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2 UNITED STATES
3 ENVIRONMENTAL PROTECTION AGENCY
4 REGION 10
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10 IN THE MATTER OF:) UNILATERAL ADMINISTRATIVE
11) ORDER FOR REMOVAL ACTIONS
12)
13)
14 FMC Idaho LLC)
15 Pocatello, Idaho) U.S. EPA Region 10
16) CERLCA Docket No.
17) CERCLA-10-2007-0051
18 Respondent.) Proceeding Under Section
19) 106 (a) of the Comprehensive
20) Environmental Response,
21) Compensation, and Liability
22) Act, as amended, 42 U.S.C.
23) § 9606 (a).
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1 partnership status of Respondent, including, but not limited to,
2 any transfer of assets or real or personal property, shall not
3 alter Respondent's responsibilities under this Order.

4 5. Respondent shall ensure that their contractors,
5 subcontractors, and representatives receive a copy of this Order
6 and comply with this Order. Respondent shall be responsible for
7 any noncompliance with this Order.

8
9 **III. DEFINITIONS**

10 6. Unless otherwise expressly provided herein, terms used
11 in this Order which are defined in CERCLA or in regulations
12 promulgated under CERCLA shall have the meaning assigned to them
13 in CERCLA or in such regulations. Whenever terms listed below
14 are used in this Order or in the attached appendices and
15 incorporated hereunder, the following definitions shall apply:

16 a. "Action Memorandum" shall mean the EPA Action
17 Memorandum relating to the Site signed on December 13, 2006, by
18 the Director, Office of Environmental Cleanup, EPA Region 10,
19 and all attachments thereto. The Action Memorandum is attached
20 as Appendix B.

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

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

28 d. "Effective Date" shall be the effective date of
29 this Order as provided in Section XXVIII.

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

1 f. "Interest" shall mean interest at the rate
2 specified for interest on investments of the EPA Hazardous
3 Substance Superfund established by 26 U.S.C. § 9507, compounded
4 annually on October 1 of each year, in accordance with 42 U.S.C.
5 § 9607(a). The applicable rate of interest shall be the rate in
6 effect at the time the interest accrues. The rate of interest
7 is subject to change on October 1 of each year.

8 g. "National Contingency Plan" or "NCP" shall mean
9 the National Oil and Hazardous Substances Pollution Contingency
10 Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. §
11 9605, codified at 40 C.F.R. Part 300, and any amendments
12 thereto.

13 h. "Order" shall mean this Unilateral Administrative
14 Order, all appendices attached hereto including the Statement of
15 Work and Action Memo, and all documents incorporated by
16 reference into this document including without limitation EPA-
17 approved submissions. EPA-approved submissions (other than
18 progress reports) are incorporated into and become a part of the
19 Order upon approval by EPA. In the event of conflict between
20 this Order and any appendix or other incorporated documents,
21 this Order shall control.

22 i. "Paragraph" shall mean a portion of this Order
23 identified by an Arabic numeral.

24 j. "Parties" shall mean EPA and Respondent.

25 k. "Response Costs" shall mean all costs, including,
26 but not limited to, direct and indirect costs, that the United
27 States incurs in reviewing or developing plans, reports and
28 other items pursuant to this Order, verifying the Work, or
29 otherwise developing, implementing, overseeing, or enforcing
30 this Order, including but not limited to, payroll costs,
31 contractor costs, travel costs, laboratory costs, the costs
32 incurred pursuant to Paragraph 49 (cost of attorney time and any

1 monies paid to secure access, including the amount of just
2 compensation), and Paragraph 58 (emergency response).

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

6 m. "Respondent" shall mean FMC Idaho LLC.

7 o. "Section" shall mean a portion of this Order
8 identified by a Roman numeral.

9 p. "Site" shall mean the FMC Idaho LLC Site, located
10 on Highway 30 west of the City of Pocatello, Idaho, in Township
11 6 South, Range 33 East, and largely within the boundaries of the
12 Fort Hall Indian Reservation in Power County.

13 q. "Statement of Work" or "SOW" shall mean the
14 statement of work for implementation of the removal action, as
15 set forth in Appendix A to this Order, and any modifications
16 made thereto in accordance with this Order.

17 r. "Waste Material" shall mean: (i) any "hazardous
18 substance" under Section 101(14) of CERCLA, 42 U.S.C. §
19 9601(14); (ii) any pollutant or contaminant under Section
20 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (iii) any "solid
21 waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

22 s. "Work" shall mean all activities Respondent is
23 required to perform under this Order.

24 25 **IV. FINDINGS OF FACT**

26 7. The FMC Site is located in Southeastern Idaho on
27 Highway 30, approximately 2.5 miles northwest of Pocatello,
28 Idaho. The Site was used to manufacture elemental phosphorus
29 from phosphate ore from the late 1940s until December 2001.
30 Various lined and unlined surface impoundments, including Pond
31 16S, were used to manage wastewater containing phosphorus. FMC
32

1 has conducted activities to decommission and dismantle the
2 manufacturing plant.

3 8. Most of the FMC Site is within the boundary of the Fort
4 Hall Reservation. Fort Hall Reservation land in the vicinity of
5 the FMC Site is both agricultural and residential. The Bureau of
6 Land Management (BLM) lands in the vicinity of the Site are
7 designated as multiple uses. Unincorporated land in Bannock and
8 Power Counties in the vicinity of the Site is mostly
9 agricultural with scattered residences. Pocatello and Chubbuck
10 land in the vicinity of the FMC Site is primarily zoned for
11 residential use.

12 9. From 1947 to April 2000, FMC Corporation owned the FMC
13 Site. In April 2000, FMC sold the FMC Site to Astaris Idaho
14 LLC, a subsidiary of Astaris LLC. Astaris LLC was owned 50% by
15 FMC Corporation and 50% by Solutia Inc. In February 2002, FMC
16 acquired 100% of Astaris Idaho LLC and changed its name to FMC
17 Idaho LLC. FMC Idaho LLC, a wholly owned subsidiary of FMC
18 Corporation, has owned and operated the FMC Site since February
19 2002.

