UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF: Belden Cribbing Site Eagle County, Colorado	ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMOVAL ACTION
Union Pacific Railroad Company, Respondent.	U.S. EPA Region 8 CERCLA Docket No. **CERCLA-08-2007-0009** Proceeding Under Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622

TABLE OF CONTENTS

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and Union Pacific Railroad Company ("Respondent" or "UP"). This Settlement Agreement provides for the performance of certain response actions by EPA and by Respondent and the payment by Respondent of certain response costs incurred or to be incurred by the United States at or in connection with the area identified as the Belden Cribbing Site ("Site"). Specifically, in addition to the payments and other obligations set forth in this Settlement Agreement, this Settlement Agreement requires Respondent to: (1) provide access to the Site including removing or covering the railroad track and re-grading an access road along the railroad right-of-way to enable EPA to enter the property and conduct necessary response actions to address the threat to human health and the environment as described in the Action Memorandum for the Site; (2) provide access for the installation of a permanent repository for waste material at the Site and rock-fall protection devices; and (3) provide access for the installation of permanent collection pipe systems for mine seeps at the Site, as set forth herein. The Site is generally depicted on the maps attached as Appendix 1 to this Settlement Agreement.

2. This Settlement Agreement is entered into pursuant to the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended ("CERCLA"), and the authority vested in the Administrator of the EPA by Section 122(h) of CERCLA, 42 U.S.C. § 9622(h), which authorities have been delegated to the Regional Administrator by EPA Delegation Nos. 14-14-C and 14-14-D and re-delegated to the undersigned EPA officials by EPA Delegation Nos. 14-14-C and 14-14-D.

3. EPA has notified the State of Colorado (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondent recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Settlement Agreement do not constitute an admission of any liability and Respondent expressly denies the same. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of EPA's findings of facts, conclusions of law, and determinations in Sections IV and V of this Settlement Agreement. Respondent agrees to comply with and be bound by the terms of this Settlement Agreement and further agrees it will not contest the basis or validity of this Settlement Agreement or its terms, including the authority of EPA to enter into this Agreement or to implement or enforce its terms.

II. PARTIES BOUND

5. This Settlement Agreement applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall in no way alter such Respondent's responsibilities under this Settlement Agreement. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to legally bind Respondent to this document.

6. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Respondent shall be responsible for any noncompliance with this Settlement Agreement.

III. DEFINITIONS

7. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandum" shall mean the EPA Action Memorandum relating to the Site signed on July 3, 2006, by the properly delegated EPA Region 8 official, and all attachments thereto. The Action Memorandum is attached hereto as Appendix 2.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq*.

c. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXXII.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States pays or incurs in implementing, overseeing and performing this Removal Action, and in reviewing or developing plans, reports and other items for the Belden Cribbing Site pursuant to this Settlement Agreement, verifying the Work, or otherwise implementing, overseeing, and enforcing this Settlement Agreement, including but not limited to, payroll costs, contractor costs, travel costs and laboratory costs. Costs incurred by the

United States pursuant to pursuant to Paragraph 24 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 33 (emergency response) and Paragraph 59 (Work Takeover) of this Settlement Agreement shall not be included within the meaning of Future Response Costs.

g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

i. "Other Response Costs" shall mean all costs, including but not limited to all direct and indirect costs, that EPA or the U.S. Department of Justice ("DOJ") on behalf of EPA incurs pursuant to Paragraph 24 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 33 (emergency response) and Paragraph 59 (Work Takeover) of this Settlement Agreement.

j. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

k. "Parties" shall mean EPA and Respondent.

l. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through December 31, 2006, plus Interest on all such costs through such date.

m. "Railroad right-of-way" shall mean that right-of-way within the Site granted under the March 3, 1875 Act of Congress and located on the east side of the Eagle River within the Site boundaries as generally depicted on the detailed Site map attached hereto as Appendix 1 to this Settlement Agreement.

n. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

o. "Repository" shall mean the area shown on Appendix 1 located on the Railroad right-of-way near Waste Rock Piles 14, 15 and 16, designated for disposal of waste rock and related Waste Materials from the Site, and further generally described in the Action Memorandum and in this Settlement Agreement.

p. "Respondent" shall mean the Union Pacific Railroad Company.

q. "Removal Action" shall mean the response actions performed and to be performed at or in connection with the Site necessary to implement the Action Memorandum.

r. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

s. "Seep" shall mean those seeps located at the Site, as depicted on the detailed Site map attached to this Settlement Agreement as Appendix 1.

t. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXXI). In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

u. "Site" shall mean the Belden Cribbing Site, located on the slopes of Battle Mountain just south of the historic mining mill station of Belden, between the towns of Minturn and Red Cliff, in Eagle County, Colorado, as generally depicted on the map attached hereto as Appendix 1. The Site includes at least twenty-one significant waste rock piles from former mining operations and a series of deteriorating wood cribbings originally constructed apparently to retain the waste rock on the mountain. The steep slopes within the Site level off at the bottom of the canyon where the railroad track is located along the eastern side of the Eagle River. The approximate northern border of the Site is, and includes, the Ben Butler mining claim, at or immediately south of Belden. The Site extends approximately 1 (one) mile south to, and includes, the Alpine mining claim. The Site is bordered on the west by the Eagle River and on the east by the canyon rim, approximately 500 feet west of US Highway 24.

v. "State" shall mean the State of Colorado.

w. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27);

x. "Work" shall mean all activities Respondent is required to perform under this Settlement Agreement.

IV. FINDINGS OF FACT

EPA makes the following findings of fact:

Site Description and History

8. a. The Belden Cribbing Site (Site) is located on the slopes of Battle Mountain just south of the historic mining mill station of Belden, between the towns of Minturn and Red Cliff, in Eagle County, Colorado, as generally depicted on the map attached hereto as Appendix 1. The Site includes at least twenty-one significant waste rock piles from former mining operations and a series of deteriorating wood cribbings originally constructed apparently to retain the waste rock on the mountain. The steep slopes within the Site level off at the bottom of the canyon where the railroad track is located along the eastern side of the Eagle River. The approximate northern border of the Site is, and includes, the Ben Butler mining claim, at or immediately south of Belden. The Site extends approximately 1 (one) mile south to, and includes, the Alpine mining claim. The Site is bordered on the west by the Eagle River and on the east by the canyon rim, approximately 500 feet west of US Highway 24. Historic mine claims in the vicinity include, but are not limited to, the Ben Butler, Tip Top, Star of the West, Mabel, Percy Chester, Pine Martin, Copper King, and Alpine. The railroad line and right-of-way on the east side of the Eagle River, currently owned by Union Pacific Railroad Company (UP)(although not currently in service), are located on the Site.

b. Miners began working the Eagle Mine area, including certain of the mine claims at the Site, in approximately the mid-1870s, searching for gold and silver. Some mine claims at the Site were worked (on and off, depending on the specific mine) at least into the 1930s and 1940s. In approximately 1881, the narrow-gage Denver and Rio Grande Railroad reached Red Cliff (to the south of the Site) and by approximately 1883 was continued through the canyon of the Eagle River as far as Rock Creek (to the north of the Site), which remained the terminus until 1887 when the line was extended further north.

c. The Railroad right-of-way generally is a right-of-way created under the March 3, 1875 Act of Congress, which generally extends one-hundred (100) feet on both sides of the center-line of the railroad track on the east side of the Eagle River through the Site. The eastern half of the right-of-way thus generally extends east into the Site 100 feet from the centerline of the tracks (by horizontal distance) for the length of the Site. See Map, Appendix 1. The western portion of the right-of-way, extending approximately 100 feet west from the centerline of the tracks on the east side of the River, encompasses the western half of the railroad bed of the east track and portions of the west bank of the Eagle River and the railroad bed running along the west side of the River.

