



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGIONS 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

SEP 13 2007

REPLY TO THE ATTENTION OF:

LU-9J

**CERTIFIED MAIL: 7001 0320 0006 1458 8481**  
**RETURN RECEIPT REQUESTED**

Jeff O'Connell  
Vice President  
Bway Corporation  
8200 Broadwell Road  
Cincinnati, Ohio 45244

RE: RCRA 3008(h) Consent Order  
Bway Corporation  
Cincinnati, Ohio  
OHD 004 253 225 **RCRA-05-2007-0011**

Dear Mr. O'Connell:

I am enclosing a fully executed copy of the 3008(h) Administrative Order on Consent covering the completion of the corrective action work at the subject facility. This performance-based agreement will provide the flexibility that you need to complete the work expeditiously. In addition, we expect that it will lead to better communication between our two organizations and the public. We look forward to working cooperatively with your staff on this project.

In accordance with Section V of the agreement, I am hereby designating Jennifer Dodds as the U.S. EPA project manager for this project. If you have any questions, please contact her at (312) 886-1484.

Sincerely,

A handwritten signature in black ink, appearing to read "Jose G. Cisneros".

Jose G. Cisneros, Chief  
Remediation and Reuse Branch

Enclosure

cc: Jeffery Trevino

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

IN THE MATTER OF:	)	ADMINISTRATIVE ORDER
	)	ON CONSENT
Bway Corporation	)	
8200 Broadwell Road	)	US EPA Docket No. <u>RCRA-05-2007-0011</u>
Cincinnati, Ohio 45244	)	
	)	
EPA ID#: OHD 004 253 225	)	Proceeding under Section 3008(h) of the
	)	Resource Conservation and Recovery Act,
Respondent.	)	as amended, 42 U.S.C. § 6928(h)

RECEIVED  
REGIONAL HEARING CLERK  
US EPA REGION 5  
2007 FEB 14 AM 11:11

**I. JURISDICTION**

1. The Administrator of the United States Environmental Protection Agency ("U.S. EPA") is issuing this Administrative Order on Consent ("Order") to Bway Corporation ("Bway") under Section 3008(h) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6928(h). The Administrator has delegated the authority to issue orders under Section 3008(h) of RCRA to the Chief, Remediation and Reuse Branch; Land and Chemicals Division; U.S. EPA Region 5.

2. Bway currently operates a metal container manufacturing facility located at 8200 Broadwell Road, Cincinnati, Ohio (the "Facility"). The Facility is located approximately ten miles east of Cincinnati, Ohio, and is about one-half mile south of the Little Miami River. Bway began operating the Facility in 1996. Bway manufactures metal containers from sheets of steel at the facility. Bway began that process in or about October 1996. Bway understands that prior owners of the Facility manufactured three-piece cans at the Facility since approximately 1958. Bway understands that a prior owner of the Facility manufactured two-piece cans at the Facility from 1973 until approximately July 1989.

3. Bway agrees not to contest U.S. EPA's jurisdiction to issue this Order, to enforce its terms, or to impose sanctions for violations of the Order.

4. Bway waives any right to request a hearing on this matter pursuant to Section 3008(b) of RCRA and 40 C.F.R. Part 24, and consents to the issuance of this Order without a hearing under Section 3008(b) of RCRA as a Consent Order issued pursuant to Section 3008(h) of RCRA.

**II. DEFINITIONS**

5. This Order incorporates the definitions in RCRA, 42 U.S.C. §§ 6901 - 6922k, and the regulations promulgated under RCRA unless otherwise specified.

### III. PARTIES BOUND

6. This Order applies to and binds U.S. EPA, Bway and its agents, successors, assignees, trustees, receivers, and all persons acting for or on behalf of Bway. Bway will be responsible for and liable for any violations of this Order, regardless of Bway's use of employees, agents, contractors, or consultants to perform work required by this Order. To the extent that Bway uses employees, agents, contractors or consultants to perform work required by this Order, Bway shall inform such persons of the contents of this Order.

7. No change in ownership or corporate or partnership status relating to the Facility will alter Bway's obligations under this Order. Any conveyance of title, easement, or other interest in the Facility, or a portion of the Facility, will not affect Bway's obligations under this Order. Bway will give written notice of this Order to any successor in interest prior to transferring ownership or operation of the Facility or a portion thereof and will notify U.S. EPA in writing within fourteen (14) days of the transfer. This written notice will describe how Bway has assured that, despite the transfer, all institutional controls required now or in the future for the Facility will be implemented and maintained. This paragraph will not apply if U.S. EPA and Bway agree that this Order has terminated as to the Facility or any relevant portion of the Facility.