20 10. The FMC Site is part of the Eastern Michaud Flats
21 (EMF) Superfund site that was listed on the CERCLA National
22 Priority List (NPL) on August 30, 1990 (Federal Register, Volume
23 55, Number 169, page 35502). Within the EMF Superfund site
24 boundaries are the FMC Site and the J.R. Simplot Company "Don"
25 Plant.

26 11. EPA issued a CERCLA Record of Decision (ROD) selecting
27 a remedy for the EMF site in 1998. EPA is reevaluating the
28 Record of Decision as it pertains to the FMC Site. FMC is
29 conducting a Supplemental Remedial Investigation and Feasibility
30 Study pursuant to a CERCLA Administrative Order on Consent,
31 which will include an investigation of former FMC plant
32

1 operating areas that were in operation and not evaluated at the
2 time of EPA's original site investigation.

3 12. The FMC Site contains hazardous waste management units
4 regulated under RCRA, including Pond 16S. On October 16, 1998,
5 the United States filed a Complaint against FMC in U.S. District
6 Court for the District of Idaho alleging a number of RCRA
7 violations at the FMC elemental phosphorus manufacturing
8 facility, including the allegation that FMC placed reactive and
9 ignitable phossey wastes in Pond 16S since it became operational
10 in 1993. A Consent Decree entered on July 13, 1999, required FMC
11 Corporation, among other things, to close and cap Pond 16S waste
12 in accordance with all applicable RCRA requirements and an EPA
13 approved closure plan. Pond 16S is located entirely within the
14 exterior boundaries of the Fort Hall Reservation.

15 13. Pond 16S covers an area of approximately 10.2 acres
16 and contains approximately 140 square feet of phosphorus
17 containing water and solids from the elemental phosphorus
18 manufacturing process. Pond 16S received waste until September
19 1999, including waste to which lime had been added. Pond 16S
20 received phosphorus containing water and precipitator slurry
21 from the furnace building, phosphorus decontamination residues,
22 and water from other ponds. Pond 16S solids consist of fine-
23 grained furnace solids (ore, coke and silica), elemental
24 phosphorus from the precipitators, and residual sludge and dirt
25 contained in phossey water after processing at the phosphorus
26 loading dock.

27 14. EPA approved the final closure plan for Pond 16S on
28 February 6, 2004. The Consent Decree and the approved closure
29 plan required removal of water, construction of a center dike to
30 allow placement of fill material, and placement of a cap over
31 the waste. It also required temperature and pressure monitoring
32 and gas collection systems to be installed. FMC reported that it

1 had completed closure in 2004, and certified that it had
2 completed closure in accordance with the approved closure plan
3 in January 2005.

4 15. On March 13, 2001, FMC discovered that phosphine had
5 apparently built up, auto-ignited, and melted small holes in the
6 temporary cover that FMC installed over the fill material on
7 Pond 16S in advance of installing the final cap. The holes were
8 located immediately next to the fill material in the anchor
9 trench for the temporary cover at the west side of the Pond.
10 Subsequent gas monitoring detected phosphine at the perimeter of
11 the temporary cover in concentrations greater than 20 parts per
12 million (ppm). FMC attributed the presence of phosphine to the
13 sludge-intrusive activities of the center dike construction,
14 which caused mixing of limed and non limed materials. FMC
15 indicated that because the initial fill and temporary cover were
16 constructed immediately following placement of the center dike,
17 the increased volume of phosphine gas was trapped within the
18 initial fill and beneath the temporary cover. An interim gas
19 extraction and treatment system was installed and put into
20 service by May 11, 2001.

21 16. The Pond 16S cap consists of a seven foot thick
22 evapotranspiration layer composed of soil, crushed and screened
23 slag and sand which overlays a geo-synthetic composite barrier
24 and drainage system which overlays the waste. A dual purpose
25 pressure monitoring and gas collection system was installed
26 under the cap around the perimeter of the Pond. Eight
27 temperature monitoring sensors were also installed in well
28 casings extending down through the cap to locations above the
29 waste to monitor temperature. The Post Closure Plan for Pond
30 16S requires that the pressure monitoring system be converted to
31 a gas collection and treatment system if pressure exceeds 27
32

1 inches of mercury for a one week period and detectable
2 concentrations of phosphine or hydrogen gas have been measured.

3 17. In January 2006, a high temperature alarm (temperature
4 exceeding 22°C) was observed in temperature monitoring sensor
5 number 8. FMC determined that the alarm was a false alarm
6 related to failure of the transmitter, and reported that there
7 have been no exceedances of the temperature or pressure limits
8 in the post closure plan since post closure monitoring began in
9 2005. In February 2006, elevated levels of phosphine gas was
10 detected in the metal enclosure housing the top of the well
11 casing for a temperature sensor, and FMC began operating two gas
12 extraction systems meeting the design specified in Appendix O of
13 the Pond 16S closure plan. Subsequently, in June 2006,
14 intermittent emissions of smoke from two temperature monitoring
15 point (TMP) vents (T03 and T04) were observed. FMC has reported
16 that its assessment is that phosphine gas was continuing to
17 collect in TMP well casings and likely accumulating to the
18 phosphine auto-ignition concentration (20,000 parts per million)
19 inside the temperature well casings or vents forming phosphorus
20 pentoxide.

21 18. Visible air emissions from Pond 16S have been observed
22 on a number of occasions since June 2006, including by Shoshone-
23 Bannock Tribal staff on September 6, 2006 and September 18,
24 2006.

25 19. On November 20 and 21, 2006, the EPA conducted removal
26 site evaluation activities at the Site. Air samples were
27 collected of ambient air at Pond 16S, upwind of Pond 16S and
28 downwind of Pond 16S. Additionally, air samples were collected
29 from the top of temperature monitoring well casing no. 1 as well
30 as from the discharge end of FMC's existing gas extraction and
31 treatment system. Samples were analyzed for phosphine, hydrogen
32 cyanide, and hydrogen sulfide. Analytical data show elevated

1 concentrations of phosphine gas (360 ppm), hydrogen cyanide gas
2 (0.12 ppm), and hydrogen sulfide gas (507 ppm) being generated
3 within the cap at Pond 16S. Ambient air samples showed
4 concentrations as high as 0.13 ppm for hydrogen sulfide downwind
5 of the pond. Phosphine and hydrogen cyanide were not detected in
6 ambient air at levels at or above the detection limit.
7 Concentrations of phosphine, hydrogen cyanide and hydrogen
8 sulfide gas accumulating within the Pond 16S cap and being
9 released may present an imminent and substantial endangerment to
10 human health and the environment.

