALYSIS
Ciba-Geigy Corporation Superfund Site
McIntosh, Alabama

I. OVERVIEW

Region IV proposes to enter into a CERCLA Section 106, 42 U.S.C. § 9606, Consent Decree with Ciba-Geigy Corporation ("Ciba-Geigy") for the performance and funding of a complete Remedial Design/Remedial Action (RD/RA) for Operable Unit 4 at the Ciba-Geigy Corporation Superfund Site, McIntosh, Washington County, Alabama (the "Site"). Ciba-Geigy is the sole responsible party for the contamination at the Site, and has executed the attached judicial Consent Decree, which provides for Ciba-Geigy to conduct the RD/RA for Operable Unit 4 at the Site ("OU4"), which has a present value of approximately $25,000,000, and to reimburse the United States for future response costs related to the Consent Decree, including but not limited to oversight costs. Ciba-Geigy has already entered into a Consent Decree for Operable Unit 2 at the Site ("OU2"). Past costs are not included in the OU4 Consent Decree because they have already been paid pursuant to the OU2 Decree. The OU2 Consent Decree was entered on November 18, 1992.

The OU2 remedy was originally estimated to cost a maximum of $120,000,000, assuming that all excavated material is treated by incineration, and the OU4 remedy was originally estimated to cost a maximum of $50,000,000, also assuming incineration as the only treatment for excavated material. The original cost estimates were based on an action level of 1000 ppm total organics that was set forth in the Feasibility Study for the Site several years ago. However, during the comment period for the OU2 ROD, soil cleanup levels for indicator contaminants were developed based on the protection of groundwater, resulting in a decrease in the volume of contaminated material to be excavated and treated for both Operable Units. In addition, the costs per cubic yard for incineration have gone down since the publication of the FS. Accordingly, in addition to the Consent Decree for OU4, Region IV proposes to enter into an amendment to the Consent Decree for OU2 which reduces the amount of the financial assurances Ciba-Geigy is required to provide. The amendment reduces the amount of financial assurances for OU2 to $70,000,000. The OU4 Decree reflects the reduced cost estimate for that Operable Unit of $25,000,000.

Headquarters consultation and concurrence is required for this Section 106/107 RD/RA settlement given that the response costs and total claims for the Site exceed $60 million.

II. TERMS

Under the terms of settlement embodied in the Consent Decree, Ciba-Geigy will perform and fund the entire RD/RA, and reimburse the United States for costs incurred by the United States under the terms of the Consent Decree, including, but not limited to oversight costs. The estimated cost of implementing the selected remedy is $25,000,000. EPA's recently received Ciba-Geigy's payment of past costs, equal $322,313.52, pursuant to the OU2 Decree. This Consent Decree, like the OU2 Decree, constitutes a 100 % settlement.

Under the terms of the amendment to the OU2 Consent Decree, the financial assurances provision would be changed to reflect that the total estimated cost of the Work for Operable Unit 2 is 70,000,000. In addition, Ciba-Geigy will be allowed to reduce its financial assurances amount in future years to reflect amounts already expended. Finally, Ciba-Geigy will be required to submit an additional demonstration of the total estimated cost of the Work at the completion of the Remedial Design ("RD") to reflect information developed during the RD. The amount of financial assurances will then be adjusted accordingly. The amendment to the OU2 Decree also provides for certain changes to the OU2 SOW, which mirror certain negotiated provisions from the OU4 SOW, as described on page 6, below.

III. BACKGROUND

A. General Description of the Site

The Ciba-Geigy McIntosh plant property encompasses 1,468 acres adjacent to the Tombigbee River near McIntosh, Alabama. The Ciba-Geigy plant is an operating facility and currently manufactures over 100 specialty chemicals, making it Ciba-Geigy's largest manufacturing facility in the United States.

The Ciba-Geigy McIntosh facility began operations in October 1952, as the Geigy Chemical Corporation, manufacturing dichlordiphenyl-trichloroethane (DDT). Over the next eighteen years the operation expanded to include the production of fluorescent brighteners for laundry products, herbicides, insecticides, agricultural chelating agents and chemical sequestering agents for industrial use.

In 1970, Geigy Chemical Corporation merged with Ciba, the Chemical Industry in Basel, Switzerland, forming the Ciba-Geigy Corporation. The operations expanded to produce resins and additives used in the plastics industry, anti-oxidants and small volume specialty chemical products such as water treatment chemicals and fire fighting foams.

In August 1982, the EPA Region IV Environmental Services Division (ESD), conducted an investigation of the neighboring Olin Chemical Company which included taking samples from a drinking water well on the Ciba-Geigy property. The sample results indicated the presence of hazardous substances at concentrations in the shallow aquifer that warranted further investigation of the Ciba-Geigy property. The investigation resulted in a June 1983, Hazardous Ranking System (HRS) survey. The HRS score for the Site was 53.42 and in September 1983, the Site was included on the National Priorities List.

Previous sampling reported by BCM Engineers Inc. (1988) in the vicinity of the production facility has documented groundwater contaminated by benzene, chlorobenzene, carbon tetrachloride, and chloroform. Surface water samples indicate the presence of as many as 29 analytes, mostly metals, volatile organics, and 17 manufactured pesticides. Soil samples also indicate the presence of as many as 43 analytes at the Site, mostly manufactured pesticides, metals, DDT, DDD, DDE, and volatile organics.

The Ciba-Geigy plant is a permitted facility under the Solid Waste Disposal Act (SWDA), 42 U.S.C. §§ 6901 to 6991(i).

B. Response Actions at the Site

A condition of Ciba-Geigy's 1985 RCRA operating permit required Ciba-Geigy to develop a Work Plan to conduct a Remedial Investigation/Feasibility Study (RI/FS) to investigate the source of groundwater contamination. Subsequent to EPA's approval of the Work Plan, Ciba-Geigy conducted the RI/FS to identify areas of contamination and develop the remedial strategies to address the areas identified.

The planned remediation of the Site has been divided into four Operable Units. The first Operable Unit addresses contamination of the shallow (alluvial) groundwater aquifer. Ciba-Geigy is conducting the clean-up of groundwater pursuant to the corrective action portion of its RCRA permit. Accordingly, as described below, EPA issued a no-action ROD with respect to OU1. The second Operable Unit at the Site addresses soil contamination at ten of eleven former waste management areas of the Site. Ciba Geigy is currently conducting the OU2 RD/RA pursuant to a Consent Decree which was entered on November 18, 1992. Operable Unit 3 addresses contamination within the floodplain area of the Site, including contamination in an effluent ditch running through the floodplain area. A ROD has not yet been issued for Operable Unit 3. Operable Unit 4 addresses contamination of soils in one former waste management area of the Site and in the upland portion of the effluent ditch. The RD/RA for Operable Unit 4 is the subject of the settlement embodied in the attached Consent Decree.

Ciba-Geigy installed pump and treat groundwater intercept wells at the facility near the southern boundary of the facility property in 1987, pursuant to the corrective action portion of the present RCRA operating permit. In addition, a Record of Decision (ROD) for Operable Unit One (groundwater) was signed in September 1989. This ROD identified "No Further Action" as the EPA selected remedy, recognizing that the pump and treat system was already being implemented pursuant to the operating permit. The pump and treat system has successfully intercepted the contaminant plume, preventing the off-site migration of the contaminants, and the concentrations of contaminants detected in the wells have stabilized at reduced concentrations.

In a Record of Decision (ROD) issued by EPA on September 30, 1991, the Regional Administrator, Region IV, EPA, selected a remedial action for Operable Unit 2 at the Site. EPA's preferred alternative for remediation of Operable Unit 2 at the Site, as set forth in the ROD consists of (1) The excavation of contaminated soils and sludges until established cleanup levels are reached or until excavation becomes technically impracticable (i.e., depths in excess of 20 feet), whichever is reached first; (2) On-site thermal treatment of approximately 65,000 cubic yards of highly contaminated soils and sludge; (3) Disposal of treated soil and residual ash from the thermal treatment process in an on-site RCRA Minimum Technology Subtitle C landvault(s); (4) Stabilization-solidification (or the utilization of an innovative technology proven effective during the remedial design), of approximately 62,300 cubic yards of moderately contaminated soils and sludge; (5) In-situ soil flushing (or an innovative technology proven effective during remedial design) combined with isolation walls and extraction wells to remediate areas where the risk based cleanup levels are not achieved before an excavation depth of 20 feet is reached; (6) Backfilling excavated areas with common fill and vegetating the areas with a suitable vegetative cover; (7) Operation and maintenance of the landvault(s) for a minimum of thirty years, with continued maintenance of the landvault(s) to occur under the authority of RCRA; and (8) Institutional controls restricting land use and groundwater use until both direct contact soil cleanup levels and subsurface soil cleanup levels are permanently achieved. Ciba-Geigy is conducting the RD/RA for Operable Unit 2 pursuant to a Consent Decree entered on November 18, 1992.

In a Record of Decision (ROD) issued by EPA on July 14, 1992, the Regional Administrator, Region IV, EPA, selected a remedial action for Operable Unit 4 at the Site. EPA's preferred alternative for remediation of Operable Unit 4 at the Site, as set forth in the ROD consists of: (1) The excavation of approximately 63,000 cubic yards of contaminated soils and sludges until established cleanup levels are reached or until

excavation limits are reached ; (2) On-site treatment of excavated soils and sludges through thermal treatment or one or more of several innovative technologies that will be tested during Remedial Design, including solidification/stabilization, dechlorination, innovative thermal technologies and biotreatment; (3) disposal of stabilized/solidified material in an on-site RCRA Minimum Technology Subtitle C landvault(s); (4) Disposal of other treated soil and residual ash in excavated areas; (5) In-situ soil flushing (or an innovative technology proven effective during remedial design) combined with isolation barriers and extraction wells to remediate areas where the risk based cleanup levels are not achieved before excavation limits are reached; (6) In-situ stabilization/fixation treatment of approximately 46,000 cubic yards of iron slurry waste; (7) Backfilling excavated areas with common fill and vegetating the areas with a suitable vegetative cover; (8) Operation and maintenance of the landvault(s) for a minimum of thirty years, with continued maintenance of the landvault(s) to occur under the authority of RCRA; and (9) Institutional controls restricting land use and groundwater use until both direct contact soil cleanup levels and subsurface soil cleanup levels are permanently achieved. Ciba-Geigy will implement the ROD for OU4 pursuant to the attached Consent Decree.

C. RD/RA Negotiations History

EPA issued Ciba-Geigy a CERCLA Section 122(a) letter on September 18, 1992, providing Ciba-Geigy an opportunity to conduct the RD/RA pursuant to a Consent Decree with EPA oversight. The Section 122(a) letter provided for a 60 day negotiation period. However, at the time the letter was sent, it was determined by EPA that additional dioxin sampling needed to be done at OU4 pursuant to a Headquarters directive calling for dioxin sampling at all NPL sites where open burning of pesticides was known to have occurred. The negotiation period was extended pending the results of the dioxin sampling, which Ciba-Geigy agreed to conduct with EPA oversight. RD/RA negotiations were conducted concurrently with the dioxin sampling. Recently, Ciba-Geigy completed the dioxin sampling and data presented to EPA shows that the results will not impact the OU4 remedy. Accordingly, Ciba-Geigy executed the attached Consent Decree on March 23, 1993.

---

[1]Excavation limits established in the ROD allow excavation to be halted because of technical impractibility in the following four situations: (1) When large concrete structures are encountered, such as building foundations, reinforced concrete slabs and concrete roadway sections connected with reinforcing steel; (2) When the water table is encountered; (3) When a depth of 20 feet below land surface is reached; and (4) When the iron-slurry waste is encountered.

During RD/RA negotiations, Ciba-Geigy sought to amend the financial assurances provisions of the attached Consent Decree and the OU2 Decree. Ciba-Geigy argued that the cost estimates contained in the OU2 and OU4 RODs were based on Feasibility Study data developed years ago when action levels were more stringent and incineration costs were higher. Upon review, Region IV found Ciba-Geigy's contentions to be correct. Ciba-Geigy demonstrated to Region IV's satisfaction that the cost estimates were excessive, and that updated cost estimates prepared by Ciba-Geigy should be used instead as the basis for setting the amount of financial assurance to be provided by Ciba-Geigy. Instead of the original estimates of $120,000,000 for OU2 and $50,000,000 for OU4, Region IV has approved revised estimates of $70,000,000 for OU2 and $25,000,000 for OU4. Those estimates are reflected in the attached OU4 Consent Decree and the attached Amendment to the OU2 Consent Decree.

Some negotiated items in the SOW will result in minor changes to the ROD that will be addressed in an ESD. These include: (1) placement of treated material which meets LDR standards in excavated areas instead of in a RCRA landvault (the material will not be a RCRA hazardous waste and will have contamination levels far lower than action levels for excavation); (2) use of isolation barriers instead of or in addition to isolation walls in areas where deep soil will be treated in-situ; and (3) permitting Ciba-Geigy to conduct bioremediation treatability studies ex-situ in addition to in-situ. EPA has agreed to make parallel changes to the OU2 SOW, and those changes are provided for in the attached amendment to the OU2 Decree. Accordingly, when the ESD is prepared for the OU4 ROD, an ESD will also be prepared for the OU2 ROD.

D. PRP Analysis

Ciba-Geigy Corporation, as the owner and operator of the facility, as well as the generator of the hazardous substances released into the environment at the Site, is the only CERCLA Section 107(a) liable party.

IV. TEN-POINT SETTLEMENT ANALYSIS

A. Volume of Waste Attributable to Each PRP

Ciba-Geigy (with its predecessor, Geigy Chemical Corporation, the liabilities of which Ciba-Geigy assumed by merger) contributed 100% of the contaminants found at the Site.

B. Nature of Wastes Contributed.

As indicated above, all of the wastes at the Site were generated by Ciba-Geigy Corporation. The majority of the wastes and residues generated by production operations at the Ciba-Geigy

facility have been managed, treated, and disposed of on-site throughout the Site's history. Contaminants of concern are numerous and include high molecular weight chlorinated pesticides (e.g., DDT, gamma-BHC), site-manufactured pesticides (e.g., atrazine, simazine), and volatile solvents (e.g., chloroform, xylenes). Ciba-Geigy caused the release of these contaminants into the environment.

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

Liable parties under Section 107 of CERCLA include the current owners or operators of a Site and persons who at the time of disposal of hazardous substances at the Site owned or operated the facility. Ciba-Geigy is the current owner/operator of the facility. In addition, Ciba-Geigy, or its predecessor, Geigy Chemical Corporation (the liabilities of which Ciba-Geigy assumed by merger), has been the owner/operator of the facility since operations began at the Site in 1952. Therefore, Ciba-Geigy is liable under Section 107(a) of CERCLA. In addition, Ciba-Geigy has admitted through various submissions to EPA that it caused the release of the contaminants at the Site.

Investigations at the Site have revealed contamination of both soil and shallow groundwater. Over the years, various impoundments and landfill areas have been used by Ciba-Geigy for treatment and disposal of the wastes generated by Site operations. The RI/FS conducted by Ciba-Geigy as a condition of its RCRA operating permit identified eleven former waste management areas at which hazardous substances have been released. In light of Ciba-Geigy's long period of ownership and operation of the facility, together with information about the treatment and disposal of wastes over the course of operations at the facility, and the documented release of hazardous substances at the Site, Ciba-Geigy's liability under CERCLA appears clear.

D. Ability of the Settling Parties to Pay

Ciba-Geigy is a large, financially secure multi-national company. Further, Ciba-Geigy has a substantial investment in the operating facility at the Site and intends to keep this operation functioning. For these reasons it appears that Ciba-Geigy will be able to meet its obligations under the Decree. Further, the Decree requires Ciba-Geigy to provide financial assurances establishing its ability to fund the remedy. Ciba-Geigy satisfied its financial assurance obiliation under the OU2 Consent Decree through a guarantee from its parent corporation, CIBA-GEIGY Limited, Basel, Switzerland. Through submissions to EPA, this parent corporation has demonstrated that it meets the requirements of 40 C.F.R. § 264,143(f), and has adequate assets to meet the obligations under the attached Consent Decree and the OU2 Consent Decree. The parent company's equity exceeds

$12 billion in US dollars.

E. Litigative Risks in Proceeding to Trial

There are no obvious litigative risks that might preclude EPA from recovering all of its costs at trial. However, the remedy selected is complex, and the combined expense of the various Operable Units makes the remediation of this Site one of the most expensive clean-ups in Superfund history. As such there is the potential for an elevated level of scrutiny in the case.

The Region is not aware of any procedural or substantive problems affecting the admissibility of the government's evidence. Nor does their appear to be any question as to the adequacy of the government's evidence. There do not appear to be any defenses available to Ciba-Geigy. Ciba-Geigy has been fully cooperative in developing an effective remedy for the Site. Ciba-Geigy appears committed to implementing the remedy, and has not challenged the Agency's action to date. Due to the complexity of the Site and the selected remedy, the ROD has been the subject of considerable review during its development, both in the Region and in Headquarters. Headquarters and the State of Alabama have both concurred with the ROD.

While the litigative risks appear to be minimal, the settlement embodied in the attached Consent Decree requires Ciba-Geigy to fund 100% of the RD/RA for Operable Unit 4. The Consent Decree also requires Ciba-Geigy to reimburse EPA for all of its future costs to be incurred in overseeing the implementation of the RD/RA (Past costs have already been paid pursuant to the Consent Decree for OU2). Therefore, a combined cost recovery/RD/RA settlement is the optimum resolution of this case.

F. Public Interest Considerations

The public interest in this case lies in conservation and reimbursement of the Superfund, and in the prompt commencement of the RD/RA, as provided for in the Consent Decree.

G. Precedential Value

This case does not have significant precedential value, as the Consent Decree does not deviate from EPA's policies on issues of national significance, and the factual situation does not raise any novel issues.

H. Value of Obtaining a Present Sum Certain

EPA is recovering 100% of its future costs to be incurred under the terms of the Consent Decree. Past costs have already been reimbursed. Ciba-Geigy has agreed to fund all of the response costs for Operable Unit 4, which are estimated to exceed $25

million. Thus the benefit of settlement is substantially equivalent to what the government could obtain by proceeding to trial, only without the necessity of incurring litigation costs.

I. Inequities and Aggravating Factors

The Region is not aware of any inequities or aggravating factors which should be considered in assessing this settlement.

J. Nature of Case that Remains After Settlement

As this is a full Section 106 RD/RA settlement in combination with a 100% settlement of future costs, and past costs have already been reimbursed, no case remains with respect to Operable Unit 4 after entry of the Consent Decree. EPA will retain all of its claims against Ciba-Geigy relating to Operable Units 3, which will be addressed in future negotiations after a remedy has been selected. In addition, the Consent Decree contains standard reopeners in the event of remedy failure or discovery of previously unknown conditions.

V. CONCLUSION

The Ciba-Geigy Consent Decree for Operable Unit 4 is a favorable settlement for the United States. If the Consent Decree is accepted, the United States will achieve the goals of protecting human health and the environment, replenishing the Superfund, and conserving its limited resources, which may be used to address other environmental problems. Moreover, the settlement is consistent with the Agency's settlement policy and is embodied in a Consent Decree which adheres to Agency policy and guidance. For these reasons and other reasons stated in the foregoing discussion, the Region recommends that the Complaint and the Consent Decree be signed and then filed in the appropriate court.

The attached amendment to the Consent Decree for Operable Unit 2 is reasonable in light of Region IV's determination that the cost estimates contained in the ROD are outdated and should be reduced to the amount in the amendment ($70,000,000). The Amendments only effects are to make minor adjustments to the SOW and to allow Ciba-Geigy to adjust the financial assurance amount to the demonstrated estimated total cost of the Work. Ciba-Geigy will be able to reduce its financial assurance submission in succeeding years to reflect amounts that have already been expended. At the completion of the RD, Ciba-Geigy will be required to again submit for EPA's approval a demonstration of the total estimated cost of the Work in light of information developed during the RD, and adjust its financial assurance amount accordingly. The Consent Decree remains unchanged in all other respects. Accordingly, Region IV recommends that the Amendment to Consent Decree for OU2 be signed and filed in the appropriate court.

ENFORCEMENT CONFIDENTIAL
ATTORNEY WORK PRODUCT

TEN POINT SETTLEMENT ANALYSIS FOR THE HERCULES 009 LANDFILL SITE (OPERABLE UNIT #1) CONSENT DECREE

OVERVIEW

The CERCLA Section 106/107 settlement embodied in this Consent Decree for RD/RA accomplishes two objectives. First, it provides a vehicle for total remediation, under the oversight of the U.S. Environmental Protection Agency ("EPA" or "the Agency"), of the Hercules 009 Landfill Site ("the Site") by Hercules Incorporated ("Hercules"), the party identified by the EPA as the sole Potentially Responsible Party ("PRP") at the Site. Second, because Hercules, as the Settling Defendant ("the Settlor"), has agreed to reimburse the Agency for 100 percent of past and future response and oversight costs, the settlement will eliminate any need to compromise costs or pursue cost recovery litigation.

Pursuant to Delegation 14-13-B, Concurrence in Settlement of Civil Judicial Action (September 13, 1987), Regional Administrators are authorized to exercise Agency concurrence in the settlement of CERCLA Section 104/107 recovery actions, subject to certain limitations. Exercise of authority pursuant to Delegation 14-13-B is specifically limited to cost recovery actions seeking $500,000 or less, and generally limited by OE and OSWER periodic review. Under OSWER Directive No. 9012.10-a, Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E (June 17, 1988), as modified by OSWER Directive No. 9012.10-b, Redelegation of Civil Judicial Settlement Authorities Under Delegation 14-13-B and 14-13-E (August 18, 1988), certain of the concurrence and consultation requirements of Delegation 14-13-B were modified and revised by the OE and OSWER. Thereafter, and except in two specific circumstances, Headquarters consultation or concurrence is required for neither CERCLA Section 106 RD/RA settlements where response costs do not exceed $30 million, nor for CERCLA Section 107 settlements where total claims do not exceed $30 million. Specifically, the two exceptions to the delegation arise if the settlement compromises between 25 and 50 percent of the total past and future costs (whereby Headquarters *consultation* was retained), or if the settlement compromises greater than 50 percent of the total past and future costs (whereby Headquarters *concurrence* was retained).

The present worth of the remedial action selected in the Record of Decision ("ROD") for the Site is projected to be about $9.9 million. Additionally, in the proposed settlement the Agency will be repaid 100% of its direct and indirect past response

costs of $544,199.22, and 100% of any future response and oversight costs. In this instance, therefore, any Headquarters consultation or concurrence authorities that may have been conditionally retained as described above are not applicable, and the Regional Administrator is therefore authorized to exercise Agency concurrence in the settlement.

Further, the proposed settlement is in accordance with the terms of the June 21, 1991, Memorandum from Ludwiszewski, Clay, and Stewart to Regional Administrators transmitting the interim final Model CERCLA RD/RA Consent Decree. During the negotiations with the Settlor, the Region did not offer or agree to any offers that would change any of the provisions of the Model Consent Decree that embody issues of national significance. As a consequence, the proposed settlement is not expected to result in any significant deviations from national policy.

HIGHLIGHTS OF THE REMEDIAL ACTION

The remedial action, as contained in the Record of Decision ("ROD") for Operable Unit #1 (OU #1) and contemplated in the proposed Consent Decree ("CD") and associated Statement of Work ("SOW"), is intended to be the final remedy at this Site. The remedial action addresses source areas, surface water, and groundwater at the Site; it emphasizes source control as the key component toward the prevention of future surface or groundwater contamination.

A prior remedial action at the Site was undertaken as Operable Unit #2 ("OU #2"), and enumerated in an interim action ROD ("IROD") signed by EPA on June 27, 1991. Under the remedial action selected for OU #2, use of seven (7) private wells immediately downgradient of the Site was to be replaced by access to the municipal water system. On September 23, 1991, Hercules agreed to carry out the interim action remedy in a CD entered on May 8, 1992, and on March 10, 1993, EPA issued a Certification of Completion of the Work signifying that Hercules had completed the remedial activities under the IROD. No other operable units have been identified for the Site.

The major components of the selected remedy for OU #1 include:

- Conducting a field-scale treatability study and implementation of in-situ stabilization of subsurface soils and consolidated surface soils.
- Implementation of an ex-situ chemical extraction technology on the soils and sludges at the Site if the treatability study fails to meet the required standards.
- Construction of a cover over the treated soils to reduce rainwater infiltration and direct contact with the treated soil.
- Long-term monitoring of groundwater, surface water, and

sediment in an onsite pond and adjacent drainage ditch, with the contingency implementation of a pump and treat system.

- Operation and maintenance of the cover for no less than thirty years.
- Institutional controls for restrictions on land and groundwater use.

RD/RA NEGOTIATIONS

In accordance with CERCLA Section 122(a) authority, on April 28, 1993, a discretionary thirty (30) day negotiation moratorium on response actions was initiated when the Region issued a Notice Letter to the PRP. (A CERCLA Section 122(e) Special Notice Letter was not issued because only a single PRP, Hercules, is associated with the Site.) Before the expiration date of the Region's 30 day moratorium, Hercules submitted a response deemed by the Region to constitute a good faith offer to conduct or finance the RD/RA. Accordingly, the Agency extended the moratorium a further sixty (60) days, during which time Agency and Department of Justice ("DOJ") personnel met with representatives of Hercules to negotiate an acceptable Consent Decree. Following several conference calls, and on the final day of the moratorium, the participants reached a settlement in principle on August 6, 1993, when the Region received a signed signature page from Hercules.

Negotiations focused principally on technical issues concerning implementation of the SOW and how Hercules might conduct the treatability study. In addition, Hercules challenged the accuracy of the Region's cost documentation, as well as the government's statutory authority to collect prejudgment interest calculated from the latter of the date of the expenditures or the date of the first of two demand letters. The technical issues were fully resolved by agreement, and Hercules acceded to the government's position on costs and prejudgment interest.

TERMS OF THE SETTLEMENT

The proposed settlement requires reimbursement of costs incurred by the government for response actions at the Site, together with accrued interest and performance of studies and response work by the Defendants at the Site consistent with the National Contingency Plan ("NCP"). There will be no pollution prevention or mitigation projects. Within 30 days of the effective date of the Consent Decree, Hercules will pay $544,199.22 to the Government in reimbursement of pre-January 6, 1993, response costs and prejudgment interest associated therewith. Hercules will also pay costs incurred in connection with the Site between January 6, 1993, and the date of entry of the Consent Decree,

plus interest on response costs from January 6, 1993, to the date of payment of the past response costs. Finally, Hercules will reimburse the Government for all future response costs incurred by the United States that are not inconsistent with the NCP.

Within ten (10) days of lodging of the Consent Decree, Hercules must notify EPA of the contractor it proposes to be the Supervising Contractor. Within forty five (45) days after lodging of the Consent Decree, the Settlor will submit to EPA a Treatability Study Work Plan to determine if the selected remedy will attain all Performance Standards. This Work Plan will include a schedule for the submittal of the Treatability Study Final Report and the other Remedial Design deliverables. The Remedial Design Work Plan will provide for design of the remedy set forth in the ROD in accordance with the Statement of Work and, upon its approval by EPA, shall be incorporated into and become enforceable under the Consent Decree.

The total present worth for the entire remedial action is expected to be $9.9 million. The remedial activity for the Site consists of the treatment of affected surface soil and sludge in place by in-situ stabilization. Subsurface solids and consolidated surface soil will be treated in place within the landfill. To reduce infiltration by rainwater and direct contact with the treated soil, a multimedia cap will be placed over the consolidated, stabilized soil. Treatment involves the use of hollow-stem augers to drill into the affected solids. By this means solidification reagents are delivered to the affected solids during a mixing operation. A solidification/stabilization of manufactured pesticides represents an innovative application of this technology, and will therefore be evaluated during the treatability studies for these wastes. If the stabilization process fails, under the ROD, ex-situ chemical extraction will then be used to treat the wastes.

Currently, only a monitoring of onsite groundwater and surface water is proposed for the longterm. This is because only a single onsite well currently indicates toxaphene contamination above MCLs. However, a pump and treat system is to be implemented if the levels of the contaminants of concern appear to be migrating offsite, or if onsite levels do not diminish over time to a point below MCLs.

SITE HISTORY

Located within the northern seven (7) acres of the Site are six (6) disposal cells containing an estimated thirty-three thousand (33,000) cubic yards of toxaphene sludge. A drainage ditch runs along the northeastern edge of the Site. About midway through the Site the drainage ditch curves away from the Site, and then travels past an elementary school eventually emptying into a

tidal marsh. The Site is fenced and has an entrance through a locked gate.

The Site was constructed in what had been a gravel "borrow pit." This borrow pit had been formed during local construction of Georgia Highway 25. Reportedly, the bottoms and sides of the disposal cells were lined by a one foot bentonite clay and soil mixture when the Site was constructed. The landfill was primarily filled with toxaphene sludge, but contaminated soil, empty toxaphene product drums, other process sludges, glass, rubble, and trash are also believed to be contained in the landfill.

The Site is solely owned by Hercules. The disposal and release of hazardous substances occurred after Hercules purchased the property. As it has since 1920, Hercules operates a manufacturing facility located about three (3) miles from the Site in Brunswick, Georgia. One of the industrial chemicals manufactured by Hercules was the pesticide toxaphene. As a result of the toxaphene manufacturing process, Hercules generated a wastewater sludge containing toxaphene ("toxaphene sludge"). In January, 1974, Hercules began negotiations with the Georgia Department of Natural Resources, Environmental Protection Division ("GaEPD") for a solid waste permit to dispose of toxaphene sludge. The Site was permitted by the GaEPD in 1975 to receive the toxaphene sludge for disposal, and in that year Hercules began operating the Site for the disposal of toxaphene sludge.

In 1979, as a result of a routine GaEPD inspection, elevated levels of toxaphene were detected in sediment and surface water samples collected in the drainage ditch adjacent to the Site. Hercules' operating permit was revoked in July 1980. All of the cells at the Site were closed by Hercules in accordance with a GaEPD Solid Waste Permit. The closed cells were covered with "stump dirt" and seeded with grass.

In 1983, the GaEPD requested that Hercules install a groundwater monitoring system at the Site. One (1) deep well and five (5) shallow wells were installed to assess groundwater contamination originating at the Site, and to determine the direction and rate of groundwater flow in the surficial aquifer. Because toxaphene was found in the deep well, four (4) additional deep wells were installed in 1984 to further characterize groundwater contamination at the Site. Toxaphene concentrations in excess of the drinking water standard were identified in one well cluster comprising both deep and shallow wells penetrating the aquifer beneath the Site. Sampling indicated toxaphene contamination above MCL in only one shallow well at the Site.

The Site was proposed for inclusion on the National Priorities List ("NPL") in September 1983, and finalized for inclusion in

September 1984. Initial remedial activities were performed by GaEPD; EPA assumed the role of lead agency in 1987. In an Administrative Order by Consent dated July 15, 1988, Hercules consented to conduct, under the oversight of EPA, a Remedial Investigation/Feasibility Study ("RI/FS"). Because contaminated groundwater posed an immediate threat, EPA decided to organize the work at the Site into two (2) operable units.

SETTLEMENT CRITERIA
TEN POINT ANALYSIS

1. Volume of Waste Contributed to the Site by each PRP

There is only a single PRP, and no volumetric analysis was conducted. The waste at the Site consists primarily of toxaphene sludge deposited only by Hercules under State permit, but Hercules may also have deposited other wastes associated with its toxaphene manufacturing process. In any event, 100% of the wastes at the Site (which is owned by Hercules) was contributed by Hercules.

2. Nature of Waste Contributed

The waste at the Site is a toxaphene wastewater sludge, and other associated wastes, that resulted from the toxaphene manufacturing process conducted by Hercules at it Brunswick, Georgia facility.

3. Strength of Evidence Tracing the Waste at the Site to the Settling Party

There is no question that the waste at the Site is attributable to Hercules; Hercules has never denied liability or responsibility as the owner/operator of the landfill. Shortly after Hercules submitted an application, on August 4, 1975, the Georgia Department of Natural Resources ("GaDNR") issued Permit No. 063-003D(SL)H to Hercules for the operation of a "Sanitary Landfill (Hazardous Wastes - Toxaphene)." After GaDNR required closure of the landfill, on September 15, 1980, Hercules submitted to GaDNR a report detailing the "closure, monitoring and contingency plans for the now-closed toxaphene landfill."

4. Ability of the Settling Party to Pay

The estimated amount of the remedial action is $9.9 million. If the ex-situ remedy is necessary, the remedial action might amount

to $30 million. The Settlor is a major industrial conglomerate, with sales of roughly $4.0 billion per year. As a consequence, it is likely that Hercules has sufficient unencumbered assets to pay for the cleanup, if indeed it does not also have the capacity to finance the ongoing remedial activity from current earnings.

5. Litigation Risks in Proceeding to Trial

The proposed settlement provides 100 percent relief to be obtained from Hercules as the sole PRP at the Site. As a consequence, there are neither any nonsettlors to pursue, nor any reason to proceed to trial. Nevertheless, if trial is deemed necessary to establish liability, the evidence against Hercules appears sufficient, in terms of both adequacy and admissibility, for summary judgment.

6. Public Interest Considerations

Although found principally at the local community level, public interest in the remedy and its selection process has been intense and vocal. Over a period of years, several individuals, their families living near the Site, and community organizers, have vigorously asserted that many of the ailments suffered by Brunswick residents are the direct consequence of exposure to toxaphene. The remedial alternatives contained in the Proposed Plan for the Site were closely scrutinized by various community organizations, with large turnouts at public meetings, a well orchestrated letter-writing campaign, and liberal utilization of congressional contacts. There appears to be at least two broad objectives of the organized efforts: One goal is EPA involvement in the elimination of any vestige of toxaphene exposure in the Brunswick area that may have been produced by the Site, or produced by the Hercules manufacturing plant located in Brunswick. The second objective appears to be Government sponsorship of medical research to identify a causal relationship of various individuals' medical ailments to the production and/or disposal of toxaphene in Brunswick by Hercules. To date, however, no assertions of environmental inequity have been noted in published articles or documents submitted to the Agency.

This breadth and level of public interest has caused Hercules to express a private concern for the likelihood of a toxic tort suit by various citizens of Brunswick, and may have been an important factor in Hercules' willingness to enter into the proposed settlement. However, during the remedy selection process the most vocal community activists were not entirely consistent in their apparent objectives. As a consequence, there is a possibility that these individuals or groups may utilize the CERCLA Section 122(d)(2)(B) public participation provisions for a

proposed judgment to advance certain private objections to the scope and extent of the remedy selected by EPA.

7. Precedential Value

The facts of this case do not present any issues of precedential value. The case does not present a factual scenario for the establishment of a favorable precedent for future government action, and the structure and nature of the proposed settlement are consistent with all established national and regional policies. The basis for the proposed Consent Decree was the Model RD/RA Consent Decree, and no substantive changes were made to those provisions of the Model Consent Decree that embody issues of national significance.

8. Value of Obtaining a Present Sum Certain

This settlement obtains a full recovery of past costs, both direct and indirect, and Hercules has agreed to pay for all future costs associated with the Site not inconsistent with the NCP. Any judgment of liability in the future could achieve no better results, and would be accomplished only after expending considerable time and Fund resources.

9. Inequities and Aggravating Factors

None.

10. Nature of the Case After Settlement

This settlement will resolve all matters concerning the Site relating to the remedial action, as well as all past and future response and oversight costs associated with the Site. The Region has identified no PRP at the Site other than Hercules, and there is no work to be performed at the Site currently foreseeable other than that covered by the Consent Decree and the associated Statement of Work.

ENFORCEMENT CONFIDENTIAL
ATTORNEY WORK PRODUCT

TEN POINT SETTLEMENT ANALYSIS
BLUFF ROAD SUPERFUND SITE
COLUMBIA, RICHLAND COUNTY, SOUTH CAROLINA

I. OVERVIEW

Region IV proposes to enter into a consent decree under Sections 106 and 107 of CERCLA for the Bluff Road Superfund Site, Columbia, Richland County, South Carolina (the "Site"), which provides for (1) the performance and funding of a complete remedial design/remedial action ("RD/RA") of the remedy selected in the Record of Decision (the "ROD"); (2) the payment of 99.30% of past costs incurred by the United States Environmental Protection Agency ("EPA"); and (3) the payment of 100% of future costs to be incurred by EPA in implementing the remedy selected in the ROD. The total settlement value is $8,505,084.78, which includes a present value of $5,574,984 for the estimated costs of the RD/RA; $625,475 for the estimated costs for EPA future oversight; $1,348,934.34 for the Orphans' Share of the unreimbursed past response costs and RD/RA costs; and $955,694.33 for unreimbursed past costs incurred by EPA, and interest thereon. This Consent Decree is referred to as Consent Decree Number 1.

The Region is presently negotiating a second consent decree for the Site (Consent Decree Number 2), to memorialize the terms of an Administrative Order On Consent dated April 21, 1988, ("AOC") under which forty four (44) Potentially Responsible Parties ("PRPs") known as the "Bluff Road Group" are obligated to pay 51.96% of the costs of the RD/RA, less their approved credit for the Remedial Investigation and Feasibility Study ("RI/FS"). While this ten-point settlement analysis only addresses Consent Decree Number 1, to present the complete settlement for the Site, the terms of the AOC are discussed in this analysis where relevant.

The issues of national significance in Consent Decree Number 1 are in Sections V (General Provisions), IX (U.S. EPA Periodic Review To Assure Protection Of Human Health And

Environment), X (Additional Work) and XXIV (Covenants Not To Sue By Plaintiff). Following several telephone conferences with Bruce Diamond, Director of the Office of Waste Programs Enforcement, and with Scott Fulton and William White of the Office of Enforcement concerning this settlement, EPA Headquarters concurred with the language in Sections V, IX, X and XXIV of Consent Decree Number 1. For a more detailed explanation of the issues of national significance, please refer to the memorandum from John R. Barker to Bruce M. Diamond and Raymond B. Ludwiszewski attached hereto as Appendix 2.

This memorandum recommends EPA's acceptance of the Consent Decree. Because this settlement has issues of national significance, this memorandum sets forth the terms of the settlement, background of the Site, and assesses the ten point criteria in the Interim CERCLA Settlement Policy announced as part of EPA's Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034 (Feb. 5, 1985).

II. TERMS

A. Settlement Costs

Under the terms of this settlement, EPA will recover past costs and future costs totaling approximately $8,505,084.78. This total represents the following costs:

Total Unreimbursed Past Response Costs..... $955,694.44
This total represents 99.30% of the past costs incurred by EPA from 1986 through February 28, 1991. This total includes interest that has been calculated from September 26, 1990, the date on which EPA demanded payment, through February 28, 1991.

Estimated RD/RA Cost..... $6,200,456.00
This total represents the estimated costs to perform the remedy set out in the ROD, which are $5,574,984.00, plus the estimated future oversight costs, which are $625,472.00.

Orphans' Share of the Unreimbursed..... $1,348,934.34
Past Response Costs and Estimated RD/RA Costs
This total represents 18.85% of the estimated RD/RA costs and the unreimbursed past cost. The 18.85% figure represents the percentage of PRPs who were sent special notice letters, but are no longer in business, bankrupt or who are no longer considered PRPs for the Site.

B. Settling Defendants

The PRPs participating in the settlement in Consent Decree Number 1 are divided into two groups, the Cash-Out Settlors and the Performing Settlors. The payment for the PRPs within each of these groups is as follows:

1. Cash-Out Settlors

The Cash-Out Settlors, consisting of twenty-seven (27) PRPs, including the Federal Settling Agencies, will pay EPA a share of the above costs based on the volumetric share of waste that each contributed to the Site. Their volumetric share is based on a volumetric ranking prepared by EPA in 1981.

EPA will receive a total of $617,632.71 from the Cash-Out Settlors. Of that amount, the Cash-Out Settlors will pay $136,634.87 of the past costs, $53,070.39 of the Orphans' Share of past costs, and $427,927.45 of the RD/RA costs. Attached hereto as Appendix 3 is the Statement and Calculation of Cash-Out Payments explaining how each Cash-Out Settlor's payment was calculated.

The Region applied a premium of 100% to each Cash-Out Settlors volumetric share of estimated RD/RA Costs to ensure coverage of contingent future costs. The premium added to the Cash-Out Settlor's share of the estimated RD/RA costs doubles the Cash-Out Settlor's payment towards estimated RD/RA costs.

The Region chose the 100% premium because the Region believes that the cost estimates for the RD/RA, and EPA oversight (which are included in the estimated RD/RA) are reliable and the costs are unlikely to increase. Prior to proposing the settlement the Region discussed the premium with the Office of Enforcement and its appropriateness under the Guidance on Premium Payments in CERCLA Settlements.

2. Performing Settlors

The Performing Settlors (Allied-Signal Inc., EM Industries Inc. and Monsanto Company) will perform the RD/RA. The total value of the Performing Settlors' settlement is $7,887,452.07. This total represents $765,988.74 of the past costs, $1,295,863.95 of the Orphans' Share of past costs and $5,772,528.55 of the estimated RD/RA costs. In addition, the Performing Settlors will pay costs for the performance of the RD/RA for the remedy in the ROD that may exceed the costs that EPA estimated as the RD/RA costs.

The Cash-Out Settlors' share combined with the Performing Settlors' share will give EPA 100% recovery of the RD/RA costs

and 99.30% recovery of past costs. The parties to Consent Decree Number 1 and the parties to the AOC will pay their respective shares of the past and future cost into a trust fund established by the Performing Settlors.

III. BACKGROUND

A. General Description of the Site

The Bluff Road Superfund Site is located on a four acre parcel in Columbia, Richland County, South Carolina. The Site is bordered on the east side by Bluff Road (Highway 48), and is located 10 miles south of the City of Columbia. The Congaree River is approximately four miles south of the Site. The surrounding and adjacent properties are wooded rural areas. The nearest residences are approximately one mile from the Site. Most of the nearby property and rear portions of the Site have been classified by the Corps of Engineers as wetlands. A map of the Site is attached hereto as Appendix 4.

The Site was first reportedly used as an acetylene gas manufacturing facility. Specific dates and details regarding the facility's operations are not available. Two lagoons were constructed at the north end of the Site to support the acetylene manufacture. In 1973 Columbia Organic Chemical Company ("COCC") began using the Site as a storage facility for solid and hazardous wastes, without a State permit for chemical waste storage and treatment. In 1976, COCC, while continuing to store hazardous waste on the Site, began a recycling facility on the Site under the name of South Carolina Recycling and Disposal, Inc. ("SCRDI"). COCC and SCRDI were essentially the same operation. Between 1976 and 1980 SCRDI deposited more than 7,500 fifty-five gallon drums and other containers of chemical waste on the Site. The chemical wastes included 1,1,1-Trichloroethane, acetone, phenol, cresol (methyl phenol), chlorophenol, and 2,4-dichlorophenol. The deterioration of many of the drums resulted in chemical wastes leaking into the soil and groundwater as well as the generation of noxious fumes, fires and explosions.

B. Response Actions at the Site

SCRDI continued to operate the Site, without a State permit, until 1980. In 1980 the Site was closed after a groundwater investigation conducted by SCDHEC and EPA revealed that the soils and groundwater was contaminated. The Site was subsequently listed on the National Priorities List, in October 1981, with a ranking of 83. The State of South Carolina listed the Site as a top priority.

On July 7, 1980, the United States filed a complaint against SCRDI, COCC and Oscar Sidenberg, who was the owner of the

property on which the Site is located, pursuant to Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, seeking injunctive relief to abate an imminent and substantial endangerment resulting from the handling, storage, and disposal of hazardous wastes at the Site and seeking reimbursement of costs.

EPA subsequently identified 25 PRP generators who were responsible for 90% of waste at the Site by volume. On August 4, 1982, the United States filed an Amended and Supplemental Complaint pursuant to Section 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, seeking the same relief and naming the 25 additional PRPs as defendants. Thirteen of the 25 PRP generators agreed to perform and/or fund 75% of surface cleanup at the Site under a consent decree.

A second amended complaint was filed in 1982 to limit the removal action to the surface cleanup and to name five PRP generators who were not parties to the consent decree as defendants. SCHDEC completed the remaining 25% of the removal under a State Cooperative Agreement whereby SCDHEC was awarded a federal grant by the United States to complete the removal. Over 7,500 drums were removed from the Site for disposal. Visibly contaminated soil and all above ground structures were removed from the Site.

In 1984, SCDHEC began a Remedial Investigation/Feasibility Study (RI/FS) to determine the type, extent, and degree of soil and groundwater contamination on and around the Site. The RI/FS became a federal fund lead when SCDHEC utilized all of their funding. EPA then ordered certain PRPs to perform the RI/FS. On April 21, 1988, the United States entered into the AOC with the Bluff Road Group under which the Bluff Road Group performed the RI/FS and became obligated to pay 51.96% of the RD/RA costs, less their approved RI/FS costs.

The RI/FS was completed in June 1989. The findings of the RI are set forth in detail in the Superfund Remedial Investigation Fact Sheet attached hereto as Appendix 5 (Pg. 2). A summary of the FS is set forth in detail in the Superfund Proposed Plan Fact Sheet attached hereto as Appendix 6 (pgs. 3-7).

EPA issued its Record of Decision ("ROD") for the Site in September 1990. The selected remedy for the Site consists of the following activities:

1. Extraction and on-site treatment by air stripping of contaminated groundwater;

2. In-situ soil vacuum extraction of contaminated soils;

3. Monitoring; and

4. Subsurface injection of treated water.

Specifically, the present worth of the Air Stripping alternative is approximately $4,339,500. This cost includes a capital cost of $1,012,000 for construction of the groundwater extraction system, the treatment units, a treated water discharge system, and all associated piping. This cost also includes annual expenditures for operation and upkeep of the system of $306,875. The total of the annual costs over 16 years, using a 5% discount rate is $3,326,500.

The present worth cost of the infiltration gallery/ reinjection discharge alternative is approximately $165,484. The estimated total cost for the soil vacuum extraction system with vapor phase carbon adsorption is approximately $1,070,000. This capital cost includes the anticipated O&M expenditures since this remedial action is not expected to last over two years. Capital cost include construction of the soil vapor extraction system, vapor treatment system, and all associated piping/mechanical facilities.

C. Enforcement History

In May 1987, the Region issued special notice letters to all PRPs listed on Appendix 7, offering them the opportunity to perform, finance or otherwise participate in the RI/FS. The PRPs named in the AOC, attached hereto as Appendix 8, performed the RI/FS.

In 1987 the United States filed suit against Allied-Signal Inc., EM Industries Inc. and Monsanto Company and other PRPs for the Site in the United States District Court for the District of South Carolina (Case Number 3:80-1247-6), to recover the past costs incurred by EPA in conducting the 1982-83 removal at the Site. SCDHEC intervened in the suit to recover the costs that the State incurred in performing the removal. On September 23, 1986, a judgment was entered in favor of the United States and SCDHEC whereby the PRPs named in the complaint were found liable for the surficial cleanup and all past cost incurred by EPA prior to June 1986. Presently the District Court is determining if the United States will be awarded prejudgment interest.

On September 21, 1990, the Region issued special notice letters to all PRPs listed on Appendix 9, offering them the opportunity to perform, finance or otherwise participate in the RD/RA. The Region received good faith offers from all of the PRPs listed on Appendix 9 except for the PRPs identified by an "R." Due to the number of PRPs identified for this Site and the complexity of the issues regarding this Site, the Region formally requested an extension of time from EPA Headquarters to complete

the RD/RA negotiations. As of September 10, 1991, all PRPs to the settlement have executed the attached consent decree.

D. PRP Analysis

1. Owners/Operators

The property on which the Site is located is presently owned by Fred Sidenberg and Horace Hutchinson. COCC and SCRDI are the only operators at the Site that EPA considers PRPs. COCC is no longer in business. SCRDI is in the process of filing bankruptcy. Neither the owners or operators of the Site have ever expressed any serious interest in performing the RD/RA or shown that they have the ability to perform or finance the RD/RA.

2. Generators

The remaining PRPs for this Site are generators from the Columbia, South Carolina area. Region IV identified approximately 113 PRPs after analyzing the invoices and receipts obtained from SCRDI's and COCC's files, and taking testimony from Max Gergel, James McClure and other employees of SCRDI and COCC. Many of the COCC and SCRDI receipts and invoices name the generator who sent the waste to the Site; state the amount of waste that the generator sent to the Site; and describe the waste that SCRDI received. Based on the information in the receipts, invoices, and the testimony of employees of COCC and SCRDI, the Region sent 104(e) Information Request letters to the PRPs, and accumulated additional evidence linking the PRPs to the Site.

3. Transporters

The Region has not identified any transporters that are PRPs.

4. PRPs Not Party To The Consent Decree

Appendix 9 hereto identifies all of the PRPs for the Site according to the following groups:

1. B = The Bluff Road Group;
2. D = The Cash-Out Settlors;
3. F = The Federal Settlors;
4. M = The Performing Settlors;
5. O = Orphans;
6. R = Recalcitrant;
7. X = Companies that have been released as PRPs.
8. * = Company that filed bankruptcy and paid EPA a sum as settlement of its liability.
9. - = These PRPs contributed such a small amount of waste to the Site that the computer was unable to give the PRPs a percentage number for the amount of waste that they contributed.

Region IV rounded the percentage to 0.01% Both PRPs participated as Cash-Out Settlors.

The groups identified with an O, R, X, B, and * represent the PRPs who did not participate in this settlement. The PRPs listed in groups identified with a "*" or "B" have already settled their liability to the United States. Group "X" represents the ten companies that the Region released as PRPs for this Site after the companies presented evidence proving to the Region that the companies should not be considered PRPs. The Region discussed releasing the PRPs with the Office of Enforcement and the Department of Justice prior to releasing the companies as PRPs.

Group "R" represents the 19 PRPs that the Region identified as recalcitrant. These PRPs are considered recalcitrant as opposed to orphans because the Region believes that these PRPs are in business and received special notice letters, but these PRPs did not send EPA good faith offers to participate in RD/RA settlement negotiations.

IV. Ten-Point Settlement Analysis

A. Volume of Wastes Attributable to Each PRP

The volumetric ranking prepared by Region IV in 1981 states the amount of waste that each of the PRPs contributed at the Site, with the exception of SCDHEC. EPA was not aware that SCDHEC was a PRP until after the ranking was prepared and subsequently ranked SCDHEC's share of waste contributed to the Site. A copy of the volumetric ranking is attached as Appendix 10. The liability of each Cash-Out Settlor, including SCDHEC is based on the volumetric ranking prepared by EPA.

B. Nature of the Wastes Contributed

The principle threat posed by the Site are volatile and semi-volatile organic compounds in the groundwater and the soil, contaminating the surficial aquifer.

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

Proving the Cash-Out Settlor's liability for the Site is problematic. The primary evidence that the Region will rely upon to prove each PRP's liability for the Site are receipts and invoices that the Region obtained from COCC and SCRDI in the early 1980s. These receipts are old and many are illegible. Few of the receipts and invoices contain all of the details about the business transactions between the PRPs and COCC and/or SCRDI that are needed to prove that the PRP's liability (i.e. the type of

waste that the PRP sent to the Site; if the waste was actually received by COCC or SCRDI; names of transporters).

The owners of COCC and SCRDI were unable to independently recall the names of the generators of the waste or the types of waste disposed of by there customers at the Site when asked by the Department of Justice in past depositions. Consequently, there is little corroborative testimony to prove that many of the Cash-Out Settlors are PRPs. The Region is not aware of any other individuals who would have knowledge of the companies that generated and/or transported the waste to the Site. Due to the age of the Site, it would be difficult, if not impossible, to locate additional witnesses at this time who the United States could rely upon to provide additional evidence of the PRP's liability. During RD/RA negotiations, the Region was forced to release ten PRPs who challenged EPA's evidence proving that they are PRPs for the Site because the evidence as to each PRP was weak (See Appendix 9, group X).

D. Ability of the Settling Parties to Pay

The Region has no reason to question the Performing Settlor's ability to pay their share of the costs or perform the RD/RA based on Dun and Bradstreet Reports. Due to the small amount of money that each Cash-Out Settlor is obligated to pay the United States, the Region has not evaluated each Cash-Out Settlor's individual ability to pay; however, the Region has no reason to question the Cash-Out Settlor's ability to pay their share. Since the PRPs are jointly and severally liable, the Region would look to the Performing Settlors to pay the share of any Cash-Out Settlor that did not make its payment to the United States.

E. Litigation Risks in Proceeding to Trial

The evidence that the Government would rely upon at trial to prove the Performing Settlors' and the Cash-Out Settlors' liability presents significant litigation risks. As stated in Section IV C of this memorandum, the evidence proving that each Cash-Out Settlor is liable for the Site is weak. The Region also would need to compile additional evidence to be sure that EPA could prove the Performing Settlor's liability for the RD/RA. Due to the limited records on this Site and the age of the Site, EPA would have a difficult time compiling additional evidence to prove that the Cash-Out Settlors and the Performing Settlors are liable for the cleanup of the Site.

F. Public Interest Considerations

This Consent Decree serves the public interest because it will conserve Government resources and reimburse the fund for most of the past and future costs.

G. Precedential Value

Although this settlement is consistent with the national policy of encouraging voluntary action by PRPs, achieving effective and expedited clean-up, and recovering 99.30% of the past costs incurred by EPA at this Site, Sections V (General Provisions), IX (Periodic Review), X (Additional Work), and XXIV (Covenants Not To Sue By Plaintiffs) of the Consent Decree deviate from the National Model RD/RA Consent Decree. In Section V, the Performing Settlors have agreed not to contest future liability as to EPA, for the cleanup of this Site. In Section X, the Consent Decree provides that the Performing Settlors are not obligated under this Consent Decree to perform additional work if that additional work is required by an Amendment to the ROD. For further details on the precedential value see Appendix 2 attached hereto.

H. Value of Obtaining a Present Sum Certain

The settlement value proposed in the Consent Decree outweighs any benefit that EPA could recover by litigating this case to recover the additional .70% or $102,463 of past costs not recovered in the settlement. Litigation costs would well exceed $100,000. Further, as stated in sections IV C and E of this memorandum, the evidence connecting the PRP's to the Site is weak.

I. Inequities and Aggravating Factors

An aggravating factor in this settlement is the issue of the nonrecovery of $102,463 or .70% of past costs. This sum represents the amount that the Region awarded SCDHEC on June 28, 1991, for costs that SCDHEC incurred during the 1982 surface cleanup under the terms of a State Cooperative Agreement. Based on a previous audit, EPA had disallowed certain project costs that SCDHEC sought to recover under the State Cooperative Agreement; and therefore, the United States did not owe SCDHEC any sum of money. On July 26, 1990, SCDHEC requested the Region to reconsider certain disallowed project costs totaling $373,196.

During this review the Region unexpectedly found that project costs exceeding $373,196 had been incorrectly disallowed by the Region in a previous audit. The Region determined that the United States actually owes SCDHEC $102,463. A copy of the letter to SCDHEC from Region IV explaining the Region's decision is attached hereto as Appendix 1.

Before the Region's review was complete, the Region and the PRPs had entered into an agreement whereby the PRPs agreed to pay the United States unreimbursed past costs totaling $955,694.33, which included the $373,196 of the State Cooperative Agreement

that was in dispute. The Region informed the PRPs that the total of the past costs would not increase. EPA agreed to decrease the total of past costs if any of the project costs in dispute were not approved by the Region in its final review. The Region does not intend to recover the additional costs since this agreement was made and the PRPs signed the signature pages before the Region was aware of the additional costs. Nevertheless, the Region is recovering a premium from the Cash-Out Settlors for the RD/RA costs, totaling $265,864.54, which actually gives the United States a settlement value in excess of 100%.

J. Nature of Case that Remains After Settlement

As this is a settlement which recovers 100% of future costs and 99.30% of past costs, no case remains after entry of Consent Decree Number 1 with regard to the remedy outlined in the ROD. If the ROD is amended, and additional work is required, the Performing Settlors are not required to perform the Amended ROD under Consent Decree Number 1, and EPA may be required to negotiate a new Consent Decree with the Performing Settlors. However, the issue of the Performing Settlor's liability for the Site has been resolved in this Consent Decree.

The Region is presently embodying the terms of the AOC into a judicial consent decree to be filed with the United States District Court. The only other issue to be resolved is obtaining long term access to three properties surrounding the Site in order to perform the remedy.

INDEX OF APPENDICES

APPENDIX	DOCUMENT
1	State Cooperative Agreement
2	Memorandum to Bruce M. Diamond and Raymond Ludwiszewski
3	Statement And Calculation Of Cash-Out Payments
4	Map
5	Fact Sheet
6	Proposed Plan
7	List of PRPs who received RI/FS Special Notice 1987
8	Administrative Order By Consent dated April 21, 1988
9	List of PRPs according to Groups
10	Volumetric Ranking

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

MAY 28 1993

Honorable Myles E. Flint
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

Re: Cost Recovery Consent Decree and Ten Point Settlement Analysis for the Lees Lane Landfill Site, Louisville, Ky. United States v. Ben Hardy, et al., Civil Action No. C-90-0695-L(J)

Dear Mr. Flint:

The purpose of this letter is to transmit the enclosed CERCLA Section 107 cost recovery consent decree and Ten Point Settlement Analysis for the Lees Lane Landfill Site in Louisville, Kentucky. The consent decree has been signed by Ford Motor Company, Dow Corning Corporation and EPA. Ford and Dow have each agreed to reimburse EPA $321,000 in settlement of EPA's complaint against them. This consent decree follows the 1989 consent decree signed by EPA, DOJ and 23 PRPs in which the PRPs agreed to reimburse EPA a total of $2.4 million. After DOJ lodged the first Consent Decree in 1990, Ford and Dow filed motions to intervene. DOJ added Ford and Dow to the complaint as defendants, and filed a motion to enter the consent decree.

In September 1992, the court issued an Order which denied the motion to enter and stated that the consent decree would not be entered unless the government offered to settle with Ford and Dow using the same cost basis ($3.2 million) used in the first settlement with the 23 PRPs. Subsequently, the government reached agreement with Dow and Ford in accordance with the court's Order. That agreement is reflected in the enclosed consent decree. James Farrell has been DOJ's lead counsel and Robert Caplan (404/347-2641, ext. 2239) has represented EPA. Mr. Farrell has prepared the government's renewed motion to enter the first decree which will be filed along with the enclosed consent decree.

Sincerely yours,

Patrick M. Tobin
Acting Regional Administrator

Enclosures

Printed on Recycled Paper

cc: Ray Ludwiszewski, OE
William White, OE
Bruce Diamond, OWPE
Sally Mansbach, OWPE
James Farrell, DOJ

ENFORCEMENT CONFIDENTIAL
ATTORNEY WORK PRODUCT
ATTORNEY-CLIENT PRIVILEGE

LEES LANE LANDFILL SITE
LOUISVILLE, KENTUCKY

TEN POINT SETTLEMENT ANALYSIS FOR SETTLEMENT
WITH FORD MOTOR COMPANY AND DOW CORNING CORPORATION

Background

The Lees Lane Landfill Site (the Site) sits astride the Ohio River in Louisville, Kentucky. The Site was operated as a municipal landfill until it was closed in 1975. Commercial, industrial and residential waste were disposed in the 53 acre unlined landfill. The Site was listed on the NPL in 1983. EPA conducted an RI/FS from 1984 until 1985. In 1986, EPA issued an Enforcement Decision Document (EDD, the equivalent of a ROD) requiring capping of hot spot areas, installation of rip-rap along the river bank, installation of a monitoring well system, and upgrading of an existing gas venting system. In 1987, after negotiations with the PRPs for implementation of RD/RA failed, EPA implemented the remedy selected in the EDD by conducting a removal action (this was one of Region IV's "removial" actions.) EPA's response action costs totalled approximately $3.2 million.

In 1988, EPA issued demand letters to approximately 30 PRPs, including the owners/operators of the Site, seeking recovery of its costs. EPA also referred the case to Headquarters and requested that Headquarters request the Department of Justice to file a Section 107 cost recovery action. After filing suit, EPA and DOJ conducted negotiations with the PRPs. In early 1989, EPA and 23 PRPs signed a consent decree. Under the proposed consent decree, the PRPs were obligated to reimburse EPA a total of $2.4 million dollars. Because the owners/operators refused to settle, the government planned to litigate against them to recover the remaining $800,000.