### IV. DETERMINATIONS

8. After consideration of the Administrative Record, the Chief, Remediation and Reuse Branch; Land and Chemicals Division; U.S. EPA Region 5 has made the following conclusions of law and determinations:

- a. Bway is a "person" within the meaning of Section 1004(15) of RCRA.
- b. Bway is the owner or operator of a facility that has operated under interim status subject to Section 3005(e) of RCRA.
- c. Certain wastes and constituents found at the Facility are hazardous wastes and/or hazardous constituents pursuant to Section 1004(5), 3001 of RCRA and 40 C.F.R. Part 261.
- d. There is or has been a release of hazardous wastes or hazardous constituents into the environment from the Facility.
- e. The actions required by this Order are necessary in order to protect human health or the environment.
- f. U.S. EPA has determined, in its sole discretion, that Bway is a responsible entity with sufficient technical ability and resources to proceed on an expedited basis under an Order on Consent for the work described herein.

## V. PROJECT MANAGER

9. EPA and Bway must each designate a Project Manager and notify each other in writing of the Project Manager selected within fourteen (14) days of the effective date of this Order. To the extent practicable, all communications between EPA and Bway, and all documents, reports, approvals, and other correspondence concerning the activities undertaken pursuant to this Agreement, shall be directed through the Project Managers. Each Project Manager will be responsible for overseeing the implementation of this Project. The parties must provide prompt written notice whenever they change Project Managers.

## VI. WORK TO BE PERFORMED

10. Pursuant to Section 3008(h) of RCRA, Bway agrees to and is hereby ordered to perform the actions specified in this section, in the manner and by the dates specified here. Bway represents that it has the technical and financial ability to carry out an investigation and corrective action at the Facility. Bway must perform the work undertaken pursuant to this Order in compliance with RCRA and other applicable federal and state laws and their implementing regulations, and consistent with all relevant U.S. EPA guidance documents as appropriate to the Facility. This guidance includes, but is not limited to, the Documentation of Environmental Indicator Determination Guidance, and relevant portions of the Model Scopes of Work for RCRA Corrective Action and of U.S. EPA's risk assessment guidance.

11. Bway will complete activities necessary to identify and define the nature and extent of releases of hazardous waste and/or hazardous constituents at or from the Facility. This includes:

- a. Historical Data Facility Condition. Prior to the date of this Order, Bway and/or its predecessors at the Facility have voluntarily completed several Facility investigation activities at SWMUs identified in the "Final Preliminary Review/Visual Inspection Report (the "Report") dated August 1989 to identify and define the nature and extent of potential releases of hazardous waste and hazardous constituents at and from the Facility. Within thirty (30) days after the effective date to this Order, Bway shall provide to EPA copies of all reports available to Bway that provide information on current and historic site conditions, and the results of prior Facility investigation activities.
- b. Current Conditions Report. Provide to U.S. EPA, within 60 days after the effective date of this Order, a brief Current Conditions Report that includes any recent sampling data from the Facility and a summary of the historic operations and physical setting of the Facility. The Current Conditions Report will describe, at a minimum, conditions at all locations specified in the report "Final Preliminary Review Visual Site Inspection Report" for the Diamond International, Heekin Can Company Division, Broadwell Road Facility, Cincinnati, Ohio (8/89) and any other past or present locations at the Facility for which Bway knows of past treatment, storage, or disposal of hazardous waste or hazardous constituents.

- c. Environmental Indicator Reporting. Bway will perform an investigation to identify the nature and extent of any releases of hazardous waste and/or hazardous constituents at or from the Facility which may pose an unacceptable risk to human health and the environment and provide a report to U.S. EPA. The report must also describe the nature and extent of any releases of hazardous waste and/or hazardous constituents at or from the Facility which do not pose an unacceptable risk to human health and the environment, and provide the basis for those conclusions, including an evaluation of the risks. Bway may prepare and submit the report in phases to provide timely support for the demonstrations described in paragraph 13, below, and for the determinations and proposal described in paragraph 15, below. EPA may require Bway to perform additional investigative measures if EPA concludes that such measures are required for a full assessment of the conditions at the Facility. The Environmental Indicator Report shall be submitted on or before December 31, 2008.
12. Bway may proceed with remedial actions to limit site investigation or risk assessment activities to complete the work as defined in paragraphs 13 through 15, below.
  13. Bway will demonstrate by 12/31/2008, through submitting an Environmental Indicators Report and by performing any other necessary activities, consistent with this Section, that:
    - a. All current human exposures to contamination at or from the Facility are under control, except to the extent that Bway establishes that such contamination originates from some place other than the Facility as a result of off-site migration. That is, significant or unacceptable exposures do not exist for all media known or reasonably suspected to be contaminated with hazardous wastes or hazardous constituents above risk-based levels, for which there are complete pathways between contamination and human receptors.
    - b. Migration of contaminated groundwater at or from the Facility is stabilized, except to the extent that Bway establishes that such contamination originates from some place other than the Facility as a result of off-site migration. That is, the migration of all groundwater known or reasonably suspected to be contaminated with hazardous wastes or hazardous constituents above acceptable levels is stabilized to remain within any existing areas of contamination as defined by monitoring locations designated at the time of the demonstration. In addition, any discharge of groundwater to surface water is either insignificant or shown to be currently acceptable according to an appropriate interim assessment. Bway will collect monitoring and measurement data in the future as necessary to verify that migration of any contaminated groundwater is stabilized.
  14. To prepare for and provide the demonstrations required by paragraph 13, above, Bway will:
    - a. Determine appropriate risk screening criteria under current use scenarios and provide the basis and justification for the use of these criteria.

