PETITIONERS EXHIBITS TO ITS' SECOND MOTION TO SUPPLEMENT, CORRECT AND/OR AMED THE ADMINISTRATIVE RECORD

Petitioners Exhibit	Description
A	8/19/2010 Kathleen Montalte letter to Mark Johnson re: documents responsive to 10/6/2008 FOIA request
B	9/1/2010 Brian Williams letter to Kathleen A. Montalte re: documents not accessible on DVD provided
C	9/22/2010 Daniel Shiel email to Brian Williams re: unreadable files on DVD
D	Record Maintenance Log EAQ13 Varian 3800GC
E	Record Maintenance Log EAQ028 Varian GC 04078
F	USEPA Region 7 Analytical Services dated 5/7/2008
G	USEPA Region 7 Analytical Services dated 5/20/2008
H	Data Quality Assessment Record (DQAR), Sample Analysis Results (SAR) and Matrix Spike (MS/MSD) Bias Report for Solid Samples at SIM site
I	Data Quality Assessment Record (DQAR), Sample Analysis Results (SAR) and Matrix Spike (MS/MSD) Bias Report for Wipe Samples at SIM site
J	Data Quality Assessment Record (DQAR), Sample Analysis Results (SAR) and Matrix Spike (MS/MSD) Bias Report for Soil Samples at SIM Site
K	Quantitation Report
L	10/6/2008 Mark Johnson letter to Kathleen Montalte re: FOIA request
M	1/9/2009 Mark Johnson letter to Kathleen Montalte and Dan Shiel re: EPA FOIA response regarding the SIM site
N	Parties Joint Motion to Approve Stipulation for Entry of Preliminary Injunction (docket no. 34) filed 8/16/2010 *Union Pacific Railroad Co. v. US EPA*
O	Union Pacific's Supplemental Memorandum Brie in Support of Plaintiff's Motion for Preliminary Injunction (docket no. 37) *Union Pacific Railroad Co. v. US EPA*
P	Memorandum and Order dated 8/26/2010 in *Union Pacific Railroad Co. v. US EPA*

PETITIONERS' EXHIBIT

A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

August 19, 2010

Mr. Mark Johnson
Stinson Morrison Hecker, LLP
1201 Walnut, Suite 2900
Kansas City, MO 64106-2150

Dear Mr. Johnson:

Freedom of Information Act Request Number
07-RIN-00006-09

This is in regard to the above-referenced request dated October 6, 2008, regarding the Southern Iowa Mechanical Site, Ottumwa, Iowa.

Enclosed are approximately 230 pages of documents and one DVD. It is my understanding that you spoke with Mr. Dan Shiel in our Office of Regional Counsel and he informed you that these documents appear to be responsive to your October 6, 2008, FOIA request and they may not have been included in our October 29, 2008 response to you. We are sending these documents to you free of charge. If you have questions regarding these documents, please contact Mr. Shiel at (913) 551-7278.

I apologize for any inconvenience this may have caused.

Sincerely,

Kathleen A. Montalte
Freedom of Information Officer
(913) 551-7790

Enclosures.

PETITIONERS' EXHIBIT B

STINSON
MORRISON
HECKER
LLP

Brian D. Williams
816.691.3414 DIRECT
816.412.9370 DIRECT FAX
bwilliams@stinson.com

September 1, 2010

VIA U.S. MAIL AND ELECTRONIC MAIL

Ms. Kathleen A. Montalte
Freedom of Information Officer, United States Environmental Protection Agency,
Region VII
901 North 5th Street
Kansas City, KS 66101

Re: August 19, 2010 Response to Freedom of Info. Act Request No. 07-RIN-00006-09

Dear Ms. Montalte:

By letter dated August 19, 2010, you produced approximately 230 pages of documents and a DVD in response to our October 6, 2008, FOIA request. The DVD contains approximately 72.6 MB of data in several dozen files which we cannot open or read. These files include the following extensions: .run, .RCL, .mth, and .XLT.

The DVD you provided does not contain the programs or applications necessary to open and read these files. We do not have, and we have not been able to locate or obtain, any programs or applications which will allow us to open and read these files.

We request that you please provide to us either the programs or applications necessary to open and read each of the files on the DVD, or paper print-outs of all of the data in readable format. Your prompt attention to this request would be appreciated.

Please let me know if you have any questions.

Sincerely,

STINSON MORRISON HECKER LLP

Brian D. Williams

Brian D. Williams

cc: Daniel J. Sheil, Office of Regional Counsel

PETITIONERS' EXHIBIT C

Williams, Brian

From: Shiel.Daniel@epamail.epa.gov
Sent: Wednesday, September 22, 2010 4:24 PM
To: Williams, Brian
Cc: Montalte.Kathy@epamail.epa.gov; Johnson, Mark
Subject: RE: In re Southern Iowa Mechanical Site -- Unreadable Files on DVD produced on 8-19-10 in response to FOIA Request No. 07-RIN-00006-09

Brian--

We have overnight expressed the documents, with disk, to Mark, since he made the initial request. Kathy Montalte was unexpectedly out today, so the documents are coming without a formal transmittal letter. I included my business card with the documents, if there's any question about where they came from. I understand that Kathy will send Mark a letter when she returns to the office referencing my having already sent you the documents.

Daniel J. Shiel
Office of Regional Counsel
US EPA Region VII
901 North 5th Street
Kansas City, KS 66101
Direct Dial 913-551-7278
Fax 913-551-7925
shiel.daniel@epa.gov

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| From: |
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|"Williams, Brian" <BWilliams@stinson.com>
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| To: |
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|Daniel Shiel/R7/USEPA/US@EPA
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| Cc: |
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|Kathy Montalte/R7/USEPA/US@EPA, "Johnson, Mark" <MJohnson@stinson.com>
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| Date: |

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|09/21/2010 05:45 PM
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| Subject: |
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|RE: In re Southern Iowa Mechanical Site -- Unreadable Files on DVD produced on 8-19-10 in response to FOIA Request No. 07-RIN-00006-09 |
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Dan,

Please mail to us a paper print-out of each of the electronic files and all electronically stored information contained on the DVD provided to us on August 19, 2010.

Thank you.

Brian Williams

Brian D. Williams | Attorney | Stinson Morrison Hecker LLP
1201 Walnut Street, Suite 2900 | Kansas City, MO 64106-2150
T: 816.691.3414 | F: 816.412.9370 | M: 816.522.9798 BWilliams@stinson.com |
http://www.stinson.com/

-----Original Message-----
From: Shiel.Daniel@epamail.epa.gov [mailto:Shiel.Daniel@epamail.epa.gov]

Sent: Tuesday, September 21, 2010 4:06 PM
To: Williams, Brian
Cc: Montalte.Kathy@epamail.epa.gov
Subject: RE: In re Southern Iowa Mechanical Site -- Unreadable Files on DVD produced on 8-19-10 in response to FOIA Request No. 07-RIN-00006-09

Brian—
In your September 3, 2010, email you raised questions regarding the documents and electronically stored information provided by EPA on August 19, 2010. We understand that you were having difficulty matching the file paths on the printouts with the file paths of the electronic files on the disk. It is my understanding that the printouts previously provided were copies of documents printed directly from the computer associated with the analytical instrument, not printouts made from the disk we sent you. The file paths on the disk would not necessarily be the same as the files paths on computer, but the file names

would be the same, so you should be able to match paper printouts with electronic files by comparing the .run file names on the disk with the file name on the printout.

You were also concerned that you could not find an electronic file for each of the printouts. As we previously mentioned, we do not have electronic files for all the paper copies. In some instances EPA no longer has the electronic files corresponding to the paper copies and in other instances there never was an electronic file. For example, we currently have the electronic files for only one of the two instruments used to analyze the SIM Site samples. We provided both copies of the electronic files and a printout of these files for the first instrument.
For the second instrument, for which EPA no longer have the electronic files, we provided copies of the paper files. Also, for those documents that were not created in an electronic form, we provided a paper copy of the document.

To assist you in matching electronic files and paper documents we have made another copy of the electronic files and printed copies of the electronic files. As mentioned above, you should be able to match paper printouts with electronic files by comparing the file names on the disk with the file names on the printout. There are a limited number of additional files on the disk and paper copies that were probably not previously provided, e.g., information related to the initial daily instrument prime.

I have spoken with Ms. Montalte about these documents. We can make the documents available for you to pick up or put them in the mail to you.
Please let me know your preference.

Daniel J. Shiel
Office of Regional Counsel
US EPA Region VII
901 North 5th Street
Kansas City, KS 66101
Direct Dial 913-551-7278
Fax 913-551-7925
shiel.daniel@epa.gov

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| From: |
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|"Williams, Brian" <BWilliams@stinson.com>
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| To: |
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|<Shiel.Daniel@epamail.epa.gov>
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| Cc: |
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|"Johnson, Mark" <MJohnson@stinson.com>
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| Date: |
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|09/17/2010 04:11 PM
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| Subject: |
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|RE: In re Southern Iowa Mechanical Site -- Unreadable Files on DVD
produced on 8-19-10 in response to FOIA Request No. |
|07-RIN-00006-09
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Dan, it has now been more than 2 weeks since we requested paper copies of the previously undisclosed electronic files on the DVD which EPA produced to us last month. Please advise

as to when you intend to respond so we can determine what further actions we need to take to obtain these documents which Ms. Montalte acknowledges are responsive to our October 2008 FOIA request.

Brian Williams

Brian D. Williams | Attorney | Stinson Morrison Hecker LLP
1201 Walnut Street, Suite 2900 | Kansas City, MO 64106-2150
T: 816.691.3414 | F: 816.412.9370 | M: 816.522.9798 BWilliams@stinson.com |
http://www.stinson.com/

-----Original Message-----
From: Shiel.Daniel@epamail.epa.gov [mailto:Shiel.Daniel@epamail.epa.gov]

Sent: Friday, September 03, 2010 2:51 PM
To: Williams, Brian
Cc: Johnson, Mark
Subject: RE: In re Southern Iowa Mechanical Site -- Unreadable Files on DVD produced on 8-19-10 in response to FOIA Request No. 07-RIN-00006-09

We'll take a look at this and I'll get back with you as soon as I have some more information.

Daniel J. Shiel
Office of Regional Counsel
US EPA Region VII
901 North 5th Street
Kansas City, KS 66101
Direct Dial 913-551-7278
Fax 913-551-7925
shiel.daniel@epa.gov

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| From: |
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|"Williams, Brian" <BWilliams@stinson.com>
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| To: |
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|Daniel Shiel/R7/USEPA/US@EPA
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| Cc: |
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|"Johnson, Mark" <MJohnson@stinson.com>
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| Date: |
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|09/03/2010 12:00 PM
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|RE: In re Southern Iowa Mechanical Site -- Unreadable Files on DVD produced on 8-19-10 in response to FOIA Request No. |
|07-RIN-00006-09
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Dan,

As we discussed during our phone conversation this morning, I am providing some examples of electronic files on the DVD we received from EPA on 8-19-10 which do not appear in the 270 pages of documents which accompanied the DVD. It is our understanding from Ms. Montalte's August 19, 2010 cover letter that these are previously unproduced documents which are responsive to our October 6, 2008 FOIA request.

Here are a few initial observations:

- approximately 190 pages of the printed documents have file paths or file names which include: ". . .\asr3760\042408\ . . .".

- All of the electronic files on the DVD are contained in a folder identified as "asr3867". Inside folder "asr3867" are two sub-folders: "asr3867" and "initial calibration".

- Inside subfolder "asr3867\asr3867" is a folder identified as "052108", as well 6 individual electronic files.

- Sub-subfolder "asr3867\asr3867\052108" contains approximately 85 electronic files with extensions ending in either ".run", ".RCL", or ".smp".

- None of the 270 pages of printed documents have file paths or

file names which include "asr3867", "asr3867\asr3867", "asr3867\initial calibration", or "asr3867\asr3867\052108".

- Approximately 80 pages of the printed documents have no file path or file name indicated on the document. Therefore, we cannot determine for certain whether any of these documents appear on the DVD. However, most of these documents appear to either be in "Word" format or photocopies of notebooks. There are no electronic files on the DVD which contain the file extensions ".DOC", "DOCX", or ".PDF", which would indicate that they are in "Word" format or that they are portable data files.

Based on these observations, I do not believe that any of the electronic files on the DVD are in the 270 pages of paper documents which accompanied the DVD. However, during our phone conversation, I agreed to give you some examples so that you could check the electronic file against the paper copies to see whether the electronic file is a duplicate of one of the 270 pages of paper. Here are a few examples:

- asr3867\asr3867\baseline.mth
- asr3867\asr3867\pcb.mth
- asr3867\asr3867\report.mth
- asr3867\asr3867\run30708.mth
- asr3867\initial calibration\60verify.run
- asr3867\initial calibration\2160.run
- asr3867\initial calibration\2160cal1.run
- asr3867\initial calibration\2160cal1gnf.run
- asr3867\asr3867\052108\2160ccv2.run
- asr3867\asr3867\052108\3867-2.run

- asr3867\asr3867\052108\3867-960-lcs.run
- asr3867\asr3867\052108\3867-960-mb.run
- asr3867\asr3867\052108\3867-960-rlc.run
- asr3867\asr3867\052108\3867-121-ms.run
- asr3867\asr3867\052108\3867-121-msd.run

If you believe that these electronic files are duplicates of paper documents provided with the DVD, would you please send me print-outs of these electronic files so that I can compare them to what we received.
If these examples are not duplicates of the paper copies documents which accompanied the DVD, we request that you please provide paper copies of each of the electronic files on the DVD.

If you have any questions or would like to discuss this issue further, please give me a call at 816-691-3414.

Thank you for your assistance in this matter.

Brian Williams

Brian D. Williams | Attorney | Stinson Morrison Hecker LLP
1201 Walnut Street, Suite 2900 | Kansas City, MO 64106-2150
T: 816.691.3414 | F: 816.412.9370 | M: 816.522.9798 BWilliams@stinson.com | www.stinson.com

From: Williams, Brian
Sent: Wednesday, September 01, 2010 11:53 AM
To: 'Montalte.Kathy@epamail.epa.gov'; Shiel.Daniel@epamail.epa.gov
Cc: Johnson, Mark
Subject: In re Southern Iowa Mechanical Site -- Unreadable Files on DVD produced on 8-19-10 in response to FOIA Request No. 07-RIN-00006-09

Dan and Ms. Montalte,

Attached is a letter we are mailing to you today regarding the DVD we received from EPA last week in response to our October 6, 2008 FOIA request. We cannot open or read any of the files on this DVD.

We are requesting that you provide to us either the programs or applications necessary to access these files, or hard-copy printouts of the data in readable format.

Please let Mark Johnson or me know if you have any questions.

Thank you.
Please consider the environment before printing this e-mail.

PETITIONERS' EXHIBIT D

MØ1-GC231

RECORD

MAINTENANCE

LOG

EAQ13

Varian 3800 GC

EPA Prop # A22552

Serial # 02231

7530-00-222-3525
FEDERAL SUPPLY SERVICE
(GPO)

3/7/08 UEE New syringe needle.

3/10/08 UEE New liner, oring, septum

3/19/08 UEE Clipped ~ 1 foot off front end of each col. new ferrule + col. nut.
Breakdown much better

3/21/08 UEE new syringe

3/28/08 UEE new septum + liner

4/8/08 UEE let ESAT have 8200 tower, as theirs was malfunctioning

4/9/08 UEE put ESAT's 8200 tower on my GC to troubleshoot. Put back. Got my tower back

5/9/08 UEE Autosampler stopped on line 11 of 23. No clear reason given.

5/21/08 UEE Power outage in middle of run. Caught it before I left for the day. Restarted sequence at next line.

5/23/08 UEE Nasty ASR3867 samples made curve blown. replaced syringe needle, septum, liner + graphite ferrule. Baked col. + inj. port @ 250°C

5/23/08 LEJ (cont.) didn't completely fix baseline problem. Clipped ~ 1 ft off front of columns. New ferrule. Reran from beginning of day 3.

Varian
Had trouble w/ ferrule not fitting right.
Use supelco P.N. 22463

Clipping col. didn't help.

bake col + inj. port @ 250 overnight

5/27/08 LEJ helped some, but not enough.

Replaced columns DB5 SN US5265746H
(in since 1905) DB1701 SN US5232827H

conditioned @ 270° overnight

6/2/08 LEJ — curves run over weekend gave poor chromatography/sensitivity.

Columns not inserted correctly. I had inserted 3.7cm rather than 7.5 cm.

Replaced inj. nut, septum, liner, graphite ferrule, aluminum washer, 2 hole ferrule. Clipped few inches off front of each column + reinserted to proper depth.

PETITIONERS' EXHIBIT

E

MP1-
GC678
Maint Log EAQ028

RECORD

Varian GC
04078

7530-00-222-3525
FEDERAL SUPPLY SERVICE
(GPO)

3-11-08 SR

Slowing down some. Run scan disk + defrag

Last December finished '06 first late. First few weeks later injected first '07. first + curves were very high 30-50% high. Can think of no reason. Checked curves today + they're low 60-75%. Checked detector + injector nuts - injector was a little loose - But R.T.s were not later. Checked again + now it's high! ≈20% high. So here's a case where r.t. were the same but a leak at the injector nut lowered the area counts. Reset curves.

4/17/08 VEI Computer locked up. Rebooted. scan disk + defrag

5-7-08 SR

Herb std peaks have been tailing a lot in last month (first std's peaks OK). So changed septum + liner to see if helps. Didn't 5-8-08 cut 6" from front of column - that helped very much - pks good + sharp now.

5-22-08 SR

run scan disk + defrag.

6-24-08 SR

again

PETITIONERS' EXHIBIT

F

US EPA Region 7 Analytical Services Request (ASR)

05/07/2008 11:28

Project ID: MP072504 **ASR Number:** 3867 **Projected Delivery Date:** 05/15/2008

Project Desc: Des Moines TCE Site Insulation and wipe sampling

City: Des Moines **State:** Iowa **Program:** Superfund
Site Name: 0725 DES MOINES TCE - SOUTH POND/DRAINAGE AREA
Site ID: 0725 **Site OU** 04 **CERCLIS ID:** IAD980687933
GPRA PRC: 302DD2C

OK per DA 5/7/08

Project Manager: Mary Peterson
Organization: SUPR/IANE **Phone Number:** 913-551-7882

Contact: Campbell, Todd
Organization: SUPR/ERNB **Contact Phone:** 913-551-7115

ASR Purpose: Site Cleanup Support
Comments: The purpose of this sampling effort is to determine whether PCB residues remain on the surfaces of steel beams removed from the Dico property, and to determine whether any PCBs have migrated from the beams into surrounding soils.

