

010-2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

LITTLE TRAVERSE BAY CKD
RELEASE SITE

[Emmet County, Michigan]

Respondents:

Listed in Attachment A

ADMINISTRATIVE ORDER ON
CONSENT FOR REMOVAL ACTION

Docket No. ~~V-W~~ '05-C-810

Proceeding Under Sections 104, 106(a), and
107 of the Comprehensive Environmental
Response, Compensation, and Liability Act,
as amended, 42 U.S.C. §§ 9604, 9606(a),
and 9607

2/22/05

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("U.S. EPA") and Respondents. This Order provides for the performance of removal actions by Respondents and the reimbursement of Future Response Costs incurred by the United States at or in connection with the Site as more fully defined in Paragraph 8 located in Emmet County, Michigan.

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a) and 9607, as amended ("CERCLA"). This authority has been delegated to the Administrator of the U.S. EPA by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, and further delegated to the Regional Administrators by U.S. EPA Delegation Nos. 14-14-A, 14-14-C and 14-14-D, and to the Director, Superfund Division, Region 5, by Regional Delegation Nos. 14-14-A, 14-14-C and 14-14-D.

3. U.S. EPA has notified the State of Michigan (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). Nothing in this Order shall be construed or interpreted as preempting the State from imposing additional requirements with respect to releases of hazardous substances not inconsistent with this Order..

4. U.S. EPA and Respondents recognize that this Order has been negotiated in good faith and that the execution of this Order by Respondents and the actions undertaken by Respondents in accordance with this Order do not constitute an admission of fact or law or of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Each Respondent agrees to comply with and be bound by the terms of this Order applicable to it and further agrees that it will not contest the basis or validity of this Order or its terms. Respondents agree not to challenge the issuance or enforcement of this Order based on the provisions of Section 128(b) of CERCLA, 42 U.S.C. § 9628(b).

II. PARTIES BOUND

5. This Order applies to and is binding upon U.S. EPA and upon each Respondent and its successors and assigns according to its terms. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Order.

6. Respondents CMS Land Company, and CMS Capital LLC (collectively referred to as "CMS") are agreeing to be jointly and severally obligated for carrying out all activities required by this Order. In the event of the insolvency or other failure of either of the foregoing

Respondents to implement the requirements of this Order, the remaining of the foregoing Respondents shall complete all such requirements. Respondent Bay Harbor Company only agrees to be bound to the terms of this Order in accordance with Section XXVIII-A.

7. Respondents shall ensure that their contractors, subcontractors, and representatives comply with this Order. Respondents shall be responsible for any noncompliance with this Order by Respondent's contractors, subcontractors and representatives.

III. DEFINITIONS

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

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

b. "Day" shall mean a calendar day unless otherwise expressly specified. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business on the next business day.

c. "Effective Date" shall be the effective date of this Order as provided in Section XXIX.

d. "Future Response Costs" shall mean all costs, including direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order on or after the Effective Date up to \$500,000 as provided in Paragraph 37.

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

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

g. "Order" shall mean this Administrative Order on Consent and all attachments and appendices attached hereto. In the event of conflict between this Order and any appendix, this Order shall control.

h. "Parties" shall mean U.S. EPA and Respondents.

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

j. "Respondents" shall mean those Parties identified in Attachment A

k. "Site" shall mean the Little Traverse Bay CKD Release Site in Resort Township, Emmet County, Michigan and depicted generally on the map attached as Attachment B.

l. "State" shall mean the State of Michigan.

m. "Tribe" shall mean the Little Traverse Bay Bands of Odawa Indians.

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

o. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and 3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and 4) any "hazardous substance" as defined in Section 20101(t) of the Michigan Natural Resources and Environmental Protection Act, 1994 PA 451 as amended.

p. "Work" shall mean all activities Respondents are required to perform under this Order.