- b. Determine any current unacceptable risks to human health and the environment and describe why other identified risks are acceptable.
- c. Control any unacceptable current human exposures that are identified. This may include performing any corrective actions or other response measures (“Corrective Measures”) necessary to control current human exposures to contamination to within acceptable risk levels.
- d. Stabilize the migration of contaminated groundwater. This may include implementing any Corrective Measures necessary to stabilize the migration of contaminated groundwater.
- e. Conduct groundwater monitoring to identify the migration of contaminated groundwater and to confirm that any contaminated groundwater remains within the original area of contamination.
- f. Prepare a report, either prior to or as part of the Environmental Indicators Report, that describes and justifies any interim actions performed to meet the requirements of this Section, including sampling documentation, construction completion documentation and/or confirmatory sampling results.

15. Bway will propose to U.S. EPA by 6/30/2009 final Corrective Measures necessary to protect human health and the environment from all current and future unacceptable risks due to releases of hazardous waste or hazardous constituents at or from the Facility, except to the extent Bway establishes that such contamination originated from some place other than the Facility as a result of off-site migration, (the “Final Corrective Measures Proposal”). The proposal will describe all Corrective Measures implemented at the Facility since the effective date of this Order. It will also include a description of all other final corrective measures evaluated by Bway, a detailed explanation of why the proposed final Corrective Measures were preferred by Bway, and cost estimates for the final Corrective Measures evaluated. The proposal will also include a detailed schedule for construction and implementation of the final Corrective Measures, and for submittal of a Final Remedy Construction Completion Report. This schedule will provide that as much of the initial construction work as practicable within one year after U.S. EPA selects the final Corrective Measures and that all final Corrective Measures within a reasonable period of time such that human health and the environment are protected.

16. As part of the development of its proposal, Bway will propose appropriate risk screening criteria, cleanup objectives, and points of compliance under current and reasonably expected future land use scenarios and provide the basis and justification for these decisions.

17. U.S. EPA may request supplemental information from Bway if it determines that the proposal and supporting information do not provide an adequate basis for selection of final Corrective Measures that will protect human health and the environment from the release of hazardous waste and hazardous constituents at or from the Facility. Bway will provide such supplemental information in a timely manner as directed in writing by U.S. EPA.

18. U.S. EPA will provide the public with an opportunity to review and comment on its proposed final Corrective Measures, including a detailed description and justification for the proposal (the "Statement of Basis"). Following the public comment period, U.S. EPA will select the final Corrective Measures to be implemented by Bway, and provide notification of its decision and rationale in a "Final Decision and Response to Comments" ("Final Decision").

19. Upon notice by U.S. EPA, Bway will implement the final Corrective Measures selected in U.S. EPA's Final Decision in accordance with the schedule therein, subject to Section XI – Dispute Resolution.

20. Reporting and other requirements:

- a. Bway will establish a publicly accessible repository for information regarding site activities and conduct public outreach and involvement activities.
- b. Bway will provide quarterly progress reports to U.S. EPA by the fifteenth day of the month after the end of each quarter, provided, however, that the first such quarterly report shall not be due before October 15, 2007. The report must list work performed to date, data collected, problems encountered, project schedule, and percent project completed.
- c. The parties will communicate frequently and in good faith to assure successful completion of the requirements of this Order, and will meet on at least a semi-annual basis to discuss the work proposed and performed under this Order.
- d. Bway will provide a Final Remedy Construction Completion Report documenting all work Bway has performed pursuant to the schedule in U.S. EPA's Final Decision selecting the final Corrective Measures.
- e. If ongoing monitoring or operation and maintenance is required after construction of the selected final Corrective Measures, Bway will include an operations and maintenance plan in the Final Remedy Construction Completion Report. Bway will revise and resubmit the Report in response to U.S. EPA's written comments, if any, by the due dates specified by U.S. EPA. Upon U.S. EPA's written approval, Bway will implement the approved operation and maintenance plan in accordance with the schedule and provisions contained therein.
- f. Any risk assessments conducted by Bway must estimate human health and ecological risk under reasonable maximum exposure for both current and reasonably expected future land use scenarios. Risk assessments will be conducted in accordance with the Risk Assessment Guidance for Superfund (RAGS) or other appropriate U.S. EPA guidance. Bway will utilize appropriate, conservative screening values when screening to determine whether further investigation is required. Appropriate screening values include those derived from Federal Maximum Contaminant Levels (MCLs), U.S. EPA Region 9 Preliminary Remediation Goals (PRGs), U.S. EPA Region 5 Ecological

Screening Levels (ESLs formerly known as EDQLs), U.S. EPA Region 5 Risk Based Screening Levels (RBSLs), or RAGS.