Is this activity currently or potentially a criminal investigation? Yes
Has a QAPP for the requested services been approved? Yes
QAPP Log Number and/or QA Document Number:

For health, safety and environmental compliance are any samples expected to contain:

Dioxin > 1ppb: Unlikely
RCRA Listed Wastes: Unlikely
Toxic/Hazardous Chemicals >1000ppm: Possibly

D Dalal / HC

No. of Samples	Req No	Analysis Name	CNS List	Conc of Interest	Expected Conc	Lab
10	2	PCBs in Soil by GC/EC		25 ppm	Low	EPA
10	1	Percent Solid				EPA
20	1	PCBs in Wipe Samples by GC/EC			Low	EPA

Special Analytical Requirements or Comments:
CI ASR and ~~7~~ 8-Day TAT is needed due to urgent nature of response. Samples will be collected on 5/14-15/08 and hand-delivered by the field sampler on 5/15/08. Field sampler must ensure that samples are collected and labeled properly prior to sample delivery, that 1 wipe sample have triple volume for QC (MS/MSD) purposes and that each sample container is sealed with a completed piece of custody-seal tape. Field sampler must note wipe area on each field sheet.

Date Submitted: 05/07/2008 **By:** Mary Peterson **ASR Status:** Accepted
Date Accepted: 05/07/2008 **By:** Nicole Roblez **RLAB Turn Around Time:** ~~7~~ 8 Days
Date Transmitted: **By:** **ANOP Turn Around Time:** ~~8~~ 7 Days

No KCRMO Needed
Trust Rwiggins

Sampling Supplies and QC/PE Samples

05/07/2008 11:28

ASR Number: 3867 **Project ID:** MP072504

Project Desc: Des Moines TCE Site Insulation and wipe sampling

Project Manager: Mary Peterson
Organization: SUPR/IANE **Phone Number:** 913-551-7882

Contact: Campbell, Todd
Organization: SUPR/ERNB **Contact Phone:** 913-551-7115

Supply Pickup Date: 05/12/2008 RLAB Will supply Field sheets and Tags

Supply Comments:
Field sheets, tags, COCs, solvent (hexane and iso-octane) and enough sterile gauze for up to 20 samples (+QC) and the remaining sampling gear will all be ready in a cooler on the back dock at the STC for the PM to pickup on or before 5/12am.

Qty	Sample Containers
30	8-oz. Wide Mouth Glass Jar (250 mL)

Qty	Equipment
1	Ice Chest (w/ plastic bag)

Qty	Preservatives
(None)	

Qty	Misc. Supplies
3	Chain-of-Custody Forms (each)
36	Custody-Seal Tape (by piece)
1	Fiber Tape (by roll)
1	Clear Wide Tape (by roll)
1	Large Plastic Bags (each)

Qty	QC Samples
(None)	

Performance Evaluation Samples

Qty	Matrix	Analytes	Concentration Range
(None)			

SOP No. 2410.1F

Attachment 1

Date 5/1/08
Initials [illegible] 5/7/08

SUPERFUND ANALYTICAL ACTIVITIES – DECISION TREE FORM

ASR Number 3867 Site Des Moines TCE Proj. Sample Delivery Date 5/15/08

1. Assign entire activity to **EPA**?
   - ~~o~~ Yes
   - o No – Reason:
     - o Capability
     - o Capacity / Workload
     - o Turn-around time
     - o Cost
     - o Other (explain): _____

2. Assign entire activity to **ESAT**?
   - o Yes
   - ~~o~~ No – Reason:
     - o Capability
     - o Capacity / Workload
     - ~~o~~ Other (explain): CF

3. Assign entire activity to **CLP**?
   - o Yes
   - ~~o~~ No – Reason:
     - o Funding
     - o Capability
     - o Capacity / Workload
     - ~~o~~ Other (explain): CF

4. Assign entire activity to **REAP**?
   - o Yes
   - o No – Reason:
     - o Funding
     - o Capability
     - o Capacity / Workload
     - o Turn-around time
     - o Cost
     - o Other (explain): CT _____

5. **Split** assignment as shown below:
   - o EPA _____
   - o ESAT _____
   - o CLP _____
   - o REAP _____
   - o START _____
   - o ARCS _____
   - o RAC _____
   - o ERRS _____
   - o (Other source) _____

Reason for split assignment _____

6. Assign to **other** source(s)?
   - o START
   - o ARCS
   - o RA
   - o ERRS
   - o Other (identify)_____

Reason: _____

PETITIONERS' EXHIBIT

G

US EPA Region 7 Analytical Services Request (ASR)

05/20/2008 16:32

Project ID: MP072504 **ASR Number:** 3867 **Projected Delivery Date:** 05/19/2008

Project Desc: Des Moines TCE Site Insulation and wipe sampling

City: Des Moines **State:** Iowa **Program:** Superfund
Site Name: 0725 DES MOINES TCE - SOUTH POND/DRAINAGE AREA
Site ID: 0725 **Site OU** 04 **CERCLIS ID:** IAD980687933
GPRA PRC: 302DD2C

Project Manager: Mary Peterson
Organization: SUPR/IANE **Phone Number:** 913-551-7882

Contact: Todd Campbell
Organization: SUPR/ERNB **Contact Phone:** 913-551-7115

ASR Purpose: Site Cleanup Support
Comments: The purpose of this sampling effort is to determine whether PCB residues remain on the surfaces of steel beams removed from the Dico property, and to determine whether any PCBs have migrated from the beams into surrounding soils.

Is this activity currently or potentially a criminal investigation? Yes
Has a QAPP for the requested services been approved? Yes
QAPP Log Number and/or QA Document Number:

For health, safety and environmental compliance are any samples expected to contain:

Dioxin > 1ppb: Unlikely
RCRA Listed Wastes: Unlikely
Toxic/Hazardous Chemicals >1000ppm: Possibly

No. of Samples	Req No	Analysis Name	CNS List	Conc of Interest	Expected Conc	Lab
10	2	PCBs in Soil by GC/EC		25 ppm	Low	EPA
10	1	Percent Solid				EPA
20	1	PCBs in Wipe Samples by GC/EC			Low	EPA

Special Analytical Requirements or Comments:
CI ASR and 8-Day TAT is needed due to urgent nature of response. Samples will be collected on 5/16/08 and hand-delivered by the field sampler on Monday, 5/19am. Field sampler must ensure that samples are collected and labeled properly prior to sample delivery, that 1 wipe sample have triple volume for QC (MS/MSD) purposes and that each sample container is sealed with a completed piece of custody-seal tape. Field sampler must note wipe area on each field sheet.

Date Submitted: 05/07/2008 **By:** Mary Peterson **ASR Status:** All Samples Received
Date Accepted: 05/07/2008 **By:** Nicole Roblez **RLAB Turn Around Time:** 8 **Days**
Date Transmitted: **By:** **ANOP Turn Around Time:** 6 **Days**

Analysis Analyte Information

05/20/2008 16:31

ASR Number: 3867
Project ID: MP072504 **Project Manager:** Mary Peterson
Project Desc: Des Moines TCE Site Insulation and wipe sampling
ASR Status: All Samples Received

Analysis: Percent Solid
Request No: 1

Default	Report Flag Req.	EPA	Analyte Name	CAS Number	TRL	Conc. Of Concern	Units
Yes	Yes	Yes	Solids, percent				%

Sample Receipt Notice

05/19/2008 09:18

ASR Number 3867
Samples Received: 05/19/2008
RLAB T-A-T: 8
Criminal: Yes
Project ID: MP072504
Project Desc: Des Moines TCE Site Insulation and wipe sampling

Lab: (All)
Report Sample: Numbers

Req No	Analysis	Matrix	Lab	Analyst Pri	Analyst Sec	Samples
2	PCB 8082G	Solid	EPA	LEI		1-__, 2-__, 3-__, 4-__, 5-__, 6-__, 9-__
1	% Solid.9E	Solid	EPA	LLB	JLB	1-__, 2-__, 3-__, 4-__, 5-__, 6-__, 9-__
1	PCB Wipe 8082G	Waste	EPA	LEI		108-FB, 109-__, 110-__, 111-__, 112-__, 113-__, 114-__, 115-__, 116-__, 117-__, 118-__, 119-__, 120-__, 121-__

Comments:
The above EPA (CI ASR) 8-Day TAT assigned samples will complete this ASR and are locked in the CI refrig. in L55. Samples 6 and 121 have triple volume for all RLAB QC (MS/MSD) purposes. Wipe area = 100cm2. Sample 9 is a sample of insulation material and may need to be defined as a Haz. Waste not soil. See RSCC if change is needed. EPA analysts will need to get access to the CI refrig. from RSCC or backup.

PETITIONERS' EXHIBIT

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Data Quality Assessment Record **ASR:** 3867 **Analysis:** PCB's

Method: RLAB Method 3240.2 **Matrix:** Solid

Project ID / Desc: Des Moines TCE

Laboratory: EPA X ESAT ____ Other (specify) ____

	Analyst	Peer-Reviewer	EPA Program Manager
Signature:			
Date:	05/29/08	5/29/8	5/30/2008

Sample Numbers: All of the samples for this ASR

950MB/LCS; 1 through 6; 9; 6MS/MSD

	Yes	N/A	No	RevCk
1. Overview of Analytical Services:				
•Is ASR, SRN, and Analyte List included?	X			✓
•Did customer request specific reporting limits?			X	✓
If so, were the requested reporting limits met?		X		✓
•Did customer specify other DQOs?			X	✓
If so, were these DQOs met?		X		✓
•Were all requested analyses performed?	X			✓
2. Sample Receipt/ Prep:				
•Were water samples extracted within 7 days?		X		✓
•Were solid samples extracted within 14 days?	X			✓
•Were extracts analyzed within 40 days of extraction?	X			✓
•Were samples stored at 4°C in amber/dark?	X			✓
•Is the extraction sheet fully filled out?	X			✓
3. Initial Calibration:				
•Is Curve summary present with documentation (DQAR copy, std conc., areas, rts, %RSD, CFs, correl. coeff., inj. date, calc. check)?	X			✓
•Are there at least 5 levels for each compound, except DCB Surr.?	X			✓
•If avg CFs are used, are %RSDs ≤ 20%?	X			✓
•If linear regression is used, are correl. coeff. ≥ 0.995?	X			✓
4. Continuing Calibration:				
•Are initial, continuing, and final CCVs within ± 15%?	X		X	✓
If not, is the average within ± 15%?	X			✓
•Are the retention times updated and acceptably stable?	X			✓
•Is Endrin/DDT breakdown within limits? (≤ 20%)		X		✓
5. Quality Control Samples:				
•Was a method blank extracted with each set of 20 samples?	X			✓
Was it free of positive hits and interferences?	X			✓
If not, were any blank rules applied to the samples?		X		✓
•Was an LFB extracted? (required only for DW)		X		✓
Were at least 80% of the results within LIMS QC limits?		X		✓
•Were MS/MSD samples extracted with each set of 20 samples?	X			✓
Was spiking level ≥ 50% of any positive innate values, and was it within the curve's linear range?	X			✓
Were the results within LIMS QC limits?			X	✓
•Were RPD calculated for any pairs? (LD, MSD)	X			✓
•Was an LCS extracted with each set of 20 samples?	X			✓
Were the results within LIMS QC limits?	X			✓
•Were surrogate recoveries acceptable?	X			✓
6. Raw Data Evaluation:				

•Is a sequence with standard prep date info present?	X			✓
•Does each inject. have a full chrom./rt&area report, and quant.reports with rts, rt diff., area counts, std info., and results for each column?	X			✓
•Are manual integrations properly documented?	X			✓
•Does worksheet show dilutions, surrogate recoveries and surrogate recovery windows?	X			✓
•Are all positives evaluated per 11.9.3 and recorded on worksheet? (following RCRA guidelines if needed)	X			✓
•Are solid sample results and reporting limits corrected for % solids?		X		✓
•Is an acceptable calculation check included?	X			✓
7. Final Review:				
•Are all LIMS sample and QC reports present?	X			✓
•Are all LIMS reports signed/initialed?	X			✓
•Are all other required documents present?	X			✓
•Are results rounded to the correct number of significant figures?	X			✓
•Were data reported without qualification?	X			✓
•Did data meet customer's DQOs?	X			✓
If not, was supervisor or PM notified?		X		✓
•Are all exceptions properly documented?	X			✓
•Does the overall picture make sense?	X			✓

Additional Comments:

1. Reporting Limits:

Dilutions were necessary because of high levels of Aroclors 1248 and 1254 in some samples for this analysis. Some of the reporting limits were elevated 5 times due to dilutions in samples 1, 5, and 6; the reporting limits were elevated 20 times due to dilutions in sample 4; and the reporting limits were elevated 20000 times due to dilutions in sample 9. Additionally, the reporting limits for all are adjusted for dry weight.

5. Surrogates:

Sample 9 required dilution by a factor of 20000. Because of this, surrogate recoveries were not used to evaluate data quality.

5. Matrix Spikes:

The matrix spike recovery was high, probably due to innate Aroclor 1248. No data qualified due to high matrix spike recovery.

Sample Analysis Results

US EPA Region 7 Laboratory
901 N. 5th Street
Kansas City, Kansas 66101

05/29/2008

ASR Number: 3867

Analysis: 2 PCBs In Soil by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G with Acid Cleanup **Reviewer:**

Project ID: MP072504 **Project Manager:** Mary Peterson

Project Desc: Des Moines TCE Site Insulation and wipe sampling

Location: Des Moines **State:** Iowa **Program:** Superfund

Site Name: 0725 DES MOINES TCE - SOUTH POND/DRAINAGE AREA **Site Id:** 0725 **Site OU:** 04

Report Comments:

Dilutions were necessary because of high levels of Aroclors 1248 and 1254 in some samples for this analysis. Some of the reporting limits were elevated 5 times due to dilutions in samples 1, 5, and 6; the reporting limits were elevated 20 times due to dilutions in sample 4; and the reporting limits were elevated 20000 times due to dilutions in sample 9. Additionally, the reporting limits for all are adjusted for dry weight.

Analysis Comments:

Sample 9 required dilution by a factor of 20000. Because of this, surrogate recoveries were not used to evaluate data quality.

The matrix spike and matrix spike duplicate recoveries were high, probably due to innate Aroclor 1248 which biased the Aroclor 1254 results. No data were qualified due to high matrix spike recovery.

ASR Number: 3867 **Project ID:** MP072504 **Analysis Results** 05/29/2008 **Analyst:** **Reviewer:**

Analysis: 2 PCBs In Soil by GC/EC

Analyte	Units	1-__	2-__	3-__	4-__	5-__	6-__
Aroclor 1016	ug/kg	110 U	23 U	23 U	440 U	100 U	120 U
Aroclor 1221	ug/kg	110 U	23 U	23 U	440 U	100 U	120 U
Aroclor 1232	ug/kg	110 U	23 U	23 U	440 U	100 U	120 U
Aroclor 1242	ug/kg	110 U	23 U	23 U	440 U	100 U	120 U
Aroclor 1248	ug/kg	110 U	23 U	23 U	440 U	100 U	120 U
Aroclor 1254	ug/kg	250	12 U	46	3100	52 U	170
Aroclor 1260	ug/kg	55 U	12 U	11 U	220 U	52 U	61 U
Decachlorobiphenyl	% Rec	75	57	52	66	97	52

ASR Number: 3867 **Project ID:** MP072504 **Analysis Results** 05/29/2008 **Analyst:** [illegible] **Reviewer:** [illegible]

Analysis: 2 PCBs In Soil by GC/EC

Analyte	Units	6-MS	6-MSD	9-__	950-MB	950-LCS
Aroclor 1016	ug/kg			1100000 U	20 U	
Aroclor 1221	ug/kg			1100000 U	20 U	
Aroclor 1232	ug/kg			1100000 U	20 U	
Aroclor 1242	ug/kg			1100000 U	20 U	
Aroclor 1248	ug/kg			1100000 U	20 U	
Aroclor 1254	ug/kg	480	639	6300000	10 U	103
Aroclor 1260	ug/kg			540000 U	10 U	
Decachlorobiphenyl	% Rec	73	69	N/A O	83	90

Matrix Spike (MS/MSD) Bias Report

05/29/2008 13:57

ASR Number: 3867

Analysis Name: 2 PCBs In Soil by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G with Acid Cleanup **Reviewer:**

Project ID: MP072504

Definitions:

MS / MSD: A Matrix Spike (MS) sample (or Matrix Spike Duplicate - MSD) is an aliquot from an environmental sample to which known concentrations of one or more analytes of interest have been added. The MS (MSD) is taken through the entire analytical procedure and the recovery of the added analyte(s) is calculated. MS and MSD data are evaluated against control limits to assess the effect of the sample matrix on the accuracy of the analysis.

Conc. Spiked: The Concentration Spiked is the calculated increase in concentration in the spiked sample that results from the addition of the spike material. The concentration is calculated in the same units as the sample analysis.

%Rec: The percent recovery (bias) of the Matrix sample. %Rec = ((MS-Sam) / CS) * 100

Where MS = The measured result (Final Result) of the Matrix Spike sample (or MSD). If the Final Result has a Detection ID of 'U', 'UJ', or 'K', the Raw Result is used, if available. If the raw result is not available, zero is used as the measured result. If the Raw Result is used, it will have a Detection ID of 'Rw'.

Sam = The measured result (Final Result) of the original sample. If the Final Result has a Detection ID of 'U', 'UJ', or 'K', the Raw Result is used, if available. If the Raw Result is not available, zero is used as the measured result. If the Raw Result is used, it will have a Dection ID of 'Rw'.

CS = The Concentration Spike as defined above.

Flag: The Flag column is used to identify how the percent recovery comapres to the control limits.

High: The percent recovery is greater than the upper control limit (UCL).

Low: The percent recovery is less than the lower control limit (LCL).

(Blank): The percent recovery is within the control limits.

J: The percent recovery is within the control limits, but one of the measured results was an estimated value.

<<: The Concentration Spiked is less than 50 percent of the Final Result for the original sample. It may be inappropriate to qualify data based on this spike recovery.

**: The acceptability of the percent recovery can not be determined due to missing values.

LCL: The Lower Control Limit expressed in percent recovery.

UCL: The Upper Control Limit expressed in percent recovery.

ASR Number: 3867 **Project ID:** MP072504 **MS/MSD Bias** 05/29/2008 **Analyst:** VRS **Reviewer:** BCT

Analysis: 2 PCBs In Soil by GC/EC

Analyte	Units	6-__	6-MS	Conc. Spiked	%Rec	Flag	6-MSD	Conc. Spiked	%Rec	Flag	LCL	UCL
Aroclor 1254	ug/kg	170	480	122	254	High	639	122	384	High	10	144

Matrix Spike (MS/MSD) Precision Results

05/29/2008 13:57

ASR Number: 3867

Analysis: 2 PCBs In Soil by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G with Acid Cleanup **Reviewer:**

Project ID: MP072504

Definitions:

MS / MSD: A Matrix Spike (MS) sample (or Matrix Spike Duplicate - MSD) is an aliquot from an enviromental sample to which known concentrations of one or more analytes of intrest have been added. The MS (MSD) is taken through the entire analytical procedure and the recovery of the added analyte(s) is calculated. MS and MSD data are evaluated against control limits to assess the effect of the sample matrix on the accuracy of the analysis.

RPD: The relative percent difference (precision) of the Matrix Spiked samples. RPD = (2 * |MS - MSD| / (MS + MSD)) * 100

Where MS = The measured result (Final Result) of the Matrix Spike sample.

MSD = The measured result (Final Result) of the Matrix Spike Duplicate sample.

Flag: The Flag column is used to identify how the relative percent difference compares to the control limit.