11 20. Phosphine gas is extremely flammable and produces a
12 dense white cloud of phosphorus pentoxide when it burns.
13 Phosphorus pentoxide is a severe respiratory tract irritant due
14 to the rapid formation of orthophosphoric acid, H_3PO_4 , on contact
15 with water. Phosphine gas is also explosive and may ignite
16 spontaneously on contact with air. The National Institute of
17 Occupational Safety and Health has determined that phosphine gas
18 is immediately dangerous to life and health at 50 ppm (based on
19 a 30 minute exposure). The Occupational Safety and Health
20 Administration (OSHA) time weighted average Permissible Exposure
21 Limit is 0.3 ppm.

22
23 21. Hydrogen sulfide is a flammable gas. Exposure to low
24 concentrations of hydrogen sulfide may cause irritation to the
25 eyes, nose, or throat. It may also cause difficulty in breathing
26 for some asthmatics. Brief exposures to high concentrations of
27 hydrogen sulfide can cause a loss of consciousness, permanent or
28 long-term effects such as headaches, poor attention span, poor
29 memory, and poor motor function, and possibly death. The
30 Occupational Safety and Health Administration Permissible
31 Exposure Limit for General Industry is 20 ppm (ceiling), however
32 if no other measurable exposure occurs during the 8-hour work

1 shift, exposures may exceed 20 ppm, but not more than 50 ppm
2 (peak), for a single time period up to 10 minutes. The National
3 Institute of Occupational Safety and Health has determined that
4 hydrogen sulfide gas is immediately dangerous to life and health
5 at 100 ppm.

6 22. Hydrogen cyanide gas has been detected at Pond 16S,
7 including at an hourly maximum concentration of 1.11 ppm prior
8 to placement of the interim cover and final cap.

9 23. Hydrogen cyanide can cause rapid death due to
10 metabolic asphyxiation within seconds or minutes of the
11 inhalation of high concentrations of hydrogen cyanide gas.
12 Cyanide directly stimulates the chemoreceptor of the carotid and
13 aortic bodies, causing hyperpnoea. Cardiac irregularities are
14 often noted. Exposure to hydrogen cyanide can occur through
15 inhalation, ingestion, eye or skin contact, and absorption
16 through the skin, eyes, and mucous membranes. Explosive hazards
17 can occur on exposure to air, sources of ignition, including
18 heat, or open flame; and when stored for long periods of time.
19 The Occupational Safety and Health Administration time weighted
20 average permissible exposure limit is 10 ppm. The National
21 Institute of Occupational Safety and Health has determined that
22 hydrogen cyanide is immediately dangerous to life and health at
23 50 ppm.

24 24. Potential receptors of the phosphine, hydrogen cyanide
25 and phosphorus pent oxide released from Pond 16S include
26 Respondent's employees, contractors and subcontractors, as well
27 as visitors. Concentrations of phosphine, hydrogen cyanide and
28 hydrogen sulfide gas accumulating within the Pond 16S cap and
29 being released may present an imminent and substantial
30 endangerment to site workers and others at the site.

31 25. EPA issued a time critical removal Action Memorandum
32 on December 13, 2006 for Pond 16S to remove and treat phosphine

1 and other gases present at levels of concern in a manner that
2 satisfies specified performance objectives.

3 26. Action is necessary to protect receptors from
4 inhalation of phosphine, hydrogen cyanide, hydrogen sulfide and
5 phosphorus pent oxide at Pond 16S, and to minimize the risk of
6 fire and explosion from build-up of phosphine, hydrogen sulfide
7 and hydrogen cyanide gas under the cap at Pond 16S.

8
9 **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

10 27. Based on the Findings of Fact set forth above, and the
11 Administrative Record supporting the removal action, EPA has
12 determined that:

13 a. The FMC LLC Site and Pond 16S are each a "facility"
14 as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

15 b. The contamination found at the Site and at Pond
16 16S, as identified in the Findings of Fact above, includes
17 "hazardous substances" as defined by Section 101(14) of CERCLA,
18 42 U.S.C. § 9601(14).

19 c. The Respondent is a "person" as defined by Section
20 101(21) of CERCLA, 42 U.S.C. § 9601(21).

21 d. The Respondent is a liable party under one or more
22 provisions of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).
23 Respondent is the "owner" and/or "operator" of the facilities,
24 as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20),
25 and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C.
26 § 9607(a)(1).

27 e. The conditions described in the Findings of Fact
28 above constitute an actual and/or threatened "release" of a
29 hazardous substance from the facility as defined by Section
30 101(22) of CERCLA, 42 U.S.C. § 9601(22).

31 f. The conditions at the Site constitute a threat to
32 public health or welfare or the environment, based on the

1 factors set forth in Section 300.415(b)(2) of the National Oil
2 and Hazardous Substances Pollution Contingency Plan, as amended,
3 40 CFR Part 300 ("NCP").

4 g. The conditions present at the Site constitute an
5 imminent and substantial endangerment to public health or
6 welfare or the environment within the meaning of Section 106(a)
7 of CERCLA, 42 U.S.C. § 9606(a).

8 h. The removal actions required by this Order are
9 necessary to protect the public health, welfare, or the
10 environment and are not inconsistent with the NCP and CERCLA.

11
12 **VI. ORDER**

13 28. Based upon the foregoing Findings of Fact,
14 Conclusions of Law, Determinations, and the Administrative
15 Record for this Site, it is hereby Ordered that Respondent
16 comply with all provisions of this Order and any modifications
17 hereto, including, but not limited to, all appendices to this
18 Order and all documents incorporated by reference into this
19 Order.