- g. All sampling and analysis conducted under this Order will be performed in accordance with the Region 5 RCRA Quality Assurance Project Plan (QAPP) Policy (April 1998) as appropriate for the Facility, and be sufficient to identify and characterize the nature and extent of all releases as required by this Order. U.S. EPA reserved the right to audit laboratories selected by Bway or require Bway to purchase and have analyzed any Performance Evaluation (PE) samples selected by U.S. EPA which are compounds of concern. Bway will notify U.S. EPA in writing at least fourteen (14) days before beginning each separate phase of field work performed under this Order. At the request of U.S. EPA, Bway will provide or allow U.S. EPA or its authorized representative to take split or duplicate samples of all samples collected by Bway pursuant to this Order.

21. Project Managers can agree in writing to extend, for ninety (90) days or less, any deadline in this Section VI. However, extensions of greater than ninety (90) days require obtaining approval from the Chief of the Remediation and Reuse Branch; Land and Chemicals Division.

## VII. ACCESS

22. Upon reasonable notice, and at reasonable times, U.S. EPA, its contractors, employees, and any designated U.S. EPA representatives may enter and freely move about the Facility pursuant to this Order to, among other things: interview Facility personnel and contractors in the presence of a Bway representative; review Bway's progress in carrying out the terms of this Order; conduct tests, sampling, or monitoring as U.S. EPA deems necessary; use a camera, sound recording, or other documentary equipment; and verify the reports and data Bway submits to U.S. EPA. Bway will permit such persons to inspect and copy all non-privileged records, files, photographs, and documents, including all sampling and monitoring data that pertain to work undertaken under this Order and that are within the possession or under the control of Bway or its contractors or consultants. U.S. EPA will permit Bway to take split samples during any sampling events conducted by U.S. EPA.

23. To the extent that work being performed pursuant to this Order must be done beyond the Facility property boundary, Bway will use good faith efforts to obtain access agreements necessary to complete work required by this Order from the present owner(s) of such property within thirty (30) days of the date that the need for access becomes known to Bway. Any such access agreement will provide for access by U.S. EPA and its representatives. Bway will submit a copy of any access agreement to U.S. EPA's Project Manager. In the event that agreements for access are not obtained within thirty (30) days, Bway will notify U.S. EPA in writing within fourteen (14) days thereafter of both the efforts undertaken to obtain access and the failure to obtain access agreements. U.S. EPA may, at its discretion, assist Bway in obtaining access to such properties.

24. Nothing in this Section limits or otherwise affects U.S. EPA's right of access and entry under applicable law, including RCRA and the Comprehensive Environmental Response,



Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675.

VIII. COST ESTIMATES AND ASSURANCES OF FINANCIAL RESPONSIBILITY  
FOR COMPLETING THE WORK

25. Estimated Cost of the Work.

- a. Within thirty (30) days after submission of the Current Conditions Report required by Section 11(b) above, Bway shall submit to EPA for approval detailed written estimates, in current dollars, of the estimated cost of all Work to Be Performed under Section VI of this Order (Cost Estimate). The Cost Estimate must account for the costs of all remaining long term care work in addition to all remaining construction work.
- b. Bway shall annually adjust the Cost Estimate for inflation and for changes in the scope of the Work to be performed, within sixty (60) days prior to the anniversary date of the establishment of the financial assurance instrument(s), until the Work required by this Order is completed. Bway shall submit each annual Cost Estimate to EPA for review.

26. Assurances of Financial Responsibility for Completing the Work

- a. Within forty-five (45) days after U.S. EPA approves the initial Cost Estimate (the "Financial Assurances Due Date"), Bway shall establish and maintain financial assurance for the benefit of the U.S. EPA in the amount of the most recent Cost Estimate, even if U.S. EPA has not yet approved the Cost Estimate. However, U.S. EPA may request in writing that Bway establish and maintain the financial assurance in the amount of the draft initial Cost Estimate prior to final approval. Bway may use one or more of the financial assurance forms described in subparagraphs i - v below. Any and all financial assurance instruments provided pursuant to this Order shall be submitted to U.S. EPA for review in draft form at least thirty (30) days before they are due to be filed and shall be satisfactory in form and substance as determined by U.S. EPA.
  - i. A trust fund established for the benefit of U.S. EPA, administered by a trustee;
  - ii. A surety bond unconditionally guaranteeing performance of the Work in accordance with this Order, or guaranteeing payment at the direction of U.S. EPA into a standby trust fund that meets the requirements of the trust fund in subparagraph i above;
  - iii. An irrevocable letter of credit, payable at the direction of the Director, Land and Chemicals Division, into a standby trust fund that meets the requirements of the trust fund in subparagraph i above;