High: The relative percent difference is greater than the precision control limit (PCL).

(Blank): The relative percent difference is within the control limit.

J: The relative percent difference is within the control limit, but the measured result was an estimated value.

<>: The difference between the concentrations spiked into the samples is greater than 20 percent of the precision control limit. It may be inappropriate to qualify data based on the RPD of these results.

**: The acceptability of the relative percent difference can not be determined due to missing or coded values.

PCL: The Precision Control Limit expressed as the maximum acceptable relative percent difference.

ASR Number: 3867 **Project ID:** MP072504 **MS/MSD Precision** 05/29/2008 **Analyst:** [illegible] **Reviewer:** 06/17

Analysis: 2 PCBs In Soil by GC/EC **Spike of:** 6-__

Analyte	Units	6 MS	6 MSD	RPD	Flag	PCL
Aroclor 1254	ug/kg	480	639	28		44

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Laboratory Control Sample (LCS) Bias Report

05/29/2008

Asr Number: 3867

Analysis: 2 PCBs In Soil by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G with Acid Cleanup **Reviewer:**

Project Id: MP072504

Definitions:

LCS: A Laboratory Control Sample(LCS) consists of a control matrix (blank) which has been spiked with one or more target compounds representative of the method analytes. An LCS is analyzed with environmental samples to provide evidence that the laboratory is performing the analytical method within accepted QC guidelines.

True Value: The True Value (Concentration Spiked) of a Laboratory Control Sample is the calculated increase in concentration in the control matrix that results from the addition of the spike material. The concentration is calculated in the same units as the sample analysis.

%Rec: The percent recovery(bias) of the Laboratory Control Sample. %Rec = (LCS/TV)*100

Where: LCS = The measured result (Final Result) of the Lab Control Sample. If the Final Result has a Detection ID of 'U', 'UJ', or 'K'', the Raw Result is used, if available. If the Raw Result is not available, zero is used as the measured result. If the Raw Result is used, it will have a Detection ID of 'Rw'.
TV = The True Value as defined abov.

Flag: The Flag column is used to identify how the percent recovery compares to the control limits.

High: The percent recovery is greater than the upper control limit(UCL).
Low: The percent recovery is less than the lower control limit(UCL).
(Blank): The percent recovery is within control limits.
J: The percent recovery is within control limits, but the measured result was an estimated value.
**: The acceptability of the percent recovery can not be determined due to missing values.

LCL: The Lower Control Limit expressed in percent recovery.
UCL: The Upper Control Limit expressed in percent recovery.

ASR Number: 3867 **Project ID:** MP072504 **LCS Bias** 05/29/2008 **Analyst:** **Reviewer:**

Analysis: 2 PCBs In Soil by GC/EC

Analyte	Units	950-LCS	True Value	%Rec	Flag	LCL	UCL
Aroclor 1254	ug/kg	103	100	103		69	117

Data Quality Assessment Record **ASR:** EAQ13 **Analysis:** Organic annual RL Checks

Method: RLAB Method 3210.1/3240.2 **Matrix:** wipe

Project ID / Desc: Annual RL check of Aroclors 1221 and 1260

Laboratory: EPA X ESAT ____ Other (specify) ____

	Analyst	Peer-Reviewer	EPA Program Manager
Signature:			
Date:	05/29/08	5/29/8	5/30/2008

Sample Numbers: All of the samples for this ASR

960MB; 960RLC

	Yes	N/A	No	RevCk
1. Overview of Analytical Services:				
•Is ASR, SRN, and Analyte List included?	X			✓
•Were all requested analyses performed?	X			✓
2. Sample Receipt/ Prep:				
•Were extracts analyzed within 40 days of extraction?	X			✓
•Were samples stored at 4°C in amber/dark?	X			✓
•Is the extraction sheet fully filled out?	X			✓
3. Initial Calibration:				
•Has 5pt curves been established for the analytes?	X			✓
4. Continuing Calibration:				
•Are the retention times updated and acceptably stable?	X			✓
5. Quality Control Samples:				
•Was a method blank extracted with each set of 20 samples?	X			✓
Was it free of positive hits and interferences?	X			✓
If not, were any blank rules applied to the samples?		X		✓
•Was an LCS extracted?	X			✓
Were at least 80% of the results within LIMS QC limits?	X			✓
6. Raw Data Evaluation:				
•Is a sequence with standard prep date info present?	X			✓
•Does each inject. have a full chrom./rt&height report, and quant reports with rts, rt diff., height counts, and results for each column?	X			✓
•Are manual integrations properly documented?	X			✓
7. Final Review:				
•Are all LIMS sample and QC reports present?	X			✓
•Are all LIMS reports signed/initialed?	X			✓
•Are all other required documents present?	X			✓
•Did data meet customer's DQOs?	X			✓
If not, was supervisor or PM notified?		X		✓
•Are all exceptions properly documented?	X			✓
•Does the overall picture make sense?	X			✓

Additional Comments:
Slight Aroclor 1254 contamination was noted in the method blank. The level of contamination was well below the reporting limit.

Since no acceptance limits currently exist for the RLC of Aroclors 1221 and 1260 in this matrix, the results of 104% and 77%, respectively, are assumed to be acceptable. The RL check was performed instead of the MDL check because no MDL study has been performed for this matrix.

The other aroclors will be tested for RL check at the next convenient time.

Data Quality Assessment Record **ASR:** EAQ28 **Analysis:** Pest./Herb 5pt Curves

Method: circle: 3240.2 3240.6 3240.7 3250.4 3270.1 **Temp.Program:** regular.

Project ID / Desc: 5pt Curves

Laboratory: EPA X ESAT ____ Other (specify) ____

	Analyst	Peer-Reviewer	EPA Program Manager
Signature:		Barry S Mills	
Date:	05/29/08	5/29/08	

Analyte List:

Aroclors 1221; 1232; 1242; 1248; 1254; 1260; and 1016

DCB Surrogate

	Yes	N/A	No	RevCk
1. Overview of Analytical Services:				
•Were curves of all requested analyses performed?	X			✓
2. Standard Prep:				
•Were standards prepped from stock solutions not more than 1 yr old?	X			✓
•If purchased stocks were used, are cert. of authenticity stored?	X			✓
•Was the correct solvent used?	X			✓
•Various levels of conc. used and evenly spaced on curve?	X			✓
•Is the low standard ≤ the reporting limit?	X			✓
•100% resolution between single peaks in standard mixes?		X		✓
3. Initial Calibration:				
•Full chromatograms and rt/area reports for all levels present?	X			✓
•Injection sequence with date and standard prep dates present?	X			✓
•Each analyte rt, conc. levels present?	X			✓
•Are there at least 5 levels for each analyte? (except DCB;1232;1016)	X			✓
•If avg CFs are to be used, were the %RSDs < 20%?	X			✓
•If linear regression is used, are correl. coeff. > 0.995?	X			✓
5. Quality Control Samples:				
•Was a second source verification run for each analyte?	X			✓
6. Raw Data Evaluation:				
•Is an acceptable check of the calculations present?	X			✓
7. Final Review:				✓
•Are all other required documents present?	X			✓
•Are all exceptions properly documented?	X			✓
•Does the overall picture make sense?	X			✓

Additional Comments if necessary:
Aroclor 1260 gave slightly high recovery in the second source check. Positive field samples will be J-coded as potentially biased high.

PETITIONERS' EXHIBIT

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Data Quality Assessment Record **ASR:** 3867 **Analysis:** PCB's

Method: RLAB Method 3240.2 **Matrix:** wipe

Project ID / Desc: Des Moines TCE

Laboratory: EPA X ESAT ____ Other (specify) ____

	Analyst	Peer-Reviewer	EPA Program Manager
Signature:			Date Received
Date:	05/29/08	5/29/8	5/30/08

Sample Numbers: All of the samples for this ASR

960MB; 960LCS; 108FB; 109 - 121; 121MS/MSD

	Yes	N/A	No	RevCk
1. Overview of Analytical Services:				
•Is ASR, SRN, and Analyte List included?	X			✓
•Did customer request specific reporting limits?			X	✓
If so, were the requested reporting limits met?		X		✓
•Did customer specify other DQOs?			X	✓
If so, were these DQOs met?		X		✓
•Were all requested analyses performed?	X			✓
2. Sample Receipt/ Prep:				
•Were water samples extracted within 7 days?		X		✓
•Were solid samples extracted within 14 days?	X			✓
•Were extracts analyzed within 40 days of extraction?	X			✓
•Were samples stored at 4°C in amber/dark?	X			✓
•Is the extraction sheet fully filled out?	X			✓
3. Initial Calibration:				
•Is Curve summary present with documentation (DQAR copy, std conc., areas, rts, %RSD, CFs, correl. coeff., inj. date, calc. check)?	X			✓
•Are there at least 5 levels for each compound, except DCB Surr.?	X			✓
•If avg CFs are used, are %RSDs ≤ 20%?	X			✓
•If linear regression is used, are correl. coeff. ≥ 0.995?	X			✓
4. Continuing Calibration:				
•Are initial, continuing, and final CCVs within ± 15%?	X		X	✓
If not, is the average within ± 15%?	X			✓
•Are the retention times updated and acceptably stable?	X			✓
•Is Endrin/DDT breakdown within limits? (≤ 20%)		X		✓
5. Quality Control Samples:				
•Was a method blank extracted with each set of 20 samples?	X			✓
Was it free of positive hits and interferences?	X			✓
If not, were any blank rules applied to the samples?		X		✓
•Was an LFB extracted? (required only for DW)		X		✓
Were at least 80% of the results within LIMS QC limits?		X		✓
•Were MS/MSD samples extracted with each set of 20 samples?	X			✓
Was spiking level ≥ 50% of any positive innate values, and was it within the curve's linear range?	X			✓
Were the results within LIMS QC limits?	X		X	✓
•Were RPD calculated for any pairs? (LD, MSD)	X			✓
•Was an LCS extracted with each set of 20 samples?	X			✓
Were the results within LIMS QC limits?	X			✓
•Were surrogate recoveries acceptable?	X			✓
6. Raw Data Evaluation:				

•Is a sequence with standard prep date info present?	X			
•Does each inject. have a full chrom./rt&area report, and quant.reports with rts, rt diff., area counts, std info., and results for each column?	X			
•Are manual integrations properly documented?	X			
•Does worksheet show dilutions, surrogate recoveries and surrogate recovery windows?	X			
•Are all positives evaluated per 11.9.3 and recorded on worksheet? (following RCRA guidelines if needed)	X			
•Are solid sample results and reporting limits corrected for % solids?		X		
•Is an acceptable calculation check included?	X			
7. Final Review:				
•Are all LIMS sample and QC reports present?	X			
•Are all LIMS reports signed/initialed?	X			
•Are all other required documents present?	X			
•Are results rounded to the correct number of significant figures?	X			
•Were data reported without qualification?	X			
•Did data meet customer's DQOs?	X			
If not, was supervisor or PM notified?		X		
•Are all exceptions properly documented?	X			
•Does the overall picture make sense?	X			

Additional Comments:
The project manager has requested that results be reported as micrograms per 100 square centimeters. The following samples had positive results which are expressed as micrograms per 100 square centimeters:

109 Aroclor 1248 330 ug/100 cm2
110 Aroclor 1248 150 ug/100 cm2
111 Aroclor 1254 8.4 ug/100 cm2
112 Aroclor 1254 370 ug/100 cm2
113 Aroclor 1248 68 ug/100 cm2
114 Aroclor 1254 38 ug/100 cm2
115 Aroclor 1254 210 ug/100 cm2
116 Aroclor 1248 9.4 ug/100 cm2
117 Aroclor 1254 7.4 ug/100 cm2
120 Aroclor 1248 190 ug/100 cm2
121 Aroclor 1248 4.7 ug/100 cm2

Aroclor 1254 was J-coded in sample 115. Although the analyte in question has been positively identified in the sample, the quantitation is an estimate (J-coded) due to the reported value exceeding the calibrated range of the instrument. The reported value exceeded the calibrated range by only 10%, and thus the analyst does not feel the bias associated with the result being above the calibrated range is significant.

1. Reporting Limits:
Dilutions were necessary because of high levels of Aroclor 1248 and 1254 in some samples for this analysis. Some of the reporting limits were elevated 5 times due to dilutions in samples 111, 113, 114, 116, and 121; some of the reporting limits were elevated 20 times due to dilutions in samples 110 and 120; some of the reporting limits were elevated 30 times due to dilutions in sample 109; and some of the reporting limits were elevated 50 times due to dilutions in sample 112.

5. Method Blank:
Slight Aroclor 1254 contamination was noted in the method blank. The level of contamination was well below the reporting limit. No data needed to be qualified per the blank rule.

5. Matrix Spikes:
The matrix spike recovery was high, probably due to innate Aroclor 1248. No data qualified due to high matrix spike recovery.

Sample Analysis Results

US EPA Region 7 Laboratory
901 N. 5th Street
Kansas City, Kansas 66101

05/29/2008

ASR Number: 3867

Analysis: 1 PCBs in Wipe Samples by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G applied to a wipe sample **Reviewer:**

Project ID: MP072504 **Project Manager:** Mary Peterson

Project Desc: Des Moines TCE Site Insulation and wipe sampling

Location: Des Moines **State:** Iowa **Program:** Superfund

Site Name: 0725 DES MOINES TCE - SOUTH POND/DRAINAGE AREA **Site Id:** 0725 **Site OU:** 04

Report Comments:

The project manager has requested that results be reported as micrograms per 100 square centimeters. The following samples had positive results which are expressed as micrograms per 100 square centimeters:

Samp.	Analyte	Result
109	Aroclor 1248	330 ug/100 cm2
110	Aroclor 1248	150 ug/100 cm2
111	Aroclor 1254	8.4 ug/100 cm2
112	Aroclor 1254	370 ug/100 cm2
113	Aroclor 1248	68 ug/100 cm2
114	Aroclor 1254	38 ug/100 cm2
115	Aroclor 1254	210 ug/100 cm2
116	Aroclor 1248	9.4 ug/100 cm2
117	Aroclor 1254	7.4 ug/100 cm2
120	Aroclor 1248	190 ug/100 cm2
121	Aroclor 1248	4.7 ug/100 cm2

Aroclor 1254 was J-coded in sample 115. Although the analyte in question has been positively identified in the sample, the quantitation is an estimate (J-coded) due to the reported value exceeding the calibrated range of the instrument. The reported value exceeded the calibrated range by only 10%, and thus the analyst does not feel the bias associated with the result being above the calibrated range is significant.

Dilutions were necessary because of high levels of Aroclor 1248 and 1254 in some samples for this analysis. Some of the reporting limits were elevated 5 times due to dilutions in samples 111, 113, 114, 116, and 121; some of the reporting limits were elevated 20 times due to dilutions in samples 110 and 120; some of the reporting limits were elevated 30 times due to dilutions in sample 109; and some of the reporting limits were elevated 50 times due to dilutions in sample 112.

ASR Number: 3867 **Project ID:** MP072504

Analysis: 1 PCBs in Wipe Samples by GC/EC

Analysis Results 05/29/2008 **Analyst:** LRT **Reviewer:** 06/11

Analysis Comments:

960RLC is presented as a reporting limit check for Aroclors 1221 and 1260. The recovery of 104 and 77 percent, respectively are assumed to be acceptable.

ASR Number: 3867 **Project ID:** MP072504 **Analysis Results** 05/29/2008 **Analyst:** VER **Reviewer:** JGH

Analysis: 1 PCBs In Wipe Samples by GC/EC

Analyte	Units	114-__	115-__	116-__	117-__	118-__	119-__
Aroclor 1016	ug/cm2	0.01 U	0.01 U	0.05 U	0.01 U	0.01 U	0.01 U
Aroclor 1221	ug/cm2	0.01 U	0.01 U	0.01 U	0.01 U	0.01 U	0.01 U
Aroclor 1232	ug/cm2	0.01 U	0.01 U	0.05 U	0.01 U	0.01 U	0.01 U
Aroclor 1242	ug/cm2	0.008 U	0.008 U	0.04 U	0.008 U	0.008 U	0.008 U
Aroclor 1248	ug/cm2	0.04 U	0.16 U	0.094 ~~X~~ UEI 5/30/08	0.008 U	0.008 U	0.008 U
Aroclor 1254	ug/cm2	0.38	2.1 J UEI 5/30/08	0.03 U 5/30/08	0.074	0.006 U	0.006 U
Aroclor 1260	ug/cm2	0.02 U	0.08 U	0.004 U	0.004 U	0.004 U	0.004 U
Decachlorobiphenyl	% Rec	80	81	79	74	78	77

Corrected in LIMS 5/30/08 VER

ASR Number: 3867 **Project ID:** MP072504 **Analysis Results** 05/29/2008 **Analyst:** _____ **Reviewer:** _____

Analysis: 1 PCBs in Wipe Samples by GC/EC

Analyte	Units	108-FB	109-__	110-__	111-__	112-__	113-__
Aroclor 1016	ug/cm2	0.01 U	0.3 U	0.2 U	0.01 U	0.5 U	0.05 U
Aroclor 1221	ug/cm2	0.01 U	0.3 U	0.01 U	0.01 U	0.01 U	0.01 U
Aroclor 1232	ug/cm2	0.01 U	0.3 U	0.2 U	0.01 U	0.01 U	0.05 U
Aroclor 1242	ug/cm2	0.008 U	0.24 U	0.16 U	0.008 U	0.4 U	0.05 U
Aroclor 1248	ug/cm2	0.008 U	3.3	1.5	0.032 U	0.4 U	0.68
Aroclor 1254	ug/cm2	0.006 U	0.18 U	0.12 U	0.084	3.7	0.03 U
Aroclor 1260	ug/cm2	0.004 U	0.12 U	0.08 U	0.02 U	0.2 U	0.02 U
Decachlorobiphenyl	% Rec	83	92	88	87	80	81

ASR Number: 3867 **Project ID:** MP072504 **Analysis Results** 05/29/2008 **Analyst:** UEA **Reviewer:** BGA

Analysis: 1 PCBs In Wipe Samples by GC/EC

Analyte	Units	120-___	121-___	121-MS	121-MSD	960-MB	960-LCS
Aroclor 1016	ug/cm2	0.2 U	0.05 U			0.01 U	
Aroclor 1221	ug/cm2	0.01 U	0.01 U			0.01 U	
Aroclor 1232	ug/cm2	0.2 U	0.05 U			0.01 U	
Aroclor 1242	ug/cm2	0.16 U	0.04 U			0.008 U	
Aroclor 1248	ug/cm2	1.9	0.047			0.008 U	
Aroclor 1254	ug/cm2	0.12 U	0.03 U	0.0735	0.0958	0.006 U	0.051
Aroclor 1260	ug/cm2	0.08 U	0.004 U			0.004 U	
Decachlorobiphenyl	% Rec	85	90	84	85	89	88

ASR Number: 3867 **Project ID:** MP072504 **Analysis Results** 05/29/2008 **Analyst:** VBT **Reviewer:** MG

Analysis: 1 PCBs In Wipe Samples by GC/EC

Analyte	Units	960-RLC
Aroclor 1221	ug/cm2	0.0104
Aroclor 1260	ug/cm2	0.00287
Decachlorobiphenyl	% Rec	88

Matrix Spike (MS/MSD) Bias Report

05/29/2008 13:31

ASR Number: 3867

Analysis Name: 1 PCBs in Wipe Samples by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G applied to a wipe sample **Reviewer:**

Project ID: MP072504

Definitions:

MS / MSD: A Matrix Spike (MS) sample (or Matrix Spike Duplicate - MSD) is an aliquot from an environmental sample to which known concentrations of one or more analytes of interest have been added. The MS (MSD) is taken through the entire analytical procedure and the recovery of the added analyte(s) is calculated. MS and MSD data are evaluated against control limits to assess the effect of the sample matrix on the accuracy of the analysis.