However, DOJ refused to lodge the consent decree because of its concern that Region IV had exceeded the $2 million limit on removal actions without having obtained a proper waiver. DOJ advised the Region that it would not lodge the decree until Region IV obtained a retroactive waiver. It took over a year for this issue to be resolved. Finally, Region IV did obtain the waiver and DOJ lodged the decree. In the interim, EPA

received evidence that Ford Motor Company [1] and Dow Corning Corporation were PRPs at the Site. Both companies were notified about this new evidence and given an opportunity to settle with EPA. However, the terms of settlement were different than those offered to the original PRPs due to the increased costs. Although DOJ/EPA agreed to settle on the same percentage basis as it did with the other large volume generators (10 %), the cost basis was increased due to additional costs which had accrued after the first settlement was reached. Ford and Dow insisted that they be offered the exact settlement terms offered to the original PRPs. The government did not agree to these terms. Next, DOJ lodged the decree and filed the complaint against the 23 settling PRPs. Ford and Dow filed a motion to intervene in order to challenge the consent decree on the grounds that it did not treat them fairly and that it would eliminate their contractual indemnification rights against Waste Management, Inc. (a settling PRP). DOJ amended the complaint and added Ford and Dow as defendants.

On September 9, 1992, the court issued an Order holding, among other things, that it would not enter the consent decree with the 23 PRPs unless and until the government offered Ford and Dow the same settlement terms offered to the other 23 PRPs. After several months of additional negotiations, the government agreed to settle with Ford and Dow on the same basis as it did with the other PRPs. As a result, Ford and Dow have signed a consent decree under which each has agreed to pay $321,000. DOJ elected to use a separate consent decree for Ford and Dow with essentially the identical terms as the first consent decree, because it was far easier to proceed this way than to get 23 corporations to sign an amended consent decree. Additionally, because these consent decrees are for cost recovery only and require no work, there should be no enforcement problems (i.e., no work plans are being submitted, so it is unlikely that stipulated penalties would be sought).

As a result of these settlements, the total amount recovered by EPA will be $3.2 million, which covers the costs incurred by EPA in performing the removal action. However, there are additional costs (enforcement, interest, indirect costs) totalling approximately $1 million which have not been recovered. DOJ and EPA intend to continue the litigation against the three remaining defendants, owners/operators Ben Hardy, J.H. Realty,

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[1]Ford had been identified during EPA's initial PRP search and was issued a demand letter along with the other 29 PRPs. However, Ford claimed that it had not sent hazardous substances to the Site. As a result, Ford did not participate in settlement discussions nor did it sign the original consent decree. Subsequently, EPA located a truck driver who stated that he had hauled Ford paint sludge to the Site.

and the Hofgesang Foundation. Financial records indicate that Mr. Hardy and Hofgesang Foundation have sufficient assets to satisfy a $1 million judgment. The evidence against all three defendants is strong.

Recently, DOJ and EPA have conducted settlement discussions with the attorney for these three defendants. Based on those discussions, DOJ/EPA believe that the defendants will submit a settlement offer in the next few weeks. In the event the offer is rejected, the government will vigorously pursue judgment. These defendants never participated in any settlement conferences and did not indicate an interest in settling or discussing the case until they learned that a settlement had been reached with Ford and Dow. Knowing that the government had settled with 25 PRPs, the defendants apparently have realized that they could be held liable for $1 million.

The original consent decree was signed by the 23 PRPs, EPA and DOJ and was lodged with the court nearly four years ago. As soon as EPA and DOJ sign the consent decree with Ford and Dow, DOJ will file a renewed motion to enter the original decree and the decree with Ford and Dow. The motion also will request the court to vacate that portion of its September 9, 1992, Order, which held that EPA was required to settle with Ford and Dow on the same terms offered to the 23 PRPs.

An analysis of the ten point criteria set forth in the Interim CERCLA Settlement Policy, announced as part of EPA's Hazardous Waste Enforcement Policy (50 Fed. Reg. 5034, Feb. 5, 1985), is presented below.

1. Volume of Waste Contributed by Ford and Dow

Dow: EPA learned about Dow's involvement at the Lees Lane Site after Dow had filed a response to a Section 104(e) Information Request Letter regarding the Tri City Superfund Site in Brooks, Kentucky. In its response, Dow stated that between 1964 and 1968, waste from Dow's plant in Elizabethtown, Kentucky, were disposed at the Lees Lane Landfill. Dow stated that it was unable to furnish any information about the volume of wastes, but also stated that all of its wastes were sent to Lees Lane. Dow also stated that its wastes contained various hazardous substances such as toluene and other solvents. Solvent type compounds were detected at the Site.

Ford: Although EPA had obtained Site records indicating that Ford may have sent waste to the Site, Ford contested the evidence through affidavits. After settlement negotiations had begun with the 23 PRPs, EPA located a former truck driver who remembered hauling Ford's paint sludges to the Site. Although he could not recall the exact quantity of Ford's paint sludge he had hauled from Ford, reference to the information previously

submitted by Ford enabled EPA to estimate the volumes of waste which may have been generated and sent to the Site.

Based on the estimated volume sent by Ford and Dow, EPA and DOJ decided to place them in the 10 percent generator category. The court was concerned not with the volume percentage assigned to Ford and Dow, but the cost basis the government was using to calculate Ford and Dow's respective shares. Accordingly, the government calculated Ford and Dow's share as 10 percent of the same cost basis used for the 23 PRPs, or $3.21 million. Ford and Dow have each agreed to the 10 percent designation and to pay $321,000.

2. Nature of the Waste Contributed

Ford: Ford's paint sludges were generated at its Louisville plant and typically contained metals (hazardous substances) many of which were detected at the Site.

Dow: Dow's plant waste contained hazardous substances including toluene and other solvents.

3. Strength of Evidence Connecting Ford and Dow and Their Wastes to the Site

Ford: Ford's plant was located within the general vicinity of the Site and most industries located near Ford also sent waste to the Site. The truck driver indicated that he specifically recalled hauling Ford's paint sludge to the Site. He remembered how the sludge was stored by Ford, what it looked like and how it was transferred to his truck. He did have trouble pinpointing the exact dates, but this is understandable since it occurred about 20 years ago.

Dow: Dow has admitted sending its wastes to the Site.

4. Ability of Ford and Dow to Pay

Both Ford and Dow are large financially viable companies and can easily pay their allocated share of $321,000.

5. Litigation Risks in Proceeding to Trial

If the government does not settle now with Ford and Dow, the court will not enter the consent decree with the other 23 PRPs meaning that we would have to try the case against all 28 PRPs in order to recover any of our costs. This would be a lengthy, costly trial not without litigation risks, i.e., the government could have evidentiary problems regarding some of the 23 settling PRPs; also, the PRPs might argue that EPA's actions (performing a "removial" - implementing the remedy by conducting a removal action instead of RD/RA) were inconsistent with the NCP. Aside from the factors listed above, there would be little

risk from an evidentiary standpoint in proceeding to trial with respect to Dow. There might be some risk with respect to Ford, due to the truck driver's inability to pinpoint more details about Ford's paint sludge. Another "risk" in proceeding to trial would be the likelihood of invoking the ire of the court since it has basically told the government that any settlement must be on the same cost basis offered to the first settlors.

6. Public Interest Considerations

There are probably no tangible public interest considerations because no one other than the government and the PRPs have shown any interest in this litigation. Since the cleanup has already been performed, the main benefit to the public is that the Superfund will be reimbursed $3.2 million and the government does not have to spend additional resources in litigation.

7. Precedential Value

The Court's Order could be considered to represent an adverse precedent in that it could be construed as holding that EPA must settle with subsequent settlors on the same basis as earlier settlors. This is contrary to EPA policy and other case law. For that reason, DOJ will move the court to vacate the objectionable portion of the Order.

8. Value of Obtaining a Present Sum Certain

EPA completed the response action at the Site in 1987. The 23 PRPs agreed to reimburse EPA $2.4 million in 1989. With Dow and Ford's agreement to pay a total of $642,000, the total recovery is approximately $3.2. The government does not intend to reopen the case against the 23 PRPs since the decree was signed four years ago. By entering into a settlement with Ford and Dow and the original 23 PRPs, the government will recover almost 100 percent of its actual response costs. This represents an excellent settlement at this Site. Most of the remaining costs are not actual cleanup costs but transactional, legal, enforcement, indirect and interest costs. The government team is confident that it will recover a significant portion of these remaining costs from the non-settling defendants.

9. Inequities and Aggravating Factors

EPA knows of no such factors present in this case.

10. Nature of Case Remaining After Settlement

As explained previously in this document, after this settlement is entered, the government will continue to pursue a settlement and/or judgment against the remaining three owner/operator defendants for costs not recovered from the 25 settlors. If settlement is not reached within the next few months, the government will proceed with additional discovery and the filing of a motion for summary judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA, Plaintiff, v. BEN HARDY, et al., Defendants.	CIVIL ACTION NO. C-90-0695-L(J)

CONSENT DECREE

I.

BACKGROUND

WHEREAS, the United States of America ("United States") on behalf of the Administrator of the United States Environmental Protection Agency ("EPA") filed on January 4, 1991, an Amended Complaint in this matter pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (hereinafter "CERCLA");

WHEREAS, in response to a release or a substantial threat of a release of a hazardous substance at or from the Lee's Lane Landfill ("the Site") in Jefferson County, Kentucky, the EPA conducted a response action pursuant to Section 104 of CERCLA;

WHEREAS, EPA has incurred costs in conducting response actions at the Site and will continue to incur response costs with respect to the Site;

WHEREAS, the United States and certain Defendants named in the Amended Complaint desire to settle this matter;

WHEREAS, the Settling Defendants deny liability for those matters alleged in the Amended Complaint, and the entry of this Consent Decree shall not be construed as an admission of liability by Settling Defendants;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that implementation of this Consent Decree will avoid prolonged and complicated litigation among the Parties, that entry of this Consent Decree is in the public interest, and that the past response costs incurred by the Plaintiff in connection with the Site are consistent with the National Contingency Plan;

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II.

JURISDICTION

This Court has jurisdiction over the subject matter of these actions pursuant to 28 U.S.C. §§ 1331 and 1345, 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over the Settling Defendants who, for purposes of this Consent Decree, waive all objections and defenses that they may have to

jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge this Court's jurisdiction to enter and enforce this Consent Decree.

III.

PARTIES BOUND

The Consent Decree applies to and is binding upon the United States and upon the Settling Defendants, their employees and officers and their successors, assigns, contractors, and agents. Any change in ownership or corporate status of a Settling Defendant shall in no way alter such Settling Defendant's responsibility under this Decree.

IV.

DEFINITIONS

Unless noted to the contrary, the terms of this Consent Decree shall have the same meaning as terms defined in CERCLA. Whenever the following terms are used in this Consent Decree and the Appendices attached hereto, the following definitions specified in this Paragraph shall apply:

A. "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

B. "EPA" means the United States Environmental Protection Agency.

C. "Future Response Costs" means any Response Costs which may be incurred by the Plaintiff in relation to the Site following lodging of this Consent Decree.

D. "MSD" means the Louisville and Jefferson County Metropolitan Sewer District.

E. "National Contingency Plan" or "NCP" means the National Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including any amendments thereto.

F. "Parties" means the United States of America and the Settling Defendants.

G. "Past Response Costs" means all Response Costs incurred by the Plaintiff in connection with the Site prior to lodging of this Consent Decree.

H. "Plaintiff" means the United States of America.

I. "Response Costs" means any costs incurred by Plaintiff pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

J. "Settling Defendants" means those Defendants who sign this Consent Decree, and their successors and assigns.

K. "Site" means the "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), encompassing the property commonly know as Lee's Lane Landfill, where hazardous substances have been disposed of and otherwise have come to be located. The Site is located approximately 4.4 miles southwest of Louisville, Kentucky, in Jefferson County, and is adjacent to the Ohio River.

L. "United States" means the United States of America and its departments and agencies, including the United States Environmental Protection Agency.

V.

REIMBURSEMENT OF RESPONSE COSTS

1. Settling Defendants agree to reimburse the Plaintiff as provided herein for Past Response Costs. Within thirty (30) days of the entry of this Consent Decree, Settling Defendants shall pay to EPA the dollar amounts specified below in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," and marked as relating to the Site, the civil action number of this matter, and the Department of Justice File No. 90-11-3-215, in reimbursement of Response Costs incurred by the United States:

Settling Defendant	Amount Due
Ford Motor Company	$321,000
Dow Corning Corporation	$321,000

The certified check(s) shall be forwarded to EPA-Region IV, Attention: Superfund Accounting, P.O. Box 100142, Atlanta, Georgia, 30384. Copies of the check(s) and any transmittal letter(s) shall be sent to the United States.

VI.

STIPULATED PENALTIES AND INTEREST

2. If any Settling Defendant fails to comply with any requirement applicable to it in this Consent Decree, such Settling Defendant shall pay to EPA stipulated penalties in the

following amounts for each day of each and every violation of said requirements:

Period of Delay	Penalty Per Violation Per Day
1st through 14th day	$ 3,000
15th through 30th day	$ 6,000
Beyond 30 days	$10,000

3. Except as otherwise provided in this Paragraph 3, stipulated penalties shall begin to accrue on the day that noncompliance occurs or on the day following the date that payment is due pursuant to Paragraph 1, and shall continue to accrue through the final day of correction of the noncompliance or the day that payment is received by EPA. With respect to any violation of Paragraph 14, stipulated penalties shall begin to accrue upon notification by the United States or EPA of noncompliance. Separate penalties shall accrue for each separate violation of this Consent Decree.

4.a. All penalties due to EPA under this Section shall be payable within thirty (30) days of receipt by the Settling Defendant of notification of noncompliance. Interest shall begin to accrue on the unpaid penalty balance at the end of the thirty-day period, at the rate specified in Subparagraph 4(c) below. A handling charge shall be assessed at the end of each thirty-day late period, and a six (6) percent per annum penalty charge shall be assessed if the penalty is not paid within ninety (90) days after it is due.

b. With respect to any outstanding payment obligation under Paragraph 1, Section V, except as otherwise specified

therein, interest shall accrue on the outstanding obligation beginning on the day after payment is due at the rate specified in Subparagraph 4(c) below. The interest due under this Subparagraph shall be in addition to any interest or charges assessed under Subparagraph 4(a).

c. All interest payable pursuant to this Consent Decree shall accrue at the rate equal to the yield fixed in the 52-week U.S. Treasury MK Bills purchased by the U.S. Treasury Department for investment of Superfund monies in September for the applicable fiscal year. For fiscal year 1989 (October 1, 1988, to September 20, 1989), the interest rate shall be 8.39%. Interest shall be compounded annually on October 1.

5. Stipulated penalties due to EPA shall be paid by certified check made payable to "EPA Hazardous Substance Superfund" and shall be mailed to EPA-Region IV, Attention: Superfund Accounting, P.O. Box 100142, Atlanta, Georgia, 30384.

6. The stipulated penalties set forth above shall be in addition to any other remedies or sanctions which may be available to the Plaintiff by reason or any Settling Defendant's failure to comply with the requirements of this Consent Decree.

VII.

COVENANTS NOT TO SUE BY PLAINTIFF

7. Past Response Costs. Subject to the reservations of rights in Paragraph 9 of this Section, the Plaintiff covenants not to sue Settling Defendants in any civil or administrative proceeding for reimbursement of Plaintiff's Past Response Costs.

This covenant not to sue shall take effect upon the receipt by Plaintiff of the payments required by Paragraph 1, Section V. This covenant not to sue is conditioned upon complete and satisfactory performance by Settling Defendants of their payment obligations under Paragraph 1, Section V, of this Consent Decree. This covenant not to sue extends only to the Settling Defendants and does not extend to any other person.

8. Monitoring Activities and Operation and Maintenance.

a. Plaintiff has entered into an enforceable agreement with MSD for the performance of monitoring, operation, and maintenance work related to the Site. Plaintiff covenants not to sue Settling Defendants for the performance by MSD pursuant to said agreement and further covenants not to sue Settling Defendants for oversight costs which may be incurred by EPA in overseeing the work required pursuant to said agreement.

b. The covenants not to sue set forth in this Paragraph 8 shall take effect upon the receipt by Plaintiff of the payments required by Paragraph 1, Section V. These covenants not to sue are conditioned upon complete and satisfactory performance by Settling Defendants of their payment obligations under Paragraph 1, Section V, of this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

9. Reservation of rights. The Plaintiff reserves, and this Consent Decree is without prejudice to, all rights against each Settling Defendant with respect to all matters other than

those expressly specified in the covenants not to sue set forth in Paragraphs 7 and 8 of this Section, including but not limited to:

(1) claims based on a failure by such Settling Defendant to meet a requirement of this Consent Decree;

(2) claims for reimbursement of Future Response Costs, except as expressly provided in Paragraph 8 of this Section;

(3) claims for injunctive relief for the performance of response actions except as expressly provided by Paragraph 8 of this Section;

(4) claims for damages for injury to, destruction of, or loss of natural resources; and

(5) any criminal liability.

10. Any claim or defense which any Settling Defendant may have against any person or entity, not a party to this Consent Decree, including, but not limited to, claims for indemnity or contribution, is expressly reserved. Except as expressly provided in Paragraph 8(a), nothing in this Consent Decree shall in any way limit the rights and defenses which may be available to any Settling Defendant in any action other than an action to enforce the provisions of this Consent Decree.

11. Notwithstanding any other provision of this Consent Decree, the Plaintiff retains all authority and reserves all rights to take any and all response actions authorized by law.

VIII.

CONTRIBUTION PROTECTION

12. Subject to the reservations of rights in Section VII, Paragraph 9, the Plaintiff agrees that by entering into and carrying out the terms of this Consent Decree, the Settling Defendants will have resolved their liability to the Plaintiff for those matters set forth in the covenants not to sue in Section VII, Paragraphs 7 and 8, pursuant to Section 113(f) of CERCLA, and shall not be liable for claims for contribution for those matters.

IX.

COVENANTS BY SETTLING DEFENDANTS

13. Settling Defendants hereby covenant not to sue the Plaintiff or its representatives for any claims related to or arising from this Consent Decree, including any direct or indirect claim for reimbursement from the Hazardous Substances Superfund established pursuant to Section 221 of CERCLA, 42 U.S.C. § 9631.

X.

COOPERATION AND RETENTION OF RECORDS

14. Settling Defendants agree to cooperate and assist the Plaintiff in the prosecution of this or any other actions relating to the Site against all persons or entities who are not parties to this Consent Decree. Settling Defendants' obligations of cooperation and assistance include, but are not limited to, naming and producing fact witnesses with knowledge relating to

the Site for interviews, depositions, and trial; waiving the subpoena requirements for the depositions and trial testimony of such witnesses; producing documents requested; and promptly responding to requests for information regarding those matters specified in Section 104(e)(2) of CERCLA. The benefit of said agreement by Settling Defendants shall extend only to Plaintiff and not to any other person. Nothing in this Paragraph shall be construed to limit or otherwise affect the exercise of Plaintiff's prosecutorial discretion or any of Plaintiff's authorities under Section 104(e) of CERCLA. Further, nothing in this Paragraph shall be construed to alter the scope of the covenants not to sue and reservations of rights set forth in Paragraphs 7 through 9, Section VII of this Consent Decree.

15. Until ten years after the entry of this Consent Decree, each Settling Defendant shall preserve and retain all records and documents now in its possession or control that relate in any manner to the Site. After this document retention period, Settling Defendants shall notify the United States at least ninety (90) calendar days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendants shall relinquish custody of the records or documents to the United States.

16. Nothing in this Section X shall be construed as a waiver of the attorney-client privilege or work product doctrine by any of the Parties to this Consent Decree.

XI.

NOTICES AND SUBMISSIONS

17. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals and the addresses specified below, unless those individuals or their successors give notice of a change to the other parties in writing. Written notice as specified herein shall constitute complete satisfaction of any notice requirement of the Consent Decree with respect to the Parties hereto.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DOJ # 90-11-3-215

and

Director, Waste Management Division
United States Environmental Protection Agency,
Region IV
345 Courtland Street
Atlanta, GA 30365

As to the Settling Defendants:

Ford Motor Company:

John R. Phillips, Esq.
Ford Motor Company
728 Parklane Towers East
One Parklane Boulevard
Dearborn, Michigan 48126-2493

Dow Corning Corporation:

David E. Dearing, Esq.
Cromer, Eaglesfield & Maher, P.A.

1500 Market Tower
10 West Market Street
Indianapolis, IN 46204-2968

XII.

EFFECTIVE AND TERMINATION DATES

18. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

19. This Consent Decree shall terminate upon expiration of the ten-year document retention period specified in Section X. Termination of this Consent Decree shall not affect the covenants not to sue or the reservations of rights set forth in Section VII or the continuing obligations of Settling Defendants set forth in Section X.

XIII.

RETENTION OF JURISDICTION

20. This court will retain jurisdiction for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the modification of this Consent Decree or to effectuate or enforce compliance with its terms.

XIV.

MODIFICATION

21. No modification shall be made to this Consent Decree without written notification to and written approval of the Parties and the Court. The notification required by this Section shall set forth the nature of and reasons for the requested modification. No oral modification of this Consent Decree shall

be effective. Nothing in this paragraph shall be deemed to alter the Court's power to supervise or modify this Consent Decree.

XV.

SIGNATORIES

22. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

23. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure, including service of a summons, and any applicable local rules of this Court.

SO ORDERED THIS _____ DAY OF _____, 19__.

_____
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree relating to the Lee's Lane Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

Myles E. Flint
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: _____

James D.P. Farrell
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: MAY 2 0 1993

Patrick M. Tobin
Acting Regional Administrator
U.S. Environmental Protection Agency, Region IV
345 Courtland Street
Atlanta, Georgia 30365

OF COUNSEL:

Robert Caplan, Esq.
U.S. Environmental Protection Agency, Region IV

THE UNDERSIGNED PARTY enters into this Consent Decree relating to the Lee's Lane Superfund Site.

FOR THE FORD MOTOR COMPANY:

Date: 3/22/93

J. M. Rintamaki
Assistant Secretary

Agent Authorized to accept service on Behalf of Ford Motor Company:

Name: J. A. Courter
Title: Secretary
Address: Ford Motor Company
The American Road
Dearborn, MI 48121-1899

THE UNDERSIGNED PARTY enters into this Consent Decree relating to the Lee's Lane Superfund Site.

FOR THE DOW CORNING CORPORATION:

Date: Feb. 18, 1993

David E. Dearing

Agent Authorized to accept service on Behalf of Dow Corning Corporation:

Name: David E. Dearing, Esq.
Title: Cromer, Eaglesfield & Maher
Address: 1500 Market Tower
10 West Market Street
Indianapolis, IN 46204-2968

Partial Cost Recovery

ENFORCEMENT CONFIDENTIAL
ATTORNEY WORK-PRODUCT

TEN POINT SETTLEMENT ANALYSIS
JMC SUPERFUND SITE
LEXINGTON, NORTH CAROLINA

I. OVERVIEW

The purpose of this Memorandum is to set forth the basis for EPA Region IV's recommendation that the Partial Consent Decree (the Decree) for the JMC Site (the Site), located in Lexington, North Carolina, entered by EPA, Region IV, and co-defendants: Gaither S. Walser, Executor of the Estate of Nancy P. Miller, Edwin Goldstein, and Herbert Klion (the Settling Defendants) be executed and approved by EPA Headquarters and the Department of Justice. This Memorandum sets forth the background of this case, the terms of the settlement, and an analysis of the agreement pursuant to the ten point criteria outlined in the Interim CERCLA Settlement Policy announced as part of EPA's Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034 (Feb. 5, 1985).

The Decree provides for an approximately thirty-eight percent (38%) settlement of total past costs for this Site. Approval of the proposed Decree will result in the United States recovering nearly forty percent (40%) of the total costs incurred in connection with a removal action (the Removal) performed by EPA at the Site in 1988.[1] The United States' litigation team recommends approval of this settlement because of the inherent litigation risks in this case.

First, each of the Settling Defendants has a strong "divisibility of harm defense." Although EPA's costs are for the removal of liquids and soils at the Site, based on the particular facts of this case, each Settling Defendant could argue persuasively that its responsibility is limited to soil removal only. Because our strongest argument against these defendants is that they are liable for removal of contaminated soils only, and soil removal accounts for approximately fifty percent (50%) of total costs, the costs recovered pursuant to this settlement constitute a recovery of approximately seventy-five (75%) percent of the defendants' potential liability. Second, there are litigation risks with regard to establishing each Settling Defendant's liability in a complex, fluctuating, corporate ownership scenario where EPA's liability evidence presents certain problems.

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[1] As set out more fully below, a partial removal, supervised by the State of North Carolina which removed contaminated liquids only, was conducted at the Site in 1984. EPA did not participate in this removal.

Litigation for the recovery of the remaining costs will continue against the non-settling defendants. The United States' litigation team is considering a further settlement with some of the non-settling defendants. However, this possible settlement will not cover all of the remaining costs incurred at the Site. This case presents issues concerning "divisibility of harm," a developing area of Superfund law.

This cost recovery action was referred to the Department of Justice (DOJ) in 1989, and the case was filed that same year. The total past costs incurred by EPA at the Site as of October 5, 1992, exclusive of interest, is $1,011,056.54. Pre-judgment interest through October 5, 1992, totals $169,632. Approximately half of these costs were for soil cleanup at the Site, while the remainder was spent on removal of hazardous substances in liquid form. EPA does not expect to incur significant future costs in connection with the Site, since the removal has been completed, the Site did not rank on the National Priorities List (NPL), and no future action is contemplated. There will probably be future litigation costs with respect to the remaining defendants.

II. TERMS OF THE SETTLEMENT

Attached for your concurrence[2] is a proposed partial consent Decree with defendants the Estate of Nancy Miller (the "Estate"), Herbert Klion ("Klion"), and Edward Goldstein ("Goldstein") providing for reimbursement of $446,000 for past costs incurred at the Site.

The proposed Decree seeks to resolve the Settling Defendants' alleged liability under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, ("CERCLA"), 42 U.S.C. § 9607, for past costs incurred in connection with EPA's removal action at the Site in exchange for their payment to the United States of $446,000. The payment will be made in one lump sum within thirty days of entry of the Decree by the three Settling Defendants.

Approval of the proposed Decree will result in the United States recovering $446,000, approximately thirty-eight percent (38%) of the total costs of $1,180,688.54, incurred in connection with the Removal performed at the Site in 1988. Litigation for recovery of the remaining costs will continue against defendants Linda and Steven Pitchersky (the Pitcherskys) and Miroslav Arandjelovic (Miro) former owner/operators of the Site. However,

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[2] As set out in OSWER Directive No. 9012 10-b, "Redelegation of Civil Judicial Settlement Authorities Under Delegation 14-13-B and 14-14-E."

as noted above, the United States litigation team is entertaining settlement negotiations with the Pitcherskys.

The key provisions of the Decree include: Section V, Covenant Not to Sue; Section IX, Contribution Protection; and Section VI, Reservation of Rights. While the Decree does not contain reopener language, the Reservation of Rights Clause explicitly reserves the government's rights to maintain an action for cost recovery of future costs, injunctive relief, and natural resources damages.

The Decree contains the standard provisions related to the settlement of a CERCLA Section 107 action. The Decree does not address performance of work by Settling Defendants. As noted above, the Decree provides a standard Covenant Not To Sue Settling Defendants for past response costs incurred at the Site. The Settling Defendants had originally demanded that the covenant be broadened to include any future costs that may be incurred at the Site; however, EPA refused to include such language in the Decree. The Decree does not provide for any environmental projects.

The Contribution Protection provision included in the Decree applies only to costs incurred by the United States. Therefore, this provision will not preclude the State of North Carolina from filing an action against the Settling Defendants for reimbursement of response costs incurred by the State during the 1984 removal. However, the contribution protection shields the Settling Defendants against any action that the non-Settling Defendants may file against them for reimbursement of costs that these parties could pay to the United States as a consequence of any future judgment for past costs that may be entered in the case against the non-Settling Defendants.

The JMC litigation team and Region IV recommend acceptance of the proposed settlement. An assessment of the ten point criteria is set forth in Section IV below.

III. BACKGROUND

A. Site Description

The JMC Furniture Site consisted of a metal plating facility located in Lexington, North Carolina. The facility was known by several names and was owned and operated by a series of corporate entities over the years, all of which are now defunct. The facility operated from the early 1960's until it was closed in 1987, plating zinc, cadmium, chrome, nickel, and brass during the years of its operations. Large quantities of acids, caustics, and solvents were also used at the Site.

B. Enforcement History

Several state RCRA inspections conducted in the early 1980's identified numerous waste management violations. During this time, the facility remained out of compliance with interim status requirements and the State of North Carolina assessed several administrative penalties. In 1984, the Site was cleaned up by the Pitcherskys under the supervision of the State of North Carolina. Prior to 1984, hazardous substances in liquid form had been stored at the facility in drums, vats, and containers. Also, soil contamination had occurred as a consequence of the facility's operation. Pursuant to the 1984 cleanup, all drums, vats, and open containers of hazardous substances were removed from the Site; however, no contaminated soils were removed from the Site. In 1987, EPA participated in a RCRA inspection at the request of the North Carolina Division of Health Services (NCDH). A 1987 EPA Preliminary Site Assessment noted newly filled vats and drums of hazardous substances and areas of stressed vegetation on-site.

Pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, EPA conducted a removal action at the Site during the spring and summer of 1988. Contaminated soils on and adjacent to the Site were excavated and removed. Vats and drums of wastes stored on-site and in a building adjacent to the facility were stabilized and disposed of off-site. To date, EPA has incurred costs amounting to $1,180.688.54 in connection with the Removal at the JMC Site.

On December 5, 1989, EPA filed a Civil Complaint (the Complaint) pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, Civil Action No. C-89-886-S, for cost recovery against past owner/operator, the Estate of Nancy P. Miller. On June 20, 1990, EPA amended the Complaint naming four additional defendants: past owners/operators Steven and Linda Pitchersky (the Pitcherskys), Carolin Corporation (Carolin) and Benz Holding Company (Benz). On May 13, 1991, a second amended complaint was filed naming three additional defendants: past owner/operator Miroslav Aranjdelovic (Miro) and past operators Herbert Klion (Klion) and Edward Goldstein (Goldstein).

C. Analysis of Settling PRPS

1. The Estate of Nancy P. Miller - As a past owner/operator of the Site during the time of disposal, Nancy P. Miller is liable under CERCLA § 107(a)(2). Miller was a principal in several of the corporations which owned and operated the plating facility at the Site between 1981 and 1983. Miller died in 1988, and her estate is currently in the Probate Court of Davidson County, North Carolina. Although ample evidence indicates that Nancy Miller actively managed the Site until 1983, when the facility was sold to Linda and Steven Pitchersky, establishing Miller's

liability at trial might present some problems which are more fully explained below in Section IV 3 B.

2-3. Herbert Klion and Edwin Goldstein As past operators at the time of disposal, Klion and Goldstein, were added as defendants for their role in operating both Carolin Corporation, the holding company that owned the Site property from 1985-1989, and JMC Furniture Company, the last known company to operate a plating facility at the Site for the period between 1985 and 1986. (In 1986, JMC was sold to the final operator, Miro, who continued to operate the facility under the JMC name until a time immediately prior to EPA's 1988 removal.)

EPA has alleged that Klion and Goldstein are liable under CERCLA § 107(a)(2) as past operators at the Site at the time of hazardous waste disposal. However, Klion's liability is not well-established based on the evidence available to EPA. With regard to Goldstein, EPA's evidence indicates he played a much more active role in operating the Site, however, establishing his liability at trial might also present problems. Section IV 3 B of this report provides a detailed explanation of Klion's and Goldstein's involvement at the Site.

D. Analysis of Non-Settling PRPs

1. Steven and Linda Pitchersky (the Pitcherskys) - The Pitcherskys, past owners and operators at the time of disposal, were added as defendants for their role in owning and operating the Site during a two-year period of time (1983-85). The Pitcherskys are liable parties under CERCLA § 107(a)(2).

2-3. Carolin Corporation; Benz Corporations (Carolin; Benz) Carolin and Benz, past owners at the time of disposal, are also liable under CERCLA § 107(a)(2). These real estate holding companies were added as defendants due to their ownership of the Site property between 1985 and 1989.[3] Carolin and Benz are both defunct corporations without assets.

4. Miroslav Arandjelovic (Miro) - Miro whose liability is based on CERCLA § 107(a)(2), was added as a defendant due to his extensive involvement in running the operations of the Site during the late 1980's and his ownership of the now defunct JMC Furniture Company between 1986 and 1988. Miro is probably the most culpable individual associated with the Site. He was the

[3] The Pitcherskys have acted variously as officers and stockholders of Benz and Carolin and may have some additional liability as operators for conditions at the Site based on their activities during the Carolin/Benz periods of Site ownership.

last owner/operator at the Site, and apparently allowed conditions to deteriorate badly. Miro fled to Canada in the late 1980's, and on July 23, 1992, EPA was finally able to serve him with process. On September 3, 1992, the United States submitted a Request to Enter Default against Miro in the United States District Court for the Middle District of North Carolina, Greensboro Division, which recently entered default against him.

IV. ANALYSIS OF THE TEN POINT SETTLEMENT CRITERIA

The Ten Point Settlement Criteria are set out below:

1. Volume of Wastes Attributable to Each Settling Defendant

There is no effective method by which EPA can determine the volume of wastes contributed to the Site by each PRP. EPA does not have records indicating the amount of wastes contributed by each PRP to the Site. This criterion is thus inapplicable.

2. Nature of Wastes Contributed

Soil samples taken both by NCDH and EPA showed high levels of chromium, nickel, cadmium, copper, and lead at the Site. These substances were released from plating wastes which were spilled in and around treatment and storage areas and spilled or dumped down a slope located just behind the facility. In addition, the Site contained numerous vats and drums of cyanides, acids, caustics, solvents, and spent plating wastes.

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

While the United States has fairly convincing evidence linking the Estate to the Site based on Nancy Miller's status as operator of the facility, the evidence against Goldstein is not quite as strong, and the evidence against Klion is weak. In addition, the available evidence also indicates that each Settling Defendant is probably responsible for only a portion of the costs, since all of them were involved with the Site at a time prior to the 1988 EPA cleanup, but none was likely responsible for the conditions that caused EPA to take immediate removal action at the Site.

As detailed more fully below, because of the 1984 cleanup of liquids, the Estate may have valid grounds to limit its liability only for soils excavated during the removal. Like the Estate, Klion and Goldstein are also primarily liable for soil contamination. EPA does not have conclusive evidence indicating that any liquid contamination occurred during the Klion and Goldstein operation of the site. Instead, the evidence strongly

indicates that Miro bears primary responsibility for the majority of this portion of the costs.

A. The Estate of Nancy P. Miller- The majority of the evidence indicates that Miller operated the Site from 1981-1983. She was a corporate principal in the two defunct corporations operating the Site during this time.[4] Deposition testimony given by Roger Spach, Superintendent for the City of Lexington Water Resources, indicates that Miller was the person of highest authority at the Site, was usually present during his numerous visits during the early 1980's, and appeared to be the person in charge of all environmental matters. Deposition testimony by Ronnie Arnette, plant manager, indicates Miller's complete control over the Site. Finally, in 1981, Miller filed a RCRA application wherein she stated that she was the facility's owner/operator.

With regard to releases during her tenure, Spach's deposition substantiates sloppy waste handling practices, a poorly functional wastewater treatment system, and overrunning tanks. A 1982 North Carolina RCRA inspection report notes problems with the wastewater treatment system and deteriorating drums and basins filled with plating wastes. Finally, one of the former plating managers at the Site, Jack Parker, reported in a witness interview that there were spills and leaks from time-to-time throughout the facility's entire operation.

While the above evidence strongly implicates Miller as an operator, establishing her liability at trial could present certain problems. First, the State of North Carolina RCRA inspector, Steve Phibbs, recalled during an interview with Steve Silverman, attorney for DOJ that when Phibbs visited the Site on several infrequent occasions, he found Nancy Miller a "very uninformed person" with regard to facility operations at the site. Second, in light of the fact that over ten years have elapsed since Nancy Miller operated the Site, Spach's testimony as to her involvement might not be as convincing as it might have been earlier.

Finally, of all the Settling Defendants, Miller has the strongest divisibility of harm argument. Specifically, the Estate's liability as an owner, is limited to conditions prevailing before 1983, when Nancy Miller sold the Site property to the Pitcherskys, who continued to own and operate the Site. Approximately one year after Miller sold the JMC property, the Site was cleaned up under the supervision of the State of North Carolina. During this cleanup, any drums, vats and open containers containing hazardous substances were removed from the

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[4] These defunct corporations were not included as defendants in this lawsuit.

Site. However, no contaminated soil was excavated as part of the 1984 cleanup. When EPA conducted the 1988 removal, it cleaned up contaminated soils, and vats and drums of hazardous substances presumably placed there by Miro and JMC.[5] Thus, it is arguable that the government cannot establish joint and several liability for the entire cost of EPA's cleanup against the Estate. Rather, our strongest case against this past owner/operator is that it is jointly and severally liable only for contaminated soils removed by EPA in 1988 which account for approximately one-half of the total cost of the cleanup.[6]

B. Herbert Klion and Edwin Goldstein- In terms of establishing operator liability, for Klion and Goldstein, there is little evidence that Klion ever operated the Site. While the evidence does indicate that Goldstein played a much more active management role during JMC's operation of the Site, his liability as an operator is not completely clear. Klion's Section 104(e) responses claim that he was a "passive investor" in the plating operation with no actual responsibilities at the Site or knowledge of waste handling practices. EPA has no evidence to the contrary. In addition, although EPA deposed other witnesses at the Site, including his co-defendants, none of them ever implicated Klion.

With regard to Goldstein's liability as an operator, the picture that emerges from the evidence shows he played a much more active role at the Site than Klion, yet evidence showing he operated the Site on a day-to-day basis is not completely definitive. In Goldstein's Section 104(e) response he admits that he was involved in the marketing aspects of JMC and that he had contact with city and governmental officials regarding health and environmental problems. However, Goldstein denies that he had day-to-day knowledge of or involvement in the plating operations or waste management practices at the Site. Deposition testimony paints a conflicting view of Goldstein's role at JMC. Most witnesses testified that Goldstein "called the shots" at the facility; however, one witness saw his role as less active. Thus, if this case were to proceed to trial, it is not entirely certain whether the government could prevail against Goldstein, and it is unlikely that the government would be successful in establishing operator liability against Klion.

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[5] As noted earlier, the available evidence indicates that a this time Herbert Klion and Edwin Goldstein had sold JMC to Mir and were no longer involved in its operations.

[6] See the discussion of the "divisibility of harm" issue i point 5 of this section below.

Even if the United States was able to establish operator liability against both Klion and Goldstein, we would be faced with the same evidentiary difficulties, regarding the divisibility of harm defense as we would with the Estate. Although Klion and Goldstein became involved with the Site between 1984 and 1986, after the Estate (Nancy P. Miller) and the Pitcherskys had operated the Site (and therefore closer in time to the date of the EPA cleanup), there is no specific evidence indicating that the drums, vats, and open containers found at the Site and removed in 1988 were placed there during the Klion/Goldstein era.[7] Rather, the evidence indicates the drums, vats, and containers were placed there by the subsequent operator, Miro. With regard to liability for soil contamination, during the Klion/Goldstein era, Roger Spach stated in his deposition that the facility's wastewater treatment system never functioned properly throughout its entire history, discharging wastewater onto the ground. In addition, Spach noted the facility's continuous history of sloppy housekeeping practices.

The theory of liability against these two defendants is similar to the Estate's: namely, that during the Klion/Goldstein era of operation, there was incremental soil contamination for which the two defendants are jointly and severally liable. As noted above, these costs are approximately one-half of the total cleanup costs.

4. Ability of Settling Party to Pay

EPA has no reason to question the Settling Defendants' ability to pay the amount of the past costs in the attached Decree. (Of the $446,000.00 the Settling Defendants have agreed to pay, EPA does not know how much each of them is contributing other than that the Estate is paying the largest share followed by Goldstein and then Klion). However, unfortunately, there are no defendants with both clear liability and sufficient assets to provide full reimbursement of the government's costs in this case. While some of the defendants are clearly liable for all or most of the costs of the cleanup, they are either defunct corporations: Carolin and Benz, or as in the case of Miro they present the dilemma of limited viability in addition to the problems inherent in locating and attaching assets in a foreign country. Other defendants, as noted earlier, may have greater ability to pay, but may have limited liability for the costs of the cleanup, specifically: the Estate, Klion, Goldstein, and the Pitcherskys. In addition, EPA's evidence indicates that Goldstein is not a man of means.

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[7] The Pitcherskys are non-settling defendants whose involvement at the Site is described in Section III D 1 above.

A. The Estate of Nancy P. Miller- In June of 1989, when Region IV referred this case to the Department of Justice, the Assets of the Estate were over $1,482,000. EPA filed a complaint in December of that year in order to prevent dispersal of Estate assets. Although the actual financial situation of the Estate is unknown, it is likely its assets have diminished in defense of this litigation.

B. Edwin Goldstein and Herbert Klion- Financial information about Edward Goldstein and Herbert Klion indicates that Klion has sufficient assets to pay his agreed upon share.

With regard to Goldstein, the Region has no evidence indicating he is able to pay the entire amount of EPA costs. The Region's initial assessment of Goldstein's property holdings, conducted by a civil investigator, did not indicate substantial assets. In addition, we were informed on several occasions by attorneys for the Estate of Nancy Miller that despite their efforts, they were unable to locate any significant assets belonging to Goldstein. Finally, during settlement negotiations, Herbert Klion informed Regional Counsel and counsel for DOJ that he initially became involved as an investor in JMC because Goldstein was financially unable to make the investment on his own.

5. Litigative Risks in Proceeding to Trial

Region IV believes that there are no litigative risks regarding the admissibility of the government's evidence, but there are some litigative risks regarding the adequacy of the government's evidence against the Settling Defendants both in terms of each Settling Defendant's joint and several liability for the entire cleanup, and Herbert Klion's liability as an operator.

First, with regard to joint and several liability for the entire cost of the cleanup, as noted in Section IV (3) above, the government may only be able to establish joint and several liability among the Settling Defendants for contaminated soils excavated during the 1988 removal and not for the entire cost of EPA's cleanup. EPA believes that it is likely the Settling Defendants will not be found liable for costs incurred in connection with the 1988 removal of vats, drums and containers of hazardous substances. Because all the drums, vats, and open containers of hazardous substances linked to the Estate were removed from the property during the 1984 cleanup (in which EPA was not involved) and there is no evidence of liquid disposal during the Klion/Goldstein era, the Settling Defendants could argue that their harm, the incremental soil contamination, is properly divisible from the contaminated liquid harm caused by more recent owner/operators such as Miro.

CERCLA does not expressly provide for joint and severable liability among potentially responsible parties, rather the doctrine was intentionally omitted "in order to have the scope of liability determined under common law principles". U.S. v. Alcan Aluminum Corp., 964 F.2d 252, 268 (3rd Cir. 1992). In determining these common law principles, courts have looked to the Restatement (Second) of Torts for guidance. See Alcan, Id.; U.S. v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983); U.S. v. Monsanto Co., 858 F.2d, 161, 171; U.S. v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989). Section 875 of the Restatement explains the concept of joint and several liability as follows:

> Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

However, this principle is balanced by the doctrine of "divisibility of harm" provided by Section 433A of the Restatement:

> If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he himself caused.

Thus, in determining the nature and extent of liability under CERCLA, courts have consistently held that PRPs may limit their liability if they can establish that the environmental harm at the site is divisible and that the damages are capable of some reasonable apportionment. See .eg., Alcan, Id.; Monsanto, Id.; U.S. v. Kramer., 757 F. Supp. 397, 422 (D.N.J. 1991); Purolator Products Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 133 (W.D.N.Y. 1991); O'Neill V. Picillo, 883 F.2d 176 (1st. Cir. 1989). [8]

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[8] Although factually different, O'Neill v. Picillo, supra, might be used by the Settling Defendants to establish that they are only liable for the soil cleanup and not for the disposal of the vats and drums containing hazardous substances that were stored and disposed of at the Site after 1984.

In Picillo, supra, a generator (defendant) argued that its liability should be separated from other generators where a state official overseeing a cleanup of a large dump site identified only a few dozen barrels, out of a total of over 10,000 excavated, as belonging to the defendant. The court refused to find the harm caused by the defendant divisible because said party could not prove that any specific percentage of costs were attributable solely to that defendant. However, the court did

In the present case, the Estate and Klion/Goldstein should be expected to argue that the drums and vats of liquid waste removed from the site created a harm separate from the soil contamination. While the outcome of this argument is difficult to predict, there is a significant risk that the settling defendants will succeed in establishing separate harms. Clearly, the remediation necessitated by the drums is separate from the soil remediation conducted at the Site, and the costs can also be separated. Likewise, it would be scientifically difficult for the United States to argue that the soil which was remediated in 1988 contributed to the contamination of the liquids which were removed.

If the divisibility argument is decided in favor of the settling defendants, the United States must independently link each defendant to both the liquids and the soils to prevail at trial. This burden would be most difficult to satisfy against the Estate. The Estate has the clearest factual support for a claim that its liability should be limited to soils. The Estate ceased operation and ownership of the site in 1983, after which, in 1984, all liquids were removed from the site under the supervision of the state. Thus, arguably, the Estate could not have contributed the liquids removed by U.S. EPA in 1988. Similarly, it would be difficult for the United States to link either Klion or Goldstein to the drums and vats of liquid removed by EPA in 1988. The United States has not uncovered any evidence which ties Klion or Goldstein to the drums and vats of liquid. Rather, the evidence tends to establish that the vats and drums were disposed of at the Site during the time when Miro operated the facility. Furthermore, even if the United States were able

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agree that had the defendant been able to prove definitively the specific cost expended in disposing of the discrete number of barrels attributed to it, the defendant would have been liable only for that limited cost. In other words, the defendant would not be liable for those costs traceable to other defendants.

Unlike Picillo, supra, in this case the Estate, in particular, should be able to prove that all of its drums and vats were removed from the Site in 1984. Since the cost incurred by EPA in 1988 for removing the new drums and containers has already been separated from the cost of excavating the soil (approximately 50% of the cost for the removal of the containers and 50% for the excavation of the soil), the court should be able to apportion costs handily in this case between the Settling Defendants and other owners and operators.

The State of North Carolina may have a valid claim against Settling Defendants for the 1984 removal of the vats and drums. As we have said before, this settlement does not preclude the State from pursuing recovery of costs from Settling Defendants.

to establish that the drums and vats removed by EPA were left on Site by Klion and Goldstein, and not Miro, the United States would also be obligated to establish that these vats and drums contained actual waste and not useful products which were transferred as part of the sale to Miro.

In addition, to the "divisibility of harm" problem, while existing evidence generally indicates the Estate's liability, further discovery might be necessary in order to fully establish Goldstein's liability as an operator. Also, as previously noted, discovery indicates that Klion was only a passive investor in JMC and Carolin and not actively involved in the day-to-day business operations of either entity. Thus, if this case were to proceed to trial, it is unlikely that we would be successful in establishing operator liability against Klion, Goldstein's liability is not totally clear, and even establishing liability against the Estate might present some problems.

These factors, taken together, indicate that the United States would face serious evidentiary and legal obstacles were the case to proceed to trial. The litigation risks presented by these obstacles favor settlement of the case as proposed by this memorandum.

6. Public Interest Considerations

This Consent Decree serves the public interest because it will conserve government resources and reimburse the fund for almost thirty-eight percent (38%) of the past costs.

7. Precedential Value

Given the fact that further discovery is necessary to fully establish Goldstein's liability as an operator, the weak evidence against Klion, the possible problems with the Estate, the potential "divisibility of harm" argument, and the particular facts of this case, the litigation of this action may produce a decision adverse to EPA. Therefore, the best alternative is to settle the case. The proposal set forth in the attached Consent Decree is justified by these considerations.

8. Value of Settlement

A. Value of Obtaining a Present Sum Certain

As discussed above, EPA's 1988 removal action included the removal of soil and liquid hazardous substances contained in vats, drums and containers. The $446,000 that the Settling Defendants have agreed to pay is approximately thirty-eight percent (38%) of the total amount of Site costs. However, this amount is approximately seventy-five percent (75%) of the costs

incurred by EPA to deal with the soil contamination.[9] Since our strongest argument against these defendants is that they are jointly and severally liable only for the contaminated soils removed during the 1988 cleanup, then payment of the amount of $446,000.00 constitutes approximately seventy-five percent (75%) of their potential liability. In addition, obtaining a present sum certain is preferable to expending additional Agency resources to litigate these costs.

By entering into this agreement, EPA would not recover from the Settling Defendants approximately $144,000 of past costs that they may be liable for, taking into account the potential divisible harms in this case.[10]

Although EPA would not recover the amount of $144,000.00 from Settling Defendants, Region IV still believes it is in the Agency's best interest to accept the present sum certain ($446,000) because: a) protracted litigation would be avoided; b) the possibility of an adverse precedent regarding the "divisibility of harm" is averted; c) the liability of one of the Settling Defendants (Klion) is questionable, that of another (Goldstein) is not entirely clear, and establishing liability against the Estate might present some, albeit minor, problems; d) the financial ability of Goldstein to pay for fifty percent (50%) of the total costs is questionable; and e) the $446,000 amount would begin to earn interest immediately.

B. Special Environmental Projects/Value of Injunctive Relief

The settlement does not provide for any special environmental projects or other injunctive relief, as all cleanup activities have been completed.

9. Inequities and Aggravating Factors

The Region is aware of no inequities or aggravating factors relating to the proposed settlement.

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[9] The total current costs of EPA's removal action are $1,180,688.54. The soils cleanup constitutes approximately half of the costs linked to the 1988 removal. If Settling Defendants' liability is limited to the soil costs, then $590,000 (approximately one-half of the total current costs of $1,180,688.54) would constitute 100% of their liability.

[10] When the settlement was agreed upon, in principle, the settlement amount of $446,000 constituted approximately one hundred percent (100%) of the costs linked to the soils cleanup. The costs to continue to litigate this case however, would be more than the $144,000 incurred in the interim.

The Region is aware of no inequities or aggravating factors relating to the proposed settlement.

10. Nature of the Case Remaining After Settlement

Region IV and the Department of Justice plan to continue the litigation against the remaining PRPs, Miro, and the Pitcherskys. Although Miro is arguably the most culpable individual associated with contaminating the Site, he fled to Canada and the Agency has only recently been able to serve him with process. In addition, any financial recovery from Miro is speculative at this point. In terms of Miro's viability, only one asset, a piece of Canadian property worth about $200,000, has been located. This piece of property is currently up for sale. In order for the United States to attach the property, it must first get the default judgment entered in a Canadian Court in order to initiate collection.[11]

As for the Pitcherskys, their alleged liability stems only from being owner/operators of the Site prior to 1985. Although at present, EPA is involved in settlement negotiations with the Pitcherskys, the maximum amount the United States believes it can recover is $145,000 based on the limited financial resources of these defendants.

Attachment

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[11] Canada and the United States have a reciprocal agreement whereby individuals in one country can initiate collection actions against those in the other. However, Canadian procedures for attachment are more stringent than those in the United States and there is a possibility that the property could be sold while the United States was in the process of meeting the required jurisdictional hurdles.

APPENDIX TO
TEN POINT SETTLEMENT ANALYSIS
JFD ELECTRONICS/CHANNEL MASTER SUPERFUND SITE,
OXFORD, GRANVILLE COUNTY, NORTH CAROLINA

1. December 9, 1992 RD/RA Pre-Referral Litigation Report for JFD Electronics/Channel Master Superfund Site, Oxford, Granville County, North Carolina

2. April 26, 1993 U.S. District Court ruling on Channel Master Satellite Systems, Inc. v. JFD Electronics Corp., Harvey Finkel, and The Unimax Corporation, Civil No. 88-605-CIV-5-F, U.S. District Court (E.D.N.C.)

3. April 27, 1993 U.S. District Court ruling on Channel Master Satellite Systems, Inc., supra.

4. August 25, 1993 Dun & Bradstreet Report for Avnet, Inc., (Channel Master's parent company)

5. August 25, 1993 Dun & Bradstreet Report for Unimax, Inc., (JFD's parent company)

6. Consent Decree filed on May 14, 1993 on Channel Master Satellite Systems, Inc., supra.

7. SCORE Report of Response Costs incurred as of May 31, 1993, for JFD Electronics/Channel Master Superfund Site, N.C.

8. Summary of DOJ costs as of June 12, 1993, (including prejudgment interest on DOJ and EPA's costs).

9. April 29, 1993 Granville Industrial Developers, Inc., response to EPA Special Notice Letter.

Inability to Pay
to Post Settlement
Document

DATE:

SUBJECT: Proposed Settlement of the Coleman Evans Wood Preserving Site

FROM: Greer C. Tidwell
Regional Administrator
Region IV

TO: Richard B. Stewart
Assistant Attorney General
Land and Natural Resources

BACKGROUND

The Coleman Evans Wood Preserving Company ("Coleman Evans" or the "Site") is located on Celery Avenue in Whitehouse, Duval County, Florida. Coleman Evans operated a wood preserving facility on eleven acres from 1954 until 1988. The preservative used in the process and the primary contaminant at the Site is pentachlorophenol (PCP). The environmental problems at the Coleman Evans Site consist of soil and groundwater contamination. The Site was proposed for the NPL in 1981 and finalized in March 1983 with a score of 46.18.

In 1985, EPA performed an immediate removal of contaminated soil at the Site. The removal was undertaken pursuant to a federal court order for access. The Remedial Investigation for the Site was completed in April 1986; the Feasibility Study became final in September 1986. The Record of Decision (ROD) was signed in September 1986 and was primarily concerned with soil and groundwater contamination. Accordingly, the remedy selected for the Site recommends the excavation of all PCP contaminated soils in excess of 10 mg/kg and destruction of contaminated soils through on-site incineration. Further Remedial Action will consist of groundwater recovery and treatment. According to the ROD, the remedy was estimated to cost between $4 million and $5.8 million dollars. However, due to continued wood preserving operations at the Site by Coleman Evans and Jack Coleman, the soil contamination tripled and increased the costs for the remedy to an estimated $17 million to $25 million dollars.

Enforcement activities to date include the issuance of a Section 106 removal order in 1985 for the immediate removal, issuance of a Section 106 unilateral order in 1988 for the remedial action, issuance of notice letters, issuance of information request letters, and issuance of demand letters. Coleman Evans did not comply with the 1985 or the 1988 unilateral orders.

On June 13, 1988, the Region requested the Department of Justice to file a civil action against Coleman Evans Wood Preserving Company and Jack Coleman pursuant to Section 107 of CERCLA for the recovery of $400,768 in past removal costs and punitive damages. On July 11, 1988 the complaint was filed in the Middle District of Florida, Jacksonville Division, seeking the recovery of $400,768 in past removal costs, costs to be incurred, and punitive damages. To date, the United States has incurred approximately $2,591,489 in past costs.

The United States and the Defendants have been negotiating the terms of a settlement since July 1988. Pursuant to these settlement discussions, the United States required and obtained from the Defendants an audit of the Coleman Evans Wood Preserving Company and Jack Coleman to fully ascertain their financial positions, and an unrestricted access agreement. After these audits were completed, the United States and the Defendants began settlement negotiations under the direction of Magistrate Howard T. Snyder. After two months of negotiations with Magistrate Snyder, the Defendants offered $350,000 to the United States in payment for past and future response costs at the Site and in consideration for an immediate release from future liability.

This memorandum recommends EPA's acceptance of the settlement offer tendered by Coleman Evans and Jack Coleman. However, because this memorandum proposes settlement for less than 100 percent of EPA's past costs and proposes an "extraordinary circumstances" exception to reopeners pursuant to Section 122(f)(6) of CERCLA effective upon entry of the settlement, what follows is the Region's assessment of the ten point criteria set forth in the Interim CERCLA Settlement Policy announced as part of EPA's Hazardous Waste Enforcement Policy, 50 Federal Register 5034 (February 5, 1985).

1. Volume of Waste Contributed to the Site by the Defendants

The Site is a former wood preserving facility that was owned by Coleman Evans and operated by both Defendants. All of the waste at the Site was generated by the Defendants.

2. Nature of the Wastes Contributed

The Site operated as a wood treating facility from 1954 until 1988. The wood treating process used pentachlorophenol (PCP) dissolved in number two diesel fuel oil as a wood preservative. The treatment process included the steaming, drying, and pressure soaking of wood with PCP and diesel fuel. After the wood is placed in the chamber and pressurized, PCP, fuel oil, wood sugar, and water are discharged as process effluent. In addition, phenol, lead, and cadmium were by-products of the wood treating process. From 1959 to 1970, the discharged process effluent was precipitated with caustic soda and aluminum sulfate, passed through a sand filter, and discharged into an on-site drainage ditch. The recovered sludge was then deposited into two unlined pits on-site. At the time the plant was in operation, 500 gallons of heavily contaminated process effluent containing phenols, heavy metals, and PCP were processed. PCP, phenol, lead and cadmium are toxic pollutants pursuant to Section 307(a) of the Clean Water Act. PCP and phenol have also been designated as "hazardous wastes" pursuant to Section 3001 of RCRA. Accordingly, these wastes are hazardous substances pursuant to Section 101(14) of CERCLA.

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

As the operator of the Site from 1954 to 1988, and the owner of the Site from 1954 to the present, Coleman Evans Wood Preserving Company is a responsible party. Likewise, as president and majority shareholder of Coleman Evans from 1972 to the present, Jack Coleman actively participated in the management and direction of the company and is liable as a operator of the Site. Substantial discovery has been taken on the issue of liability and has established that the Defendants are responsible parties.

4. Ability of the Settling Parties to Pay

At the time that this matter was referred, past costs for the 1985 removal action totalled approximately $400,768. At the writing of this memorandum, past costs-- including costs for the 1985 removal, the Remedial Investigation/Feasibility Study, and the Remedial Design-- total $2,591,489. The Region anticipates the the remedial action will cost from $17 million to $25 million dollars.

Throughout discussions with the Defendants, they have maintained that they did not have the financial means to fully reimburse the United States for past costs or for future costs. Since past and future costs at the Site are substantial, the Defendants were audited by the United States during August and September 1988. These audits revealed two significant factors to be taken into account in assessing the Defendants' ability to pay: (1) the fair market value and liquidity of

stocks held in closely held corporations by Jack Coleman; and (2) lawful exemptions from execution by judgment creditors under Florida law of Jack Coleman's assets. The statements of financial condition of Coleman Evans Wood Preserving Company and Jack Coleman are as follows:

Coleman Evans Wood Preserving Company
As of May 31, 1988

Assets	
Cash	$ 12,492
Accounts Receivable	13,852
Inventory	89,457
Prepaid taxes	1,366
Deposits	75
Cash surrender value of life insurance	10,995
Loans to employees	-
Accrued interest income	-
Total Current Assets	$128,237
Depreciable fixed assets	197,074
Accumulated depreciation	(190,518)
Land	10,000
Incorporation expense	273
Prepaid insurance	6,814
Total Assets	$ 151,880
Liabilities	
Current Liabilities	$ -
Accounts payable	13,373
Taxes payable	2,939
Total Liabilities	16,312
Total Value of Coleman Evans	$135,568
Stockholders' Equity	$135,568

Jack Coleman

Cash	
Florida Federal Savings Bank	$ 2,895.00
Johnson Lane, Space Smith and Co., Inc.	$ 25,548.12

Securities	
American Celcure Wood Preserving Co.	No Value
Coleman Evans Wood Preserving Co.	No Value
American Cross-Arm Co., Inc.	$238,573.72
45 West Duval Inc.	25,742.98
Gamma Associates, Ltd. Partnership	No Value
Insurance (Exempt under Florida Law)	Cash Value
Massachusetts Mutual	43,211.34
Government Issue Insurance	None
Jewelry	Approximate Market Value
	$ 1500.00
Total Assets of Jack Coleman	$293,259.82
Total Assets of Coleman Evans and Jack Coleman (Less Exempt Insurance)	$446,139.82

Coleman Evans ceased operating as a business in September 1988 and is in the process of liquidating. There will never be any additional revenues forthcoming from Coleman Evans. Thus in many respects, Coleman Evans is de facto bankrupt.