d. Among other activities, the Railroad facilitated the movement of mining materials and ores from the mines and transported other necessary materials by rail to the Site.

e. To transport ores from the mines located higher on the cliffs of the canyon within the Site, aerial or rail trams were constructed from several of the mines down to the railroad. Tipples and other structures used for loading material on or off railroad cars were also built. Remnants of these structures are still visible on the canyon walls and along the railroad. Several of the mines at the Site utilized such structures for moving mine-related products and other materials to and from the Railroad for transport.

f. The activities of the mines at the Site produced waste rock which was generally deposited by the mine operators on the sides of the canyon near the respective mine openings. Deposition of the waste rock resulted in the formation of large waste rock piles.

g. Waste rock piles at the Site were partially contained with log cribbing structures (or "cribs") to hold them to the mountainside, allowing waste rock piles of significant mass to build up behind them.

h. The cribs were constructed of logs on the steep canyon walls and have deteriorated and decayed. The cribs are not effective in holding the waste rock piles behind them. Some of the cribs have broken through or overtopped, or have deteriorated completely, releasing additional rock further down the canyon wall.

i. Waste rock piles and waste rock at the Site have migrated or slid, and continue to migrate or slide, downhill toward the River. Some relatively small portions of the waste rock piles have partially migrated or slid over the railroad tracks into the River.

j. The mining companies implemented little or no maintenance activities with respect to the cribs or the waste rock piles.

k. The waste rock piles and deteriorating cribs are of particular concern, given the hill slope angles, proximity to the river, and relatively large amounts of fine, relatively low-pH, high metal-content, waste rock material that could be directly delivered into the Eagle River in the event of deterioration or failure of the cribs, slope failure, or rock slides resulting from natural or human forces.

l. During EPA's September 8, 2005 site assessment visit, mine-related contaminated water seeps were also observed and photographed. One seep emanated from an unfinished mine adit just south of the large waste pile associated with the Mabel and Percy Chester mines, numbered 3-7 by EPA. (See Site Map attached hereto.) This mine adit has been commonly referred to as the 'Doghole'. The Doghole seep is located on the Railroad right-of-way and the water from this seep runs into the River through a culvert under the Railroad tracks. An additional seep was observed associated with the waste pile numbered 21 at the Site. It emanates from a waste pile located on the Railroad right-of-way and the seep itself flows along the east side of the railroad tracks and is then also directed through a culvert under the Railroad tracks into the River. These seeps add to the contaminant load in the Eagle River.

m. The waste rock and seeps at the Site contain various metals, including zinc, cadmium, copper, lead and arsenic. These metals are among the metals identified as "contaminants of concern" at the Site.

n. The Site, the waste rock piles, cribs, related structures, and seeps and seep channeling structures, and the areas at which they are or have come to be located at the Site are "facilities" within the meaning of section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

o. Deposition and continued migration of waste rock and creation of waste rock piles at the Site constitutes "disposal" within the meaning of section 101(29) of CERCLA, 42 U.S.C. § 9601(29).

p. The Eagle Mine, located generally immediately to the north of the Site, became the largest producer in the area. The Eagle Mine later was mainly a zinc-mining operation, leaving high levels of arsenic, cadmium, copper, lead and zinc in the soil, and in surface and ground water. One hundred years of mining at the Eagle Mine resulted in 8 million tons of waste rock/tailings, some of which contained metals that migrated into the Eagle River, killed fish, and threatened drinking water wells in the town of Minturn.

q. EPA placed the Eagle Mine on its National Priorities List in 1986. It was selected as a Superfund Site; and the Colorado Department of Public Health and Environment (CDPHE) and the Responsible Party, CBS Operations, Inc. (and its predecessors), implemented a cleanup plan in 1988. Since then, EPA and CDPHE have cooperated on long-term remedial actions. Results have been encouraging: fish populations in the Eagle River have improved; testing shows that risks to human health have been diminished; and EPA, CDPHE and the community have been working together to develop long-term water-quality standards for the Eagle River.

r. The waste rock piles, crib structures and seeps at the Site were not addressed as part of EPA's Superfund cleanup of the Eagle Mine NPL Site because they have been and are considered to be outside of the Superfund NPL Site area.

s. The ongoing degradation and potential failure of the wooden crib structures, the continued migration and potential collapse of waste rock piles and the continuing seepage of mine waste at the Site represent substantial risks to the stream water quality and biological improvements that have been achieved at the Eagle Mine Superfund Site.

t. EPA assessed the Site on or about September 8, 2005, for emergency action. (See Belden Cribbing Site Trip Report, Toeroek Associates, Inc., September 8, 2005.) Sampling of waste rock and other measurements at the Site were detailed in the START 3, Trip Report, authored by URS Operating Services, Inc., dated November 22, 2005 (Attachment to Action Memorandum).

u. Results of sampling at the Site show that acid pH values and potential zinc release have the potential to negatively impact the water quality in the Eagle River, with impacts ranging

from acute to chronic. Paste pH measurements ranged from 1.74 – 2.95 and from 1.7 – 3.6. Waste rock paste pH measurements less than 4.0 indicate that the material readily generates acid on weathering and contact with water, with a concomitant release of metals; therefore, the material screened in conjunction with this action shows a significant potential to generate acidity and release metals. Leachable zinc concentrations ranged from 0.27 – 5.38 mg Zn/lb rock. (See START 3 Trip Report, November 22, 2005; and "Technical Memorandum "Results for Geochemical Screening of Waste Rock, Belden Mill Site, Gilman, Colorado", to Eagle River Watershed Council, from Mark A Williamson, et al., August 25, 2004 (Attachment to Action Memorandum).

v. In the event of slope failure and a corresponding release of waste rock to the River, there would be an immediate impact to water quality as the pH of the river is lowered and the waste rock is rinsed of its weathering products. The worst case scenario estimates a release of 22,000 tons of waste rock with 5,000 tons being deposited in the river; a moderate scenario estimates 1,500 tons deposited in the river. Chronic and acute estimates, based on failure and direct loading scenarios and measured leachable zinc concentrations, suggest stream pulses could occur producing elevated zinc concentrations ranging from 13 mg/L to 350 mg/L over current conditions in the River. For comparison, the existing water quality for zinc in this reach of the Eagle River typically ranges from 0.006 mg/L to 0.150 mg/L (see "Eagle Mine Annual Report - 2005," prepared for Viacom International Inc. by NewFields, March 1, 2006, Appendix A-1, Eagle Mine Water Quality Data, Station E-3; and "Biological Monitoring Report for the Eagle Mine Superfund Site," released July 2005.)

w. Regulations promulgated by the Colorado Department of Public Health and the Environment (CDPHE), 5 CCR 1002-31, establish water standards that are protective of the aquatic community, termed Table Value Standards (TVS). TVS for zinc and other metals are calculated for specified water hardness conditions and for acute and chronic effects. With a hardness of 75 and 100, within which approximate range the values for the Belden Crib site section of the Eagle River fall, acute TVS values for dissolved zinc are 112 and 143 micrograms per liter, respectively; chronic TVS values for zinc are 97 and 124 micrograms per liter, respectively.

x. Slope failure and collapse of the waste rock piles at the Site, or significant further sliding downhill of the waste rock into the Eagle River, would have a high probability of greatly exceeding safe chronic and acute zinc and other metal levels for trout and the biological community in the Eagle River.

y. For the "Doghole" and Waste Pile 21 seeps, flow is estimated to be approximately 20 gallons per minute, and 70 gallons per minute, respectively. Flows are believed to be seasonal. Zinc concentrations in the seeps were measured at 15,000 ppb and 740 ppb, respectively. These seeps add to the contaminant load in the Eagle River.

z**.** Final water quality standards for the segments of the Eagle River within the NPL Site that represent fully protective levels to the trout and biological community have not yet been

promulgated, although temporary modification standards have been established. EPA anticipates that final standards will be set at a level above the TVS, but significantly less than the expected 'pulse' of zinc resulting from collapse of waste rock piles at the Site. TVS standards currently apply to the Eagle River at the Site.