20
21 **VII. NOTICE OF INTENT TO COMPLY**

22 29. Respondent shall notify EPA in writing within 3 days
23 after the Effective Date of this Order of Respondent's
24 irrevocable intent to comply with this Order. Failure of
25 Respondent to provide such notification within this time period
26 shall be a violation of this Order by Respondent. Such written
27 notice shall be sent to:

28 Andrew Boyd
29 Office of Regional Counsel
30 United States Environmental Protection Agency,
31 Region 10
32 1200 Sixth Avenue (M/S ORC-158)

1 Seattle, Washington 98101

2 Telephone: (206) 553-1222

3
4 **VIII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR,**
5 **AND ON-SCENE COORDINATOR**

6 30. Respondent shall perform the Work or shall retain one
7 or more contractors to perform the Work and shall notify EPA of
8 the name(s) and qualifications of Respondent or the
9 contractor(s) within 10 days of the Effective Date. If, after
10 the commencement of Work, Respondent retains additional
11 contractor(s) or subcontractor(s), Respondent shall notify EPA
12 of the name(s) and qualification(s) of such contractor(s) or
13 subcontractor(s) retained to perform the Work at least 10 days
14 prior to commencement of such Work, unless otherwise agreed to
15 by EPA. EPA retains the right, at any time, to disapprove of
16 any or all of the contractors and/or subcontractors retained by
17 Respondent or of Respondent's decision to perform the Work
18 itself. If EPA disapproves of a selected contractor or
19 subcontractor or of Respondent's decision to perform the Work,
20 Respondent shall retain a different contractor or subcontractor
21 and shall notify EPA of that contractor's or subcontractor's
22 name and qualifications within 14 days of EPA's disapproval,
23 unless otherwise agreed to by EPA.

24 31. Within 7 days after the Effective Date, Respondent
25 shall designate a Project Coordinator who shall be responsible
26 for administration of the Work required by this Order and shall
27 submit in writing to EPA the designated Project Coordinator's
28 name, address, telephone number, electronic mail address, and
29 qualifications. To the greatest extent possible, the Project
30 Coordinator shall be present on Site or readily available during
31 the Work. EPA retains the right to disapprove of the designated
32 Project Coordinator. If EPA disapproves of the designated

1 Project Coordinator, Respondent shall retain a different Project
2 Coordinator and shall notify EPA of that person's name, address,
3 telephone number, and qualifications within 7 days following
4 EPA's disapproval, unless otherwise agreed to by EPA.
5 Communications between Respondent and EPA, and all documents
6 concerning the activities performed pursuant to this Order,
7 shall be directed to the Project Coordinator. Receipt by
8 Respondent's Project Coordinator of any notice or communication
9 from EPA relating to this Order shall constitute receipt by
10 Respondent.

11 32. EPA has designated Greg Weigel of the Emergency
12 Response Unit, Office of Environmental Cleanup, Region 10, as
13 its On Scene Coordinator ("OSC"). Except as otherwise provided
14 in this Order, Respondent shall direct all submissions required
15 by this Order to the OSC at U.S. EPA, 1435 North Orchard Street,
16 Boise Idaho 83706 or to his or her designee. The OSC may be
17 reached by phone at (208) 378-5773, or by e-mail at
18 weigel.greg@epa.gov. Respondent shall ensure that all
19 submittals are received by the On-Scene Coordinator by the
20 applicable date.

21 33. EPA and Respondent shall have the right, subject to
22 Paragraph 31, to change their respective designated OSC or
23 Project Coordinator. Respondent shall notify EPA 7 days before
24 changing their Project Coordinator. The initial notification
25 may be made orally, but shall be followed by a written notice
26 within 2 days.

27 28 **IX. WORK TO BE PERFORMED**

29 34. Respondent shall perform, at a minimum, all actions
30 necessary to implement the Statement of Work ("SOW") which is
31 attached as Appendix A.
32

1 35. The actions to be implemented include, but are not
2 limited to, the implementation of the Action Memorandum for Pond
3 16S, dated December 13, 2006, as set forth in the SOW.

4 36. The primary objective of this removal action is to
5 take interim action to characterize the gases under Pond 16S and
6 remove and treat phosphine and other gases present at levels of
7 concern in a manner that satisfies specified performance
8 objectives.

9 37. As required by the SOW, Respondent shall submit to EPA
10 for review and approval a design documents and work plans for
11 performing the removal actions in accordance with the SOW. The
12 design documents and work plans shall provide a description of,
13 and an expeditious schedule for, the Work required by this
14 Order. All plans, including design documents, the Work Plan,
15 reports and other deliverables will be reviewed and approved by
16 EPA pursuant to Section X (EPA Approval of Plans and Other
17 Submissions).

18 a. Except as otherwise approved by EPA, Respondent
19 shall not commence any Work on-site until EPA has approved the
20 Work Plan pursuant to Section X (EPA Approval of Plans and Other
21 Submissions). Respondent shall notify EPA at least 48 hours
22 prior to performing any Work on-Site pursuant to this Order,
23 unless otherwise agreed to by EPA. Any non-compliance with any
24 EPA-approved plans, reports, specifications, schedules, or other
25 deliverables shall be considered a violation of the requirements
26 of this Order. Determinations of non-compliance shall be made
27 by EPA. Approval of design documents, the Work Plan and other
28 submittals shall not limit EPA's authority under the terms of
29 this Order to require Respondent to conduct activities
30 consistent with this Order to accomplish the Work outlined in
31 this Section.
32

1 b. To the extent that information concerning the
2 details of a particular item does not yet exist so that it can
3 be described in the design documents or plans, the document
4 shall set forth an expeditious schedule and plan for submission
5 of supplement(s) to EPA for approval, which supplement(s) shall
6 fully detail such items. All references to the review, approval
7 and enforcement of the design documents and plans shall also be
8 applicable to any supplement(s).

9 38. Respondent shall submit 5 copies of all plans, reports
10 or other submissions required by this Order, the Statement of
11 Work, or any approved work plan. Upon request by EPA,
12 Respondent shall submit such documents in electronic form.

13 39. Respondent shall, at least 30 days prior to the
14 conveyance of any interest in real property at or adjacent to
15 Pond 16S give written notice to the transferee that the property
16 is subject to this Order and written notice to EPA of the
17 proposed conveyance, including the name and address of the
18 transferee. Respondent also shall require that their successors
19 comply with the immediately preceding sentence and Sections XI
20 (Site Access) and XII (Access to Information).