Approximately $264,316.70 of the assets held by Jack Coleman represent the cash value of stock in two closely held corporations in which Jack Coleman is the majority shareholder. According to Jack Coleman, the value of this stock is $221,298.00 which is $17,275.72 less than the stock was valued by the audit. Therefore, in assessing the Defendants' ability to pay, the liquidity and fluctuating value of stocks in Coleman Evans, American Cross Arm, and 45 West Duval were taken into account.

Under Florida law, annuities, life insurance policies, and the home are exempt from execution by a judgment creditor. Moreover, assets held jointly with a spouse not subject to judgment are exempt from execution. Jack Coleman and his wife own various annuities, proceeds of life insurance policies, and a home. However, since these assets are held jointly with his wife and in any event are exempt from execution, Jack Coleman's ability to pay was primarily based on the value of non-exempt assets that were not held with his wife.

While ability to pay for a CERCLA claim is not a defense to liability, ability to pay is an issue that was reconciled with the value of obtaining a sum certain through settlement and the value of obtaining a judgment and receiving an uncertain amount through execution. It is evident from the audit that Coleman Evans and Jack Coleman are unable to pay for 100% of past and

future costs. Nevertheless, the United States received most, if not all, of the liquid assets of Jack Coleman and Coleman Evans.

5. Litigative Risks in Proceeding to Trial

a. Admissibility of the Government's Evidence

There appear to be no procedural or substantive problems in the admissibility of the government's evidence.

b. Adequacy of the Government's Evidence

The government's sampling and analytical data is adequate. However, the Defendants would have challenged the adequacy of the evidence concerning Jack Coleman's individual liability. Discovery demonstrated that Jack Coleman had actively participated in the management of the company and had directed, in his capacity as president and majority shareholder of the company, the disposal of hazardous substances at the site. Nevertheless, Jack Coleman alleged that he was not an operator under Section 107 of CERCLA. The United States would have likely prevailed in this instance.

Jack Coleman and Coleman would also have challenged the adequacy of the government's cost documentation. The government had not begun to reconcile costs incurred with the cost documentation package. The process probably would have detected some irregularities in the documentation. However, most of the costs would have been appropriately documented.

c. Availability of Defenses

In the answer to the United States' Complaint, Coleman Evans asserted five affirmative defenses. All of these defenses are without merit.

Jack Coleman asserted nine affirmative defenses. Likewise, many of these defenses were without merit. However, two of these defenses are worthy of discussion. Jack Coleman asserted pursuant to Section 107(b)(3) of CERCLA that: (1) the releases at the Site were caused solely by acts or omissions of third parties who are not employees or agents and whose acts or omissions did not occur in connection with a contractual relationship existing directly or indirectly with him; and (2) the majority interest of Coleman Evans was acquired by Jack Coleman through inheritance.

While Jack Coleman may be able to prove the threshold requirements of these defenses, he must additionally demonstrate by a preponderance of the evidence that he took precautions against foreseeable acts or omissions of third parties and the consequences that could foreseeably result from such acts or omissions. Discovery demonstrated that after Jack Coleman acquired the Site through inheritance and during his tenure as

president of the corporation, he continued to contribute to the contamination at the Site by failing to cease wood treating operations and disposal practices. Thus, in light of the Defendant's failure to take precautions, the United States would prevail on a motion to dismiss on all of the affirmative defenses asserted by Jack Coleman.

6. Public Interest Considerations

Entering into the proposed settlement will demonstrate to the public that inability to pay is not a defense to CERCLA. Moreover, this settlement shows the public that the United States will aggressively seek to collect all available monies from responsible parties.

7. Precedential Value

This settlement is of significant precedential value for two reasons: (1) the granting of an "extraordinary circumstances" exception to reopeners pursuant to Section 122(f)(6) of CERCLA; and (2) the effective date of the release.

The Agency's policy on "Covenants Not To Sue Under SARA," July 10, 1987, states that EPA may grant a covenant not to sue without reopeners upon a showing pursuant to Section 122(f)(6) of CERCLA that "extraordinary circumstances" exist and "other terms, conditions, or requirements of the agreement ... are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility."

In determining whether extraordinary circumstances exist, the President may assess "the volume, toxicity, mobility, strength of evidence, ability to pay (emphasis added), litigative risks, public interest considerations, precedential value, and inequities and aggravating factors." This guidance also requires prior approval of the waiver of reopener by the Assistant Administrators for OECM and OSWER and the Assistant Attorney General. Representatives from these respective offices have been briefed and approval for this provision has been obtained.

In this settlement, the most prevalent factor which supports an extraordinary circumstances release is the ability to pay by the Defendants. As discussed earlier in this memorandum, the United States contracted a CPA to conduct a financial audit of the Defendants. The United States also received copies of tax returns for the past five years, and where necessary, requested the Defendants to supply additional information in the form of an affidavit.

After the financial positions of the Defendants were verified by the audits and other information, the Defendants offered to settle for $350,000; however, this offer was

conditioned upon the granting of a covenant not to sue without reopeners under the "extraordinary circumstances" exception to reopeners under Section 122(f)(6) of CERCLA. Upon a showing of extraordinary factors, such as those factors listed above, the "extraordinary circumstances" exception would release the Defendants from future liability for unknown conditions at the time the remedial action has been certified as complete. In this instance, negotiators for the government believed that the Defendants' ability to pay sufficed for a showing of "extraordinary circumstances."

Notwithstanding the requirement of certification of the remedy prior to the granting of an "extraordinary circumstances" release, the Defendants requested the release prior to the certification of the remedy. This kind of release contradicts the Agency's general policy position that no release for future liability can be granted prior to the certification of the remedial action. According to Agency guidance, certification of a remedy prior to a release for future liability ensures that viable parties remain responsible for the remedy if the remedy at the site is not working. However, in this instance, the financial information analyzed by the government showed that the Defendants will never be in a position to implement any type of remedy. Coleman Evans Wood Preserving Company is no longer an operating entity and Jack Coleman is of advanced age and unless he wins a lottery, his financial position is unlikely to change. Therefore, the certification policy would not be effectuated by pursuing these Defendants since their resources are limited. Thus, the granting of an extraordinary circumstance release with an immediate effective date will reserve valuable EPA resources that can be expended in litigating sites with viable responsible parties. Moreover, the interests of the government are protected since the covenant not to sue is conditioned upon the accuracy of the information received in the audits and affidavits.

In sum, this settlement has precedential value inasmuch as the United States is granting an immediate release from future liability. This type of settlement is the exception, not the rule, and is recommended by the Region only after careful analysis of of all relevant facts.

8. Value of Obtaining a Present Sum Certain

The value of obtaining a present sum for the Fund in the amount of $350,000 outweighs the possibility of receiving a far less amount by obtaining a judgment and executing on the judgment. In fact, if the case were fully litigated, the possibility of a declaration of bankruptcy by the Defendants increases substantially. Thus, the value of obtaining a present sum certain is of substantial benefit to the government.

9. Inequities and Aggravating Factors

This settlement presents no apparent inequities to the settling parties. However, the "extraordinary circumstances" release is an inherent inequity for the government as well as other responsible parties seeking full releases at other Superfund sites. In spite of this inherent inequity, this settlement is a result of an extensive analysis of the financial position of the Defendants and it is not the type of settlement which should be followed at other Superfund sites. Moreover, the government is receiving substantially all of the Defendants liquid assets. Therefore, in light of all the facts surrounding this type of a settlement and with the knowledge that this is a "one of a kind" settlement, the inequities are minimal.

10. Nature of the Case Remaining After Settlement

The settlement contains an immediate release from future liability; therefore, after entry of the consent decree, the government's enforcement actions against the Defendants will be concluded. Moreover, there are no other responsible parties to proceed against for any remaining past costs or future costs. Nevertheless, in light of the Defendants' ability to pay, this settlement represents everything that the government could expect to receive in litigation or in settlement at the site. By settling this case in this manner, the government could close the books on a site that has been the subject of environmental enforcement activities since 1980 and use its resources at other Superfund sites with viable responsible parties. In sum, while the Defendants will not be reimbursing the Fund for 100% of past and future costs, there is no realistic expectation that this could ever be realized. Therefore, in consideration of all the factors surrounding this settlement, the Region recommends Headquarters and Department of Justice concurrence.

ENFORCEMENT CONFIDENTIAL
ATTORNEY WORK PRODUCT

TEN POINT SETTLEMENT ANALYSIS
CONSENT DECREE FOR REMOVAL COSTS
POTTER'S PITS SITE, BRUNSWICK, NORTH CAROLINA

I. INTRODUCTION

Region IV proposes to enter into a consent decree, pursuant to Section 107 of CERCLA, for the Potter's Pits Site, Brunswick, North Carolina (the "Site"). This document sets forth the terms of the settlement, the site background, and assesses the ten point settlement criteria set forth in the Interim CERCLA Settlement Policy announced as part of EPA's Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034 (Feb. 5, 1985). Since this settlement compromises more than 50% of the total past and future costs,[1] the Region must obtain Headquarters' concurrence, pursuant to the June 17, 1988, memorandum entitled "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E", OSWER Directive 9012.10-a. Additionally, since this settlement contains an "extraordinary circumstances" exception, Headquarters' concurrence is required, pursuant to the July 10, 1987, memorandum entitled "Covenants Not to Sue Under SARA." Region IV recommends EPA's approval of the consent decree.

II. TERMS OF SETTLEMENT

Pursuant to Sections 107 and 122 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 (CERCLA), 42 U.S.C. §§ 9607 and 9622, the United States Environmental Protection Agency, Region IV, (EPA) and Jimmy and Peggy Cain and Ada Anderson and the Estate of Hubert Anderson (Settling Defendants) propose to enter into a Consent Decree for settlement of Defendants' past and future liability with regard to cleanup of the Potter's Pits Site.

The key provisions of the Consent Decree include Section IX., Covenant Not to Sue, Section XIII., Contribution Protection, Section X., Reservation of Rights, and Section VI., Payment. In Section IX., it is agreed that the United States will not take any other civil or administrative action related to or arising from existing contamination at the Site against the settling defendants. Therefore, the settling defendants are being released from both past and future liability. In consideration for this release, the settling defendants agree not to sue the government for any liability arising out of its activities at the site and not to assert any claims for reimbursement from

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[1] EPA's past costs total $1,822,477 as of March 21, 1992, and the Agency is recovering $10,000, which represents a 99.5% compromise of the claim for past costs. Projected future costs total $10,000,000, 100% of which is compromised by this settlement.

the Superfund. In Section XIII., it is agreed that settling defendants are entitled to protection from contribution claims, for matters addressed in the Consent Decree, as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2). In Section X., the government reserves the right to pursue the settling defendants for failure to comply with the Consent Decree, natural resource damage, or any criminal liability. There are no provisions for reopener for unknown conditions in light of the extraordinary circumstance of inability to pay. Therefore, this settlement grants an extraordinary circumstances exception to reopeners pursuant to Section 122(f)(6) of CERCLA. The settling defendants have already agreed to the terms of settlement and based on a review of the record, pre-approval does not appear to have been obtained. Concurrence in the extraordinary circumstances exception to reopeners is being sought herewith.

In developing the provisions of Section VI., the United States considered certain financial information provided by the Settling Defendants and determined that they are unable to pay all past costs and any future costs incurred by EPA in responding to the release or threat of release of hazardous substances at the Site. The Cains are financially able to pay the amount of $4,000 within 15 days of entry of the Consent Decree. Mrs. Anderson and the estate of Hubert Anderson can commit to paying a total of $6,000 over a period of twelve months as follows: $2,000 within twenty-five days of the entry of the Consent Decree; $1,000 within three months of the entry; $1,000 within six months of entry; $1,000 within nine months of entry; and $1,000 within twelve months of entry. The proposed Consent Decree is attached.

Pursuant to the June 17, 1988, memorandum entitled "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegation 14-13-B and 14-14-E" OSWER Directive 9012.10-A, Headquarters' concurrence is necessary since the settlement compromises more than 50% of the total past and future costs and provides for an extraordinary circumstances covenant not to sue.

III. BACKGROUND

A. Site Description

The Potter's Pits Site consists of a five-acre area located in the Sandy Creek Acres Subdivision, Brunswick County, North Carolina. From 1969 to 1976, the Skipper family used the property to dispose of septic tank sludge, oil sludge, creosote and other waste materials. These wastes were hauled from local businesses, and possibly from other locations, and placed in low, unlined pits or directly on the land surface during these years.

B. Response Actions and Enforcement History

In 1976, the Coast Guard responded to an oil spill into nearby waterways resulting from a release from one of the unlined pits. All oil in the pits was pumped out and the sludge on the bottom was removed. Two pits still contained a non-recoverable sludge which was mixed with sand and buried on the site.

In the early 1980s, the Potter's Pits Site was developed into a residential community known as Sandy Creek Acres and eventually the Town of Sandy Creek. An emergency removal was conducted in 1984 following a resident's discovery of creosote, spill residue, tank bottom sludge, and septic tank sludges on his property. Contaminants associated with these materials were also found in well water. In March 1984, a Fund-lead removal action was commenced which resulted in the relocation of three families and the installation of a nine well groundwater monitoring system. On March 31, 1989, the site was placed on the NPL with a hazardous ranking score of 29.14.

Between 1969 and 1976, the Skipper brothers, Otto, Wade and Albert, were engaged in the septic tank business in the Wilmington area, each owning and operating his own company. Although it is generally assumed that all three brothers contributed to waste disposal at the Site, evidence obtained definitively links only Otto Skipper's operations with the Site. In 1979, Otto Skipper purchased the property from his mother by securing a loan from Wachovia Bank and Trust Company. After he failed to make payments, Wachovia foreclosed on the property in January 1980.

In October 1980, Wachovia sold the property to Wilbur and Barbara McLamb and Jimmy and Peggy Cain. In early 1981, the Cains sold their interest to Willard and Kathleen Buffkin only to repurchase it several months later. Within a couple of days, they sold their interest to the McLambs. The McLambs then sold a one-half interest to Hubert and Ada Anderson.

In May 1982, the McLambs and the Andersons formed Investors Management Corporation (IMC), each owning 1,000 of the 2,000 shares of stock. Wilbur McLamb was the director and Hubert Anderson was the president of IMC. Ada Anderson served as vice-president and Barbara McLamb held the position of assistant secretary. In June 1982, the McLambs and Andersons sold the property to IMC for development of a residential subdivision to be known as Sandy Creek Acres. The Site, identified as lots 85 and 86, was purchased from IMC by Earl and Dixie Gurkin on July 29, 1982, and March 25, 1983, respectively.

On July 11, 1983, Earl Gurkin reported to the State that he had uncovered creosote, oil and septic sludge in his front yard. An investigation conducted by EPA documented the presence of various organic contaminants in groundwater and soil on Site.

Response actions at the Site totalled $1,496,016.31 as of March 21, 1992. Of this amount, $365,208.24 is attributable to the 1984-1990 removal action. It is projected that future response costs will total an estimated 10 million dollars.

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An analysis of the settlement under the ten point criteria included in the Interim CERCLA Settlement Policy announced as part of EPA's Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034 (Feb. 5, 1985) is set forth below.

1. Volume of Wastes Contributed

The Cains and the Andersons did not contribute any of the wastes to the Site. Available evidence indicates that all of the wastes at the Site were transported there by the Skipper brothers.

2. Nature of Wastes at the Site

The most prevalent chemicals at the Site include toluene, xylene, benzene, chlorobenzene, naphthalene, ethyl benzene, and creosote. These chemicals are associated with septic tank and oil sludge.

3. Strength of Evidence Linking Wastes at the Site to the Settling Defendants

According to deeds recorded in Brunswick County, Wachovia Bank and Trust Company had foreclosed on the Site property on January 3, 1980, and sold it to Wilbur and Barbara McLamb and Jimmy and Peggy Cain on October 8, 1980. The McLambs and Cains surveyed and subdivided the property into lots known as the Sandy Creek Acres Subdivision. On April 16, 1981, the Cains sold their interest in the property to the McLambs. On April 30, 1981, the McLambs sold an undivided one-half interest in the property to H.J. and Ada B. Anderson. On May 18, 1982, Investors Management Corporation (IMC) filed its papers of incorporation in South Carolina. On June 28, 1982, the McLambs and the Andersons sold the subject Site property to IMC. IMC then sold the property to Earl B. and Dixie Gurkin.

The innocent landowner defense is not available to the Cains, McLambs, Andersons and IMC, since the evidence indicates that they must have had actual or constructive knowledge of the previous disposal at the Site prior to their purchase of the property. Local residents have indicated that the pits were obvious to anyone walking the property at the time these Defendants purchased and developed it. Finally, the grading and other subdivision development activities conducted while the Andersons owned the property, may constitute active "disposal" of the hazardous substances.

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Hubert Anderson had a cash flow problem prior to his death on July 17, 1991. The real estate that he owned, now in his wife's name, is located in an economically depressed area. The total appraised value of the property, which includes Mrs. Anderson's home, is $205,215.50. The property is heavily mortgaged, and, if liquidated, would probably not sell for more than the outstanding mortgages. Hubert Anderson's estate does not have the cash flow at this time to pay his final medical and funeral expenses. Mrs. Anderson only owns what she inherited from her husband. She has also been hospitalized and has been unable to pay her medical expenses. In Hubert Anderson's retirement program, there were no benefits to be received by his widow, and she is not old enough to receive Social Security benefits. Her source of income for living expenses is a part-time job. Jimmy Cain is a sole proprietor, operating a surveying business. Business income has ranged from $4,000 to $8,000 over the last several years. Mrs. Cain is not employed and has no earned income. The Cains have not had sufficient income to pay any federal or state taxes for the last three years, other than self-employment tax on the sole proprietorship. They reported a net worth of approximately $18,000 in June of 1990. Half of their assets are automobiles and a mobile home. The only liquid asset available is approximately $800 in a checking account. The Cains have substantial outstanding debt, securing virtually all of their assets, and have little or no income to support additional debt.

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a. Admissibility of the Government's Evidence

There are no problems associated with this factor.

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The Government's strongest argument for asserting liability against the Andersons is based on the redistribution theory asserted in Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988). In that case, it was held that activities which cause the contaminated soil to be moved around amount to redistribution of hazardous waste. The Andersons owned the property when it was being developed, that is, when soil was being moved around. Therefore, they are liable for redistributing or redisposing of hazardous waste. This theory is novel and may not be accepted by the Court. Evidence of the pits being covered over is circumstantial in that it amounts to the pits being there before the Andersons purchased and not being there when they sold the property to the Gurkins. The redistribution theory does not apply to the Cains since they owned the property before any landscaping activities began. Evidence of liability on the part of the Cains is very weak as it will be difficult to prove that they had any knowledge of the pits at the time of their ownership.

c. Availability of Defenses

There are four identified litigation risks relative to this factor. First, there is a question as to the liability of the Coast Guard resulting from possible improper disposal. In 1976, the Coast Guard buried what may have been fuel oil sludge on the Site during the 1976 cleanup, thereby arguably acting as an operator. Second, in an interview with TechLaw, Wade Skipper indicated that the Coast Guard had given his brother, Otto, permission to dig the pits and to dispose of oil in them. Presumably, Wade was implying that Otto acted as a contractor for the Coast Guard in some of its oil spill cleanup activities in the area, but this was never clearly stated. Wade is now deceased and cannot clarify his statement. The Coast Guard informed TechLaw that it does not maintain records related to cleanup activities for more than 5 years and has no records related to the Site. Third, there is an issue regarding the liability of Wachovia Bank and Trust. The Bank has not been named as a PRP in view of the following facts: its former ownership by foreclosure began and ended prior to the enactment of CERCLA; no profit was made on the transaction; the Bank sold to purchasers who had knowledge of the former use of the property; no disposal occurred during the time the Bank held the property. However, the other PRPs feel that Wachovia should be named since its relationship to the property is also one of former ownership. Finally, the Cains and Andersons will be able to show that they are financially incapable of paying any significant amount of the cleanup costs being sought.

6. Public Interest Considerations

The public interest is best served through this settlement since it would eliminate further expenditure of money in pursuing PRPs who are unable to make a significant contribution to the defrayal of past or future costs and it demonstrates to the public that inability to pay is not a defense to CERCLA., It is anticipated that the future costs of remediating this Site could total a minimum of 10 million dollars. The small sum of money the government could possibly recover from these defendants, beyond the settlement amount herein, would be outweighed by the cost of pursuing them. Additionally, both parties could be forced into bankruptcy if compelled to pay more. Yet, this settlement shows that the United States will aggressively seek to collect all available monies from responsible parties.

7. Precedential Value

This settlement is of significant precedential value in that it grants an "extraordinary circumstances" exception to reopeners pursuant to Section 122(f)(6) of CERCLA.

The Agency's policy on "Covenants Not to Sue Under SARA," July 10, 1987, states that EPA may grant a covenant not to sue without reopeners (emphasis added) upon a showing pursuant to Section 122(f)(6) of CERCLA that "extraordinary circumstances" exist and "other terms, conditions, or requirements of the agreement ... are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility." In determining whether extraordinary circumstances exist, the President may assess "the volume, toxicity, mobility, strength of evidence, ability to pay (emphasis added), litigative risks, public interest considerations, precedential value, and inequities and aggravating factors."

In this settlement, the most prevalent factor which supports an extraordinary circumstances release is the ability to pay of the settling defendants. The United States hired an accounting firm to assess the financial conditions of the settling defendants. After the financial posititons of the settling defendants were verified, the Cains offered to settle for $4,000 and the Andersons for $6,000. However, this offer was conditioned upon the granting of a covenant not to sue without reopeners for unknown conditions. Upon a showing of extraordinary factors, such as those factors listed above, the "extraordinary circumstances" exception would release the settling defendants from future liability for unknown conditions at the time the remedial action has been certified as complete. In this

instance, negotiators for the government believed that the defendants' inability to pay sufficed for a showing of "extraordinary circumstances."

8. Value of Obtaining a Present Sum Certain

In this case, partial reimbursement is preferable to attempting to collect from a bankruptcy estate or not collecting at all. Due to the financial status of the Cains and Mrs. Anderson's inability to even pay medical expenses, the likelihood of obtaining a larger sum in the future is virtually nonexistent. Thus, the value of obtaining a present sum certain is of substantial benefit to the government.

9. Inequities and Aggravating Factors

There are no apparent inequities associated with this settlement.

10. Nature of Case Remaining After Settlement

The settlement contains an immediate release from future liability, therefore, after entry of the consent decree, the United States' enforcement actions against the Cains and the Andersons will be concluded. There are no specific reopeners in the Consent Decree, but Section X., Reservation of Rights, reserves the government's right to pursue the settling defendants for failure to comply with the consent decree, natural resource damages or any criminal liability. The settlement does not provide for any environmental projects since EPA is undertaking the entire cleanup and the settling defendants could not afford to undertake such a project. There are no provisions for injunctive relief in this settlement. There is still a cost recovery action pending against Wilbur McLamb, who may be able to pay about $300,000 of past removal costs. Additionally, investigation is being done to uncover generator PRPs. As of April 1991, one possible generator PRP had been found. If the company under investigation is determined to be a PRP, then some of the future costs may be recoverable.

ENFORCEMENT CONFI[illegible]NTIAL
ATTORNEY WORK PRC[illegible]CT

TEN POINT SETTLEMENT ANALYSIS
CONSENT DECREE FOR REMOVAL COSTS
POTTER'S PITS SITE, BRUNSWICK, NORTH CAROLINA

I. INTRODUCTION

Region IV proposes to enter into a consent decree, pursuant to Section 107 of CERCLA, for the Potter's Pits Site, Brunswick, North Carolina (the "Site"). This document sets forth the terms of the settlement, the site background, and assesses the ten point settlement criteria set forth in the Interim CERCLA Settlement Policy announced as part of EPA's Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034 (Feb. 5, 1985). Since this settlement compromises more than 50% of the total past and future costs,[1] the Region must obtain Headquarters' concurrence, pursuant to the June 17, 1988, memorandum entitled "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E", OSWER Directive 9012.10-a. Additionally, since this settlement contains an "extraordinary circumstances" exception, Headquarters' concurrence is required, pursuant to the July 10, 1987, memorandum entitled "Covenants Not to Sue Under SARA." Region IV recommends EPA's approval of the consent decree.

II. TERMS OF SETTLEMENT

Pursuant to Sections 107 and 122 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 (CERCLA), 42 U.S.C. §§ 9607 and 9622, the United States Environmental Protection Agency, Region IV, (EPA) and Jimmy and Peggy Cain and Ada Anderson and the Estate of Hubert Anderson (Settling Defendants) propose to enter into a Consent Decree for settlement of Defendants' past and future liability with regard to cleanup of the Potter's Pits Site.

The key provisions of the Consent Decree include Section IX., Covenant Not to Sue, Section XIII., Contribution Protection, Section X., Reservation of Rights, and Section VI., Payment. In Section IX., it is agreed that the United States will not take any other civil or administrative action related to or arising from existing contamination at the Site against the settling defendants. Therefore, the settling defendants are being released from both past and future liability. In consideration for this release, the settling defendants agree not to sue the government for any liability arising out of its activities at the site and not to assert any claims for reimbursement from

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[1]EPA's past costs total $1,822,477 as of March 21, 1992, and the Agency is recovering $10,000, which represents a 99.5% compromise of the claim for past costs. Projected future costs total $10,000,000, 100% of which is compromised by this settlement.

the Superfund. In Section XIII., it is agreed that settling defendants are entitled to protection from contribution claims, for matters addressed in the Consent Decree, as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2). In Section X., the government reserves the right to pursue the settling defendants for failure to comply with the Consent Decree, natural resource damage, or any criminal liability. There are no provisions for reopener for unknown conditions in light of the extraordinary circumstance of inability to pay. Therefore, this settlement grants an extraordinary circumstances exception to reopeners pursuant to Section 122(f)(6) of CERCLA. The settling defendants have already agreed to the terms of settlement and based on a review of the record, pre-approval does not appear to have been obtained. Concurrence in the extraordinary circumstances exception to reopeners is being sought herewith.

In developing the provisions of Section VI., the United States considered certain financial information provided by the Settling Defendants and determined that they are unable to pay all past costs and any future costs incurred by EPA in responding to the release or threat of release of hazardous substances at the Site. The Cains are financially able to pay the amount of $4,000 within 15 days of entry of the Consent Decree. Mrs. Anderson and the estate of Hubert Anderson can commit to paying a total of $6,000 over a period of twelve months as follows: $2,000 within twenty-five days of the entry of the Consent Decree; $1,000 within three months of the entry; $1,000 within six months of entry; $1,000 within nine months of entry; and $1,000 within twelve months of entry. The proposed Consent Decree is attached.

Pursuant to the June 17, 1988, memorandum entitled "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegation 14-13-B and 14-14-E" OSWER Directive 9012.10-A, Headquarters concurrence is necessary since the settlement compromises more than 50% of the total past and future costs and provides for an extraordinary circumstances covenant not to sue.

III. BACKGROUND

A. Site Description

The Potter's Pits Site consists of a five-acre area located in the Sandy Creek Acres Subdivision, Brunswick County, North Carolina. From 1969 to 1976, the Skipper family used the property to dispose of septic tank sludge, oil sludge, creosote and other waste materials. These wastes were hauled from local businesses, and possibly from other locations, and placed in low, unlined pits or directly on the land surface during these years.

B. Response Actions and Enforcement History

In 1976, the Coast Guard responded to an oil spill into nearby waterways resulting from a release from one of the unlined pits. All oil in the pits was pumped out and the sludge on the bottom was removed. Two pits still contained a non-recoverable sludge which was mixed with sand and buried on the site.

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In October 1980, Wachovia sold the property to Wilbur and Barbara McLamb and Jimmy and Peggy Cain. In early 1981, the Cains sold their interest to Willard and Kathleen Buffkin only to repurchase it several months later. Within a couple of days, they sold their interest to the McLambs. The McLambs then sold a one-half interest to Hubert and Ada Anderson.

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Final DRAFT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. OTTO SKIPPER; WILBUR AND BARBARA MCLAMB; JIMMY F. AND PEGGY CAIN; HUBERT J. AND ADA ANDERSON; AND INVESTORS MANAGEMENT CORPORATION, Defendants.	CIVIL ACTION NO. 89-102-CIV-7-F
WILBUR AND BARBARA MCLAMB; JIMMY F. AND PEGGY CAIN; HUBERT J. AND ADA ANDERSON; AND INVESTORS MANAGEMENT CORPORATION, Counter-Claimants, v. UNITED STATES OF AMERICA, Defendant on the Counterclaim.	
WILBUR AND BARBARA MCLAMB; JIMMY F. AND PEGGY CAIN; HUBERT J. AND ADA ANDERSON; AND INVESTORS MANAGEMENT CORPORATION, Third-Party Plaintiffs, v. WACHOVIA BANK AND TRUST, N.A.; Third-Party Defendant.	

CONSENT DECREE

I. BACKGROUND

Plaintiff, the United States of America (United States), by the authority of the Attorney General of the United States and at the request of the United States Environmental Protection Agency (EPA), filed a complaint herein against Otto Skipper; Wilbur and Barbara McLamb; Jimmy F. and Peggy Cain; Hubert J. and Ada Anderson; and Investors Management Corporation under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat, 1613 (1986), seeking to recover costs incurred in responding to the release and threatened release of hazardous substances on the site known as "Potter's Pits Waste Disposal Site", which is located in the town of Sandy Creek, in Brunswick County, North Carolina (the Site).

This Decree is made and entered into by and between plaintiff, the United States of America, and the persons defined in this Decree as the Settling Defendants.

By entering into this Decree, Settling Defendants do not admit any legal or equitable liability under any federal, state or local law, and reserve all defenses to any claims asserted in connection with this action. Entry of this Decree shall not be construed to be an acknowledgement by Settling Defendants that any release or threatened release has occurred or that an imminent and substantial endangerment to the public health or

welfare or the environment exists at the Site. Settling Defendants have stipulated to the entry of this Decree in recognition of their status as potentially responsible parties (PRPs) at the Site in order to compromise a disputed claim.

The Parties to this Decree have entered into this Decree as a good faith settlement to avoid expensive and protracted litigation and to settle certain claims of the United States raised against the Settling Defendants in this action.

The Parties to this Decree agree that settlement of this matter is in the public interest and embodies a fair and reasonable settlement, and that entry of this Decree without further litigation is the most appropriate means of resolving this matter.

The United States has considered certain financial information provided by the Settling Defendants and has determined, based upon this information, that Settling Defendants are unable to pay all past costs incurred by plaintiff in responding to the release or threat of release of hazardous substances at the Site.

Now, therefore, before the taking of any testimony, before adjudication of the merits of this case, and with the consent of the parties to this Decree, it is ORDERED AND DECREED as follows:

II. JURISDICTION

The complaint states a claim upon which relief may be granted. This Court has jurisdiction over the subject matter of this action and over the parties, and venue is properly in this

Court pursuant to Section 113(b) and (e) of CERCLA, 42 U.S.C. § 9613(b) and (e) and 28 U.S.C. § 1345.

III. DEFINITIONS

The following definitions shall apply to this Consent Decree:

A. "CERCLA" refers to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Public law 99-499.

B. "EPA" means the United States Environmental Protection Agency.

C. The "Potter's Pits Waste Disposal Site" or the "Site" refers to the site located in Brunswick County, North Carolina, in the town of Sandy Creek near Highway 74-76.

D. "Parties" mean the United States and the Settling Defendants in this action.

E. The "Entry" or "Effective" date shall be the date when this Consent Decree is signed by the Court.

F. "Response costs" refers to all costs of response, removal and remedial action undertaken at the Potter's Pits Waste Disposal Site, including but not limited to, administrative, investigative, removal, remedial, access, enforcement (including attorney's fees) and oversight costs, prejudgment interest on any or all such costs, and all other direct or indirect costs, however denominated, incurred, or incurred hereafter, by any person, including the United States, in connection with the Site.

G. "Settling Defendants" mean Jimmy F. and Peggy Cain; Ada Anderson and the estate of Hubert Anderson.

H. Terms not otherwise defined herein shall have their ordinary meaning unless defined in Section 101 of CERCLA, 42 U.S.C. § 9601, or the National Contingency Plan (NCP), 40 C.F.R. Part 300, in which case the definition in CERCLA or the NCP shall control.

IV. PARTIES BOUND

The provisions of this Consent Decree shall apply to and be binding upon the Parties and their respective officers, directors, agents, trustees, servants, employees, successors, assigns, attorneys, and all persons, firms and corporations acting under the control or direction of the parties.

V. EFFECT OF THIS SETTLEMENT

A. The Parties have negotiated and executed this Decree in good faith and agree that it represents a fair and reasonable settlement.

B. By his/her signature to this Decree, each Settling Defendant certifies to the best of his/her knowledge and belief that the information he/she has given the United States regarding his/her income and financial status is true, correct and complete. The United States reserves all rights it may have to bring any action against each Settling Defendant and the covenant not to sue in Section IX shall become null and void if the information provided by or on behalf of that Settling Defendant is not true, correct and complete.

VI. PAYMENT

A. The settling Defendants shall pay to the United States as follows:

1. Jimmy F. and Peggy Cain shall pay the amount of $500 within 15 days of the entry of this Decree.

2. Ada Anderson and the estate of Hubert Anderson shall pay the amount of $1,000 within 15 days of the entry of this Decree.

B. The above-referenced payments shall be by Electronic Funds Transfer ("EFT" or "wire transfer") to the U.S. Department of Justice Lockbox Bank, referencing CERCLA Number TJB04D504 and the U.S. Attorney's Office File Number 89V0434. Payment shall be made in accordance with the instructions provided by the plaintiff to the Defendants upon execution of the Consent Decree. Any EFTs received at the U.S. Department of Justice Lockbox Bank after 11 a.m. (Eastern Time) will be credited on the next business day.

C. The amounts specified in paragraph A above are being paid by Settling Defendants to resolve their liability to the United States at the Site. Pursuant to 42 U.S.C. § 9613(f)(2), this Consent Decree does not discharge the liability of any other potentially responsible party which is not a party to this Consent Decree.

VIII. CIVIL PENALTIES

In addition to any other remedies or sanctions available to the United States, if Settling Defendants fail or refuse to

comply with any term or condition of this Decree, each settling Defendant may be subject to a civil penalty of up to $25,000 per day of such failure or refusal, pursuant to Section 122(1) of CERCLA, 42 U.S.C. § 9622(1).

IX. COVENANT NOT TO SUE

A. Subject to the reservation of rights under Sections V. B and X of this Consent Decree, upon certification of the remedial action by Plaintiff and payment by Settling Defendants of the full amount required by this Consent Decree in Section VI, the United States covenants not to sue or take any other civil or administrative action pursuant to CERCLA against Settling Defendants related to or arising from, existing contamination or hazardous substances at the Site. This covenant not to sue shall include all claims for response costs incurred in connection with any response action taken at the Potter's Pits Site, pursuant to CERCLA, including claims based upon conditions at the Site that were previously and presently may be unknown to the United States.

B. In consideration of the foregoing covenant not to sue and the other agreements contained in this Consent Decree, Settling Defendants covenant not to sue the United States for any liability arising out of any activity or expenditure by the United States in responding to the release or threatened release of hazardous substances at the Site, including, but not limited to, any claims for contribution or indemnification.

C. Settling Defendants hereby remise and covenant not to

sue the United States for any liability for action taken and expenditures made by the United States, its agents and employees prior to the Effective Date in responding to the release or threatened release of hazardous substances into the environment from the Site. Further, Settling Defendants agree not to assert any causes of action, claims, or demands against the United States for reimbursement from the Hazardous Substance Superfund, 26 U.S.C. § 9507, including claims pursuant to Sections 106(b)(2), 111, 112 and 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9611, 9612, 9613, or assert any other claims or demands for sums paid in settlement of claims which arise prior to the Effective Date. This paragraph shall not be construed as precluding, in any subsequent action other than enforcement of this Consent Decree, the assertion of (1) any defense available to Settling Defendants or (2) any release or covenant not to sue obtained in this paragraph.

D. These covenants not to sue shall not extend to any person or legal entity other than Settling Defendants.

E. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a CERCLA claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611 or 40 C.F.R. § 300.700(d).

X. RESERVATION OF RIGHTS

A. Nothing in this Consent Decree is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, at law or

in equity, which the United States may have against Settling Defendants for: (1) any liability as a result of failure to comply with the terms of this Consent Decree; (2) natural resource damages; or (3) any and all criminal liability.

B. Nothing in this Consent Decree shall constitute or be construed as a release or a covenant not to sue regarding any claim or cause of action against any person, firm, trust, joint venture, partnership, corporation, or other entity not a signatory to this Consent Decree for any liability it may have arising out of or relating to the Site. Settling Defendants and the United States expressly reserve the right to sue or take any other action against any person or entity other than the signatories to this Consent Decree with respect to any matter, including claims relating to the Site.

XII. DISMISSAL OF CLAIMS

All counterclaims by the Settling Defendants shall be dismissed with prejudice upon entry of the Decree.

XIII. CONTRIBUTION PROTECTION

With regard to claim for contribution against Settling Defendants for matters addressed in this Consent Decree, the Parties hereto agree that Settling Defendants are entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

XIV. MODIFICATIONS

There shall be no modification of this Consent Decree, including modifications deemed necessary by the United States or

the Court as a result of public notice and comment, without written agreement of all parties to the Consent Decree and the Court.

XV. PUBLIC COMMENT

The parties agree and acknowledge that final approval by the United States and entry of this Consent Decree is subject to the requirements of Section 122(d) of CERCLA, 42 U.S.C. § 9622(d), and 28 C.F.R. § 50.7, which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment, and consideration of any comments. Having executed this Consent Decree, Settling Defendants are bound by this Consent Decree unless and until final approval is denied by the United States or the Court.

XVI. CONTINUING JURISDICTION OF THE COURT

The Court shall retain jurisdiction to enforce the terms and conditions of the Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

XVII. TERMINATION

The Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Decree. This Decree shall terminate upon confirmation by the United States that all payments required by this Decree have been made and the remedial action has been certified. Except as provided by this Consent Decree, each party shall be required to bear the costs incurred by it in connection with this action.

ENTERED this _____ day of _____, 199__.

_____
United States District Judge

The parties whose signatures appear below hereby consent to the terms of this Consent Decree. The consent of the United States is subject to the public notice and comments requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES OF AMERICA:

_____
Date

VICKI A. O'MEARA
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

_____
Date

JAMES A. LOFTON
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

MARGARET PERSON CURRIN
United States Attorney
Eastern District of North Carolina
Raleigh, North Carolina 27611

Date

By: _____
STEPHEN A. WEST
Assistant United States Attorney
Eastern District of North Carolina
Raleigh, North Carolina 27611

Date

_____
PATRICK M. TOBIN
Acting Regional Administrator
U.S. Environmental Protection
Agency - Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Date

_____
ZYLPHA K. PRYOR
Associate Regional Counsel
U.S. Environmental Protection
Agency - Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

The undersigned Settling Defendants hereby consent to the foregoing Consent Decree in United States v. Otto Skipper et al.

_____ _____
Date ADA ANDERSON

_____
Address

_____
Telephone Number

The Estate of Hubert Anderson

_____ By: _____
Date ALBERT E. WHELESS
Wheless & McInnis
457 Main Street
Ocean Drive Beach Section
North Myrtle Beach, S.C. 29582
(803) 249-1441

The undersigned Settling Defendants hereby consent to the foregoing Consent Decree in United States v. Otto Skipper et al.

_____ _____

Date JAMES F. CAIN

_____

Address

_____

Telephone Number

_____ _____

Date PEGGY CAIN

_____

Address

_____

Telephone Number

Site:
Break: 10.10
Other:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET
ATLANTA, GEORGIA 30365

MEMORANDUM

DATE: NOV 25 1987

SUBJECT: Proposed Settlement of the Hollingsworth Solderless Terminal Company Matter

FROM: Lee A. DeHihns, III
Acting Regional Administrator, Region IV

TO: Thomas L. Adams, Jr. (LE-133)
Assistant Administrator
Office of Enforcement and Compliance Monitoring

From 1968 through 1982, Hollingsworth Solderless Terminal Company (HSTC) manufactured electrical solderless terminals in Fort Lauderdale, Florida. As part of its manufacturing process, metal parts were heated in molten salt baths, degreased in trichloroethene (TCE) and electroplated. TCE was also used to scrub the floors of the facility. Sludge, heavy-metal-contaminated waste waters and waste chemicals were discharged, contaminating on-site soils and ground water.

In June 1981, the Broward County Environmental Quality Control Board (BCEQCB) requested assistance in its investigation of HSTC's disposal practices from the U.S. Environmental Protection Agency (EPA) under the Superfund Program. The HSTC site was proposed for inclusion on the National Priorities List (NPL) in October 1981 and it was included on the first official NPL published in December 1982. In November 1981, HSTC filed for bankruptcy pursuant to 11 U.S.C. § 1101 et seq.

In 1981 and 1982, under the direction of EPA, HSTC installed groundwater monitoring wells on the HSTC property. In 1982, EPA set forth a Remedial Action Master Plan (RAMP) as a first step in preparation for cleaning up the Hollingsworth site.

In early 1985, EPA installed nine additional monitoring wells around the HSTC site. Data gathered from the new wells again confirmed the presence of VOCs in groundwater samples taken from the

original monitoring wells. Another contaminant, vinyl chloride, a known carcinogen, also was detected in the new samples.

Between 1981 and 1985, under guidance from Florida's Department of Environmental Regulation (DER) and the BCEQCB, HSTC incurred expenses totalling $702,719 (exclusive of attorneys' fees) to address environmental concerns. See letter from R. Pettigrew of Morgan, Lewis, and Bockius to J. Ravan, former EPA Regional Administrator, and J. Orban, former EPA remedial Project Manager, Region IV (September 26, 1985). HSTC also commissioned several investigations by environmental consultants who prepared a remedial investigation and feasibility study for site clean up.

Because EPA had conducted thorough investigations at the HSTC site since 1981, and due to the large amount of data collected, a formal Remedial Investigation was not necessary. Instead, EPA conducted a Focused Feasibility Study (FFS) and carried out additional studies as needed to complete the analysis of remedial alternatives. On August 23, 1985, EPA presented the draft FFS report to the public and provided a five week public comment period.

On September 23, 1987, the Final Remedial Design Report (FRDR) on the HSTC site was issued. According to the FRDR, the remediation of the site should be accomplished by December 1988. It is expected that the remedial action will begin in December 1987. The estimated maximum cost of the clean up is $543,000. FRDR, Table 6-2, "Cost Estimate for Remedial Action, Remediation of Maximum Area of Contamination." This figure reflects the costs of both Phase I and Phase II of the remediation. The maximum cost of only Phase I is estimated at $394,000. FRDR, Table 6-1, "Cost Estimate for Remedial Action, Remediation of Primary Area of Contamination." It is anticipated that only Phase I will be required. Expenses incurred by EPA to date relative to the HSTC site total approximately $416,000. SCAP Site Summary, August 21, 1987.

HSTC has proposed an administrative settlement of this matter under Section 122(h)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). It has proposed to settle its recovery costs obligation by paying $50,000 at the time of the settlement agreement and $150,000 at the time the remediation is accomplished. Under HSTC's proposal, EPA would provide HSTC with a complete release for all past and future costs at the site, as well as for damages to natural resources under the trusteeship of the United States. The Department of Interior (DOI) has completed an assessment of natural resources damages. According to the person at DOI responsible for such assessments in Florida, a release under § 107(a)(4)(C) for damages to natural resources under the trusteeship of the United States is forthcoming.

This memorandum recommends EPA's acceptance of HSTC's settlement offer. There are two primary reasons for that recommendation: 1) HSTC is in bankruptcy; and 2) the risk of contamination of Fort Lauderdale's primary water supply by HSTC is not significant.

The public interest is best served by settling with HSTC rather than pursuing what is certain to be protracted and expensive litigation with virtually no possibility of recovering more than a fraction of EPA's clean up costs because of 1) HSTC's financial status, 2) HSTCs being in bankruptcy and 3) vagueness in the law as to whether EPA's claim will be characterized as a pre-petition claim, a post-petition claim or an administrative cost of the bankruptcy.

Moreover, although the HSTC site is only two miles from Fort Lauderdale's primary water supply, the Prospect Well Fields, it is not and has never been a source of contamination of those well fields. In addition, contamination at the HSTC site at this time is minimal and decreasing. The maximum concentrations of volatile organic compounds (VOCs) found anywhere at the site for the years 1981/82, 1985 and 1987 are indicated below.

	1981/82	1985	1987
TCE	4300 ug/l	789 ug/l	1.0 ug/l
DCE	2160 ug/l	6700 ug/l	107 ug/l
vinyl chloride	---------	6000 ug/l	138 ug/l

(It should be noted that DCE is a decomposition compound of TCE. Thus the increase in DCE would correspond to a decrease in TCE.)

Because this memorandum proposes settlement for less than 100% of clean up costs, what follows is an assessment of each of the ten criteria set forth in the Interim CERCLA Settlement Policy announced as part of EPA's Hazardous Waste Enforcement Policy, 50 Federal Reg. 5034 (February 5, 1985). Attached to this memorandum is a Cost Recovery Agreement drafted in accordance with EPA's Draft Procedures for Administrative Settlements under Sections 122(h)(1) and (g)(4) of CERCLA (July 2, 1987).

1. Volume of Wastes Contributed to Site by Each PRP

There is only one potentially responsible party contributing to the contaminantion at the HSTC site - the Hollingsworth Solderless Terminal Company.

2. Nature of the Wastes Contributed

The principal wastes of concern are the VOCs, trichloroethene (TCE) which has a maximum contaminant level (MCL) of 3.2 ug/l, dichloroethene (DCE) which has a MCL of 70 ug/l, and vinyl chloride which has a MCL of 1 ug/l. Other wastes contaminating the site are heavy metals involved in HSTC's manufacturing business copper, nickel and tin - and some liquid dyes and caustics.

The contaminants discharged at the HSTC site potentially pollute the Biscayne Aquifer, a sole source aquifer under the Safe Drinking Water Act. Indeed, the HSTC site is located only two miles east of the primary well fields serving Fort Lauderdale, the Prospect Well Fields. However, because of the relatively low solubility of TCE and the low hydraulic gradient of the area (due to the flatness of the area) the extent of migration of VOCs to the drainfields has been minimal and it appears that the HSTC site is not a source of contamination of the Prospect Well Fields. The VOCs appear to contaminate only the ground water and soil at the site.

The February 1985 sampling done as part of the Focused Feasibility Study (FFS) also revealed that while concentrations of the contaminants at the 50-foot depth were similar to or greater than those reported in 1981 and 1982, the concentrations at 25, 75, and 100 foot depths were significantly lower than previously reported. The increase at the 50-foot depth has been attributed to entrapment of VOCs associated with oil and grease wastes in the zone of formation change that occurs at approximately 50 feet below the land's surface. The increase in contaminants at the 50 foot depth, however, does not pose an immediate threat to the drinking aquifer. Moreover, the FFS revealed a plume 200-400 feet in diameter moving to the southeast - away from the well fields. FFS Section 1.2.1, pp. 1-17 thru 1-20.

The same decreasing trend was observed in the volume of contaminated water. The volume of contaminated ground water was estimated at between 400 and 800 million gallons in 1985. However in 1987, after redefining the plume, that volume was reduced to between 76 and 180 million gallons.

Of the contaminants found in the soil at the site, lead is the only heavy metal for which there is a RCRA E.P. toxicity standard. That standard is .5 mg/l. The surface and subsurface soil sampling done in December 1984 revealed that in the areas of the highest concentrations of metals - the west drain field and the area between the two buildings at Plant #2 - the toxicity rating was less than 0.2 mg/l.

Where VOCs were found in the soil, they were found at very low levels of concentration. The highest concentration of any of them was of TCE. TCE was recorded at 1.2 ug/g in a soil sample from the east drainfield. In that same drainfield, DCE was detected at between .05 ug/g and 1.0 ug/g. Vinyl chloride was not detectable in any of the soil samples.

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

At the time of disposal of the hazardous substances, HSTC owned and operated the manufacturing facility at which those substances were disposed of. HSTC arranged for and actually conducted the disposal of the hazardous substances. Neither the release of the substances nor the damages resulting therefrom were caused by an act of God or war, or by the actions or omissions of a third party other than an employee or agent of HSTC.

4. Ability of the Settling Parties to Pay

The legislative history of CERCLA is scant. And since CERCLA is a relatively recent statute attempting to regulate in what heretofore has been foreign territory, there is little judicial illumination to guide us in deciding the ability of a potentially responsible party who is in bankruptcy to pay recovery costs. Moreover, there is no easy definition of the term, "ability to pay." How that term is defined depends at least in part upon how far EPA wants to push potentially responsible parties, e.g., to what extent EPA wants to jeopardize a firm's viability. For example, although a potentially responsible party may not have cash-on-hand to pay recovery costs, it may be able to pay those costs if it borrows money, postpones payment of other creditors, or sacrifices future profits, etc. Such actions, however, may jeopardize the firms' viability.

Of course, there also are important quantitative factors measuring a firm's ablity to pay: liquidity, solvency and equity. The February 1986 Financial Analysis of HSTC prepared by Putnam, Hayes & Bartlett, Inc. with input from HSTC's attorneys evaluates those quantitative factors. It concludes that if the HSTC matter is not settled and instead is litigated, it is likely that HSTC will be in an even weaker financial position than it is now and it is less likely that EPA will be able to recover any of its clean up costs.

Of even more importance in deciding HSTC's ability to pay is the fact that HSTC is in bankruptcy. While providing bankruptcy as an option for polluters is certainly something to be avoided, a firm's bankruptcy status not only goes to whether the firm has the financial resources with which to pay, but whether whatever financial resources it has can be reached to pay recovery costs.

There are several possible approaches to enforcing CERCLA against bankrupt parties, some of which are outlined in EPA's Revised Hazardous Waste Bankruptcy Guidance (May 23, 1986). First, the Guidance suggests that EPA take advantage of the exceptions to the automatic stay provision of the Bankruptcy Code. 11 U.S.C. §362(a) provides that enforcement actions which were or which could have been initiated prior to the filing of a petition in bankruptcy are automatically stayed. However, 11 U.S.C. §§362(b)(4) and (5) provide exceptions to the automatic stay. 11 U.S.C. § 362(b)(5) states that "the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental units's police or regulatory power" is not automatically stayed. 11 U.S.C. § 362(b)(4) states that "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" is not automatically stayed.

It is clear that the automatic stay provision was not intended as a shield against all enforcement actions. Indeed, the legislative history is plain: among the specific examples of actions which are not automatically stayed is listed actions by the government to enforce "environmental protection, consumer protection, safety or similar policy or regulatory laws." H.R. Rep. No. 595, 95th Cong., 1st Sess. 343, reprinted in 1978 U.S. Code Cong. & Ad. News. 6299, S. Rep No. 989, 95th Cong. 2d. Sess. 52, reprinted in 1978 U.S. Code Cong. & Ad. News 5838. However, it is equally plain that the exceptions to the automatic stay provision "extend to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but [they do] not extend to permit enforcement of a money judgment." Id. The drafters of the exceptions to the automatic stay were sensitive to the fact that enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors." Id. This was not their intent.

Thus, if by recovering costs under CERCLA, EPA is enforcing a money judgment, EPA is stayed. But, if recovery of costs is not the enforcement of a money judgment, EPA is not stayed and in the HSTC case, it may be able to place a claim against the other assets of HSTC's shareholder (the Hollingsworth Trust), the firm which purchased HSTC's equipment and inventory with financing from HSTC (Midland-Ross Company), proceeds from the future sale of HSTC's plants or the personal assets of HSTC's trustees, the value of which are unknown. That is not to suggest that any of those claims would be successful. In fact, it is not likely that any of them would be successful.

The answers to the question whether by recovering costs, EPA is enforcing a money judgment have varied. In Ohio v. Kovacs, 469 U.S. 274 (1985), the defendant and the state had agreed that, among other things, the defendant would clean up its facility. Defendant breached its agreement; and at the state's request and in

accordance with state law, the court appointed a receiver whose charge it was to conduct the clean up. Defendant then filed for bankruptcy under Chapter 11.

The state sought a declaration by the bankruptcy court that defendant's obligation to cleanup was not dischargeable, it was not a debt within the meaning of §362(b). Reasoning that the state at this point was only interested in the payment of money by defendant to effectuate the clean up, the court disagreed with the state and concluded that clean up costs are a money judgment and that the state is stayed from collecting those costs from defendant because defendant was in bankruptcy.

The result reached by the Third Circuit Court of Appeals just the year before on substantially the same facts was entirely different. In Penn Terra Ltd. v. Department of Environmental Resources, 733 F.2d 267 (3rd Cir. 1984), the court cautioned that "federal supremacy [should] be invoked only where it is clear that Congress so intended. Statutes should therefore be construed to avoid preemption, absent an unmistakable indication to the contrary." 733 F.2d 267, 273. Thus, in order to avoid preemption by the Bankruptcy Code, the court characterized the state's injunction compelling a firm to correct its violations of various state environmental laws as an effort to enforce the state's police powers, not an effort to enforce a money judgment - even though as in Ohio v. Kovacs, the result of the states' efforts would be a a money payment by a firm in bankruptcy to effectuate the clean up.

The Court in Ohio v. Kovacs distinguished Penn Terra Ltd. pointing out that "in [Penn Terra Ltd.] there had been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, but [to] the enforcement of such a judgment by seeking money from the bankrupt... " 469 U.S. 274, 278 note 11. See also, United States v. ILCO 48 Bankr. 1016 (N.D. Ala., 1985) where the court did not bother even to make that distinction. In ILCO, the government's complaint was for an order compelling ILCO to remedy environmental harm. The court characterized that action as an equitable action to prevent future harm, not an action to enforce a money judgment - even though the firm was in bankruptcy and would have to expend funds to satisfy the requested order. Interestingly, the court in ILCO cited both Penn Terra and U.S. v. Kovacs for support.

The court in Thomas Solvent Company v. Kelley, 44 Bankr. 83 (W.D. Mich., 1984) made an important distinction between how the automatic stay provision will be applied in Chapter 11 proceedings and in Chapter 7 (liquidation) proceedings. In that case, the polluting firm was successful in arguing that by seeking to require the firm to comply with a clean up order, the state was seeking

to enforce a money judgment. The court also pointed out, however, that "a debtor cannot avoid its responsibility to society simply by filing a Chapter 11 petition." 44 Bankr. 83, 88. If the firm had not converted from a Chapter 11 to a Chapter 7 (liquidation) proceeding, "an order may [have been] entered granting relief from the automatic stay." Id.

As a second possible approach to enforcing CERCLA against bankrupt parties, the Guidance suggests that EPA get a confession of liability, a judgment, and a specific provision for enforcement of the judgement in the confirmed plan or reorganization. This can be done even though the debt will not have arisen prior to the bankruptcy. 11 U.S.C. 1141(d)(1) provides that "unless otherwise provided in the plan of reorganization", the confirmation of the plan discharges the debtor from debts arising before the date of confirmation.

As a third possible approach, the Guidance suggests that EPA agree with the trustee-in-bankruptcy on a prorata distribution of the firm's assets.

Fourth, the payment of recovery costs to EPA may be a part of the firm's reorganization plan.

Fifth, EPA and the firm's creditors may agree to share in the amount available for distribution to creditors.

Sixth, EPA may be able to convince the bankruptcy court that its response costs are an "actual, necessary cost and expense of preserving the estate" under 11 U.S.C. 503(b)(A) and, therefore, should be accorded the priority allowed for administrative expenses. After all, it will be difficult - if not impossible - to dispose of the property of a firm which is on the NPL and, under Midatlantic Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986) such property cannot be abandoned to avoid CERCLA liabilities. (A similar argument was successful in T.P. Long Chemical Inc., 45 Bankr. 278 (N.D. Ohio, 1985))

Seventh, the firm's obligation to EPA for recovery costs may be said to have arisen post-petition, when EPA expended funds - not when HSTC harmed the environment or was put on the NPL - in which case EPA's claim is not discharged in bankruptcy and EPA may seek to have the firm fulfill its obligation. Only pre-petition obligations are discharged. A pre-petition obligation is one for which a claim or potential claim existed prior to the filing of the bankruptcy petition.

Of these approaches, most "fail" in the HSTC matter for want of timelinesss: HSTC's Second Revised Plan of Reorganization was confirmed in 1982. EPA had notice of the plan and did not object to it. Neither did EPA file a claim in the bankruptcy proceeding.

The only approaches which are appropriate to the HSTC matter at this point are preserving EPA's ability to seek recovery by either (1) taking advantage of the exceptions to the automatic stay provisions, or (2) characterizing HSTC's obligation to EPA as a post-petition obligation.

Characterizing EPA's recovery costs as an administrative expense probably is not a viable route for EPA to take to reach whatever assets HSTC may have since it did not object to its being listed as a Class III creditor under HSTC's reorganization plan. The bankruptcy court is not likely to upset that plan five years after its confirmation. Indeed it would be preferable not to even broach this possibility since it has only been recently that bankruptcy courts have begun to accomodate EPA by giving its recovery costs the status of administrative expenses. The bankruptcy court may disallow EPA's claim for administrative expenses on the poor facts of this case and that may set a precedent for future such disallowances.

The obvious difficulty with the two appropriate approaches however, is that their effectiveness depends upon HSTC having resources out of which recovery costs can be paid. Unfortunately, it does not appear that HSTC has such resources.

According to the 1986 Financial Analysis of HSTC, HSTC will likely have cash-flow problems beginning in 1988 if by December 1987 cleanup of the site and the sale of Plant #2 are not accomplished. Specifically, it would not be able to meet its creditor payments and might need to liquidate its remaining assets. Interim financing would be needed to avoid liquidation. And of course, each year of delay in completing clean up requires HSTC to make additional payments to its unsecured creditors, thus reducing its asset base.

HSTC owns Plant #1 clear of any liens. In 1986 this plant had an estimated market value of approximately $1.3 million <u>if the site were clean</u>, Plant #2 has been dedicated by the bankruptcy court to HSTC's creditors. According to the plant manager, that plant is currently rented at $10,000 per month and it has a current fair market value of $94,000.

HSTC receives payments until 1991 from the Midland-Ross Company for the sale of equipment, inventory and manufacturing technology. According to the Financial Analysis, those payments totaled $735,000 in present value in 1986; but, attaching a claim against those payments would likely force HSTC to liquidate unless bank financing could be arranged.

HSTC's sole shareholder, the Hollingsworth Trust, does not provide much in the way of resources either. According to the Financial Analysis, in 1986, the trust's other assets were valued

only at between $250,000 and $500,000. Moreover, those assets probably could not be reached unless EPA were successful in piercing HSTC's corporate veil.

The thing most incongruous about HSTC's resources, bankruptcy status and obligation to EPA are that Plant #1 once cleaned-up has a value of $1.3 million and the reorganization plan seems to anticipate that EPA will clean up the site. If EPA accepts HSTC's $200,000 settlement offer and cleans up the site, HSTC may gain $1.28 million in the subsequent sale of the plant. As incongruous as this sequence of events may seem, EPA probably cannot avoid it.

Section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) provides for a lien in favor of the United States upon property which is the subject of a removal or remedial action. Although this lien provision probably applies to costs incurred both prior to and after the passage of SARA and indeed the situation presented in the HSTC matter is just the sort to which that provision was intended to apply, EPA cannot avail itself of it in this matter. See EPA's Guidance on Federal Superfund Liens (September 22, 1987). As the Guidance points out, a "lien unperfected as of the time of the filing of the bankruptcy petition, will be invalidated by the bankruptcy trustee." HSTC's bankruptcy petition was filed in 1981; its reorganization plan was confirmed in 1982. The Superfund lien provision was not available at that time. And, EPA did not file a lien prior to that time.

If EPA somehow were successful in an attempt to require HSTC to sell Plant #1 and give EPA proceeds from that sale to pay its recovery costs, it would be upsetting the reorganization plan. At 5.02 of the plan, it is stated that funding for the annual payments through 2003 to Class VII creditors "shall be provided primarily from rental income from Plant #2 and Plant #1." And, for the reasons cited above, the HSTC matter does not provide the best set of facts on which to seek an amendment to the reorganization plan.