Release or Threatened Release

aa. Historic operation of the various mining claims at the Site resulted in the deposition and disposal of Waste Material in the form of piles of waste rock and contaminated mine-waste seeps in and at areas near the Site, which piles and seeps contain heavy metals, including zinc, lead, arsenic, copper and cadmium, in levels that may threaten human health or the environment. Deposition and disposal of waste rock, downhill migration of waste rock, the actual collapse and introduction of waste rock into the River, and the seepage of contaminated mine waste at the Site constitute releases, as defined by section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

Endangerment

bb. The above-described hazardous substances and pollutants and contaminants are contained in the waste rock and seeps in concentrations and quantities that may pose an imminent and substantial endangerment to the public health or the environment.

cc. Migration pathways and exposure routes exist at or from the Site through which the environment may be exposed to toxic concentrations of the contaminants of concern. The principal pathway at or from the Site is that contaminants of concern, including zinc and other metals, will enter the Eagle River in the event of collapse of waste rock piles and further migration and sliding downhill of the waste rock at the Site, resulting in waste rock entering the River. Seepage of contaminated mine waste enters the River either directly or via pathways under the railroad tracks. Such contamination in the River impacts or potentially impacts the biological community of the River, including fish, and human populations that consume the fish.

(i) The Eagle River is the main surface body of water at the Site that would be impacted by metals contamination. The main environmental concern is the potential for impacts to aquatic organisms in the Eagle River. However, the Eagle River is also used as a water supply and for recreation. Fishing also occurs on the Eagle River from the headwaters to the Colorado River. There are numerous diversions from the Eagle River for municipal supply, stock watering, and irrigation downstream from the confluence with Gore Creek. Impacts to the River at the Site would extend downstream due to natural flow of the surface water. The environmental receptors of concern at the Site and in the downstream portions of the Eagle River include the fresh-water biota, particularly fish. Wetlands may be impacted via migration of contaminated surface water.

(ii) Residents, recreationalists and tourists in the area could consume trout caught in the Eagle River. Chemicals of concern (hazardous substances), chiefly lead and arsenic, could bio-accumulate in trout tissue prior to ingestion by humans of the contaminated food supply.

(iii) Wildlife in the adjacent habitats and the fish in the confluent waters could be exposed to the contamination either through direct contact or indirectly through consumption of organisms (algae, aquatic insects, or animals) feeding in the river area. While other metals are secondary to zinc as a contaminant of concern for aquatic life, there are sufficient releasable concentrations of other metals in the waste rock to present significant risk to aquatic life.

Zinc Zinc produces acute toxicity in freshwater organisms over a range of concentrations from 90 to 58,100 ug/liter, and appears to be less toxic in harder water. Acute toxicity is similar for freshwater fish and invertebrates. In many types of aquatic plants and animals, growth, survival, and reproduction can all be adversely affected by elevated zinc levels. A final acute-chronic ratio for freshwater species of 3.0 has been reported.

Zinc is an essential element necessary for maintaining good health, but high doses can be harmful to humans. Oral ingestion of large doses of zinc may cause stomach cramps, nausea, and vomiting. Continued ingestion of large doses may result in anemia, damage to the pancreas, and lower levels of high density lipoprotein cholesterol.

Cadmium At sufficient concentrations, cadmium has been shown to be a carcinogen in both animal studies and occupationally exposed groups of humans via the inhalation route of exposure. Laboratory experiments suggest that cadmium may have adverse effects on reproduction in fish at levels present in lightly to moderately polluted waters. At sufficient concentrations, exposure and duration, cadmium is highly toxic to wildlife; it is cancer-causing and teratogenic and potentially mutation-causing, with severe sublethal and lethal effects at low environmental concentrations. It bio-accumulates at all trophic levels, accumulating in the livers and kidneys of fish. Crustaceans appear to be more sensitive to cadmium than fish and mollusks. Cadmium can be toxic to plants at lower soil concentrations than other heavy metals and is more readily taken up than other metals.

Copper At sufficient concentrations, exposure and duration, copper produces acute toxicity in freshwater animals and data is available for species in 41 Genera. At a hardness of 50 mg/L, the genera range in sensitivity from 16.74 ug/L for Ptychocheilus to 10,240 ug/L for Acroneuria. Data for eight species indicates that acute toxicity also decreases with increases in alkalinity and total organic carbon. Chronic values are available for 15 freshwater species and range from 3.873 ug/L for brook trout to 60.36 ug/L for northern pike. Fish and invertebrate species seem to be about equally sensitive to the chronic toxicity of copper. At sufficient concentrations, exposure and duration, copper is highly toxic in aquatic environments and has effects in fish, invertebrates and amphibians. Copper will bio-concentrate in many different organs in fish (potential low, however) and mollusks. Copper sulfates and other copper compounds are algaecides, with sensitive algae potentially affected by free copper at low ppb concentrations. Toxicity tests have been conducted on copper with a wide range of freshwater plants, and their sensitivities are similar to those of animals.

Copper is an essential element necessary for maintaining good health in humans, but high doses can be harmful. Oral ingestion of high amounts of copper may cause vomiting diarrhea,

stomach cramps, and nausea. Chronic ingestion of high amounts of copper can cause liver and kidney damage.

Arsenic Excess exposure to arsenic is known to cause a variety of adverse health effects in humans. These effects may depend on concentration, form, exposure and duration. Arsenic is a known human carcinogen. Inhalation exposure is associated with increased risk of lung, gastrointestinal, renal or bladder cancer. Oral exposure to arsenic is associated with skin, liver, and bladder cancer. At very high doses, oral exposure to arsenic elicits nausea and vomiting. Lower doses over a chronic time period may elicit skin abnormalities, such as hyperkeratosis and kidney and liver toxicity.

Lead At high doses for sufficient duration, lead exposure is associated with adverse effects on reproduction and development, as well as inhibition of heme synthesis. At lower doses with sufficient duration, impairment of the nervous system in young children is considered to be of greatest concern. Younger children are more susceptible to lead exposure because they absorb lead from their gastrointestinal tracts at a greater rate than adults do, their neurological systems are still rapidly developing, and they have more direct contact with soil and indoor dust than adults do. These neurological effects manifest as decreased I.Q., shortened attention span, and decreased hand and eye coordination. EPA classifies lead as a B2 carcinogen. Studies in animals show an increased incidence of kidney tumors in association with very high levels of lead exposure.