- iv. An insurance policy that provides U.S. EPA with rights as a beneficiary, issued for a face amount at least equal to the current Cost Estimate, except where costs not covered by the insurance policy are covered by another financial assurance instrument;
- v. A corporate guarantee, executed in favor of the U.S. EPA by one or more of the following: (1) a direct or indirect parent company, or (2) a company that has a “substantial business relationship” with Bway (as defined in 40 C.F.R. § 264.141(h)), to perform the Work to Be Performed under Section VI of this Order or to establish a trust fund as permitted by subparagraph I above; provided, however, that any company providing such a guarantee shall demonstrate to the satisfaction of the U.S. EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the portion of the Cost Estimate that it proposes to guarantee; or
- vi. A demonstration by Bway that it meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Cost Estimate, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied. To the extent Bway intends to provide financial assurance through this mechanism, it must provide all documentation required under 40 C.F.R. § 264.143(f) prior to the Financial Assurances Due Date.

The contents of Bway's financial assurance documents must be developed and implemented consistent with the standards and procedures described in U.S. EPA's “Model RCRA §3008(h) Order on Consent - Financial Assurance Section” (Feb. 2006).

Bway shall submit all executed and/or otherwise finalized instruments or other documents to U.S. EPA's Regional Comptroller (MF-10J), 77 W. Jackson Blvd., Chicago, IL 60604-3590, within 90 days after the effective date of this Consent Order. Bway shall also provide copies to:

Project Manager  
Land and Chemicals Division  
U.S. EPA  
77 West Jackson Blvd., DE-9J  
Chicago, Illinois 60604

- b. If at any time Bway provides financial assurance for completion of the Work by means of a corporate guarantee or financial test, Bway shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these methods, and will promptly provide any additional information requested by U.S. EPA from Bway or corporate guarantor at any time.
- c. For purposes of the corporate guarantee or the financial test described above, references in 40 C.F.R. § 264.143(f) to “the sum of current closure and post-

closure costs and the current plugging and abandonment cost estimates” shall mean “the sum of all environmental remediation obligations” (including obligations under CERCLA, RCRA, UIC, TSCA and any other state or tribal environmental obligation) guaranteed by such company or for which such company is otherwise financially obligated in addition to the Cost Estimate.

- d. Bway may combine more than one mechanism to demonstrate financial assurance for the Work to Be Performed under Section VI of this Order.
  - e. Bway may satisfy its obligation to provide financial assurance for the Work by providing a third party who assumes full responsibility for the Work and otherwise satisfies the obligations of the financial assurance requirements of this Order; however, Bway shall remain responsible for providing financial assurance in the event such third party fails to do so and any financial assurance from a third party shall be in one of the forms provided in subparagraphs 26(a)(i) through 26(a)(iv) above.
  - f. If at any time U.S. EPA determines that a Cost Estimate or a financial assurance mechanism provided pursuant to this Section is inadequate, U.S. EPA shall notify Bway in writing. If at any time Bway becomes aware of information indicating that any Cost Estimate(s) or financial assurance mechanism(s) provided pursuant to this Section is inadequate, Bway shall notify U.S. EPA in writing of such information within ten days. Within thirty (30) days of receipt of notice of U.S. EPA's determination, or within thirty (30) days of Bway's becoming aware of such information, Bway shall obtain and present to U.S. EPA for approval a proposal for a revised Cost Estimate or a revised or alternative form of financial assurance listed in Paragraph a above that satisfies all requirements set forth in this Section.
  - g. Bway's inability or failure to establish or maintain financial assurance for completion of the Work shall in no way excuse performance of any other requirements of this Order.
27. Modification of Amount and/or Form of Performance Guarantee
- a. Reduction of Amount of Financial Assurance. If Bway believes that the Cost Estimate has diminished below the amount covered by the existing financial assurance provided under this Order, Bway may, at the same time that Bway submits its annual Cost Estimate, submit a written proposal to U.S. EPA for approval to reduce the amount of the financial assurance to equal the revised Cost Estimate.
  - b. Change of Form of Financial Assurance. If Bway desires to change the form or terms of financial assurance, Bway may, at the same time that Bway submits the annual Cost Estimate, submit a written proposal to U.S. EPA for approval to change the form of financial assurance. The written proposal shall specify all proposed instruments or other documents required in order to make the proposed

financial assurance legally binding and shall satisfy all requirements set forth in this Section. Within ten (10) days after receiving written approval of the proposed revised or alternative financial assurance, Bway shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding. Bway shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected financial assurance legally binding to the U.S. EPA Comptroller's Office, with a copy to U.S. EPA's Project Manager, as provided in Section 26(a)(vi), above.

- c. Release of Financial Assurance. Bway may submit a written request to the Director, Land and Chemicals Division that U.S. EPA release Bway from the requirement to maintain financial assurance under this Section once U.S. EPA and Bway have both executed an "Acknowledgment of Termination and Agreement to Record Preservation and Reservation of Right" pursuant to Section XVIII (Termination and Satisfaction) of the Order. The Director, Land and Chemicals Division shall notify both the Bway and the provider(s) of the financial assurance that Bway is released from all financial assurance obligations under this Order.