5. Litigation Risks in Proceeding to Trial

a. Admissibility of the Government's Evidence

There appear to be no procedural or substantive problems in the acquisition or creation of evidence to support EPA's cost recovery claim.

b. Adequacy of the Government's Evidence

In an October 20, 1986 letter to Patrick Tobin, Director, EPA Waste Management Division from D. Beavers of Stradley, Ronon,

Stevens & Young, HSTC disputes the conclusions in the Record of Decision (ROD) because, it says, those conclusions are based upon an "inaccurate summary of the available data." (emphasis added) However, in that letter, HSTC does not dispute the accuracy of the data themselves - much of which was generated by HSTC's own environmental consultants or by them in conjunction with EPA. Neither does HSTC, in that letter, suggest that the data are in any way inadequate. Indeed, in its comments on the FFS, HSTC states that "the FFS comports with the conclusions reached by Hollingsworth's experts three years ago." See letter from R. Pettigrew of Morgan, Lewis and Bockius to J. Ravan, former EPA Regional Administrator, and J. Orban, former EPA Remedial Project Manager, Region IV, (September 26, 1985). (But see same letter at p. 27: "The FFS raises serious doubts about the validity of the data collected and the conclusions drawn in it.")

HSTC's only "complaints" are (1) that EPA has violated its regulations and guidance in that it has not considered all available remedies and (2) that it appears that the risk which at one time seemed to have been presented by the site exists no longer. Regarding the latter "complaint," HSTC has concluded - and EPA does not disagree with its conclusion - that the level of toxicity and the concentration of VOCs are diminishing.

Regarding the former "complaint", HSTC suggests that the "no action" alternative is required by the regulations and guidance accompanying the National Contingency Plan (NCP), CERCLA § 105, 42 U.S.C. 9605 et seq., and that a less expensive course of remedial action is possible. As discussed below however, in conducting its FFS and deciding on appropriate remedial action, EPA adhered to the regulations and guidance accompanying the NCP.

c. Availability of Defenses

HSTC will argue in defense that in developing its FFS, EPA did not adhere to the NCP, it did not consider all remedies as required by CERCLA § 105, 42 U.S.C. 9605, and its accompanying regulations and guidance. In addition, it will argue that the remedy recommended by the FFS does not meet the cost-effectiveness standards of the NCP regulations, 40 C.F.R. 300.68(j).

If these allegations were true, EPA would be found to have acted arbitrarily and capriciously in seeking to recover costs from HSTC. However, these allegations are not true.

NCP regulations, 40 C.F.R. 300.68, require that EPA enploy the following procedure in considering alternative remedial actions:

> (g) A limited number of alternatives should be developed for remedial actions. One alternative may be a no-action alternative. No-action alternatives are appropriate, for example, when response action may cause a greater environmental or health danger than no action ...

(h) The alternatives developed under subparagraph (g) ... will be subject to an initial screening to narrow the list of potential remedial actions...

(i)(1) A more detailed evaluation will be conducted of the limited number of alternatives that remain after the initial screening in subparagraph (h)

EPA's Guidance on Feasibility Studies under CERCLA (April 1985) recommends an approach to developing alternative remedial actions. At chapter 2.1, it recommends that "possible technologies be screened to eliminate inapplicable and infeasible technologies based on site conditions and to eliminate those that are an order of magnitude higher in cost than other alternatives but do not provide significantly greater environmental or public health benefits or technical reliability."

The cost-effectiveness standards of the NCP, 40 C.F.R. 300.68(j), require that EPA select the remedial alternative which is the "lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare or the environment." EPA adhered to these regulations and guidance in conducting its FFS.

EPA developed and considered six alternatives, including a no-action alternative. After an initial screening and subsequent more detailed evaluation of the alternatives, it was determined that two alternatives would be effective and are equally acceptable. EPA has decided upon the less expensive of those two alternatives, thus, satisfying the cost-effectiveness standards of the NCP.

6. Public Interest Considerations

The hydrogeology of the Fort Lauderdale area is such that contaminants go right into the groundwater. Groundwater is the major source of drinking water in the area. However, there is no evidence to suggest that the HSTC site was ever a source of contamination of the Prospect Well Fields, as initially presumed. Indeed, because of the low solubility of TCE and the low hydraulic gradient of the area, the extent of migration of VOCs from the drainfields has been minimal. Also, the plume has decreased in size and is moving away from the Prospect Well Fields. Thus, there appears not to be a need for a quick remedy to protect health or the environment.

There is another public interest consideration however. That is that because of three factors - 1) HSTC's financial status 2) HSTC's being in bankruptcy and 3) vagueness in the law as to whether EPA's claim against HSTC will be characterized

as a pre-petition claim, a post-petition claim or an administrative cost of bankruptcy - EPA's claim against HSTC is doomed to result in protracted and expensive litigation with virtually no possibility of recovering more than a fraction of EPA's clean up costs. Thus, if conserving federal resources for clean ups under CERCLA is a public interest consideration, then those three factors may be used to justify EPA's acceptance of HSTC's settlement offer.

7. Precedential Value

The issue presented in this matter is the result of two very important federal policies coming into conflict. On one hand is the policy underlying CERCLA which requires that those who release hazardous wastes into the environment be responsible for the oftentimes very expensive clean up of those wastes. On the other hand is the policy underlying the Bankruptcy Code. That policy is to give debtors a temporary respite from creditors, to ensure that all creditors are treated equally and fairly under the circumstances, and to help rehabilitate failing businesses. Those policies come into conflict where, as in this matter, the EPA seeks to recover from a firm which is in bankruptcy the cost of cleaning up the firm's hazardous waste site.

In a nutshell, the issue is whether a firm which is in bankruptcy wil' be allowed to escape liability under CERCLA, and if so, when. No case has addressed that increasingly important issue. The court in In re Johns-Manville Corporation et al., 57 Bankr. 680 (S.D. N.Y., 1986) recognized that that was the issue and that the resolution of that issue required "substantial and material consideration" of federal environmental statutes. However, it did not resolve the issue. It decided instead that because substantial and material consideration of non-bankruptcy statutes was required, withdrawal of the bankruptcy proceeding was mandatory. Ironically, In re Johns - Manville Corporation et al. provides us with the most substantial guidance available: whether a firm which is in bankruptcy will be allowed to escape liability under CERCLA is an issue to be decided based on CERCLA and other federal environmental statutes, not based on the Bankruptcy Code. Unfortunately, however, most of the litigation to date involves state, not federal, environmental laws. So, while In re Johns-Manville Corporation has taken the important step of posing the issue, there is no precedent for an answer to that issue. Moreover, where the issue has been presented in the context of state environmental laws, although the clear trend is away from providing bankruptcy as an option for polluters, the courts have not been consistent in their answers to the issue.

The settlement of the HSTC matter can give EPA an opportunity to set forth the factors it will consider in deciding to settle with potentially responsible parties who are in bankruptcy and to

suggest the limited circumstances in which the EPA will settle with potentially responsible parties. While a settlement agreement is not tantamount to regulations or guidance, it does provide precedent for the EPA's Settlement Decision Committee and, therefore, may be used as a guide by other potentially responsible parties. Thus, the settlement of this matter may have some important, precedential value.

8. Value of obtaining a Present Sum Certain

The possibility of obtaining a larger sum than that offered by HSTC to settle this matter is almost nil. As pointed out in the 1986 Financial Analysis, if forced to go to litigation, HSTC's already meager financial resources will only be further depleted. Moreover, because HSTC is operating under a reorganization plan which has been in effect for more than five years and pursuant to which (according to the 1986 Financial Analysis) over $1.2 million already has been paid to unsecured creditors, it is improbable that more substantial resources would be available in the future.

9. Inequities and Aggravating Factors

The HSTC site was proposed for inclusion on the NPL in October 1981 because it was presumed to contaminate the Prospect Well Fields, Fort Lauderdale's primary source of drinking water. Subsequent research has indicated that although the HSTC site potentially contaminates the Biscayne Aquifer, it does not and has never contaminated the well fields. Moreover, as previously discussed, the risk of contamination today is substantially less than that at the time HSTC was put on the NPL. Indeed, it is unlikely that the HSTC would qualify for the NPL today. HSTC's current Mitre Model score of less than 8 does not warrant Superfund's attention.

That is not to suggest that remedial action is not necessary or that cost recovery is not appropriate, however. Because the primary source of drinking water in the Fort Lauderdale area is groundwater, the fact that the ground water at the HSTC site does not meet the standards of the Clean Water Act means that remedial action is necessary. Nonetheless, there may be some inequity in - in essence - holding HSTC to a "higher standard" than similarly situated firms.

On the other hand, there may be some inequity in allowing HSTC to settle for so substantially less than the 100% of recovery costs to which EPA is entitled. There are some facts in addition to those discussed elsewhere in this memorandum which mitigate in favor of EPA settling for so substantially less than 100% however, including the following: (1) HSTC has cooperated with EPA's

investigation in good faith as evidenced by its expending some $702,719 to address environmental concerns; (2) the contamination of the Prospect Well Fields with which EPA is concerned could have been caused by a number of other companies (ROD, p. 13); and (3) contaminants from the HSTC site could not have migrated and contaminated the Prospect Well Fields (ROD, p. 13).

10. Nature of the Case that Remains After Settlement

No case remains after settlement of this matter with HSTC. HSTC is the only potentially responsible party; and under the terms of its proposed settlement, HSTC would receive a complete release for all past and future costs at the site as well as for damages to natural resources under the trusteeship of the United States.

cc: Gene A. Lucero (WH-527)
Director
Office of Waste Program Enforcemtent

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

IN THE MATTER OF:	)
	)
HOLLINGSWORTH SOLDERLESS TERMINAL COMPANY SITE FORT LAUDERDALE, FLORIDA	)
	)
	)
PROCEEDING UNDER SECTION 122(h)(1) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, 42 U.S.C. §9622(h)(1), AS AMENDED BY THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, PUB. L. NO. 99-499.	)

COST RECOVERY AGREEMENT

This Agreement is made and entered into by the U.S. Environmental Protection Agency ("EPA"), and the Hollingsworth Solderless Terminal Company ("Settling Party"). The purpose of this Agreement is for EPA to recover response costs incurred and to be incurred at or in connection with the Hollingsworth Solderless Terminal Company site ("Site") in Fort Lauderdale, Florida and to resolve the liability of the Settling Party for such response costs. EPA is authorized to enter into this Agreement pursuant to the authority vested in the Administrator of the EPA by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("CERCLA"), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D (Feb. 26, 1987).

This Agreement shall be binding upon EPA and shall be binding upon the Settling Party, its directors, officers, employees, agents, successors and assigns. Each signatory to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind the party represented by him or her. The Settling Party agrees to undertake all actions required by this Agreement. The Settling Party consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms.

WHEREAS, EPA alleges that hazardous substances, pollutants and contaminants as defined in Sections 101(14) and 104(a)(2) of CERCLA, 42 U.S.C. §§9601(14) and 9604(a)(2) have been or are threatened to be released into the environment from the Site;

WHEREAS, EPA alleges that such releases or threatened releases required response action to be undertaken at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. §9604, and will require further response action to be undertaken in the future;

WHEREAS, EPA alleges that in performing this response action, response costs have been incurred at or in connection with the Site and that further response costs will be incurred in the future;

WHEREAS, EPA alleges that the Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. §9607(a), and is liable for response costs incurred and to be incurred at or in connection with the Site;

WHEREAS, the Settling Party does not admit any of EPA's allegations; and

WHEREAS, EPA and the Settling Party desire to settle certain claims arising from the Settling Party's alleged involvement with the Site without litigation and without the admission or adjudication of any issue of fact or law;

NOW, THEREFORE, EPA and the Settling Party, in consideration of the promises and convenants herein, and intending to be legally bound hereby, agree as follows:

1. The Settling Party agrees to pay to the Hazardous Substance Superfund $50,000 at the time this Agreement is entered into and additional $150,000 at the time response action is completed.

2. Each payment shall be made by certified or cashier's check made payable to "EPA-Hazardous Substance Superfund." Each check shall reference the name of the Settling Party and the site and shall be sent to:

EPA Superfund
P.O. Box 371003M
Pittsburgh, Pennsylvania 15251

3. The Settling Party shall simultaneously send a copy of its check to:

Chief, Hazardous Waste Branch
Office of Regional Counsel
U.S. Environmental Protection Agency - Region IV
345 Courtland Street
Atlanta, Georgia 30365

4. In addition to any other remedies or sanctions available to EPA, if the Settling Party fails or refuses to comply with any term or condition of this Agreement it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA.

5. Subject to Paragraph 6 of this Agreement, upon payment of the amounts specified in Paragraph 1 of this Agreement, EPA covenants not to sue or to take any other civil or administrative action against the Settling Party for "Covered Matters." "Covered Matters" include the costs of removal or remedial action incurred by the United States Government consistent with the National Contingency Plan and damages for injury to, destruction of or loss of natural resources under the trusteeship of the United States resulting form the release or threatened release of the hazardous substances which are the subject of this agreement.

6. Nothing in this Agreement is intended to be nor shall it be construed to be a release or covenant not to sue for any clair or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against the Settling Party for:

(a) any continuing liability as a result of failure to make the payments required by Paragraph 1 of this Agreement;

(b) any matters not expressly included in Covered Matters.

7. Nothing in this Agreement is intended to be nor shall it be construed to be a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

8. In consideration of EPA's covenant not to sue in Paragraph 5 of this Agreement, the Settling Party agrees not to

assert any claims or causes of action against the United States or the Hazardous Substance Superfund arising out of response activities undertaken at the Site, or to seek any other costs, damages, or attorneys fees from the United States, its agencies, employees or contractors arising out of response activities undertaken at the Site.

9. Subject to Paragraph 6 of this Agreement, EPA agrees that by entering into and carrying out the terms of this Agreement, the Settling Party will have resolved its liability to the United States for "Covered Matters" pursuant to Section 113(f)(2) of CERCLA and shall not be liable for claims for "Covered Matters."

10. This Agreement shall be subject to a thirty-day public comment period pursuant to Section 122(i) of CERCLA. In accordance with Section 122(i)(3) of CERCLA, EPA may withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

11. The Attorney General or his designee has issued prior written approval of the settlement embodied in this Agreement pursuant to Section 122(h)(1) of CERCLA.

12. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Party that the public comment period pursuant to Paragraph 10 of this Agreement has closed and that comments received, if any, do not require either modification of this agreement or EPA withdrawal from this Agreement.

IT IS SO AGREED:

[Settling Parties]

By: _____ _____
[Name] [Date]

U.S. Environmental Protection Agency

By: _____ _____
[Name] [Date]

Supplement to Ten Point Settlement Document

The purpose of this Supplement to the Ten Point Settlement Document is to explain the circumstances giving rise to the revised Consent Decree. Since the original Consent Decree was signed by Hollingsworth Solderless Terminal Company, Inc. ("HST") in 1990, HST has suffered financial difficulties such that HST no longer is able to comply with its financial obligations under the original Consent Decree. HST, however, is able to meet the general financial terms of the original Consent Decree under a different timetable. The new timetable for payments owing to EPA is reflected in the revised Consent Decree and affects only Paragraphs Four, Five, Six, and Eight (4, 5, 6, and 8) of the Ten Point Settlement Document. The following paragraphs will supplement the original paragraphs in the Ten Point Settlement Document. The other paragraphs in the Ten Point Settlement Document remain in full force and effect.

4. Ability of the Settling Parties to Pay

HST is unable to perform its financial obligations under the original Consent Decree because HST has not received rental income owed to it. The original CD as signed, stated in paragraph IX: "Maintaining the rental income under each of these leases is essential to the financial viability of HST and therefore, to its ability to perform its obligations hereunder." In the one year interval between HST signing the CD and the actual lodging of the CD, HST's various tenants had financial difficulty and did not meet all of their rental payments. For example, one tenant, Lance Enterprises, Inc. ("Lance"), filed for bankruptcy. HST was prepared to prove over $200,000 in claims, but the Bankruptcy Court only recognized $165,000. Of this $165,000 judgment, HST will receive $31,000 over 4 years after the secured creditors have been paid.

Since HST is no longer able to comply with the financial terms of the original CD, HST proposed a modification. Instead of EPA being paid $150,000 within thirty (30) days of the Effective Date (when the CD is entered into Bankruptcy Court) and EPA receiving the rest of its funds as 55% of the net proceeds upon the sale of Plant 1, EPA is to receive all of its monies at the time Plant 1 is sold. The terms are as follows: At the time Plant 1 is sold, EPA will receive $150,000, plus interest compounded annually at the rate of 7% per annum from the Effective Date, and 55% of the net proceeds of the Plant 1 sale.

In sum, the modification is better for EPA. HST will not have to finance the $150,000 with a $200,000 loan/mortgage. If HST had obtained a $200,000 loan/mortgage, that loan/mortgage would have to be repaid out of the sale proceeds before EPA would receive its 55% share of the net proceeds. Accordingly, the Region recommends the acceptance of the revised CD.

5. Litigation Risks in Proceeding to Trial

If the revised CD is not be accepted, EPA will have to litigate against HST to receive monies owing to EPA by HST. Such litigation would force HST into Chapter 7 bankruptcy. As an unsecured creditor, EPA is unlikely to receive any of its response costs in a Chapter 7 bankruptcy liquidation.

6. Public Interest Considerations

The revised CD benefits the public interest because EPA will receive a sum certain without litigation and EPA will receive more of its response costs in a forum outside of Chapter 7 liquidation bankruptcy. In addition, the revised Consent Decree does not affect the response action chosen by EPA.

8. Value of Obtaining a Present Sum Certain

EPA stands to gain the same amount as originally negotiated in the first CD providing the Site's value has not dramatically dropped since 1990. The value of the sum certain is represented by EPA's ability to be reimbursed for past response costs without expending Superfund costs in litigation.

De Minimis

(see under SETTLEMENTS)

De Micromis

(see under SETTLEMENTS)

Prospective Purchaser

(see under SETTLEMENTS)

#18. Small Cost Recovery
Settlement Ten-Point Analysis
Carrier Air Conditioning

TEN-POINT SETTLEMENT ANALYSIS
ADMINISTRATIVE COST RECOVERY SETTLEMENT
CARRIER AIR CONDITIONING SUPERFUND SITE

The purpose of this memorandum is to set forth the basis for EPA Region IV's decision that the Cost Recovery Agreement for the Carrier Air Conditioning Superfund Site, Collierville, Tennessee, be entered into between EPA and Respondent/PRP Carrier Corporation. Pursuant to CERCLA section 122(h)(1), 42 U.S.C. 9622(h)(1), because the total response costs at this Site are expected to exceed $500,000, the prior written approval of the Department of Justice is being sought. This memorandum sets forth the background of this case and the ten-point analysis used by EPA Region IV to determine the appropriateness of this settlement of past response costs.

I. BACKGROUND

The Carrier Air Conditioning Site (hereinafter "the Site") is located on the western edge of the Town of Collierville, Shelby County, Tennessee, southwest of the intersection of Poplar Avenue (Highway 57) and Byhalia Road. The Town of Collierville (hereinafter "the Town" or "Collierville") is approximately 21 miles east of downtown Memphis, Tennessee.

The Site includes 135 acres of property (hereinafter "the property") currently owned by the Carrier Corporation (hereinafter "Carrier"), a subsidiary of United Technologies Corporation. Since the late 1960s, Carrier has operated a manufacturing facility of residential heating and air conditioning units on the property.

From 1967 until 1987, the Town of Collierville owned the property and leased it to Carrier. The Town of Collierville's ownership coincided with releases of hazardous substances (discussed below). This formed the basis for EPA's decision to name Collierville as a PRP.

There were three discernible releases of hazardous substances at the Site which are now being addressed under CERCLA. On June 21, 1979, as a result of a failed filter cover on one of the degreaser units, approximately three thousand gallons of trichloroethylene (TCE) were spilled near the southwest corner of the main manufacturing plant. The solvent was released in the form of liquid and vapor due to the high internal pressure in the unit. The liquid material spilled onto and flowed across the adjacent parking lot. Some of the liquid evaporated, while a substantial quantity was absorbed by the asphalt surface.

On January 23, 1985, as a result of a failed underground portion of an aboveground storage tank pipe, approximately five hundred gallons of TCE leaked from the southeastern corner of the manufacturing plant. Carrier employees discovered the solvent

leaking through the surrounding soil into an adjacent storm sewer. The leaking material saturated approximately 1500 square feet of the surrounding soil. Reports from both the U.S. Coast Guard and the Memphis Shelby County Health Department state that approximately 80 gallons of the material were released into the Nonconnah Creek via a storm sewer and runoff ditch.

In addition to the two discrete releases of solvent, Carrier operated an unlined clarifier sludge surface impoundment on the northwest portion of the property. The impoundment, which was approximately 50 feet by 48 feet, was utilized from 1972 until 1980 for the storage of alkaline zinc phosphate washer sludge produced during the washing of sheet metal prior to its painting. Representatives from Carrier dispute that TCE-contaminated materials were placed in the impoundment, but, after a 1980 removal of the material, a waste profile from the disposal facility indicated that the shipped material contained 75 percent TCE-contaminated soil.

In 1989, EPA proposed the Site for listing on the National Priorities List (NPL) (40 C.F.R. § 300, Appendix A); the Site was listed in 1990 and is currently no. 221 on the NPL.

In 1989, the Region sent general notice letters and information requests under CERCLA Section 104(e), 42 U.S.C. § 9604(e), to Carrier and Collierville. In 1989, the Region sent a special notice letter pursuant to CERCLA Section 122(e), 42 U.S.C. § 9622(e), to Carrier for the conducting of the Remedial Investigation (RI) and Feasibility Study (FS) phases of the cleanup process.

On September 29, 1989, Carrier and EPA entered into an Administrative Order on Consent for performance of the RI/FS phase of the response action. The RI and FS reports were finalized in April, 1992. A Proposed Plan, outlining EPA's preferred remedial action plan for the Site, was also issued in April, 1992. A 30-day public comment period on the Proposed Plan which began on April 21, 1992, and ended on May 21, 1992, did not result in any significant comments. On April 30, 1992, a public meeting was held at the Memphis/Shelby County Public Library. The Record of Decision was signed by the Regional Administrator on September 3, 1992.

As set forth in the Record of Decision, the remedy selected for the Site consists of soil vapor extraction and groundwater pump and treat. Treatment of the groundwater will be conducted through the use of air stripping technology.

On August 29, 1992, the Region forwarded a prereferral litigation package to the Department of Justice in anticipation of Consent Decree negotiations. On October 9, 1992, the Region sent notice letters for the conduct of remedial design (RD) and remedial

action (RA) to the Carrier Corporation and the Town of Collierville. Negotiations were concluded unsuccessfully on January 11, 1993, and on February 11, 1993, EPA issued an unilateral administrative order (UAO) for RD/RA to the Carrier Corporation. Presently, Carrier is proceeding with the work required by the Order.

II. SETTLEMENT ANALYSIS

This settlement encompasses payment of 100% of outstanding past costs for the Site. These costs are $298,692.01 and include expenditures for RI/FS oversight and RD/RA preparation. However, total response costs are expected to exceed $500,000 after oversight of the RD/RA is completed. Therefore, prior written approval from DOJ is necessary before the Cost Recovery Agreement can be executed. This memorandum outlines the basis for EPA's recommendation that DOJ concur in this settlement.

Pursuant to the Administrative Order on Consent entered into by EPA and Carrier in 1989, Carrier agreed to pay oversight costs for the duration of RI/FS. To date, Carrier has paid the costs incurred in through fiscal year 1991. The costs for fiscal year 1992 and the internal EPA costs incurred since the issuance of the Record of Decision constitute the outstanding past costs covered in this CRA.

1. Volume of Wastes Contributed to Site by Each PRP

The Carrier Corporation is responsible for all hazardous substances released at the Site. As discussed in the Region's prereferral litigation Report, dated August 29, 1992, Carrier was the operator of the facility during the relevant time periods. The Town of Collierville was an owner of the property until 1987; however, there is no evidence that it contributed any of the wastes to the Site. Furthermore, Carrier has in the past and continues to be willing to assume 100% liability.

2. Nature of the Wastes Contributed

As discussed above, the primary substance released at the Site was trichloroethylene. This substance has been detected in both the soils and the groundwater. Other contaminants of concern include 1,2-dichloroethene, 1,2-dichloroethane, vinyl chloride, lead, zinc, and tetrachloroethene.

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

Strong evidence exists linking the Carrier Corporation with the releases of TCE (see Background section relating to prior releases). The contaminants of concern can be linked to either the direct releases, degradation products of the materials

released, or materials found in the surface impoundment. Morever, Carrier has never disputed liability.

4. Ability of Settling Party to Pay

The settling party is a wholly-owned subsidiary of United Technologies Corp., a Fortune 50 company. The settling party has submitted substantial documentation demonstrating its ability to pay.

5. Litigation Risks in Proceeding to Trial

There are no litigation risks associated with this case beyond those risks normally associated with proving all costs in a cost recovery suit.

6. Public Interest Considerations

The only minor public interest consideration is that, because Carrier is a major employer in the area and because anti-EPA sentiment has been expressed in the past, a settlement between Carrier and EPA may be perceived as another positive step in the cleanup process.

7. Precedential Value

There are no issues in this settlement that have precedential value.

8. Value of Obtaining a Present Sum Certain

EPA will recover 100% of outstanding past costs. Therefore, this is not a significant factor in this settlement.

9. Inequities and Aggravating Factors

There are no inequities or aggravating factors in this settlement.

10. Nature of Case that Remains After Settlement

All past costs will be recovered. Future costs, specifically RD/RA oversight costs, will be demanded as they accrue. The CRA does not include any covenant not to sue relating to future costs.

MISCELLANEOUS

T

ROUTING SLIP - MODEL EXAMPLE

August 18, 1993

ROUTING AND TRANSMITTAL SLIP		
TO:	Initials	Date
1. LUETSCHER - ORC		
2. BUSH	WBB	8/19
3. P. HARRIS		8/20
4. YARBROUGH-WMD		
5. COLLINS		8/24/93
6. MUNDRICK		8/24/93
7. ~~GREEN~~		8/25
8. FRANZMATHES		8/25
9. BARKER - ORC		8/27
10. TOBIN (2 signatures)		

ACTION REQUESTED: Concurrence/Signature

REMARKS:

The ENCLOSED documents pertain to a proposed CERCLA Consent Decree for RD/RA with the sole Potentially Responsible Party ("PRP"), Hercules Incorporated, at the **Hercules 009 Landfill Site** in Brunswick, Glynn County, Georgia (the "Site"). Specifically, the enclosed documents for signature consist of a transmittal letter and a signature page from the proposed Consent Decree. Enclosed with these documents is a "10 Point" Settlement Analysis of the proposed settlement and a draft Complaint. Enclosed separately is the complete Consent Decree executed by the Settling Defendant, including the Record of Decision ("ROD"), Statement of Work ("SOW"), and Map of the Site as Appendices "A", "B", and "C", respectively.

The proposed Consent Decree is **SIGNIFICANT** because it embodies an entirely favorable conclusion to negotiations with Hercules Incorporated ("Hercules"), the sole PRP at the Site. Hercules had designed and used the Site to land-fill toxaphene sludge. The proposed Consent Decree requires Hercules to perform, under EPA oversight, the remediation of the Site required by the March 25, 1993, ROD. The remedial action will consist of a treatability study, followed by in-situ stabilization of toxaphene-contaminated soils, and emphasizes source control to prevent future surface or groundwater contamination. The proposed settlement also requires Hercules to reimburse the government for 100% of the past and future response and oversight costs associated with the Site.

The Model Consent Decree for RD/RA ("the Model CD") formed the basis for the proposed Consent Decree. No significant deviations or modifications were made to the language of those Sections of the Model CD deemed to embody issues of national significance, hence no EPA HQ "Cluster Group" authorization was necessary or sought. EPA/OE was, however, regularly apprised of the negotiations and provided valuable advice.

Please refer to the enclosed "10 Point" Settlement Analysis for a more thorough review of the significance and details of the proposed settlement.

FROM: Gregory Luetscher, ORC (2641, VMX 2275)

LETTER AUTHENTICATING

EPA DOCUMENTS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

MEMORANDUM

DATE: December 12, 1991

SUBJECT: Authentication of Copies of EPA Documents

FROM: Andrew Harrison
Assistant Regional Counsel

TO: Anne L. Asbell
Chief, Southern Section
Hazardous Waste Law Branch

The purpose of this memorandum is to enunciate the appropriate procedures for certifying and authenticating copies of EPA documents.

Federal Rule of Civil Procedure (FRCP) 44 establishes a mechanism for authenticating copies of official records.[1] An official record may be evidenced by a copy attested by the officer (or his deputy) having custody of the original. For purposes of FRCP 44, the legal custodian is the cognizant Assistant Administrator, Regional Administrator, Staff Office Director or Office Director or his designee.[2]

A copy of an official record must be accompanied by a certificate that such officer has custody of the record.[3] The certificate may be made by the appropriate federal district court judge with authentication established by application of the court's seal. A certificate may also be made by a public officer having an official seal and duties within the district. The public officer must authenticate the document with his seal.[4]

---

[1] The method of authenticating documents described herein also applies to requests for documents for admissibility under 28 U.S.C. § 1733.

[2] 40 C.F.R. § 2.406 (1991).

[3] Fed. R. Civ. P. 44.

[4] Fed. R. Civ. P. 44.

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EPA Order 1200.4[5] of March 4, 1975, designated the following officials as authorized to use the Agency seal to authenticate documents:

a. the General Counsel;
b. the Deputy Assistant Administrator for Administration;
c. the Executive Officer, Office of the Administrator; and
d. the Regional Counsels.

Procedures for preparing a package of documents have also been established. Provided below are instructions on how to properly bind EPA documents using the "blue ribbon and gold seal method."[6] Note that in a September 26, 1989, memorandum from James Sargent, he indicated that the embossing EPA seal alone should suffice at the place indicated for the location of the EPA seal.[7] However, according to Don Nantkes (OGC), the following method of binding documents (the purpose of which is to prevent substitution or forgery) has never failed to get documents admitted in Federal Court:[8]

1. Punch two holes at the top of the "authentication" and the documents to be attached;

2. Bind the "authentication" and the documents together with a strong ribbon (blue is traditional--also, 1/4" "woven-edge" single-face satin ribbon from a notions store is best), tying a tight knot at the underside of the left hole and leaving enough ribbon at both sides of the knot for the next step;

3. Cut a 1/2" horizontal slit in the "authentication" to the left of the "certification" signature, and push both ends of the ribbon back up through the left hole, bringing them out of the hole under the "authentication";

4. Push the ends of the ribbon up through the slit in the "authentication" and cut off the ends of the ribbon just above the bottom of the document;

5. Impress the EPA seal on a round seal patch with serrated

---

[5] This Order was referenced by Mr. Nantkes in his memorandum. Memorandum from Don Nantkes on Certification Under Rule 44 and 40 C.F.R. § 2.406 at 3 (October 24, 1988).

[6] Id. at 2.

[7] Memorandum from James Sargent on Authentication of EPA Documents (September 26, 1989).

[8] Nantkes, supra note 5, at 3.

edges and backed with glue (available from drugstores and office supply stores---gold is traditional) and stick the seal over the spot where the ribbon ends emerge from the document, leaving the ends of the ribbon dangling at the bottom.[9]

A specific format for both the authentication and certification has been specified by the Office of General Counsel. An "authentication" appears as follows:

AUTHENTICATION

I, (name of official having custody) attest that I am the (title) of the U.S. Environmental Protection Agency and that the attached document is a true, correct and compared copy of official documents in my legal custody, consisting of:

(Briefly describe the documents and state the number of pages.)

Subscribed under penalty of perjury on ___(date)___.

(Signature)_____
(Typed name & title of official)

A "certification" appears as follows:

CERTIFICATION

I, (name of official), certify that I am the (title) of the U.S. Environmental Protection Agency, that I have duties in (the jurisdiction where the original record is kept or "throughout the United States") and that the official whose signature appears above has legal custody pursuant to 40 C.F.R. § 2.406 of the original document of which a copy is attached,

---

[9] A quote from Don Nantkes' memorandum is appropriate at this point.

> Real estate is hardly ever conveyed by livery of seisin nowadays and judges neglect to wear their perukes. But, thankfully, some standards remain. The relic described above has never failed to get EPA documents admitted in Federal Court, and I suspect it would work in any other court on earth. Who could refuse such an impressive document[?]

Nantkes, supra note 5, at 3.

as witnessed by my signature and the official seal of the Environmental Protection Agency which appear below.

(EPA Seal)

(Signature)_____
(Typed name & title of official)

BRIEFING PAPERS

OUTLINE OF BRIEFING ON PEAK OIL/BAY DRUMS/REEVES SOUTHEASTERN SUPERFUND SITES MINI-LITIGATION REFERRAL REPORT, APRIL 19, 1993

BACKGROUND:

-Region IV plans to send a Mini-Litigation Report on the above-referenced Sites to DOJ later this week. The Report indicates that the Region expects to enter into RD/RA Consent Decrees for each Site. The Report is being routed through the program. A cover letter accompanying the Report should be signed by Joe Franzmathes and John Barker.

-The Peak Oil, Bay Drums and Reeves Southeastern Sites are three adjacent NPL sites located in Tampa, Florida. Peak Oil is a defunct waste oil re-refinery and is contaminated with metals and organic chemicals. EPA conducted a removal action between 1985 and 1987 to incinerate oily acidic PCB contaminated sludge. Bay Drums is a defunct drum reconditioning facility and is contaminated with metals, organics and pesticides. EPA conducted a removal in 1989-90 to remove contaminated soils and drums of hazardous wastes and pesticides. Reeves Southeastern is an operating wire fencing manufacturer and is contaminated with metals.

-An RI/FS was conducted for the soils and sediments at each Site. An area-wide ground water RI/FS was conducted at all three Sites. An area-wide wetlands impact study is being conducted. A total of six RODs will be issued for these Sites: three separate soil/sediments RODS for (1) Peak Oil, (2) Bay Drums and (3) Reeves; two separate ground water RODS for (4) Reeves, and (5) Peak Oil and Bay Drums; and (6) a Wetlands ROD. To date, EPA has issued the soil/sediment RODs for Bay and Reeves. Reeves is conducting Remedial Design under an amendment to the RI/FS Consent Order.

-Presently, 1400 Peak Oil PRPs have received Notice Letters and EPA expects to issue Special Notice to a total of 1600 PRPs. At Bay Drums, 391 PRPs have been noticed and EPA expects to issue Special Notice to 200 or more PRPs. Reeves Southeastern is the only PRP at the Reeves Site.

STATUS

-Public comment on EPA's proposed plans for ground water cleanup for Peak and Bay, and for Reeves, set to expire this week. EPA plans to sign ground water RODs as soon thereafter as possible.

-EPA is working closely with Peak and Bay PRP steering committees to finalize PRP lists, volumetric rankings and de minimis proposals. Special Notice will be issued as soon as the lists are finalized, probably in early June 1993.

-At Region IV and OE's request, OGC is reviewing the Inspector General's Audit Report on the Peak Oil removal action to determine if OGC disagrees with the IG's opinion that the removal was inconsistent with the NCP. DOJ has indicated that it will not allow EPA to file suit or to agree to settle EPA's potential $5 million CERCLA Section 107 cost recovery claim against the PRPs unless OGC repudiates the IG's finding of inconsistency. OGC should issue its opinion in the next few weeks.

POTENTIAL ISSUES AFFECTING SETTLEMENT

-Peak Oil: The main impediment to settlement will be issues surrounding EPA's $5 million removal cost recovery claim. The PRPs will be reluctant to enter into settlement negotiations if EPA has not resolved the issue by the time Special Notice is issued. There is a potential Statute of Limitations problem for recovering the $5 million although an analysis by OE and ORC indicates that the SOL will not affect recovery. Also of potential concern is the issue concerning the State's insistence that Florida's secondary drinking water standards be met in the surficial and deep aquifers. The PRPs believe that meeting such standards could triple the costs of cleaning up ground water.

-Bay Drums: as with the Peak Oil Site, the Bay PRPs are concerned about the State's insistence on meeting secondary drinking water standards. The the only other potential issue concerns the liability of Hillsborough County as an owner of the Site. The county has threatened to sue EPA on the ground that EPA illegally moved the pile of roofing shingles from the Site onto county property. However, the evidence indicates that the county knowingly purchased a portion of the Site in 1984, and that contaminated soil and drums of hazardous waste were excavated from county property during EPA's 1989/90 removal action. The county attorney has been notified of the county's potential status as an owner PRP. As a result, the county is reevaluating its position.

-Reeves: Reeves also has expressed its concern that EPA will agree with the State's requirement to impose Florida's secondary drinking water standards as ARARs. However, the State has indicated that Reeves may be exempt from such standards under State regulations.

-ORC is in the process of evaluating whether or not Florida's Secondary Standards are ARARs.

Contact person: Robert Caplan, ORC

CLOSEOUT MEMO -- STATUTE OF LIMITATIONS

YELLOW

M. Davis

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

ENFORCEMENT

CONFIDENTIAL

MEMORANDUM

DATE: JAN 12 1993

SUBJECT: DECISION NOT TO PURSUE COST RECOVERY ACTION AT THE SONFORD PRODUCTS SITE #J5, JACKSON, MISSISSIPPI

FROM: MARY B. HUTSON, ENFORCEMENT PROJECT MANAGER
WASTE PROGRAMS BRANCH, SOUTH COST RECOVERY UNIT

TO: JOSEPH R. FRANZMATHES, DIRECTOR
WASTE MANAGEMENT DIVISION

A. SITE DESCRIPTION

The Sonford Products Site (the Site) located at 3506 Payne Drive, Flowood, Mississippi, is approximately 2.8 acres in size and is located several miles east of Jackson, Mississippi. Two (2) companies, Sonford Products Corporation (Sonford), which operated on the Site from 1970 to 1985, and Sonford International Co., Inc. (Sonford International), which operated on the Site from 1974 to 1980, formulated pentachlorophenol (PCP) for wood preserving and saw mill operations. Sonford International ceased operations in 1980 after a new employee allegedly died from PCP poisoning (Attachment A).

On June 15, 1983, a fire broke out at the Site. A memorandum, dated June 15, 1983, written by the Flowood, Mississippi, Fire Chief, stated that Sonford employees had added caustic soda to a PCP solution and the heat generated by the chemical reaction caused the solution to catch fire. The fire caused a release of air contaminants which were not permitted by EPA or the State of Mississippi (Mississippi) (Attachment A).

Mississippi issued an Order on September 1, 1983, requiring Sonford to immediately cease producing all products, except for Penta-Care Concentrate, and also required Sonford to discontinue the remaining operations by March 1, 1985 (Attachment A).

In April 1985, a rainwater pump from diked PCP storage tanks was left on too long, causing two thousand (2,000) gallons of PCP to be spilled out into the diked area. The PCP eventually overflowed the dikes around the tanks and spilled onto the parcel on the Site's southern border. The Mississippi Bureau of Pollution Control (Mississippi BPC) responded to the spill and discovered that, in addition to the PCP spill, there were other hazardous substances on the Site (Attachment A).

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B. WORK AUTHORIZED AND CONDUCTED, ASSOCIATED COSTS

The owners of Sonford, Mr. William T. Burford and Mr. Harold Cox, stated that Sonford could not finance a cleanup of the Site. This prompted Mr. Bob Rogers of the Mississippi BPC to request EPA's assistance in the entire cleanup operation. Hazardous substanees identified at the Site include: PCP, Naphtha (mineral spirits), alcohol bottoms, hexalene glycol, ethylene glycol, caustic soda, sodium pentachlorophenate, buanol, cellosolve acetate, borax, and sodium metaborate.

Cleanup activities included removing tanks, removing contaminated soil, pumping contaminated water through filters, and removing twenty-eight thousand (28,000) gallons of pure PCP for incineration.

According to a memorandum written by Mr. Mike Norman, an EPA On-Scene Coordinator, cleanup activities were completed at the Site on May 12, 1985 (Attachment B). As of August 31, 1992, the United States has incurred expenses totaling $488,537.55 (Attachment C).

C. BASIS NOT TO PURSUE COST RECOVERY

Financial Status of Potentially Responsible Parties

William T. Burford (Owner)

Mr. Burford is listed as a potentially responsible party (PRP) due to his ownership of the Site between October 1969, and December 1970 (Attachment A).

Document review and interviews with individuals knowledgeable about the Site indicate that Mr. Burford also owns all of the stock of Sonford and had day to day control of Sonford which operated at the Site between 1970 and 1985. In addition, Mr. Burford was vice president of Sonford International Co., Inc., which operated at the Site between 1974 and 1980 (Attachment A).

Mr. Burford owns no real, business or personal property in Rankin County (Attachment A). He is 75 years old and is living on his Social Security Administration income (Attachment F). Therefore, Mr. Burford is not a viable PRP.

Sonford Products Corporation (Owner and Operator)

Sonford is listed as a potentially responsible party due to its operations conducted at the Site between 1970 and 1985 and its ownership of the Site from 1970 to the present. The Rankin County Tax Assessor's office has assessed the Site as follows: buildings and improvements, $86,260.00; land $8,400.00; for a total assessed value of $94,660.00. According to Ms. Mary E. McAlister, attorney for Sonford, the only other assets owned by

Sonford are miscellaneous pieces of equipment and some accounts receivable (Attachment A). The value of the equipment and the accounts are not known.

On August 30, 1985, Chapman Chemical Company obtained a judgement, in Circuit Court of Rankin County against Sonford in the amount of $70,262.68 (Attachment A).

On February 10, 1986, Hunt Oil Company obtained a judgment in Rankin County Circuit Court against Sonford in the amount of $8,398.99 (Attachment A).

The two (2) judgements obtained by Chapman Chemical Company and Hunt Oil Company against Sonford total $78,661.67. Subtracting these judgements from Sonford's known assets, the balance remaining on Sonford's known assets is $15,998.33. EPA has not determined whether there are any other secured or unsecured creditors or whether the $15,998.33 in known assets is still available. Therefore, it would appear that Sonford is not a viable PRP.

Sonford International Co., Inc. (Operator)

Sonford International Co., Inc. (Sonford International), is listed as a potentially responsible party due to its production of PCP and its operations at the Site between 1974 and 1980. Ms. Mary E. McAlister, attorney for Sonford International, stated in an interview with Techlaw, Inc., an EPA contractor, that when the company ceased operations in 1980, all of its assets were liquidated. Ms. McAlister went on to state that due to the liquidation of the assets there were no assets in the company (Attachment A).

Sonford International ceased operations prior to the date of the release that resulted in EPA conducting a fund lead removal and incurring response costs.

EPA has determined that since it appears Sonford International has no assets and there are litigation risks involved in suing an operator that ceased operations prior to the date of the release to which EPA responded, the possibility of recovering any money from Sonford International is minimal.

Insurance Coverage

EPA explored the possibility of recovering costs from the insurance policies held by Sonford and Sonford International. However, only one insurance policy provides for environmental loss. The Hartford Company policy has a provision entitled, "Hazardous Substance Limit" which states:

"As a result of an Accident to an 'Object' property may be damaged, contaminated or polluted by a substance declared to be hazardous to health by an authorized governmental agency. We

will pay up to $25,000 for any additional expenses incurred by you for clean up, repair or replacement or disposal of that damaged, contaminated or polluted property. As used here, additional expenses mean expenses incurred beyond those for which we would be liable if no substance hazardous to health had been involved." (Attachment D).

In attempting to determine whether to pursue the Hartford Company policy, EPA took into account the following concerns which the United States Department of Justice (DOJ) expressed as contributing to a general reluctance on its part to pursue Superfund costs from insurers:

1) Resolution of insurance companies' disputes is a matter of State, not Federal law, and any precedents that may be set go no further than that one State.

2) Litigation of insurance contracts can be quite complicated and cumbersome because of the interpretation of contracts. Many issues in a contract have to be litigated and won before the suit is won.

3) Insurance companies are fearful of suffering bad precedent in their States, and therefore, they fight extremely hard, even to the point of gathering resources from other insurance companies who have a lot at stake to prevent a precedent from being set.

4) State laws are not clear as to who should prevail in pollution liability cases, the United States or the insurance companies, therefore, DOJ is hesitant to file suit.

5) Many insurance policies written in the mid-70's have specific pollution exclusion clauses as a result of new environmental legislation. The earlier the date of the policy, the less likely a pollution exclusion clause will be included in it. (This Item does not pertain to the Sonford Products insurance policies although its effective dates were 1972-1985).

6) Many insurance policies have clauses which prevent third parties from suing the insurance company itself. EPA would have to sue the PRP who in turn would have to sue the insurance company.

EPA has determined that the costs that it would incur as a result of suing the Hartford Company would far exceed the $25,000.00 recoverable under this policy, particularly in light of the above-mentioned difficulties in pursuing insurers. Therefore, EPA has determined that filing a suit against the Hartford Company is not a viable option.

Statute of Limitations on pre-SARA Removals

CERCLA Section 113, 42 U.S.C. § 9613, establishes a statute of limitations for the recovery of response costs. CERCLA Section

113(g)(2), 42 U.S.C. § 9613(g)(2), states:

"An initial action for recovery of the costs referred to Section 9607 [107] of this title must be commenced--

(A) for a removal action, within three (3) years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under Section 9604(c)(1)(C) of this title for continued response action; ..."

The CERCLA Section 113(g)(2) statute of limitations provision, which was added by the Superfund Amendments and Reauthorization Act of 1986 (SARA), applies only to those response actions initiated after the effective date of SARA.

In 1988, Thomas L. Adams, Jr., Assistant Administrator, issued a draft Memorandum entitled "Guidance on Statute of Limitations for CERCLA Section 107 Cost Recovery Actions" in which he sets forth EPA policy regarding the timing of cost recovery actions in light of SARA. It is stated in paragraph 6 that, "Section 113(g) cost recovery time limits do not apply to recovery of pre-SARA costs. We are advised by the Department of Justice ("DOJ") that the most likely statute of limitations on recovery of pre-SARA response costs is a six (6) year statute of limitations accruing on the date of completion of all response actions at a site. There are strong arguments that the CERCLA Section 113(g) statute of limitations was intended by Congress to apply prospectively only because to apply the statute retroactively would cut off the United States' right to bring many cost recovery actions." (Attachment E).

Response actions at the Site were completed on May 12, 1985, more than seven (7) years ago, so that EPA would not likely recover its response costs due to CERCLA Section 113, 42 U.S.C. § 9613, statute of limitations.

CONCLUSION

EPA completed a fund lead removal at the Sonford Products Site in Flowood, Mississippi, on May 10, 1985, and incurred expenses totalling $488,537.55. EPA has not found any viable PRPs in which to recover its response costs. Only one of Sonford and Sonford International's insurance policies provides for environmental loss. However, the policy will only provide $25,000.00. The Department of Justice expressed its reluctance to pursue response costs against insurers especially where, as in this case, the costs to litigate would exceed the amount recoverable under the policy.

In addition, due to the fact that the removal at the Site was completed over seven (7) years ago, on May 12, 1985, with no other response actions performed at the Site, EPA would not likely recover the removal costs even if the PRPs were viable due

to the statute of limitations.

Mary B. Hutson 1/12/93
Mary B. Hutson, Enforcement Project Manager
South Cost Recovery Unit

Concurrence: 1/12/93
Charles Swan, Chief
South Cost Recovery Unit

for CA 1/12/93
Constance S. Jones, Chief
Cost Recovery Section

1/12/93
Prentiss Anne Allen, Chief
CERCLA Branch
Office of Regional Counsel

Kirk Lucius, Chief
Waste Programs Branch

Richard D. Green 1/12/93
Richard Green, Deputy Division Director
Division of Waste Management

Richard D. Green, Deputy for 1/12/93
Joseph R. Franzmathes, Director
Waste Management Division

ATTACHMENT A

PRC Engineering
Suite 600
303 East Wacker Drive
Chicago, IL 60601
312-938-0300
TWX 910-2215112
Cable CONTOWENG

prc
Planning Research Corporation

SONFORD PRODUCTS

RESPONSIBLE PARTY SEARCH

FINAL REPORT

Prepared For

U.S. ENVIRONMENTAL PROTECTION AGENCY
Office Of Waste Programs Enforcement
Washington, D.C. 20460

Work Assignment No.	:	476
EPA Region	:	4
Site No.	:	45J5 (C)
Date Prepared	:	June 26, 1986
Contract No.	:	68-01-7037
PRC No.	:	15-4764-67
Prepared By	:	TechLaw, Inc. (Kathleen Vivian)
Telephone No.	:	(703) 476-1100
EPA Primary Contact	:	Gena Townsend
Telephone No.	:	(404) 347-2930

PROTECTED WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION

ENFORCEMENT CONFIDENTIAL

prc

PRC Engineering
Suite 600
303 East Wacker Drive
Chicago, IL 60601
312-938-0300
TWX 910-2215112
Cable CONTOWENG

Planning Research Corporation

June 26, 1986

Ms. Gena D. Townsend
U.S. EPA Region 4
345 Courtland St.
Atlanta, GA 30365

Dear Ms. Townsend:

PRC Environmental Management, Inc. and its subcontractor, TechLaw, Inc. are pleased to submit the Final Report entitled "Sonford Products." Attachments I-III for the report were submitted to you with the draft report on April 4, 1986. Attachment IV is enclosed with your copy of the report only. The delivery of this report should complete the work required under Work Assignment No. 476.

Please close-out the Work Assignment by completing the Work Assignment Action Form and forwarding the form through Ron Joyner. The enclosed Performance Appraisal Form should be returned to PRC.

Should you have any questions concerning this Work Assignment, please contact Bakul Khara (PRC Technical Monitor for TechLaw) at (312) 938-0300.

Sincerely,

PRC Environmental Management, Inc.

FOR Thomas D. Brisbin
Deputy Program Manager

TDB/jy

Enclosures

cc: Nancy Deck (w/copy of report)
Bruce Bakaysa (letter only)
William Heglund (w/copy of report)
Ron Joyner (letter only)

PRC ENVIRONMENTAL
MANAGEMENT, INC.

JUN 26 19

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APPENDICES

APPENDIX A: DOCUMENT REFERENCES

APPENDIX B: PROPERTY OWNERSHIP NARRATIVE

APPENDIX C: INTERVIEW SUMMARIES

APPENDIX D: FIGURES

APPENDIX E: LAWSUITS FILED AGAINST SONFORD PRODUCTS CORPORATION, SONFORD INTERNATIONAL CO., INC., OR MR. WILLIAM T. BURFORD

APPENDIX F: COMPANIES THAT PROVIDED INSURANCE COVERAGE FOR SONFORD PRODUCTS CORPORATION OR SONFORD INTERNATIONAL CO., INC.

ATTACHMENTS

ATTACHMENT I: DOCUMENTS PROVIDED BY U.S. EPA

ATTACHMENT II: DOCUMENTS PROVIDED BY BUREAU OF POLLUTION CONTROL, MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES AND MISSISSIPPI SECRETARY OF STATE'S OFFICE

ATTACHMENT III: TITLE DOCUMENTS

ATTACHMENT IV: ADDITIONAL DOCUMENTS OBTAINED AFTER DELIVERY OF THE DRAFT REPORT

I. INTRODUCTION

A. Project Background

The Sonford Products site consists of a 2.8 acre parcel located in Flowood, Mississippi. After a 2,000 gallon spill of pentachlorophenol (PCP) in April of 1985, the Bureau of Pollution Control (BPC), Mississippi Department of Natural Resources (MDNR), collected soil samples from the site and discovered contamination by PCP, lindane, and mercury.

Two companies, Sonford Products Corporation and Sonford International Co., Inc., operated on the Sonford Products site formulating PCP for wood preserving and saw mill operations between 1970 and 1985. The companies purchased solid PCP in bulk from Dow Chemical and Reichold Chemical, shipped the PCP to the site, formulated a liquid wood preservative product by blending solvents with the solid PCP, and shipped the finished product to their customers.

In Work Assignment 476, the U.S. EPA has requested assistance in the identification of potentially responsible parties (PRP's) for the Sonford Products site.

B. Project Approach

TechLaw consulted with Region IV contact, Ms. Giezelle Bennett for specific direction regarding the information to be developed in this report. As a result of these discussions, TechLaw proposed in its Work Plan that federal, state, and local officials be contacted for information and records regarding the Sonford Products site. In addition, TechLaw's Work Plan proposed to conduct research into the financial status of identified responsible parties.

TechLaw also proposed to have a title search conducted for the Sonford Products site. Although documents initially reviewed by TechLaw refer to the site as six acres, the property owned by Sonford Products Corporation is only 2.8 acres in size. Ms. Bennett directed TechLaw to conduct the title search from 1960 to the present for the 2.8 acre parcel, and include certified copies of all deeds and leases and regular copies of all other recorded documents.

There is a 3.5 acre parcel on the southern border of the Sonford Products site which was contaminated in 1985 by a 2,000 gallon spill of PCP from Sonford Products Corporation operations. However, Ms. Giezelle Bennett directed TechLaw not to conduct a title search on the 3.5 acre parcel. Subsequently, Ms. Gena Townsend, who succeeded Ms. Bennett as Region IV contact, directed

TechLaw to determine the current owner of the 3.5 acre parcel on the southern border of the Sonford Products site. This information has been included in the Site History section of this report.

TechLaw was directed to focus on operations at the site from 1970 to the present by Ms. Bennett and Ms. Townsend. However, TechLaw identified two companies, Woodflo Corporation and W.G. Avery Body Company, during its research, that had operated on the Sonford Products site prior to 1970. Techlaw was instructed by Ms. Townsend to determine the nature of these companies' operations on the site. TechLaw contacted the Jackson Public Library and the Jackson, Mississippi, Research and Development Center but was unable to determine the extent or the nature of the companies' operations at the site. Subsequently, U.S. EPA directed TechLaw to list both companies as potentially responsible parties.

Techlaw's Work Plan also proposed that contact be made with citizens' groups and other private individuals for information regarding the site. However, Mr. Bob Rogers, BPC, advised TechLaw that there had been a number of lawsuits filed by local residents against Sonford Products Corporation and contact with private individuals in the area was likely to result in TechLaw staff being subpoenaed to testify in these lawsuits. When informed of Mr. Rogers' advice, Ms. Townsend directed TechLaw to confine its contacts to federal, state, and local officials.

During its research Ms. Townsend directed TechLaw to seek information regarding insurance coverage for Sonford Products Corporation and Sonford International Co., Inc. Subsequently, TechLaw discovered that Ms. Mary E. McAlister (attorney for Sonford Products Company, Sonford International Co., Inc. and Mr. William T. Burford, president of Sonford Products Company) had researched insurance coverage for these companies. With the permission of Ms. Townsend, TechLaw contacted Ms. McAlister for this information but she could not provide it in time for inclusion in the Draft Report which was submitted on March 27, 1986. Rather than delay the delivery of the report, Ms. Townsend directed TechLaw to provide the insurance information in a separate addendum to the Draft Report.

The addendum was transmitted to the U.S. EPA on April 15, 1986. The addendum has been incorporated into this Final Report in the form of Appendix F: Insurance Companies That Provided Coverage for Sonford Products Corporation and Sonford International Co., Inc.

After review of the Draft Report, Ms. Gena Townsend, U.S. EPA, sent a letter to PRC Engineering, dated May 5, 1986, enumerating additional research tasks to be performed. Once these comments were received by TechLaw, Ms. Townsend was contacted and a date for

delivery of the Final Report was scheduled. The additional research requested has been completed and is included at appropriate points in this Final Report.

The following agencies and individuals were contacted for information and documents concerning the Sonford Products site:

Region IV, U.S. EPA

Mr. Mike Norman
404/347-3931

Mr. Norman was the On Scene Coordinator (OSC) for the U.S. EPA when the MDNR and the U.S. EPA conducted cleanup activities on the Sonford Products site in 1985. Mr. Norman provided TechLaw with maps, log books, correspondence, reports, and aerial photographs of the site. Copies of these documents are included in Attachment I.

Bureau of Pollution Control (BPC), Mississippi Department of Natural Resources, (MDNR)

Mr. Bob Rogers, Emergency Response Officer
601/961-5171

Mr. Rogers is BPC's Emergency Response Officer for the State of Mississippi. When contacted by TechLaw Mr. Rogers expressed the desire to be BPC's sole contact for Techlaw. Mr. Rogers gathered documents from the BPC's Divisions of Enforcement, Air Quality, Hazardous Waste, and Water Quality for TechLaw to review. These documents included inspection reports, internal memoranda, correspondence, maps, and judgments. Copies of these documents are included in Attachment II.

Mr. John Harper, Chief of Law Enforcement
601/961-5171

Mr. Harper was interviewed on March 4, 1986 regarding operations and MDNR involvement with the Sonford Products site. His comments have been incorporated into the Site History section of this report.

Mississippi Secretary of State's Office

601/359-1350

Staff members of the Mississippi Secretary of State's office were contacted regarding the current status of corporations involved with the Sonford Products site. The Mississippi Secretary

of State's office also provided TechLaw with copies of articles of incorporation, amendments, and annual reports for these corporations. The copies are included in Attachment II.

Reference Desk, Public Library
Jackson, Mississippi

601/968-5803

The Reference Desk of the Jackson Public Library was contacted for information regarding companies that TechLaw had identified as operating at the Sonford Products site. The library was unable to provide information about these companies.

Jackson Research and Development Center
Jackson, Mississippi

601/982-6313

The Jackson Research and Development Center was contacted for information regarding the companies that Techlaw had identified as operating on the Sonford Products site. The Jackson Research and Development Center was unable to provide information about these companies.

Rankin County Tax Assessor's Office

601/825-2217

The Rankin County Tax Assessor's office was contacted for information about assets held by companies or individuals identified by TechLaw as potentially responsible parties during research for this report. This information is included in Section III, Potentially Responsible Parties.

Hines County Tax Assessor's Office

601/968-6617

The Hines County Tax Assessor's office was contacted for information about assets held by companies or individuals identified by TechLaw as potentially responsible parties during research for this report. This information is included in Section III, Potentially Responsible Parties.

The following firms and individuals were contacted for information regarding the Sonford Products site:

Bennett, Lotterhos, Sulser, & Geno

Ms. Mary E. McAlister, Esquire
601/944-0466

Ms. McAlister, of Bennett, Lotterhos, Sulser, & Geno represents Sonford Products Corporation, Sonford International Co., Inc., and Mr. William Troy Burford, an officer of both corporations. Techlaw contacted Ms. McAlister to request permission to interview Mr. William T. Burford regarding his personal knowledge of operations and ownership of the Sonford Products site. Ms. McAlister granted permission for this interview and subsequently arranged for a meeting between TechLaw staff and Mr. William Troy Burford at the offices of Bennett, Lotterhos, Sulser & Geno.

Ms. McAlister also provided information regarding the current status of Sonford Products Corporation and Sonford International Co., Inc. A summary of her comments is provided in Appendix C, Interview Summaries. Her comments have been incorporated in the Site History section of this report as well.

The information in Appendix F regarding insurance companies that provided coverage for Sonford Products Corporation and Sonford International Co., Inc. was also provided by Ms. McAlister. This information was obtained from her during a telephone interview on April 1, 1986 with TechLaw staff.

Mr. William T. Burford

Mr. Burford is the president of Sonford Products Corporation and vice president of Sonford International Co., Inc. He was interviewed by TechLaw staff, on March 3, 1986, at the offices of Bennett, Lotterhos, Sulser & Geno in the presence of Ms. Mary E. McAlister, Bennett, Lotterhos, Sulser & Geno, and Mr. John Burford, Mr. Burford's son.

Mr. Burford provided information on the operations at the Sonford Products site, companies that operated on the site, companies that operated at the site prior to 1970, materials brought into the site, products produced, and waste streams. His comments are summarized in Appendix C, Interview Summaries, and are included at appropriate points in the Site History section of this report.

Mr. William Walsh Sr., Esquire
901/685-0922

Ms. Mary E. McAlister, Esquire, informed TechLaw that Mr. Walsh is Mr. Morris E. Weeks attorney. TechLaw contacted Mr. Walsh for permission to interview Mr. Weeks regarding his involvement with the Sonford Products site. Mr. Walsh granted permission for this interview.

Mr. Morris E.Weeks
158 Perkins Extended
Memphis, Tennessee 38117
901/685-6774

Mr. Weeks is president of Sonford International Co., Inc., and TechLaw's research indicates that he had day to day control of the operations of the company. TechLaw attempted to contact Mr. Weeks by telephone but was unable to speak with him prior to the delivery of the Draft Report. TechLaw was able to contact Mr. Weeks by phone on June 16, 1986. Mr. Weeks stated that he declined to make any comments regarding the site because of his friendship with Mr. William T. Burford.