Respondent

dd. Respondent is Union Pacific Railroad Company ("UP"). UP is a Delaware corporation registered in the State of Colorado as a qualified, active corporation in good standing, organized in the State of Colorado on October 16, 1998.

ee. The Denver and Rio Grande Railroad Company ("DRGRC") was founded in 1870. Under the March 3, 1875 Act of Congress, the Railroad right-of-way on the east side of the Eagle River at the Site was established and granted to DRGRC. DRGRC merged with the Rio Grande Western Railway in 1901, consolidating in 1908. In 1918, the DRGRC fell into receivership. The Denver and Rio Grande Western Railroad ("DRGWR") emerged as the newly formed company in 1920. DRGWR entered bankruptcy in 1935, emerging again in 1947.

ff. In 1988, the Interstate Commerce Commission approved the purchase of the Southern Pacific ("SP") by Rio Grande Industries, the parent, or controlling, company of the DRGWR. After the purchase, the combined railroad company kept the "Southern Pacific" name for all railroad operations. In 1996, the SP (then, the combined SP and DRGWR) was acquired by the Union Pacific Railroad Company ("UP"), retaining the name "Union Pacific" for all railroad operations at the Site.

gg. UP acquired the Railroad right-of-way when UP acquired Southern Pacific in 1997. UP did not conduct any operations with mining companies on the spur line on the east side of the

Eagle River when it acquired the Railroad right-of-way. However, UP continued service at or near the Site on the mainline on the west side of the Eagle River for a short time after it acquired Southern Pacific in 1996, until the line ceased operations in 1997. The rail line at the Site currently is temporarily "out of service" but is not "abandoned."

hh. UP's right, title and interest in the Railroad right-of-way through the Site is that which was granted to UP's predecessors-in-interest by the March 3, 1875 Act of Congress establishing the right-of-way which continues through the present.

ii. Some of the waste rock piles at the Site were deposited and formed, or have come to be located, in whole or in part, on the Railroad right-of-way.

jj. Waste rock piles at the Site, including those portions of the waste rock piles situated on the Railroad right-of-way, were deposited during the time of the Railroad's predecessors' ownership and operation of the railroad line and the Railroad right-of-way at the Site.

kk. Construction of the cribs, including those portions of the cribs situated on the Railroad right-of-way, occurred during the time of the Railroad's predecessors' ownership and operation of the railroad line and the Railroad right-of-way at the Site.

ll. Structures and devices used to move materials from and to the mines to and from the railroad were built and operated during the time of the Railroad's predecessors' ownership and operation of the railroad line and the Railroad right-of-way at the Site.

mm. Respondent facilitated, acquiesced or was otherwise involved in the placement and deposition of the waste piles, the construction and maintenance of the cribs, and construction and operation of structures used for loading and transportation of mining materials.

nn. Respondent has the ability to control, in whole or significant part, access to and security of those portions of the waste rock piles and cribs and culverts located upon the Railroad right-of-way at the Site.

oo. Respondent is the current holder of the 1875 Act Right-of-way grant and the operator of railroad facility or facilities at the Site. Respondent is the corporate successor to prior railroad holder(s) of the 1875 Act right-of-way grant and operator(s) of the facility or facilities within the right-of-way at the Site at the time of disposal of hazardous substances or pollutants or contaminants at the facility, as defined by section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of sections 107(a)(1) and (2) of CERCLA, 42 U.S.C. §§ 9607(a)(1) and (2).

Response Actions

pp. There have been prior (but not directly related) CERCLA response actions at the Site including: a) a study of various waste piles in the Ben Butler mine claim area; b) actions to

address mine drainage in the Ben Butler and Tip Top mine claim areas; and c) sampling in the Eagle River at certain points through the Site, performed by persons not party to this Settlement Agreement.

qq. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook certain response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake additional response actions in the future.

rr. On July 3, 2006, EPA issued an Action Memorandum for removal action to address the cribs, waste rock piles, and seeps at the Site.

ss. EPA has incurred response costs in carrying out response actions at and in connection with the Site, including, but not limited to, costs related to investigatory and design work, and anticipates incurring additional costs at and in connection with the Site, including, but not limited to, costs related to implementing the removal actions outlined in the Action Memorandum and overseeing work required under this Settlement Agreement.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

EPA makes the following conclusions of law and determinations:

9. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Belden Cribbing Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes "hazardous substance(s)" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of response action and for response costs incurred and to be incurred at the Site.

i. Respondent is the "owner" and/or "operator" of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

ii. Respondent is the successor to railroad predecessor(s) which were the "owners" and/or "operators" of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

iii. Respondent arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at the facility, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

e. The conditions described in Paragraphs 8.a. to ss. of the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C.§ 9601(22).

f. The removal action required by this Settlement Agreement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement Agreement, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP, and for all other purposes.

VI. SETTLEMENT AGREEMENT AND ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Settlement Agreement, including, but not limited to, all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement, as set forth herein.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

10. Unless Respondent conducts the Work with its own personnel, Respondent shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within fourteen (14) days of the Effective Date. Respondent shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least five (5) days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves of a selected contractor, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within fourteen (14) days of EPA's disapproval**.**

11. Within fourteen (14) days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Settlement Agreement and shall submit to EPA the designated Project

Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within fourteen (14) days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent.

12. EPA has designated Hays Griswold, of the Region 8 Emergency and Enforcement Response Branch, as its On-Scene Coordinator ("OSC"). Except as otherwise provided in this Settlement Agreement, Respondent shall direct all submissions required by this Settlement Agreement to the OSC at:

Hays Griswold (8EPR-ER)
On-Scene Coordinator, Belden Cribbing Removal Site
Preparedness, Assessment and Emergency Response Program
EPA Region 8
1595 Wynkoop Street, Denver, CO 80202-1129
(303) 312-6809

Delivery shall be by U.S. Mail or by Federal Express or equivalent service. With the concurrence of the OSC, delivery may be by electronic mail.

13. EPA and Respondent shall have the right, subject to Paragraph 11, to change their respective designated OSC or Project Coordinator. Respondent shall notify EPA seven (7) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

14. Respondent shall perform all actions necessary to implement the actions detailed below, in accordance with this Settlement Agreement and the Action Memorandum.

Respondent is not required under this Settlement Agreement to construct and install necessary repositories, rock-fall protection devices, and seep collection systems, as described in the Action Memorandum. EPA anticipates performing such actions, in accordance with the Action Memorandum. Respondent shall cooperate fully with EPA during EPA's implementation of these response actions. EPA anticipates initiating activities to construct and install the Repository and rock-fall protection devices as soon as possible after Respondent completes those portions of Work under this Section. EPA anticipates completing the seep collection systems when arrangement is made for treatment of the water. The Parties will cooperate to ensure this transition is achieved safely and effectively, and in a timely manner. The actions to be implemented include the following:

a. Respondent shall provide EPA with access to the Site so that EPA and/or its authorized contractors (collectively "EPA") can conduct necessary response actions within the Site in accordance with the Action Memorandum. Respondent shall remove the track and ties on the Railroad right-of-way on the east side of the Eagle River in approximately 39-foot or longer sections, from Belden to the southern end of the Repository, or shall cover such track and ties in-place, or shall perform a combination thereof, in order to create the temporary haul access road described below in Paragraph 14.b. This rail line is currently out of service, but is not abandoned, and service may be restored at any time, within the limitations specifically provided in this Agreement and except during implementation of the Work and until after completion of the Removal Action. Respondent shall not take any action, including but not limited to replacement of the rail line and restoration of active rail service at the Site, that interferes with or compromises in any way the implementation and effectiveness of the Removal Action. Respondent shall provide EPA written notice at least thirty (30) days in advance of its decision to restore the rail line at the Site. Nothing herein shall be construed by any person or entity as abandonment or intent to abandon the rail line.