Conc. Spiked: The Concentration Spiked is the calculated increase in concentration in the spiked sample that results from the addition of the spike material. The concentration is calculated in the same units as the sample analysis.

%Rec: The percent recovery (bias) of the Matrix sample. %Rec = ((MS-Sam) / CS) * 100

Where MS = The measured result (Final Result) of the Matrix Spike sample (or MSD). If the Final Result has a Detection ID of 'U', 'UJ', or 'K', the Raw Result is used, if available. If the raw result is not available, zero is used as the measured result. If the Raw Result is used, it will have a Detection ID of 'Rw'.

Sam = The measured result (Final Result) of the original sample. If the Final Result has a Detection ID of 'U', 'UJ', or 'K', the Raw Result is used, if available. If the Raw Result is not available, zero is used as the measured result. If the Raw Result is used, it will have a Dection ID of 'Rw'.

CS = The Concentration Spike as defined above.

Flag: The Flag column is used to identify how the percent recovery comapres to the control limits.

High: The percent recovery is greater than the upper control limit (UCL).

Low: The percent recovery is less than the lower control limit (LCL).

(Blank): The percent recovery is within the control limits.

J: The percent recovery is within the control limits, but one of the measured results was an estimated value.

<<: The Concentration Spiked is less than 50 percent of the Final Result for the original sample. It may be inappropriate to qualify data based on this spike recovery.

**: The acceptability of the percent recovery can not be determined due to missing values.

LCL: The Lower Control Limit expressed in percent recovery.

UCL: The Upper Control Limit expressed in percent recovery.

ASR Number: 3867 **Project ID:** MP072504 **MS/MSD Bias** 05/29/2008 **Analyst:** VKB **Reviewer:** BCM

Analysis: 1 PCBs In Wipe Samples by GC/EC

Analyte	Units	121-__	121-MS	Conc. Spiked	%Rec	Flag	121-MSD	Conc. Spiked	%Rec	Flag	LCL	UCL
Aroclor 1254	ug/cm2	0.03 U	0.0735	0.0500	147		0.0958	0.0500	192	High	60	164

Matrix Spike (MS/MSD) Precision Results

05/29/2008 13:31

ASR Number: 3867

Analysis: 1 PCBs In Wipe Samples by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G applied to a wipe sample **Reviewer:**

Project ID: MP072504

Definitions:

MS / MSD: A Matrix Spike (MS) sample (or Matrix Spike Duplicate - MSD) is an aliquot from an enviromental sample to which known concentrations of one or more analytes of intrest have been added. The MS (MSD) is taken through the entire analytical procedure and the recovery of the added analyte(s) is calculated. MS and MSD data are evaluated against control limits to assess the effect of the sample matrix on the accuracy of the analysis.

RPD: The relative percent difference (precision) of the Matrix Spiked samples. RPD = (2 * |MS - MSD| / (MS + MSD)) * 100

Where MS = The measured result (Final Result) of the Matrix Spike sample.

MSD = The measured result (Final Result) of the Matrix Spike Duplicate sample.

Flag: The Flag column is used to identify how the relative percent difference compares to the control limit.

High: The relative percent difference is greater than the precision control limit (PCL).

(Blank): The relative percent difference is within the control limit.

J: The relative percent difference is within the control limit, but the measured result was an estimated value.

<>: The difference between the concentrations spiked into the samples is greater than 20 percent of the precision control limit. It may be inappropriate to qualify data based on the RPD of these results.

**: The acceptability of the relative percent difference can not be determined due to missing or coded values.

PCL: The Precision Control Limit expressed as the maximum acceptable relative percent difference.

ASR Number: 3867 **Project ID:** MP072504 **MS/MSD Precision** 05/29/2008 **Analyst:** VER **Reviewer:** AGM

Analysis: 1 PCBs In Wipe Samples by GC/EC **Spike of:** 121-__

Analyte	Units	121 MS	121 MSD	RPD	Flag	PCL
Aroclor 1254	ug/cm2	0.0735	0.0958	26		44

Laboratory Control Sample (LCS) Bias Report

05/29/2008

Asr Number: 3867

Analysis: 1 PCBs In Wipe Samples by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G applied to a wipe sample **Reviewer:**

Project Id: MP072504

Definitions:

LCS: A Laboratory Control Sample(LCS) consists of a control matrix (blank) which has been spiked with one or more target compounds representative of the method analytes. An LCS is analyzed with environmental samples to provide evidence that the laboratory is performing the analytical method within accepted QC guidelines.

True Value: The True Value (Concentration Spiked) of a Laboratory Control Sample is the calculated increase in concentration in the control matrix that results from the addition of the spike material. The concentration is calculated in the same units as the sample analysis.

%Rec: The percent recovery(bias) of the Laboratory Control Sample. %Rec = (LCS/TV)*100

Where: LCS = The measured result (Final Result) of the Lab Control Sample. If the Final Result has a Detection ID of 'U', 'UJ', or 'K'', the Raw Result is used, if available. If the Raw Result is not available, zero is used as the measured result. If the Raw Result is used, it will have a Detection ID of 'Rw'.
TV = The True Value as defined abov.

Flag: The Flag column is used to identify how the percent recovery compares to the control limits.

High: The percent recovery is greater than the upper control limit(UCL).
Low: The percent recovery is less than the lower control limit(UCL).
(Blank): The percent recovery is within control limits.
J: The percent recovery is within control limits, but the measured result was an estimated value.
**: The acceptability of the percent recovery can not be determined due to missing values.

LCL: The Lower Control Limit expressed in percent recovery.
UCL: The Upper Control Limit expressed in percent recovery.

ASR Number: 3867 **Project ID:** MP072504 **LCS Bias** 05/29/2008 **Analyst:** **Reviewer:**

Analysis: 1 PCBs In Wipe Samples by GC/EC

Analyte	Units	960-LCS	True Value	%Rec	Flag	LCL	UCL
Aroclor 1254	ug/cm2	0.051	0.0500	102		31	213

Reporting Limit Check (RLC) Bias Report

05/29/2008

Asr Number: 3867

Analysis: 1 PCBs In Wipe Samples by GC/EC **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3240.2G applied to a wipe sample **Reviewer:**

Project Id: MP072504

Definitions:

RLC: A Reporting Limit Check (RLC) sample consists of a control matrix (blank) which has been spiked with the target compound(s) at or near their reporting limit. An RLC is analyzed with environmental samples to provide evidence that the laboratory is performing the analytical method within accepted QC guidelines.

True Value: The True Value (Concentration Spiked) of a Reporting Limit Check Sample is the calculated increase in concentration in the control matrix that results from the addition of the spike material. The concentration is calculated in the same units as the sample analysis.

%Rec: The percent recovery(bias) of the Reporting Limit Check Sample. %Rec = (RLC/TV)*100

Where: RLC = The measured result (Final Result) of the Reporting Limit Check Sample. If the Final Result has a Detection ID of 'U', 'UJ', or 'K', the Raw Result is used, if available. If the Raw Result is not available, zero is used as the measured result. If the Raw Result is used, it will have a Detection ID of 'Rw'.
TV = The True Value as defined above.

Flag: The Flag column is used to identify how the percent recovery compares to the control limits.

High: The percent recovery is greater than the upper control limit(UCL).
Low: The percent recovery is less than the lower control limit(UCL).
(Blank): The percent recovery is within control limits.
J: The percent recovery is within control limits, but the measured result was an estimated value.
**: The acceptability of the percent recovery can not be determined due to missing values.

LCL: The Lower Control Limit expressed in percent recovery.
UCL: The Upper Control Limit expressed in percent recovery.

ASR Number: 3867 **Project ID:** MP072504 **RLC Bias** 05/29/2008 **Analyst:** **Reviewer:**

Analysis: 1 PCBs In Wipe Samples by GC/EC

Analyte	Units	960-RLC	True Value	%Rec	Flag	LCL	UCL
Aroclor 1221	ug/cm2	0.0104	0.0100	104	**		
Aroclor 1260	ug/cm2	0.00287	0.00375	77	**		

PETITIONERS' EXHIBIT

J

Data Quality Assessment Record ASR: 3867 Analysis: *PERCENT SOLIDS*

Method: 3142.9E **Matrix:** soil

Project ID / Desc: Des Moines TCE Site Insulation and wipe sampling

Laboratory: EPA X ESAT ____ Other (specify) ____

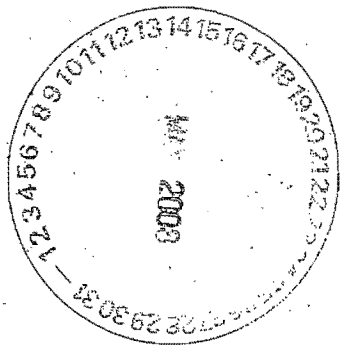
	Analyst	Peer-Reviewer	EPA Program Manager
Signature:			
Date:	05/20/08	5-21-08	5-22-08

Sample Numbers: All / Part of the samples for this ASR

1-6, 9, 1-LD

	Yes	N/A	No	RevCk
1. Overview of Analytical Services:				
Is a copy of the ASR, SRN, and analyte list included?	X			✓
Did customer request specific reporting limits?	X			✓
If so, were the requested reporting limits met?	X			✓
Did customer specify other DQOs?	X			✓
If so, were these DQOs met?	X			✓
If not, was the supervisor or PM notified?		X		✓
Were all requested analyses performed?	X			✓
2. Sample Receipt/ Prep:				
Were all samples properly preserved and stored?	X			✓
3. Quality Control Samples:				
Laboratory Duplicate:				✓
Was an LD analyzed with each set of 15 samples?	X			✓
Were the results within LIMS QC limits?	X			✓
4. Raw Data Evaluation:				
Were samples free of interferences?	X			✓
5. Final Review:				
Are all LIMS reports signed/initialed?	X			✓
Are all other required documents present?	X			✓
Are results rounded to the correct number of significant figures?	X			✓
Were data reported without qualification?	X			✓
Did data meet customer's DQOs?	X			✓
If not, was supervisor or PM notified?		X		✓
Are all exceptions properly documented?	X			✓

Additional Comments:



Sample Analysis Results

US EPA Region 7 Laboratory
901 N. 5th Street
Kansas City, Kansas 66101

05/20/2008

ASR Number: 3867

Analysis: 1 Percent Solid **Lab:** EPA **Analyst:**

Method: EPA Region 7 RLAB Method 3142.9E **Reviewer:**

Project ID: MP072504 **Project Manager:** Mary Peterson

Project Desc: Des Moines TCE Site Insulation and wipe sampling

Location: Des Moines **State:** Iowa **Program:** Superfund

Site Name: 0725 DES MOINES TCE - SOUTH POND/DRAINAGE AREA **Site Id:** 0725 **Site OU:** 04

Report Comments:
(No Comment)

Analysis Comments:
(No Comment)

ASR Number: 3867 **Project ID:** MP072504 **Analysis Results** 05/20/2008 **Analyst:** UB **Reviewer:** JS

Analysis: 1 Percent Solid

Analyte	Units	1-__	1-LD	2-__	3-__	4-__	5-__
Solids, percent	%	84.2	83.9	78.2	77.1	81.8	92.3

ASR Number: 3867 **Project ID:** MP072504 **Analysis Results** 05/20/2008 **Analyst:** WB **Reviewer:**

Analysis: 1 Percent Solid

Analyte	Units	6-__	9-__
Solids, percent	%	69.4	98.1

Laboratory Duplicate (LD) Precision Results

05/20/2008

ASR Number: 3867

Analysis: 1 Percent Solid **Lab:** EPA

Method: EPA Region 7 RLAB Method 3142.9E

Project Id: MP072504

Analyst:

Reviewer:

Definitions:

LD: A Lab Duplicate (LD) is the analysis of a second aliquot from an environmental sample. The Lab Duplicate is taken through the entire analytical procedure the same as the original sample (which has a QC Code of "__"). The original analysis and Lab Duplicate analysis data are evaluated against a control limit to assess the precision of the analysis for that sample matrix. Only analytes that are detected in both sample are included in this report.

RPD: The relative percent difference (precision) of the duplicate samples. RPD = (2 * |Sam- LD|/(Sam+LDL)*100

Where: Sam = The measured result (Final Result) of the original sample.
LD = The measured result (Final Result) of the Lab Duplicate sample.

Flag: The Flag column is used to identify how the relative percent difference compares to the control limits.

High: The relative percent difference is greater than the precision control limit(PCL).
(Blank): The relative percent difference is within control limits.
J: The relative percent difference is within control limits, but the measured result was an estimated value.
**: The acceptability of the relative percent difference can not be determined due to missing values.

PCL: The Precision Control Limit expressed as the maximum acceptable relative percent difference.

ASR Number: 3867 **Project Id:** MP072504 **LD Precision** 05/20/2008 **Analyst:** WB **Reviewer:** QB

Analysis: 1 Percent Solid

Analyte	Units	1-__	1-LD	RPD	Flag	PCL
Solids, percent	%	84.2	83.9	0		5

PETITIONERS' EXHIBIT

K

Quantitation Report - PCB's In waste

Run File : c:\star\lorraine\eaq13\asr3760\042408\48verify.run
Method File : C:\star\Lorraine\EAQ13\asr3760\042408\pcb.mth
Sample ID : 48verify

Multiplier 1
Divisor 1.00
Instrument EAQ13

Extract vol,mL 10
Smpl wt, g 0.10
Analyst = Liverson

Compound Name		RL mg/kg Hi conc	Std RT	Sam RT	RT Diff	RT Window +/- 0.15%	Sam Area	Smpl Results w/ Curve, mg/kg	Slope	Intercept	Codes p h l d
PCB1221		2.0	5.459	5.454	-0.005	0.008	364	37.0267	2.6561	265.54	
	front	4000	7.053	7.059	0.006	0.011	149	no result	4.04790	700.45	#
			7.470	7.477	0.007	0.011	1016	no result	8.8476	1941.90	#
							average result		**37.0267**		#
			8.420	8.433	0.013	0.013	9324	no result	39.7600	14814.00	p #
	middle		9.007	9.007	0.000	0.014	0	0.0000	26.3820	6888.60	l
			9.234	9.246	0.012	0.014	12765	no result	82.797	20294.00	#
							average result		**0.0000**		
PCB1232		2.0	8.811	8.816	0.005	0.013	3914	716.4324	0.4637	0.0000	
	front	1000	8.886	8.890	0.004	0.013	1609	361.2751	4.4550	0.0000	
			9.211	9.214	0.003	0.014	281	281.0175	0.99858	0.0000	
							average result		**452.9083**		
			11.181	11.186	0.005	0.017	65416	747.2231	87.545	0.0000	
	middle		12.344	12.350	0.006	0.019	19970	723.4021	27.6060	0.0000	
			12.645	12.651	0.006	0.019	20990	538.6899	38.9650	0.0000	
							average result		**669.7717**		
PCB1242		2.0	9.544	9.549	0.005	0.014	3234	301.9138	7.8920	850.90	
	front	3000	11.326	11.334	0.008	0.017	5713	393.4281	11.5320	1175.70	
			11.745	11.752	0.007	0.018	4063	390.6656	8.7794	632.83	
							average result		**362.0025**		
			14.139	14.143	0.004	0.021	181146	499.1057	324.530	19169.00	
	middle		15.197	15.202	0.005	0.023	65787	507.4741	114.860	7497.90	
			15.945	15.953	0.008	0.024	44594	413.1412	93.563	5939.00	
							average result		**473.2403**		
PCB1248		2.0	14.327	14.339	0.012	0.022	11042	743.1663	13.0520	1342.20	
	front	3000	17.525	17.537	0.012	0.026	18173	726.994	21.4580	2573.30	
			18.688	18.698	0.010	0.028	14204	704.351	17.1380	2132.90	
							average result		**724.8371** ✓		
			19.386	19.395	0.009	0.029	164130	710.1534	221.56	6792.00	
	middle		21.436	21.448	0.012	0.032	155823	734.8806	203.470	6300.00	
			21.579	21.590	0.011	0.032	181273	719.2625	241.710	7417.40	
							average result		**721.4322** ✓		

Quantitation Report - PCB's In waste

Run File : c:\star\lorraine\eaq13\asr3760\042408\42verify.run
Method File : C:\star\Lorraine\EAQ13\asr3760\042408\pcb.mth
Sample ID : 42verify

Multiplier 1
Divisor 1.00
Instrument EAQ13

Extract vol,mL 10
Smpl wt, g 0.10
Analyst = Liverson

Compound Name		RL mg/kg Hi conc	Std RT	Sam RT	RT Diff	RT Window +/- 0.15%	Sam Area	Smpl Results w/ Curve, mg/kg	Slope	Intercept	Codes p h l d
PCB1221		2.0	5.459	5.450	-0.010	0.008	419	57.8683	2.6561	265.54	p
	front	4000	7.053	7.054	0.001	0.011	1035	82.6597	4.04790	700.45	
			7.470	7.472	0.002	0.011	5378	388.4102	8.8476	1941.90	
						average result			**176.3127**		
			8.420	8.424	0.004	0.013	17869	76.8448	39.7600	14814.00	
	middle		9.007	9.009	0.002	0.014	12379	208.1222	26.3820	6888.60	
			9.234	9.235	0.001	0.014	58153	457.2485	82.797	20294.00	
						average result			**247.4052**		
PCB1232		2.0	8.811	8.808	-0.003	0.013	6648	1216.6926	0.4637	0.0000	h
	front	1000	8.886	8.883	-0.003	0.013	4479	1005.3962	4.4550	0.0000	h
			9.211	9.207	-0.004	0.014	1179	1180.4905	0.99858	0.0000	h
						average result			**1134.1931**		
			11.181	11.174	-0.007	0.017	107838	1231.7964	87.545	0.0000	h
	middle		12.344	12.336	-0.008	0.019	34403	1246.2211	27.6060	0.0000	h
			12.645	12.638	-0.008	0.019	48855	1253.796	38.9650	0.0000	h
						average result			**1243.9378**		
PCB1242		2.0	9.544	9.540	-0.004	0.014	7211	805.9115	7.8920	850.90	
	front	3000	11.326	11.321	-0.005	0.017	10528	810.9457	11.5320	1175.70	
			11.745	11.741	-0.004	0.018	7642	798.4022	8.7794	632.83	
						average result			**805.0865**		
			14.139	14.128	-0.011	0.021	261942	748.0648	324.530	19169.00	
	middle		15.197	15.188	-0.009	0.023	95846	769.1716	114.860	7497.90	
			15.945	15.934	-0.011	0.024	77405	763.8183	93.563	5939.00	
						average result			**760.3516**		
PCB1248		2.0	14.327	14.321	-0.006	0.021	7626	481.4555	13.0520	1342.20	
	front	3000	17.525	17.519	-0.006	0.026	12238	450.4236	21.4580	2573.30	
			18.688	18.682	-0.006	0.028	10846	508.4117	17.1380	2132.90	
						average result			**480.0969**		
			19.386	19.383	-0.003	0.029	123190	525.3696	221.56	6792.00	
	middle		21.436	21.430	-0.006	0.032	89436	408.6003	203.470	6300.00	
			21.579	21.571	-0.009	0.032	108678	418.9282	241.710	7417.40	
						average result			**450.966**		