Mr. Charles (Chuck) Penn
L.A. Penn and Sons
304 Yandell Ave.
Canton, Mississippi 39046
601/859-1861

TechLaw originally attempted to contact Mr. L.A. Penn, the Registered Agent for Woodflo Corporation, by phone. However, as Mr. L.A. Penn was unavailable Mr. Chuck Penn, his son and a director of Woodflo Corporation agreed to answer TechLaw's questions about operations at the site. Mr. Penn's remarks are summarized in Appendix C: Interview Summaries and have been included in this report.

Northbrook Insurance Company

Ms. Kathleen Fairbairn
312/551-2907

Mr. Larry Coffee
312/551-2911

Northbrook Insurance Company provided insurance coverage for Sonford Products Corporation between 1981 and 1983. Ms. Fairbairn and Mr. Coffee were requested to provide information about other

companies that might have written insurance policies for Sonford Products Corporation. Ms. Fairbairn deferred to Mr. Coffee in these requests for information and Mr. Coffee ignored TechLaw's repeated telephone calls on this subject.

The remainder of this report is organized as follows:

Section II: Site History - this section describes ownership of the site from approximately 1960 to the present, operators at the site, site operations, and generators and haulers of materials to the site.

Section III: Potentially Responsible Parties - this section lists the owners, operators, generators, and haulers identified in the Site History and includes corporate status information regarding these identified responsible parties.

Section IV: Conclusions and Recommendations - this section presents conclusions and recommendations based on research conducted.

Documents from federal and state agencies referenced in this Final Report, are included in Attachments I, II, and IV. They are stamped with a document reference number in the lower right hand corner of each page. Statements in the body of the report which are supported by these documents are noted by the use of the reference number stamped on the first page of the document i.e. (001). Title documents, included in Attachment III, are referenced in this Final Report by the Book and Page number where they are recorded in the Rankin County Chancery Land Office.

II. SITE HISTORY

This section presents the ownership and operational history of the Sonford Products site (or hereinafter "site"). It focuses on the operations of Sonford Products Corporation which operated on the site from 1970 to 1985 and Sonford International Co., Inc. which operated on the site from 1974 to 1980. This section is organized in a chronological manner to introduce companies or individuals involved with the Sonford Products site at appropriate points in this site history.

The Sonford Products site consists of a 2.8 acre parcel located at 3506 Payne Drive, Flowood, Mississippi. It is located several miles east of Jackson, Mississippi (Figure 1).

Sonford Products Corporation was incorporated on March 25, 1960 in the State of Mississippi. The incorporators were Mr. William T. Burford and Mr. Harold Cox (186). A newspaper article dated, June 24, 1985, stated that this Mississippi Corporation was known as "Sonford Products Corporation, Southern Division" (176). According to Ms. Mary E. McAlister, attorney for Sonford Products Corporation and Mr. William T. Burford, a Sonford Products Corporation known as the "Northern Division" was incorporated in Minnesota by a friend of Mr. Burford's, Mr. Howard E. Olson. Ms. McAlister stated that the only connection between the two corporations was that they had the same name, which was to make it appear that the Company was larger than it really was. Hence the Mississippi corporation was designated as the "Southern Division" and the Minnesota corporation as the "Northern Division" when each "Division" was in fact a separate corporation with no connections. Neither man had a financial interest in the other's corporation.

Little information about operations on the site prior to 1970 was discovered by TechLaw during its research. However, Mr. William T. Burford, Sonford Products Corporation, stated during an interview with TechLaw staff, that he knew of three companies that had operations on the Sonford Products site prior to 1970: 1)an ammunition box manufacturer during World War II (Mr. Burford could not remember the company's name), 2)W.G. Avery Body Company (a sawmill operator), and 3)Woodflo Corporation (a pulpwood concentrator). The Jackson Public Library and the Jackson Research and Development Center could not provide additional information about Woodflo Corporation's or W.G. Avery Body Company's activities on the site.

In an telephone interview with TechLaw, Mr. Chuck Penn, listed as a director on Woodflo Corporation's 1983 Annual Report, stated that Woodflo Corporation was a pulpwood dealer for International Paper and an independent pulpwood broker. The company operated the Sonford Products site between 1959 and 1969 as a pulpwood yard and the site was chosen because it was adjacent to a railroad spur.

According to Mr. Penn, farmers and landowners in the area would cut pulpwood and truck it to the Sonford Products site. Woodflo Corporation would buy the wood and transfer it from the trucks to railroad cars. Mr. Penn stated that there was no treating of the wood while it was on the site; company operations consisted strictly of purchasing and loading the pulpwood onto railroad cars.

On October 15, 1969, Woodflo Corporation granted the Sonford Products site to William Troy Burford (Book 255, Page 10). On December 29, 1970, William Troy Burford granted the Sonford Products site to Sonford Products Corporation (Book 288, Page 538).

Sonford Products Corporation's operations consisted of blending solid PCP with various solvents in order to create liquid wood preservatives. The primary solvent used in the blending operation was petroleum based. Two other forms of PCP were manufactured at the Sonford Products site: 1)a water repellant form with a mineral spirits base and 2)a PCP emulsifiable concentrate (144). According to Mr. Burford, Sonford Products also produced a liquid sapstain material that contained sodium salt tetrachlorophenol and mercury during its last years of operation. This product was packaged in 55 gallon drums and was produced in 550 gallon lots.

Mr. Burford stated that Sonford Products Corporation would blend PCP approximately 2 or 3 times per month and store the blended PCP in tanks on the Sonford Products site. When the company received an order for the wood preservative, Sonford Products Corporation would ship the material to its customers in its own tanker trucks.

According to Mr. Burford, when Sonford Products Corporation began operations, the company purchased PCP in 50 pound bags. Later the PCP was purchased in 2,000 pound blocks. The PCP was initially obtained from Dow Chemical but was later purchased from Reichold Chemical. Mr. Burford also stated that the PCP was hauled in Sonford Products Corporation trucks from Dow Chemical and Reichold Chemical.

Mr. Burford also stated that aside from the PCP, the following materials were purchased for use in the production of wood preservatives by Sonford Products Corporation:

tetra PCP
lindane
mercury
solvents:
- alcohol
- ketones
- methyl oxide bottoms

On March 7, 1974, Sonford International Co., Inc. was incorporated in Mississippi. The Articles of Incorporation list the incorporators as Mr. William T. Burford, Mr. Morris E. Weeks, and Mr. James L. Martin (191). Mr. Burford stated that Mr. Weeks was president while Mr. Burford was vice president. This information was confirmed by the 1985 Annual Report for Sonford International Co., Inc. (190). According to Mr. Burford, his connection with Sonford International Co., Inc. was limited to a "financial interest only". In a subsequent telephone interview

with TechLaw staff, Ms. McAlister, attorney for Sonford Products Corporation, Sonford International Co., Inc., and Mr. Burford, stated that Mr. Burford owned a 49% interest in Sonford International Co., Inc.

Mr. Burford also said that Sonford International Co., Inc. was a separate operation from Sonford Products Corporation although both companies were located on the Sonford Products site. Mr. Burford claimed that Mr. Weeks handled all the operations, orders, and management for Sonford International Co., Inc. Mr. Burford indicated that Mr. Weeks worked at the Sonford Products site approximately three days per week directly supervising operations at the site.

A memorandum from Mr. Jim Hardage, MDNR, stated that Sonford International Co., Inc.'s operations consisted of converting PCP to sodium pentachlorophenate (169). According to Mr. Burford, Sonford International Co., Inc. purchased solid PCP from Dow Chemical and Reichold Chemical as did Sonford Products Corporation. Mr. Burford also stated that Mr. Weeks was familiar with the sapstain business and this was the market that Sonford International Co., Inc. concentrated on especially in South America.

On May 15, 1975, Mr. Randy Davis, Mississippi Air & Water Pollution Control Commission, inspected the Sonford Products site after receiving a complaint from a neighbor that material from the Sonford Products site was killing trees on her property. Mr. Davis discovered that two discharges from Sonford Products Corporation boilers had drained onto Parcel 1 (Figure 2) to the south of the Sonford Products site and killed trees and other vegetation (096).

According to Mr. Burford and his attorney, Ms. McAlister, Sonford International Co., Inc. operations were shut down in March of 1980.

Mr. Bill Barnett, MDNR, inspected the Sonford Products site on June 23, 1980. Mr. Barnett noted that solvent had been spilled on the ground around the tank used for blending PCP with solvents (103).

According to Mr. Bob Rogers and Mr. John Harper, of BPC, on June 15, 1983, there was a fire at the Sonford Products site. A memorandum written by the Flowood Fire Chief, on June 15, 1983, stated that the company had added caustic soda to a PCP solution and the heat generated by the chemical reaction caused the solution to catch fire. The Flowood Fire Department responded and extinguished the fire (129). According to Mr. Harper, the fire caused a release of air contaminants although he did not elaborate as to the nature of these contaminants.

On July 25, 1983, a complaint was issued in the matter of Mississippi Commission on Natural Resources v. Sonford Products Corporation. The complaint alleged that Sonford Products Corporation had utilized manufacturing processes that caused the release of air contaminants, between January 1, 1982 and June 14, 1983, which were not permitted by the Mississippi Permit Board. Subsequently, Sonford Products entered a plea of "nolo contendre" to the complaint, meaning that, while it did not admit guilt, the company would not contest the complaint (002).

On September 1, 1983, an Order was issued in the matter of Mississippi Commission on Natural Resources V. Sonford Products Corporation that required Sonford Products Corporation to cease production of all products except Penta-Care Concentrate immediately. The company was also ordered to cease all operations at the Sonford Products site before March 1, 1985 (002).

On February 26, 1985, Mr. Burford, Sonford Products Corporation, wrote to Mr. Charlie L. Blalock, MDNR, to request an extension of the March 1, 1985 deadline for closing the Sonford Products Corporation facility (165). On March 20, 1985, the Mississippi Commission on Natural Resources denied the request for an extension from Sonford Products Corporation (010).

Mr. Burford told TechLaw staff that Sonford Products Corporation stopped production in March 1985 but continued to sell products that had been formulated and were stored on the site.

Mr. Mike Norman, U.S. EPA, stated in an interview with TechLaw staff that there had been a PCP spill in April of 1985. He also stated that the spill had occurred because, in the process of pumping rainwater out of several of the diked PCP storage tanks, a pump was left on resulting in PCP being pumped out into the diked area. The PCP eventually overflowed the dikes around the tanks and spilled onto the parcel on the Sonford Products site southern border (Figure 2). Mr. Norman provided a logbook containing his notes on cleanup activities regarding the PCP spill. The logbook indicates that the BPC responded to the spill and discovered that in addition to the spill there was soil contamination on the Sonford Products site which was not caused by the spill. Mr. Norman's notes indicate that Mr. Burford claimed that Sonford Products Corporation could not afford to pay for the cleanup of both the PCP spill and soil contamination on the site. Therefore, Mr. Bob Rogers, BPC, called Mr. Norman to request U.S. EPA assistance in the entire cleanup operation (016).

Bureau of Pollution Control

In spite of Mr. Burford's claim that Sonford Products Corporation could not afford to pay for cleanup of the PCP spill and soil contamination at the Sonford Products site, Ms. Mary E. McAlister, attorney for Sonford Products Corporation, has stated that the company has not filed for bankruptcy as of March, 1986.

Cleanup at the site consisted of the removal of tanks, removal of contaminated soil, pumping contaminated water through filters, and removal of 28,000 gallons of pure PCP for incineration. According to a memorandum written by Mr. Norman, U.S. EPA, cleanup activities were completed at the site on May 10, 1985 (054).

A U.S. EPA Site Inspection Report, dated September 10, 1985, stated that the following Hazardous substances had been or were currently at the Sonford Products site:

PCP
Solvents:
- Naptha (mineral spirits)
- alcohol bottoms
- hexalene glycol

ethylene glycol
caustic soda
sodium pentachlorophenate
buanol
cellosolve acetate
borax
sodium metaborate (060)

Mr. Burford stated, during the March 3, 1986, interview with TechLaw, that neither Sonford Products Corporation nor Sonford International Co., Inc. are currently operating.

During 1984, 1985, and 1986 numerous civil suits have been filed in Chancery and Circuit Courts of Rankin County against Sonford Products, Sonford International Co., Inc. and Mr. William T. Burford personally. These lawsuits may represent outside financial interests in this site and, therefore, are listed in Appendix E to this Final Report.

At the direction of Ms. Townsend, U.S. EPA, TechLaw conducted additional research on two civil suits against Sonford Products Corporation which were filed in the Rankin County Circuit Court. The first, filed by Chapman Chemical Company on March 21, 1985, sought payment for materials sold to Sonford Products Corporation during 1984 and 1985 which totaled $58,891.50. Invoices that accompanied the complaint indicate that the materials sold were (219-224):

Sta-brite
SP-60
Tetrachlorophenol

On August 30, 1985, a Final Consent Judgment was entered in favor of Chapman Chemical Company, in the case in response to a joint motion by Chapman Chemical Company and Sonford Products

Corporation. This judgment stated that Chapman was entitled to recover $58,891.50 for the materials sold, late charges, attorney's fees and expenses for a total of $70,262.68.

The second case was filed by Hunt Oil Company on October 9, 1985 and sought payment for mineral spirits sold to Sonford Products Corporation. The complaint stated that Sonford Products Corporation owed Hunt Oil Company $7,398.72, which had accumulated on an open account basis for goods and materials sold to Sonford by Hunt (214).

On February 10, 1986, a Default Judgment was entered against Sonford Products Corporation because it had not responded to the suit. The judgment stated that Hunt was entitled to recover $7,398.72 and attorney's fees for a total of 8,398.72.

On September 13, 1985, Mr. George Anderson, Northbrook Insurance Company, wrote to Mr. Charley L. Blalock, MDNR, stating that Northbrook Insurance Company had been one of the insurers of Sonford Products Company from approximately May, 1981, to May, 1983. This coverage was written under Northbrook Insurance Company policy number 22-02465. In spite of indicating that Northbrook Insurance Company was only one of Sonford Products Corporation's insurers, Mr. Anderson did not identify any other insurance companies in his letter (180).

TechLaw contacted Ms. Kathleen Fairbairn, Northbrook Insurance Company, for information regarding insurers of Sonford Products Corporation other than Northbrook Insurance Company. Ms. Fairbairn stated that Northbrook Insurance Company provided environmental insurance. Her records did not contain any reference to Northbrook Insurance Company's policy. Therefore, Ms. Fairbairn referred TechLaw to Mr. Larry Coffee, Northbrook Insurance Company, for more information about this policy.

When TechLaw contacted Mr. Coffee, he stated that Crump, London Underwriters had underwritten the environmental insurance policy, which Northbrook Insurance Company had been part of, for Sonford Products Corporation. Mr. Coffee was requested to provide an address and telephone number for Crump, London Underwriters. However, Mr. Coffee had not provided TechLaw with this information at the time of delivery of this Final Report.

TechLaw discovered that Ms. Mary E. McAlister, attorney for Sonford Products Corporations, Sonford International Co, Inc. and Mr. William T. Burford had already researched insurance coverage for the Sonford Products site. She provided TechLaw with a list of companies that had provided coverage to Sonford Products Corporation and Sonford International Co, Inc. This list along with addresses, policy numbers, and dates of coverage is Appendix F to this report.

According to the Rankin County Tax Assessor's office, Parcel 1 (Figure 2), the property to the south of the Sonford Products site, which was contaminated by the 2,000 gallon spill of PCP, is currently owned by:

Mr. Calvin Wixson
1116 Flowood Drive
Flowood, Mississippi 39208

III. POTENTIALLY RESPONSIBLE PARTIES

This section lists the owners and operators identified in the Site History and includes corporate status information regarding these identified potentially responsible parties. The rationale for including each individual or company in this section is stated as well.

This section also includes financial information for Sonford Products Corporation and Sonford International, Co., Inc.

William Troy Burford (Owner)
322 North Point Parkway
Jackson, Mississippi
601/957-0874

Mr. Burford is listed as a potentially responsible party due to his ownership of the Sonford Products site between October, 1969, and December, 1970.

Document review and interviews with individuals knowledgeable about the Sonford Products site indicate that Mr. Burford had day to day control of Sonford Products Corporation which operated at the Sonford Products site between 1970 and 1985. In addition, Mr. Burford was vice president of Sonford International Co., Inc. which operated at the site between 1974 and 1980.

Financial Information:

According to the Rankin County Tax Assessor's office Mr. Burford is not currently listed as owning any real, business, or personal property in Rankin County.

Sonford Products Corporation (Owner and Operator)
3506 Payne Drive
Pearl, Mississippi 39208 (from Dun and Bradstreet's Market Identifiers - could not be confirmed by long distance operator)

Registered agent: W.T. Burford
P.O. Box 8474
Jackson, Mississippi 39208

Sonford Products Corporation is listed as a potentially responsible party due to its operations conducted at the Sonford Products site between 1970 and 1985 and its ownership of the Sonford Products site from December 1970, to the present.

According to the Mississippi Secretary of State's office, Sonford Products Corporation is a Mississippi corporation in good standing that was incorporated on March 28, 1960. Sonford Products Corporation's 1985 Annual Report listed Mr. W.T. Burford as president, Mr. John Burford (Mr. Burford's son) as vice-president, and Ms. Ethel Burford as secretary and treasurer (185).

Financial Information:

Sonford Products Corporation is the current owner of the Sonford Products site. The Rankin County Tax Assessor's office has assessed the Sonford Products site as follows:

Buildings and improvements	$86,260
Land	8,400
Total	$94,660

According to Ms. Mary E. McAlister, attorney for Sonford Products Corporation, the only other assets owned by the company are miscellaneous pieces of equipment still on the site and some accounts receivable. Ms. McAlister stated that Mr. William T. Burford was of the opinion that the accounts receivable were not collectible.

On August 30, 1985, Chapman Chemical Company obtained a judgment, in Circuit Court of Rankin County, against Sonford Products Corporation in the amount of $70,262.68 (Book 19, Page 21). This judgment was entered in the case of Chapman Chemical Company v. Sonford Products Corporation (Case # 14,759).

On February 10, 1986, Hunt Oil Company obtained a judgment, in Circuit Court of Rankin County, against Sonford Products Corporation in the amount of $8,398 (Book 19, Page 71). This judgment was entered in the case of Hunt Oil Company V Sonford Products Corporation (Case # 14,871).

In addition, there are numerous civil lawsuits that have been filed against Sonford Products Corporation which are listed in Appendix E. However, Ms. McAlister stated in an interview with TechLaw that Sonford Products Corporation has not filed for bankruptcy at the time of this report.

According to Ms. McAlister, Mr. William T. Burford owns all of the stock of Sonford Products Corporation.

Sonford International Co., Inc. (Operator)
P.O. Box 5570
Jackson, Mississippi 39208 (from 1985 Annual Report - could not be confirmed by the long distance operator)

Registered agent: Mr. Morris E. Weeks
P.O. Box 5570
3506 Payne Drive
Jackson, Mississippi 39208

Sonford International Co., Inc. is listed as a potentially responsible party due to its operations at the Sonford Products site between 1974 and 1980.

According to the Mississippi Secretary of State's office, Sonford International Co., Inc. is a Mississippi corporation, in good standing, that was incorporated on March 7, 1974. Sonford International Co., Inc.'s 1985 Annual Report listed Mr. Morris E. Weeks as president and Mr. W.T. Burford as vice-president (190). In addition, Mr. William T. Burford, Sonford Products Corporation, stated that Mr. Morris E. Weeks exercised day to day control over the operations of Sonford International Co., Inc.

Ms. Mary E. McAlister, attorney for Sonford International Co., Inc., stated in an interview with TechLaw that when the company ceased operations in 1980 all of its assets were liquidated. Ms. McAlister went on to state that due to the liquidation of the assets there were no assets in the company presently. Presumably then the proceeds of the asset liquidation were distributed to the creditors and shareholders of Sonford International Co. Inc. However, Ms. McAlister also stated that the company had not filed for bankruptcy at the time of this report.

Ms. McAlister also stated that Mr. Burford held a 49% interest in Sonford International Co., Inc. while Mr. Morris E. Weeks owned the other 51% of the company's stock.

Woodflo Corporation (owner and operator)
(the long distance operator had no listing for Woodflo Corporation)

Registered agent: Mr. Lester Penn, Jr.
P.O. Box 169
Canton, Mississippi 39046

Woodflo Corporation is listed as a potentially responsible party at U.S. EPA's direction. According to title documents, Woodflo Corporation owned the Sonford Products site between 1964 and 1969 but the nature and extent of its operations on the site are not known at this time. In addition, Mr. William T. Burford stated that Woodflo Corporation had operated on the site prior to Sonford Products Corporation.

According to the Mississippi Secretary of State's office Woodflo Corporation is a Mississippi corporation, in good standing, that was incorporated on June 26, 1959.

According to Mr. Chuck Penn, listed as a director of the company on its 1983 Annual Report, Woodflo Corporation has been inactive for the past two to three years. He stated that the company had become inactive after his father, Mr. L.A. Penn, had bought out the other partners in the business (basically Mr. L.A. Penn's brother). Mr. Penn stated that the company currently owns some equipment and, although it is still a current Mississippi corporation, does not carry out any operations. In addition, Woodflo Corporation only owns one pulpwood yard similar to the Sonford Products site at this time. Mr. Penn did not indicate whether this lot is currently active.

W.G. Avery Body Company (operator)
Box 4270 Fondren Station
Jackson, Mississippi 39216

Registered agent: W.G. Avery
3002 N. Mill Street
Jackson, Mississippi 39216

The W.G. Avery Body Company is listed as a potentially responsible party at the direction of U.S. EPA. According to Mr. William T. Burford, W.G. Avery Body Company operated on the site prior to Sonford Products Corporation's operations but the nature and extent of its operations are not known at this time.

According to the Mississippi Secretary of State's office W.G. Avery Body Company is a Mississippi corporation, in good standing, and was incorporated on August 21, 1939.

IV. CONCLUSIONS AND RECOMMENDATIONS

The Sonford Products site was operated by two companies making wood preservative products that contained PCP as the primary ingredient. These companies and their dates of operation were: 1)Sonford Products Corporation, 1970 to 1985, and 2)Sonford International Co., Inc., 1974 to 1980.

TechLaw also discovered, during its research, that Woodflo Corporation and W.G. Avery Body Company had operated on the Sonford Products site. TechLaw did not discover the nature of these companies' operations.

On the basis of the results of its research, summarized in Section II, Site History, TechLaw makes the following recommendations:

Obtain Copies of Policies from Insurers and Sonford Products Corporation

The U.S. EPA may wish to send letters under CERCLA Section 104(e) to request copies of insurance policies regarding the Sonford Products site, Sonford Products Corporation, and Sonford International Co., Inc. These letters could be sent to Sonford Products Corporation, Sonford International Co., Inc. and/or the insurance companies listed above. Obtaining copies of these policies would allow the U.S. EPA to determine whether each policy covers environmental liability, whether it provides continuing coverage for claims arising during the policy term, and the payout limits for claims against the coverage.

The U.S. EPA may wish to also ask for information regarding underwriters who initially underwrote the policies and other insurance companies that had policies regarding the Sonford Products site.

Contact Potentially Responsible Parties

To obtain more details on the site activities of the potentially responsible parties identified in this report, the U.S. EPA could request, under CERLA Section 104(e), that the parties identified provide specific information and documentation concerning years of operation on the site, type of operations on the site, areas of the site utilized, manufacturing and treatment processes employed, chemical substances used, wastes generated,

wastes known to be disposed of at the site, substances transported to and from the site, and other subjects related to the contamination at the site.

Initiate Financial Assessments

The U.S. EPA should request that its National Enforcement Investigation Center (NEIC) prepare a Superfund Financial Assessment report for the potentially responsible parties identified in this report to determine each party's ability to assume the cost of clean-up measures at the site.

APPENDIX A

DOCUMENT REFERENCES

002 ORDER in the matter of Mississippi Commission on Natural Resources v. Sonford Products Corporation, September 1, 1983.

010 ORDER No. 843 85 in the matter of Mississippi Commission on Natural Resources VS. Sonford Products Corporation, March 20, 1985.

016 Logbook for the Sonford Products site written by Mr. Mike Norman, U.S. EPA, beginning April 20, 1985.

054 POLREP #9 from Mr. Mike Norman, U.S. EPA, to Ms. Joanne Williams, U.S. EPA. April 14, 1985.

060 Potential Hazardous Waste Site, Site Inspection Report, U.S. EPA, September 10, 1985.

096 Report of Field Investigation from Mr. Randy Davis, Air & Water Pollution Control Commission, May 15, 1975.

103 Memorandum from Mr. Bill Barnett, MDNR, to file, June 23, 1980.

129 Report on Fire at Sonford Products site by Mr. Bill E. Bush, Fire Chief of Flowood, June 15, 1983.

144 Air Polution Study and Recommendations for Sonford Products Corporation, September 28, 1983.

165 Letter from Mr. Troy Burford, Sonford Products Corporation, to Mr. Chalie L. Blalock, MDNR, February 26, 1985.

169 Memorandum from Mr. Jim Hardage, MDNR, to file, March 15, 1985.

176 Newspaper article, "Ex-Sonford Site in Minnesota May Make Superfund List Too", June 24, 1985.

180 Letter from Mr. George Anderson, Northbrook Insurance Company, to Mr Charley L. Blalock, MDNR, September 13, 1985.

185 1985 Annual Report to Mississippi Secretary of State for Sonford Products Corporation.

186 Articles of Incorporation for Sonford Products Corporation, March 28, 1960.

190 1985 Annual Report to Mississippi Secretary of State's office for Sonford International Co., Inc.

191 Articles of Incorporation for Sonford International Co., Inc., March 7, 1974.

214 Complaint filed by Hunt Oil Company, October 9, 1985.

219 Invoices from Chapman Chemical Company to Sonford Products
224 Corporation, 11/20/84 - 2/7/85.

APPENDIX B

PROPERTY OWNERSHIP NARRATIVE

TechLaw was requested in Work Assignment 476 to have a title search conducted for the Sonford Products site located at 3506 Payne Drive, Flowood, Mississippi, which is in Rankin County (Figure 1). TechLaw contracted with Home-Land Title & Abstract Co., Inc. to provide a title search on the Sonford Products site from 1950 to the present. Subsequently, Home-Land Title & Abstract Co., Inc. provided title documents from 1939 to the present. All documents supporting this Property Ownership Narrative are recorded in the Chancery Clerk's office of Rankin County.

On December 14, 1950, I.W.G. Avery granted the Sonford Products site, and property unrelated to the site, to Belton Johnson Shannon. This Warranty Deed was recorded on February 14, 1951 in Book 131, Page 85.

On June 10, 1959, Mrs. Belton J. Shannon granted the Sonford Products site, and property unrelated to the site, to John W. Squires. This Warranty Deed was recorded on June 11, 1959 in Book 166, Page 484.

On February 20, 1963, Mrs. Shannon executed a Correction Deed which Mr. Squires joined. The Correction Deed made the Warranty Deed, dated June 10, 1959, subject to a Gas Storage Agreement between Mrs. Shannon and United Gas Pipe Line which was executed on August 19, 1955. Any oil, gas, and other minerals in, on or under the Sonford Products site was subject to the Correction Deed. This Correction Deed was recorded on March 13, 1963 in Book 192, Page 609.

On March 23, 1964, John Squires granted the Sonford Products site, and property unrelated to the site, to Woodflo Corporation. This Warranty Deed states that Mr. Squires acquisition of the Sonford Products site, and property unrelated to the site, was a convenience and that the purchase price was paid by Woodflo Corporation. This Warranty Deed was recorded on November 17, 1964 in Book 208, Page 287.

The Deed between Mr. Squires and Woodflo Corporation was subject to a lease between Woodflo Corporation, lessor, and Mr. Benny Garner, lessee. The lease was dated January 14, 1964 and was to last for one year beginning on January 1, 1964.

On March 5, 1969, the Chancery Court of Rankin County, Mississippi, granted the Town of Flowood's petition for confirmation of the extension of its boundaries to include the Sonford Products site. This Final Decree was recorded on March 7, 1969 in Book 248, Page 406.

On October 15, 1969, Woodflo Corporation granted the Sonford Products site, and property unrelated to the site, to William Troy Burford. This Warranty Deed was recorded on October 24, 1969 in Book 255, Page 10.

On December 29, 1970, William Troy Burford granted the Sonford Products site to Sonford Products Corporation. This Warranty Deed was recorded on August 28, 1972 in Book 288, Page 538.

On November 23, 1977, Sonford Products Corporation (grantor) executed a Deed of Trust with Robert G. Barnett (trustee), with the Sonford Products site, and property unrelated to the site, being used as security for the indebtedness involved in this transaction. Contained within this deed was Sonford Products Corporation's grant of a beneficial interest in the property to Deposit Guaranty National Bank. This Deed of Trust secured an indebtedness of $100,000. This deed was recorded on November 28, 1977 in Book 329, Page 36.

On August 25, 1983, Sonford Products Corporation (grantor) executed a Deed of Trust with Robert G. Barnett (trustee), with the Sonford Products site, and property unrelated to the site, being used as security for the indebtedness involved in this transaction. Contained within this deed was Sonford Products Corporation's grant of a beneficial interest in the property to Deposit Guaranty National Bank. This Deed of Trust secured an indebtedness of $350,000. This deed was recorded on August 31, 1983 in Book 470, Page 351.

On May 14, 1984, Sonford Products Corporation granted an easement over the Sonford Products site to the Town of Flowood, Mississippi. This easement allowed the Town of Flowood to install and maintain a sewer main on part of the property. This easement was recorded on July 11, 1984 in Book 466, Page 509.

The following lawsuits have been filed in Chancery Court regarding the Sonford Products site:

TITLE	CASE NUMBER	DATE FILED
Roy Anderson, Jr., et al.	24,502	5/21/85
VS		
Sonford International Co., Inc., et al., Sonford Products Corporation William Troy Burford, and the Dow Chemical Company		
James Grant Wixon	24, 846	5/1/85
VS		
Sonford Products Corp., et al.		
Calvin Wixon, et al.	24,847	/15/85
VS		
Sonford Products Corp, et al.		

On August 7, 1985, the U.S. District Court ordered that all three of the above cases be remanded to the respective state courts. This Order was recorded in Book 4, Page 562.

On August 30, 1985, Chapman Chemical Company obtained a judgment against Sonford Products Corporation in the amount of $70,262.68. This judgment was recorded on August 30, 1985 in Book 56, Page 9.

On February 10, 1986, Hunt Oil Company obtained a judgment against Sonford Products Corporation in the amount of $8,398. This judgment was recorded in Book 57, Page 6221.

APPENDIX C

INTERVIEW SUMMARIES

Mr. William Troy Burford

Mr. William Troy Burford (hereinafter "Mr. Burford") was the incorporator and president of Sonford Products Corporation and was vice president of Sonford International Company, Inc. Both operated on the Sonford Products Site. Mr. Burford was interviewed by TechLaw staff in the offices of his attorneys, Bennett, Lotterhos, Sulser & Geno, in the presence of Ms. Mary E. McAlister, Esquire, and Mr. Burford's son, Mr. John Burford on March 3, 1986.

Mr. Burford stated that he purchased the Sonford Products site in 1970 from Mr. Lester Penn. Mr. Penn had operated a pulpwood concentration business on the site called Woodflo prior to Mr. Burford's purchase of the site.

Two prior operations on the site mentioned by Mr. Burford were an ammunition box manufacturer during World War II and a saw mill operated by Avery Body Company.

Site operations conduced by Sonford Products Corporation consisted of formulating wood preservatives to sell to wood preserving or saw mill operations. The bulk of Sonford Products Corporation's production was pentachlorophenol (PCP) which was produced in two forms 1) water based and 2) oil based. Sonford Products Corporation also produced a dry PCP and PCP containing lindane.

In the last years the company was in operation Sonford Products Corporation began producing a liquid sapstain material that contained sodium salt tetrachlorophenol and mercury. This product was packaged in 55 gallon drums and was produced in 550 gallon lots.

Sonford Products initially purchased solid PCP from Dow and later from Reichold Chemical. The sold PCP was shipped to the Sonford Products site by Sonford Products Corporation trucks.

The solid PCP was converted into a liquid form by spraying warm solvent over it. Sonford Products Corporation formulated the PCP liquid approximately three times per month and then stored the PCP in tanks on the site until it could be shipped out in tank truck quantities to wood treating plants.

Mr. Burford also said that Sonford International Company, Inc. was a separate operation from Sonford Products Corporation although both companies occupied the same site. According to Mr. Burford, Mr. Weeks, who was president of Sonford International Company, Inc. ran the operation on his own. Mr. Burford's connection with Sonford International Company, Inc. was limited to financial involvement. Mr. Weeks handled all the operations, orders, and management of the company.

Mr. Burford informed TechLaw that Mr. Weeks had worked at Chapman Chemical Company of Memphis, Tennessee before he and Mr. Burford formed Sonford International Company, Inc. According to Mr. Burford, Mr. Weeks was familiar with the sap stain business and this was the market that Sonford International Company, Inc. concentrated on especially in South America.

In addition, Mr. Burford pointed out that Mr. Weeks, although living in Memphis, Tennessee, worked at the Sonford Products site approximately three days per week directly supervising operations at the site. When not present he kept in constant contact with the site by phone. Sonford International Co., Inc. produced sodium pentachlorophenol.

According to Mr. Burford, Sonford International Company, Inc. shut down in March of 1980. This was the direct result of the death of one of Sonford International Company, Inc's employees.

Mr. Burford informed TechLaw that Mr. Weeks had worked at Chapman Chemical Company of Memphis, Tennessee before he and Mr. Burford formed Sonford International Company, Inc. According to Mr. Burford, Mr. Weeks was familiar with the sap stain business and this was the market that Sonford International Company, Inc. concentrated on especially in South America.

Mr. Burford stated that the materials brought into the site were:

pentachlorophenol
tetrachlorophenol
lindane
mercury
solvents - alcohol, ketones, or methyl oxide bottoms

Sonford Products Corporation stopped production in March 1985 but continued to sell off product that had been formulated and was stored on the site. Sonford Products Corporation and Sonford International Co., Inc. no longer operate at the site. However, neither corporation has filed for bankruptcy. According to Mr. Burford, both companies are still Mississippi corporations in good standing.

According to Mr. Burford a 2,000 gallon spill of PCP in April, 1985, flowed onto the parcel to the south of the Sonford Products site.

Mr. Burford stated that neither he nor Sonford Products Corporation or Sonford International Co., Inc. leased any of the property adjacent to the Sonford Products site.

In addition, the only business that Mr. Burford knew of that was on the parcel to the south of the Sonford Products site was a glass bead manufacturer. Mr. Burford believes that the current occupant of the southern parcel is a sign shop.

Mary E. McAlister, Esquire

Ms. McAlister is an attorney with the firm of Bennett, Lotterhos, Sulsa & Geno which represents Mr. William Troy Burford, Sonford Products Corporation, and Sonford International Company, Inc. Ms. McAlister was contacted by telephone on February 13, 1986.

According to Ms. McAlister, Sonford Products Corporation operated at the Sonford Products site from 1970 to April of 1985. Sonford International Company, Inc. operated at the Sonford Products site between 1974 and 1980.

Ms. McAlister also stated that both Sonford Products Corporation and Sonford International Co., Inc. are both Mississippi corporations in good standing with the Secretary of State's office. Neither company is in bankruptcy at this time.

Ms. McAlister was interviewed by phone twice more: on April 1, 1986 and June 19, 1986. The information obtained from Ms. McAlister on April 1 has been included in this report as Appendix F and therefore will not be repeated here. What follows is a summary of Ms. McAlister's comments during the June 19 interview.

Ms. McAlister stated that there was no connection between Sonford Products Corporation, the Mississippi corporation known as the "Southern Division", and Sonford Products Corporation, the Minnesota corporation known as the "Northern Division." Mr. Burford, founder of the "Southern Division" and Mr. Howard E. Olson, founder of the "Northern Division" had worked together at the same company prior to starting their own companies. They started their companies the same year and agreed to use the same name for the corporations, "Sonford Products Corporation", so that it would appear that the company was larger than it actually was.

According to Ms. McAlister neither Sonford Products Corporation or Sonford International Co., Inc. are doing business at this time. Sonford Products Corporation stopped producing on March 1, 1985, in accordance with an agreement with the MDNR, and stopped operations on April 18, 1985, when a PCP spill occurred. Sonford International Co., Inc. has not done business since 1980. However, neither company has filed for bankruptcy at this timed.

Sonford Products Corporation possesses the following assets according to Ms. McAlister:

-the site property
-miscellaneous equipment on the site
-some accounts receivable (uncollectable in Mr. Burford's opinion according to Ms. McAlister)

Sonford International Co., Inc. has no assets of any kind at this time. Ms. McAlister stated that when it stopped operating all of its assets were "liquidated."

Ms. McAlister stated that Mr. Burford was the sole stockholder in Sonford Products Corporation. However, Ms. McAlister understood that Mr. Burford held a 49% interest in Sonford International Co., Inc. while Mr. Morris E. Weeks holds a 51% interest.

Ms. McAlister also stated that she was instructed by the insurance companies that wrote the policies for Sonford Products Corporation and Sonford International Co., Inc. not to respond to TechLaw's request for copies of the insurance policies that she has in her possession.

Mr. Charles (Chuck) Penn

Mr. Penn is a director of Woodflo Corporation. TechLaw originally attempted to contact Mr. Penn's father, Mr. L.A. Penn, who is listed by the Mississippi Secretary of State's office as the Registered Agent for Woodflo Corporation. However, since Mr. L.A. Penn was unavailable, Mr. Chuck Penn agreed to answer TechLaw's questions about Woodflo Corporation and its operations at the site. Mr. Penn was interviewed by phone on June 18, 1986.

Mr. Penn stated that Woodflo Corporation had operated the site as a pulpwood yard during the years that it owned the site. These operations consisted strictly of purchasing wood from local farmers and landowners that they trucked to the site. Then unloading the

trucks and loading the pulpwood onto railroad cars. According to Mr. Penn there was no treating of the wood at all on the site while Woodflo Corporation operated there.

Mr. Penn also stated that Woodflo Corporation acted as an independent broker of pulpwood and as a dealer for International Paper. The site was chosen largely because of the railroad spur adjacent to the property.

According to Mr. Penn, Woodflo Corporation is currently inactive and has been for two or three years since Mr. L.A. Penn bought out his partners (mainly his brother). Mr. Penn also stated that although Woodflo Corporation is a Mississippi corporation it was operated as a division of L.A. Penn and Sons when active. L.A. Penn and Sons carries out the same activities as Woodflo Corporation but is completely owned by the immediate family of Mr. L.A. Penn.

At this time, according to Mr. Penn, Woodflo Corporation owns some equipment and only one pulpwood yard.

APPENDIX D

FIGURES

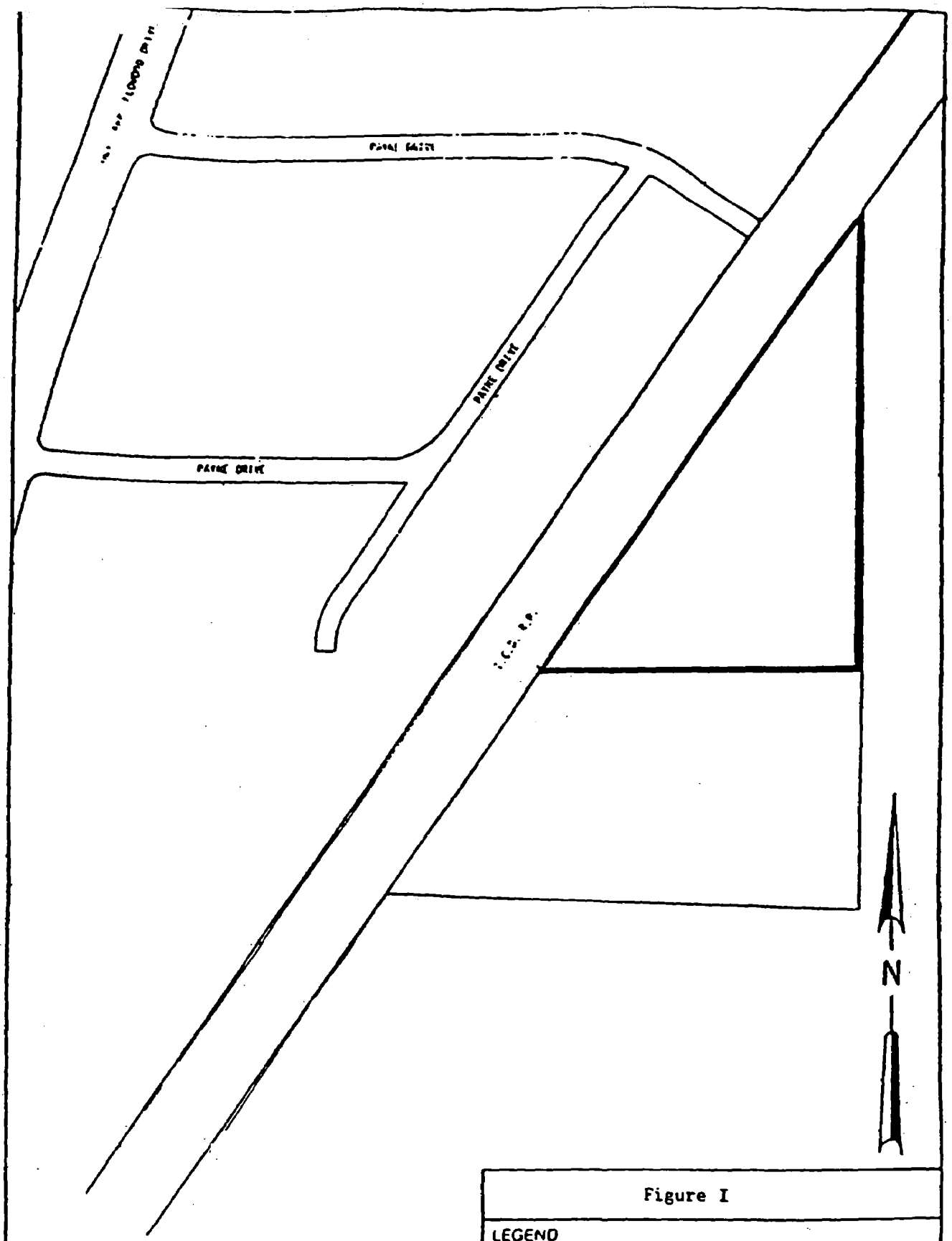

Figure I

LEGEND

——— Sonford Products Site

SOURCE Rankin County Tax Map DOH9

TechLaw, Inc.

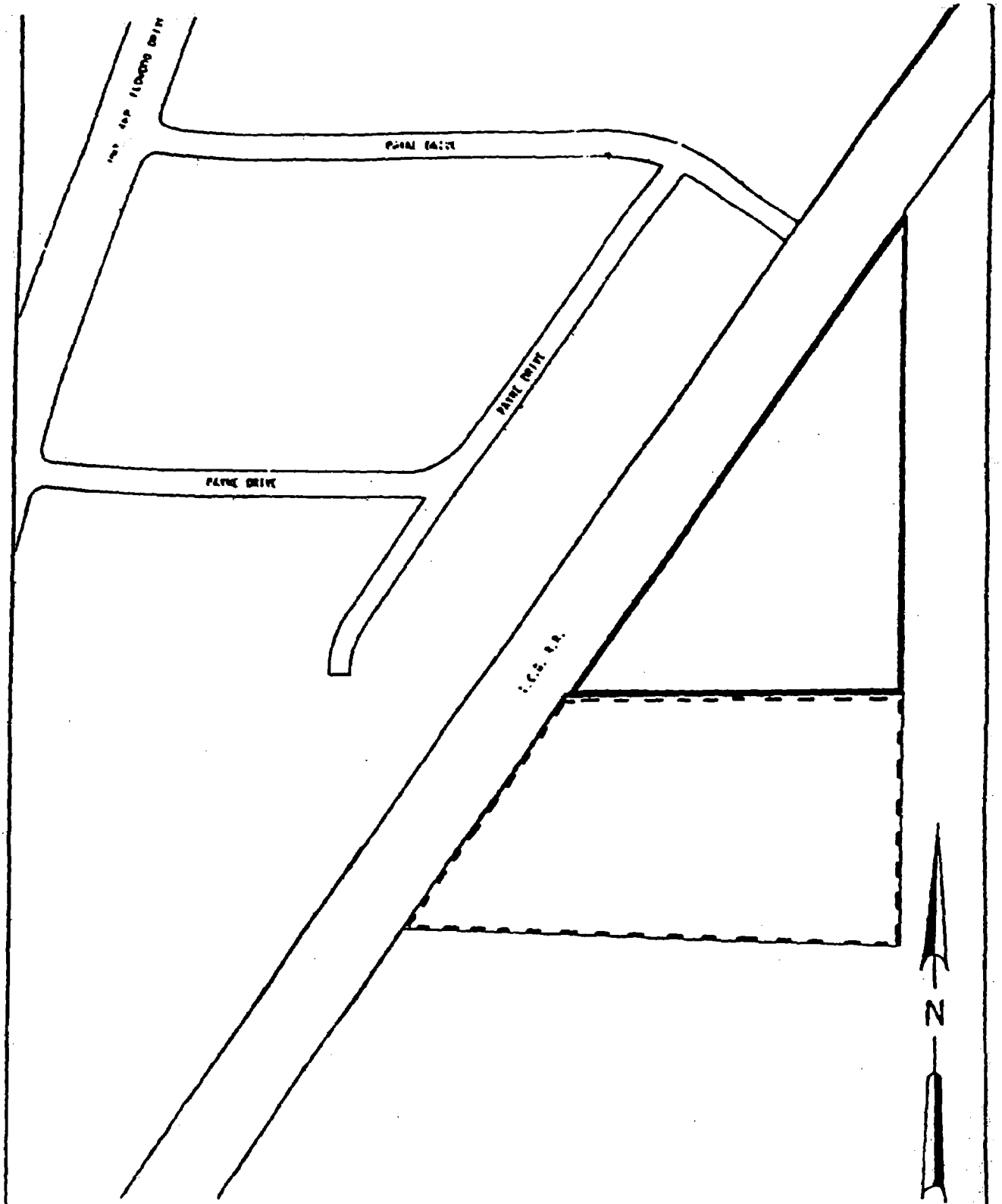

Figure II

LEGEND

Sonford Products Site

Parcel I

SOURCE: Rankin County Tax Map D0119

TechLaw, Inc.

APPENDIX E

LAWSUITS FILED AGAINST SONFORD PRODUCTS CORPORATION, SONFORD INTERNATIONAL CO., INC., OR MR. WILLIAM T. BURFORD

CHANCERY COURT

Case	Case Number	Date Filed
James Grant Wixon v Sonford Products Corp. et al.	24,846	5/1/85
Calvin Wixon et al. v Sonford Products Corp. et al.	24,847	5/15/85
Roy Anderson, Jr., et al. v Sonford International Co., Inc. et al.	24,502	5/21/85

CIRCUIT COURT

Case Title	Case Number	Date Filed
Evelyn Freebs, Morris O'Neal, and Marva Yvonne Lovelady v The Dow Chemical Company, Sonford Products Corp, and W.T. Burford	14963	2/19/86
Leon Moore, Jr. v Sonford Products Corp., et al.	14964	2/19/86
Samuel Lee Davis v Sonford Products Corp., et al.	14965	2/19/86
Jerry McBride v Sonford Products Corp., et al.	14966	2/19/86

Jimmy Lee Calender v Sonford Products Corp., et al.	14967	2/19/86
Howard L. King v Sonford Products Corp., et al.	14968	2/19/86
Larry Calender v Sonford Products Corp., et al.	14969	2/19/86
Carolyn A. Earles v Sonford Products Corp., et al.	14970	2/19/86
Raymond Hall v Sonford Products Corp., et al.	14976	2/28/86
Bruce Calender v Sonford Products Corp., et al.	14977	2/28/86
Johnny Settlemeire v Sonford Products Corp., et al.	14978	2/28/86
Danny W. Watkins v Sonford Products Corp., et al.	14979	2/28/a86
Joe E. Tucker v Sonford Products Corp., et al.	14980	2/28/86
Roy Hall v Sonford Products Corp., et al.	14981	2/28/86
Douglas A. Parkman v Sonford Products Corp., et al.	14982	2/28/86
Douglas Edward Parkman v Sonford Products Corp., et al.	14983	2/28/86

APPENDIX F:

COMPANIES THAT PROVIDED INSURANCE COVERAGE

FOR SONFORD PRODUCTS CORPORATION

OR SONFORD INTERNATIONAL CO., INC.

At the direction of U.S. EPA contact, Ms. Gena Townsend, TechLaw sought information regarding insurance coverage for Sonford Products Corporation and Sonford International Co., Inc. Ms. Townsend authorized TechLaw to contact Ms. Mary E. McAlister (attorney for Sonford Products Corporation) in this regard. The insurance information provided by Ms. McAlister is listed below by insurance company. Ms McAlister also provided addresses, policy numbers, and dates of coverage.

TechLaw requested copies of insurance policies in Ms. McAlister's possession. However, Ms. McAlister stated that without a written request from Techlaw detailing the reason the U.S. EPA wanted the documents, she would be unable to provide copies of these insurance policies. TechLaw consulted Ms. Townsend and it was decided that TechLaw would transmit the insurance information it had been able to obtain over the phone in this Appendix and also make a written request for Ms. McAlister to provide copies of any policies that she had in her possession.

TechLaw requested the terms under which it might obtain copies of insurance policies in her possession in a letter to Ms. McAlister on April 11, 1986. Subsequently, in a telephone interview with TechLaw Staff, Ms. McAlister stated that she had been instructed by the insurance companies not to respond to TechLaw's request.

The table below lists the company name, address (as provided by Ms McAlister), contact person that Ms. McAlister has been dealing with, policy numbers, and effective dates for each policy. Ms. McAlister stated that many of these policies may have lapsed in March 1985 due to nonpayment of premiums. Unless otherwise noted all of the policies listed below cover only Sonford Products Corporation.

Lexington Insurance Company
100 Summer Street
Boston, Massachusetts 02110

Policy Number: MP86322703

Effective Dates: 12/27/84 - 85

According to Ms. McAlister this policy precludes pollution claims.

Western Employers Insurance Company
P.O. Box 1978
Santa Ana, California 92702

Policy Number: UL10-0584-06355

Effective Dates: 5/21/84 - 85

According to Ms. McAlister this policy is an excess coverage policy.

Hartford Insurance Company
Rolf Salenger
Hartford Plaza
Hartford, Connecticut 06115

Policy Number: 43SMP-WY5408

Effective Dates: 5/20/84 - 10/16/84

According to Ms. McAlister this company was Sonford Products Corporation's primary insurer.

Hartford Steam Boiler Inspection and Insurance Company

Ms. McAlister has contacted this company's Jackson, Mississippi attorney. His name and address are:

K. Hayes Callicutt
P.O. Box 157
Jackson, Mississippi 39205

Policy Number: 951071403

Effective Dates: 5/23/79 -80

Policy Number: 951071410

Effective Dates: 5/23/83 - 86

Policy Number: 951071408

Effective Dates: 5/23/82 - 83

Nationwide Insurance Company
Virgil Bowles
2600 Nonconnah Boulevard
Memphis, Tennessee 38132

Policy Number: 22-0265B

Effective Dates: 5/22/81 - 84

According to Ms. McAlister this policy covers product liability and completed operations.

Wausau Insurance Company
William Cormack
7411 Lake Street
River Forest, Illinois 60305

Policy Number: GA26194

Effective Dates: 2/17/81 - 5/22/81

Commercial Union Insurance Company
Michael Rosler
1 Beacon Street
Boston, Massachusetts 02108

Policy Number: CEE763853

Effective Dates: 9/30/80 - 81

Home Insurance Company
James Moran
59 Maiden Lane
New York, New York 10038

Policy Number: GA9734258

Effective Dates: 9/30/78 - 79

Policy Number: GA9739986

Effective Dates: 9/30/78 - 79

Policy Number: GA9955870

Effective Dates: 9/30/78 - 79

Policy Number: GA9955868

Effective Dates: 9/30/78 - 80

Policy Number: GA9962186

Effective Dates: 3/1/80 - 81

According to Ms. McAlister Home Insurance Company may have insured Sonford International Co., Inc. in addition to Sonford Products Corporation.

Aetna Life and Casualty
David Byrd
P.O. Box 1993
Jackson, Mississippi 39205

Policy Number: 87AL800920

Effective Dates: 9/15/76 - 77

Policy Number: 87XS800920

Effective Dates: 9/15/76 - 77

Gulf Insurance Group
Gene W. Golembiewski
P.O. Box 1771
Dallas, Texas 75221

Policy Number: 567-02-97

Effective Dates: 10/17/72 - 73

Republic Insurance Company
Sherry Sanders
P.O. Box 1660
Houston, Texas 77251

Policy Number: CDUO-162

Effective Dates: 6/9/75 - 76

According to Ms. McAlister this is an excess coverage policy.

Travelers Insurance Company
1 Tower Square
Hartford, Connecticut 06115

Ms. McAlister stated that she has never been able to determine if Travelers Insurance Company ever provided coverage on more than just Sonford Products Corporation vehicles.