IV. FINDINGS OF FACT

9. Based on available information, U.S. EPA hereby finds that:

a. The Site is located along the south shore of Little Traverse Bay, including shoreline, just west of the City of Petoskey in Resort Township, Emmet County, Michigan.

b. The Site is located on a former limestone mining and cement manufacturing plant operated by the Penn-Dixie Company from approximately 1870 through 1980. The active release areas of the Site, defined as Seep 1 and Seep 2, are located along the Little Traverse Bay shoreline adjacent to remnant cement kiln dust (CKD) waste piles, located beneath portions of the resort's 27-hole golf course. These remnant waste piles were formerly referred to as the Eastern West CKD pile and the Central West CKD pile.

c. The Site was previously owned by Holnam, Inc. (predecessor to Holcim USA, Inc.). Portions of the Site are now owned by Bay Harbor Golf Course, Inc., a wholly-owned subsidiary of Boyne USA, Inc. with access roads owned by Bay Harbor Company.

d. In 1994, Respondents CMS Land Company, CMS Capital Corp, Boyne USA, Inc. and Bay Harbor Company among others entered into an "Administrative Agreement and Covenant Not to Sue" dated July 11, 1994 (AACNTS) in connection with the redevelopment of the Site.

e. Pursuant to the AACNTS, the Respondents performed a number of activities at the Site, including reshaping of CKD waste piles and consolidation of CKD waste piles, and installation of a collection trench system near the base of the Central West CKD waste pile to intercept leachate generated by the pile. Subsequently, a leachate pre-treatment system was installed to manage collected leachate prior to discharge to the City of Petoskey's wastewater treatment plant.

f. The pre-treatment plant for the subsurface leachate collection system along the Central West CKD pile was shut down for a period of time beginning in approximately January 2004.

g. Leachate discharge from the Central West CKD waste pile was observed impacting the shoreline of Little Traverse Bay during a routine visit by the Michigan Department of Environmental Quality (MDEQ) on August 17, 2004. At that time, a visible reddish-brown discharge was observed to be releasing to the lake along a 600-foot section of the lakeshore. This release has been referred to as Seep 2.

h. Subsequent MDEQ investigations in August and September, 2004 documented discharges associated with Seep 2 with a pH of 12 standard units (s.u.) and above. In addition, surface water pH readings were measured consistently between 9.0 and 9.5 s.u. (over the Michigan water quality standard of 9.0) as far offshore as approximately 90 feet along the visible Seep 2 release area.

i. MDEQ performed additional investigation at the Site pursuant to its Site visit in August, 2004. The report of this investigation is entitled: **An Investigation of the Cement Kiln Dust Seep Discharge into Little Traverse Bay at Bay Harbor, September 7-8, 2004, Emmet County, MDEQ Water Bureau.** This report documented numerous exceedances of Michigan Water Quality parameters in the seep 2 leachate and waters of Lake Michigan and concluded that exposure to the CKD leachate will have injurious effect on the public health, wildlife, and aquatic life.

j. The operation of the pretreatment plant was reported to have been restarted during September 2004.

k. Subsequent investigations by the U.S. EPA conducted on September 30, 2004, November 4, 2004, and November 22, 2004 also revealed visible evidence (darkly colored pools

of liquid) of CKD releases in two distinct areas along the Little Traverse Bay shoreline, known as Seep 1 and Seep 2. Monitoring conducted by the U.S. EPA during the site visits with a pH meter has documented readings ranging from 9.98 s.u. to as high as 13.13 s.u. in seep pools along the shoreline throughout the Seep 1 and Seep 2 areas. During the November 4, 2004 site visit, U.S. EPA collected samples from seep pools in the Seep 1 and 2. Analysis of these samples revealed exceedences of Michigan Water Quality Standards for pH and heavy metals.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

10. Based on the Findings of Fact set forth above and available information, U.S. EPA has determined that:

- a. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b. The contamination found at the Site, as identified in the Findings of Fact above, includes "hazardous substance(s)" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
- c. Each Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- d. Each Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).
- e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility into the "environment" as defined by Sections 101(22) and 101(8) of CERCLA, 42 U.S.C. §§ 9601(22) and 9601(8).
- f. The conditions present at the Site constitute a threat to public health, welfare, or the environment based upon the factors set forth in Section 300.415(b)(2) of the National Oil and Hazardous Substances Pollution Contingency Plan, as amended ("NCP"), 40 CFR §300.415(b)(2).
- g. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. ORDER

Based upon the foregoing Findings of Fact and the Conclusions of Law and Determinations, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

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

11. Respondents shall retain one or more contractors to perform the Work and shall notify U.S. EPA of the name(s) and qualifications of such contractor(s) within 5 business days of the Effective Date. Respondents shall also notify U.S. EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least 5 business days prior to commencement of such Work. U.S. EPA retains the right to disapprove of, for good cause, any or all of the contractors and/or subcontractors retained by Respondents. If U.S. EPA disapproves of a selected contractor, Respondents shall retain a different contractor and shall notify U.S. EPA of that contractor's name and qualifications within 3 business days of U.S. EPA's disapproval. The contractor must demonstrate compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared consistent with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B0-1/002), or equivalent documentation as required by U.S. EPA.