Quantitation Report - PCB's in waste

Run File : c:\star\lorraine\eaq13\asr3760\042408\21verify.run
Method File : C:\star\Lorraine\EAQ13\asr3760\042408\pcb.mth
Sample ID : 21verify

Multiplier 1
Divisor 1.00
Instrument EAQ13

Extract vol,mL 10
Smpl wt, g 0.10
Analyst = Liverson

Compound Name		RL mg/kg HI conc	Std RT	Sam RT	RT Diff	RT Window +/- 0.15%	Sam Area	Smpl Results w/ Curve, mg/kg	Slope	Intercept	Codes p h l d
PCB1221		2.0	5.459	5.466	0.007	0.008	3150	1086.0214	2.6561	265.54	
	front	4000	7.053	7.061	0.008	0.011	5168	1103.6719	4.04790	700.45	
			7.470	7.477	0.007	0.011	11851	1119.9717	8.8476	1941.90	
						average result			1000	**1103.2217**	
			8.420	8.425	0.005	0.013	55794	1030.696	39.7600	14814.00	
	middle		9.007	9.013	0.006	0.014	34499	1046.5612	26.3820	6888.60	
			9.234	9.240	0.006	0.014	107445	1052.5826	82.797	20294.00	
						average result				**1043.2799**	
PCB1232		2.0	8.811	8.815	0.004	0.013	639	116.9222	0.4637	0.0000	
	front	1000	8.886	8.888	0.002	0.013	2235	501.5917	4.4550	0.0000	
			9.211	9.214	0.003	0.014	185	184.8481	0.99858	0.0000	
						average result				**267.7873**	d
			11.181	11.184	0.003	0.017	13720	156.7207	87.545	0.0000	
	middle		12.344	12.344	0.000	0.019	0	0.0000	27.6060	0.0000	l
			12.645	12.648	0.003	0.019	6510	167.0769	38.9650	0.0000	
						average result				**107.9325**	
PCB1242		2.0	9.544	9.545	0.001	0.014	829	no result	7.8920	850.90	#
	front	3000	11.326	11.328	0.002	0.017	1271	8.2376	11.5320	1175.70	
			11.745	11.748	0.003	0.018	778	16.4986	8.7794	632.83	
						average result				**12.3681**	d
			14.139	14.143	0.004	0.021	30249	34.1396	324.530	19169.00	
	middle		15.197	15.203	0.006	0.023	11951	38.7679	114.860	7497.90	
			15.945	15.947	0.002	0.024	8261	24.8128	93.563	5939.00	
						average result				**32.5734**	
PCB1248		2.0	14.327	14.331	0.004	0.021	285	no result	13.0520	1342.20	#
	front	3000	17.525	17.572	0.047	0.026	884	no result	21.4580	2573.30	p #
			18.688	18.693	0.005	0.028	629	no result	17.1380	2132.90	#
						average result				**#DIV/0!**	#
			19.386	19.435	0.049	0.029	5821	no result	221.56	6792.00	p #
	middle		21.436	21.445	0.009	0.032	4386	no result	203.470	6300.00	#
			21.579	21.590	0.011	0.032	7274	no result	241.710	7417.40	#
						average result				**#DIV/0!**	

Compound Name	RL ug/L Hi conc	Std RT	Sam RT	RT Diff	RT Window +/- 0.15%	Sam Area	Smpl Results w/ Curve, mg/kg	Slope	Intercept	Codes p h l d
PCB1254	1.0	19.307	19.312	0.005	0.029	6153	154.5527	26.7500	2018.70	l
front	2000	21.087	21.091	0.004	0.032	749	no result	20.3260	1185.00	#
		21.756	21.760	0.004	0.033	2680	no result	33.7050	3200.80	#
					average result			154.5527		#
		25.064	25.067	0.003	0.038	6631	no result	165.240	13771.00	#
middle		25.826	25.828	0.002	0.039	22182	no result	315.070	25214.00	#
		27.343	27.349	0.006	0.041	13560	no result	234.990	25471.00	#
					average result			#DIV/0!		
PCB1260	0.8	29.234	29.234	0.000	0.044	21581	629.0546	33.4850	16.95	l
front	800	30.956	30.957	0.001	0.046	52016	630.3965	79.668	1793.60	
		32.599	32.599	0.000	0.049	27074	583.5025	40.7100	3319.70	
					average result			614.3179		
		32.678	32.678	0.000	0.049	141423	566.9664	237.900	6539.50	
middle		34.356	34.354	-0.002	0.052	307528	571.3266	549.850	-6618.6000	
		36.304	36.303	-0.001	0.054	247275	543.1588	436.060	10425.00	
					average result			560.4839		
DCB Surrogate		39.950	40.575	0.625	0.061	468	no result	396.49	0.0000	p
	300	42.319	42.319	0.000	0.063	0	0.0000	3459	0.0000	

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Sample ID : 60verify

PETITIONERS' EXHIBIT

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STINSON
MORRISON
HECKER LLP

Mark E. Johnson
(816) 691-2724
mjohnson@stinson.com
www.stinson.com

1201 Walnut, Suite 2900
Kansas City, MO 64106-2150

Tel (816) 842-8600
Fax (816) 412-1208

Via Facsimile

October 6, 2008

Kathleen Montalte
Freedom of Information Officer
EPA, Region 7
901 North 5th Street
Kansas City, Kansas 66101

Re: Southern Iowa Mechanical Site, Ottumwa, Iowa – Freedom of Information Act Request

Dear Kathleen:

Please consider this e-mail to be a formal Freedom of Information Act request.

In my letter of October 2, 2008, to Dan Shiel, I requested and hereby request again the following regarding the Southern Iowa Mechanical Site ("Site"):

"We need to see the technician's raw data and calculations for each of these sample analyses to determine the validity and accuracy of the tabulated results (including whether the data was reported in units of micrograms per square centimeter, or micrograms per 100 square centimeters). Please consider this a formal request, pursuant to the Freedom of Information Act, for the technician's raw data and calculations relating to each of the samples, blanks, and replicates supporting the May 30, 2008 report, any sampling plan or protocols, sampling map or sketch identifying where samples were taken, and QA/QC protocols or data used or obtained in connection with the sampling of the Southern Iowa Mechanical Site."

In addition to my request in the letter of October 2 above, I hereby also request the following:

All field and lab notes, records, data, electronically stored information, printouts and documents of any kind reflecting or regarding the EPA sampling and/or lab work in connection with the Site.

You are authorized by this request to send me the above up to a maximum of $100. If it appears that this request will exceed $100, please call me for authorization.

Please let me know if you have any questions. Thank you.

Very truly yours,

STINSON MORRISON HECKER LLP

Mark E. Johnson

MEJ:gc

PETITIONERS' EXHIBIT

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STINSON
MORRISON
HECKER LLP

Mark E. Johnson
(816) 691-2724
mjohnson@stinson.com
www.stinson.com

1201 Walnut, Suite 2900
Kansas City, MO 64106-2150

Tel (816) 842-8600
Fax (816) 412-1208

January 9, 2009

VIA E-MAIL AND FACSIMILE

Kathleen Montalte
Freedom of Information Officer
EPA, Region 7
901 N. 5th Street
Kansas City, KS 66101

Dan Shiel
Office of Regional Counsel
EPA, Region 7
901 N. 5th Street
Kansas City, KS 66101

Re: Southern Iowa Mechanical Site

Dear Kathleen and Dan:

In my Freedom of Information Act letter of October 6, 2008, a copy of which is attached, I requested the production of the following:

"All field and lab notes, records, data, electronically stored information, printouts and documents of any kind reflecting or regarding the EPA sampling and/or lab work in connection with the [Southern Iowa Mechanical] Site."

This letter is to confirm that EPA produced no procedure, computer software or calculation that shows any division by 100 of the sampled material. If this information exists, please produce it or if you already produced it, please refer me to the specific page, part of the software or any other section of any electronically stored information, lab note or document showing this division step.

Very truly yours,

STINSON MORRISON HECKER LLP

Mark E. Johnson

MEJ:cm

Enclosure

PETITIONERS' EXHIBIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ADMINISTRATOR, LISA P. JACKSON, In Her Official Capacity, Defendants.	)	CASE NO. 8:10CV235 JOINT MOTION TO APPROVE STIPULATION FOR ENTRY OF PRELIMINARY INJUNCTION

COMES NOW the Plaintiff, Union Pacific Railroad Company ("Union Pacific") and Defendants, the United States Environmental Protection Agency ("EPA") and Administrator Lisa P. Jackson (the "Administrator"), by and through their undersigned counsel, and hereby request the Court to approve the Joint Stipulation for Preliminary Injunction and Order consistent with the terms set forth in this Joint Stipulation.

The matter is before the Court on the Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Filing No. 6). The motion is supported by a brief and index of evidence (Filing Nos. 7 and 8). At the hearing on June 23, 2010 on Plaintiff's Motion, the Court entered a Temporary Restraining Order (Filing No. 16). The parties have conferred and have agreed to the Court's entry of a Preliminary Injunction.

WHEREFORE, the Parties pray the Court to approve said stipulation, and enter a Preliminary Injunction Order in the form proposed by the Joint Stipulation for Preliminary Injunction and Order.

Defendants also consent to a further extension of the Temporary Restraining Order issued on June 23, 2010 (Filing No. 16) until the Court enters an Order granting the Preliminary Injunction.

DATED this 16th day of August, 2010.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff,

BY: s/ William M. Lamson, Jr.
WILLIAM M. LAMSON, JR., #12374
Lamson Dugan and Murray, LLP
10306 Regency Parkway Drive
Omaha, NE 68114
Telephone: (402) 397-7300
Facsimile: (402) 397-7824
wlamson@ldmlaw.com

And

BY: Carolyn L. McIntosh
Patton Boggs
1801 California Street, Suite 4900
Denver, CO 80202
Telephone: (303) 894-6127
Facsimile: (303) 894-9239
cmcintosh@pattonboggs.com

ITS ATTORNEYS

UNITED STATES OF AMERICA,
Defendant,

By: DEBORAH R. GILG
United States Attorney
District of Nebraska

And: s/ Lynnett M. Wagner
LYNNETT M. WAGNER, #21606
Assistant U.S. Attorney
1620 Dodge Street, Suite 1400
Omaha, NE 68102-1506
Tel: (402) 661-3700
Fax: (402) 661-3081
lynnett.m.wagner@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following: William M. Lamson, Jr., Carolyn L. McIntosh, Debra T. Baker, and Earnest W. Wotring; and also hereby certify that a copy of the same has been served by regular mail, postage prepaid, to the following non-CM/ECF participants: None.

LYNNETT M. WAGNER
Assistant U.S. Attorney

PETITIONERS' EXHIBIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ADMINISTRATOR, LISA P. JACKSON, In Her Official Capacity, Defendants.	)	CASE NUMBER: 8:10 cv 235 **SUPPLEMENTAL MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

This matter is before the Court on the Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Filing No. 6). The motion is supported by a brief (the "Initial Brief") and index of evidence (Filing Nos. 7 and 8). At the June 23, 2010 hearing on Plaintiff's Motion, the Court entered a Temporary Restraining Order (Filing No. 16) ("TRO"). Plaintiff, Union Pacific Railroad Company ("Union Pacific") has provided additional evidence in the form of affidavits and documents.[1] Defendants have presented no contrary evidence.

Consistent with Paragraph 6 of the TRO, the Parties conferred and Plaintiff has conducted informal interviews of the two persons Defendants designated as liaisons. By agreement of the Parties, Plaintiff has also conducted one two and one-half hour deposition and the Parties have

[1] The Court ordered that the parties file and serve any additional affidavits or supporting evidence no later than August 18, 2010. By agreement of the parties, Union Pacific provided this Supplemental Memorandum Brief In Support of Plaintiff's Motion for Preliminary Injunction ("Supplemental Brief"), together with four supporting affidavits, to the Defendants on August 11, 2010. Subsequently, as is set forth in Union Pacific's accompanying Reply in Support of Court Expert Recommendation (the "Reply"), the parties reached an agreement as to the entry of a Preliminary Injunction Order. However, as is discussed in the Reply, there are a few issues upon which the parties have not reached an agreement. This Supplemental Brief references additional evidence that the Court may wish to consider in entering the Preliminary Injunction and is provided to the Court for that purpose and in the interest of creating a complete record. The facts reflected herein were based on the information known to Union Pacific on August 11. Subsequent developments are reflected in the Reply.

exchanged information about the role of the Court's expert. The Parties are working toward a stipulation on many, but not all, terms of a preliminary injunction.

However, Defendants have only taken those actions required by the TRO. Even before a Court expert is appointed, Defendants would like to return to their normal backup tape rotation, return original computer hard-drives to users involved in document destruction, and essentially sweep this matter under the rug to return to business as usual. Plaintiff files this Supplemental Memorandum Brief In Support of Plaintiff's Motion for Preliminary Injunction ("Supplemental Brief") because injunctive relief is clearly warranted in this case and the scope and terms of the Preliminary Injunction must be broad enough to truly preserve the status quo to avoid rendering this Court's future rulings futile. Accordingly, Plaintiff requests that the Court enter a preliminary injunction order.

I. SUMMARY OF FACTS[2]

A. The Omaha Lead Superfund Site

The Omaha Lead Site ("OLS") is an approximately twenty-seven square-mile area of Omaha, Nebraska defined by the EPA as residential and residential-type properties where surface soils have been contaminated with lead. The parties dispute the source of the lead contamination. The EPA contends that the lead came from the smokestack emissions of two former lead processing operations, the American Smelting and Refining Company, Inc. ("ASARCO") lead refinery and the Aaron Ferer & Sons Company ("Aaron Ferer") battery recycling and secondary lead smelter, later acquired and operated by Gould Electronics, Inc. ("Gould"). Union Pacific contends the source of the contamination is the presence of lead-based paint on Omaha's older homes.

[2] Union Pacific's Initial Brief sets forth the factual basis for its request for injunctive relief. (Initial Br. at 3-8.) The facts are summarized here for the Court's convenience. Additionally, where appropriate, Union Pacific has supplemented the facts with additional information that has come to light since the TRO was granted, including information obtained through interviews of the EPA's designated liaisons and the single deposition that has been taken.

The EPA began working at the OLS in March 1999 under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"). The EPA added the OLS to the National Priorities List ("NPL") on April 30, 2003. On December 15, 2004, the EPA issued an Interim Record of Decision (the "Interim ROD") selecting an interim remedy for the OLS. On May 13, 2009, the EPA issued the final Record of Decision (the "ROD"), selecting a final remedy for the OLS, estimated by the EPA to cost over $400 million (including costs for the Interim ROD, for which the EPA spent an estimated $100 million).

B. The EPA's OLS Enforcement Actions

The EPA issued a general notice letter to ASARCO, directing it to perform a time-critical removal action in Omaha, on August 4, 1999. When ASARCO did not comply, on August 30, 1999, the EPA issued a Unilateral Administrative Order ("UAO") ordering ASARCO to perform the removal action.

On July 10, 2000, the EPA issued an information request letter to Union Pacific pursuant to its authority under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), compelling Union Pacific to provide the EPA information in Union Pacific's possession related to the OLS. Compliance with a CERCLA Section 104(e) request is mandatory and failure to respond fully and truthfully or to justify a failure to respond can result in civil or criminal enforcement. Union Pacific provided its response on September 28, 2000.

In approximately 2001, the EPA identified Union Pacific as a potentially responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), solely because from 1898 to 1946, Union Pacific leased a portion of the land occupied by ASARCO's refinery operations to ASARCO. The EPA issued a General Notice Letter to Union Pacific on June 4, 2002, along with ASARCO, Aaron Ferer, and Gould, requesting that they collectively conduct the remedial investigation and feasibility study. On December 16, 2004, the EPA issued Special Notice Letters to Union Pacific, ASARCO,

Gould, and Aaron Ferer demanding payment of past costs incurred through November 27, 2004, which totaled over $30 million, and performance of the work required under the Interim ROD. The Special Notice Letters also contained a demand for interest on the costs incurred pursuant its CERCLA Section 107(a) authority. On March 31, 2005, the EPA issued a UAO ordering Union Pacific to perform the work required by the Interim ROD at an estimated cost of $50 million. The UAO became effective on December 16, 2005. On January 3, 2006, Union Pacific declined to implement the Order. The UAO remains in effect, and if a court were to so order, it could subject Union Pacific to substantial penalties and punitive damages.

On July 31, 2009, the EPA again invited Union Pacific to participate in the Special Notice Procedure under 42 U.S.C. § 9622(e), this time requesting Union Pacific to implement the entire remaining final remedy at an estimated cost of approximately $300 million. Union Pacific declined to implement the entire remedy and the EPA rejected Union Pacific's offer to perform certain work.

The EPA, through Assistant Regional Counsel Steve Sanders, issued a legal hold order dated June 17, 2010.[3]

C. Union Pacific's FOIA Requests

Union Pacific submitted requests under the Freedom of Information Act, 5 U.S.C. § 552, ("FOIA") to the EPA in 2002, 2003, 2004, and 2009. The purpose of the FOIA requests was to enable Union Pacific to evaluate the merits of the EPA's OLS remedy findings and conclusions and its enforcement actions against Union Pacific concerning the OLS. The EPA never fully complied with the 2004 request.[4] Recently, the EPA unilaterally modified its records to show that the 2009

[3] The EPA may have issued a legal hold order at an earlier date, as represented by the U.S. during the TRO hearing on June 23, 2010. However, Defendants have not yet confirmed that statement. Union Pacific will seek confirmation in discovery. Coincidentally, the EPA issued this legal hold just three days after Administrator Jackson's receipt of Union Pacific's request for an investigation into the destruction of records pursuant to the Federal Records Act. It can be surmised that the trigger for the issuance of the legal hold is the Administrator's receipt of this request.