ATTACHMENT B

```
VIEW                    EVENT SUMMARY                    SCREEN 1 OF 1

   REF NO.: 02405                              EPA ID: MSD086556388
    OPUNIT: 00                              SITE NAME: SONFORD PRODUCTS
     EVENT: RV1                            EVENT NAME: REMOVAL ACTION

                          EVENT DATA
  EVENT LEAD: F                          PLANNING STATUS:
   SCAP NOTE:                            EVENT QUALIFIER: C
    TAKEOVER:                           APPROVAL AUTHORITY: OC
EVENT CATEGORY:
                    START       COMPLETE
     PLANNED:     /  /          /  /
      ACTUAL: 04/21/85      05/12/85

   FIRST START INDICATOR: A          FIRST COMPLETE INDICATOR: A

 CONTACT NAME:                          CONTACT NO.: (    )    -

Menu options          Edit          Leave          Quit      [M]
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ATTACHMENT C

FINAL IFMS RECONCILIATION PENDING

Itemized Cost Summary
09/02/92
SONFORD PRODUCTS, MS
(SSID = 4 J5)

COSTS FROM 10/01/69 THROUGH 08/31/92

EPA Expenditures

REGIONAL PERSONNEL COST	7030.95
HEADQUARTER PERSONNEL COST	137.88
EPA INDIRECT COST	19437.50
REGIONAL TRAVEL COST	2771.51
HEADQUARTERS TRAVEL COST	0.00
EMERGENCY REMOVAL CLEANUP (ERC) CONTRACT	
HAZARDOUS WASTE TECHNOLOGY SERVICES (68-01-6859)	420314.22
ENVIRONMENTAL SERVICES ASSISTANCE TEAMS (ESAT)	
ICF (68-01-7456)	925.32
ICF TECHNOLOGY INCORPORATED (68-D1-0135)	674.47
TECHNICAL ASSISTANCE TEAM (TAT) CONTRACT	
ROY F. WESTON (68-01-6669)	23420.23
TECHNICAL ENFORCEMENT SUPPORT (TES) CONTRACT	
ALLIANCE/GCA (68-01-6769)	80.55
PLANNING RESEARCH CORPORATION (68-01-7037)	13744.92
TOTAL EPA EXPENDITURES:	488537.55

FINAL IFMS RECONCILIATION PENDING

09/02/92
SONFORD PRODUCTS, MS (SSID = 4 J5)

1. The United States Environmental Protection Agency has incurred costs of at least $ 420314.22 for EMERGENCY REMOVAL CLEANUP (ERC) CONTRACT contract expenditures. The total represents the amount spent under the HAZARDOUS WASTE TECHNOLOGY SERVICES Contract.

2. The United States Environmental Protection Agency has incurred costs of at least $ 925.32 for ENVIRONMENTAL SERVICES ASSISTANCE TEAMS (ESAT) contract expenditures. The total represents the amount spent under the ICF Contract.

3. The United States Environmental Protection Agency has incurred costs of at least $ 674.47 for ENVIRONMENTAL SERVICES ASSISTANCE TEAMS (ESAT) contract expenditures. The total represents the amount spent under the ICF TECHNOLOGY INCORPORATED Contract.

4. The United States Environmental Protection Agency has incurred costs of at least $ 23420.23 for TECHNICAL ASSISTANCE TEAM (TAT) CONTRACT contract expenditures. The total represents the amount spent under the ROY F. WESTON Contract.

5. The United States Environmental Protection Agency has incurred costs of at least $ 80.55 for TECHNICAL ENFORCEMENT SUPPORT (TES) CONTRACT contract expenditures. The total represents the amount spent under the ALLIANCE/GCA Contract.

6. The United States Environmental Protection Agency has incurred costs of at least $ 13744.92 for TECHNICAL ENFORCEMENT SUPPORT (TES) CONTRACT contract expenditures. The total represents the amount spent under the PLANNING RESEARCH CORPORATION Contract.

7. The United States Environmental Protection Agency has incurred at least $ 137.88 for headquarters payroll expenses.

8. The United States Environmental Protection Agency has incurred at least $ 7030.95 for regional payroll expenses.

9. The United States Environmental Protection Agency has incurred at least $ 2771.51 for regional travel expenses.

10. The United States Environmental Protection Agency has incurred at least $ 19437.50 for indirect expenses.

Total EPA Expenditures on this site are at least $ 488537.55

ATTACHMENT D

THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY

COMPREHENSIVE

D E C L A R A T I O N S

DATE ISSUED 06/08/84
EFFECTIVE DATE THIS CHANGE. 05/23/84

POLICY NUMBER NO-9510714-10

NAME OF INSURED . . . . SONFORD PRODUCTS CORP

ADDRESS OF INSURED . . PO BOX 5570
JACKSON MS 39208

POLICY PERIOD . . . . . 5/23/83 TO 5/23/86
ANNUAL PREMIUM $830.00
PREMIUM THIS CHANGE . . $830.00

LOCATION (00001) . . . P/I 3506 PAYNE DR
FLOWOOD MS 39708

PROPERTY DAMAGE
LIMIT $750,000.00
DEDUCTIBLE. $250.00

BUSINESS INTERRUPTION/EXTRA EXPENSE
LIMIT $187,500.00
COMMENCEMENT OF LIABILITY . . . . . 12 HOURS

SPOILAGE INSURANCE
LIMIT $5,000.00
DEDUCTIBLE. $250.00

PLEASE ATTACH THIS DECLARATIONS TO YOUR POLICY

THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY

COMPREHENSIVE

D E C L A R A T I O N S

DATE ISSUED 06/08/84
EFFECTIVE DATE THIS CHANGE. 05/23/84

POLICY NUMBER NO-9510714-10

NAME OF INSURED . . . . SONFORD PRODUCTS CORP

ADDRESS OF INSURED . . PO BOX 5570
JACKSON MS 39208

POLICY PERIOD . . . . . 5/23/83 TO 5/23/86
ANNUAL PREMIUM $830.00
PREMIUM THIS CHANGE . . $830.00

LOCATION (00001) . . . P/I 3506 PAYNE DR
FLOWOOD MS 39708

PROPERTY DAMAGE
LIMIT $750,000.00
DEDUCTIBLE. $250.00

BUSINESS INTERRUPTION/EXTRA EXPENSE
LIMIT $187,500.00
COMMENCEMENT OF LIABILITY . . . . . 12 HOURS

SPOILAGE INSURANCE
LIMIT $5,000.00
DEDUCTIBLE. $250.00

PLEASE ATTACH THIS DECLARATIONS TO YOUR POLICY

IMPORTANT NOTICE TO POLICYHOLDERS

POLICY CONTAINS CHANGES IN COVERAGES AND RATES

To Our Policyholders:

Your new boiler and machinery policy contains some significant changes in insurance coverage, wordings, and rates.

We are pleased to tell you that in many cases, coverage has been expanded. In addition, the insurance coverage provided under this policy more closely complements coverage you may have under other property and/or casualty policies.

CHANGES IN COMPREHENSIVE AND BASIC SBP

- RATES — New rates have gone into effect on policies renewed on or after April 15, 1984.
- EXPEDITING EXPENSES/WATER DAMAGE LIMITS — The coverage on these items has been substantially expanded. The policy sublimits have been increased from $5,000 to $25,000 per covered Accident for expenses of this type.
- AVAILABLE LIMIT OF LIABILITY — Higher limits of liability (up to $5,000,000 per boiler and machinery Accident) are now available to you.
- ADDITIONAL EXPENSES — A new coverage has been added which modifies the policy exclusion for increases in your loss resulting from the operation of governmental laws, ordinances, or regulations. This provision grants coverage for additional expenses associated with the clean up, repair or replacement, or disposal of property contaminated by a substance declared hazardous to health by any authorized governmental agency. This coverage is provided with a sublimit of $25,000.
- EARTH MOVEMENT — Coverage for boiler and machinery Accidents resulting from earth movement (e.g., earthquake, landslide, mudslide, subsidence, volcanic eruption, etc.) is no longer included with your policy. This coverage is available to you under other forms of property insurance.

CHANGES IN COMPREHENSIVE SBP ONLY

- AMMONIA CONTAMINATION LIMIT — The coverage for ammonia contamination has been expanded from $5,000 to $25,000 per covered Accident for expenses of this type.
- SPOILAGE INSURANCE — You may now purchase one of three available limits ($5,000, $10,000, or $25,000) for coverage of the spoilage of your "perishable goods" resulting from a boiler and machinery Accident. (NOTE: Spoilage is an optional coverage and is not automatically included. Some classes of business are not eligible for spoilage coverage.)

Please read your policy carefully and, if you have any questions, contact your Agent or Broker.

THE HARTFORD
STEAM BOILER INSPECTION
AND INSURANCE CO.
Hartford, Connecticut 06102

HS 6267 (2-84)

PROPERTY DAMAGE INSURANCE

Coverage A Loss to Your Property. We will pay you the amount you spend to repair or replace your property directly damaged by the "Accident". The amount of our payment, subject to the Property Damage Limit, shall be the smaller of:

1. the cost at the time of the "Accident" to repair the damaged property; or,
2. the cost at the time of the "Accident" to replace the damaged property, at the same location, with property of like kind, capacity and quality.

We will not pay for loss or damage to property which was useless or obsolete to you before the "Accident". Also, we will not pay for the cost of repairing or replacing any part or parts of an "Object" in excess of the cost of repairing or replacing the entire "Object"

You may replace the damaged property with better kind or quality or larger capacity if you pay the extra cost of doing so.

The damaged property must be repaired or replaced within eighteen months after the "Accident". This time period may be extended only with our written consent.

If the damaged property is

1. not repaired or replaced within the time allowed, or
2. not repaired or replaced at all,

then we will pay only the actual cash value of the damaged part of the property.

The term "actual cash value" wherever it is used in this policy, means the amount which it would cost to repair or replace damaged property with material of like kind, capacity, size, and quality, less allowance for physical deterioration and depreciation.

Coverage B - Expediting Expenses. We will pay the reasonable extra cost to

1. make temporary repairs to,
2. expedite permanent repairs to, and
3. expedite permanent replacement of your damaged property.

However, our payment will be limited to what is left of the Property Damage Limit after we pay your loss under Coverage A, or $25,000, whichever is less.

Coverage C - Liability for Loss to Property of Others. An "Accident" may directly damage property of others that is in your care, custody or control. If you have a legal obligation to pay for that damage, we will make that payment for you. However, our payment will be limited to what is left of the Property Damage Limit after we pay your loss under Coverages A and B.

If the other party brings a claim or suit against you, stating that you have a legal obligation to pay for the damaged property, then, at our choice, we will either

1. settle the claim or suit, or
2. defend you against the claim or suit, but keep for ourselves the right to settle it at any point.

The Property Damage Limit shall apply only to the amounts paid under this coverage for the payment of claims, judgments or awards. We will pay the entire cost to defend you without regard to the Property Damage Limit.

Property Damage Limit. The limit of your insurance against loss under Property Damage coverage from any One Accident will be the amount shown as Property Damage Limit in the Declarations for the location where the "Accident" occurs. If an initial Accident causes other Accidents, all will be considered "One Accident". All Accidents at any one location which manifest themselves at the same time and are the result of the same cause will be considered "One Accident". Our payment will not increase if more than one insured is named in the policy.

Ammonia Contamination Limit. Our total payment for damage caused by ammonia contacting or permeating property under refrigeration as a result of One Accident to one or more refrigerating systems will not exceed $25,000. This Ammonia Contamination Limit

1. includes salvage expenses and
2. is part of the Property Damage Limit in the Declarations for the location, and is not an additional amount of insurance.

Water Damage Limit. Our total payment for water damage to property as a result of One Accident to one or more air conditioning units or refrigerating systems will not exceed $25,000. This Water Damage Limit

1. includes salvage expenses and
2. is part of the Property Damage Limit in the Declarations for the location, and is not an additional amount of insurance.

Hazardous Substances Limit. As a result of an Accident to an "Object" property may be damaged, contaminated or polluted by a substance declared to be hazardous to health by an authorized governmental agency. We will pay up to $25,000 for any additional expenses incurred by you for clean up, repair or replacement or disposal of that damaged, contaminated or polluted property. As used here, additional expenses mean expenses incurred beyond those for which we would be liable if no substance hazardous to health had been involved.

Property Damage Deductible. We will first deduct $250 from the total amount of loss and expense from any One Accident that we would pay for under Coverages A, B and C.

BUSINESS INTERRUPTION/ EXTRA EXPENSE INSURANCE

Coverage D. We will pay

1. your actual loss from a total or partial interruption of business, but not the charges and expenses which do not necessarily continue during the interruption of business, and
2. the reasonable extra expense to continue your normal business operations during the interruption,

caused solely by an "Accident" to

(a) a defined "Object", or
(b) any transformer or electrical apparatus which is
  (1) located on or within 500 feet of your premises; and,
  (2) owned by a public utility company; and,
  (3) used to supply electrical power solely to your premises.

The "Accident" must occur during the Policy Period but expiration of the policy does not limit our liability under this coverage.

The term "normal business operations" means the condition of your business that would have existed had no "Accident" occurred. The term "extra expense" means the additional cost you incur to run your business during the interruption, over and above the cost that normally would have been incurred to run the business during the same period had no "Accident" occurred.

Exclusions Applying to Business Interruption/Extra Expense Insurance. This coverage does not apply

1. during the time when business would not or could not have been carried on if the "Accident" had not occurred, or,
2. if you fail to use all reasonable means to resume business as soon as possible, or
3. for that part of any loss or expense which is due solely to suspension, lapse or cancellation of a contract, lease, license or order.

Business Interruption/Extra Expense Limit. The Business Interruption/Extra Expense Limit under this coverage for any One Accident is equal to 25% of the Property Damage Limit for the location where the

"Accident" occurs. This limit is in addition to the Property Damage Limit for that location.

Notice of Accident. At our expense, you must immediately give notice of "Accident" to any of our offices. You must confirm that notice in writing.

Commencement of Liability. Our liability under this coverage starts

1. twelve hours after the time of the "Accident", or
2. twelve hours before we receive notice of "Accident"

whichever is later.

Reducing Your Loss. You must reduce your loss, if possible, by

1. resuming business, in part or completely,
2. using merchandise or other property available to you,
3. using the property or services of others.

We may, at our option, take any action that may reduce your loss.

Coverage E - Spoilage Insurance. Spoilage Insurance applies at any location for which a Spoilage Limit is shown in the Declarations. At each location where coverage is provided, we will pay for your loss of perishable goods due to spoilage resulting from lack of power, light, heat, steam or refrigeration caused solely by an "Accident" to:

1. an "Object", or
2. any transformer or electrical apparatus which is
   (a) located on or within 500 feet of that location; and,
   (b) owned by a public utility company; and,
   (c) used to supply electrical power solely to that location,

provided that the "Accident" occurs during the policy period.

The amount of our payment, which shall be determined on the basis of the actual cash value of the damaged goods at the time of the "Accident", shall not exceed the Spoilage Limit specified for the location where the "Accident" occurs.

Exclusion Applying to Spoilage Insurance. This coverage does not apply if you fail to use due diligence and dispatch and all reasonable means to protect the perishable goods from damage following an "Accident".

Spoilage Limit. The limit of your insurance against loss under Spoilage coverage from any One Accident is the amount shown as Spoilage Limit in the Declarations for the location where the "Accident" occurs. This limit is in addition to the limits that apply to the Property Damage and Business Interruption/ Extra Expense coverages. If an initial Accident causes other Accidents, all will be considered "One Accident". All Accidents at any one location which manifest themselves at the same time and are the result of the same cause will be considered "One Accident". Our payment will not increase if more than one insured is named in the policy.

Spoilage Deductible. This coverage does not apply unless your loss of insured goods is $250 or more. If your loss is less than $250, we will not pay any part of

it. If your loss is $250 or more, we will pay all of the loss, but not more than the Spoilage Limit.

Reducing Your Loss. You must reduce your loss, if possible, by:

1. using other property or services that you own or control, or
2. using the property or services of others.

We may, at our option, take any action that may reduce your loss.

DEFINITIONS

You/We
The words "you" and "your" refer to the insured shown in the Declarations. The words "we", "us", and "our" refer to The Hartford Steam Boiler Inspection and Insurance Company.

Object
"Object" means any of the following equipment owned or leased by you or operated under your control:

1. any boiler or fired vessel;
2. any unfired vessel subject to vacuum or internal pressure other than weight of contents;
3. any refrigerating or air conditioning system, including all vessels, coils and piping that contain refrigerant or other medium for cooling, humidifying or space heating;
4. any piping and its accessory equipment, but not including
   (a) sewer piping
   (b) underground gas piping
   (c) piping forming part of a sprinkler system, or
   (d) water piping other than boiler feedwater piping, boiler condensate return piping or water piping forming part of a refrigerating or air conditioning system;
5. any compressor, pump, engine, turbine, motor, generator, gear, gear set, fan or blower, including any shaft forming a part of the "Object", together with any coupling, clutch, wheel or bearing on that shaft;
6. any transformer or electrical distribution equipment; and
7. any other mechanical or electrical equipment used for maintenance or service of the premises, but not used for processing or manufacturing.

However, "Object" does not include

(a) any oven, stove or furnace;
(b) any boiler setting;
(c) any insulating or refractory material;
(d) any equipment used for computing, data processing, communication, lighting, advertising, display, testing, experimental, research, diagnostic, therapeutic, surgical, dental, or pathological purposes;

(e) any "Object" which is being, or has been, manufactured for sale; nor,
(f) any vehicle, elevator, escalator, conveyor, hoist or crane.

Accident.
"Accident" means a sudden and accidental breakdown of the "Object" or part of the "Object". At the time the breakdown occurs, it must manifest itself by physical damage to the "Object" that requires repair or replacement.

None of the following is an "Accident":

1. depletion, deterioration, corrosion or erosion of material;
2. wear and tear;
3. leakage at any valve, fitting, shaft seal, gland packing, joint or connection;
4. breakdown of any structure or foundation supporting the "Object" or any of its parts;
5. explosion of gas or unconsumed fuel within the furnace of any "Object" or within the passages from the furnace of said "Object" to the atmosphere;
6. functioning of any safety or protective device; nor,
7. explosion of any "Object" other than a steam boiler, steam piping, steam engine or steam turbine, or the explosion of any machine unless such loss is caused by centrifugal force or mechanical breakdown.

If a strike, riot, civil commotion or act of sabotage, vandalism or malicious mischief causes an "Accident", this insurance applies. However, the War Damage exclusion and other Conditions of the policy still apply.

SPECIAL PROVISIONS

1. Refillable "Objects" used for storage of gas or liquid and movable in normal service are considered to satisfy the connected-ready-for-use policy requirement.
2. We will not pay for loss from an "Accident" to any "Object" undergoing a hydrostatic, pneumatic or gas pressure test.

3. As respects any boiler or fired vessel, we will not be liable for loss from an explosion of gas or unconsumed fuel within the furnace of the "Object" or within the passages from the furnace to the atmosphere, whether or not such explosion
   (a) is contributed to or aggravated by an "Accident" to any part of the "Object" that contains steam or water, or
   (b) is caused in whole or in part, directly or indirectly, by an "Accident" to any "Object" or part of an "Object"
4. We will not pay for loss from an "Accident" to any electrical equipment undergoing a test or being dried out.
5. As respects any electrical equipment forming part of an "Object", Exclusion A of the policy is changed to read
   "A. Fire. This policy does not apply to loss from fire outside said electrical equipment
      (1) that occurs at the same time as an "Accident",
      (2) that follows an "Accident", or the use of water or other means to extinguish fire.

   Also, this policy does not apply to loss from an "Accident" caused directly or indirectly by fire or the use of water or other means to extinguish fire."

EXCLUSIONS

A. **FIRE.** This policy does not apply to loss from fire

(1) that occurs at the same time as an "Accident",
(2) that follows an "Accident",

or the use of water or other means to extinguish fire.

Also, this policy does not apply to loss from an "Accident" caused directly or indirectly by fire or the use of water or other means to extinguish fire.

B. **Combustion Explosion.** This policy does not apply to loss from a combustion explosion outside the "Object"

(1) that occurs at the same time as an "Accident", or
(2) that follows an "Accident".

Also, this policy does not apply to loss from an "Accident" caused directly or indirectly by a combustion explosion outside the "Object".

C. **Flood.** This policy does not apply to loss from flood unless an "Accident" ensues, in which case we pay only for loss resulting from that "Accident".

D. **Earth Movement.** This policy does not apply to an Accident caused directly or indirectly by earth movement, including but not limited to earthquake, landslide, mudslide, subsidence or volcanic eruption.

E. **Ordinance or Law.** This policy does not apply to any increase in the loss necessitated by compliance with any ordinance, law, regulation, rule or ruling regulating or restricting repair, alteration, use, operation, construction or installation.

F. **Indirect Losses.** Under Property Damage Insurance, this policy does not apply to loss from:

(1) a delay in or interruption of any business, manufacturing or process,
(2) lack of power, light, heat, steam or refrigeration, or
(3) any other indirect result of an "Accident".

G. **War Damage.** This policy does not apply to loss from an "Accident" caused directly or indirectly by

1. hostile or warlike action, including action in hindering, combating or defending against an actual, impending or expected attack, by

   (a) any government or sovereign power (de jure or de facto) or any authority maintaining or using military, naval or air forces.
   (b) military, naval or air forces, or
   (c) an agent of any such government, power, authority or forces;

2. insurrection, rebellion, revolution, civil war or usurped power, including any action in hindering, combating or defending against such an occurrence, or by confiscation by order of any government or public authority.

H. **Nuclear Energy.** This policy does not apply to loss, whether it be direct or indirect, proximate or remote

1. from an "Accident" caused directly or indirectly by nuclear reaction, nuclear radiation or radioactive contamination, all whether controlled or uncontrolled; or
2. from nuclear reaction, nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, caused directly or indirectly by, contributed to or aggravated by an "Accident"

nor shall we be liable for any loss covered in whole or in part by any contract of insurance which you carry and which also covers any hazard or peril of nuclear reaction or nuclear radiation.

CONDITIONS

1. **Additional Insured.** As respects any location stated in the Declarations, any person or organization designated as an Additional Insured will be considered an insured with respect only to loss from an "Accident" at that location.

2. **Cancellation.** You may cancel this policy by returning it to us or our authorized agent, or by mailing us advance notice of the date cancellation is to take effect. We may cancel the policy by sending you a notice of our intent to cancel. The notice will state the effective date of cancellation which ends the policy. If we cancel for nonpayment of premium, we will send you at least ten days notice. If we cancel for any other reason, we will send you at least thirty days notice. If the policy is cancelled, you may be entitled to a premium refund. If we cancel, the refund will be pro rata. If you cancel, the refund will be 75% of pro rata. But the cancellation will be effective even if we have not yet made or offered a refund.

   A notice of cancellation may be mailed or delivered. If mailed, proof of mailing will be sufficient proof of notice. In either case, we will send the notice to the mailing address shown in this policy.

3. **Changes.** This policy contains all the agreements between you and us. It can be amended only by a policy change issued by us.

4. **Concealment or Misrepresentation.** This insurance is void if you intentionally conceal or misrepresent any material fact or circumstance relating to this insurance at any time.

5. **Death, Bankruptcy or Insolvency.** If you die, or are adjudged bankrupt or become insolvent, your rights and duties will be transferred to your legal representative if we are notified in writing within 60 days.

6. **Duties After an "Accident".** You have the following duties after an "Accident":

   (a) You, or someone acting on your behalf, must immediately notify us in writing.

   (b) You must not allow repairs to be made or physical evidence of the "Accident" to be removed until we have had time to examine the property and premises. But you may take whatever measures are necessary for protection from further damage.

   (c) You must present your claim in writing in the form we require.

   (d) If suit is brought against you or us because of a loss insured against under this policy, you have further duties:

      1. Immediately send us copies of any notice or legal papers received concerning claims or suits.
      2. Cooperate with us in the investigation, settlement or handling of any claim or suit.
      3. Unless another part of this policy expressly allows it, you must not willingly commit yourself to make any kind of compensation or incur any expense at anyone's cost but your own.
      4. You must not participate in any settlement negotiations or legal proceedings without our written consent.

   We specifically direct your attention to the "Notice of Accident" and "Commencement of Liability" provisions under the Business Interruption/Extra Expense Insurance section of this policy.

7. **Inspection.** We may inspect your "Objects" at any reasonable time, but are not obligated to do so. An inspection is for our benefit only. Neither our right to make inspections nor our making inspections nor our reports on those inspections shall constitute an undertaking, on behalf of or for the benefit of you or others, to determine or guarantee that your "Objects" are safe or not harmful to health.

8. **Legal Action Against Us.** Legal action may not be brought against us unless there has been full compliance with all the terms of this policy. You may not bring legal action against us more than two years after the date of the "Accident"

Under Coverage C, no one has a right to bring legal action against us unless the amount you are required to pay has first been determined. The amount may be determined either by

(a) final judgment against you after trial, or
(b) written agreement between the claimant, you and us.

Any person or organization entitled to such a judgment or written agreement to recover under this policy will have the right to do so, up to the amount of insurance available for payment of Coverage C loss. No one has the right under this policy to bring us into an action to determine your liability. Your bankruptcy or insolvency, or that of your estate, shall not relieve us of any obligations under Coverage C of this policy.

9. **Loss Payee.** Coverages A and B Only. If a person or organization is stated in the policy as a Loss Payee, we will adjust with and make payment to that Loss Payee.

10. **Mortgagee Interest.** This Condition applies only if a Mortgagee is shown in the Declarations for the location where the "Accident" occurs. Loss to your property shall be adjusted with and payable to you and the Mortgagee as interests may appear. Cancellation as respects the Mortgagee shall be effective at the time specified in the notice to you, but in no event earlier than ten days after the date of mailing of the copy of notice to the Mortgagee. We will mail a copy of the cancellation notice to the Mortgagee at the Mortgagee's address shown in the Declarations.

    Suspension of insurance on an "Object" under the Suspension Condition of the policy will apply to any interest of the Mortgagee. We will mail the Mortgagee a copy of the suspension notice.

11. **Other Insurance - Coverage A and B.** If you have other insurance that applies to loss insured against by this policy, we call that loss a joint loss.

We will determine

(a) the amount that this policy alone would pay for the joint loss, and
(b) the total amount that would have been paid by all of the policies, separately, for the joint loss.

We will pay no more of the joint loss than the fraction determined by dividing item (a) by item (b).

If the other policy or policies do not have a provision similar to the above, the following procedure will be used:

We will determine

(c) the limits for all coverages that apply to the joint loss under this policy, and
(d) the limits for all coverages that apply to the joint loss under all policies.

We will pay no more of the joint loss than the fraction determined by dividing item (c) by item (d).

12. **Other Insurance - Coverage C.** We will pay only that part of a loss under Coverage C that remains after you have used up all other valid and collectible insurance. Other valid and collectible insurance includes any applicable deductibles and self-insurance retentions.

13. **Our Right to Recover Payment from Others.** Any persons or organizations to or for whom we make a payment under this policy must transfer to us their rights of recovery against any other party for what we paid. They must do everything necessary after loss to secure, and nothing to harm, these rights.

14. **Policy Period.** The dates shown in the Declarations indicate the Policy Period. The effective time for each of the dates is 12:01 a.m., Standard Time, at the location where the "Accident" occurs.

15. **Premium Payment.** The policy premium is payable annually. If the Policy Period is one year or less, the premium is due as of the effective date of the policy.

If the Policy Period is longer than one year, the premium for the first year is due as of the effective date of the policy. At each anniversary, the premium for the next year becomes due. It will be computed on the basis of the rules, rates and forms then in effect.

16. **Special State Requirement.** Any and all provisions of this policy which conflict with the statutes of the state in which this policy has been issued are understood by us to conform to such statutes.

17. **Suspension.** Whenever an "Object" is found to be in, or exposed to, a dangerous condition, any of our representatives may immediately suspend the insurance against loss from an "Accident" to that "Object" We can do this by delivering or mailing a written notice of suspension to

    (a) your address as shown in the Declarations, or
    (b) the address where the "Object" is located.

    Once suspended in this way, your insurance can be reinstated only by written notice from us.

    If we suspend your insurance, you will get a pro rata refund of premium. But the suspension will be effective even if we have not yet made or offered a refund.

18. **Titles of Paragraphs and Pages.** The title of various paragraphs and pages are included only to help you locate information within this policy. They are not intended to limit or otherwise affect the provisions to which they relate.

19. **Transfer of Your Rights and Duties.** Your rights and duties under this policy may not be transferred without our written consent.

ATTACHMENT E

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 10 1998

DRAFT

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Statute of Limitations for CERCLA Section 107 Cost Recovery Actions

FROM: Thomas L. Adams, Jr., Assistant Administrator

TO: Regional Counsel
Regions I-X

The purpose of this memorandum is to further delineate EPA policy regarding the timing of CERCLA Section 107 cost recovery actions in light of the new CERCLA statute of limitations. This memorandum expands upon and updates guidance entitled, "Cost Recovery Actions/Statute of Limitations" (OWPE, June 12, 1987). This memorandum also interprets key language in CERCLA Section 113(g)(2) regarding the period of time in which cost recovery actions may be brought.

BACKGROUND

CERCLA Section 113(g)(2) states:

> An initial action for recovery of the costs referred to in section 107 must be commenced --
>
> > (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 104(c)(1)(C) for continued response action; and (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.
>
> In any such action described in this subsection, the court shall enter a declaratory judgement on liability for response costs or damages that will be binding

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> on any subsequent action or actions to recover further response cost or damages. A subsequent action or actions under section 107 for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 107 for recovery of costs at any time after such costs have been incurred.

ISSUES

The general EPA policy is to file cost recovery actions well in advance of deadlines. However, implementing this policy in light of the new statutory language raises several policy issues as well as issues of statutory interpretation. Included among those issues are:

1. What is the meaning of the word, "commenced?"

2. When is a removal action "completed?"

3. What is the deadline for removal cost recovery when 104(c)(1)(C) waivers are used?

4. When is a remedial action "initiated?"

5. What is the deadline for RI/FS cost recovery -- removal or remedial time limits?

6. Do Section 113(g) cost recovery time limits apply to recovery of pre-SARA costs?

7. What are the other time limits under CERCLA for filing removal cost recovery actions?

8. What are the time limits for filing "subsequent" cost recovery actions after entry of a declaratory judgment?

9. Should each operable unit have its own time limit?

10. What marks the completion of remedial action?

11. Can new defendants be added after the statute of limitations has tolled?

Each of these issues is discussed below.

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DISCUSSION

1. Meaning of the word, "commenced"

Section 113(g) requires that cost recovery actions be "commenced" within certain periods of time -- the deadline for commencing a cost recovery action varies depending upon the response action taken. As used, the word "commenced" means the filing of a CERCLA Section 107 cost recovery action in court.

2. Completion of a removal action

Section 113(g)(2)(A) requires initial cost recovery actions for removals to be commenced within 3 years of the completion of the removal action. As stated in the June 12, 1987 guidance, EPA, as a matter of policy, considers a removal action to be complete on the day that the cleanup contractor demobilizes at the site and completes the scope of work identified in the original or modified Action Memorandum. The final Pollution Report (POLREP) submitted by the OSC normally contains this information. (See Superfund Removal Procedures, Revision #2, August 20, 1984.)

3. Timing for removal cost recovery when section 104(c)(1)(C) waivers are used

The language of section 104(c)(1)(C) allows a waiver to be granted to the statutory removal time and cost limits (i.e., 12 months and $2 million, respectively) if "continued response action is otherwise appropriate and consistent with the remedial action to be taken."

In calculating when to bring an initial cost recovery action for a removal site in which this waiver was granted, the granting of the waiver is deemed to occur only when the Regional Administrator, or some other duly delegated representative of the President, has signed a written determination to grant this waiver.

A statute of limitations that is different than the ordinary three year time limit on initial cost recovery for removal actions applies to any removal site in which a section 104(c)(1)(C) waiver has been granted. Section 113(g)(2)(A) allows a removal cost recovery action to be commenced within a six year statute of limitations when such a waiver has been granted. The six year period begins on the day that the written determination to grant the waiver is signed by the duly delegated representative of the President.

A section 104(c)(1)(C) waiver determination must be made within 12 months of the date when the Action Memo initiating the action is signed. If there is no section 104(c)(1)(C) waiver determination within the 12 months after one removal action commences, and

subsequent removal actions are done after the 12 month limit, an initial cost recovery action must be brought for the first removal action within three years after physical on-site work toward completing the first removal action ended

4. "Initiation" of remedial action

Section 113(g)(2)(B) requires that initial cost recovery actions for remedial actions be commenced within six years of the initiation of physical on-site construction of the remedial action. This means that the beginning of physical activities involving on-site construction of the remedy selected in the ROD starts the six year statute of limitations clock. However, because the evidence of when physical onsite activity actually begins is sometimes tenuous, a more conservative approach may be used in which the calculation of the statute of limitations is begun on the date that the construction contract is signed.

A word of caution is in order. The term, "remedial action," does not include remedial design. Thus, "initiation of physical on-site construction of the remedial action," is the date that marks the beginning of the on-site physical activity which implements the selected remedy after design has been completed.

5. RI/FS cost recovery -- removal or remedial time limits

A remedial investigation and feasibility study (RI/FS) falls within the definition of the term "removal" because an RI/FS is an action "taken ... necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances ... ." CERCLA Section 101(23). Hence, a cost recovery action for an RI/FS should usually be brought before the three year statutory limit runs for removal actions. Because the applicable statute of limitations is "within three years after completion of the removal action, a cost recovery action for an RI/FS should be filed within three years from the completion date of the final FS. The FS is completed when a proposed remedial action is published for public comment.

Nevertheless, if a remedial action is initiated within three years after the completion of a removal action (such as an RI/FS) section 113(g)(2)(B) allows such RI/FS costs to be recovered in the remedial cost recovery action, and the remedial cost recovery statute of limitations (six years after the initiation of onsite physical activity) applies.

If it appears that a remedial action will not be initiated within three years after the completion of the RI/FS, and the parties are engaged in negotiations, it may be advisable to petition the court to suspend the statute of limitations. Courts generally have this power (see ...). Because of the need to ensure good continuing relationships during negotiations, this avenue may be

more preferable than filing for RI/FS cost recovery during negotiations just to file within the statute of limitations.

6. Section 113(g) cost recovery time limits do not apply to recovery of pre-SARA costs

We are advised by the Department of Justice (DOJ) that the most likely statute of limitations on recovery of pre-SARA response costs is a six year statute of limitations accruing on the date of completion all response actions at a site.[1] There are strong arguments that the CERCLA section 113(g) statute of limitations was intended by Congress to apply prospectively only because to apply the statute retroactively would cut-off the United States' right to bring many cost recovery actions. This would create an inequitable result -- one which could limit achievement of the purposes of the statutory scheme. Courts are unlikely to find that Congress intended such a result.

7. Different time limits for filing removal cost recovery actions

Section 113(g)(2)(B) allows a alternate statute of limitations from the ordinary three year limit for filing removal cost recovery actions. If a remedial action is initiated within three years after a removal is completed, the Agency may defer bringing a cost recovery action for that removal (even if it is an RI/FS) and coordinate it with a cost recovery action for a subsequent remedial action.

In other words, if onsite physical construction activities are begun within three years of the completion of a previous removal action at the same site, the costs of that previous removal action can be recovered in the same action as the remedial cost recovery, and within the same time limits -- six years after initiation of physical on-site construction.

8. Entry of Declaratory Judgment regarding liability in an initial cost recovery action; different statute of limitations for subsequent cost recovery actions

Section 113(g)(2) states that when an initial cost recovery action is brought, "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." Once liability has been determined, subsequent cost recovery actions "for further response costs ... may be maintained at any time during the response action, but must be commenced no later than three years after the date of completion of all response action."

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[1] See DOJ Memorandum entitled, "PAS Complaint," October 21, 1986, from Joyce A. Rechtschaffen and Anna Wolgast.

The Agency notes that the words, "maintained" and "commenced," while not synonymous, are nonetheless overlapping; the word, "maintained" is broader than the word, "commenced." An action must be commenced (or filed) to be maintained, but once filed, the action's maintenance (or duration) will depend upon the case. For instance, because of court docket pressures, a judge may not want to allow a commenced action to be maintained for a long period of time without progress towards resolution.

Using the above construction of "maintained" and "commenced," the paragraph allows the Agency to commence an initial CERCLA Section 107 cost recovery action within the three or six year time limits for removal and remedial responses delineated in section 113(g)(2) paragraphs (A) and (B). When an initial cost recovery action is filed within the appropriate statute of limitations, the court shall decide liability for that action and for any future (i.e., un-filed) cost recovery actions against the same responsible party for the same site. Subsequently, any and all cost recovery actions brought against the same responsible party for the same site will be bound by the declaratory judgment regarding liability. These subsequent cost recovery actions must be filed within a different statute of limitations; for cost recovery actions filed subsecuent to a declaratory judgment regarding liability, the statute of limitations is three years after the date of completion of all response action.

One alternative to the above interpretation of the CERCLA Section 113(g)(2) declaratory judgment language would permit the Agency to file an initial law suit within the appropriate statute of limitations, and then wait a number of years and make demands for future costs within three years of the completion of all response actions. The Agency has rejected this interpretation for two reasons: 1) such an interpretation would not be accepted by many courts because, unless the case is stayed, it would entail keeping a case on a court's docket for possibly many years until all costs become known, and 2) such an interpretation is contradictory to EPA's policy of treating each operable unit as having a separate statute of limitations. See the discussion of issue 9, below.

9. Each operable unit should have its own time limit

Each operable unit is a separate remedial action with a separate Record of Decision (ROD). Merely because a number of operable units may constitute the final remedy at a particular site does not mean that each operable unit is not a separate remedial action. Each operable unit ROD has a well defined scope of activity, and each ROD has a date certain when onsite physical activity begins and ends. Therefore, each operable unit should have its own remedial action time limit -- six years after the initiation of onsite physical activity for an initial cost recovery, and after

a declaratory judgment the time limit changes to a three year period after the completion of a remedial action operable unit.

10. Completion of remedial action -- varies with the type of remedy constructed

Because subsequent cost recovery actions may be brought within three years of the completion of all response action, it is necessary to identify an endpoint for remedial action (as mentioned above, for removals the endpoint is the date that the clean-up contractor demobilizes at the site).

For remedial actions, neither the five year periodic review required by CERCLA section 121(b) for sites at which hazardous wastes remain, nor the operations and maintenance periods should be considered a part of the response actions for calculating the statute of limitations. Instead, the completion of remedial action generally depends upon the type of remedial action.

Type of Remedial Action	Date of Completion
landfill/s.i. construction	1 yr after construction complete and contractor demobilizes (includes 1 yr. shakedown)
gw pump & treat for aquifer restoration	10 yrs after construction complete and contractor demobilizes, or until cleanup targets are met; whichever comes first
gw pump & treat for plume containment or drinking water supply	1 yr. after construction complete and contractor demobilizes
treatment remedies (thermal, biological, other)	date treatment completed, site stabilized, and contractor demobilizes (certified by RPM or OSC)

11. Adding new defendants after the statute of limitations has run

Joinder of new parties after the statute of limitations has run is permitted by federal courts if the amendment to the complaint (changing or adding a party against whom a claim is asserted) relates back to the date of the original pleading. In order for an amendment adding another party as a defendant to relate back to the date of the original filing of the complaint so as to remove

DRAFT

a statute of limitations bar, the party to be added must meet all three requirements of Rule 15(c) of the Federal Rules of Civil Procedure.[2] The three requirements that must be met by the party to be added are as follows:

> 1) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;
> 2) the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits; and
> 3) the party knew, or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her.

Use of this exception may be possible in CERCLA Section 107 cost recovery actions where PRPs who are not named as defendants have nonetheless received notice or demand letters before the statute of limitations has run. A word of caution is in order. The decision on whether to permit the addition of a new party defendant to relate back to the filing of the original complaint involves a factual determination and a complete factual record is required on the issues of the party's notice of the institution of the action and the manner, if any, which it was prejudiced by not being named in the original complaint. Furthermore, if the amended complaint alleges claims for damages that, although arising out of the same occurrence as the original claims, was not asserted by the original plaintiff in the original complaint, the new party can not be added after the statute of limitations has run.[3]

EPA policy on when to file cost recovery actions

This guidance notwithstanding, it remains the Agency policy to begin cost recovery activity within one year after completion of the removal. For remedial actions, Agency policy requires that cost recovery activity be initiated within 18 months of the signing of the ROD, or during the later phase of construction of the remedial action, if the construction is expected to take more that two years after the ROD is signed. Adherence to these time frames will ensure that current, not stale, evidence and

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[2] See Johnson v. Bechtel Associates Professional Corp., 717 F.2d 574, (D.C. Cir., 1983)

[3] See Leachman v. Beech Aircraft Corp., 694 F.2d 1301 (D.C. Cir., 1982)

knowledgeable witnesses will be available to support the prosecution of the action and that the Agency will not be faced with statute of limitations risks.

CAVEAT

This guidance document has suggested conservative legal interpretations of the new statute of limitations language in order to avoid even the possibility of a timing problem in prospective cost recovery filings. Nevertheless, this guidance is not intended to limit the arguments that may be made to support actions that already suffer from cost recovery timing problems. For instance, this guidance suggests that the safest legal interpretation of when a removal action is complete is the point in time that the cleanup contractor demobilizes at the site. If this safe interpretation will cause a specific case with questionable cost recovery timing to appear to be outside of the CERCLA statute of limitations, there is no reason why a more liberal interpretation cannot be argued in court. In the example above, for instance, it may be critical to winning cost recovery to argue that the removal was not complete until the OSC submitted the Pollution Report. In no event should cases already encountering timing problems be limited by the conservative interpretations in this prospective guidance document.

DISCLAIMER

The policies and procedures established in this document are intended solely for the guidance of Government personnel. They are not intended and can not be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

cc: Directors, Waste Management Division,
Regions I, IV, V, VII, VIII

Directors, Hazardous Waste Management Division,
Regions III, VI

Director, Emergency and Remedial Response Division, Region II

Director, Toxic and Waste Management Division, Region IX

Director, Hazardous Waste Division, Region X

Regional Counsel Branch Chiefs, Regions I-X

David Buente, Chief, Environmental Enforcement Section, Department of Justice

Gene Lucero, Director, Office of Waste Programs Enforcement

Dr. Win Porter, Assistant Administrator, Office of Solid Waste and Emergency Response

U.S. Department of Justice

SOL

Washington, D.C. 20530

October 17, 1986

Walter Mugdan
Deputy Regional Counsel
Region II
Environmental Protection Agency
26 Federal Plaza
New York, NY 10278

Dear Walter,

Subsequent to our conversation several weeks ago, we looked again at the statute of limitations issues that may arise under current law and the proposed reauthorized statute. While we do not believe it is likely that the Agency's action (or part of the action) will be time-barred if we delay filing, we have prepared the attached memorandum to advise you of the potential risks.

In light of the issues raised in the memorandum, we recommend that the litigation team obtain an agreement from the ~~defendants that they will~~ not interpose any defense based on the statute of limitations ~~or~~ any similar defense concerning timeliness ~~(e.g. laches) and that~~ they agree that the limitations period for all claims of the United States does not run until at least 1992. Absent this agreement, we advise either 1) file promptly or 2) a decision by the Agency to delay filing based on the settlement prospects, despite the litigation risks.

At the present time, we do not have a hold letter. As we discussed several weeks ago, I am not in a position to delay filing a complaint without this letter. Please advise me how the Agency plans to proceed.

Sincerely,

F. Henry Habicht II
Assistant Attorney General
Land and Natural Resources Division

By:

Kevin Gaynor
Assistant Chief
Environmental Enforcement
Section

Memorandum

DTB:JR:plh
90-11-2-2

Subject	Date
PAS Complaint	October 21, 1986

To

Walter Mugdan
Deputy Regional Counsel
U.S. Environmental Protection Agency, Region II

Eric Schaaf
Office of Regional Counsel
U.S. Environmental Protection Agency, Region II

Andrea Pearl
Office of Enforcement and Compliance Monitoring
Headquarters, U.S. Environmental Protection Agency

From

Joyce A. Rechtschaffen JAR
Anna Wolgast
Attorneys
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice

INTRODUCTION

Subsequent to our recent discussion regarding the PAS complaint, we have taken a closer look at the statute of limitations issues, both under the current law and the proposed reauthorized statute. The purpose of this memorandum is to advise you of the litigation risks which may arise if we do not file the complaint by December 1986.

RECOMMENDATION

Based on our analysis of current case law and the proposed reauthorized statute, we believe that the most likely statute of limitations is a six year period accruing at the completion of cleanup. At the PAS site, the statute would not run until at least 1992 since cleanup is not yet completed.

You should be aware, however, that there is significant concern that a court may apply a statute of limitations which would run on December 11, 1986. Consequently, we recommend that if a decision is made not to file the case before December 1986 because of settlement progress, the litigation

team obtain an agreement from all potential defendants to toll the statute of limitations for the period of settlement discussions. */

DISCUSSION

A. Facts

In brief, the following response actions have been taken at the PAS site:

1. In 1976, the Coast Guard under its Clean Water Act authority, undertook response actions including the construction of lagoon to receive runoff from the site.

2. In 1977, EPA constructed an additional lagoon to receive surface runoff from the site and constructed a dike to prevent lagoon overtopping.

3. In 1977, EPA undertook the removal and disposal of materials from lagoons and a pit on the site. Additionally, in 1977, EPA took response actions involving closing, capping and/or grading all lagoons on the site, the installation of a leachate filter system, drainage and disposal of contents of fuel storage tanks and the overpacking of deteriorating drums.

4. In 1978, EPA in conjunction with the State of New York, removed 4,000 drums from the site. Additional drum removal occurred during 1978-1982.

5. In 1982, EPA entered into a cooperative agreement with the State of New York. In accordance with that agreement, the State undertook a RI/FS at the site which was completed in January 1984. In June 1984, a record of decision was finalized that recommended the following on-site remedial activities: limited excavation and removal of contaminated soil, tanks, and drums to a landfill approved under RCRA, construction of a perimeter slurry wall, site grading followed by installation of an impermeable cap and groundwater recovery and treatment. To date, all remedial activity described above has been completed with the exception of a groundwater recovery and treatment system.

B. Legal Analysis

1. Current Law

The United States has argued that no statute of limitations applies under CERCLA. Three district courts have adopted this position. See, United States v. Mottolo, 605 F. Supp. 898, 909 (D.N.H. 1985); United States v. Dickerson, No. Y-85-3249, slip op. at 11, 12 (D. Md. May 28, 1986); United States v. Miami Drum Services, Inc., No. 85-0038 (S.D. Fla., July 17, 1985).

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*/ This agreement may be difficult to obtain because of the large number of generators involved. We must determine if we would need the agreement of all generators or only those companies we have determined to name as defendants.

Alternatively, the United States has argued that the applicable statute of limitations is the six year period applicable to suits brought by the United States for restitution established under 28 U.S.C. § 2415(a). Section 2415(a) provides that actions brought by the United States founded on contracts implied in law, e.g., restitution, are barred unless brought within six years of the accrual of cause of action. See, United States v. Miami Drum, supra (as an alternative basis for its decision, the court held that the six-year statute provided by 28 U.S.C. § 2415(a) governs cost recovery actions); see United States v. P/B STCO 213, On 527/979, 756 F.2d 364 (5th Cir. 1985) (six year contract limitations governs actions brought by the United States under the Federal Water Pollution Control Act).

It should be noted, however, that two courts have indicated that the period statute of limitations found in CERCLA § 112 (d) applies by analogy to CERCLA § 107 cases. See Mola Development Corp. v. United States, No. 820819-RMT, slip op. at 2-3 (C.D. Cal. April 25, 1986)(the court held that the three year statute of limitations in CERCLA § 112 (d) should be applied by analogy to Section 107 actions. However, Mola was not an action by the United States or State acting in its sovereign capacity); see also, Colorado v. ASARCO, 616 F. Supp. 822, 825 (D. Col. 1985) (agreeing, in dicta, with Mola).

Under either a three or six-year statute of limitations, an additional issue is when the statute of limitations begins to run. It is the United States' position that the date from which any applicable statute of limitations runs is the date of completion of the response action at the site. See United States v. Miami Drum, slip op. at 2; see also Caldwell v. Gurley Refining Co., 755 F.2d 645, 651 (8th Cir. 1985)("[t]he government's cause of action accrues on completion of the oil removal action"); United States v. Barge Shamrock, 635 F.2d 1108 (4th Cir. 1980), cert. denied, 454 U.S. 830 (1981)(government's cause of action for costs expended in removing oil spills under the Federal Water Pollution Control Act accrued on date oil removal was complete); United States v. C&R Trucking Co., 537 F. Supp. 1080 (N.D. W. Va. 1982)(government's cause of action to recover removal costs under Section 311(f)(2) of the Clean Water Act accrued on date oil removal was completed).

Defendants in Superfund cases have raised different arguments regarding both the applicable period of limitations and when the statute of limitations accrues. First, defendants have contended that a three year statute applies. Second, defendants have contended the statute of limitations runs from the time the United States begins to spend money at the site, from the date that defendants ceased shipping hazardous substances to the site and a variety of other time periods. The most viable theories for this case are: (1) the statute of limitations would run from the date that the United States first incurred response costs at the site or (2) each particular response action at the site should have a separate statute of limitations (i.e., the actions taken in 1977 would be governed by a separate statute of limitations than the ongoing actions). The defendants might argue

that the response actions between the period 1976 and 1978 constitute discrete actions which were completed in 1976 - 1978. Assuming a six year statute of limitations, under defendants' theory, the statute of limitations for actions undertaken prior to 1980 would run in December 1986 (six years after the enactment of CERCLA). */

It is our conclusion that the most likely result under applicable legal principles is that a six year statute of limitations applies which accrues on the date of completion of all response actions (a date which has not yet occurred). The courts have not adopted the positions advanced by defendants and we do not believe it is likely that defendants will prevail here. Nevertheless, you should be aware of the possibility that one or more of defendants' arguments will succeed.

2. Reauthorization

The statute of limitations section in the reauthorized bill provides as follows:

a. For a removal action, an initial action for recovery of costs under Section 107 must be commenced within three years after completion of the removal action, except that this period is extended ~~to six years~~ if the Administrator had made a determination that further response action is consistent with the remedial action to be undertaken (the action then must be brought within six years of the determination).

b. For remedial actions, an initial action for cost recovery must be commenced within six years after initiation of physical on-site construction of the remedial action.

c. If remedial action is initiated within three years after the completion of the removal action, costs incurred in the removal action may be recovered in the remedial action cost recovery action.

d. Subsequent action or actions for further response costs under Section 107 may be maintained at any time during the response action, but must be commenced no later than three years after the date of completion of all response actions.

The statute of limitations set forth in reauthorization is subject to at least several interpretations. **/

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*/ The statute of limitations cannot begin to run until enactment of CERCLA since no cause of action existed prior to that date.

**/ Neither the conference committee nor House and Senate reports provide guidance on this issue.

a. Prospective Application to Cleanups Commenced after Enactment

We believe the best interpretation is that the amendment applies only to future cleanup actions, i.e., removal or remedial actions commenced after the date of enactment. */ Under this interpretation, the amendment has no application to the PAS site because response action has been commenced prior to reauthorization. Consequently, legal principles under current case law would apply (i.e., the court probably will apply a six year statute commencing at the completion of response actions).

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*/ All provisions of the reauthorized statute are effective immediately, with the exception of the cleanup standards. We believe, however, there are strong arguments that the statute of limitations will be effective prospectively only. We would argue that Congress did not intend to require the United States to bring cost recovery actions by December 1986 (two months after enactment) in all those cases where on-site construction of remedial work commenced pre-CERCLA. In short, to apply the statute retroactively would cut-off the United States' right to bring many cost recovery actions. See, Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). (In determining whether a statute of limitations will be applied retroactively, the courts should weigh three factors: 1) whether a new principle of law is established by overruling clear past precedent on which the litigants may have relied; 2) whether retrospective operation will further or retard the purposes of the statutory scheme; and 3) whether retroactive application would produce inequitable results); James v. Home Const. Co. of Mobile, 621 F.2d 727 (5th Cir. 1980) (whether a statute of limitations will be applied prospectively or retroactively depends on Congress' intent in passing the legislation. In enacting amendments to the Truth-in-Lending Act (a broad remedial statute), including statute of limitations amendments, Congress did not intend to limit substantive rights under the Act); Kotval v. Gridle, 698 F.2d 344, 347, n.s (8th Cir. 1983) (retroactive application of a statute of limitations is constitutional so long as the plaintiff is not suddenly cut-off from bringing an action, but is given a reasonable opportunity after the effective date of the statute to bring suit before his claim is absolutely barred by the new enactment); Accord, Fust v. Arnar-Stone Laboratories, 736 F.2d 1098 (5th Cir. 1984)

However, even if the amendment does not apply, a court might look to Congress' intent in the new bill as guidance for determining the applicable statute of limitations. Because of the absence of clear authority, the court might view the provisions of the new bill as particularly persuasive. Thus, a court might conclude that a cost recovery action must be commenced within six years of initiation of on-site construction, potentially December 1986 (see discussion below).

b. Retroactive Application

Another interpretation might be that the amendment applies retroactively to all remedial and removal actions, i.e., all cost recovery actions must be commenced within six years after initiation of on-site construction of the remedial action or within three years after completion of a ~~remedial~~ action. In the event initiation of on-site construction occurred prior to 1980, we would have to commence the action by December 11, 1986, a date six years after the passage of CERCLA.

This interpretation poses difficult problems for ongoing enforcement actions because, in many cases, the Agency assumed a six-year statute of limitations commencing at the completion of cleanup. For example, the Agency may not yet have referred a cost recovery case where interim remedial construction occurred in 1981 but final cleanup is not completed.

Applied to the PAS site, retroactive application could lead to several results.

i. The response actions commenced in 1976-78 and continuing until 1982 (capping, closing and grading lagoons, installation of a leachate filter system) might be viewed as initiation of on-site construction of remedial action. The cost recovery action, therefore, must be commenced by December 1986.

ii. The response actions prior to 1982 may be categorized as removal actions. */ CERCLA and the new NCP provides a broad definition of removal actions (see 40 C.F.R. § 300.65) and some of the actions at the PAS fit within the examples set forth in the NCP (e.g., capping of contaminated soils, soil removal, drum removal). Remedial action at the site would be defined as those activities commenced after the Record of Decision. Initiation of physical on-site construction of the remedy, therefore, commenced in 1984.

Under this scenario, with respect to the remedial action, we would have until 1990 (six years after initiation of construction) to commence our action. Additionally, we would argue that we should be able to recover our costs of the removal action as part of the remedial action cost recovery, under the provision allowing costs

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*/ Because these activities were commenced pre-CERCLA, they were not clearly classified as removal or remedial actions.

incurred in a removal action to be recovered in the remedial action cost recovery if the remedial action is commenced three years after completion of the removal. Here, we would contend that removal actions were not completed until 1982 and remedial action commenced in 1982 (the start of the RI/FS).

CONCLUSION

We believe that the statute of limitations will not be a bar to recovery of costs incurred at the PAS site if we file within six years from completion of response actions. Nevertheless, we believe there is some possibility, as outlined above, that a court might rule that the statute of limitations runs on December 11, 1986. **/

Attachment

**/ Attached for your information is an excerpt from an EPA Inspector General's Report discussing the statute of limitations issue.

... victory for upholding the principle of a broad-based tax, despite losing on the waste-end tax.

However, at press time it was unclear whether the Senate would accept the House plan — with the waste-end tax a particularly sticky issue. Oil companies in particular fear that a waste-end tax would result in disproportionate impacts on their high-volume, low-toxicity wastewaters. Others worry that it will interefere with the working of the Resource Conservation & Recovery Act and promote illegal dumping. While at $500-million the waste-end tax has been reduced from original House numbers to "flea size," for many pro and con it has become an issue of principle. However, several sources guessed that the funds could simply be snitched from the general revenues pot, or even the broad-based tax in the event that a waste-end tax were disavowed. Another issue unresolved is whether the food-producing industry will receive an exemption from the broad-based tax. In fact, some Hill aides have speculated that the food industry supporters — reportedly including Reps. Charles Rangel (D-NY) and Howard Wolpe (D-MI, whose district includes the cereal producer Kelloggs) — might be coerced into signing off on a waste-end tax in exchange for an exemption, despite the waste-end tax's impact on the food industry.

In EPA Inspector General study

EPA'S LOW SUPERFUND COST RECOVERY RECORD THREATENS FUTURE PROGRAM

EPA has recovered from polluting parties only 1.1 cent out of every dollar spent from the Superfund trust fund — an enforcement trend which if continued could dangerously impede the agency's ability to clean up the nation's hazardous waste sites, according to a new study by the EPA Office of the Inspector General. The review by the agency's internal oversight arm covers the expenditures of EPA's enforcement program from Superfund's inception in 1980 through Sept. 30, 1985. The IG report finds that only $14-million of the $1.3-billion in trust fund monies expended has been reimbursed from 84 negotiated efforts with those responsible for pollution at the sites.

This is only a cost recovery ratio of 1.1%, says the IG, not including monies derived from EPA "efforts in negotiating cleanup actions to be performed by responsible parties" or "cash outs" by responsible parties not technically capable of performing cleanup. EPA's IG blames the poor recovery rate on lack of "aggressive cost recovery actions" and various other problems "outside of EPA's control" which may require court or congressional resolution.

IG found EPA was particularly lax in trying to recover monies from relatively small Superfund cleanup expenditures — some 182 completed removal actions which individually cost less than $200,000, but total more than $6.1-million. Extending these figures over 20 years, IG calculated that EPA could potentially lose more than $60-million from failure to pursue reimbursement at these small cost recovery sites. IG notes, however, that EPA attributes this failing to "resource constraints, and the fact that the expenditures required to recover costs may approach the costs of the cleanup itself."

An issue IG states is "somewhat outside" EPA control involves potentially responsible parties (PRPs) filing for bankruptcy — but which is compounded when EPA fails to take "aggressive and timely action in filing for cost recovery." The latter, the report argues, is "especially important" as EPA forgoes its right as a creditor and the courts "have been leaning towards giving [g]overnment units first priority after secured creditors." As of last September, reports IG, EPA recovered only $27,165 of more than $65-million in bankruptcy claims.

To speed negotiations — which despite EPA's 60-day cutoff policy were found to last an average of 279 days — IG recommended EPA require regional offices to maintain an information system which tracks milestone dates, with EPA informing responsible parties of the negotiation deadlines. "Thus, if a reasonable settlement did not appear feasible, negotiations can be broken off and cost recovery pursued through civil action after EPA cleans up the site." The review found that in 15 cases where site negotiations lasted longer than 60 days — with cleanup costs adding up to $3.6-million — the negotiations were cut off without a settlement or cost recovery agreement reached with PRPs.

Confusion over whether a statute of limitations applies to Superfund cases presents another potential risk for EPA — until the matter is resolved by Congress or the courts. IG identified 65 completed removal actions, totalling nearly $3-million, which may violate tort laws if not filed by the end of this year.