12. Within 5 business days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Order and shall submit to U.S. EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. U.S. EPA retains the right to disapprove of the designated Project Coordinator for good cause. If U.S. EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify U.S. EPA of that person's name, address, telephone number, and qualifications within 4 business days following U.S. EPA's disapproval. Receipt by Respondents' Project Coordinator of any notice or communication from U.S. EPA relating to this Order shall constitute receipt by all Respondents.

13. U.S. EPA has designated *Ralph Dollhopf of the Emergency Response Branch, Region 5*, as its On-Scene Coordinator ("OSC"). Except as otherwise provided in this Order, Respondents shall direct all submissions required by this Order to the OSC by fax or express mail at:

Ralph Dollhopf
U.S. EPA, Emergency Response Section One
9311 Groh Road, Room 216
Grosse Ile, Michigan 48138-1697
Fax: (734) 692-7677

Respondents shall also send one courtesy copy of all submissions to

(1) Rodger Field, Associate Regional Counsel,

Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604.

- (2) Rachel Schwarz, Environmental Services Director
Little Traverse Bay Bands of Odawa Indians
7500 Odawa Circle
Harbor Springs, Michigan 49740
- (3) Robert Wagner, Environmental Manager
Remediation & Redevelopment Division
Michigan Department of Environmental Quality
Cadillac District, Gaylord Field Office
2100 West M-32
Gaylord, Michigan 49735
- (4) Scott J. Kendzierski, REHS
Director of Environmental Services
Northwest Michigan Community Health Agency
220 W. Garfield
Charlevoix, MI 49720

Respondents are encouraged, but not required, to make their submissions to U.S. EPA on recycled paper (which includes significant postconsumer waste paper content where possible) and using two-sided copies.

14. U.S. EPA and Respondents shall have the right, subject to Paragraph 12, to change their respective designated OSC or Project Coordinator. U.S. EPA shall notify the Respondents, and Respondents shall notify U.S. EPA, as early as possible before such a change is made, but in no case less than 24 hours before such a change. The initial notification may be made orally but it shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

15. Respondents shall perform, at a minimum, the following removal activities consistent with the Work Plan approved pursuant to Paragraph 16:

- i. Provide Site security and restrict access to known high-pH "cement kiln dust" (CKD) leachate release areas to the north and east of Coastal Drive (seep areas) by (1) constructing fences or other engineering controls approved by U.S. EPA and (2) posting warning signs which specifically warn of the potential threats associated with direct

contact with the leachate release, and (3) by means of any other security provisions approved by EPA.

The CKD leachate release areas which are currently known are described in Attachment C hereto. (CKD leachate release areas described in Attachment C and those subsequently identified pursuant to subparagraph iii are collectively referred to as "CKD leachate release areas".) For purposes of this Order, "high-pH" means pH at levels above water quality standards established by the State of Michigan.

- ii. Prepare a Site Health and Safety Plan, Site Control and Access Management Plan to carry out the work to be performed under this Order;
- iii. Evaluate all other areas along lakeshore of the Site with pathways for releases to surface waters, including Lake Michigan, with the objective of identifying additional CKD leachate release areas which may not have been identified, but may be causing a threat of direct contact or threat of release of high pH releases to surface waters, including Lake Michigan. The workplan shall identify a method for conducting such evaluation including visual and other indicators of CKD leachate releases;
- iv. Restrict access with (1) fencing or other engineering controls approved by U.S. EPA and (2) posting signs, and (3) any other measures approved by U.S. EPA at CKD leachate release areas identified during evaluation in subparagraph iii above;
- v. Implement recovery of all high-pH leachate from all CKD leachate release areas for treatment on-site and/or arrange for off-site treatment, storage and disposal to the maximum extent practicable as determined by U.S. EPA;
- vi. Continue activities in subparagraph (v) until such time as interim response activities under subparagraph (vii) can be designed, constructed and demonstrated to be effective to prevent high-pH leachate releases to lakeshore areas and surface waters, including Lake Michigan;
- vii. Design, construct and implement operation of interim recovery systems to prevent release of high-pH leachate to lakeshore areas and surface waters, including Lake Michigan, in and from CKD leachate release areas until long-term engineering controls can be designed, constructed and demonstrated to be effective;
- viii. Confirm the effectiveness of the measures set forth in subparagraph (i) to (vii) above and develop and implement a monitoring program that measures releases of high pH leachate and hazardous substances which may continue to be released to surface waters, including Lake Michigan, or lakeshore areas in or from CKD leachate release areas.