b. Following removal or covering, or a combination thereof, of the track and tie sections, Respondent or its contractor shall grade the rail line on the Railroad right-of-way to provide a sufficient, and properly bermed and ditched, temporary haul road that will allow access and competent use of the rail-line area by EPA for large trucks and other equipment as may be needed to enter the Site to construct retaining walls and all necessary appurtenances constituting the Repository, and to haul waste rock to, and deposit such materials in, the Repository, and by other waste-handling equipment required for the response action, in accordance with the Action Memorandum. Such rail track removal, and/or covering of the rails and ties, road grading and provision of access shall not result in waste material being released into the River and shall not impinge on the planned Repository site. Respondent shall complete all such actions and all actions described herein by no later than June 15, 2007. EPA will maintain the temporary haul road during EPA's performance of the Removal Action under this Settlement Agreement, if, in EPA's unreviewable discretion, the haul road requires such maintenance to enable effective performance of the Removal Action. Respondent shall provide access for EPA and its representatives to oversee construction of the haul road and to ensure it meets the requirements specified herein.

c. EPA will provide written notification to UP within thirty (30) days of the date that EPA has completed the Removal Action, including removal of the waste rock designated for removal from "Zone 1" at the Site, construction of the Repository and placement of the waste rock in the Repository, installing rockfall protection and installing seep collection systems, in accordance with the Action Memorandum. Respondent at its sole discretion may replace or uncover the tracks and ties at any time after EPA has provided such notice; EPA will endeavor to complete the Repository and rockfall protection portions of the Removal Action by no later than January 1, 2008; however the Parties recognize that this estimated completion date depends on a timely Work initiation date and coordination between the Parties and represents an estimate for convenience only.

d. Respondent shall provide access on the Railroad right-of-way to EPA and its contractors for the design, construction, operation, maintenance and repair of a permanent Repository for the containment of waste rock to be located in the area shown on the detailed site map in Appendix 1. The access rights that UP is granting to EPA for the Repository are only those which UP can grant given the nature of UP's 1875 Act right, title and interest in the Railroad right-of-way, and are subject to any and all conditions and limitations imposed by the 1875 Act. Respondent certifies to the best of its knowledge that it has fully disclosed all such conditions and limitations of the 1875 Act to EPA that may in any way affect the Removal Action and the access rights granted under this Settlement Agreement, and the ability of Respondent to complete all actions set forth herein. In granting access to EPA for the Repository, Seep collection systems and connections, and rockfall protection systems under this Settlement Agreement, and subject to the specific limitations set forth in this Settlement Agreement, Respondent reserves the right to use the full width of its Railroad right-of-way for railroad purposes and operations; provided that Respondent does not interfere with or compromise in any way the implementation and effectiveness of the Removal Action, including the Repository, Seep collection systems and connections, and rockfall protection systems.

e. EPA anticipates that the Repository will be located as shown in the vicinity of waste rock piles 14, 15 and 16 in Zone 2 (see detailed site map in Appendix 1). The downhill, western boundary of the Repository, retaining wall and rockfall structures, and other structures installed in this Removal Action that are subject to setbacks established by federal regulation shall not be located within fifteen (15) feet of the current center of the rail line. The Repository is expected to hold approximately 40,000 - 45,000 cubic yards of waste rock or related materials. The Repository will only be used for waste rock materials from the Belden Cribbing Site and other related waste materials. EPA shall determine the amount of waste rock to be placed in the Repository.

f. Respondent shall provide access to EPA and its contractors for the design, construction, operation and maintenance of a permanent Seep collection system for mine drainage from the Doghole Seep located at the north end of the Site near Belden and for the seep at the southern end of the Site in "Zone 3" and for the permanent location and placement of a Seep collection system and piping off-site for treatment (see detailed site map in Appendix 1). EPA will install the piping and collection systems for the "Doghole" and other seeps as determined to be necessary by EPA, in accordance with the Action Memorandum. The Parties agree the Action Memorandum anticipates that the Seep collection system will be connected to the piping system associated with the water collection and treatment system at the Eagle Mine Superfund Site, currently operated by CBS Operations, Inc. ("CBS")(formerly Viacom International). Respondent will not be responsible under this Settlement Agreement for the design, construction, operation or maintenance of the Seep collection system, or for connecting the piping from the Seep collection trench to CBS's or any other piping system, or for treatment of the Seep water. Respondent shall provide access to, and cooperate with, EPA and CBS for completion and maintenance of the connection to CBS's existing system. EPA in its sole discretion may determine that construction and operation of any Seep collection system, and

connection to any existing pipe and treatment system, is not feasible and may decide not to construct or operate any such Seep collection system at the Site. Installation of the Seep collection system(s) will comply with all setbacks from the center-line of the railroad tracks that may be applicable under federal regulation.

g. Respondent shall provide access to EPA on the Railroad right-of-way for design, construction, operation and maintenance of permanent retaining walls or "rockfall protection" devices in the southern-most portion of the site (Zone 3)(see detailed site map in Appendix 1). EPA will install the retaining walls and rockfall protection system and devices as determined to be necessary by EPA, in accordance with the Action Memorandum. The retaining walls and rock fall protection shall not be located within fifteen (15) feet from the current center of the rail line. EPA in its sole discretion may determine that construction and operation of any rockfall protection system is not feasible and may decide not to construct or operate any such system at the Site.

h. Through EPA's construction of the Repository, and any other structure installed in this Removal Action, and observance of the setback described in subparagraph e. and g. above, the Parties recognize that the Removal Action implemented under this Agreement will not impede, impair or otherwise interfere with active operation of the Railroad when active service is resumed; provided that Respondent does not interfere with or compromise in any way the implementation and effectiveness of the Removal Action and Repository. The Parties will endeavor to cooperate under this Settlement Agreement to ensure achievement of these goals.

i. Respondent shall provide access to EPA and its contractors to monitor, operate and maintain the Belden Cribbing Site Removal Action, to perform all actions determined by EPA to be necessary pursuant to 40 CFR 300.415(l), and to ensure the effectiveness and protectiveness of the Removal Action at the Site. When practicable, EPA will provide Respondent reasonable notice of future actions to monitor and maintain the Removal Action and to ensure its integrity, effectiveness and protectiveness. Respondent agrees that nothing in this Settlement Agreement shall in any way imply or create a duty or obligation on EPA to take any action to operate or maintain or monitor the Repository, Seep collection systems or connections, or rock fall protection systems at the Site, once installed. EPA retains all rights and authorities to conduct or order such actions as EPA determines necessary. This Settlement Agreement does not require Respondent to operate or maintain all or any part of the Repository, Seep collection and piping system, or rockfall protection systems.

j. During the implementation of this Removal Action, EPA agrees to observe all applicable Railroad safety requirements, as may be presented to EPA in a reasonable and timely manner, as are necessary to ensure the safety of any persons entering the Railroad right-of-way.

15. Work Implementation.

Respondent shall not commence or perform any Work except in conformance with the terms of this Settlement Agreement. Respondent or its contractor may commence implementation of the actions described herein for construction of the access haul road without advance notice or approval from EPA.

16. Health and Safety Plan. Within ten (10) days after the Effective Date, Respondent shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Settlement Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondent shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

17. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Settlement Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures.

b. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondent shall notify EPA not less than five (5) days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondent's implementation of the Work.

18. Reporting.

Respondent shall submit a written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement every 7th day (weekly) after the Effective Date, during the time period that Respondent is removing or covering track and constructing the temporary access road, until termination of this Settlement Agreement, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

19. Submittals. Respondent shall submit three (3) copies of all plans,

reports or other submittals required by this Settlement Agreement or any approved work plan. Upon request by EPA, Respondent shall submit such documents in electronic form.