The report strongly urges EPA to upgrade its present information system for managing the Superfund enforcement program by consolidating data from several systems, and by including statute of limitation and negotiation milestone dates which are not now being collected. Stepping up enforcement action will become "increasingly more important" in future cleanup projects as EPA predicts about half of 4,000 of the worst hazardous waste sites will be cleaned up or financed by responsible parties over the next 30 years, the report notes, with costs estimated to total up to $80-billion.

Attachment F

VINCE W. BARR, III
CERTIFIED PUBLIC ACCOUNTANT

P.O. BOX 16925, JACKSON, MISSISIPPI 39236-0925
601 - 982-1177

FACSIMILE TRANSMITTAL SHEET

TO: Mary B. Hutson DATE: 12/31/92

FAX NUMBER: 404-347-7817 TIME: _____

No. of Pages to follow this page 8

FROM: William Troy Burford

FAX NUMBER: 601-982-1177

MESSAGE: _____

If you do not receive all pages, please call us at 982-1177 as soon as possible.

VINCE W. BARR, III
ITIFIED PUBLIC ACCOUNTANT

P.O. BOX 16925, JACKSON, MISSISIPPI 39236-0925
601 - 982-1177

December 31, 1992

Ms. Mary B. Hutson
Enforcement Project Manager
U.S. Environmental Protection Agency
Cost Recovery Section
345 Courtland Street, NE
Atlanta, Georgia 30365

Dear Ms. Hutson:

Mr. W. T. Burford (SSN 438-18-3534) has requested that we furnish you with copies of his 1989, 1990, and 1991 individual Federal income tax returns. We have enclosed copies of his 1989 and 1990 tax returns. Mr. Burford is a 75 year old retired person. He was not required to file a 1991 income tax return because of insufficient income.

If you need any additional information, please let me know.

Sincerely,

Vince W. Barr, III

Vince W. Barr, III

Enclosures

COPY

Form 1040 Department of the Treasury—Internal Revenue Service U.S. Individual Income Tax Return 1989

For the year Jan.–Dec. 31, 1989, or other tax year beginning , 1989, ending 19 | OMB No. 1545-0074

Label (Use IRS label. Otherwise, please print or type.)

LABEL HERE

Your first name and initial: WILLIAM T. Last name: BURFORD

If a joint return, spouse's first name and initial: Last name:

Home address (number and street). (If a P.O. box, see page 7 of instructions.): 139 MALLARD POINTE DR. Apt. no.:

City, town or post office, state and ZIP code. (If a foreign address, see page 7.): MADISON, MS. 39110

Your social security number: 438 : 18 : 3534

Spouse's social security number:

For Privacy Act and Paperwork Reduction Act Notice, see Instructions.

Presidential Election Campaign — Do you want $1 to go to this fund? Yes ☐ No ☐ If joint return, does your spouse want $1 to go to this fund? Yes ☐ No ☐ Note: Checking "Yes" will not change your tax or reduce your refund.

Filing Status (Check only one box.)

1 ☒ Single
2 ☐ Married filing joint return (even if only one had income)
3 ☐ Married filing separate return. Enter spouse's social security no. above and full name here.
4 ☐ Head of household (with qualifying person). (See page 7 of instructions.) If the qualifying person is your child but not your dependent, enter child's name here.
5 ☐ Qualifying widow(er) with dependent child (year spouse died ▶ 19). (See page 7 of instructions.)

Exemptions (See instructions on page 8.)

6a ☒ Yourself. If someone (such as your parent) can claim you as a dependent on his or her tax return, do not check box 6a. But be sure to check the box on line 33b on page 2.
b ☐ Spouse

c Dependents:

(1) Name (first, initial, and last name)	(2) Check if under age 2	(3) If age 2 or older, dependent's social security number	(4) Relationship	(5) No. of months lived in your home in 1989

If more than 6 dependents, see instructions on page 8.

d If your child didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶ ☐
e Total number of exemptions claimed.

No. of boxes checked on 6a and 6b: 1
No. of your children on 6c who:
a lived with you:
b didn't live with you due to divorce or separation (see page 9):
No. of other dependents on 6c:
Add numbers entered on lines above ▶ 1

Income (Please attach Copy B of your Forms W-2, W-2G, and W-2P here. If you do not have a W-2, see page 6 of instructions. Please attach check or money order here.)

7	Wages, salaries, tips, etc. (attach Form(s) W-2)	7	—
8a	Taxable interest income (also attach Schedule B if over $400)	8a	—
b	Tax-exempt interest income (see page 10). DON'T include on line 8a. 8b		
9	Dividend income (also attach Schedule B if over $400)	9	
10	Taxable refunds of state and local income taxes, if any, from worksheet on page 11 of instructions	10	
11	Alimony received	11	
12	Business income or (loss) (attach Schedule C)	12	5,579
13	Capital gain or (loss) (attach Schedule D)	13	
14	Capital gain distributions not reported on line 13 (see page 11)	14	
15	Other gains or (losses) (attach Form 4797)	15	
16a	Total IRA distributions. 16a	b Taxable amount (see page 11)	16b
17a	Total pensions and annuities. 17a	b Taxable amount (see page 12)	17b
18	Rents, royalties, partnerships, estates, trusts, etc. (attach Schedule E)	18	
19	Farm income or (loss) (attach Schedule F)	19	
20	Unemployment compensation (insurance) (see page 13)	20	
21a	Social security benefits. 21a 10,788	b Taxable amount (see page 13)	21b —
22	Other income (list type and amount—see page 13)	22	
23	Add the amounts shown in the far right column for lines 7 through 22. This is your total income ▶	23	5,579

Adjustments to Income (See instructions on page 14.)

24	Your IRA deduction, from applicable worksheet on page 14 or 15	24	
25	Spouse's IRA deduction, from applicable worksheet on page 14 or 15	25	
26	Self-employed health insurance deduction, from worksheet on page 15	26	
27	Keogh retirement plan and self-employed SEP deduction	27	
28	Penalty on early withdrawal of savings	28	
29	Alimony paid. a Recipient's last name: and b social security number:	29	
30	Add lines 24 through 29. These are your total adjustments ▶	30	

Adjusted Gross Income

31 Subtract line 30 from line 23. This is your adjusted gross income. If this line is less than $19,340 and a child lived with you, see "Earned Income Credit" (line 58) on page 20 of the instructions. If you want IRS to figure your tax, see page 16 of the instructions ▶ 31 5,579

Form 1040 (1989) Page 2

Tax Compu-tation	32	Amount from line 31 (adjusted gross income)		32	5,529
	33a	Check if: ☒ You were 65 or older ☐ Blind; ☐ Spouse was 65 or older ☐ Blind. Add the number of boxes checked and enter the total here ▶	1	33a	
	b	If someone (such as your parent) can claim you as a dependent, check here ▶		33b ☐	
	c	If you are married filing a separate return and your spouse itemizes deductions, or you are a dual-status alien, see page 16 and check here ▶		33c ☐	
	34	Enter the larger of: • Your standard deduction (from page 17 of the instructions), OR • Your itemized deductions (from Schedule A, line 26). If you itemize, attach Schedule A and check here ▶ ☐		34	3850
	35	Subtract line 34 from line 32. Enter the result here		35	1729
	36	Multiply $2,000 by the total number of exemptions claimed on line 5e		36	2000
	37	Taxable income. Subtract line 36 from line 35. Enter the result (if less than zero, enter zero)		37	-0-
		Caution: If under age 14 and you have more than $1,000 of investment income, check here ▶ ☐ and see page 17 to see if you have to use Form 8615 to figure your tax.			
	38	Enter tax. Check if from: a ☐ Tax Table, b ☐ Tax Rate Schedules, or c ☐ Form 8615. (If any is from Form(s) 8814, enter that amount here ▶ d _____.)		38	-0-
	39	Additional taxes (see page 18). Check if from: a ☐ Form 4970 b ☐ Form 4972		39	
	40	Add lines 38 and 39. Enter the total	▶	40	-0-
Credits (See instructions on page 18.)	41	Credit for child and dependent care expenses (attach Form 2441)	41		
	42	Credit for the elderly or the disabled (attach Schedule R)	42		
	43	Foreign tax credit (attach Form 1116)	43		
	44	General business credit. Check if from: a ☐ Form 3800 or b ☐ Form (specify) _____	44		
	45	Credit for prior year minimum tax (attach Form 8801)	45		
	46	Add lines 41 through 45. Enter the total		46	
	47	Subtract line 46 from line 40. Enter the result (if less than zero, enter zero)	▶	47	-0-
Other taxes (including Advance EIC Payments)	48	Self-employment tax (attach Schedule SE)		48	726
	49	Alternative minimum tax (attach Form 6251)		49	
	50	Recapture taxes (see page 18). Check if from: a ☐ Form 4255 b ☐ Form 8611		50	
	51	Social security tax on tip income not reported to employer (attach Form 4137)		51	
	52	Tax on an IRA or a qualified retirement plan (attach Form 5329)		52	
	53	Add lines 47 through 52. Enter the total	▶	53	726
Medicare Premium	54	Supplemental Medicare premium (attach Form 8808)		54	
	55	Add lines 53 and 54. This is your total tax and any supplemental Medicare premium	▶	55	726
Payments Attach Forms W-2, W-2G, and W-2P to front.	56	Federal income tax withheld (If any is from Form(s) 1099, check ▶ ☐)	56		
	57	1989 estimated tax payments and amount applied from 1988 return	57		
	58	Earned income credit (see page 20)	58		
	59	Amount paid with Form 4868 (extension request)	59	100	
	60	Excess social security tax and RRTA tax withheld (see page 20)	60		
	61	Credit for Federal tax on fuels (attach Form 4136)	61		
	62	Regulated investment company credit (attach Form 2439)	62		
	63	Add lines 56 through 62. These are your total payments	▶	63	100
Refund or Amount You Owe	64	If line 63 is larger than line 55, enter amount OVERPAID	▶	64	
	65	Amount of line 64 to be REFUNDED TO YOU	▶	65	
	66	Amount of line 64 to be APPLIED TO YOUR 1990 ESTIMATED TAX ▶	66		
	67	If line 55 is larger than line 63, enter AMOUNT YOU OWE. Attach check or money order for full amount payable to "Internal Revenue Service." Write your social security number, daytime phone number, and "1989 Form 1040" on it		67	626
	68	Penalty for underpayment of estimated tax (see page 21)	68		

Sign Here (Keep a copy of this return for your records.)

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature PREPARED BY VINCE W. BARR, III Date Your occupation

Spouse's signature (if joint return, BOTH must sign) Certified Public Accountant Date Spouse's occupation

YOUR COPY

Preparer's Use Only

Preparer's signature Date Check if self-employed ☐ Preparer's social security no.

Firm's name (or yours if self-employed) and address E.I. No. ZIP code

SCHEDULE C (Form 1040)

Department of the Treasury Internal Revenue Service

Profit or Loss From Business
(Sole Proprietorship)

Partnerships, Joint Ventures, Etc., Must File Form 1065.

▶ Attach to Form 1040 or Form 1041. ▶ See Instructions for Schedule C (Form 1040).

OMB No. 1545-0074

1989

Attachment Sequence No. 09

Name of proprietor: W.T. BURFORD

Social security number (SSN): 438 | 18 | 3534

A Principal business or profession, including product or service (see instructions): CHEMICAL SALES

B Principal business code (from page 2) ▶ 2675

C Business name and address ▶

D Employer ID number (Not SSN): None

E Method(s) used to value closing inventory: (1) ☐ Cost (2) ☐ Lower of cost or market (3) ☐ Other (attach explanation) (4) ☒ Does not apply (if checked, skip line G)

F Accounting method: (1) ☒ Cash (2) ☐ Accrual (3) ☐ Other (specify) ▶

		Yes	No
G	Was there any change in determining quantities, costs, or valuations between opening and closing inventory? (If "Yes," attach explanation.)		No
H	Are you deducting expenses for business use of your home? (If "Yes," see instructions for limitations.)		X
I	Did you "materially participate" in the operation of this business during 1989? (If "No," see instructions for limitations on losses.)	X	

J If this schedule includes a loss, credit, deduction, income, or other tax benefit relating to a tax shelter required to be registered, check here ▶ ☐
If you checked this box, you MUST attach Form 8271.

Part I Income

1	Gross receipts or sales 1099. MISC.	1	6,055	
2	Returns and allowances	2	—	
3	Subtract line 2 from line 1. Enter the result here			6,055
4	Cost of goods sold and/or operations (from line 39 on page 2)			—
5	Subtract line 4 from line 3 and enter the gross profit here			6,055
6	Other income, including Federal and state gasoline or fuel tax credit or refund (see instructions)			
7	Add lines 5 and 6. This is your gross income ▶			6,055

Part II Expenses

8	Advertising	8		22	Repairs	22	
9	Bad debts from sales or services (see instructions)	9		23	Supplies (not included in Part III)	23	
10	Car and truck expenses	10		24	Taxes	24	
11	Commissions	11		25	Travel, meals, and entertainment:		
12	Depletion	12		a	Travel	25a	
13	Depreciation and section 179 deduction from Form 4562 (not included in Part III)	13		b	Meals and entertainment		
14	Employee benefit programs (other than on line 20)	14		c	Enter 20% of line 25b subject to limitations (see instructions)		
15	Freight (not included in Part III)	15		d	Subtract line 25c from line 25b	25d	
16	Insurance (other than health)	16		26	Utilities (see instructions)	26	
17	Interest:			27	Wages (less jobs credit)	27	
a	Mortgage (paid to banks, etc.)	17a		28	Other expenses (list type and amount):		
b	Other	17b			Per diem - 3x44 132		
18	Legal and professional services	18			Mileage 1350m x .255 344		
19	Office expense	19				28	476
20	Pension and profit-sharing plans	20					
21	Rent or lease:						
a	Machinery and equipment	21a					
b	Other business property	21b					

29	Add amounts in columns for lines 8 through 28. These are your total expenses ▶	29	476
30	Net profit or (loss). Subtract line 29 from line 7. If a profit, enter here and on Form 1040, line 12, and on Schedule SE, line 2. If a loss, you MUST go on to line 31. (Fiduciaries, see instructions.)	30	5,579

If you have a loss, you MUST check the box that describes your investment in this activity (see instructions).
If you checked 31a, enter the loss on Form 1040, line 12, and Schedule SE, line 2.
If you checked 31b, you MUST attach Form 6198.

31a ☐ All investment is at risk.
31b ☐ Some investment is not at risk.

SCHEDULE SE (Form 1040)
Department of the Treasury
Internal Revenue Service

Social Security Self-Employment Tax

▶ See Instructions for Schedule SE (Form 1040).
▶ Attach to Form 1040.

OMB No. 1545-0074
1989
Attachment Sequence No. 18

Name of person with self-employment income (as shown on social security card): WILLIAM T. BURFORD

Social security number of person with self-employment income ▶ 438 | 18 | 3534

Who Must File Schedule SE

You must file Schedule SE if:

- Your net earnings from self-employment were $400 or more (or you had wages of $100 or more from an electing church or church-controlled organization); AND
- Your wages (subject to social security or railroad retirement tax) were less than $48,000.

Exception. If your only self-employment income was from earnings as a minister, member of a religious order, or Christian Science practitioner, AND you filed Form 4361 and received IRS approval not to be taxed on those earnings, DO NOT file Schedule SE. Instead, write "Exempt-Form 4361" on Form 1040, line 48.

For more information about Schedule SE, see the Instructions.

Note: *Most people can use the short Schedule SE on this page. But, you may have to use the longer Schedule SE that is on the back.*

Who MUST Use the Long Schedule SE (Section B)

You must use Section B if ANY of the following applies:

- You choose the "optional method" to figure your self-employment tax (see Section B, Part II);
- You are a minister, member of a religious order, or Christian Science practitioner and you received IRS approval (from Form 4361) not to be taxed on your earnings from these sources, but you owe self-employment tax on other earnings;
- You were an employee of a church or church-controlled organization that chose by law not to pay employer social security taxes;
- You had tip income that is subject to social security tax, but you did not report those tips to your employer; OR
- You were a government employee with wages subject ONLY to the 1.45% Medicare part of the social security tax.

Section A—Short Schedule SE

(Read above to see if you must use the long Schedule SE on the back (Section B).)

1	Net farm profit or (loss) from Schedule F (Form 1040), line 36, and farm partnerships, Schedule K-1 (Form 1065), line 14a	1	—
2	Net profit or (loss) from Schedule C (Form 1040), line 30, and Schedule K-1 (Form 1065), line 14a (other than farming). See the Instructions for other income to report	2	5,579
3	Add lines 1 and 2. Enter the total. If the total is less than $400, do not file this schedule; you do not owe self-employment tax ▶	3	5,579
4	The largest amount of combined wages and self-employment earnings subject to social security or railroad retirement tax (tier 1) for 1989 is	4	$48,000 00
5	Total social security wages and tips (from Form(s) W-2) and railroad retirement compensation (tier 1)	5	—
6	Subtract line 5 from line 4. Enter the result. If the result is zero or less, stop here; you do not owe self-employment tax ▶	6	48,000
7	Enter the smaller of line 3 or line 6	7	5,579
8	Rate of tax	8	x.1302
9	**Self-employment tax.** If line 7 is $48,000, enter $6,249.60. Otherwise, multiply the amount on line 7 by the decimal amount on line 8 and enter the result. Also enter this amount on Form 1040, line 48	9	726

Form **1040A**

Department of the Treasury—Internal Revenue Service

U.S. Individual Income Tax Return 1990

COPY

OMB No. 1545-0085

Step 1 Label (See page 14.) Use IRS label. Otherwise, please print or type.

Your first name and initial: WILLIAM T. Last name: BURFORD

If a joint return, spouse's first name and initial: Last name:

Home address (number and street). (If you have a P.O. box, see page 14.): 246 MAPLEWOOD DR. Apt. no.:

City, town or post office, state, and ZIP code. (If you have a foreign address, see page 14.): MADISON MS. 39110

Your social security no.: 438 | 18 | 3534

Spouse's social security no.:

For Privacy Act and Paperwork Reduction Act Notice, see page 8.

Presidential Election Campaign Fund (see page 16)

Do you want $1 to go to this fund? ☐ Yes ☐ No

If joint return, does your spouse want $1 to go to this fund? ☐ Yes ☐ No

Note: Checking "Yes" will not change your tax or reduce your refund.

Step 2 Check your filing status (Check only one.)

1 ☒ Single. (See page 16 to find out if you can file as head of household.)

2 ☐ Married filing joint return (even if only one had income)

3 ☐ Married filing separate return. Enter spouse's social security number above and spouse's full name here ▶

4 ☐ Head of household (with qualifying person). (See page 16.) If the qualifying person is your child but not your dependent, enter this child's name here ▶

5 ☐ Qualifying widow(er) with dependent child (year spouse died ▶ 19___). (See page 17.)

Step 3 Figure your exemptions (See page 17.)

6a ☒ Yourself. If your parent (or someone else) can claim you as a dependent on his or her tax return, do not check box 6a. But be sure to check the box on line 16b on page 2.

6b ☐ Spouse

No. of boxes checked on 6a and 6b: 1

(1) Dependents: 1. Name (first, initial, and last name)	2. Check if under age 2	3. If age 1 or older, dependent's social security number	4. Dependent's relationship to you	5. No. of months lived in your home in 1990

If more than 7 dependents, see page 20.

No. of your children on 6c who:
- lived with you ___
- didn't live with you due to divorce or separation (see page 21) ___

No. of other dependents listed on 6c ___

Add numbers entered on lines above: 1

d If your child didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶ ☐

e Total number of exemptions claimed: 1

Step 4 Figure your total income

Attach Copy B of your Forms W-2 and W-2P here.

Attach check or money order on top of any Forms W-2 or W-2P.

7 Wages, salaries, tips, etc. (This should be shown in Box 10 of your W-2. If not, see page 21. Attach Form(s) W-2.): 2834

8a Taxable interest income (see page 23). (If over $400, also complete and attach Schedule 1, Part I.): 8a

b Tax-exempt interest. (DO NOT include on line 8a.): 8b

9 Dividends. (If over $400, also complete and attach Schedule 1, Part II.): 9

10a Total IRA distributions: 10a — b Taxable amount (see page 24): 10b

11a Total pensions and annuities: 11a — b Taxable amount (see page 25): 11b

12 Unemployment compensation (insurance) from Form(s) 1099-G: 12

13a Social security benefits: 13a 11,246 — b Taxable amount (see page 28): 13b -0-

14 Add lines 7 through 13b (far right column). This is your total income. ▶ 14: 2834

Step 5 Figure your adjusted gross income

15a Your IRA deduction from applicable worksheet: 15a

b Spouse's IRA deduction from applicable worksheet. Note: *Rules for IRAs begin on page 30.*: 15b

c Add lines 15a and 15b. These are your total adjustments.: 15c

16 Subtract line 15c from line 14. This is your adjusted gross income. (If less than $20,264, see "Earned income credit" on page 38.) ▶ 16: 2834

1990 Form 1040A

Step 6

Figure your standard deduction, exemption amount, and taxable income

17 Enter the amount from line 16. 17 2834

18a Check if: [X] You were 65 or older [ ] Blind; [ ] Spouse was 65 or older [ ] Blind. Enter number of boxes checked ▶ 18a 1

b If your parent (or someone else) can claim you as a dependent, check here ▶ 18b [ ]

c If you are married filing separately and your spouse files Form 1040 and itemizes deductions, see page 34 and check here ▶ 18c [ ]

19 Enter your standard deduction. See page 35 for the chart (or worksheet) that applies to you. Be sure to enter your standard deduction here. 19 4,050

20 Subtract line 19 from line 17. (If line 19 is more than line 17, enter -0-.) 20 - 0 -

21 Multiply $2,050 by the total number of exemptions claimed on line 6a. 21 2050

22 Subtract line 21 from line 20. (If line 21 is more than line 20, enter -0-.) This is your taxable income. ▶ 22 - 0 -

Step 7

Figure your tax, credits, and payments

If you want IRS to figure your tax, see the instructions for line 22 on page 18.

23 Find the tax on the amount on line 22. Check if from: [ ] Tax Table (pages 49–54) or [ ] Form 8615 (see page 36) 23 - 0 -

24a Credit for child and dependent care expenses. Complete and attach Schedule 2. 24a

b Credit for the elderly or the disabled. Complete and attach Schedule 3. 24b

c Add lines 24a and 24b. These are your total credits. 24c

25 Subtract line 24c from line 23. (If line 24c is more than line 23, enter -0-.) 25 - 0 -

26 Advance earned income credit payments from Form W-2. 26

27 Add lines 25 and 26. This is your total tax. ▶ 27 - 0 -

28a Total Federal income tax withheld. (If any is from Form(s) 1099, check here ▶ [ ].) 28a 337

b 1990 estimated tax payments and amount applied from 1989 return. 28b

c Earned income credit. See page 38 to find out if you can take this credit. 28c

d Add lines 28a, 28b, and 28c. These are your total payments. ▶ 28d 337

Step 8

Figure your refund or amount you owe

Attach check or money order on top of Form(s) W-2, etc. on page 1.

29 If line 28d is more than line 27, subtract line 27 from line 28d. This is the amount you overpaid. 29 337

30 Amount of line 29 you want refunded to you. 30 337

31 Amount of line 29 you want applied to your 1991 estimated tax. 31

32 If line 27 is more than line 28d, subtract line 28d from line 27. This is the amount you owe. Attach check or money order for full amount payable to "Internal Revenue Service." Write your name, address, social security number, daytime phone number, and "1990 Form 1040A" on it. 32

33 Estimated tax penalty (see page 42). 33

Step 9

Sign your return

Keep a copy of this return for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than the taxpayer) is based on all information of which the preparer has any knowledge.

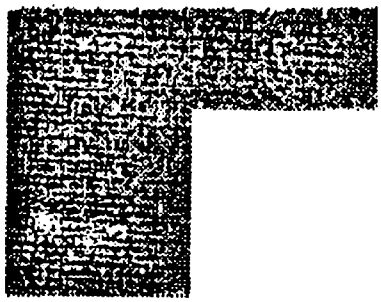
Your signature PREPARED BY VINCE W. BARR, III Date Your occupation

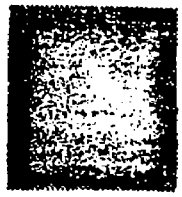
Spouse's signature (if joint return, BOTH must sign) CERTIFIED COPY FOR YOUR COPY Date Spouse's occupation

Paid preparer's use only

Preparer's signature Date Check if self-employed [ ] Preparer's social security no.

Firm's name (or yours if self-employed) and address E.I. No. ZIP code





EMPLOYER'S NAME, ADDRESS, ZIP CODE		EMPLOYER'S IDENTIFICATION NUMBER	STATE AND LOCAL WAGE AND TAX INFORMATION		
BUREAU OF THE CENSUS			NAME	EMPLOYER ID	TAX WITHHELD
6303 HARRY HINES BLVD		76-0986668	MS	910006473	11.02
DALLAS TX 75235		OMB NO.			
9 FEDERAL INCOME TAX WITHHELD	337.32	1545-0008			
10 WAGES AND OTHER COMP.	2,834.40				
FICA TAX WITHHELD	216.84				
10TAL FICA WAGES	2,834.40				

EMPLOYEE'S SOCIAL SECURITY NUMBER

438-18-3534

EMPLOYEE'S NAME, ADDRESS, AND ZIP CODE

BURFORD, WILLIAM T
130 MALLARD PT. DRIVE
MADISON MS 39110

OFFICE CODE

3000

RM W-2 Wage and Tax Statement 1990 — Copy B – To be filed with employee's FEDERAL tax return — Department of the Treasury Internal Revenue Service

XYZ

PAPERWORK TO ASSERT
DELIBERATIVE PROCESS PRIVILEGES
(see under ADMINISTRATIVE DISCOVERY)

FOIA

(SEE UNDER ADMINISTRATIVE DISCOVERY)

LIEN NOTICES (FEDERAL)

ATTACHMENT 1

MODEL: PRE-PERFECTION NOTICE

[REGIONAL LETTERHEAD]
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION [ ]
[ADDRESS]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

RE: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency ("EPA") intends to perfect a lien upon property located at [street address], the exact legal description of which is contained in Attachment 1 to this letter. The Property is part of the [ ] Superfund Site. EPA has determined that you are the owner of this property (the "Property"). The lien which EPA intends to perfect against the Property arises under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the "Superfund," 42 U.S.C. § 9607(l). The lien is intended to secure payment to the United States of costs and damages for which you, as the owner of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. §9607(a).

Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. §§9607(a) and 9701(a), liable persons include persons who own any "facility," including a site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. EPA has determined that a release or threat of release of hazardous substances pursuant to CERCLA Section 101(22) has occurred at or from the Property. The Property is part of the [ ] Superfund Site, at which [hazardous substances] came to be located, and is subject to or affected by a removal or remedial action. As the owner of a facility, you are a person liable for all costs of removal or remedial action at the site. Costs and damages include the costs incurred by the United States in responding to a release or threat of release at the [ ] Superfund Site.

The lien arising in favor of the United States on the Property continues until the liability for the costs is satisfied or until the liability for the costs becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

On [date], EPA notified you by certified or registered mail of your potential liability under CERCLA [or EPA hereby furnishes notice, if notice has not already been furnished.] You may avoid the perfection of a lien upon your property by paying all costs and damages for which you are liable.

EPA has assembled a Lien Filing Record consisting of documents relating to its decision to perfect the lien. This record is kept at the following address, and may be reviewed and copied at reasonable times by arrangement with:

[Regional Attorney]
[Address and Telephone Number]

EPA has reviewed the information in the Lien Filing Record and believes that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien are satisfied. After [14 calendar days or other period, set by the Region] from the date of this letter, EPA intends to transmit a notice of lien to [the appropriate office within the state (or county or other governmental subdivision), as designated by State law, where the real property is located, or with the District Court of the United States for the district in which the real property is located]. The effect of this filing is to perfect the lien upon your property.

You may notify EPA within [14 calendar days or other period, set by the Region] from the date of mailing of this letter in writing if you believe EPA's information or determination is in error. You may also request to appear before a neutral EPA official to present any information that you have indicating that EPA does not have a reasonable basis to perfect a lien. You should describe in your letter or written request your reasons for believing that EPA does not have a reasonable basis to perfect its lien, because EPA may, as described below, agree with your reasons and reconsider its intention to perfect a lien without further review or a meeting. Any written submissions or requests for a meeting should reference the Superfund Site, be addressed to the above referenced Regional Attorney, and may include documents or information which support your contentions.

If EPA receives a written submission or a request for a meeting from you within [14 calendar days or other period, set by the Region] from the date of mailing of this letter, Agency staff will review your submission or request for a meeting. If, after review and consultation, EPA agrees that the Agency does not have a reasonable basis upon which to perfect a lien, EPA will not perfect its lien, and will so notify you. If EPA disagrees, the written submission or request will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting, along with the Lien Filing Record.

If you have requested an opportunity to appear, a meeting will be scheduled. You may choose to attend this meeting via teleconference. The Agency will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting.

The meeting will be an informal hearing in which you may provide EPA with information as to why the Agency's assumptions require reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting would be whether EPA has a reasonable basis to perfect a lien based upon CERCLA Section 107(l).

After reviewing your written submissions, or conducting a meeting, if one is requested, the neutral EPA official will issue a recommended decision based on the Lien Filing Record. The recommended decision will state whether EPA has a reasonable basis to perfect the lien and will be forwarded to the Agency official delegated to execute liens for action. You will be notified of the Agency's action (whether perfection or the decision not to perfect) and furnished a copy of the recommended decision.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participation at a meeting, or recommended decision by the neutral EPA official that EPA has a reasonable basis to perfect a lien.

If you have any questions pertaining to this letter, please contact [ORC attorney] at [ ].

Sincerely,

Waste Management Division Director/Regional Counsel/Regional Administrator

ATTACHMENT 2

MODEL: POST-PERFECTION NOTICE

[REGIONAL LETTERHEAD]
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION [ ]
[ADDRESS]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

RE: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency ("EPA") has perfected a lien upon property located at [street address], the exact legal description of which is contained in Attachment 1 to this letter. The Property is part of the [ ] Superfund Site. EPA has determined that you are the owner of this property (the "Property"). The lien which EPA has perfected against the Property arises under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the "Superfund," 42 U.S.C. § 9607(l). The lien is intended to secure payment to the United States of costs and damages for which you, as the owner of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. §9607(a).

Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. §§9607(a) and 9701(a), liable persons include persons who own any "facility," including a site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. EPA has determined that a release or threat of release of hazardous substances pursuant to CERCLA Section 101(22) has occurred at or from the Property. The Property is part of the [ ] Superfund Site, at which [hazardous substances] came to be located, and is subject to or affected by a removal or remedial action. As the owner of a facility, you are a person liable for all costs of removal or remedial action at the site. Costs and damages include the costs incurred by the United States in responding to a release or threat of release at the [ ] Superfund Site.

The lien arising in favor of the United States on the Property continues until the liability for the costs is satisfied or until the liability for the costs becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

On [date], EPA notified you by certified mail of your potential liability under CERCLA. You may satisfy the lien placed upon your property by paying all costs and damages for which you are liable.

EPA has assembled a Lien Filing Record consisting of documents relating to its decision to perfect the lien. This record is kept at the following address, and may be reviewed and copied at reasonable times by arrangement with:

[Regional Attorney]
[Address and Telephone Number]

EPA has reviewed the information in the Lien Filing Record and believes that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien are satisfied. EPA has perfected its lien by filing a notice of lien with [the appropriate office within the state (or county or other governmental subdivision), as designated by State law, where the real property is located, or with the District Court of the United States for the district in which the real property is located]. EPA perfected its lien prior to notifying you of its intention because [ ].

You may notify EPA within [14 calendar days or other period, set by the Region] from the date of mailing of this letter in writing if you believe EPA's information or determination is in error. You may also request to appear before a neutral EPA official to present any information that you have indicating that EPA did not have a reasonable basis to perfect a lien. You should describe in your letter or written request your reasons for believing that EPA did not have a reasonable basis to perfect its lien, because EPA may, as described below, agree with your reasons and release its lien without further review or a meeting. Any written submissions or requests for a meeting should reference the Superfund Site, be addressed to the above referenced Regional Attorney, and may include documents or information which support your contentions.

If EPA receives a written submission or a request for a meeting from you within [14 calendar days or other period, set by the Region] from the date of mailing of this letter, Agency staff will review your submission or request for a meeting. If, after review and consultation, EPA agrees that the Agency did not have a reasonable basis upon which to perfect a lien, EPA will release its lien, and will so notify you. If EPA disagrees, the written submission or request will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting, along with the Lien Filing Record.

If you have requested an opportunity to appear, a meeting will be scheduled. You may choose to attend this meeting via

teleconference. The Agency will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting.

The meeting will be an informal hearing in which you may provide EPA with information as to why the Agency's assumptions require reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting would be whether EPA had a reasonable basis to perfect its lien based upon CERCLA Section 107(l).

After the reviewing your written submissions, or conducting a meeting, if one is requested, the neutral EPA official will issue a recommended decision based on the Lien Filing Record. The recommended decision will state whether EPA had a reasonable basis to perfect the lien and will be forwarded to the Agency official delegated to execute liens for action. You will be notified of the Agency's action (whether the lien will stay in place or be released) and furnished a copy of the recommended decision.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participation at a meeting, or recommended decision by the neutral EPA official that EPA has a reasonable basis to file a lien.

If you have any questions pertaining to this letter, please contact [ORC attorney] at [ ].

Sincerely,

Waste Management Division Director/Regional Counsel/Regional Administrator

NOTICE OF FEDERAL LIEN

NOTICE IS HEREBY GIVEN by the United States of America that it holds a lien on the lands and premises described below situated in the State of Washington, as provided by Section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Public Law No. 99-499, amending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 et seq., to secure the payment to the United States of all costs and damages covered by that Section for which Western Processing Company, Inc. and Garmt J. Nieuwenhuis (and the marital community composed of himself and his wife) are liable to the United States under Section 107(a) of CERCLA as amended. The lien for which this instrument gives notice exists in favor of the United States upon all real property and rights to such property which belong to said persons and are, have been, or will be, subject to, or affected by, removal and remedial actions as defined by federal law, at or near 7215 South 196th in the City of Kent, County of King, State of Washington, including the following described land:

> That portion of the Southeast Quarter (S.E. 1/4) of the Northwest Quarter (N.W. 1/4) of Section One (1), Township Twenty-Two (22) North, Range Four (4) East, Willamette Meridian, lying Westerly of the Puget Sound Electric right-of-way less than North Thirty (30) feet of Drainage Ditch No. One (1), containing 12.9 acres more or less.

This statutory lien exists and continues until the liability for such costs and damages (or for any decree or judgement against such persons arising out of such liability) is satisfied or becomes unenforceable through the operation of the statute of limitations as provided by Section 113 of Public Law 99-499.

IN WITNESS WHEREOF, the United States has caused this instrument to be executed through the United States Environmental Protection Agency, and its attorney, in his official capacity as Regional Counsel of the United States Environmental Protection Agency, Region 10.

Dated at Seattle, Washington, this 23d day of January, 1987.

UNITED STATES OF AMERICA and
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

By: John T. Hannit, Acting
for James R. Moore
Regional Counsel
U.S. EPA, Region 10

United States Of America)
State of Washington)ss
County of King)

On this 23d day of JANUARY, 1987, there appeared personally before me the undersigned Notary, James R. Moore, known to me to be the Regional Counsel of the United States Environmental Protection Agency, Region 10, and he acknowledged that he signed the foregoing NOTICE OF FEDERAL LIEN in a representative capacity as the free and voluntary act and deed of the United States and its said Agency for the uses and purposes therein mentioned. GIVEN under my hand and official seal the day and year first stated above.

NOTARY PUBLIC in and for the State of Washington residing at Seattle

My Commission Expires: 12/7/90

EPA EMPLOYEES AS WITNESSES IN PRIVATE LITIGATION

Cardinal®

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET N.E.
ATLANTA GEORGIA 30365

August 3, 1992

4RC

VIA FACSIMILE

Kenneth S. Canfield, Esq.
Doffermyre Shields Canfield & Knowles
1600 The Peachtree
1355 Peachtree Street
Atlanta, Georgia 30309

RE: Burnett v. Myriad Properties, Civil No. D-91149 (Subpoenas of Mr. Dan Ahern and Mr. Ira Linville)

Dear Mr. Canfield:

Two subpoenas, dated July 31, 1992, from the Superior Court of Fulton County, Georgia were served today around 11:45 a.m. on two EPA employees, Mr. Daniel Ahern, Chief, Watershed Protection Section, Water Management Division, and Mr. Ira Linville, Chief, Watershed Unit, Water Management Division. The subpoenas purport to require Mr. Ahern and Mr. Linville to appear to be examined on deposition by defendant in the above stated matter in Atlanta today at 4:00 p.m.

I have advised Mr. Ahern and Mr. Linville not to attend the depposition and I have further advised that the subpoenas have no legal effect. The state courts have no constitutional authority to compel federal employees to provide testimony concerning their official duties unless a federal statute confers such authority upon them. See Boron Oil v. Downie, 873 F.2d 67 (4th Cir. 1989). I am not aware of any such federal statute that would apply here. See also 40 C.F.R. §2.404(b).

EPA regulations at 40 C.F.R. Part 2, Subpart C, prohibit EPA employees from testifying regarding official matters, either voluntarily or in response to subpoenas, in any proceeding in which the United States Government is not a party. The purpose of the regulations is:

> ". . . to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA." [40 C.F.R. §2.401(c)]

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Employees may testify only where the General Counsel or his designee (or, where the request is from a state or local government, a Staff Office Director or other official head) determines that the testimony would "clearly be in the interest of EPA." I serve as the designee of the General Counsel for testimony by employees in EPA Headquarters. See 40 C.F.R. §2.404. In accordance with the regulations, I have consulted with the Regional Administrator regarding this matter.

These concerns are important to us because of the potential number of private lawsuits in which EPA employees could be requested to testify if the regulations are not strictly applied. Even though providing a witness for a few hours in this case might not significantly impede our mission, the cumulative effect of such interruptions would be very serious. This concern is the basis for our "clear interests of EPA" standard for approving employees' testimony.

Based on the telephone conversations you have held with the Office of Regional Counsel, we understand the subpoenas have been issued in a private lawsuit which Mr. Thomas Burnett, an EPA employee, has brought against a construction company for injuries resulting from an alleged assault by the defendants. You have informed us that you wish to question EPA employees who have first-hand knowledge of Mr. Burnett in order to assess his claims that he has and will continue to suffer damages in lost wages because his job performance has deteriorated as a result of the injuries.

Under the circumstances of this case, we have determined that providing Mr. Ahern and Mr. Linville would not be in the interest of EPA. Mr. Burnett's Official Personnel File, which contains his Performance Appraisals, has been made available to him pursuant to a waiver for the release of these documents that he has executed. Pursuant to 40 C.F.R. §2.406, these documents could be authenticated by our Agency in order to assist you in making them admissible in court.

The effect of providing Mr. Ahern and Mr. Linville to private litigants would constitute an improper diversion of EPA resources for private purposes. EPA resources are severely limited and we cannot permit private litigants to use the duty time of federal employees for numerous proceedings.

Pursuant to your letter dated July 28, 1992, and addressed to Attorney Maria J. Ramos, we hereby request that you dispense with the depositions. We would appreciate it if we could receive a letter from you to that effect.

Finally, we are in possession of the $28.00 (cash) witness fee given to Mr. Ahern and Mr. Linville and will hold until further instructions from you.

If you have any questions concerning this matter, please contact Maria J. Ramos at 347-5101, extension 2159.

Sincerely yours,

John R. Barker
Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET N.E.
ATLANTA, GEORGIA 30365

August 24, 1992

VIA FACSIMILE

James O. Williams, Jr., Esquire
Derrevere & Williams, P.A.
224 Datura Street, Suite 1102
West Palm Beach, Florida 33401

Re: Subpoena For Trial Issued to Records Custodian, U.S. EPA, Region IV, In The Matter Of Fitzgerald v. City Of Mount Dora, Et. Al.,
Case No: 91-391-CA-01

Dear Mr. Williams:

The purpose of this letter is to respond to a Subpoena For Trial directing the "Records Custodian" of EPA-Region IV to appear and testify in the above-referenced matter in the state circuit court in Tavares, Florida, on Monday, August 24, 1992. In a telephone conference with Assistant Regional Counsel Stedman S. Southall on August 20, 1992, you released the "Records Custodian" from appearance on August 24, 1992. You also stated you were interested in certain unspecified EPA records and you would like certified copies of those unspecified records.

In addition to the subpoena to testify, you have telefaxed a copy of a letter dated August 20, 1992, addressed to the "Records Custodian", requiring the presence of the witness as stated in the subpoena, and directing the witness to produce documents relating to the City of Mount Dora Wastewater Water Treatment Plant and effluent disposal system during the years 1983 through 1986.

This office has reviewed the subpoena, which has serious deficiencies. First, this is a subpoena issued by a Florida state court for a proceeding in which the EPA is not a party. A review of Florida state law did not yield any jurisdictional authority allowing service of a subpoena upon an out-of-state witness to appear in a Florida trial. Furthermore, state courts have no constitutional authority to compel federal employees to provide testimony concerning their official duties unless a federal statute confers such authority upon them. See Boron Oil v. Downie, 873 F.2d 67 (4th Cir. 1989). I am not aware of any such federal statute that would apply here. See also 40 C.F.R. § 2.404. Second, the $32.40 witness fee is grossly insufficient to defray the travel costs of any witness from EPA's Regional Office

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in Atlanta, Georgia. Third, we have no indication that the subpoena was personally served.

Because the subpoena was not validly issued or served, the subpoena, the witness fee, and your August 20, 1992 letter are herewith returned to you in this letter. I invite your attention to the regulations at 40 CFR Part 2, which govern the production of information by the Agency.

In addition, EPA regulations at 40 C.F.R. Part 2, Subpart C, contain restrictions on EPA employees testifying regarding official matters, either voluntarily or in response to subpoenas, in any proceeding in which the United States Government is not a party. The purpose of the regulations is:

> "... to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA". [40 C.F.R. § 2.401 (c)]

Employees may testify only where the General Counsel or his designee (or, where the request is from a state or local government, a Staff Office Director or other official head) determines that the testimony would "clearly be in the interest of EPA". I serve as the designee of the General Counsel for testimony by employees in EPA Region IV. See 40 C.F.R. § 2.404.

These concerns are important to us because of the potential number of private lawsuits in which EPA employees could be requested to testify if the regulations are not strictly applied. Even though providing a witness for a few hours in this case might not significantly impede our mission, the cumulative effect of such interruptions would be very serious. This concern is the basis for our "clear interests of EPA" standard for approving employees' testimony.

In this case the subpoena has been issued in a private lawsuit. Previous to the issuance of said subpoena EPA had no knowledge of the existence of the suit. Although we now know such a lawsuit exists, we are not aware of the allegations contained in the complaint and how EPA could possibly be involved in any way in such lawsuit. As a result, it is impossible for EPA to issue a determination that it would be in its interest to approve an employee's testimony. Both the subpoena and the letter fail to state why it would be in the interests of EPA to approve a request for an employee's testimony. As such, assuming the

subpoena had been validly issued, I cannot determine that according to the regulations it would be in the interests of EPA to provide testimony in this matter.

Sincerely,

John R. Barker
Regional Counsel

cc: Honorable James C. Watkins
Clerk of Court
Circuit Court
Fifth Judicial Circuit
Lake County Judicial Building Center
550 West Main Street
Tavares, Florida, 32778

Enclosures

GINNA MCGEE EPA correct sheet service of with a letter

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
VALDOSTA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMTRECO, INC. and JAMES L. DICKERSON, Defendants, Third Party Plaintiffs v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND WESTERN ELECTRIC COMPANY, Third Party Defendants	CIV. NO. 90-31-VAL

MOTION TO QUASH SUBPOENA AND
FOR A PROTECTIVE ORDER TO PROHIBIT
THE DEPOSITION OF MR. LEE DEHIHNS, III

Defendants served a subpoena on Mr. Lee A. DeHihns, III on Friday, June 19, 1992, for a deposition to be held on Tuesday, June 23, 1992. Mr. DeHihns is a former Acting Regional Administrator for EPA, Region 4. The Defendants seek to depose Mr. DeHihns regarding decisions made while acting in his official capacity. For the reasons more fully set forth in the accompanying memorandum, the United States respectfully requests

that this Court quash the subpoena and issue a protective order precluding his deposition.

Respectfully submitted,

UNITED STATES OF AMERICA

BARRY M. HARTMAN
Acting Assistant Attorney General
Environment and Natural Resources Division

VALERIE ANN LEE
Trial Attorney
Environmental Enforcement Section
Land and Natural Resources Division
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 514-2779

Attorneys for the United States

Of Counsel:
VIRGINIA MCGEE
Office of Regional Counsel
U.S. EPA, Region IV
345 Courtland Street, N.E.
Atlanta, GA 30365

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
VALDOSTA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CIV. NO. 90-31-VAL
AMTRECO, INC. and JAMES L. DICKERSON,	)	
	)	
Defendants, Third Party Plaintiffs	)	
	)	
v.	)	
	)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND WESTERN ELECTRIC COMPANY,	)	
	)	
Third Party Defendants	)	

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ITS MOTION TO QUASH SUBPOENA AND FOR A PROTECTIVE ORDER TO PROHIBIT THE DEPOSITION OF MR. LEE DEHIHNS, III

Introduction

Mr. Lee A. DeHihns, III served as the Acting Regional Administrator of EPA from August of 1987 until March 31, 1988. As Acting Regional Administrator, Mr. DeHihns assumed the authority delegated to him from the President of the United States and the Administrator of the Environmental Protection Agency for the administration and management of Region IV, EPA. Mr. DeHihns delegations of authority included the authority to make decisions under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., ("CERCLA") to conduct activities in response to a release or

substantial threat of a release into the environment. Pursuant to this authority, Mr.DeHihns signed "Action Memoranda" under CERCLA for the Dickerson Post Site in Homerville, Georgia on February 11, 1988 and March 15, 1988. These two "Action Memoranda" authorize increases in the amount of funding for the removal action (a category of clean-up actions under CERCLA) being conducted in response to a release and substantial threat of a release of hazardous substances at the Dickerson Post Site. See Dickerson v. Administrator, E.P.A., 834 F.2d 974 (11th Cir. 1987) (approving this district court's order granting the EPA access to the Dickerson Post Site for the purpose of conducting a clean-up at the Dickerson Post Site in response to a release and a substantial threat of release of hazardous substances). The "Action Memoranda" are included in the administrative record already filed with the Court. See Attachment 1. Mr. DeHihns' only involvement with the Dickerson Post Site is these two Action Memoranda. Moreover, he does not have personal knowledge of the facts contained in the memoranda.

The Defendants have had an opportunity to depose those with personal knowledge of the facts contained in the Action Memoranda. The Defendants deposed Rita Ford, who drafted the Action Memoranda, over a period of two days for approximately 15 hours. They questioned her closely regarding the various action memoranda drafted by her, including those signed by Mr. DeHihns. Moreover, Defendants have deposed numerous individuals regarding

For the reasons outlined below, the subpoena should be quashed.

I. The Deliberative Process Privilege protects the decision-making process of the former Acting Regional Administrator from Discovery.

Courts recognize that the deliberative process privilege protects the head of an agency from inquiry into or disclosure of his decision-making and thought processes. The privilege protects the head of an agency from testifying at depositions and trials. United States v. Morgan, 61 S.Ct. 999, 1004 (1941), Coalition on Sensible Transportation Inc. v. Dole, 826 F.2d 60, 72 (D.C. Cir. 1987) (plaintiffs barred from inquiring into the mental processes of administrative decisionmakers during discovery); Bank of Commerce of Laredo v. City National Bank of Laredo, 484 F.2d 284, 288 (5th Cir. 1973), cert. denied, 416 U.L.S. 905 S. Ct. 1609 (1974) (deliberative process privilege protects Comptroller from deposition and interrogatories); Bacon v. Department of Housing and Urban Development, 757 F.2d 265, 270 (Fed. Cir. 1985) (party cannot probe mental processes of decisionmaker at trial); San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission, 789 F.2d 26, 44 (D.C. Cir. 1986).

In United States v. Morgan, 61 S.Ct. 999 (1941), the Supreme Court found error in the District Court's decision to allow the deposition of the Secretary of Agriculture on a decision that he made in the course of his responsibilities as an administrative official. The Court compared the Secretary of Agriculture's mental processes to those of a judge and held:

> [s]uch an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that it was not the function of the court to probe the mental processes of the Secretary. Just as a judge cannot be subjected to such scrutiny, so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. (cites omitted)

Morgan at 1004.

The deliberative process privilege protects and encourages the free flow of information necessary to make informed decision-making by the agency. "[T]he privilege subserves a preponderative policy of frank expression and discussion among those upon whom rests the responsibility for making the determination that enables government to operate." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd sub. nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir 1967), cert. denied, 389 U.S. 952, 88 S. Ct. 334 (1967). Courts have likened the thought processes of an agency administrator to those of a judge who reviews documentation, and consults with advisors before making a decision. See U.S. v. Morgan, 61 S.Ct. 999, 1004, San Luis Obispo at 44. In Bacon v. Department of Housing and Urban Development, 757 F.2d 265 (Fed. Cir. 1985) the Court of Appeals found that the Secretary of the Department of Housing and Urban Development should not have been called as a witness in a trial contesting an agency decision. The Bacon court held "it is not the function of the court to

probe the mental processes of the Secretary. Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." Bacon at 270.

The deposition of Mr. DeHihn on the Dickerson Post site will necessarily involve inquiry into his mental processes as the Acting Regional Administrator of EPA. Mr. DeHihns became involved in the Dickerson Post site for the sole purpose of deciding whether EPA would increase the funds available for the removal action at the Dickerson Post Site. In making this decision, Mr. DeHihns weighed other EPA employee's advice and observations in the context of the goals and policies of EPA in 1988. The thought processes that led Mr. DeHihns to approve the funding increases, i.e., to choose one course of action over another, are precisely the kind of information protected by the deliberative process privilege.

In circumstances similar to the facts in this case, it has been held that EPA officials should not be deposed. In United States v. Conservation Chemical Co., et al., No. 82-0983-CV-W-5, slip. op. at 3 (W.D. Mo. March 25, 1985), the Court adopted the Special Master's recommendation that Morris Kay, Regional Administrator for Region VII of EPA, not be deposed. The Special Master explained his reasons for this recommendation:

> Mr. Kay, who is the Regional Administrator for EPA Region VII, is a senior government official who holds his position by virtue of a presidential appointment. To the extent that a deposition might seek to invade the mental processes of a high-ranking policymaker, such deposition should be

disapproved. See, United States v. Morgan, 313 U.S. 409, 422 (1941).

Similarly, in United States v. Wheeling-Pittsburgh Steel Corporation, No. 79-1194 (W.D. Pa. November 8, 1984), the Court granted the United States's Motion for Protective Order seeking to prevent the deposing of Thomas P. Eichler, Regional Administrator of EPA, Region III. The court stated:

> Heads of governmental agencies are not normally subject to deposition. Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979). Eichler is a regional administrator responsible for a substantial number of enforcement actions. Although Eichler is not the head of an agency, because of his position and responsibilities it is preferable that he not be deposed, especially since discoverable information is available by other means. Through interrogatories served on EPA, Wheeling-Pittsburgh can inquire whether EPA has promulgated standards and policies on substantial compliance with consent decrees and what these standards and policies are.

Id. at 1-2.

These two decisions are in accordance with the well established principle that the deliberative process privilege cannot be overridden in either the trial or discovery context absent a "strong showing of bad faith or improper behavior on the part of the agency." Sensible Transportation, 826 F.2d at 72. See also, Mothers for Peace, 789 F.2d at 44; Bank of Commerce, 484 F.2d at 288 (allegations that agency had engaged in improper conduct insufficient to permit discovery into closed agency meeting).

In Bank of Commerce, the court refused to allow the deposition of the agency decisionmaker;

> [w]hen findings of fact, rendered contemporaneously with the concomitant administrative decision, are subsequently available, a reviewing court may not require the agency officials who participated in that decision to give testimony explaining their action unless there has been a strong showing of bad faith or improper behavior.

Bank of Commerce at 288, citing Citizens to Preserve Overton Park, Inc. v. Volpe, 91 S.Ct. 814, 825.

In San Luis Obispo, the Court of Appeals for the D.C. Circuit found,

> [t]here may be cases where a court is warranted in examining the deliberative proceedings of an agency. But such cases must be rare exceptions if agencies are to engage in uninhibited and frank discussions during there deliberations. Were courts regularly to review . . . agency deliberative proceedings, the discussions would be conducted with judicial scrutiny in mind. Such agency proceedings would then be useless both to the agency and the courts. We think the analogy to the deliberative processes of a court is an apt one.

San Luis Obispo 789 F.2d at 45.

In the case of Mr. DeHihns, the defendants cannot make the required showing of "bad faith or improper behavior" on the part of EPA to require the deposition of Mr. DeHihns. EPA has disclosed all the facts and memoranda supporting the decision made by Mr. DeHihns in the voluminous administrative record submitted in this case. Further, EPA has provided defendants the opportunity to depose current and former EPA employees under Mr. DeHihns who provided him with the facts surrounding this case, including the On-Scene-Coordinators, and managers who are familiar with EPA's removal authorities. In addition to the

administrative record and depositions, EPA has provided defendants with thousands of pages of documents in discovery concerning the cases of the removal action.

II. Deposition of Mr. DeHihns is unduly burdensome to the United States and Mr. DeHihns

A. The Deposition is duplicative

Rule 26(c) of the Federal Rules of Civil Procedure give the district court broad discretion to protect parties or persons from undue burden and annoyance during the discovery process. The deposition of Mr. DeHihns is both unduly burdensome and duplicative. Other than his private thought processes which are protected under the deliberative process privilege, Mr. DeHihns does not have any information on the Dickerson Post Site that has not already been furnished to defendants.

Defendants have had ample opportunity to obtain any information retained by EPA on the Dickerson Post Site during the past two years of discovery. The United States has already provided defendants with the opportunity to depose former and current EPA employees including the On-Scene Coordinators responsible for the Dickerson site and their managers. Unlike Mr. DeHihns, many of these persons travelled to the Dickerson Post Site and made observations and conclusions about the conditions they observed there. The current and former EPA personnel that the United States has provided during discovery are persons that Mr. DeHihns relied on to provide him with reports and advice in his decision-making role. EPA has given

defendants memorialized accounts of EPA reports and advice in the administrative record filed with the Court.

B. The Subpoena Gave Insufficient Notice

Defendants' subpoena gave only one full working days' notice for the deposition. Defendants have no reasonable basis for making this eleventh hour demand during the final week of a two-year discovery process. Defendants personally contacted Mr. Dehihns at his home and his work in early May of 1992. A one full working day notice period is unreasonable, and there is no reason that defendants could not have given reasonable notice as required under Rule 30 of the Federal Rules of Civil Procedure. Mr. DeHihns is presently employed in a large corporate law firm in Atlanta. The one full working day notice provided by the subpoena is an insufficient period of time for him to properly schedule a deposition. Moreover, this period is insufficient time for the United States to respond to a subpoena for the deposition of the head of an EPA agency.

III. Conclusion

For the foregoing reasons, the United States requests that this court exercises its authority under Rule 26(c) of the Federal Rules of Civil Procedure and grant the United States Motion for a Protective Order to prohibit the deposition of Mr.

Lee DeHihns, III former Acting Regional Administrator of the Environmental Protection Agency.

Respectfully submitted,

UNITED STATES OF AMERICA

BARRY M. HARTMAN
Acting Assistant Attorney General
Environment and Natural Resources Division

VALERIE ANN LEE
Trial Attorney
Environmental Enforcement Section
Land and Natural Resources Division
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 514-2779

Attorneys for the United States

Of Counsel:
VIRGINIA MCGEE
Office of Regional Counsel
U.S. EPA, Region IV
345 Courtland Street, N.E.
Atlanta, GA 30365

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
vs.	:	CIV. NO. 90-31-VAL(DF)
AMTRECO, INC. AND JAMES L. DICKERSON,	:	
Defendants, Third Party Plaintiffs	:	
vs.	:	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND WESTERN ELECTRIC COMPANY,	:	
Third Party Defendants.	:	

Filed at 5:05 P. M
JUN 22 1992
DEPUTY CLERK, U. S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

ORDER

Motion of the Plaintiff, United States of America, to quash the subpoena and for a protective order to prohibit the deposition of Mr. Lee DeHihns, III set for Tuesday, June 23, 1992, is hereby granted. The basis for this ruling is that the subpoena gave insufficient notice to the deponent in that the subpoena was served on Friday, June 19, 1992, in the afternoon, leaving only one full working day for the deponent to prepare. It is further noted that this case is in the Valdosta Division of this court and is assigned to the Honorable Wilbur D. Owens, Jr., but Judge Owens is out of the district for the week and will return on Monday. The parties are directed to address any further pleadings to Judge

Owens, this order only being issued by this judge because of his absence from the district.

SO ORDERED, this 22nd day of June, 1992.

DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

AO 88 (Rev. 11/91) Subpoena in a Civil Case

United States District Court

NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA,
PLAINTIFF,
V.
ARTHRICO, INC. AND JAMES L. DICKERSON,
DEFENDANTS/THIRD PARTY PLAINTIFFS
V.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND WESTERN ELECTRIC COMPANY
THIRD PARTY DEFENDANTS.

SUBPOENA IN A CIVIL CASE

CASE NUMBER:

TO: MR. LEE A. DEHIHNS, III
C/O ALSTON & BIRD
One Atlantic Center, 1201 West Peachtree Street
Atlanta, GA 30309-3424

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
KILPATRICK & WILLIAMS OFFICES, 2500 One Atlanta Plaza, 950 East Paces Ferry Road, Atlanta, GA 30326	6/23/92 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants	June 16, 1992

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
RONALD B. SLOCOMB
SUTTON & SLOCOMB, P. O. box 496, Homerville, Georgia 31634 (912) 487-5273

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

2 9 0013

D: 29
Other: 2/11/88

ION MEMORANDUM

JECT: Ceiling Increase Request for Dickerson Post Site
in Homerville, Georgia

FROM: Rita Ford
-- On-Scene Coordinator

TO: Lee A. DeHihns III
Acting Regional Administrator, Region IV

POSE

s memorandum is to request additional funding in the amount $195,000 which would increase the Dickerson Post immediate val budget to $778,390.

additional funds requested are for actions consistent with original scope of work, and will be used to remove additional aminated soil. It was orginally estimated that there would 00 cubic yards of sludge. After the lagoon water was treated oximately 2000 cubic yards of contaminated soil was removed.

GROUND

I[redacted]ent or Site Setting/Description

1. Physical location - Dickerson Post is located on Highway 187, one mile south of Homerville in Clinch County, Georgia. The site is in a rural area, but seven residences are located within 1500 feet. See attachment #1.

2. Site Characteristics - This site housed a creosote wood treating facility from 1978 to 1982. The processing used one pressure cylinder and three product storage tanks. Two large surface impoundments are located on site. One of the impoundments measures 215 feet x 100 feet. The second impoundment is 75 feet x 50 feet, but has been backfilled. There were 252 open top 55 gallon drums which contained a creosote resin, and were contaminated with PCB.

Waste Management - The PPP has been biologically treating the waste in the main impoundment. Because the lagoons are unlined, a potential threat to perched groundwater exists. EPA has used carbon adsorption to treat the lagoon wastewater. The contaminated soil from the lagoons has been staged and is awaiting disposal. The drums and adjacent contaminated soil have been removed.

4. Surrounding Area - The adjacent land use consists of private residences and paper/pulp tree farms.

Quantity and Type of Substances Present:

The hazardous substance is creosote and creosote sludge, a listed waste. There were 252 open 55 gallon drums of creosote resin. The tanks contained 4,000 gallons of liquid waste that was a mixture of creosote cut with fuel. Approximately 1000 cubic yards of soil adjacent to the drums and tanks was contaminated. The impoundments contained 800,000 gallons of water and 2000 cubic yards of sludge.

THREAT

Threat of Exposure to Public or the Environment

The threat of public exposure to creosote or creosote byproducts exists by contact, inhalation, and possible ingestion of contaminated groundwater.

The site is not fenced and human contact exposure to creosote waste is possible. Both the surface impoundments and product remaining in the storage tanks are potential exposure sources.

Surface impoundments are a potential source of groundwater contamination. The depth to groundwater ranges from 2 to 12 feet. Nearby residences use wells as their drinking water source.

The building on site is being used as an auto repair shop. The workers could come into direct contact with creosote waste, a strong irritant. The building tenants allow their children to play around the site.

Evidence of Extent of Release

On site soil and sludge samples show polynuclear aromatic hydrocarbons. Naphthalene, methyl naphthalene, phenanthrene and pyrene are some of the major polynuclear aromatic hydrocarbons and are constituents of creosote. Phenanthrene concentrations were as high as 18,000 ppm in the soil samples.

Impoundment water samples contained 170 ppb acenaphthene, 160 ppb fluorene, 150 ppb fluoranthene, and 586 ppb pyrene as well as lower quantities of other creosote contaminants.

2 9 0015
ENDORSEMENT

Attachment #2.

PROPOSED PROJECT AND COSTS

A. Objectives of the Project

Immediate actions will include recycling and/or disposing of tank liquids, and transportation and disposal of contaminated soil.

B. Estimated Clean-up Costs

Costs are based on worst case scenario that is liquids cannot be recycled.

	Current Ceilings	Proposed Increase	New Ceilings
EXTRAMURAL COSTS			
ERCS contractor	$420,000	$195,000	$615,000
TAT Costs	21,000		21,000
Subtotal, Extramural	$441,000		$636,000
15% Contingency	66,150		66,150
TOTAL, EXTRAMURAL	$507,150		$702,150
INTRAMURAL COSTS			
Intramural Direct Costs			
Labor @ $30/hour	$ 38,400		$ 38,400
Travel	13,000		13,000
Intramural Indirect Costs			
Region @ $54/hr.	24,840		24,840
TOTAL, INTRAMURAL	$ 76,240		$ 74,240
TOTAL SITE BUDGET	$583,390	$195,000	$778,390

2 9 0016

EGIONAL RECOMMENDATION

ıse conditions at the Dickerson Post Site meet the NCP Section 300.65 :eria for an immediate removal, I recommend your approval of this 195,000 ceiling increase request. Your approval would increase the roject ceiling to $778,390 of which $615,000 are for ERCS removal ontractor costs.

ou may indicate your approval or disapproval by signing below.

Approve: _____ Date: _____

Disapprove: _____ Date: _____

Attachments

Break: 2.9.7
Other:

2 9 0017

[illegible] 1988

ACTION MEMORANDUM

DATE: MAR 15 1988

SUBJECT: Ceiling Increase Request for Dickerson Post Site in Somerville, Georgia

FROM: Rita Ford
On-Scene Coordinator

TO: Lee A. DeHihns, III
Acting Regional Administrator, Region IV

PURPOSE

This memorandum is to request additional funding in the amount of $616,000 which would increase the Dickerson Post removal budget to $1,394,390.

BACKGROUND

[illegible] 2, 1987, funding was authorized for removal actions at the Dickerson [illegible] Site in Somerville, Georgia. The original scope of work included disposal of drums, tank liquids, lagoon wastewater, lagoon sludge, and contaminated soil.

Work began on the site August 10, 1987. During Phase I, the site was sampled to determine the extent of soil contamination. Samples were also taken to establish disposal profiles. Based on these profiles the site was categorized into four waste streams 1) PCB contaminated drums and soil, 2) lagoon wastewater, 3) K001 sludge from treatment of creosote wastes, and 4) abandoned liquid creosote.

Phase II - Removal and Disposal began December 7, 1987. The PCB contaminated drums and soil were excavated and transported to Chemical Waste Management, in Emelle, Alabama. The lagoon wastewater was processed through two carbon filtration units and discharged on site after sampling confirmed effective treatment. The lagoons were excavated with contaminated sludge/soil being stored awaiting disposal.

The additional funds requested are for actions consistent with the original scope of work, and will be used to remove additional contaminated soil. It was originally estimated that there would be 2500 cubic yards of sludge. After the lagoon water was treated approximately 5000 cubic yards of

4-WD-ERRB	4-WD-ERRB	4-WD-ERRB	4-WD-ERRB	4-WD-ERRB
Ford	~~Hitchcock~~	Rogers	Stonebraker	Tobin

adjacent to the lagoon, which ha[illegible] cont[illegible]inated when the lagoons overflowed during periods of heavy rain prior to the removal action. This additional soil [illegible]led and found to have total polynuclear aromatic hydrocarbons (PAH's) in excess of 22,000 ppm. The clean-up criteria for this site is 100 ppm total PAH's.

PROPOSED PROJECT COSTS

Additional funds are not being requested for TAT or Intramural expenses. The daily cost summaries through March 1, 1988 show 52% TAT funds remaining ($10,600) and 80% Intramural funds remaining ($59,250).

	Current Ceilings	Proposed Increase	New Ceilings
EXTRAMURAL COSTS			
FPCS contractor	$615,000	$616,000	$1,231,000
TAT Costs	21,000		21,000
Subtotal, Extramural	$636,000		$1,252,000
Contingency	66,150		66,150
TOTAL, EXTRAMURAL	$702,150		$1,318,150
INTRAMURAL COSTS			
Intramural Direct Costs			
Labor @ $30/hour	$ 38,400		$ 38,400
Travel	13,000		13,000
Intramural Indirect Costs			
Region @ $54/hr.	24,840		24,840