- ix. Perform operation and maintenance of the measures set forth in subparagraphs (i) to (vii) above until such time as long-term engineering controls can be designed and constructed and demonstrated to be effective to prevent CKD leachate releases to lakeshore areas and surface waters, including Lake Michigan.
- x. Investigate the nature and extent of hazardous substances, pollutants or contaminants at the Site to determine the nature and extent of current and potential threats to public health, welfare or the environment from CKD Waste Material and evaluate alternatives for addressing such threats that meet the goals described below as part of the long-term remedy and prepare a report of the results of work performed under this subparagraph.

The parties recognize that the work described above is intended as an interim response to releases from the Site. The Respondents agree to negotiate in good faith with the State to enter an enforceable agreement within 120 days from approval of the report set forth in subparagraph x above. The agreement shall provide for the Respondents to carry out further response activities which will accomplish all of the following:

- Integrate the interim response activities provided in subparagraphs (i) through (ix) above as appropriate;
- Prevent unacceptable exposures to surface waters and sediment impacted by CKD Waste Material;
- Design, construct and operate long-term response activity to prevent discharge of groundwater containing hazardous substances above state criteria from the Site to surface waters of the state;
- Prevent unacceptable risk from human direct contact with CKD Waste Material;
- Prohibit exacerbation, prevent new releases and unacceptable exposure and place land use and resource use restriction related to CKD Waste Material;
- Construct and maintain erosion control measures for underlying CKD Waste Material;
- Ensure adequate financial resources are available in an acceptable form and amount to assure the performance of the response activities necessary to protect human health or the environment in perpetuity;
- Ensure that any other unacceptable exposures are adequately addressed and assure the effectiveness and integrity of the long-term response activities.

These goals will be achieved through (a) removal of CKD Waste Material, or (b) containment and isolation of CKD Waste Material, or (c) other engineering controls with equivalent or superior effectiveness to containment and isolation; (a) through (c), either singly or in combination, shall achieve the goals listed above. U.S. EPA reserves the right to take further enforcement action for investigation, containment, isolation or removal of CKD Waste Material in the event that Respondents fail to comply with the subparagraphs (i) through (x) of this paragraph.

16. Work Plan and Implementation.

a. Within 10 business days after the Effective Date, Respondents shall submit to U.S. EPA for approval a draft Work Plan for performing the removal action generally described in Paragraph 15 above. The draft Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Order. The draft Work Plan shall include a Quality Assurance Quality Control plan for approval which meets the requirements of Paragraph 18 below.

b. U.S. EPA may approve, disapprove or require revisions to the draft Work Plan in whole or in part. If U.S. EPA requires revisions, Respondents shall submit a revised draft Work Plan within 7 business days of receipt of U.S. EPA's notification of the required revisions. U.S. EPA may then approve, disapprove, require revisions to, or modify the revised Work Plan in whole or part. Respondents shall implement the Work Plan as approved in writing by U.S. EPA in accordance with the schedule approved by U.S. EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Order.

c. Respondents shall not commence any Work except in conformance with the terms of this Order. Respondents shall not commence implementation of the Work Plan developed hereunder until receiving written U.S. EPA approval pursuant to Paragraph 16(b).