[4] Apparently, the request was "lost" for four months. (*See* Ex. 1 to Affidavit of Catherine J. Sosso ("Sosso Aff.") (the affidavits referenced throughout this Supplemental Brief are attached as Exhibits to Plaintiff's First Supplementary Index

request subsumed the 2004 request.[5]

Beginning in September 2009 and continuing through May 25, 2010, the EPA provided nine partial responses to Union Pacific's 2009 FOIA request. The EPA advised Union Pacific on April 22, 2010 that it would send its last production by hard drive and would require at least another six months to prepare a privilege log, thereby responding fully to Union Pacific's 2009 FOIA request. The EPA has never given Union Pacific a date certain when it would complete its response. (Sosso Aff. ¶ 5.) The EPA has produced fewer than 40,000 of its estimated 200,000 emails and advised Union Pacific that it has withheld as many documents as it produced. (*Id.* ¶¶ 5, 7; Filing No. 8, Ex. B(8) at Ex 8-000056.) The EPA has not given Union Pacific a *Vaughn* index or otherwise identified withheld documents and has not set a date certain when it will do so. (Sosso Aff. ¶ 5.) Union Pacific timely filed administrative appeals to each of the EPA's nine partial FOIA responses. Union Pacific sent the last administrative appeal to the EPA on June 14, 2010. (Bocquin Aff. ¶ 11.) The EPA acknowledged receipt of the first administrative appeal, but has not timely provided any substantive response to any of Union Pacific's administrative appeals. (*Id.* ¶ 12.) The EPA may not do so now.

Within the volume of documents released by the EPA to date, Union Pacific has identified eight emails documenting that an EPA supervisor, Robert Feild ("Feild"), instructed EPA employees and EPA contractors to destroy information. Emails destroyed may have been

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of Evidentiary Materials); Sosso Aff. ¶ 8.) When the EPA finally responded to the 2004 FOIA request in September 2004, it produced fewer than 200 pages of documents. (Affidavit of Charlotte Bocquin ("Bocquin Aff."), ¶ 7.) Although there were no additional documents received from the EPA in response to the 2004 FOIA request, a 2005 email from Donald Bahnke to Steven Sanders indicates that Bahnke had 500-600 pages responsive to the request that were never produced to Union Pacific and that Feild had "thousands of emails to review." However, Union Pacific received no email documents until the EPA responded to its 2009 FOIA request. (*Id.* ¶¶ 8-10; Ex. 2 to Bocquin Aff. at 1-2.)

[5] Assuming for purposes of this Supplemental Brief that the EPA completed its response to the 2004 request by responding to Union Pacific's April 6, 2009 request, completion of the response to the 2004 request took six years, or 2,190 days (using the May 25, 2010 date of EPA's ninth partial response to Union Pacific's 2009 FOIA request as the EPA's final response to the 2004 request). However, the EPA still has not provided a *Vaughn* index or otherwise identified documents withheld from its response to the 2004 request.

responsive to Union Pacific's FOIA requests, potentially would have been part of the Administrative Record, or may be relevant in future enforcement actions. These emails with Feild's intentional deletion instructions include three strings of emails addressing: a) the EPA removal of paint chips from yard soil samples; 2) the limitations of the EPA's air modeling since it cannot be used to estimate soil lead concentrations; and 3) the EPA's concern about dust air monitoring of interest to the Community Advisory Group ("CAG"). True and correct copies of the email records that the EPA produced to Union Pacific in response to Union Pacific's April 6, 2009 FOIA request were attached to Union Pacific's Complaint. (Filing No. 1, Exs. A, C-H, P; *see also* Filing No. 8, Ex. C (Sosso Decl.), incorporated by reference in Sosso Aff. ¶ 4.)

D. Region 7's Record of FOIA Noncompliance

The EPA's violations of FOIA may be the most egregious in the context of requests for OLS records. However, Region 7's FOIA noncompliance is not unique to the OLS. This fact is documented by the EPA Office of Inspector General ("OIG"). A preliminary injunction is critical in this case to overcome what seems to be a long history of Region 7's disregard for FOIA.

Robert Feild was responsible for responding to at least four FOIA requests related to the OLS—the 2004 and 2009 FOIA requests from Union Pacific, a request submitted on March 16, 2005 by the CAG, and a request made in 2008 by ASARCO, Incorporated ("ASARCO, Inc.," the parent company of ASARCO). Feild did not meet his responsibilities and did not timely respond to any of those four FOIA requests. To the contrary, Feild delayed responding and intentionally directed EPA employees and contractors under his supervision to destroy responsive records. His supervisors and the Region 7 FOIA officers were aware of Field's violations, yet did nothing. The Court is already familiar with Union Pacific's requests. What follows is a summary of the other two OLS FOIA requests, followed by the OIG findings of Region 7 FOIA violations.

The CAG has expressed concerns and requested monitoring information about lead dust

generation at the OLS. (Affidavit of Jennifer Jacobs ("Jacobs Aff."), ¶ 13.) Exposure to lead dust from the EPA's activities at the Site could present risks of lead exposure for OLS residents.[6] Lead dust generation from the EPA's activities at the OLS is a material issue of public concern. Preservation of records about this issue is in the public interest. Destruction of records about this issue will cause irreparable harm to Union Pacific and to the public.

The CAG submitted a request to the EPA under the Freedom of Information Act on March 16, 2005 to obtain information about an EPA OLS contractor. (Jacobs Aff., ¶ 8.) The CAG did not receive any documents responsive to that request until May 12, 2009, more than four years later (1,517 days). (*Id.* ¶ 10.) The EPA provided fewer than 200 pages of records, (*id.*), without any index of withheld information or any explanation of the extreme delay.

On April 22, 2008, ASARCO, Inc. sent a FOIA request to the EPA for records about a Recontamination Study the EPA had conducted at the OLS. When the EPA advised there were no responsive records, ASARCO, Inc. filed an administrative appeal on May 29, 2008, to which the EPA did not timely respond. The EPA's lack of response necessitated that ASARCO, Inc. file an action under FOIA to force the EPA to produce the requested records. Ultimately, after two court orders and many months of delay, the EPA produced approximately 100 responsive records.

Between January 9, 2007 and March 6, 2008, the OIG reviewed the EPA's FOIA compliance, reporting the results on March 25, 2009 in a report titled "EPA Has Improved Its Response to Freedom of Information Act Requests But Further Improvement Is Needed" ("FOIA Report"). The FOIA Report is attached as Exhibit G to Plaintiff's First Supplementary Index of Evidentiary Materials.[7] The FOIA Report documents a significant backlog in the EPA's FOIA

[6] As evidenced by Donald Bahnke's July 30, 2010 deposition, the EPA itself recognized the importance of air sampling in the community.

[7] The FOIA Report is available on the EPA's website at http://www.epa.gov/oig/reports/2009/20090325-09-P-0127.pdf.

responses, lack of training, and regular failure to process appeal cases timely. The FOIA Report also included a limited review of Region 7 performance and found the Region to be out of compliance with FOIA in several respects, including untimely responses. (*Id.* at 7.) There is no evidence on the EPA FOIA website that Region 7 has corrected those problems.

E. Federal Records Act Notice and Investigation Request

On June 11, 2010, Union Pacific sent a letter to EPA Administrator, Lisa P. Jackson, requesting that she initiate an investigation into the unlawful removal or destruction of OLS documents in violation of the Federal Records Act. (Bocquin Aff. ¶ 13.) Union Pacific provided a copy of that letter to the Archivist of the United States ("Archivist"), David Ferriero. (*Id.* ¶ 14.) Administrator Jackson received Union Pacific's letter on June 14, 2010. (*Id.* ¶ 13.) Administrator Jackson has not responded to Union Pacific regarding its investigation request. (*Id.* ¶ 15.) Union Pacific has no evidence that Administrator Jackson has notified Archivist Ferriero about the letter or the OLS document destruction or that Administrator Jackson has requested that Attorney General Holder begin an investigation of the OLS document destruction.

Archivist Ferriero received Union Pacific's letter on June 15, 2010. (*Id.* ¶ 14.) Mr. Ferriero has not responded to Union Pacific regarding its investigation request. (*Id.* ¶ 15.) Union Pacific has no evidence that Archivist Ferriero has initiated, through Attorney General Holder, an action to recover the OLS records.

F. The EPA's Electronic Information Systems

On July 7, 2010, Union Pacific representatives interviewed the EPA's Region 7 designated liaison, Luetta Flournoy, Deputy Director of Office of Policy and Management, Region 7.[8] In summary, Ms. Flournoy advised that Region 7 EPA has not maintained backups beyond thirty days

[8] Also on the phone were Roger Bradshaw, IRM Section Chief, Karina Vorrmao, EPA Sr. Counsel and Kathleen Clever, EPA Sr. Asst. Regional Counsel, and Defendants' counsel, Ms. Wagner and Ms. Kelly.

for many years.[9] Accordingly, destroyed OLS records are lost forever, unless they are also stored on individual hard drives or other media held by someone among the 100 EPA employees with OLS responsibilities. Yet, of these 100 Region 7 employees that may have records, in response to the TRO, the EPA has only copied the hard drives of four employees and the EPA would like to return these original hard drives, including that used by Mr. Field, before the parties, the Court, or the Court's expert has any opportunity to examine the originals. In fact, Mr. Bahnke stated in his deposition, that his computer has already been returned to him. The computer hard drives and loose media from at least all ten employees that received deletion instructions should be impounded. Ms. Flournoy was not familiar with network sites, databases or other shared data locations where OLS information may be stored.

On July 12, 2010, Union Pacific representatives interviewed the headquarters designated liaison, Vaughn Noga, Director, Office of Technology Operations and Planning, Office of Environmental Information.[10] (*Id.* ¶ 14.) The headquarters liaison advised that headquarters backs up its electronic systems on tape in the same manner as Region 7. (*Id.*) In response to the TRO, the EPA has stopped reusing its backup tape media and has secured backup media for the 30 days prior to entry of the TRO. (*Id.*) In response to the TRO, EPA headquarters has saved one 30-day backup tape and has notified all EPA employees of the TRO. Similar to Ms. Flournoy, Mr. Noga was not familiar with network sites, databases or other shared data locations where OLS information may be stored.

The labyrinth of the EPA information management system where OLS records may be stored is complex and not fully understood by the EPA's designated liaisons. Many of Union

[9] A more detailed summary of the conversation with Ms. Flourney is set forth in ¶¶ 9-12 of the Sosso Aff.

[10] Also on the phone were Michael Hilliard, Associate Division Director responsible for e-mail, Lisa Hern, Branch Chief responsible for desktop systems, Alan Margolis and Scott Albright, EPA headquarters staff attorneys, and Defendants' counsel, Ms. Wagner and Ms. Kelly. A more detailed summary of the conversation with Mr. Noga appears in ¶¶ 14-15 to the Sosso Aff.

Pacific's questions about the system and securing pertinent records therein remain open issues. (*Id.* ¶ 16.) The EPA has only taken those actions required by the TRO and has interpreted its obligations narrowly. Since neither Region 7 nor headquarters has backup tape retaining more than 30 days of information, it is likely that destroyed OLS information is lost forever. Any hope of finding and restoring it rests on mapping this information management system maze by understanding all shared sites, databases, and systems that contain OLS information, and obtaining hard drives and loose media of all EPA employees where OLS information may be stored. An understanding and examination of both the Region 7 and headquarters information management system is crucial before more information is inadvertently deleted by reinstating "business as usual" practices.

II. ARGUMENT

This Court has jurisdiction over this matter under both FOIA and the Federal Records Act. 5 U.S.C. § 552(a)(4)(B); *Armstrong v. Bush,* 924 F.2d 282, 295 (D.C. Cir.1991) (acknowledging the availability of "judicial review of the agency head's . . . refusal to seek the initiation of an enforcement action by the Attorney General."). FOIA gives this Court power to issue injunctions ordering the EPA to produce records under FOIA. 5 U.S.C. § 552(a)(4)(B) (federal courts have "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld"). Numerous courts have granted injunctive relief for alleged violations of FOIA.[11] Likewise, in the absence of the Administrator's compliance with her mandatory duties under the Federal Records Act, 44 U.S.C. § 3106, Union Pacific has standing to

[11] *See, e.g., Am. Friends v. Webster,* 485 F. Supp. 222, 236 (D.D.C. 1980), *aff'd,* 720 F.2d 29 (D.C. Cir. 1983) (granting preliminary injunction halting further destruction of records pending submission and approval of a retention plan to the court); *Armstrong v. Bush,* 924 F.2d 282, 287 (D.C. Cir. 1991) (recognizing district court's issuance of temporary restraining order enjoining agency from destroying or altering records); *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 59, 62 (D.D.C. 2003) (discussing violation of injunction entered "to ensure that all material potentially responsive to [plaintiff's] FOIA request would be preserved"); *Meeropol v. Meese,* 790 F.2d 942, 946 (D.C. Cir. 1986) ("enjoining the defendants from destroying or in any way altering the documents requested" via a FOIA request).

seek enforcement of those mandatory duties through the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, 702, and 706. *Armstrong v. Bush,* 807 F. Supp. 816, 822 (D.D.C. 1992) (*citing Am. Friends v. Webster*, 720 F.2d 29, 45 (D.C. Cir. 1983)). Courts may enforce that duty in a private action for injunctive relief under the APA. *Armstrong v. Bush*, 924 F.2d 282, 295-296 (D.C. Cir. 1991).

Additionally, this Court has jurisdiction under the APA to enforce the EPA's broader duties to preserve records that may be relevant to potential litigation or administrative proceedings. 5 U.S.C. §§ 704, 706(2)(A), (D); *Raz v. Lee*, 343 F.3d 936, 938 (8th Cir. 2003) (per curiam). Any party that suffers a legal wrong from agency action or that is aggrieved by it has standing to seek judicial review and have it set aside if unlawful. 5 U.S.C. §§ 702, 706(2)(A). Relief shall be granted when agency action is "arbitrary, capricious, an abuse of discretion," "not in accordance with law," or "without observance of procedure required by law." *Id.* § 706(2)(A), (D). In this context, "law" means "any and all applicable law." *Cousins v. United States Dep't of Transp.*, 880 F.2d 603, 609 (1st Cir. 1989) (en banc) (citing H.R. Rep. No. 1980, 79th Cong. 2d Sess., 276 (1946)). This Court has jurisdiction to enforce document preservation duties imposed upon the EPA by the federal common law prohibiting spoliation, federal criminal statutes, and the EPA's own regulations. The EPA's intentional destruction of relevant evidence is contrary to law, aggrieves Union Pacific, and causes it legal harm—entitling Union Pacific to injunctive relief.

This Court should enter a preliminary injunction to continue the TRO's prohibition on the EPA, its contractors, and all others working with it on OLS matters, from removing, deleting, modifying, destroying, or tampering with information in their possession, or under their control, that is potentially responsive to Union Pacific's FOIA requests. This Court should also require the EPA to collect and preserve records in its possession or control that are potentially responsive to the Union Pacific's FOIA request.

A. Union Pacific Meets the Requirements for a Preliminary Injunction

This Court has already held, in issuing the TRO:

> When considering a motion for a preliminary injunction, a court must weigh the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between that harm and the injury that issuance of an injunction might inflict on other interested parties, and the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)(*en banc*).[12]

The Court's determination that injunctive relief in the form of the TRO was warranted in this case applies with equal force to continuing that injunctive relief by preliminary injunction order. The purpose of a preliminary injunction is to preserve the status quo until the merits of a case are determined. *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984). "[T]he most compelling reason to grant injunctive relief is to prevent the judicial process from being rendered futile by a party's act or refusal to act." *Armstrong v. Bush,* 807 F. Supp. 816, 821 (D.D.C. 1992).

Union Pacific meets the requirements for a preliminary injunction.

1. Union Pacific Has a Likelihood of Success on the Merits

Union Pacific has a strong likelihood of succeeding on the merits of its allegations. Specifically, the EPA repeatedly violated its obligations to produce records under FOIA and the Administrator failed to fulfill her statutory duties under the Federal Records Act. Additionally, the EPA violated the APA by engaging in the intentional destruction of evidence in contravention of its common law, statutory, and regulatory obligations to preserve evidence.

a. Union Pacific is likely to succeed on its claim that the EPA has not complied with FOIA.

The EPA admits that it has received valid FOIA requests from Union Pacific. Yet, the EPA's OLS Project Coordinator—the very person charged with preserving OLS records—has

[12] (Filing No. 16 at 3.) *See also Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ----, 129 S. Ct. 365, 375 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.")

repeatedly ordered EPA employees and contractors to destroy records responsive to Union Pacific's FOIA requests.

As a federal agency, the EPA is subject to FOIA. Except where statutory exemptions apply, FOIA requires federal agencies to promptly make available requested records, so long as the request reasonably describes the requested records and complies with rules for requests established by the agency. 5 U.S.C. § 552(a)(3)(A). Under FOIA, an agency must produce requested records within 20 days after its receipt of a request. 5 U.S.C. § 552(a)(6)(A)(i). Where the agency determines responding to the request constitutes unusual circumstances, as the EPA did in the context of Union Pacific's 2009 request, that schedule may vary. 5 U.S.C. § 552(a)(6)(B)(i). A requester may appeal the agency's response administratively. The EPA again has 20 days to respond to such administrative appeals. 5 U.S.C. § 552(a)(6)(A)(ii).

Here, Union Pacific is likely to succeed on the merits of its FOIA claims because, among other reasons:

a) the EPA destroyed records responsive to Union Pacific's 2004 and 2009 FOIA requests;

b) the EPA far exceeded the statutory period for completing its response and did not advise Union Pacific of a date by which it would complete its response to the 2009 FOIA request;

c) the EPA did not conduct an adequate search for records responsive to the 2009 FOIA request and still, after 504 days, as of August 23, 2010, has failed to produce all records responsive to Union Pacific's 2009 FOIA request;

d) the EPA has withheld a substantial volume of records (estimated at over one million pages), but has not provided a *Vaughn* index or other description/identification of the records withheld[13] for either the 2004 or the 2009 requests; and

e) the EPA did not respond to any of Union Pacific's administrative appeals of the EPA's responses to the 2009 FOIA request.

[13] *See, e.g.*, 40 C.F.R. § 2.104(h)(2) & (3) requiring "identification of records being withheld, and any FOIA exemption applied by the office in denying the request" and "[a]n estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. . . ."

The EPA represented to Union Pacific that its May 25, 2010 ninth partial response was its last response to Union Pacific's 2009 FOIA request. Union Pacific administratively appealed that final response and did not file this action until nearly a month later. The EPA failed to respond to any of Union Pacific's administrative appeals. Thus, Union Pacific has constructively exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i); *Stabasefski v. U.S.*, 919 F. Supp. 1570, 1572 n.1 (M.D. Ga. 1996) (agency's failure to make a decision within 20 days of the receipt of any appeal results in constructive exhaustion). Further, to the extent the EPA had not completed its response, there is no evidence that the EPA was making reasonable progress toward completion.

Union Pacific need not wait for years to allow the EPA to respond to Union Pacific's FOIA requests, particularly while the EPA is destroying records subject to Union Pacific's requests.[14] The EPA did not timely respond to any of the last four FOIA requests for information about the OLS. The EPA lost Union Pacific's 2004 request for more than 100 days. The EPA took an average of 1,396 days (rather than the statutory response time of 20 days) to respond to three out of four of these OLS FOIA requests (Union Pacific's 2004 and 2009 requests and the 2005 CAG request). Finally, the EPA did not provide any response to the administrative appeals filed in connection with two out of four of these FOIA requests (Union Pacific's 2009 requests and ASARCO's request). As is discussed above, OIG documented this consistent non-compliance with FOIA during the period relevant to this case in the FOIA Report, with specific reference to Region 7's pattern of untimely response. Union Pacific is not aware of any evidence that Region 7 corrected those documented problems.