## 28. Performance Failure

- a. If U.S. EPA determines that Bway (i) has ceased implementing any portion of the Work, (ii) is significantly or repeatedly deficient or late in its performance of the Work, or (iii) is implementing the Work in a manner that may cause an endangerment to human health or the environment, U.S. EPA may issue a written notice ("Performance Failure Notice") to both Bway and the financial assurance provider of Bway's failure to perform. The notice issued by U.S. EPA will specify the grounds upon which such a notice was issued and will provide Bway with a period of twenty (20) days within which to remedy the circumstances giving rise to the issuance of such notice.
- b. Failure by Bway to remedy the relevant Performance Failure to U.S. EPA's satisfaction before the expiration of the twenty-day notice period specified in Paragraph 28.a shall trigger U.S. EPA's right to have immediate access to and benefit of the financial assurance provided pursuant to subparagraphs 26.a.i, 26.a.ii, 26.a.iii, 26.a.iv, or 26.a.v. If U.S. EPA is unable after reasonable efforts to secure payment of funds or performance of work from the financial assurance provider, then upon written notice from U.S. EPA, Bway shall within twenty (20) days deposit into a trust fund approved by U.S. EPA, a cash amount equal to the Cost Estimate.

## IX. RECORD PRESERVATION

29. Bway will retain, during the pendency of this Order and for a minimum of six (6) years after the Order terminates, all data and all final documents now in its possession or control or which come into its possession or control which relate in any way to this Order. Bway will

notify U.S. EPA in writing ninety (90) days prior to the destruction of any such records, and provide U.S. EPA with the opportunity to take possession of such non-privileged documents. Bway's notice will refer to the effective date, caption, and docket number of this Order and will be addressed to:

Director  
Land and Chemicals Division  
U.S. EPA, Region 5  
77 W. Jackson Blvd.  
Chicago, IL 60604-3590

Bway will also promptly provide a copy of any such notification to U.S. EPA's Project Manager.

30. Bway further agrees that within thirty (30) days of retaining or employing any agent, consultant, or contractor ("Agents") for the purpose of carrying out the terms of this Order, Bway will enter into an agreement with any such Agents whereby such Agents will be required to give Bway a copy of all data and final non-privileged documents pursuant to this Order.

31. Bway agrees that it will not assert any privilege claim concerning any data or technical information developed in performing the work required by this Order, including information relating to any reports, investigations, or other actions required by this Order. Bway does not waive any privilege that would attach to communications between it and its counsel. Bway does not waive any privilege that would attach to communications, including opinions, between it and its consultants not performing Work under this Order, but retained in anticipation of litigation.

#### X. STIPULATED PENALTIES

32. Bway will be subject to pay the following stipulated penalties to the United States for violations of this Order:

- a. For failure to submit quarterly progress reports by the dates scheduled in paragraph 20, above: \$1,000 per day for the first fourteen (14) days and \$2,000 per day thereafter.
- b. For failure to adequately demonstrate that Current Human Exposures are Under Control by 12/31/2008: \$3,000 per day.
- c. For failure to adequately demonstrate that Groundwater Migration is stabilized by 12/31/2008: \$3,000 per day.
- d. For failure to submit the Final Corrective Measures Proposal in paragraph 15 by 6/30/2009: \$1,000 for the first fourteen (14) days and \$2,000 per day thereafter.
- e. For failure to implement in accordance with the approved schedule, the selected final Corrective Measures as described in paragraphs 18 and 19: \$3,000 for the

first fourteen (14) days and \$6,000 per day thereafter.

- f. For failure to submit the Final Remedy Construction Completion Report as scheduled in paragraph 15: \$1,000 per day for the first fourteen (14) days and \$2,000 per day thereafter.
- g. For failure to submit the Current Conditions Report required in paragraph 11 within sixty (60) days after the effective date of the Order: \$1,500 per day for the first fourteen (14) days and \$3,000 per day thereafter.

33. Whether or not Bway has received notice of a violation, stipulated penalties will begin to accrue on the day a violation occurs, and will continue to accrue until Bway complies. For items b and c above, stipulated penalties will not accrue during the period, if any, beginning 31 days after the Environmental Indicators Report is due until the date that U.S. EPA notifies Bway in writing of any deficiency in the required demonstration(s). Separate stipulated penalties for separate violations of this Order will accrue simultaneously.

34. Bway must pay any stipulated penalties owed to the United States under this Section within thirty (30) days of receiving U.S. EPA's written demand to pay the penalties, unless Bway invokes the dispute resolution procedures under Section XI: Dispute Resolution. A written demand for stipulated penalties will describe the violation and will indicate the amount of penalties due.