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

18. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Order shall conform to U.S. EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondents shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate U.S. EPA guidance. Respondents shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondents shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs"

(American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by U.S. EPA. U.S. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by U.S. EPA, Respondents shall have such a laboratory analyze samples submitted by U.S. EPA for QA monitoring. Respondents shall provide to U.S. EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by U.S. EPA, Respondents shall allow U.S. EPA or its authorized representatives to take split and/or duplicate samples. Respondents shall notify U.S. EPA not less than 3 business days in advance of any sample collection activity, unless shorter notice is agreed to by U.S. EPA. U.S. EPA will attempt, but is not required, to notify Respondent's Project Coordinator 24-hours in advance of any sample collection activity by U.S. EPA. U.S. EPA shall have the right to take any additional samples that U.S. EPA deems necessary. Upon request, U.S. EPA shall allow Respondents to take split or duplicate samples of any samples it takes as part of its oversight of Respondents' implementation of the Work. U.S. EPA will share with Respondents the final analytical results obtained for samples collected by U.S. EPA in connection with this Order.

19. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by U.S. EPA, Respondents shall submit a proposal for post-removal site control related to activities under this Order consistent with Section 300.415(l) of the NCP and OSWER Directive No. 9360.2-02. Upon U.S. EPA approval, Respondents shall implement such controls and shall provide U.S. EPA with documentation of all post-removal site control arrangements.

20. Reporting.

a. Respondents shall submit a written progress report to U.S. EPA concerning actions undertaken pursuant to this Order weekly until 60 days after approval of the Work Plan and every 30th day thereafter until termination of this Order, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondents shall submit to the OSC 3 copies of all plans, reports or other submissions required by this Order, or any approved work plan. Upon request by U.S. EPA, Respondents shall submit such documents in electronic form.

c. Respondents who own or are in possession of real property at the Site shall, at least 30 days prior to the conveyance of any interest in such real property at the Site, give written notice to the transferee that the property is subject to this Order and written notice to U.S. EPA of the proposed conveyance, including the name and address of the transferee. Respondents who own or are in possession of real property at the Site also agree to require that their successors comply with the immediately preceding sentence and Sections IX (Site Access) and X (Access to Information).

21. Final Report. Within 90 calendar days after completion of all Work required by Section VIII of this Order, Respondents shall submit for U.S. EPA review a final report summarizing the actions taken to comply with this Order. The final report shall conform with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports" and with the guidance set forth in "Superfund Removal Procedures: Removal Response Reporting - POLREPS and OSC Reports" (OSWER Directive No. 9360.3-03, June 1, 1994). The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Order, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

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

22. Off-Site Shipments.

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

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

ii. The identity of the receiving facility and state will be determined by Respondents following the award of the contract for the removal action. Respondents shall provide the information required by this Paragraph as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

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

IX. SITE ACCESS

23. If the Site, or any other property where access is needed to implement this Order, is owned or controlled by any of the Respondents, such Respondents shall, commencing on the Effective Date, provide U.S. EPA, CMS or any other party performing the Work hereunder, their officers, employees and representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order. State and Tribal representatives will also be granted access to accompany EPA employees and contractors

24. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within 15 business days after the Effective Date, or as such longer period as specified in writing by the OSC. Any access agreement must give U.S. EPA, the State and the Tribe access in the manner described in Paragraph 23. Respondents shall immediately notify U.S. EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. U.S. EPA may then, as expeditiously as practicable, assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as U.S. EPA deems appropriate. Such means may include utilization of U.S. EPA's access authorities under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e) and 40 C.F.R. § 300.400(d). Respondents shall reimburse U.S. EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs). If Respondents fail to obtain access to an area or areas owned by or controlled by someone other than Respondents after complying with the terms of this provision, Respondents shall not be liable for stipulated penalties under this Order or otherwise be liable for failure to comply with this Order or failure to meet any schedules or milestones in the Order, the Work Plan or other plans approved under this Order with respect to properties to which access has been denied for the period of time that access was not secured.

25. Notwithstanding any provision of this Order, U.S. EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, the July 11, 1994 Administrative Agreement and Covenant Not To Sue pertaining to the Site and any other applicable statutes or regulations. The Tribe similarly retains whatever rights of access it may have under applicable law.

X. ACCESS TO INFORMATION

26. Subject to Paragraphs 27 and 28, Respondents shall provide to U.S. EPA, upon request, copies of all non-privileged documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Each Respondent shall also use its best efforts to make available to U.S. EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work at reasonable times and upon reasonable notice subject to Paragraphs 27 and 28.