21
22 40. Off-Site Shipments.

23 a. Respondent shall, prior to any off-Site shipment of
24 Pond 16S Waste Material from the Site, provide written
25 notification of such shipment of Waste Material to the
26 appropriate state environmental official in the receiving
27 facility's state and to the On-Scene Coordinator. However, this
28 notification requirement shall not apply to any off-Site
29 shipments when the total volume of all such shipments will not
30 exceed 10 cubic yards.

31 i. Respondent shall include in the written
32 notification the following information: (1) the name and

1 location of the facility to which the Waste Material is to be
2 shipped; (2) the type and quantity of the Waste Material to be
3 shipped; (3) the expected schedule for the shipment of the Waste
4 Material; and (4) the method of transportation. Respondent
5 shall notify the OSC and the state in which the planned
6 receiving facility is located of major changes in the shipment
7 plan, such as a decision to ship the Waste Material to another
8 facility within the same state, or to a facility in another
9 state.

10 ii. The identity of the receiving facility and
11 state will be determined by Respondent following the award of
12 the contract for the removal action. Respondent shall provide
13 the information required by Paragraph 40a and 40b as soon as
14 practicable after the award of the contract and before the Waste
15 Material is actually shipped.

16 b. Before shipping any hazardous substances,
17 pollutants, or contaminants from Pond 16S to an off-Site
18 location, Respondent shall obtain EPA's certification that the
19 proposed receiving facility is operating in compliance with the
20 requirements of CERCLA Section 121(d)(3), 42 U.S.C. §
21 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send
22 hazardous substances, pollutants, or contaminants from Pond 16S
23 to an off-Site facility that complies with the requirements of
24 the statutory provision and regulation cited in the preceding
25 sentence.

26
27 **X. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

28 41. After review of any plan, report or other item that is
29 required to be submitted for approval pursuant to this Order, in
30 a notice to Respondent EPA shall: (a) approve, in whole or in
31 part, the submission; (b) approve the submission upon specified
32 conditions; (c) modify the submission to cure the deficiencies;

1 (d) disapprove, in whole or in part, the submission, directing
2 that Respondent modify the submission; or (e) any combination of
3 the above. However, EPA shall not modify a submission without
4 first providing Respondent at least one notice of deficiency and
5 an opportunity to cure within 10 days of receipt of EPA's
6 notification of the required revisions, except where to do so
7 would cause serious disruption to the Work or where previous
8 submission(s) have been disapproved due to material defects.

9 42. In the event of approval, approval upon conditions, or
10 modification by EPA, pursuant to Subparagraph 41(a), (b), (c),
11 or (e), Respondent shall proceed to take any action required by
12 the plan, report or other deliverable, as approved or modified
13 in writing by EPA, and in accordance with the schedule approved
14 by EPA. Following EPA approval or modification of a submission
15 or portion thereof, Respondent shall not thereafter alter or
16 amend such submission or portion thereof unless directed by EPA.
17 In the event that EPA modifies the submission to cure the
18 deficiencies pursuant to Subparagraph 41(c) and the submission
19 had a material defect, such defect may be considered a violation
20 of this order and may subject Respondent to civil penalties in
21 accordance with Section XVIII (Enforcement).

22 43. Resubmission.

23 a. Upon receipt of a notice of disapproval, Respondent
24 shall, within 10 days or such longer time as specified by EPA in
25 such notice, correct the deficiencies and resubmit the plan,
26 report, or other deliverable for approval. Respondent may be
27 subject to penalties in accordance with Section XVIII
28 (Enforcement) if the resubmission is disapproved or modified due
29 to a material defect as provided in Paragraphs 44 and 45.

30 b. Notwithstanding the receipt of a notice of
31 disapproval, Respondent shall proceed to take any action
32 required by any non-deficient portion of the submission, unless

1 otherwise directed by EPA. Implementation of any non-deficient
2 portion of a submission shall not relieve Respondent of any
3 liability for penalties under Section XVIII (Enforcement) for
4 violations of this Order.

5 c. EPA reserves the right to stop Respondent from
6 proceeding further, either temporarily or permanently, on any
7 task, activity or deliverable at any point during the Work.

8 44. If EPA disapproves a resubmitted plan, report or other
9 deliverable, or portion thereof, EPA may again direct Respondent
10 to correct the deficiencies. EPA shall also retain the right to
11 modify or develop the plan, report or other deliverable.
12 Respondent shall implement any such plan, report, or deliverable
13 as corrected, modified or developed by EPA.

14 45. If upon resubmission, a plan, report, or other
15 deliverable is disapproved or modified by EPA due to a material
16 defect, Respondent shall be deemed in violation of this Order
17 for failure to submit such plan, report, or other deliverable
18 timely and adequately. Respondent may be subject to penalties
19 for such violation as provided in Section XVIII.

20 46. Any plans, including the Work Plan, the schedule,
21 reports, and other deliverables submitted to EPA under this
22 Order shall, upon approval or approval with modifications by
23 EPA, be incorporated into and become fully enforceable under
24 this Order. In the event EPA approves or modifies a portion of
25 a plan, report, or other deliverable submitted to EPA under this
26 Order, the approved or modified portion shall be incorporated
27 into and enforceable under this Order.

28 47. Neither failure of EPA to expressly approve or
29 disapprove of Respondent's submissions within a specified time
30 period, nor the absence of comments, shall be construed as
31 approval by EPA. Whether or not EPA gives express approval for
32

1 Respondent's deliverables, Respondent is responsible for
2 preparing deliverables acceptable to EPA.
3

4 **XI. SITE ACCESS**

5 48. Respondent shall, commencing on the Effective Date,
6 provide EPA and its representatives, including contractors, with
7 access at all reasonable times to Pond 16S and the FMC Site, or
8 such other property, for the purpose of conducting any activity
9 related to this Order. These individuals shall be permitted to
10 move freely at the Site and appropriate off-Site areas in order
11 to conduct actions which EPA determines to be necessary.