To the extent the Defendants assert that Union Pacific has not exhausted its administrative

[14] Although Robert Feild was responsible for responding to at least four FOIA requests and knew or should have known of the EPA's obligations to preserve agency records, he directed EPA employees and contractors under his supervision to destroy records responsive to at least two of those FOIA requests while those requests were pending, rendering it impossible for the EPA to fully respond to those requests. His supervisors knew of the instructions to delete records and took no action.

remedies to proceed with its FOIA claims, such exhaustion would be futile and is therefore not required. *Armstrong v. Bush,* 807 F. Supp. 816, 819 (D.D.C. 1992) (in FOIA action where defendants denied that requested documents were subject to FOIA or the Federal Records Act, exhaustion was not required).[15] As in this case, if waiting to exhaust administrative remedies puts requested records in jeopardy of destruction, "[a] party may be excused from exhausting administrative remedies if . . . exhaustion would cause irreparable harm, if further administrative procedures would be futile, or if the issues to be decided are primarily legal rather than factual." *Ace Prop. & Cas. Ins. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 1000 (8th Cir. 2006) (exhaustion not required in non-FOIA case where relief sought could not be granted by agency).

Fundamentally, given the EPA official's order to destroy records rather than produce them to Union Pacific under FOIA, it is likely that this Court will find that the EPA violated FOIA.[16] The EPA's failure to produce a *Vaughn* index or otherwise identify withheld documents is further evidence of its failure to comply with FOIA and increases the likelihood that Union Pacific will ultimately succeed.[17]

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[15] Moreover, exhaustion is generally treated as a jurisprudential, rather than jurisdictional, requirement. *Hidalgo v. F.B.I.*, 344 F.3d 1256, 1258 (D.C. Cir. 2003); *Taylor v. Appleton*, 30 F.3d 1365, 1367 n.3 (11th Cir. 1994). Accordingly, a court is not required to dismiss a FOIA action for failure to exhaust administrative remedies. *Wilbur v. C.I.A.*, 355 F.3d 675, 677 (D.C. Cir. 2004).

[16] The Supreme Court has recognized that courts may have the power to redress efforts to avoid FOIA through destruction. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155 n.9, 100 S.Ct. 960 (1980). A FOIA request was pending when Feild issued each of his destruction directives. Moreover, in some instances, he expressly referenced Union Pacific FOIA requests as the rationale for the ordered destruction.

[17] Despite repeated requests from Union Pacific for an index of withheld records, the EPA continues to withhold records from disclosure—reportedly at least as many as it has produced—without explanation, yet the EPA has not produced a log identifying those records. For purposes of claiming an exemption under FOIA, it is insufficient for an agency to assert "conclusory and generalized allegations of exemptions." *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973). An agency failing to disclose records pursuant to a FOIA exemption must "provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of the withheld document to which they apply." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 250 (D.C. Cir. 1977); *see also Founding Church of Scientology of Washington, D.C. v. Bell*, 603 F.2d 945, 948 (D.C. Cir. 1979) (finding agency failed to discharge its obligations under FOIA to prepare an adequate *Vaughn* index).

b. Union Pacific is likely to succeed on its claim that the Administrator has not complied with the Federal Records Act.

Union Pacific is likely to succeed in its Federal Records Act claim because Administrator Jackson failed to fulfill her statutory mandate to "initiate action . . . for the recovery of records [she] knows or has reason to believe have been unlawfully removed from [her] agency." 44 U.S.C. § 3106.

The Federal Records Act establishes the framework for records management programs in federal agencies, ensuring "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," as well as "[j]udicious preservation and disposal of records." 44 U.S.C. § 2902. To fulfill this purpose, the Federal Records Act requires the head of each agency to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency." 44 U.S.C. § 3101. Under the Federal Records Act, each agency must also "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," 44 U.S.C. § 3102, and must "establish safeguards against the removal or loss of records." 44 U.S.C. § 3105.

The Federal Records Act prescribes the exclusive mechanism for the disposal of federal "records," which are defined to include:

> [A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301. The Act requires that agency heads submit proposed record disposal schedules, which the Archivist must review and approve before the agency is empowered to destroy any records. 44 U.S.C. §§ 3303, 3303a. The Act and associated regulations provide the exclusive procedure for records disposal. 44 U.S.C. § 3314. Thus, no records may be "alienated or destroyed"

except pursuant to the provisions of the Federal Records Act. *Id.* Moreover, apart from the requirements of regular and approved disposal schedules, it is unlawful to dispose of "a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records." 36 C.F.R. § 1230.3(b) (defining "unlawful destruction"). As such, the destruction of emails by EPA employees subject to Union Pacific's FOIA request is unlawful.

Upon learning of "any actual, impending, or threatened unlawful removal . . . or destruction of records in the custody of [an] agency," the agency head has a mandatory duty to initiate "action through the Attorney General for the recovery of records [she] knows or has reason to believe have been unlawfully removed from [her] agency . . ." 44 U.S.C. § 3106.

"[I]f the agency head . . . does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head . . . to fulfill [her] statutory duty to notify Congress and ask the Attorney General to initiate legal action." *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991). To succeed in such a claim, a private litigant must establish that: (1) the agency head was aware of the destruction; and (2) the agency head did not take the statutorily mandated action of initiating action through the Attorney General for the recovery of destroyed records. *Citizens for Responsibility & Ethics in Wash. v. Dep't of Homeland Sec.*, 592 F. Supp. 2d 111, 125-26 (D.D.C. 2009). The proper private party enforcement mechanism is a claim under the APA to enforce the Federal Records Act. *Armstrong v. Bush*, 807 F. Supp. 816, 822 (D.D.C. 1992) (*citing Am. Friends v. Webster*, 720 F.2d 29, 45 (D.C. Cir. 1983)).

Administrator Jackson learned of Feild's instruction to EPA employees to destroy agency records through Union Pacific's June 11, 2010 letter informing her of the destruction. Therefore,

she has had over two months to act on this information.[18] Despite this knowledge—and her mandatory obligation under the Federal Records Act to take action—she has not responded to Union Pacific in any way. Administrator Jackson has provided no evidence that she notified the Archivist or initiated action through the Attorney General. It appears that she has taken no action to comply with her Federal Records Act obligations.[19] In light of this failing, a court will likely determine Administrator Jackson violated her statutory obligation under the Federal Records Act. *See Armstrong v. Exec. Office of the President*, 810 F. Supp. 335, 348 (D.D.C. 1993) (holding that the agency head violated the duty to prevent the destruction of federal records because the agency record keeping procedures were in violation of the Federal Records Act).

The court in *American Friends Service Committee v. Webster* made such a finding regarding the obligations of the Archivist. 485 F. Supp. 222, 233 (D.D.C. 1980). There, the court found the plaintiffs demonstrated likelihood of success by showing the agency's document disposal system contravened the "procedural directives and the substantive purposes" of the Federal Records Act and that the Archivist had failed to exercise appropriate oversight. *Id.* The Act charges the Archivist with promulgating procedures for records disposal, and reviewing agency disposal schedules to determine whether any records warrant preservation under the law. *Id.* at 228 (citing 44 U.S.C. §§ 3302, 3102, 3303(a)). In *Webster*, the Archivist "did not stop, indeed he acquiesced in, FBI measures to escape the burdens of the Freedom of Information Act by disposing of some of its files" when he approved a request for the destruction of files following the enactment and effective date of FOIA. *Id.* at 230, 232.

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[18] 44 U.S.C. § 3106 does not define the "reasonable period of time" within which an agency head must act, but given the unprecedented and brazen nature of Feild's multiple deletion instructions, Union Pacific determined it could not sit idly by while additional records are destroyed at Feild's behest. Therefore, it initiated this action.

[19] Abiding by this Court's TRO is separate and apart from, and does not constitute compliance with, Federal Records Act obligations.

Although the Archivist and the Administrator have different duties under the Federal Records Act, here, as in *Webster*, each failed to comply with the statutory mandates of the Act. Additionally, as was true in *Webster*, Administrator Jackson's noncompliance may well result in the continued unlawful destruction of records and "the unavailability of the information contained in such documents for all time." *Id.* at 232. Because the Administrator's failure to act "contravene[s] both the procedural directives and the substantive purposes of the record management laws," Union Pacific is likely to succeed on the merits of its Federal Records Act claim. *Id.* at 233.

c. Union Pacific is likely to succeed on its claim for injunctive relief under the APA because the EPA has acted contrary to law and without observation of procedure required by law by engaging in the intentional destruction of evidence.

Union Pacific is also likely to succeed in its claim that the EPA's intentional destruction of evidence violates the APA. The APA requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion," "otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); *see also id.* § 704.[20] The EPA's actions are "not in accordance with the law" and "without observance of procedure required by law" for three reasons:

1) they violate the common law duty to preserve evidence the EPA knew or should have known may be relevant to future litigation;

2) they violate 18 U.S.C. § 1519, which prohibits the destruction or alteration of documents or records with the intent to "impede, obstruct, or influence the

[20] The APA provides a cause of action to set aside agency action not in accordance with law, including federal common law. *See, e.g., Robinette v. Comm'r Internal Revenue*, 439 F.3d 455, 464 (8th Cir. 2006) (reversing the Tax Court's decision because its "erroneous application of administrative law and contract law" was agency action not in accordance with law); *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362-65 (Fed. Cir. 2000) (reversing agency's application of the federal common law of estoppel as agency action "not in accordance with law"); *Horizon Lines, LLC v. U. S.*, 414 F. Supp. 2d 46, 52 (D.D.C. 2006) (reversing agency action based on an interpretation of a statute that was "not in accordance with" the federal common law of statutory construction); *cf. Cipollone v. Liggett Group*, 505 U.S. 504, 522-23 (1992) (explaining that "[a]t least since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)," the Court "ha[s] recognized the phrase 'state law' to include common law as well as statutes and regulations"). Additionally, the APA "expressly waives sovereign immunity as to any action for nonmonetary relief brought against the United States." *Raz v. Lee*, 343 F.3d 936, 938 (8th Cir. 2003) (per curiam).

> investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States"; and
>
> 3) they violate document retention policies imposed by the EPA's own regulations requiring it to "complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery," 40 C.F.R. §§ 300.160(a)(1).

The common law duty to preserve evidence arises when a party knew or should have known that the evidence "may be relevant to future litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y. 2003); *see also Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) ("It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation."); *Dillon v. Nissan Motor Corp.*, 986 F.2d 263, 267 (8th Cir. 1993); *Bd. of Regents of Univ. of Neb. v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at *4 (D. Neb. Nov. 5, 2007).[21] This legal obligation is enforced through the inherent authority of every court to protect the integrity of its processes, which in federal court is a matter of federal common law implied from the statutes establishing the federal judiciary. For this reason, the Eighth Circuit has noted that parties will be sanctioned "'when the party knew or should have known that the destroyed documents were relevant to pending or potential litigation.'" *Dillon*, 986 F.2d at 267 (quoting *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989)). Federal agencies are no less subject to these duties than any other potential litigant. *See, e.g., Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 284-91 (E.D. Va. 2001) (sanctioning the United States for spoliation even though its spoliation did not violate a court order); *see also Kirkendall v. Dep't of the Army*, 573 F.3d 1318, 1326-27 (Fed. Cir. 2009) (affirming spoliation sanctions against the Dept. of the Army).

The EPA's destruction emails provide indisputable evidence that it knew or should have known that the documents it destroyed may be relevant to future litigation. At the time these

[21] When a party reasonably anticipates litigation, "it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Pension Comm.*, 685 F. Supp. 2d at 466 (quotation omitted). Although the EPA may have issued a legal hold at an earlier date, the only evidence Union Pacific is aware of that indicates the issuance of a legal hold is the legal hold order issued by the EPA's Assistant Regional Counsel on June 17, 2010, over a decade after the EPA's preservation duty was triggered.

documents were destroyed, administrative proceedings were already pending, making litigation not just possible, but imminent. *Cf. Dillon*, 986 F.2d at 267. Yet the EPA repeatedly engaged in intentional spoliation for the express purpose of thwarting discovery through FOIA or litigation. EPA's own emails directing employees to destroy evidence to avoid "subpoenas" and other "discovery requests" coupled with the EPA's regular involvement in CERCLA litigation and related OLS litigation confirm that it knew (and certainly should have known) that the evidence might be relevant to future litigation. Indeed, the main reason motivating the destruction of these documents was their perceived relevance to future legal proceedings and FOIA requests.

Potential parties have a duty to preserve evidence once they should have reasonably anticipated litigation or a governmental investigation. Because the Federal Rules of Civil Procedure do not establish standards governing pre-litigation preservation, Courts routinely look to other authoritative outside sources including the publications of the Sedona Conference for guidance.[22] The Sedona Conference provides detailed guidelines for determining when the "reasonable anticipation of litigation" arises.[23] The duty to preserve evidence is triggered when an organization concludes, "based on credible facts and circumstances, that litigation or a government inquiry is *likely* to occur." *Id.* at 5 (emphasis in original).[24]

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[22] The Sedona Conference is a group of leading jurists, lawyers, academics and other experts. *See Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 345 n.18 (M.D. La. 2006) (relying on *The Sedona Principles* in determining the scope of preservation obligation); *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (relying on *The Sedona Principles* in determining appropriateness of defined search strategies required); *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 650 (D. Kan. 2005) (relying on *The Sedona Principles* in determining whether production of metadata was required).

[23] THE SEDONA CONFERENCE© WORKING GROUP ON ELECTRONIC DOCUMENT RETENTION & PRODUCTION, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS – THE TRIGGER & THE PROCESS, PUBLIC COMMENT VERSION (2007), *available at* http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf.

[24] *See also* THE SEDONA CONFERENCE© WORKING GROUP ON BEST PRACTICES FOR ELECTRONIC DOCUMENT RETENTION & PRODUCTION, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 44 (2d ed. 2007), *available for download at* http://www.thesedonaconference.org/publications_html?grp=wgs110 ("Circumstances that may require suspending normal destruction of electronic information and records would include, among others: actual or reasonably anticipated litigation; **government investigation or audit**; preservation orders issued in active litigation; and certain business related scenarios (*e.g.*, mergers or acquisitions, technology reviews, bankruptcy)") (emphasis added).

"A plaintiff's duty [to preserve evidence] is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation." *Pension Comm.*, 685 F. Supp. 2d at 466; *see also Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 340 (D. Conn. 2009) ("the fact that [plaintiff] was working to identify the parties responsible for the PCB contamination and then to pursue recovery of costs establishes that litigation was reasonably anticipated from the very beginning of the investigation and remediation process"). The EPA was well aware that it would likely be a plaintiff in enforcement actions related to the OLS. Indeed, at the time EPA ordered the destruction of evidence, it had already undertaken substantial efforts to identify potentially responsible parties and pursue recovery costs—actions commonly known to precede litigation over costs and remediation. *See Innis Arden Golf Club*, 257 F.R.D. at 340-41. Litigation was therefore reasonably anticipated and the EPA was required to preserve its evidence. *See id.* at 340.

The EPA's failure to preserve evidence in this case runs counter to its duty to the Court and to the public who the agency serves. Because the EPA had a fully developed investigation at the time the destruction occurred, it was obliged to preserve evidence. The EPA began its enforcement action in 1999 by issuing a UAO to ASARCO demanding that it perform removal activities at the Site. On numerous occasions both before and after an EPA supervisor instructed EPA employees and contractors to destroy relevant evidence, the EPA took additional steps to formalize its investigation and focus it directly on individual parties. Specifically, less than a year after commencing enforcement associated with the OLS, the EPA demanded information from Union Pacific pursuant to CERCLA Section 104(e), 42 U.S.C. § 9604(e). In a June 6, 2002 general notice letter and again in a meeting on June 17, 2002, the EPA informed Union Pacific that it considered the company a responsible party at the OLS as defined by CERCLA Section 107(a), 42 U.S.C. § 9607(a). Just over two years later—and less than one month after the first known instruction to destroy relevant evidence was made by an EPA supervisor—the EPA made a formal demand to

Union Pacific in a Special Notice Letter.[25] On March 31, 2005, the EPA issued a UAO[26] against Union Pacific that is still in effect. By its very nature, a UAO is adversarial, evidences that the parties disagree about response cost obligations, and demonstrates that litigation is likely to ensue.

Despite the EPA's thorough and continuous investigation of potential liability at the OLS and its issuance of formal demands and UAOs that show it anticipated litigation, the EPA improperly directed the destruction of its own relevant evidence. The EPA's careless disregard of its duty to preserve relevant evidence[27] confirms that Union Pacific will prevail in showing that the EPA's actions were "not in accordance with law" and "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

The EPA's destruction of evidence also violates federal criminal law. Title 18 U.S.C. § 1519 prohibits the destruction or alteration of documents or records with the intent to "impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." Agency action "not in accordance with" federal criminal law is subject to suit under the APA. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979) ("[A]ny disclosure that violates [18 U.S.C.] § 1905 is 'not in accordance with law' within the meaning of 5 U.S.C. § 706(2)(A).'"). Here, the EPA intentionally destroyed documents directly relevant to Union Pacific's potential liability for cleanup costs at OLS. EPA's jurisdiction over this

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[25] EPA uses the Special Notice Letter as a formal demand and to pinpoint during litigation the time at which pre-judgment interest begins to accrue. *See* EPA OFFICE OF SOLID WASTE AND ENFORCEMENT RESPONSE ("OSWER"), No. 9832.18, WRITTEN DEMAND FOR RECOVERY OF COSTS INCURRED UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (Mar. 21, 1991), *available at*: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/demand-cercla-rpt.pdf. An additional purpose of the Special Notice Letter is to serve as a "mechanism for concluding negotiations." *See* OSWER, No. 9834.10, INTERIM GUIDANCE ON NOTICE LETTERS, NEGOTIATIONS, AND INFORMATION EXCHANGE 7 (Oct. 19, 1987).

[26] EPA considers its administrative order authority to be "one of the most potent administrative remedies available to the Agency under any existing environmental statute." *See* OSWER, No. 9833.0, GUIDANCE MEMORANDUM ON USE AND ISSUANCE OF ADMINISTRATIVE ORDERS UNDER § 106(A) OF CERCLA 1 (2000), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/useiss-sec106-mem.pdf. EPA uses UAOs in an effort to compel potentially responsible parties to perform work at a site. *Id.* at 3.

[27] For example, Donald Bahnke testified during his July 30, 2010 deposition that he was not aware that email was a record subject to preservation until 2006 or 2007. He has served continuously as an OLS project manager since 1998. He further testified that he has received no records management training from the EPA.

matter is not in doubt and the available evidence strongly suggests that the EPA destroyed these documents with the intent to "influence the investigation or proper administration" of the OLS liability and remediation process. Indeed, the intentional, systematic destruction of evidence favorable to one side obviously is designed to "influence the investigation" or the EPA's "administration" of this matter. Union Pacific will thus also succeed in showing that the EPA's actions were "not in accordance with" 18 U.S.C. § 1519.