TOTAL, INTRAMURAL	$ 76,240		$ 74,240
TOTAL SITE BUDGET	$778,390	$616,000	$1,394,390

REGIONAL RECOMMENDATION

Because conditions at the Dickerson Post Site meet the NCP Section 300.65 Criteria for an immediate removal, I recommend your approval of this $616,000 ceiling increase request. Your approval would increase the project ceiling to $1,394,390 of which $1,231,000 are for FPCS removal contractor costs.

You may indicate your approval or disapproval by signing below.

Approve: /S/ Lee A. DeHihns, III
Acting Regional Administrator Date: MAR 15 1988

Disapprove: _____ Date: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff and COMMONWEALTH OF PENNSYLVANIA, ET AL., Intervening Plaintiffs v. WHEELING-PITTSBURGH STEEL CORPORATION, Defendant.	)	CIVIL ACTION NO. 79-1194

MEMORANDUM OPINION

In this contempt action, the government has moved for protective order to prevent the deposition of Thomas P. Eichler Administrator of EPA Region III.

Wheeling-Pittsburgh Steel Corporation asserts it is necessary to depose Eichler to determine EPA standards and policies on substantial compliance with consent decrees and determine whether it has been the victim of selective prosecut

Heads of governmental agencies are not normally subje to deposition. Kyle Engineering Co. v. Kleppe, 600 F.2d 226, (9th Cir. 1979). Eichler is a regional administrator responsi for a substantial number of employees and a substantial number enforcement actions. Although Eichler is not the head of an agency, because of his position and responsibilities it is preferable that he not be deposed, especially since discoverab

information is available by other means. Through interrogatori served on EPA, Wheeling-Pittsburgh can inquire whether EPA has promulgated standards and policies on substantial compliance wi consent decrees and what those standards and policies are.

If no standards or policies on substantial compliance exist, further discovery on this point, by deposition or interrogatory, would be barred. Further discovery would necessarily be an inquiry into why Zichler decided Wheeling-Pittsburgh was not in substantial compliance with the consent decree and therefore brought this enforcement action. Inquiry into mental or deliberative processes of administrativ decision-makers is generally prohibited. U.S. v. Morgan, 313 409, 422 (1941); ISI Corp. v. U.S., 503 F.2d 558, 559 (9th Ci: 1974); Ernest and Mary Hayward Weir Foundation v. U.S., 508 F 894, 895 n. 2 (2d Cir. 1974).

Further, a showing of bad faith is necessary to probe government's reason for bringing an action. 4 J. Moore, Feder Practice ¶ 26.56[2] at 26-137 (2d ed. 1984). Wheeling-Pittsbu refers to the deposition testimony of EPA environmental scient Denis M. Zielinski that no coke oven battery in the country is complete compliance with oven rules all the time, but that EPA uses enforcement discretion to determine whether to take enforcement action. This is insufficient to show bad faith to

entitle Wheeling-Pittsburgh to discovery on Eichler's reas
bringing this enforcement action.

For the foregoing reasons a protective order will
granted. An appropriate order shall issue.

Dated: November 5, 1984.

Hubert I. Teitelbaum
Chief United States District J

ORDER

AND NOW November 8, 1984 in accordance with th foregoing memorandum opinion, IT IS HEREBY ORDERED plaintiff's motion for a protective order to vacate the notice of deposition of Thomas P. Eichler is granted.

Hubert I. Teitelbaum
Chief United States District Judge

cc: Craig McKay, Ass't U. S.Atty

Thomas An, Esq.
Department of Environmental Resources
P. O. Box 2357
Harrisburg, Pa. 17120

Larry Kopelman, Special Ass't Atty General
West Virginia Air Pollution Control Commission
1558 Washington St., East
Charleston, West Virginia 25311

E. Dennis Muchnicki, Ass't Atty General
Ohio Environmental Protection Agency
316 East Broad St.
Columbus, Ohio 43216

William D. Evans, Jr., Esq.
Environmental Enforcement Section
U. S. Department of Justice
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 82-0983-CV-W-5
CONSERVATION CHEMICAL COMPANY, et al., Defendants.	)	

ORDER

On March 5, 1985, the Special Master filed the Eleventh Set of Recommendations Concerning Pretrial Matters. On March 8, 1985, the Special Master filed the Twelfth Set of Recommendations Concerning Pretrial Matters. No objection has been filed to either set of recommendations. In addition, the Court has reviewed both sets of recommendations and finds that they should be adopted. According, it is hereby

ORDERED that the Special Master's Eleventh and Twelfth Sets of Recommendations Concerning Pretrial Matters are adopted.

SCOTT O. WRIGHT
United States District Judge

March 25th, 1985.

- CC Exhibit

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

3/4/85(sm)

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 82-0983-CV-W-5
CONSERVATION CHEMICAL COMPANY, et al., Defendants.	)	

SPECIAL MASTER'S ELEVENTH SET
OF RECOMMENDATIONS CONCERNING
PRETRIAL MATTERS

---

1. The following requests should be approved: the Motion For Leave to File Answer of Third Party Defendant Metal Plating Corporation; third-party defendant Atlantic Richfield Company's Motion to File Answer Out of Time; third-party defendant Crane Packing Company's Application For Refund of Payment to Special Master's Fund; the Motion of Rival Manufacturing Company For Return of Monies Paid to the Special Master's Reimbursement Fund.

2. The Request by Armco, Inc., AT&T Technologies, Inc., FMC Corporation and International Business Machines Corporation For Issuance of Supplemental Document Production Requests To Insurer Third-Party Defendants (later joined in by Conservation Chemical Company, Conservation Chemical Company of Illinois and Norman B. Hjersted) is hereby approved. Such documents are to be produced at the document depository on or before March 18, 1985. To the extent that documents responsive to such request

have already been produced, they do not have to be produced again.

3. The following requests for admissions submitted to the Special Master by various parties are hereby approved in their entirety: Third Party Defendant American Fidelity Fire Insurance Company's Request For Admissions to Conservation Chemical Company, Conservation Chemical Company of Illinois and Norman B. Hjersted; Third Party Generator Defendant Chemcentral Corporation's Request For Admissions to Third Party Plaintiffs; Requests For Admissions By Cooperative Farm Chemicals Association For Service Upon Third-Party Plaintiffs; Third Party Generator Defendant Wellman Dynamics Corporation's Proposed Request For Admissions For Third Party Plaintiffs Armco, Inc., AT&T Technologies, Inc., FMC Corporation and International Business Machines Corporation; Proposed Requests for Admissions From Third-Party Defendant General Dynamics Corporation to Third-Party Plaintiffs; Proposed Requests For Admissions From Third-Party Defendant Midland Lithographing Company to Third-Party Plaintiffs; and Third-Party Defendant Nibco Inc's Request For Admissions.

4. The Plaintiff's Proposed Request For Admissions to Original Defendants and the Plaintiff's Motion For Leave to Submit One Additional Interrogatory Related to Requests For Admissions are hereby approved. However, due to the large number of requests for admissions (948), the defendants should have an additional week, until March 29, 1985, in which to respond to said requests and interrogatory.

5. The Motion of the United States for a Protective Order To Vacate the Notice of Deposition of Morris Kay should be approved. Mr. Kay, who is the Regional Administator for EPA Retion VII, is a senior government official who holds his position by virtue of a presidential appointment. To the extent that a deposition might seek to invade the mental processes of a high-ranking policymaker, such deposition should be disapproved. See, United States v. Morgan, 313 U.S. 409, 422 (1941). Based upon the affidavit filed by Mr. Kay, it is doubtful that meaningful information could be obtained through his deposition for the following reasons: (1) the litigation was filed prior to his appointment and thus he does not have first-hand knowledge of the facts or the reasons for its filing; (2) he has no scientific or technical expertise; and (3) he relies upon EPA professional staff and consultants, most of whom already have been, or will be or could be deposed. However, in accordance with the opinion in United States v. Tenneco Chemicals, Inc., No. 80-4141 (D.N.J. 1981), the Special Master suggests that narrowly drawn interrogatories may be appropriate to determine what relevant information, if any, might have been obtained by a deposition. See, Slip op. at 16 (attached to plaintiff's motion as Exhibit 2).

6. The third-party defendants F.L. Carswell Manufacturing Company and CMC Production Galvanizers should be treated as one entity for purposes of liaison counsel expenses and payments to the Master's Reimbursement Fund.

7. The Order filed by the Court on December 21, 1984,

requiring, inter alia, additional contributions to the Master's Reimbursement Fund provided that "(s)n order relating to the contribution of the government third-party defendants will be held in abeyance pending resolution of the motion pertaining to the third-party status of the government agencies and officers." The Special Master understood that provision to apply only to the third-party defendant federal agencies, pending resolution of the motion to dismiss the third-party complaint against the federal agencies. At least one third-party defendant which is a municipal corporation, the Sanitary District of Rockford, Illinois, has taken it upon itself to include itself within the exempt group. If the Special Master's understanding of the Court's Order is accurate, the Sanitary District of Rockford, Illinois, and any other non-federal government agencies which have failed to make the require contribution should do so on or before March 15, 1985.

8. Just as the Special Master did not approve interrogatories proposed by the third-party plaintiffs to be served on third-party defendant generators which were directed toward Phase Two issues, third-party plaintiffs should not be subjected to unnecessary discovery at this time relating to matters which they may not intend to introduce at the Phase One trial. For example, third-party plaintiffs need only establish that a given generator is responsible for a single shipment of hazardous waste to the CCC site for purposes of establishing Phase One "liability" of that generator. Thus, detailed discovery concerning other shipments could be a Phase Two matter. Third-

party defendant generators are entitled, however, to discover what evidence third-party plaintiffs intend to introduce in Phase One. Therefore, in lieu of requiring third-party plaintiffs to answer detailed interrogatories as to all information known with respect to each generator, third-party plaintiffs should be required to summarize the contentions it will attempt to prove for purposes of establishing the Phase One "liability" of each generator. The information provided should include the following for each third-party defendant (other than insurance companies):

(a) name of the party;

(b) basis of liability [generator/transporter/other (describe)];

(c) as to each act of liability for which third-party plaintiffs will introduce evidence in the Phase One trial:

(1) the date of the act;

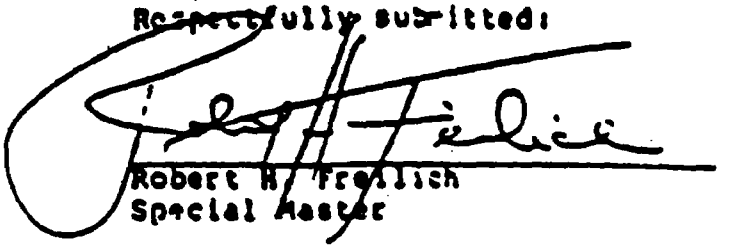
(2) the identity of the substance alleged to be hazardous;

(3) the basis upon which the substance is alleged to be hazardous;

(4) the source of the information (document/interrogatory answer/admission/deposition testimony, etc.), with specific reference to numbers, pages, etc. as applicable.

Such information shall be filed on or before March 22, 1985. With this in mind, the Motion of Third-party Defendant Gates Rubber Company For Leave to Propound Interrogatories and Requests For Production of Documents to Defendant Conservation Chemical Company and all Third-Party Plaintiffs should be denied.

Respectfully submitted:



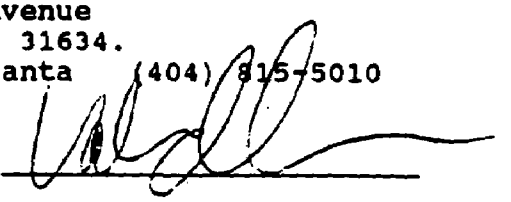
Robert H. Freilich
Special Master

FREILICH, LEITNER & CARLISLE, P.C.
4635 Wyandotte, Suite 210
Kansas City, Missouri 64112
(816) 753-8885

CERTIFICATE OF SERVICE

I hereby certify that, on this 22 day of June, 1992 a true and correct copy of the foregoing Motion and Memorandum in Support to Quash Subpoena for Deposition and Protective Order, was served by FAX, on the following counsel of record:

Berrien Sutton, Esq.
Sutton & Slocumb
305 West Dame Avenue
Homerville, GA 31634.
Penta Hotel Atlanta (404) 815-5010



June 22, 1992

CERTIFICATE OF SERVICE

This is to certify that, this June 22, 1992, I have served the foregoing United States' Response to Defendants' Notice to Produce counsel list by mailing a true and correct copy thereof in a properly addressed, franked envelope to insure delivery.

Mr. Berrien L. Sutton, Esq.
Sutton & Slocumb
Post Office Box 496
305 W. Dame Avenue
Homerville, GA 31634

Alan Wolper, Esq.
Hunton & Williams
2500 One Atlanta Plaza
950 East Paces Ferry Road
Atlanta, GA 30326

Daniel S. Reinhardt, Esq.
5200 NationsBank Plaza
600 Peachtree Street, N.E.
Atlanta, GA 30308

VALERIE LEE, Trial Attorney

U.S. Department of Justice

MNS:DSG
90-11-1-12

Washington, D.C. 20530

October 13, 1989

BY AIRBORNE EXPRESS

James R. Manspeaker, Clerk
United States District Court
for the District of Colorado
U.S. Courthouse
1929 Stout Street, Room C-145
Denver, Colorado 80294

Attention: Leslie

Re: Broderick Investment Co. v. Hartford Accident & Indemnity Co., Civil Action No. 86-Z-1033

Dear Mr. Manspeaker:

Enclosed for filing in the above-captioned case please find the original and one copy of the Motion of United States Environmental Protection Agency to Quash Subpoenas, Memorandum in support thereof, proposed Order, and Certificate of Service. It is my understanding that Ms. Betsy Bedient in Judge Weinshienk's chambers is awaiting the delivery of these filings. Thank you for your assistance in this matter.

Sincerely,

Assistant Attorney General
Land and Natural Resources Division

By: Daniel S Goodman

Daniel S. Goodman, Attorney
Environmental Defense Section

Enclosures

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 86-Z-1033

BRODERICK INVESTMENT CO.,

Plaintiff,

vs.

HARTFORD ACCIDENT & INDEMNITY CO.,

Defendant.

MOTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO QUASH SUBPOENAS

Two employees of the United States Environmental Protection Agency ("EPA"), Elisabeth Evans and Vera Moritz, as well as an unnamed Custodian of Records of the EPA Denver Regional Office, were served with subpoenas commanding them to testify at the trial in the above-captioned case. For the reasons set forth in the attached Memorandum in Support of Motion of the United States Environmental Protection Agency to Quash Subpoenas, and pursuant to Fed. R. Civ. P. 45, EPA hereby moves to quash the trial subpoenas served upon Ms. Evans, Ms. Moritz, and the Custodian of Records.

Respectfully submitted,

RICHARD B. STEWART
Assistant Attorney General

DANIEL S. GOODMAN
Attorney
Environmental Defense Section
Land and Natural Resources Division
United States Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
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OF COUNSEL:

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Acting General Counsel

DONNELL L. NANTKES
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Office of General Counsel
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

JONAH M. STALLER
Assistant Regional Counsel
U.S. Environmental Protection
Agency
Region VIII
999 18th Street, Suite 500
Denver, Colorado 80202-2405

Dated: October 13, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 86-Z-1033

BRODERICK INVESTMENT CO.,

Plaintiff,

vs.

HARTFORD ACCIDENT & INDEMNITY CO.,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION
OF THE UNITED STATES ENVRIONMENTAL PROTECTION AGENCY
TO QUASH SUBPOENAS

INTRODUCTION

The United States Environmental Protection Agency ("EPA") seeks to quash subpoenas served on EPA by a litigant in this private lawsuit, to which EPA is not a party. Specifically, EPA contends that (1) under the doctrine of United States ex rel Touhy v. Ragen, 340 U.S. 462 (1951), the EPA employees cannot be compelled to testify, since the employees have not been authorized to testify under applicable EPA regulations, and (2) the caselaw in this context holds that subpoena enforcement proceedings are actions against the United States that are barred by the government's sovereign immunity. For both these reasons, the subpoenas should be quashed.

FACTUAL BACKGROUND

This subpoena matter arises in the above-captioned private civil action pending before this Court. As EPA understands the underlying litigation, Broderick Investment Company and others (collectively, "Broderick") have sued Hartford Accident Indemnity Company ("Hartford"), seeking a declaratory judgment that Hartford should be held liable under the terms of an insurance policy for costs incurred by Broderick in investigating and cleaning up a hazardous waste site (the Broderick Wood Products site). See Letter from Susan T. Smith of Pryor, Carney and Johnson, representing Hartford, to Jonah Staller, Assistant Regional Counsel, EPA, attached hereto as Attachment A. Broderick is undertaking these response costs pursuant to the terms of a Consent Decree into which it entered with EPA. See United States v. Broderick Investment Co., et al., Civil Action No. 86-Z-369.

In response to Freedom of Information Act requests, EPA provided Hartford with extensive material from its files relating to the site. Hartford apparently believes that these files contain "admissions against interest" by Broderick that would tend to disprove Hartford's liability under the terms of the insurance policy. See Attachment A. Consequently, Hartford indicated in its October 2 letter that the insurance company would be requesting the testimony of several EPA employees to obtain "confirmation of factual representations made and recorded

by EPA investigators" and to "lay appropriate foundation for the admission of EPA documents . . . . ." Id. at 2.

Meanwhile, on September 28, 1989, and October 3, 1989, this Court issued trial subpoenas to EPA employees Elisabeth Evans and Vera Moritz and to an unnamed Custodian of Records of the EPA Denver Regional Office. Copies of the subpoenas are attached hereto as Attachment B. These subpoenas were served on EPA during the weeks of October 2 and October 9, 1989 and commanded the recipients to appear and testify before this Court on October 16, 1989. [1]

EPA responded to Hartford's October 2 letter requesting the testimony of Ms. Evans, Ms. Moritz, and a custodian of records in a letter dated October 11, 1989. See Letter from Thomas A. Speicher, Regional Counsel, to Susan T. Smith, attached hereto as Attachment C. The Regional Counsel noted that EPA regulations codified at 40 C.F.R. Part 2, Subpart C govern the testimony of EPA employees in private litigation. A copy of these regulations is attached hereto as Attachment D. Under these regulations, the Regional Counsel noted, no EPA employee may testify about information acquired during the course of performing official duties unless the Agency's General Counsel or his designee determines that such testimony "would clearly be in the interests of EPA." 40 C.F.R. § 2.404(a). As the General Counsel's

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[1] Pursuant to agreement of counsel, the return date of these subpoenas was later postponed to October 20, 1989, in order to permit sufficient time for the parties to brief and the Court to consider the instant motion to quash.

designee, the Regional Counsel concluded in this case that the requested testimony would not clearly be in the interests of EPA. Attachment C at 1.

In explaining this determination, the Regional Counsel explained the "overriding concern" that Agency employees would "be diverted from their official duties." Id. He noted that Ms. Evans, as a remedial project manager, is presently engaged in important duties managing the investigation and cleanup of the California Gulch Superfund site near Leadville, Colorado. Id. at 2. The Regional Counsel further explained that as a staff engineer, Ms. Moritz oversees the investigations and preliminary assessments of potential Superfund sites. Id. Finally, the Regional Counsel added, the Custodian of Records is responsible for overseeing the production of Administrative Records for Superfund sites, "a task critical to the Superfund enforcement process." Id.

Although the Regional Counsel recognized that the time required for any one employee to testify in private litigation might not be great, he concluded that "the cumulative disruption to EPA's mission would be severe if EPA employees had to testify in private litigation every time requested." Id. In this regard, the Regional Counsel noted that "[p]rivate litigation which relates to EPA's activities is common[,] and private litigants often seek testimony from EPA employees." Id. Consequently, the Regional Counsel concluded that "EPA must be circumspect in evaluating requests for employee testimony." Id.

Despite these compelling considerations, the Regional Counsel was not unmindful of the public interest in the fair adjudication of private lawsuits. Thus, the Regional Counsel expressed a willingness to provide Hartford with authenticated copies of the documents referenced in Hartford's October 2 letter, in accordance with the procedures set forth at 40 C.F.R. § 2.406. Attachment C at 2. It is EPA's understanding that Hartford has accepted the Agency's offer to provide such authenticated documentary evidence. [2] Nevertheless, Hartford has declined to withdraw its trial subpoenas voluntarily, thereby necessitating the filing of the instant motion to quash.

ARGUMENT

I. The Subpoenas Must Be Quashed Because No EPA Employee is Authorized to Testify.

EPA regulations, authorized by 5 U.S.C. § 301 and codified at 40 C.F.R. Part 2, Subpart C (Attachment D), set forth the procedures that EPA employees are required to follow when they are subpoenaed to testify in a private action about information that they have acquired in the course of their official duties. See 40 C.F.R. § 2.401. These regulations serve several purposes, among which are ensuring that EPA employees' official time is used only for official purposes and maintaining the impartiality of EPA in private litigation. 40 C.F.R. § 2.401(c). See Boron Oil Co. v. Downie, 873 F.2d 67, 69 (4th Cir. 1989); Davis

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[2] This documentary evidence would therefore appear to be admissible in this lawsuit. See Fed. R. Evid. 803(8) and 901(7).

Enterprises v. EPA, 877 F.2d 1181, 1184 (3d Cir. 1989). When an EPA employee is subpoenaed in a private action, he must immediately send a copy of the subpoena to the EPA General Counsel or his designee. 40 C.F.R. § 2.404(a). The General Counsel or his designee (here, Mr. Speicher, the Regional Counsel) then makes a determination whether compliance with the subpoena would clearly be in the interests of EPA." Id. If the General Counsel or his designee determines that compliance would not clearly be in the Agency's interests, the employee must respectfully refuse to testify. 40 C.F.R. § 2.404(b).

Regulations similar to those in 40 C.F.R. Part 2, Subpart C were upheld by the United States Supreme Court in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) ("Touhy"). Relying on its earlier decision in Boske v. Comingore, 177 U.S. 459 (1900), the Supreme Court in Touhy held that a local FBI agent could not be found in contempt of court for refusing to produce subpoenaed documents when such refusal was based on a Department of Justice regulation prohibiting disclosure of non-public documents without the authorization of the Attorney General. 340 U.S. at 468. The Supreme Court concluded that the Attorney General's regulation was valid and that the employee had properly refused to produce the requested papers:

> When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious.

Id.

This Court has consistently followed the Touhy holding that a federal employee cannot be compelled to obey a subpoena issued in a private action to which the government is not a party when the employee's superiors determine, in accordance with the procedures set forth in the agency's regulations, that he should not comply. See, e.g., Boatright v. Radiation Sterilizers, Inc., 592 F. Supp. 1314, 1315 (D. Colo. 1984); Smith v. C.R.C. Builders Co., Inc., 626 F. Supp. 12, 13-14 (D. Colo. 1983). Likewise, the United States Court of Appeals for the Tenth Circuit has regularly adhered to the Touhy principle. See Saunders v. Great Western Sugar Co., 396 F.2d 794 (10th Cir. 1968) (vacating district court order compelling employees of the Small Business Administration to comply with subpoenas issued by that court); United States Steel Corp. v. Mattingly, 663 F.2d 68 (10th Cir. 1980) (holding under Touhy and Saunders that the district court erred in compelling enforcement of a subpoena directed against an employee of the Bureau of Standards).

Recently, the United States Court of Appeals for the Fourth Circuit followed Touhy and its progeny in reversing a federal district court order compelling an EPA employee to appear and testify in a private action to which the government was not a party. Boron Oil Co. v. Downie, 873 F.2d at 69-70 (citing, inter alia, this Court's decision in Smith v. C.R.C. Builders Co.). The Fourth Circuit noted that

> Touhy is part of an unbroken line of authority which directly supports [the EPA employee's] contention

> that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations.

873 F.2d at 69. Indeed, the Fourth Circuit added, EPA has "a valid and compelling interest" in keeping its employees "free to conduct their official business without the distractions of testifying in private civil actions in which the government has no genuine interest." Id. at 71. Taking note of the "current explosion in environmental litigation," the court echoed the concerns expressed by the Regional Counsel in the present case, cautioning EPA

> that a strict adherence to its internal regulations is essential if it is to be successful in preventing its expert employees from being targeted as potential witnesses in private actions.

Id. at 72.

The strong public policy behind the Touhy doctrine was further explained in another recent case in which a federal court quashed subpoenas directed to EPA employees. Environmental Enterprises, Inc. v. EPA, 664 F. Supp. 585 (D.D.C. 1987). There, the United States District Court for the District of Columbia explained:

> If . . . courts could so easily subpoena federal officials, the officials might find themselves spending all of their time doing nothing but complying . . . and thus they would have little opportunity to pursue their important governmental responsibilities. Indeed, I believe the EPA regulations . . . are conscientiously designed . . . to balance the work of the agency with the desire to cooperate as much as possible with local proceedings.

Id. at 586.

Similar concerns were expressed by the district court in Massachusetts in denying motions to compel the testimony of employees of the Occupational Safety and Health Administration ("OSHA"):

> Because of the nature of the programs it administers and enforces, OSHA is particularly vulnerable to the demands of private parties seeking information acquired as a result of official investigations concerning industrial accidents and other mishaps in the workplace. If OSHA employees were routinely permitted to testify in private civil suits, significant loss of manpower hours would predictably result.

Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290 (D. Mass. 1982). See also Hotel Employees-Hotel Association Pension Fund v. Timperio, 622 F. Supp. 606, 607 (S.D. Fla. 1985) (quashing trial subpoenas served upon Department of Labor employees in private litigation where the agency had determined, under its regulations, that in light of "the limited agency resources available to carry out the agency's congressionally mandated duties, the overall public interest would be served in this case by refraining from becoming involved in private litigation").

Numerous other courts have also followed Touhy in holding that a federal employee cannot be compelled to obey a subpoena when the employee is prohibited from testifying under the agency's regulations. See, e.g., Swett v. Schenk, 792 F.2d 1447, 1451-52 (9th Cir. 1986); Giza v. Secretary of Health, Education & Welfare, 628 F.2d 748, 751 (1st Cir. 1980). See also United States v. Bizzard, 674 F.2d 1382, 1387 (11th Cir.) (rejecting constitutional challenge to Department of Justice's Touhy

regulations), cert. denied, 459 U.S. 973 (1982); Cates v. LTV Aerospace Corp., 480 F.2d 620, 623 (5th Cir. 1973) (in accordance with Touhy, Navy regulations were "designed to centralize the determination of whether a subpoena duces tecum will be obeyed or challenged on the grounds of privilege"); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600, 602 n.2 (5th Cir. 1966) ("Supreme Court recognized the validity of the 'housekeeping' function" in Touhy). As the Ninth Circuit explained in Swett, "the Touhy doctrine is jurisdictional" and precludes enforcement against a federal employee of an order compelling him to testify, regardless of the agency's reasons for precluding his testimony. 792 F.2d at 1452 (emphasis added).

Since the Regional Counsel's determination not to permit the subpoenaed employees to testify was consistent with validly promulgated EPA regulations, see 40 C.F.R. §§ 2.401(c), 2.404(a), it must be upheld under Touhy. Accordingly, this Court should quash the three trial subpoenas served upon EPA's employees.

II. The Subpoenas Should Be Quashed in the Absence of a Waiver of Sovereign Immunity to the Extent That They Constitute a Legal Proceeding Against the United States.

The United States and its agencies are immune from suit except to the extent that there has been an express waiver of sovereign immunity. See, e.g., Block v. North Dakota, 461 U.S. 273, 287 (1983); United States v. Testan, 424 U.S. 392, 399 (1976); Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 734 (1982). Several courts have held that the doctrine of

sovereign immunity applies to circumstances similar to those present here. In Environmental Enterprises, Inc. v. EPA, a case precisely on point, the district court quashed the contested subpoenas, finding that the United States had not waived its sovereign immunity. 664 F. Supp. at 586. The court saw "obvious merit to the argument that federal officers should not be subpoenaed to testify in . . . proceedings of which they are not parties without their approval." Id. Similarly, in Boron Oil Co. v. Downie, 873 F.2d at 71, the Fourth Circuit held that 'subpoena proceedings fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign." See Davis Enterprises v. EPA, 877 F.2d at 1186 (noting that in Boron a "sovereign immunity theory" was a "basis for the court's decision").

Likewise, in Nationwide Investors v. Miller, 793 F.2d 1044 (9th Cir. 1986), the Ninth Circuit affirmed the dismissal of a garnishment action in which the testimony of a non-party federal employee had been ordered. The court held that since the United States had not waived its sovereign immunity, the district court "lacked jurisdiction over the action against the federal officer." Id. at 1048. See also Reynolds Metals Co. v. Crowther, 572 F. Supp. at 290 (invoking the sovereign immunity doctrine to dismiss a contempt proceeding against two OSHA employees who, pursuant to instructions from their superiors, refused to comply with subpoenas in a private civil action); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (absent a

waiver of sovereign immunity, federal officers cannot be subpoenaed to testify before a state grand jury).

In short, there is now a substantial body of law establishing that the doctrine of sovereign immunity precludes federal employees from being compelled to testify about their official duties in private actions to which the United States is not a party. Since there has been no waiver of sovereign immunity here, the three subpoenas served upon EPA Region VIII must be quashed because this Court lacks jurisdiction to enforce them. [3]

CONCLUSION

For the reasons stated above, the trial subpoenas issued by this Court on September 28, 1989 and October 3, 1989 to employees of EPA Region VIII should be quashed in their entirety.

Respectfully submitted

RICHARD B. STEWART
Assistant Attorney General

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[3] To the extent that Hartford seeks to challenge the substance of the Regional Counsel's determination not to permit EPA employees to testify, that determination may be challenged only in a separate action brought pursuant to the Administrative Procedure Act. See Davis Enterprises v. EPA, 877 F.2d at 1184-86. Only if the Regional Counsel's decision were challenged and set aside in such an action would these EPA employees be free to comply with the subpoenas.

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Dated: October 13, 1989

This Motion, how we did it in 1985 and how DOJ does not want us to do it now.

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MAY [illegible] 1985

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Attorneys for CH2M Hill

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

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IRON MOUNTAIN MINES, INC., Plaintiff, vs. R. JAMES DIEPENBROCK, et al, Defendants.	NO. 321652 ORDER GRANTING MOTION TO QUASH SUBPENA DUCES TECUM.

The motions of CH2M Hill and the United States of America for an order quashing subpena duces tecum came on regularly for hearing on May 15, 1985, in Department 23 of the above-entitled court. Daniel S. Frost of the firm of Carr, Kennedy, Peterson & Frost appeared as counsel for CH2M Hill; R. Steven Lapham of the Attorney General's Office appeared as counsel for the United States of America, and Gregory A. Muir of the firm of Klein, Wegis & Duggan, appeared as counsel for plaintiff Iron Mountain Mines, Inc., the Honorable James T. Ford, Judge, presiding.

RECEIVED MAY [illegible]

Good cause appearing therefor, it is hereby ordered that the motions of CH2M Hill and the United States of America are granted, and that the subpena duces tecum served on CH2M Hill in the above matter is hereby quashed.

DATED: MAY 2 2 1985

JUDGE JAMES T. FORD

JUDGE OF THE SUPERIOR COURT

CAR ENNEDY,
PET & FROST
A1 ORATION
FF DRIVE
P. O. BOX 2007
REDDING, CA 96099

PROOF OF SERVICE

I am a citizen of the United States and employed in Shasta County, California; I am over the age of eighteen years and not a party to the within action; my business address is 420 Redcliff Drive, P. O. Box 2007, Redding, California 96099-2007; on this date I served the

__X__ By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at Redding, California, addressed as set forth below.

_____ By personally delivering a true copy thereof to the person and at the address set forth below.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 20, 1985, at Redding, California.

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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

IRON MOUNTAIN MINES, INC. Plaintiff, v. R. JAMES DIEPENBROCK, Defendant.	NO. 321652 SPECIAL APPEARANCE, NOTICE OF MOTION TO QUASH SUBPOENA DUCES TECUM.

TO: PLAINTIFF AND ITS ATTORNEY OF RECORD

PLEASE TAKE NOTICE that on April 9, 1985 at 9:00 a.m. in Department 10 of the Sacramento Superior Court, or as soon thereafter as the matter can be heard before this Honorable Court, the United States of America, appearing specially, and for the sole purpose of this motion, will move and hereby does move the court for an order quashing issuance and service of a Subpoena Duces Tecum directed to custodian of records, CH2M Hill.

Said motion will be made on the grounds that:

1. The affidavit in support of the Subpoena Duces Tecum is insufficient in that it fails to allege that the requested

documents are material to the lawsuit for which production is requested and that good cause exists for their production.

2. The Court lacks jurisdiction to order production of the subpoenaed records by reason of the sovereign immunity of the United States.

3. Release of the requested information is prohibited by the Privacy Act (5 U.S.C. Section 552a(b) and by 40 C.F.R. Sections 2.100 et seq.)

Said motion will be based on this notice, the declaration of Harry Seraydarian attached hereto and upon the accompanying memorandum of points and authorities.

DATED: 3/18/85

DONALD B. AYER
United States Attorney

By R. STEVEN LAPHAM
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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

IRON MOUNTAIN MINES, INC. Plaintiff, v. R. JAMES DIEPENBROCK, Defendant.	NO. 321652 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM

FACTS

On February 22, 1985, the Subpoena Duces Tecum attached hereto as Exhibit A was served by mail on CH2M Hill. The Subpoena purportedly requires the Custodian of Records for CH2M Hill to produce nine categories relating to the environmental effects of operations conducted by Iron Mountain Mines, Inc., the party subpoenaing the documents. The date of production specified in the subpoena is March 18, 1985, however, counsel for Iron Mountain Mines has consented to continue that date so that this motion to quash may be heard.

with these provisions the Subpoena Duces Tecum has no force or effect.

A. The Affidavit Fails To Allege That The Requested Documents Are Material To The Underlying Lawsuit

With regard to the materiality of the documents requested the affidavit in support of the subpoena duces tecum states only that:

> Said records and documents are a reliable source of information necessary for a fair and proper presentation of plaintiff's case.

The foregoing statement is no more than an unsupported legal conclusion and insufficient to establish the materiality of the documents to the underlying action. As the court stated in Johnson v. Superior Court, 258 Cal.App.2d 829, 835, 66 Cal. Rptr. 134 (1968

> The requirement [of good faith and materiality] . . . is not met by an affidavit which is totally devoid of any statement of facts. "The affiant cannot rely merely upon the legal conclusion, stated in general terms that the desired documentary evidence is relevant and material." McClatchy Newspaper v. Superior Court, 26 Cal.2d 386, 396 [196 p.2nd 944]; Ex Parte Clarke, 126 Cal. 235, 241, 242 [58 p.546, 77 Am. St. Rep. 176, 46 ALR 835] the parties seeking the issuance of a subpoena for the production of documents "must first show the materiality of the desired evidence and cannot obtain permission to search through all [his adversary's] papers and records merely in the hope or expectation that the investigation will disclose favorable information (McClatchy Newspaper v. Superior Court, supra at page 398)

The court reached a similar conclusion in Pacific Auto Ins. Co. v. Superior Court, 273 Cal.App.2d 61, 67, 77 Cal. Rptr. 836:

> [T]o secure discovery by use of a Subpoena Duces Tecum, there must be a showing of more than a wish for the benefit of all information in the adversary's files, and . . . the trial court must be afforded the factual data by the required affidavit to enable it to make an informed ruling on the issues of materiality and good cause.

Plaintiff's statement of materiality fails to allege any theory currently known or imagined to which the requested documents might pertain, but rather strongly suggests that plaintiff is attempting to use the present civil action as a vehicle for obtaining a preview of potential enforcement action against it by the Environmental Protection Agency. If plaintiff has a reason to believe that the requested documents will materially aid it in the prosecution of its case it should be required to state that reason so that the United States may ascertain whether any documents under its control are relevant to such theory. See Johnson v. Superior Court, 258 Cal.App.2d 829, 837, 66 Cal. Rptr. 134 (1968) (affidavit which alleged that requested documents were "necessary to prove allegations of the complaint" was insufficient to meet materiality requirement); Flora Crane Service, Inc. v. Superior Court, 234 Cal. App.2d 767, 787 (1965) (affidavit must show the requested documents are relevant to an issue in the case not merely to the subject matter of the action).

B. The Affidavit Fails To Allege Good Cause

Good cause is a separate and distinct requirement for issuance of a Subpoena Duces Tecum. With regard to good cause, the affidavit in this case alleges only that:

> Said records and documents cannot be obtained from any other source known to plaintiff.

Such an averment does not constitute good cause within the meaning of CCP Section 1985. In People ex rel Department of Public Works v. Younger, 5 Cal.App.3d 575, 580, 86 Cal. Rptr. 237 (1970) the court granted a motion to quash where the only allegation of good cause was that the requested information was "not available from any other source". The court further held that the good cause requirement could not be met by an affidavit which was totally devoid of any statement of facts. Similarly, in Seven-Up Bottling Co. v. Superior Court, 107 Cal.App.2d 75, 77 (1951) the court rejected as insufficient to meet the good cause requirement an affidavit that alleged merely that the witness to whom the subpoena was directed was the only one who could establish facts material to the complaint.

The foregoing cases are in accord with California Code of Civil Procedures Section 2036(a) which states in pertinent part:

> A party required to show "good cause" to obtain discovery under any provision of Chapter 2 (commencing with section 1985) . . . shall show specific facts justifying discovery and that the matter is relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added).

As the Johnson court noted in the passage quoted above, conclusory allegations are insufficient to meet the requirements of good cause for the issuance of a Subpoena Duces Tecum. Nor is the mere hope of discovering favorable information sufficient good cause to warrant the issuance of a Subpoena Duces Tecum.

II.

THIS COURT LACKS JURISDICTION TO ORDER PRODUCTION OF THE SUBPOENAED RECORDS BY REASON OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES

A. A Subpoena Duces Tecum Is A "Suit" For The Purpose Of Asserting A Claim Of Sovereign Immunity

Where the United States is a party to a lawsuit, a state court may apply its discovery rules to the United States because the consent of the United States to suit is a waiver of sovereign immunity which encompasses submission to discovery under the rules of the forum. Where, however, the United States is not a party to the lawsuit, it is absolutely immune from judicially directed discovery absent some waiver of sovereign immunity. In Civiletti v. Municipal Court, 116 Cal.App.3d 105, 174 Cal. Rptr. 83 (1981), a defendant in a murder prosecution issued a Subpoena Duces Tecum to the Attorney General of the United States requiring him to appear and produce documents which both parties assumed in their briefs to consist of official records of the United States Departmen of Justice. Noting the applicability of federal regulations

contained in the Code of Federal Regulations the court stated:

> An attempt to compel compliance with either subpoena by the Attorney General founders like the Titanic on the hard rock of sovereign immunity. . . .
>
> . . . .
>
> The Doctrine of Sovereign Immunity prohibits any sort of judicial action against the United States in the absence of its consent, a consent usually manifested by legislation. No such consent is asserted herein.
>
> Regarding 'the power . . . to issue subpoenas to compel the attendance of witnesses and the production of documents, and to punish by fine and imprisonment' in United States v. McCleod, supra, 385 F.2d at pg. 752, the opinion notes that "'when this power is asserted by a state sovereignty over the federal sovereignty, it is in contravention of our dual form of government and in derogation of the powers of the federal sovereignty. The state having the power to subpoena may abuse that power . . . . This power could embarrass, impede and obstruct the administration of a federal agency.'"

Id. at 109-10, 172 Cal. Rptr. at 86.

The holding in Civiletti is supported by the broad definition which was early given to the term "suit". As the United States Supreme Court noted in Westen v. City Counsel of Charleston, 2 PET. 447, 464 (1829):

> The term [suit] is a very comprehensive one, and . . . [applies] . . . to any proceeding in a court . . . by which an individual pursues that remedy in a court . . . which the law affords him. The modes of proceedings may be various, but if a right is litigated between parties in a court . . . the proceeding by which the decision of the court is sought, is a "suit".

More recently, the New Jersey Supreme Court has ruled that a proceeding to enforce a Subpoena Duces Tecum is a "suit":

> Proceeding against a third party for the production of documents, whether the proceeding originates by subpoena or some more plenary process becomes a "suit" in every real sense when a third party disputes the right asserted.

State v. Murphy, 175 A2d 622, 629 (1961). Other courts have clearly held that a subpoena is "judicial process". Hunt Foods Industries, Inc. v. FTC, 286 F.2d 803, 809 (9th Cir. 1961). See United States v. Owlett, 15 F. Supp. 736 (D. Pa. 1936).

Where the object of the subpoena is to obtain official information belonging to the United States, such a subpoena is, both in fact and in law a "suit" against the United States.

B. The United States Has Not Waived Sovereign Immunity

Commencing with 40 C.F.R. Section 2.100, Federal Regulations set forth an extensive procedure by which a private individual may obtain EPA records. Such regulations set forth to whom the requests should be made, the time limitations applicable to such requests and the requesting party's rights in the event of denial. Court action is authorized only in the event of a denial and, in such cases, jurisdiction is vested solely in the federal district courts.

Such regulations constitute a limited waiver of sovereign immunity which cannot be expanded to permit a general authorization to obtain government documents by any means.

It has long been recognized that the United States may rely on

federal regulations to refuse to supply information pursuant to a Subpoena Duces Tecum. In United States ex rel. Touhy v. Ragen, 340 U.S. 462, 71 S. Ct. 416 (1950), the United States Supreme Court upheld the right of the Attorney General to order his subordinates of the Department of Justice to refuse to obey a Subpoena Duces Tecum ordering the production of certain papers in the possession of the Department. The Court stated:

> When one considers the variety of information contained in the files of any government department and the possibility of harm from unrestricted disclosure in court, the usefullness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious.

Id. at 468, 71 S. Ct. at 419

Lower federal courts have consistently recognized the validity of this rule. In Colonial Savings and Loan Association v. St. Paul Fire & Marine Ins. Co., 89 F.R.D. 481 (E.D. Pa. 1980), the court affirmed the right of Federal Home Loan Board to refuse disclosure under 12 C.F.R. 505.5(b). The Court there cited with approval Marcoux v. Mid States Live Stock, 66 F.R.D. 573 (W.D. Mo. 1975), in which similar regulations of the Comptroller of the Currency were upheld. In Saunders v. Great Western Sugar Co., 396 F.2d 794 (10th Cir. 1968), similar regulations of the Small Business Administration were upheld.

The applicability of Touhy and its progeny was recognized by the California Supreme Court in People v. Parham, 60 Cal.2nd 378, 33 Cal Rptr. 497 (1963). In that case, an FBI agent refused to

produce records pursuant to a Subpoena Duces Tecum basing his refusal on the then existing Executive Order which prohibited such disclosure. The Court found the Order valid and applicable in the courts of California.

Since Parham, California Courts have consistently recognized that a Subpoena Duces Tecum directed to the FBI or other governmental agency cannot force an agent to testify or produce documents beyond the scope allowed by the Attorney General. In In re Pratt, 112 Cal.App.3d 795, 881, 170 Cal. Rptr. 80, the court relied on Parham to quash a subpoena directed to the FBI holding that the C.F.R. regulations regarding discovery of testimony and documents in the possession of the Department of Justice had the force and effect of law and that the trial court was bound by the Executive Order and could not hold the agency or agency in contempt. See also, People v. Cowans, 111 Cal App. 3d 121, 168 Cal. Rptr. 498 (1980); Civiletti v. Municipal Court, 116 Cal.App.3d 105, 174 Cal. Rptr. 83 (1981).

The foregoing cases confirm the applicabililty of the requirements and limitations set forth in 40 C.F.R. Section 2.100 et. seq. Because petitioner has not complied with these requirements this Court has no power to compel disclosure of the requested infomration.

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III.

PRODUCTION OF THE REQUESTED DOCUMENTS IS PROHIBITED BY THE FREEDOM OF INFORMATION ACT (5 U.S.C. SECTION 552(b) AND BY THE PRIVACY ACT (5 U.S.C. SECTION 552a(b)(11)

A. The Freedom Of Information Act

Title 40 Section 2.118 of the Code of Federal Regulations incorporates the Freedom Of Information Act into its authorized exemptions and states in pertinent part:

> No request under 5 U.S.C. 552 for an existing, located record in EPA's possession shall be denied by any EPA office or employee unless the record contains (or its disclosure would reveal) matters that are
> . . . .
>
> (3) Specifically exempted from disclosure by statute (other than 5 U.S.C. (b): Provided, That such statute:
>
> (i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
>
> (ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) Trade secrets and commercial or financial information obtained from a person and priviledge or confidential (c Subpart B);
>
> . . . .
>
> (7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would; (a) interfer with enforcement proceedings . . . ; (e) disclose investigative techniques and procedures . . .;

As set forth in the declaration of Harry Seraydarian, attached hereto as Exhibit B, subsections (4) and (7) are both implicated by plaintiffs' subpoena of EPA records although, with regard to subsection (4), the United States defers to counsel for CH2M Hill

With regard to subsection (3), if the subpoenaed documents contain confidential business data which CH2M Hill considers to be of a proprietary nature, the disclosure of such documents may be prohibited by the Privacy Act as more fully set forth in the next section.

The meaning of subsection (7) is clear. As the court noted in Bristol-Myers Co. v. Federal Trade Commission, 424 F.2d 935, 939 (D.C. Cir. 1970), cert. denied, 400 U.S. 824 (1970):

> Congress intended to limit persons charged with violation of the Federal Regulatory Statutes to the discovery available to persons charged with violations of federal criminal law. The exemption prevents a litigant from using [the Freedom Of Information Act] to achieve indirectly any earlier or greater access to investigatory files than he would have directly.

Therefore, as previously noted, plaintiffs' subpoena duces tecum constitutes an improper attempt to obtain early discovery of possible enforcement action by the Environmental Protection Agency.

B. The Privacy Act

To the extent that plaintiffs' subpoena duces tecum encompenses confidential business data which CH2M Hill considers to be of a proprietary nature, disclosure of such documents may be prohibited by the Privacy Act (5 U.S.C. Section 552a(b)) which provides in pertinent part:

> No agency shall disclose any records which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written request of, the individuals to whom the record pertains, unless disclosure of the record would be

> (11) pursuant to the Order of a court of competent jurisdiction.

Subpoenas may be issued by an attorney without prior court authorization. Issuance of the subpoena is a ministerial act performed by the court clerk, the legal sufficiency of which is decided by the court at a later time, if challenged. Johnson v. Superior Court, 258 Cal.App.2d 829, 835, 66 Cal. Rptr. 134 (1968).

It appears that the only exception to 5 U.S.C. Section 552a(b) which is arguably applicable to petitioners' document request is subsection (11). Subsection (11) is not applicable, however, for the reason that an attorney-issued subpoena is not a court order within the meaning of that section. In Stiles v. Atlanta Gas Light Co., 453 F. Supp. 798, 800 (N.D. Ga. 1978), the court stated:

> Section 552a(b)(11) provides for those cases in which, for compelling reasons, the court specifically directs that a record be disclosed. Mere issuance in discovery proceedings of a subpoena - which is always subject to the power of the court to quash or limit - does not meet this standard. [Citation omitted] To so hold would permit precisely the type of privacy invasion the Act sought to prevent. (Emphasis in original).

Because petitioner has not requested an order of this court pursuant to Section 552a(b)(11), production of the requested documents should not be required. Even if petitioner were to request such an order, however, such a request should not be granted for the reason that petitioner has failed to meet the good cause and materiality requirements for the subpoena of such documents.

IV.

CONCLUSION

Because CH2M Hill is an agent of the United States for the purpose of its investigation of Iron Mountain Mines, the United States has standing to challenge the subpoena issued herein. That subpoena should be quashed on the grounds that (1) the affidavit in support of the subpoena duces tecum is insufficient in that it fails to allege that the requested documents are material to the lawsuit for which production is requested and that good cause exists for their production; (2) the court lacks jurisdiction to order production of the subpoenaed records by reason of the sovereign immunity of the United States; and (3) release of the subpoenaed information is prohibited by the Freedom Of Information Act and by the Privacy Act. Therefore the United States respectfully requests this court issue an order quashing the subpoena duces tecum served on CH2M Hill by plaintiffs herein.

DATED: 3/18/85

DONALD B. AYER
United States Attorney

By R. STEVEN LAPHAM
R. STEVEN LAPHAM
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 86-Z-1033

BRODERICK INVESTMENT CO.,

Plaintiff,

vs.

HARTFORD ACCIDENT & INDEMNITY CO.,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION
OF THE UNITED STATES ENVRIONMENTAL PROTECTION AGENCY
TO QUASH SUBPOENAS

INTRODUCTION

The United States Environmental Protection Agency ("EPA") seeks to quash subpoenas served on EPA by a litigant in this private lawsuit, to which EPA is not a party. Specifically, EPA contends that (1) under the doctrine of United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), the EPA employees cannot be compelled to testify, since the employees have not been authorized to testify under applicable EPA regulations, and (2) the caselaw in this context holds that subpoena enforcement proceedings are actions against the United States that are barred by the government's sovereign immunity. For both these reasons, the subpoenas should be quashed.

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Dated: October 13, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 86-Z-1033

BRODERICK INVESTMENT CO.,

Plaintiff,

vs.

HARTFORD ACCIDENT & INDEMNITY CO.,

Defendant.

MOTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO QUASH SUBPOENAS

Two employees of the United States Environmental Protection Agency ("EPA"), Elisabeth Evans and Vera Moritz, as well as an unnamed Custodian of Records of the EPA Denver Regional Office, were served with subpoenas commanding them to testify at the trial in the above-captioned case. For the reasons set forth in the attached Memorandum in Support of Motion of the United States Environmental Protection Agency to Quash Subpoenas, and pursuant to Fed. R. Civ. P. 45, EPA hereby moves to quash the trial subpoenas served upon Ms. Evans, Ms. Moritz, and the Custodian of Records.

Respectfully submitted,

RICHARD B. STEWART
Assistant Attorney General

FACTUAL BACKGROUND

This subpoena matter arises in the above-captioned private civil action pending before this Court. As EPA understands the underlying litigation, Broderick Investment Company and others (collectively, "Broderick") have sued Hartford Accident & Indemnity Company ("Hartford"), seeking a declaratory judgment that Hartford should be held liable under the terms of an insurance policy for costs incurred by Broderick in investigating and cleaning up a hazardous waste site (the Broderick Wood Products site). See Letter from Susan T. Smith of Pryor, Carney and Johnson, representing Hartford, to Jonah Staller, Assistant Regional Counsel, EPA, attached hereto as Attachment A. Broderick is undertaking these response costs pursuant to the terms of a Consent Decree into which it entered with EPA. See United States v. Broderick Investment Co., et al., Civil Action No. 86-Z-369.

In response to Freedom of Information Act requests, EPA provided Hartford with extensive material from its files relating to the site. Hartford apparently believes that these files contain "admissions against interest" by Broderick that would tend to disprove Hartford's liability under the terms of the insurance policy. See Attachment A. Consequently, Hartford indicated in its October 2 letter that the insurance company would be requesting the testimony of several EPA employees to obtain "confirmation of factual representations made and recorded

by EPA investigators" and to "lay appropriate foundation for the admission of EPA documents . . . . Id. at 2.

Meanwhile, on September 28, 1989, and October 3, 1989, this Court issued trial subpoenas to EPA employees Elisabeth Evans and Vera Moritz and to an unnamed Custodian of Records of the EPA Denver Regional Office. Copies of the subpoenas are attached hereto as Attachment B. These subpoenas were served on EPA during the weeks of October 2 and October 9, 1989 and commanded the recipients to appear and testify before this Court on October 16, 1989. [1]

EPA responded to Hartford's October 2 letter requesting the testimony of Ms. Evans, Ms. Moritz, and a custodian of records in a letter dated October 11, 1989. See Letter from Thomas A. Speicher, Regional Counsel, to Susan T. Smith, attached hereto as Attachment C. The Regional Counsel noted that EPA regulations codified at 40 C.F.R. Part 2, Subpart C govern the testimony of EPA employees in private litigation. A copy of these regulations is attached hereto as Attachment D. Under these regulations, the Regional Counsel noted, no EPA employee may testify about information acquired during the course of performing official duties unless the Agency's General Counsel or his designee determines that such testimony "would clearly be in the interests of EPA." 40 C.F.R. § 2.404(a). As the General Counsel's

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[1] Pursuant to agreement of counsel, the return date of these subpoenas was later postponed to October 20, 1989, in order to permit sufficient time for the parties to brief and the Court to consider the instant motion to quash.

designee, the Regional Counsel concluded in this case that the requested testimony would not clearly be in the interests of EPA. Attachment C at 1.

In explaining this determination, the Regional Counsel explained the "overriding concern" that Agency employees would "be diverted from their official duties." Id. He noted that Ms. Evans, as a remedial project manager, is presently engaged in important duties managing the investigation and cleanup of the California Gulch Superfund site near Leadville, Colorado. Id. at 2. The Regional Counsel further explained that as a staff engineer, Ms. Moritz oversees the investigations and preliminary assessments of potential Superfund sites. Id. Finally, the Regional Counsel added, the Custodian of Records is responsible for overseeing the production of Administrative Records for Superfund sites, "a task critical to the Superfund enforcement process." Id.

Although the Regional Counsel recognized that the time required for any one employee to testify in private litigation might not be great, he concluded that "the cumulative disruption to EPA's mission would be severe if EPA employees had to testify in private litigation every time requested." Id. In this regard, the Regional Counsel noted that "[p]rivate litigation which relates to EPA's activities is common[,] and private litigants often seek testimony from EPA employees." Id. Consequently, the Regional Counsel concluded that "EPA must be circumspect in evaluating requests for employee testimony." Id.

Despite these compelling considerations, the Regional Counsel was not unmindful of the public interest in the fair adjudication of private lawsuits. Thus, the Regional Counsel expressed a willingness to provide Hartford with authenticated copies of the documents referenced in Hartford's October 2 letter, in accordance with the procedures set forth at 40 C.F.R. § 2.406. Attachment C at 2. It is EPA's understanding that Hartford has accepted the Agency's offer to provide such authenticated documentary evidence. [2] Nevertheless, Hartford has declined to withdraw its trial subpoenas voluntarily, thereby necessitating the filing of the instant motion to quash.

ARGUMENT

I. The Subpoenas Must Be Quashed Because No EPA Employee is Authorized to Testify.

EPA regulations, authorized by 5 U.S.C. § 301 and codified at 40 C.F.R. Part 2, Subpart C (Attachment D), set forth the procedures that EPA employees are required to follow when they are subpoenaed to testify in a private action about information that they have acquired in the course of their official duties. See 40 C.F.R. § 2.401. These regulations serve several purposes, among which are ensuring that EPA employees' official time is used only for official purposes and maintaining the impartiality of EPA in private litigation. 40 C.F.R. § 2.401(c). See Boron Oil Co. v. Downie, 873 F.2d 67, 69 (4th Cir. 1989); Davis

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[2] This documentary evidence would therefore appear to be admissible in this lawsuit. See Fed. R. Evid. 803(8) and 901(7).

Enterprises v. EPA, 877 F.2d 1181, 1184 (3d Cir. 1989). When an EPA employee is subpoenaed in a private action, he must immediately send a copy of the subpoena to the EPA General Counsel or his designee. 40 C.F.R. § 2.404(a). The General Counsel or his designee (here, Mr. Speicher, the Regional Counsel) then makes a determination "whether compliance with the subpoena would clearly be in the interests of EPA." Id. If the General Counsel or his designee determines that compliance would not clearly be in the Agency's interests, the employee must respectfully refuse to testify. 40 C.F.R. § 2.404(b).

Regulations similar to those in 40 C.F.R. Part 2, Subpart C were upheld by the United States Supreme Court in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) ("Touhy"). Relying on its earlier decision in Boske v. Comingore, 177 U.S. 459 (1900), the Supreme Court in Touhy held that a local FBI agent could not be found in contempt of court for refusing to produce subpoenaed documents when such refusal was based on a Department of Justice regulation prohibiting disclosure of non-public documents without the authorization of the Attorney General. 340 U.S. at 468. The Supreme Court concluded that the Attorney General's regulation was valid and that the employee had properly refused to produce the requested papers:

> When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious.

Id.

This Court has consistently followed the Touhy holding that a federal employee cannot be compelled to obey a subpoena issued in a private action to which the government is not a party when the employee's superiors determine, in accordance with the procedures set forth in the agency's regulations, that he should not comply. See, e.g., Boatright v. Radiation Sterilizers, Inc., 592 F. Supp. 1314, 1315 (D. Colo. 1984); Smith v. C.R.C. Builders Co., Inc., 626 F. Supp. 12, 13-14 (D. Colo. 1983). Likewise, the United States Court of Appeals for the Tenth Circuit has regularly adhered to the Touhy principle. See Saunders v. Great Western Sugar Co., 396 F.2d 794 (10th Cir. 1968) (vacating district court order compelling employees of the Small Business Administration to comply with subpoenas issued by that court); United States Steel Corp. v. Mattingly, 663 F.2d 68 (10th Cir. 1980) (holding under Touhy and Saunders that the district court erred in compelling enforcement of a subpoena directed against an employee of the Bureau of Standards).

Recently, the United States Court of Appeals for the Fourth Circuit followed Touhy and its progeny in reversing a federal district court order compelling an EPA employee to appear and testify in a private action to which the government was not a party. Boron Oil Co. v. Downie, 873 F.2d at 69-70 (citing, inter alia, this Court's decision in Smith v. C.R.C. Builders Co.). The Fourth Circuit noted that

> Touhy is part of an unbroken line of authority which directly supports [the EPA employee's] contention

> that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations.

873 F.2d at 69. Indeed, the Fourth Circuit added, EPA has "a valid and compelling interest" in keeping its employees "free to conduct their official business without the distractions of testifying in private civil actions in which the government has no genuine interest." Id. at 71. Taking note of the "current explosion in environmental litigation," the court echoed the concerns expressed by the Regional Counsel in the present case, cautioning EPA

> that a strict adherence to its internal regulations is essential if it is to be successful in preventing its expert employees from being targeted as potential witnesses in private actions.

Id. at 72.

The strong public policy behind the Touhy doctrine was further explained in another recent case in which a federal court quashed subpoenas directed to EPA employees. Environmental Enterprises, Inc. v. EPA, 664 F. Supp. 585 (D.D.C. 1987). There, the United States District Court for the District of Columbia explained:

> If . . . courts could so easily subpoena federal officials, the officials might find themselves spending all of their time doing nothing but complying . . . and thus they would have little opportunity to pursue their important governmental responsibilities. Indeed, I believe the EPA regulations . . . are conscientiously designed . . . to balance the work of the agency with the desire to cooperate as much as possible with local proceedings.

Id. at 586.

Similar concerns were expressed by the district court in Massachusetts in denying motions to compel the testimony of employees of the Occupational Safety and Health Administration ("OSHA"):

> Because of the nature of the programs it administers and enforces, OSHA is particularly vulnerable to the demands of private parties seeking information acquired as a result of official investigations concerning industrial accidents and other mishaps in the workplace. If OSHA employees were routinely permitted to testify in private civil suits, significant loss of manpower hours would predictably result.

Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290 (D. Mass. 1982). See also Hotel Employees-Hotel Association Pension Fund v. Timperio, 622 F. Supp. 606, 607 (S.D. Fla. 1985) (quashing trial subpoenas served upon Department of Labor employees in private litigation where the agency had determined, under its regulations, that in light of "the limited agency resources available to carry out the agency's congressionally mandated duties, the overall public interest would be served in this case by refraining from becoming involved in private litigation").

Numerous other courts have also followed Touhy in holding that a federal employee cannot be compelled to obey a subpoena when the employee is prohibited from testifying under the agency's regulations. See, e.g., Swett v. Schenk, 792 F.2d 1447, 1451-52 (9th Cir. 1986); Giza v. Secretary of Health, Education & Welfare, 628 F.2d 748, 751 (1st Cir. 1980). See also United States v. Bizzard, 674 F.2d 1382, 1387 (11th Cir.) (rejecting constitutional challenge to Department of Justice's Touhy

regulations), cert. denied, 459 U.S. 973 (1982); Cates v. LTV Aerospace Corp., 480 F.2d 620, 623 (5th Cir. 1973) (in accordance with Touhy, Navy regulations were "designed to centralize the determination of whether a subpoena duces tecum will be obeyed or challenged on the grounds of privilege"); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600, 602 n.2 (5th Cir. 1966) ("Supreme Court recognized the validity of the 'housekeeping' function" in Touhy). As the Ninth Circuit explained in Swett, "the Touhy doctrine is jurisdictional" and precludes enforcement against a federal employee of an order compelling him to testify, regardless of the agency's reasons for precluding his testimony. 792 F.2d at 1452 (emphasis added).

Since the Regional Counsel's determination not to permit the subpoenaed employees to testify was consistent with validly promulgated EPA regulations, see 40 C.F.R. §§ 2.401(c), 2.404(a), it must be upheld under Touhy. Accordingly, this Court should quash the three trial subpoenas served upon EPA's employees.

II. The Subpoenas Should Be Quashed in the Absence of a Waiver of Sovereign Immunity to the Extent That They Constitute a Legal Proceeding Against the United States.

The United States and its agencies are immune from suit except to the extent that there has been an express waiver of sovereign immunity. See, e.g., Block v. North Dakota, 461 U.S. 273, 287 (1983); United States v. Testan, 424 U.S. 392, 399 (1976); Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 734 (1982). Several courts have held that the doctrine of

sovereign immunity applies to circumstances similar to those present here. In Environmental Enterprises, Inc. v. EPA, a case precisely on point, the district court quashed the contested subpoenas, finding that the United States had not waived its sovereign immunity. 664 F. Supp. at 586. The court saw "obvious merit to the argument that federal officers should not be subpoenaed to testify in . . . proceedings of which they are not parties without their approval." Id. Similarly, in Boron Oil Co. v. Downie, 873 F.2d at 71, the Fourth Circuit held that "subpoena proceedings fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign." See Davis Enterprises v. EPA, 877 F.2d at 1186 (noting that in Boron a "sovereign immunity theory" was a "basis for the court's decision").

Likewise, in Nationwide Investors v. Miller, 793 F.2d 1044 (9th Cir. 1986), the Ninth Circuit affirmed the dismissal of a garnishment action in which the testimony of a non-party federal employee had been ordered. The court held that since the United States had not waived its sovereign immunity, the district court "lacked jurisdiction over the action against the federal officer." Id. at 1048. See also Reynolds Metals Co. v. Crowther, 572 F. Supp. at 290 (invoking the sovereign immunity doctrine to dismiss a contempt proceeding against two OSHA employees who, pursuant to instructions from their superiors, refused to comply with subpoenas in a private civil action); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (absent a

waiver of sovereign immunity, federal officers cannot be subpoenaed to testify before a state grand jury).

In short, there is now a substantial body of law establishing that the doctrine of sovereign immunity precludes federal employees from being compelled to testify about their official duties in private actions to which the United States is not a party. Since there has been no waiver of sovereign immunity here, the three subpoenas served upon EPA Region VIII must be quashed because this Court lacks jurisdiction to enforce them. [3]

CONCLUSION

For the reasons stated above, the trial subpoenas issued by this Court on September 28, 1989 and October 3, 1989 to employees of EPA Region VIII should be quashed in their entirety.

Respectfully submitted,

RICHARD B. STEWART
Assistant Attorney General

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[3] To the extent that Hartford seeks to challenge the substance of the Regional Counsel's determination not to permit EPA employees to testify, that determination may be challenged only in a separate action brought pursuant to the Administrative Procedure Act. See Davis Enterprises v. EPA, 877 F.2d at 1184-86. Only if the Regional Counsel's decision were challenged and set aside in such an action would these EPA employees be free to comply with the subpoenas.

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