12 49. Where any action under this Order is to be performed
13 in areas owned by or in possession of someone other than
14 Respondent, Respondent shall use their best efforts to obtain
15 all necessary access agreements within 30 days after the
16 Effective Date, or as otherwise specified in writing by the OSC.
17 Any such access agreement shall provide reasonable access for
18 Respondent and their representatives, including contractors, for
19 the purpose of conducting any activity related to this Order,
20 and for EPA and its representatives to move freely at the site
21 in order to conduct actions that EPA determines to be necessary.
22 Respondent shall immediately notify EPA if after using their
23 best efforts they are unable to obtain such agreements. For
24 purposes of this Paragraph, "best efforts" includes the payment
25 of reasonable sums of money in consideration of access.
26 Respondent shall describe in writing their efforts to obtain
27 access. EPA may then assist Respondent in gaining access, to
28 the extent necessary to effectuate the removal actions described
29 herein, using such means as EPA deems appropriate. EPA reserves
30 the right to seek payment from Respondent for all costs,
31 including cost of attorneys' time, incurred by the United States
32 in obtaining such access.

1 also instruct their contractors and agents to preserve all non-
2 identical copies of records and documents (including records or
3 documents in electronic form) and any additional information of
4 whatever kind, nature or description relating to performance of
5 the Work.

6 56. At the conclusion of this document retention period,
7 Respondent shall notify EPA at least 90 days prior to the
8 destruction of any such records or documents, and, upon request
9 by EPA, Respondent shall deliver any such records or documents
10 to EPA. Respondent may assert that certain documents, records
11 or other information are privileged under the attorney-client
12 privilege or any other privilege recognized by federal law. If
13 Respondent asserts such a privilege, they shall provide EPA with
14 the following: (a) the title of the document, record, or
15 information; (b) the date of the document, record, or
16 information; (c) the name and title of the author of the
17 document, record, or information; (d) the name and title of each
18 addressee and recipient; (e) a description of the subject of the
19 document, record, or information; and (f) the privilege asserted
20 by Respondent. However, no documents, reports or other
21 information created or generated pursuant to the requirements of
22 this Order shall be withheld on the grounds that they are
23 privileged.

24 25 **XIV. COMPLIANCE WITH OTHER LAWS**

26 57. Respondent shall perform all actions required pursuant
27 to this Order in accordance with all applicable local, state,
28 tribal and federal laws and regulations except as provided in
29 Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R.
30 § 300.400(e) and 300.415(j). In accordance with 40 C.F.R. §
31 300.415(j), all on-Site actions required pursuant to this Order
32 shall, to the extent practicable, as determined by EPA,

1 considering the exigencies of the situation, attain applicable
2 or relevant and appropriate requirements ("ARARs") under federal
3 environmental, or state environmental or facility siting laws.
4 Respondent shall identify ARARs in the design documents and work
5 plans subject to EPA approval.

6
7 **XV. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

8 58. In the event of any release of a hazardous substance
9 from Pond 16S or any action or occurrence during performance of
10 the Work which causes or threatens a release of Waste Material
11 from the Site that constitutes an emergency situation or may
12 present an immediate threat to public health or welfare or the
13 environment, Respondent shall, subject to Paragraph 59,
14 immediately take all appropriate action. Respondent shall take
15 these actions in accordance with all applicable provisions of
16 this Order, including, but not limited to, the Health and Safety
17 Plan, in order to prevent, abate or minimize any such release or
18 threat of release, or endangerment caused or threatened.
19 Respondent shall also immediately notify the OSC or, in the
20 event of his/her unavailability, the Regional Duty Officer,
21 Environmental Cleanup Office, Emergency Response Unit, EPA
22 Region 10, 206-553-1263, of the incident or Site conditions. In
23 the event that Respondent fails to take appropriate response
24 action as required by this Paragraph, and EPA takes such action
25 instead, Respondent shall pay EPA for all costs of the response
26 action not inconsistent with the NCP pursuant to Section XVII
27 (Payment of Response Costs).

28 59. Nothing in the preceding Paragraph or this Order shall
29 be deemed to limit any authority of EPA to: a) to take all
30 appropriate action to protect human health and the environment
31 or to prevent, abate, respond to, or minimize an actual or
32 threatened release of Waste Material on, at, or from the Site;

1 or b) to direct or order such action, or seek a court order to
2 protect human health and the environment or to prevent, abate,
3 respond to, or minimize an actual or threatened release of Waste
4 Material on, at, or from the Site.

5 60. In addition, in the event of any release of a
6 hazardous substance from Pond 16S that exceeds a CERCLA
7 Reportable Quantity, or that exceeds a level otherwise specified
8 in the Order, Respondent shall immediately notify the OSC.
9 Respondent shall submit a written report to EPA within 7 days
10 after each release, setting forth the events that occurred and
11 the measures taken or to be taken to mitigate any release or
12 threat of release or endangerment caused or threatened and to
13 prevent the reoccurrence of such a release or threat of release.
14 This reporting requirement is in addition to, and not in lieu
15 of, reporting under Section 103(c) of CERCLA, 42 U.S.C. §
16 9603(c), and Section 304 of the Emergency Planning and Community
17 Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

18
19 **XVI. AUTHORITY OF ON-SCENE COORDINATOR**

20 61. The OSC shall be responsible for overseeing
21 Respondent's implementation of this Order. The OSC shall have
22 the authority vested in an OSC by the NCP, including the
23 authority to halt, conduct, or direct any Work required by this
24 Order, or to direct any other removal actions undertaken at the
25 Site. Absence of the OSC from the Site shall not be cause for
26 stoppage of the Work unless specifically directed by the OSC.

27
28 **XVII. PAYMENT OF RESPONSE COSTS**

29 62. Upon EPA's written demand, Respondent shall pay EPA
30 for all Response Costs incurred or to be incurred in connection
31 with this Order as defined in Paragraph 6 above. On a periodic
32 basis, EPA will send Respondent an accounting of all Response

1 Costs incurred by the United States with respect to this Order
2 that consists of an EPA SCORPIOS or other regionally prepared
3 cost summary, which includes direct and indirect costs incurred
4 by EPA and its contractors. Respondent shall make all payments
5 within 30 days of receipt of each written demand requiring
6 payment, except as otherwise provided in Paragraphs 66a and 67b
7 of this Order.