20. Final Report. Within sixty (60) days after completion of all Work required by Section VIII of this Settlement Agreement, Respondent shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Settlement Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement Agreement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant, non-privileged documentation generated during the removal action (*e.g.*, manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

21. Off-Site Shipments.

a. Respondent shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the On-Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed ten (10) cubic yards.

i. Respondent shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the Removal Action. Respondent shall provide the information required by Paragraph 21(a) and 21(b) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

IX. SITE ACCESS

22. The Parties agree that Respondent shall provide access to the Railroad right-of-way portion of the Site for EPA's implementation of the Removal Action. Respondent shall (1) remove or cover the railroad track, or perform a combination thereof, and re-grade an access road along the Railroad right-of-way at the Site to enable EPA to enter the property and conduct necessary response actions as described in the Action Memorandum and this Settlement Agreement; (2) provide access on the Railroad right-of-way for the installation by EPA of a permanent repository and retaining walls and rock-fall protection devices for waste material at the Site, as described in the Action Memorandum and this Settlement Agreement; and (3) provide access for the installation by EPA of permanent collection pipe systems for two mine seeps at the Site, as described in the Action Memorandum and this Settlement Agreement.

23. If the Site, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by Respondent, Respondent shall, commencing on the Effective Date, provide EPA and its representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Settlement Agreement. Respondent shall, at least thirty (30) days prior to the conveyance or termination of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Order and written notice to EPA of the proposed conveyance or termination, including the name and address of the transferee. Respondent also agrees to require that its successors comply with the immediately preceding sentence, this Section, and Section X (Access to Information).

24. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within ten (10) days after the Effective Date, or as otherwise specified in writing by the OSC. Respondent shall immediately notify EPA if after using its best efforts it is unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing its efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV, Paragraph 37 (Payment of Other Response Costs).

25. Notwithstanding any provision of this Settlement Agreement, EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

26. Subject to and in accord with the provisions of CERCLA and Paragraphs 27 and 28, below, Respondent shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA, at reasonable times and with reasonable notice, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

27. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

28.a. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege, the work product privilege, or any other privilege recognized by federal law. If Respondent asserts such a privilege in lieu of providing documents, Respondent shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

b. No claim of confidentiality shall be made with respect to any data generated under this Agreement, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XI. RECORD RETENTION

29. Until ten (10) years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until ten (10) years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

30. At the conclusion of this document retention period, Respondent shall notify EPA at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that certain documents, records and other information are privileged or protected from disclosure under the attorney-client privilege, work product privilege, as confidential business information, or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

31. Respondent hereby certifies that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. COMPLIANCE WITH OTHER LAWS

32. Respondent shall perform all actions required pursuant to this Settlement Agreement in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or

facility siting laws. Pursuant to Section 121(e) of CERCLA, 42 U.S.C. § 121(e), no federal, State or local permits or licenses, except approvals by EPA as may be required under this Settlement Agreement, shall be required for the Repository, Seep collection systems and rockfall protection systems. Respondent shall not be required to obtain any permits, licenses or approvals for work that EPA is performing or has implemented under this Settlement Agreement. Pursuant to Section 121(e) of CERCLA, 42 U.S.C. § 121(e), the Parties agree and understand that no federal, State or local permits or licenses, except approvals by EPA as may be required under this Settlement Agreement, shall be required for Respondent's implementation of any on-site response actions under this Agreement. If permits or licenses are required for any other Work that Respondent is required to perform under this Settlement Agreement, Respondent shall identify and submit timely and complete applications and requests for all such permits, licenses, and approvals and shall obtain all such permits, licenses, and approvals in sufficient time to perform Work as scheduled under this Settlement Agreement. This Settlement Agreement is not, nor shall it act as, nor is it intended by the Parties to be, a permit issued pursuant to federal or State statute or regulation.

XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

33. In the event of any action or occurrence during performance of the Work which Respondent is performing under this Settlement Agreement which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer at the National Response Center, at (800) 424-8802 of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP in accordance with Section XV, Paragraph 37 (Payment of Other Response Costs).

34. In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify the OSC at 303-886-1633 and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq*.

XIV. AUTHORITY OF ON-SCENE COORDINATOR

35. The OSC shall be responsible for overseeing Respondent's implementation of this Settlement Agreement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement Agreement, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

XV. PAYMENT OF RESPONSE COSTS

36.a. Within thirty (30) days after the Effective Date of this Settlement Agreement, Respondent shall pay to EPA $73,321.00, for Past Response Costs, plus an additional sum for Interest on that amount calculated from December 31, 2006, through the date of payment; and $687,534.00 for Future Response Costs.

b. Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Respondent by EPA Region 8, and shall be accompanied by a statement identifying the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID # 08-KQ, and the EPA docket number for this action. Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 021030004
TREAS NYC/CTR/
BNF = 68010727

c. At the time of payment, Respondent shall send notice that such payment has been made to:

James M. Stearns (8ENF-L)
Enforcement Attorney - Eagle Mine
Legal Enforcement Program, EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
(303) 312-6912 FAX: (303) 312-6953

Sharon Abendschan (8ENF-RC)
Enforcement Specialist - Eagle Mine
Technical Enforcement Program, EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
(303) 312-6957

and

Region 8 Comptroller
Office of Finance
EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Such notice shall reference the EPA Region and Site/Spill ID # 08-KQ and the EPA docket number for this action.

d. The total amount to be paid by Respondent pursuant to Paragraph 36(a) shall be deposited by EPA in the Belden Cribbing Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

37. Payment of Other Response Costs.

a. Respondent shall pay to the EPA Hazardous Substance Superfund one-hundred percent (100%) of Other Response Costs, not inconsistent with the National Contingency Plan. If Other Response Costs are incurred, EPA will send Respondent one or more bills requiring payment, which includes an EPA Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors. Respondent shall make all payments within thirty (30) days of receipt of each bill requiring payment, except as otherwise provided in Section XVI (Dispute Resolution). Payment by Respondent shall be made either by Electronic Funds Transfer (EFT) or by certified check or checks or cashier's check or checks.

b. If payment is made by certified or cashier's check, such check(s) shall be made payable to "EPA Hazardous Substance Superfund." Each check, or a letter accompanying each check, shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region (Region 8) and Site/Spill ID Number (Site ID # 08-KQ), and the EPA docket number for this action. Payments and checks must be received by 11:00 AM EST for same day credit. Respondent shall send the check(s) to:

for Regular Mail:

EPA Superfund
Mellon Bank
Attn: Superfund Accounting
Lockbox 360859
Pittsburgh, PA 15251-6859

for Federal Express, Airborne, Etc.:

EPA Superfund
U.S. EPA: 360859
Mellon Client Service Center Rm 154-0670
500 Ross Street
Pittsburgh, PA 15251-6859

c. If payment is made by EFT, payment shall be as specified in Paragraph 36.b.

d. At the time of payment, Respondent shall send notice that such payment has been made, as provided in Paragraph 36.c.

e. The total amount to be paid by Respondent pursuant to Paragraph 37 (Payment of Other Response Costs) shall be deposited by EPA in the Belden Cribbing Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

38. In the event that the payment(s) for Past Response Costs and Future Response Costs are not made within thirty (30) days of the Effective Date, or the payments for Other Response Costs are not paid within thirty (30) days of Respondent's receipt of a bill from EPA, Respondent shall pay Interest on the unpaid balance. The Interest on Past Response Costs and Future Response Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment. The Interest on Other Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment; provided that if Dispute Resolution is invoked with respect to such costs and Respondent prevails in such Dispute Resolution, accrued interest for that portion of the costs upon which Respondent prevailed in Dispute will not be payable. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

39.a. Respondent may contest payment of any Other Response Costs billed under Paragraph 37 if it determines that EPA has made a mathematical error, or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the EPA Project Coordinator. Any such objection shall specifically identify the contested Other Response Costs and the basis for objection. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, in the event of an objection, Respondent shall within the 30-

day period pay all uncontested Other Response Costs to EPA in the manner described in Paragraph 37. Simultaneously, Respondent shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Colorado and remit to that escrow account funds equivalent to the amount of the contested Other Response Costs. Respondent shall send to the EPA Project Coordinator a copy of the transmittal letter and check paying the uncontested Other Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondent shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution).

b. If EPA prevails in the dispute regarding Other Response Costs, within five (5) days of the resolution of the dispute, Respondent shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 37. If Respondent prevails concerning any aspect of the contested costs, Respondent shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in Paragraph 37. Respondent shall be disbursed any balance of the escrow account.