35. Interest will begin to accrue on any unpaid stipulated penalty balance beginning thirty-one (31) days after Bway receives U.S. EPA's demand letter. Interest will accrue at the Current Value of Funds Rate established by the Secretary of the Treasury. Pursuant to 31 U.S.C. § 3717, Bway must pay an additional penalty of six (6) percent per year on any unpaid stipulated penalty balance more than ninety (90) days overdue.

36. Bway must pay all penalties by certified or cashier's check payable to the United States of America, or by wire transfer, and will send the check to:

U.S. Department of the Treasury  
Attention: U.S. EPA Region 5, Office of the Comptroller  
P.O. Box 70753  
Chicago, Illinois 60673.

A transmittal letter stating the name of the Facility, Bway's name and address, and the U.S. EPA docket number of this action must accompany the payment. Bway will simultaneously send a copy of the check and transmittal letters to the U.S. EPA Project Manager.

37. Bway may dispute U.S. EPA's assessment of stipulated penalties by invoking the dispute resolution procedures under Section XI: Dispute Resolution. The stipulated penalties in dispute will continue to accrue, but need not be paid, during the dispute resolution period. Bway will pay stipulated penalties and interest, if any, according to the dispute resolution decision or agreement. Bway will submit such payment to U.S. EPA within thirty (30) days after receiving the resolution according to the payment instructions of this Section.

38. Neither invoking dispute resolution nor paying penalties will affect Bway's obligation to comply with the terms of this Order not directly in dispute.

39. The stipulated penalties set forth in this Section X do not preclude U.S. EPA from pursuing any other remedies or sanctions which may be available to U.S. EPA for Bway's violation of any terms of this Order. However, U.S. EPA will not seek both a stipulated penalty under this Section and a statutory penalty for the same violation.

#### XI. DISPUTE RESOLUTION

40. The parties will use their best efforts to informally and in good faith resolve all disputes or differences of opinion arising under or in connection with this Order.

41. If either party disagrees, in whole or in part, with any decision made or action taken pursuant to this Order, that party will notify the other party's Project Manager of the dispute. The Project Managers will attempt to resolve the dispute informally.

42. If the Project Managers cannot resolve the dispute informally, either party may pursue the matter formally by placing its objections in writing. A written objection must state the specific points in dispute, the basis for that party's position, and any matters which it considers necessary for determination.

43. U.S. EPA and Bway will in good faith attempt to resolve the dispute through formal negotiations within twenty-one (21) days, or a longer period if agreed in writing by the parties. During formal negotiations, either party may request a conference with appropriate senior management to discuss the dispute.

44. If the parties are unable to reach an agreement through formal negotiations, within fourteen (14) business days after any formal negotiations have concluded, Bway and U.S. EPA's Project Manager may submit additional written information to the Director of the Land and Chemicals Division, U.S. EPA Region 5. U.S. EPA will maintain a record of the dispute, which will contain all statements of position and any other documentation submitted pursuant to this Section. U.S. EPA will allow timely submission of relevant supplemental statements of position by the parties to the dispute. Based on the record, U.S. EPA will respond to Bway's arguments and evidence and provide a detailed written decision on the dispute signed by the Director of the Land and Chemicals Division, U.S. EPA Region 5 ("EPA Dispute Decision").

45. If, at the conclusion of the Dispute Resolution process, Bway notifies U.S. EPA that it refuses to implement U.S. EPA's selected final Corrective Measures, U.S. EPA will endeavor to pursue the action(s) it deems necessary, if any, within a reasonable period of time.

#### XII. FORCE MAJEURE AND EXCUSABLE DELAY

46. Force majeure, for purposes of this Order, is any event arising from causes not foreseen and beyond the control of Bway that delays or prevents the timely performance of any obligation under this Order despite its best efforts.

47. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a force majeure event, Bway will notify U.S. EPA within seven (7) days after learning that the event may cause a delay. If Bway wishes to claim a force majeure event, within twenty (20) days thereafter Bway must provide to U.S. EPA in writing all relevant information relating to the claim, including a proposed revised schedule.

48. If U.S. EPA determines that a delay or anticipated delay is attributable to a force majeure event, U.S. EPA will extend in writing the time to perform the obligation affected by the force majeure event for such time as U.S. EPA determines is necessary to complete the obligation or obligations.

### XIII. MODIFICATION

49. This Order may be modified only by mutual agreement of U.S. EPA and Bway, except as provided in Section VI - Work to be Performed. Any agreed modifications will be in writing, will be signed by both parties, will be effective on the date of signature by U.S. EPA, and will be incorporated into this Order.

### XIV. RESERVATION OF RIGHTS

50. Nothing in this Order restricts U.S. EPA's authority to seek Bway's compliance with the Order and applicable laws and regulations. For violations of this Order, U.S. EPA reserves its rights to bring an action to enforce the Order, to assess penalties under Section 3008(h)(2) of RCRA, 42 U.S.C. § 6928(h)(2), and to issue an administrative order to perform corrective actions or other response measures. In any later proceeding, Bway shall not assert or maintain any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon a contention that the claims raised by the United States in the later proceeding were or should have been raised here. This Order is not a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers, or authorities of U.S. EPA.