8 63. Respondent shall make all payments required by this
9 Section by a certified or cashier's check or checks or
10 electronic funds transfer made payable to "EPA Hazardous
11 Substance Superfund," referencing the name and address of the
12 Respondent and EPA Site/Spill ID number 10EY. Respondent shall
13 send the check(s) to:

14 Mellon Bank
15 EPA-Region 10 Superfund
16 P.O. Box 371099M
17 Pittsburgh, PA 15251

18 64. At the time of payment, Respondent shall send a copy
19 of the check and notice that payment has been made to Servicing
20 Finance Office, EPA Financial Management Center, MS-NWD,
21 Cincinnati, OH 45268.

22 65. In the event that the payments for Response Costs are
23 not made within 30 days of Respondent's receipt of a written
24 demand requiring payment, Respondent shall pay Interest on the
25 unpaid balance. The Interest on Response Costs shall begin to
26 accrue on the date of receipt of the written demand and shall
27 continue to accrue until the date of payment. Payments of
28 Interest made under this Paragraph shall be in addition to such
29 other remedies or sanctions available to the United States by
30 virtue of Respondent's failure to make timely payments under
31 this Section. Respondent shall make all payments required by
32

1 this Paragraph in the manner described in Paragraphs 62, 63, and
2 64.

3 66. Respondent may dispute all or part of a written demand
4 for payment of Response Costs submitted under this Order, if
5 Respondent alleges that EPA has made an accounting error, or if
6 Respondent believes EPA incurred excess costs as a direct result
7 of an EPA action that was inconsistent with the NCP. Such
8 objection shall be made in writing within 30 days of receipt of
9 the written demand and must be sent to the OSC. Any such
10 objection shall specifically identify the contested Response
11 Costs and the basis for objection. EPA and Respondent shall
12 have 30 days from EPA's receipt of Respondent's written
13 objection to resolve the dispute (the "Negotiation Period").
14 The Negotiation Period may be extended at the sole discretion of
15 EPA. Such extension may be granted verbally, but must be
16 confirmed in writing. Any agreement reached by the Parties
17 pursuant to this Paragraph shall be in writing and shall, upon
18 signature by the Parties, be incorporated into and become an
19 enforceable part of this Order. If the Parties are unable to
20 resolve the dispute within the Negotiation Period, an EPA
21 management official at the Office Director level or higher will
22 issue a written decision. EPA's decision shall be incorporated
23 into and become an enforceable part of this Order. Respondent's
24 obligations under this Order shall not be tolled by submission
25 of any objection for dispute resolution under this Paragraph.
26 The dispute resolution procedures set forth in Paragraphs 66 and
27 67 shall be the exclusive mechanisms for resolving disputes
28 regarding Respondent's obligation to pay EPA for its Response
29 Costs.

30 67. In the event of an objection, Respondent shall within
31 the 30 day period pay all uncontested Response Costs to EPA in
32 the manner described in Paragraphs 62, 63, and 64. If any

1 dispute over costs is resolved before payment is due, the amount
2 due will be adjusted, as necessary. If the dispute is not
3 resolved before payment is due, Respondent shall pay the full
4 amount of the uncontested costs to EPA as specified in
5 Paragraphs 62, 63, and 64, on or before the due date.
6 Respondent shall establish an interest-bearing escrow account in
7 a federally-insured bank duly chartered in the State of Idaho,
8 or other state as approved by EPA, and remit to that escrow
9 account funds equivalent to the amount of the contested Response
10 Costs. Respondent shall send to the EPA OSC a copy of the
11 transmittal letter and check paying the uncontested Response
12 Costs, and a copy of the correspondence that establishes and
13 funds the escrow account, including, but not limited to,
14 information containing the identity of the bank and bank account
15 under which the escrow account is established as well as a bank
16 statement showing the initial balance of the escrow account. If
17 EPA prevails in the dispute, within 5 days of the resolution of
18 the dispute, Respondent shall pay the sums due (with accrued
19 interest) to EPA in the manner described in Paragraphs 62, 63,
20 and 64. If Respondent prevails concerning any aspect of the
21 contested costs, Respondent shall pay that portion of the costs
22 (plus associated accrued interest) for which they did not
23 prevail to EPA in the manner described in Paragraphs 62, 63, and
24 64. Respondent shall be disbursed any balance of the escrow
25 account.

26 27 **XVIII. ENFORCEMENT**

28 68. Violation, failure or refusal to comply with any
29 provision of this Order may subject Respondent to civil
30 penalties of up to \$32,500 per violation per day, as provided in
31 Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1), and the
32 Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg.

1 7121, 40 C.F.R. Part 19.4. EPA may carry out the required
2 actions unilaterally, pursuant to Section 104 of CERCLA, 42
3 U.S.C. § 9604, and/or may seek judicial enforcement of this
4 Order pursuant to Section 106 of CERCLA, 42 U.S.C § 9606.
5 Respondent may also be subject to punitive damages in an amount
6 up to three times the amount of any cost incurred by the United
7 States as a result of such violation, failure or refusal to
8 comply, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. §
9 9607(c)(3).

10 11 **XIX. RESERVATIONS OF RIGHTS BY EPA**

12 69. Nothing herein shall limit the power and authority of
13 EPA or the United States to take, direct, or order all actions
14 necessary to protect public health, welfare, or the environment
15 or to prevent, abate, or minimize an actual or threatened
16 release of hazardous substances, pollutants or contaminants, or
17 hazardous or solid waste on, at, or from the Site, pursuant to
18 CERCLA or any other applicable law. Further, nothing herein
19 shall prevent EPA from seeking legal or equitable relief to
20 enforce the terms of this Order, from taking other legal or
21 equitable action as it deems appropriate and necessary, or from
22 requiring Respondent in the future to perform additional
23 activities pursuant to CERCLA or any other applicable law. EPA
24 reserves the right to bring an action against Respondent under
25 Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any
26 Response Costs incurred by the United States related to this
27 Order or the Site and not paid by Respondent.