XVI. DISPUTE RESOLUTION

40. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally. Nothing in this Section shall be deemed to create a right to pre-enforcement review of response actions taken by EPA. The obligation to pay Past Response Costs and Future Response Costs under this Settlement Agreement, and the amount of that payment(s), shall not be subject to Dispute under this Settlement Agreement.

41. If Respondent objects to any EPA action taken pursuant to this Settlement Agreement, it shall notify EPA in writing of its objection(s) within five (5) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have fourteen (14) days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

42. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, Respondent shall be afforded the opportunity to promptly present its position, including any relevant written materials, to the appropriate Assistant Regional Administrator, EPA Region 8 ("ARA"). The ARA will consider the evidence and the position of

EPA and Respondent, and the ARA will issue a written decision on the dispute to Respondent, which shall not constitute final agency action for purposes of judicial review. EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondent's obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section, unless so determined by the EPA Assistant Regional Administrator. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with the EPA Assistant Regional Administrator's decision, whichever occurs. If Respondent prevails in the matter under dispute, any time frames or schedules pertaining to the specific matter under dispute for which Respondent prevailed may, in the discretion of the EPA Assistant Regional Administrator, be tolled.

XVII. FORCE MAJEURE

43. Respondent agrees to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Settlement Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Respondent, or of any entity controlled by Respondent, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

44. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within five (5) days of when Respondent first knew that the event might cause a delay. Within ten (10) days thereafter, Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure, unless EPA in its sole discretion determines otherwise.

45. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay

has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

46. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 47 and 48 for failure to comply with the requirements of this Settlement Agreement specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities and payments required of Respondent under this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

47. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 47(b):

Penalty Per Violation Per Day	Period of Noncompliance
$500	1st through 14th day
$1,000	15th through 30th day
$15,000	31st day and beyond

b. Compliance Milestones:

1. Completion of all activities required under Section VIII of this Settlement Agreement, except reporting, by no later than June 15, 2007.

2. Payment of Past Response Costs and Future Response Costs within thirty (30) days of the Effective Date, pursuant to Paragraph 36; Payment of Other Response Costs within thirty (30) days of receipt of bill from EPA, pursuant to Paragraph 37.

48. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs 19 and 20:

Penalty Per Violation Per Day	Period of Noncompliance
$250	1st through 14th day
$500	15th through 30th day
$1500	31st day and beyond

49. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 59 of Section XX, Respondent shall be liable for a stipulated penalty in the amount of $175,000.

50. All penalties under this Section shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue (1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and (2) with respect to a decision by the EPA Assistant Regional Administrator, Region 8, under Paragraph 42 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

51. Following EPA's determination that Respondent has failed to comply with a requirement of this Settlement Agreement, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation; provided however that EPA in its sole discretion may consider such failure to notify in determining the amount, if any, that EPA will assess and demand.

52. All penalties accruing under this Section shall be due and payable to EPA within thirty (30) days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to:

for Regular Mail:

EPA Superfund
Mellon Bank
Attn: Superfund Accounting
Lockbox 360859
Pittsburgh, PA 15251-6859

for Federal Express, Airborne, etc.:

EPA Superfund
U.S. EPA, 360859
Mellon Client Service Center Rm 154-0670

500 Ross Street
Pittsburgh, PA 15251-6859

Payments and checks must be received by 11:00 AM EST for same day credit. Each check, or a letter accompanying each check, shall indicate that the payment is for stipulated penalties and shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region (Region 8) and Site/Spill ID Number (Site ID # 08-KQ), and the EPA docket number for this action. At the time of payment, copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 12, and to the persons and addresses identified pursuant to Paragraph 36.c.

If payment is made by EFT, payment shall be as specified in Paragraph 36.b., including notice as provided in Paragraph 36c.

53. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Settlement Agreement.

54. Except as provided in paragraph 50 above, penalties shall continue to accrue during any dispute resolution period, but need not be paid until thirty (30) days after the dispute is resolved by agreement or by receipt of EPA's decision.

55. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 51. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(*l*) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(*l*), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3); provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(*l*) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 59. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive all or any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement. If the United States, on behalf of EPA, brings an action to enforce this Agreement, Respondent shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

XIX. COVENANT NOT TO SUE BY EPA

56. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work, the Removal Action, Past Response Costs, Future Response Costs and Other Response Costs. This covenant not to sue shall take effect upon receipt by EPA of the payments due under Section XV, Paragraph 36a, of this Settlement Agreement and any Interest or Stipulated Penalties due for failure to complete such payments as required by Sections XV and XVIII of this Settlement Agreement. This covenant not to sue is conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Settlement Agreement, including, but not limited to, performance of the Work, including completion of each of the payments required pursuant to Section XV. This covenant not to sue extends only to Respondent and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY EPA

57. a. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

b. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of 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.

58. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondent to meet a requirement of this Settlement Agreement;

b. liability for costs not included within the definitions of Past Response Costs, Future Response Costs or Other Response Costs;

c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606, for performance of response actions at the Site other than the Removal Action;

d. liability, based upon Respondent's ownership or operation of the Site, or upon Respondent's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Agreement by Respondent;

e. criminal liability;

f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

g. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and

h. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

59. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Respondent shall reimburse EPA all costs incurred by the United States in performing the Work pursuant to this Paragraph not inconsistent with the NCP, in accordance with Section XV, Paragraph 37 (Payment of Other Response Costs). Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENT

60. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, the Removal Action, Past Response Costs, Future Response Costs, Other Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work, the Removal Action, Past Response Costs, Future Response Costs or Other Response Costs.

Except as provided in Paragraphs 62 and 63 (Non-exempt De Micromis Waiver), these covenants not to sue in this Section shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 58 (b), (c), (d) and (f) - (h), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation. These covenants not to sue by Respondent apply only to the United States or EPA, and their respective contractors and employees, and not to any other person or entity. The covenants not to sue in Paragraph 60 only apply to the matters expressly set forth therein.

61. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

62. Non-exempt De Micromis Waiver. Respondent agrees not to assert any claims and to waive all claims or causes of action that Respondent may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

63. The waiver in Paragraph 62 shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Respondent. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6972, or has impeded or is impeding, through action or inaction, the performance of a response action or

natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

XXII. OTHER CLAIMS

64. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement. The Respondent shall not be deemed a party to any contract entered into by the United States or EPA, including without limitation their respective departments, agencies, offices, instrumentalities, officials, directors, contractors, subcontractors, consultants, agents, representatives or employees, in carrying out actions pursuant to this Settlement Agreement.

65. Except as expressly provided in Section XXI, Paragraphs 62 and 63 (Non-exempt De Micromis Waiver), and Section XIX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

66. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

67. In any subsequent administrative or judicial proceeding initiated by EPA, or the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondent shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by EPA, or the United States on behalf of EPA, in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by EPA set forth in Section XIX.