51. U.S. EPA reserves all of its rights to perform any portion of the work consented to here or any additional site characterization, feasibility study, and remedial work as it deems necessary to protect human health or the environment.

52. If U.S. EPA determines that activities in compliance or noncompliance with this Order have caused or may cause a release of hazardous waste or hazardous constituent(s), or a threat to human health or the environment, or that Bway is not capable of undertaking any of the work ordered, U.S. EPA may order Bway to stop implementing this Order for the time U.S. EPA determines may be needed to abate the release or threat and to take any action that U.S. EPA determines is necessary to abate the release or threat.

53. Bway does not admit any of U.S. EPA's factual or legal determinations, including specifically the determinations set forth in Section 8 above. Except for the specific waivers in this Order, Bway reserves all of its rights, remedies and defenses, including all rights and defenses it may have: (a) to challenge U.S. EPA's performance of work; (b) to challenge U.S.



EPA's stop work orders; and (c) regarding liability or responsibility for conditions at the facility, except for its right to contest U.S. EPA's jurisdiction to issue or enforce this Order. Bway has entered into this Order in good faith without trial or adjudication of any issue of fact or law. Bway reserves its right to seek judicial review of U.S. EPA actions taken under this Order, including a proceeding brought by the United States to enforce the Order or to collect penalties for violations of the Order.

#### XV. OTHER CLAIMS

54. Nothing in this Order will constitute or be construed as a release from any claim, cause of action, demand, or defense in law or equity, against any person, firm, partnership, or corporation for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken or migrating from the Facility. Bway waives any claims or demands for compensation or payment under Section 106(b), 111, and 112 of CERCLA against the United States or the Hazardous Substance Superfund established by 26 U.S.C. § 9507 for, or arising out of, any activity performed or expense incurred under this Order. Additionally, this Order is not a decision on preauthorization of funds under Section 111(a)(2) of CERCLA.

#### XVI. INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

55. Bway agrees to indemnify, save and hold harmless the United States Government, its agencies, departments, agents, and employees, from all claims or causes of action arising from or on account of acts or omissions of Bway or its officers, employees, agents, independent contractors, receivers, trustees, and assignees in carrying out activities required by this Order. This indemnification will not affect or limit the rights or obligations of Bway or the United States under their various contracts. This indemnification will not create any obligation on the part of Bway to indemnify the United States from claims arising from the acts or omissions of the United States.

#### XVII. SEVERABILITY

56. If any judicial or administrative authority holds any provision of this Order to be invalid, the remaining provisions will remain in force and will not be affected.

#### XVIII. TERMINATION AND SATISFACTION

57. Bway may request that U.S. EPA issue a determination that Bway has met the requirements of the Order for all or a portion of the Facility. Bway may also request that U.S. EPA issue a "No Further Interest" or "No Further Action" determination for all or a portion of the Facility.

58. The provisions of the Order will be satisfied upon Bway's and U.S. EPA's execution of an "Acknowledgment of Termination and Agreement on Record Preservation and Reservation of Rights", consistent with U.S. EPA's Model Scope of Work.

59. Bway's execution of the Acknowledgment will affirm its continuing obligation to preserve all records as required by Section VIII, to maintain any necessary institutional controls or other long terms measures, and to recognize U.S. EPA's reservation of rights as required in Section IX.

XIX. EFFECTIVE DATE

60. This Order is effective on the date that U.S. EPA signs the Order.

IT IS SO AGREED:

DATE: 8/30/07

BY: Jeff O'Connell  
Jeff O'Connell, Vice President  
Bway Corporation

IT IS SO ORDERED:

DATE: 9/13/07

BY: Jose G. Cisneros  
Jose G. Cisneros, Chief  
Remediation and Reuse Branch  
Land and Chemicals Division  
U.S. Environmental Protection Agency  
Region 5

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US EPA REGION V

**Case Name:** Bway Corporation - OHD 004 253 225

**Docket Number:** RCRA-05-2007-0011

Certificate of Service

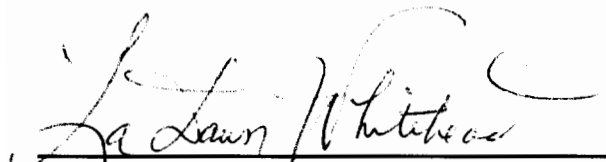
I hereby certify that today I have filed the original of this **Administrative Order on Consent** and this **Certification of Service** in the office of Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590.

I further certify that I then caused true and correct copies of the filed document to be mailed to the following:

**Certified Mail Number:** 7001 0320 0006 1458 8481

Jeff O'Connell  
Vice President  
Bway Corporation  
8200 Broadwell Road  
Cincinnati, Ohio 45244

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LaDawn Whitehead  
Administrative Program Assistant  
Remediation and Reuse Branch  
Land and Chemicals Division  
U.S. EPA – Region 5

**Dated:** September 14, 2007