28 29 **XX. OTHER CLAIMS**

30 70. By issuance of this Order, the United States and EPA
31 assume no liability for injuries or damages to persons or
32 property resulting from any acts or omissions of Respondent.

1 The United States or EPA shall not be deemed a party to any
2 contract entered into by Respondent or its directors, officers,
3 employees, agents, successors, representatives, assigns,
4 contractors, or consultants in carrying out actions pursuant to
5 this Order.

6 71. Nothing in this Order constitutes a satisfaction of or
7 release from any claim or cause of action against Respondent or
8 any person not a party to this Order, for any liability such
9 person may have under CERCLA, other statutes, or common law,
10 including but not limited to any claims of the United States for
11 costs, damages and interest under Sections 106 and 107 of
12 CERCLA, 42 U.S.C. § 9606 and 9607.

13 72. Nothing in this Order constitutes a decision on
14 preauthorization of funds under Section 111(a)(2) of CERCLA, 42
15 U.S.C. § 9611(a)(2).

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

19 20 **XXI. INSURANCE**

21 74. At least 7 days prior to commencing any Work on-Site
22 under this Order, unless otherwise agreed to by EPA, Respondent
23 shall secure, and shall maintain for the duration of this Order,
24 comprehensive general liability insurance and automobile
25 insurance with limits of 5 million dollars, combined single
26 limit. Within the same time period, Respondent shall provide
27 EPA with certificates of such insurance and a copy of each
28 insurance policy. In addition, for the duration of the Order,
29 Respondent shall satisfy, or shall ensure that their contractors
30 or subcontractors satisfy, all applicable laws and regulations
31 regarding the provision of worker's compensation insurance for
32 all persons performing the Work on behalf of Respondent in

1 furtherance of this Order. If Respondent demonstrates by
2 evidence satisfactory to EPA that any contractor or
3 subcontractor maintains insurance equivalent to that described
4 above, or insurance covering some or all of the same risks but
5 in an equal or lesser amount, then Respondent need provide only
6 that portion of the insurance described above which is not
7 maintained by such contractor or subcontractor.

8
9 **XXII. MODIFICATIONS**

10 75. The OSC may make modifications to any plan or schedule
11 or Statement of Work in writing or by oral direction. Any oral
12 modification will be memorialized in writing by EPA within 5
13 days, but shall have as its effective date the date of the OSC's
14 oral direction. Any other requirements of this Order may be
15 modified in writing by signature of the Director, Office of
16 Environmental Cleanup, EPA Region 10.

17 76. If Respondent seeks permission to deviate from any
18 approved Work Plan or schedule or the Statement of Work,
19 Respondent's Project Coordinator shall submit a written request
20 to EPA for approval outlining the proposed modification and its
21 basis. Respondent may not proceed with the requested deviation
22 until receiving approval from the OSC pursuant to Paragraph 75.

23 77. No informal advice, guidance, suggestion, or comment
24 by the OSC or other EPA representatives regarding reports,
25 plans, specifications, schedules, or any other writing submitted
26 by Respondent shall relieve Respondent of its obligation to
27 obtain any formal approval required by this Order, or to comply
28 with all requirements of this Order, unless it is formally
29 modified.

1 Respondent to implement the approved modified Work Plan shall be
2 a violation of this Order.

3
4 **XXV. ADMINISTRATIVE RECORD**

5 80. Within 60 days after initiation of on-site removal
6 activity, an Administrative Record which contains the documents
7 that form the basis for the issuance of this Order will be made
8 available for review by appointment on weekdays between the
9 hours of 8:30 and 4:00 at the Superfund Records Center at EPA
10 offices in Region 10, 1200 Sixth Avenue, Seattle, Washington. To
11 review the Administrative Record, please contact the Superfund
12 Records Center at (206) 553-4494 to make an appointment.

13
14 **XXVI. OPPORTUNITY TO CONFER**

15 81. Within 5 days after issuance of this Order, Respondent
16 may in writing request a conference with EPA, on any matter
17 pertinent to this Order, including its applicability, the
18 factual findings and the determinations upon which it is based,
19 the appropriateness of any actions Respondent is ordered to
20 take, or any other relevant and material issues or contentions
21 which Respondent may have regarding this Order. Any such
22 conference shall be held within 10 days of Respondent's request
23 unless extended by written agreement of the Parties.

24 82. Respondent may appear in person or by an attorney or
25 other representative at the conference. Respondent may also
26 submit written comments or statements of position on any matter
27 pertinent to this Order no later than the time of the
28 conference, or at least 5 days prior to the effective date if
29 Respondent does not request a conference. This conference is
30 not an evidentiary hearing, does not constitute a proceeding to
31 challenge this Order, and does not give Respondent a right to
32

1 seek review of this Order. Any request for a conference or
2 written comments or statements should be submitted to:

3 Andrew Boyd
4 Office of Regional Counsel
5 United States Environmental Protection Agency
6 1200 Sixth Avenue (M/S ORC-158)
7 Seattle, Washington 98101
8 Telephone: 206-553-1222
9

10 **XXVII. SEVERABILITY**

11 83. If a court issues an order that invalidates any
12 provision of this Order or finds that Respondent has sufficient
13 cause not to comply with one or more provisions of this Order,
14 Respondent shall remain bound to comply with all provisions of
15 this Order not invalidated or determined to be subject to a
16 sufficient cause defense by the court's order.
17

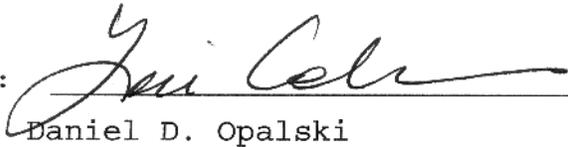
18 **XXVIII. EFFECTIVE DATE**

19 84. This Order shall be effective 15 days after the Order
20 is signed by the Director, Office of Environmental Cleanup,
21 Region 10 unless a conference is requested as provided herein.
22 If a conference is requested, this Order shall be effective on
23 the 10th day following the day of the conference unless modified
24 in writing by EPA.
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32 It is so ORDERED.

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BY:



Daniel D. Opalski

W Director, Office of Environmental Cleanup
Region 10
U.S. Environmental Protection Agency

DATE: December 14, 2006