XXIII. CONTRIBUTION

68.a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work, the Removal Action, Past Response Costs, Future Response Costs and Other Response Costs. Except as provided in Section XXI, Paragraphs 62 and 63 (Non-exempt De Micromis Waiver) of this Settlement Agreement, nothing in this Settlement Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands against any persons not parties to this Settlement Agreement for indemnification, contribution or cost recovery.

b. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondent has, as of the Effective Date, resolved its liability to the United States for the Work, the Removal Action, Past Response Costs, Future Response Costs and Other Response Costs.

c. Except as provided in Section XXI, Paragraph 62 and 63 (Non-exempt De Micromis Waiver) of this Settlement Agreement, nothing in this Settlement Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any persons not parties to this Settlement Agreement. Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

XXIV. INDEMNIFICATION

69. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Settlement Agreement. Neither Respondent nor any such contractor shall be considered an agent of the

United States. The Respondent shall not be held out as a party to any contract entered into by or on behalf of the United States or EPA or their respective officials, directors, contractors, subcontractors, consultants, agents, representatives or employees in carrying out actions pursuant to this Settlement Agreement. Neither the United States nor EPA, nor their respective officials, directors, contractors, subcontractors, consultants, agents, representatives or employees shall be deemed an agent or representative of Respondent; nor shall Respondent nor its officers, directors, contractors, subcontractors, consultants, agents, representatives or employees be deemed an agent or representative of EPA or the United States.

70. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

71. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

72. At least seven (7) days prior to commencing any on-Site work under this Settlement Agreement, Respondent shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with respective limits of one million dollars ($1,000,000.00), combined single limit naming EPA as an additional insured. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondent shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement Agreement, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Settlement Agreement. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. FINANCIAL ASSURANCE

73. Within thirty (30) days of the Effective Date, Respondent shall establish and maintain financial security for the benefit of EPA in the amount of one million three hundred thousand dollars ($1,300,000.00) in one or more of the following forms, in order to secure the full and final completion of Work by Respondent:

a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;

b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA;

c. a trust fund administered by a trustee acceptable in all respects to EPA;

d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;

e. a written guarantee to pay for or perform the Work provided by the parent company of Respondent, or by one or more unrelated companies that have a substantial business relationship with Respondent; including a demonstration that any such guarantor company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or

f. a demonstration of sufficient financial resources to pay for the Work made by Respondent, which shall consist of a demonstration that Respondent satisfies the requirements of 40 C.F.R. § 264.143(f). If Respondent or guarantors who seek to provide a demonstration under 40 C.F.R. § 264.143(f) have provided a similar demonstration at other RCRA, CERCLA, TSCA or other federally-regulated Sites, the amount for which they are providing financial assurance at those Sites by means of passing the financial test should be added to the estimated costs of the Work for purposes of determining the total dollar amount for which they must "pass the test." Respondent shall provide documentation upon EPA's request of the prior demonstration.

74. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondent shall, within thirty (30) days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 73, above. In addition, if at any time EPA notifies Respondent that the anticipated cost of completing the Work has increased, then, within thirty (30) days of such notification, Respondent shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondent's inability

to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

75. If Respondent seeks to ensure completion of the Work through a guarantee pursuant to Subparagraph 73.e. or 73.f. of this Settlement Agreement, Respondent shall (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date or such other date as agreed by EPA, to EPA. For the purposes of this Settlement Agreement, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the dollar amount to be used in the relevant financial test calculations shall be the current cost estimate of one million three hundred thousand dollars ($1,300,000.00) for the Work at the Site plus any other RCRA, CERCLA, TSCA, or other federal environmental obligations financially assured by the relevant Respondent or guarantor to EPA by means of passing a financial test.

76. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 73 of this Section, Respondent may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA. In the event of a dispute, Respondent may seek dispute resolution pursuant to Section XV (Dispute Resolution). Respondent may reduce the amount of security in accordance with EPA's written decision resolving the dispute.

77. Respondent may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondent may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

XXVII. MODIFICATIONS

78. The OSC may make modifications to any plan or schedule or Work Plan in writing or by oral direction, in order to achieve and implement the objectives set forth in such Work Plan. No such modifications may substantially alter the scope of Respondent's obligations under Section VIII of this Settlement Agreement. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual agreement of the parties.

79. If Respondent seeks permission to deviate from the requirements for construction of the access haul road or any approved schedule, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 78.

80. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXVIII. NOTICE OF COMPLETION OF WORK

81. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including, *e.g.*, payment of Other Response Costs and record retention, EPA will provide written notice to Respondent. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent complete the Work as set forth in this Settlement Agreement in order to correct such deficiencies. Respondent shall implement the modified and approved Work item(s) and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work item(s) shall be a violation of this Settlement Agreement.

XXIX. PUBLIC COMMENT

82. Final acceptance by EPA of Section XV (Payment of Response Costs) of this Settlement Agreement shall be subject to Section 122(i) of CERCLA, 42 U.S.C.§ 9622(i), which requires EPA to publish notice of the proposed settlement in the Federal Register, to provide persons who are not parties to the proposed settlement an opportunity to comment, solely, on the cost recovery component of the settlement, and to consider comments filed in determining whether to consent to the proposed settlement. EPA may withhold consent from, or seek to modify, all or part of Section XV of this Settlement Agreement if comments received disclose facts or considerations that indicate that Section XV of this Settlement Agreement is inappropriate, improper or inadequate. Otherwise, Section XV shall become effective when EPA issues notice to Respondent that public comments received, if any, do not require EPA to modify or withdraw from Section XV of this Settlement Agreement. Any modifications that EPA proposes in response to public comment under this Paragraph shall not become effective unless EPA and Respondent mutually agree upon such modification.

XXX. ATTORNEY GENERAL APPROVAL

83. The Attorney General or her designee has approved the response cost settlement embodied in this Settlement Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

XXXI. SEVERABILITY/INTEGRATION/APPENDICES

84. If a court issues an order that invalidates any provision of this Settlement Agreement or finds that Respondent has sufficient cause not to comply with one or more provisions of this Settlement Agreement, Respondent shall remain bound to comply with all provisions of this Settlement Agreement not invalidated or determined to be subject to a sufficient cause defense by the court's order.

85. This Settlement Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

Appendix 1.a., b., c. – Map of Site;

Appendix 2 – Action Memorandum;

XXXII. EFFECTIVE DATE

86. This Settlement Agreement shall be effective five (5) days after the Settlement Agreement is signed by the Regional Administrator or his/her delegatee, with the exception of Section XV, which shall be effective when EPA issues notice to Respondent that public comments received, if any, do not require EPA to modify or withdraw from Section XV of this Settlement Agreement.

Agreed this __ day of _____, 2007 .

For Respondent:

By: **SIGNED** _____ Date: **5/11/07**____
Michael L. Whitcomb
AVP – Law Department
Union Pacific Railroad Company

It is so ORDERED and Agreed this **16th** day of **May**, 2007.

By: **SIGNED** Date: **5/15/07**
David A. Ostrander, Program Director
Preparedness, Assessment and Emergency Response
United States Environmental Protection Agency, Region 8

By: **SIGNED** Date: **16 May, 2007**
Sharon Kercher, Director
Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice
United States Environmental Protection Agency, Region 8

By: **SIGNED** Date: **16 May 2007**
David J. Janik, Acting Director
Legal Enforcement Program
Office of Enforcement, Compliance and Environmental Justice
United States Environmental Protection Agency, Region 8

EFFECTIVE DATE: **June 18, 2007**

THIS DOCUMENT WAS FILED IN THE REGIONAL HEARING CLERK'S OFFICE ON JUNE 11, 2007. IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS PLEASE CONTACT THE REGIONAL HEARING CLERK.