Finally, the EPA's destruction of documents is "not in accordance with law" and "without observance of procedure required by law" because it violates the EPA's own document retention policies imposed by EPA regulations. The EPA is required to "complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery." 40 C.F.R. § 300.160(a)(1). Further, the EPA must "establish an administrative record that contains the documents that form the basis for the selection of a response action." 40 C.F.R. § 300.800, *et seq.* Here, the EPA ordered the destruction of documents that were likely relevant to any future enforcement action and certainly should have been part of the Administrative Record. Accordingly, Union Pacific is likely to succeed on the merits of its claim that the EPA's destruction of documents relating to OLS liability was "not in accordance with" and "without observance of procedure required by" the EPA's regulations. *See U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 527 n.20 (D.C. Cir. 1978) ("the agency is not free to ignore or violate its regulations while they remain in effect"); *see also Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717-21 (8th Cir. 1974) (reversing agency action for failure to comply with "the letter and the spirit" of agency guidelines).

2. Union Pacific Will Suffer Irreparable Harm Absent the Requested Injunctive Relief

The EPA's documented destruction of records already has caused Union Pacific to suffer irreparable harm. There is an imminent threat of further irreparable harm to Union Pacific if the EPA continues to destroy OLS records. Continued destruction further prevents Union Pacific from

gathering data pursuant to its FOIA requests and hampers its ability to defend itself against the EPA's enforcement actions. If further documents are deleted, "the damage is inherently irreparable; once documentary material is gone, it cannot be retrieved." *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 577 F. Supp. 2d 328, 330 (D.D.C. 2008).

The EPA, through Robert Feild, issued instructions to EPA employees and contractors with responsibility for the OLS to destroy emails addressing: a) the EPA removal of paint chips from yard soil samples; 2) the limitations of the EPA's air modeling since it cannot be used to estimate soil lead concentrations; and 3) the EPA's concern about dust air monitoring of interest to CAG. The presence and removal of paint chips from yard soil samples is a material issue in the underlying CERCLA case for cost recovery and enforcement purposes. (Affidavit of Steven A. Werner ("Werner Aff."), ¶¶ 4-5.) The question of whether the EPA's air modeling could be predictive of soil lead concentrations at specific OLS locations is also a material issue in the underlying CERCLA case for cost recovery and enforcement purposes. (*Id.* ¶ 6.) Moreover, deletion of discussions regarding the identification or maintenance of the inventory of higher lead concentration yards limits the ability of experts to evaluate the feasibility of remedial alternatives at the OLS. (*Id.* ¶ 7.) Destruction of records about the EPA's removal of paint chips from OLS soil samples and the lack of predictive value of the EPA's air modeling will cause irreparable harm to Union Pacific.

The EPA OLS Project Coordinator has, over the course of at least three years, engaged in a pattern of record destruction, in violation of the Federal Records Act and other duties imposed by federal law. The emails in which the Project Coordinator ordered record destruction demonstrate that the conduct was intentional and clearly aimed at violating the legal obligation to preserve records subject to a FOIA request. Since she became aware of the destruction by Union Pacific's June 11, 2010 letter, there is no evidence that Administrator Jackson has initiated an action to retrieve the deleted records as required by the Federal Records Act.

Any action to preserve records to date was in response to the Court's Temporary Restraining Order, and not on the initiative of the agency. Thus, absent the requested injunctive relief, the unlawful destruction of records may resume unchecked and Union Pacific will be denied the right to fully review the EPA's records regarding OLS. (Affidavit of Jeffrey D. McDermott ("McDermott Aff."), ¶ 5.) As such, Union Pacific's ability to defend against any EPA remedial action will be compromised because, once gone, the material cannot be retrieved.

In *Armstrong v. Bush*, the court held that potential document destruction was an immediate and irreparable harm. 807 F. Supp. 816, 820 (D.D.C. 1992). There, the plaintiffs sued to prevent the President, the Executive Office of the President and the Archivist from erasing records during the transition at the end of the Bush Administration. *Id.* at 818. Although document destruction had not yet occurred, the court reasoned "history is full of instances where the outgoing President has decided to erase, burn or destroy all or substantially all Presidential or Executive Office of the President records before the end of his term." *Id.* at 820-821. Thus, the harm complained of was sufficient to merit injunctive relief. *Id.* at 820.

Here, as in *Armstrong*, the destruction of documents will result in immediate and irreparable harm. However, unlike *Armstrong* where the court considered the historical behaviors of other outgoing administrations, this Court can review the continuing bad acts of the agency in question. The Project Coordinator's emails demonstrate an ongoing pattern of destruction, which will continue to cause irreparable harm absent Union Pacific's requested injunctive relief.

The very essence of the rights Union Pacific seeks to vindicate through this action—the production of responsive federal records under FOIA—depends upon the agency's preservation of those records. If the EPA's pattern and practice of destroying federal records to avoid FOIA's reach continues unabated, it will deny Union Pacific and the general public the opportunity to evaluate fully the EPA's actions and decisions regarding the OLS. (McDermott Aff. ¶ 5.) Nor

would an action for contempt after the fact relieve the irreparable harm. *See Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 70 (D.D.C. 2003) (finding EPA in contempt for destruction of records *despite* preliminary injunction, could not restore records requested under FOIA).

In addition to the immediate consequences of the agency's destruction, the EPA's continued destruction of records will cause Union Pacific to suffer irreparable harm in the future. (Werner Aff. ¶¶ 4-7; McDermott Aff. ¶5.) The EPA issued a UAO against Union Pacific regarding the OLS that went into effect in December 2005 and remains pending, subject to judicial enforcement. The EPA has stated its intention eventually to seek contribution against Union Pacific for costs it has incurred at the OLS. Continued destruction of OLS records will compromise Union Pacific's and the community's ability to challenge the merits of the EPA's OLS remedial actions, enforcement actions, and the assumptions upon which those actions were based.

3. The Balance Between the Harm to Plaintiff and the Injury of Granting Injunctive Relief Favors Entry of a Preliminary Injunction

A preliminary injunction ordering the EPA to stop destroying records and to comply with FOIA will harm no legitimate EPA interest. Union Pacific is requesting that this Court simply order the EPA to follow the law, which the President of the United States of America, Attorney General Holder, and its own Administrator have all said it must do.[28]

In contrast to the injury Union Pacific has suffered and will continue to suffer absent relief, ordering the EPA to stop destroying records and to comply with the Federal Records Act will not injure or unfairly burden the EPA. Union Pacific requests simply that the Court enforce the law and act to preserve the status quo—ensuring that no additional records are destroyed—pending

[28] Reaffirming the importance of the Freedom of Information Act, President Obama stated: "A democracy requires accountability, and accountability requires transparency. . . . In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike." 74 Fed. Reg. 4683 (Jan. 26, 2009).

resolution of this litigation and that the Court grant such additional relief as is appropriate to determine the extent of the record destruction.

An order to simply "preserve that status quo" and maintain records that are regularly preserved is not considered unduly burdensome. *Armstrong v. Bush*, 807 F. Supp. at 821; *see also Citizens for Responsibility & Ethics in Washington v. Cheney*, 577 F. Supp. 2d 328, 340 (D.D.C. 2008) (holding an order to preserve all documents "does not impose burdensome obligations on Defendants, as it only requires that they preserve records that have been, or otherwise would be, created").

Even if records preservation creates some minimal additional burden "it is clear that the interest of the government in minimizing the costs and administrative burdens associated with the storage of . . . documents cannot be deemed to outweigh the interest of plaintiffs in the preservation of records which may be of substantial economic and other value to them." *Am. Friends v. Webster*, 485 F. Supp. 222, 234 (D.D.C. 1980). The burden or "injury" to the EPA from the preliminary injunction will be minimal. The EPA already protects its electronic information systems through backup tapes. The preliminary injunction would require that the EPA simply preserve those tapes. This is analogous to the circumstances in *Armstrong v. Bush*, 807 F. Supp. at 821 (temporary restraining order held "not [to] be disruptive or overly burdensome" where the agency regularly used backup tapes to backup its system). Merely saving a complete set of backup tapes will not be disruptive or overly burdensome.

Other impacts from the preliminary injunction would include a requirement for electronic imaging of a number of computer hard drives and working with the Court's computer forensic expert. None of these obligations is costly or burdensome and Union Pacific has no other mechanism to insure and verify that the EPA will comply with FOIA, the Federal Records Act, or other document retention duties imposed by the federal common law, criminal statutes, and

administrative regulations. Defendants advised Union Pacific that the EPA has taken steps to make forensic copies of the hard drive on three employees' computers. Yet, the EPA would return the originals to their users (and perhaps already has) without providing any opportunity for examination by Plaintiff, the Court, or the Court's expert. In the face of Defendants' very narrow interpretation of the TRO and its desire to return to business as usual, a preliminary injunction with explicit directions is needed. Review by the Court's expert and the Court's oversight are simply a part of the litigation process, necessitated by the EPA's violations of these records preservation and management laws.

Congress, by enacting FOIA and the Federal Records Act, established that certain administrative and financial burdens are properly borne by federal agencies to provide access to the very types of records to be protected by the injunctive relief sought in this case. *See Webster*, 485 F. Supp. at 234. In short, there is no meaningful harm to the EPA by issuance of the preliminary injunction. Nor would a preliminary injunction cause any harm to any third party. Thus, the equities balance in favor of granting the requested injunctive relief.

4. The Requested Relief is in the Public Interest

The preservation of OLS records is not only critical to the integrity of Union Pacific's FOIA requests, but injunctive relief is also in the public interest in light of FOIA's purpose of ensuring transparency in government practices. As President Obama noted: "accountability is in the interest of the Government and the citizenry alike." *Presidential Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act*, 74 Fed. Reg. 4683 (January 26, 2009). Similarly, the Federal Records Act requires records preservation; the "thrust of the laws Congress has enacted is that governmental records belong to the American people . . ." *Webster*, 485 F. Supp. at 235.

FOIA was intended "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quotation omitted). FOIA was "broadly conceived . . . to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Id.* (quoting S. Rep. No. 89-813, at 3 (1965)). As noted in Union Pacific's Initial Brief, Attorney General Holder has issued his own memorandum to all federal agencies expressing his intention to hold each agency fully accountable for its proper administration of FOIA.[29] (Filing No. 7 at 17.)

Requiring agency compliance with the Federal Records Act is also in the public interest. The Federal Records Act was specifically designed to preserve records. "By enacting the statute, Congress has made a determination that the preservation of records is in the public interest." *Armstrong*, 807 F. Supp. at 821. And, the American people should have access to such records for "legitimate historical and other research purposes." *Webster*, 485 F. Supp. at 235. Thus, the Federal Records Act governs decisions regarding the preservation and destruction of documents. *Id.*

In this case, Union Pacific has specific evidence of the public's interest in information about the OLS. A public organization in Omaha, the CAG, has always been interested in OLS data and information, including in particular, the source or sources of lead exposure in Omaha. (Jacobs Aff. ¶ 7.) Membership in the CAG includes private citizens, various non-profit entities in Omaha, and City of Omaha, Douglas County, and State of Nebraska governmental organizations. (*Id.* ¶ 4.) The CAG has made its own FOIA requests to the EPA for OLS records. (*Id.* ¶ 8.) Also important to the public interest, the information at issue may affect public health, safety and welfare, because it

[29] Attorney General Holder instructed the agencies not to withhold FOIA-requested information merely because it might cause embarrassment to public officials or reveal agency errors or failures. Attorney General Holder specifically required transmission of his memorandum on FOIA openness and compliance to all FOIA officers and professionals in the agencies. Attorney General Holders' memo is available at: http://www.justice.gov/ag/foia-memo-march2009.pdf (site last visited July 30, 2010).

may help in the determination of the true source of lead contamination in Omaha's residential neighborhoods.[30] Additionally, the EPA's continued record destruction may affirmatively mislead the public about the status and actions taken by the EPA at the OLS. (McDermott Aff. ¶ 5.)

A preliminary injunction ensuring that the EPA complies with its other document retention duties imposed by federal common law, criminal statutes, and EPA's own regulations is also in the public interest, for the same reasons noted above. The public thus has a clear interest in ensuring that documents are not destroyed in order to obstruct or influence the EPA's investigation into OLS remediation and public health issues or its administration of the OLS liability and remediation process. *See* 18 U.S.C. § 1519. Indeed, EPA regulations implicitly confirm the public's interest in these matters by requiring that the EPA create and maintain documentation concerning potential liability and costs, as well as "impacts and potential impacts to the public health and welfare and the environment." 40 C.F.R. § 300.160. In short, there is ample evidence that preservation of OLS records is in the public interest.

The EPA's willful destruction of records defeats the public's interest in access to official agency information. Accordingly, this final factor weighs heavily in support of full public disclosure of responsive information, which is only accomplished through a preliminary injunction preventing the continued improper destruction of EPA records.

[30] For a specific discussion of CAG's longstanding concerns about the EPA's data related to the OLS and the concerns of this community-based organization about Feild's deletion directives, *see* Jacobs Aff. ¶¶ 11-15.

III. CONCLUSION

To avoid continuing irreparable harm to Union Pacific and the public, Union Pacific respectfully requests this Court to grant injunctive relief through entry of a preliminary injunction in the form attached.

Union Pacific reserves the right to seek further relief in the form of attorneys fees, costs, and sanctions.

DATED this 18th day of August, 2010.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY,
Plaintiff

BY: s/Carolyn M. McIntosh
Carolyn M. McIntosh, *admitted pro hac vice*
Patton Boggs LLP
1801 California Street, Suite 4900
Denver, CO 80202
Telephone: (303) 894-6127
Facsimile: (303) 894-9239
cmcintosh@pattonboggs.com

And

BY: William M. Lamson, Jr., #12374
Lamson Dugan and Murray, LLP
10306 Regency Parkway Drive
Omaha, NE 68114
Telephone: (402) 397-7300
Facsimile: (402) 397-7824
wlamson@ldmlaw.com

ITS ATTORNEYS

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2010 I electronically filed the foregoing **Supplemental Memorandum Brief In Support of Plaintiff's Motion for Preliminary Injunction** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Laurie A. Kelly
Lynnett M. Wagner

s/Carolyn M. McIntosh
Carolyn M. McIntosh, *admitted pro hac vice*

PETITIONERS' EXHIBIT

P

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY,	)	**CASE NO. 8:10CV235**
Plaintiff,	)	
v.	)	**MEMORANDUM AND ORDER ON PRELIMINARY INJUNCTION**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA P. JACKSON, in her official capacity,	)	
Defendants.	)	

This matter is before the Court on the parties' Joint Motion to Approve Stipulation for Entry of Preliminary Injunction (Filing No. 34) and the parties' Joint Stipulation for Preliminary Injunction (Filing No. 43). The motion and the parties' respective positions are supported by briefs and indexes of evidence (Filing Nos. 35, 36, 39, 40, and 41). A hearing on the Joint Stipulation was held on August 23, 2010. Counsel for the parties appeared and presented argument, but no further evidence was offered. The Court concludes that the Joint Stipulation should be approved and incorporated by reference into this Preliminary Injunction. The remaining issues related to enforcement are discussed below.

DISCUSSION

I. Preliminary Injunction

The Court has considered the evidence and the parties' Joint Stipulation for Preliminary Injunction (Filing No. 43), and concludes that the Joint Stipulation should be approved. Accordingly, the Motion to Approve Stipulation for Entry of Preliminary Injunction (Filing No. 34) will be granted. This order will serve as a preliminary injunction, incorporating all terms and conditions set forth in the parties' Joint Stipulation.

II. Preliminary Injunction Enforcement

The parties were not able to reach complete agreement concerning the scope and terms of the preliminary injunction. At the hearing, the parties agreed that the issues to be decided by the Court were (1) who the Court should appoint as the independent computer forensics expert to advise the Court; (2) the outline or scope of work for the independent computer forensics expert; (3) whether the Defendant should be required to prepare an implementation plan for review and Court approval; and (4) when Region 7 of the United States Environmental Protection Agency ("EPA") can resume its policy of overwriting backup tapes. The Court has carefully considered the parties' written and oral arguments and has made the following determinations regarding the scope and enforcement of the preliminary injunction:

a. Independent Computer Forensics Expert

The Court will appoint Rich Hoffman of UnitedLex to serve as the Court's independent computer forensics expert in this case. The Court notes that both experts recommended by the respective parties are well qualified for the task. Based on Mr. Hoffman's qualifications and experience, the Court is confident that he can communicate with the Court effectively to ensure the Defendant's compliance with the preliminary injunction. The Court has contacted Mr. Hoffman, who has agreed to serve as the Court's expert in this case.

b. Scope and Duties of the Expert

In general, the Court adopts the Plaintiff's characterization of the scope of the computer forensics expert's duties. The Court notes that the principal role of the expert is to aid the Court in ensuring the Defendants' compliance with the preliminary injunction, and it is not the expert's role to engage in discovery or re-construction of data. While the

scope of the expert's work may be modified from time to time as more information comes to light, a preliminary description of the expert's scope of work is in the Order section, below.

c. Implementation Plan

At this time, the Court will not require the Defendants to prepare and submit an implementation plan for compliance with this preliminary injunction. The Court will consider the expert's findings and recommendations to determine whether a Court-approved implementation plan may be necessary in the future.

d. Overwriting Backup Tapes

The Court will allow Region 7 of the EPA to resume its policy of overwriting backup tapes after the Court's expert has had a reasonable opportunity to evaluate the adequacy of Defendants' data preservation measures, and has made a recommendation to the Court that overwriting may resume without the risk of loss of relevant data. The Court will consult with the expert about the proper way to ensure that data that may not have been captured on backup tapes can be so captured and preserved. The Court will request that the expert give priority to this issue so as to avoid needless expense to the EPA.

Accordingly,

IT IS ORDERED:

1. The parties' Joint Motion to Approve Stipulation for Entry of Preliminary Injunction (Filing No. 34) is granted, and the Joint Stipulation for Preliminary Injunction and Order (Filing No. 43) is approved;
2. A Preliminary Injunction is granted in favor of Plaintiff Union Pacific Railroad Company, incorporating all terms and conditions set forth in the Joint Stipulation for Preliminary Injunction and Order (Filing No. 43);

3. The Court appoints Rich Hoffman, of UnitedLex, to serve as the Court's independent computer forensics expert;

4. The computer forensics expert shall proceed in accordance with the following scope of work, subject to later modification:

   a. The general purpose of the computer forensics expert is to advise the Court as to whether measures taken by the Defendants to comply with this Preliminary Injunction are adequate to preserve relevant electronically stored data ("ESI");

   b. The computer forensics expert will not be responsible for the actual reconstruction or recovery of any ESI or documents;

   c. The computer forensics expert will evaluate and advise the Court with respect to the adequacy of the measures that the Defendants and their experts have taken, or propose to take (i) to ensure compliance with this Preliminary Injunction; (ii) to determine what relevant ESI or documents, if any, were destroyed; and (iii) to implement feasible restoration;

   d. The computer forensics expert will help the Court to facilitate an early decision regarding when the Defendant United States Environmental Protection Agency may reinstate its policy of overwriting backup tapes; and

5. The terms and conditions stated in, and incorporated by, this Preliminary Injunction replace the Temporary Restraining Order (Filing No. 16) previously in effect.

DATED this 26th day of August, 2010

BY THE COURT:

s/Laurie Smith Camp
United States District Judge