27. Except as provided in Paragraph 29, Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to U.S. EPA under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by U.S. EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to U.S. EPA, or if U.S. EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

28. Except as provided in Paragraph 29, Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide U.S. EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

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

XI. RECORD RETENTION

30. Until 6 years after Respondents' receipt of U.S. EPA's approval of Respondents' final report pursuant to Paragraph 72, Respondents shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Each Respondent shall also instruct their respective contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

31. At the conclusion of this document retention period, Respondents shall notify U.S. EPA at least 60 days prior to the destruction of any such records or documents, and, upon request by U.S. EPA, Respondents shall deliver any such non-privileged records or documents to U.S. EPA. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide U.S. EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld from U.S. EPA on the grounds that they are privileged.

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

XII. COMPLIANCE WITH OTHER LAWS

33. Respondents shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order shall, to the extent practicable, as determined by U.S. EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws. Respondents shall identify ARARs under federal law in the Work Plan subject to U.S. EPA approval. EPA will consult with the State with respect to ARARS under state environmental or facility siting laws.

XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

34. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action. Respondents shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondents shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer, Emergency Response Branch, Region 5 at (312) 353-2318, of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and U.S. EPA takes such action instead, Respondents shall reimburse U.S. EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

35. In addition, in the event of any release of a reportable quantity of a hazardous substance from the Site, Respondents shall immediately notify the OSC at (312) 353-2318 and the National Response Center at (800) 424-8802. Respondents shall submit a written report to U.S. EPA within 7 business days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

XIV. AUTHORITY OF ON-SCENE COORDINATOR

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

XV. PAYMENT OF RESPONSE COSTS

37. Payments for Future Response Costs.

a. Respondents shall pay U.S. EPA Future Response Costs up to \$500,000 not inconsistent with the NCP. On a periodic basis, U.S. EPA will send Respondents a bill requiring payment that consists of an Itemized Cost Summary. Respondents shall make all payments within 30 calendar days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 39 of this Order.

b. Respondents shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "U.S. EPA Hazardous Substance Superfund," referencing the name and address of the party(ies) making payment and U.S. EPA Site/Spill ID number B5AM. Respondents shall send the check(s) to:

U.S. Environmental Protection Agency
Program Accounting & Analysis Section
P.O. Box 70753
Chicago, Illinois 60673

c. At the time of payment, Respondents shall send notice that payment has been made to the Director, Superfund Division, U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604-3590 and to Rodger Field, Associate Regional Counsel, 77 West Jackson Boulevard, C-14J, Chicago, Illinois, 60604-3590.

38. In the event that payments for Future Response Costs are not made within 30 days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

39. Respondents may dispute all or part of a bill for Future Response Costs submitted under this Order, only if Respondents allege that U.S. EPA has made an accounting error, or if Respondents allege that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondents shall pay the full amount of the uncontested costs to U.S. EPA as specified in Paragraph 37 on or before the due date. Within the same time period, Respondents shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondents shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 37(c) above. Respondents shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus Interest within 20 calendar days after the dispute is resolved.

XVI. DISPUTE RESOLUTION

40. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

41. If Respondents object to any U.S. EPA action taken pursuant to this Order, including billings for Future Response Costs, they shall notify U.S. EPA in writing of their objection(s) within 10 business days of such action, unless the objection(s) has/have been resolved informally. This written notice shall include a statement of the issues in dispute, the relevant facts upon which the dispute is based, all factual data, analysis or opinion supporting Respondents' position, and all supporting documentation on which such party relies. U.S. EPA shall provide its Statement of Position, including supporting documentation, no later than 10 business days after receipt of the written notice of dispute. In the event that these 10-day time periods for exchange of written documents may cause an unacceptable delay in the work, they shall be shortened upon, and in accordance with, notice by U.S. EPA. The time periods for exchange of written documents relating to disputes over billings for response costs may be extended at the sole discretion of U.S. EPA. An administrative record of any dispute under this Section shall be maintained by U.S. EPA. The record shall include Respondents' written notification of such dispute, and U.S. EPA's Statement of Position served pursuant to this paragraph. Upon review of the administrative record, the Director of the Superfund Division, U.S. EPA Region 5, shall resolve the dispute consistent with the NCP and the terms of this Order.

42. Any agreement reached by the Parties resolving a written notice of dispute shall be reduced to writing and shall, upon signature by both Parties, be incorporated into and become an enforceable part of this Order. Respondents' obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with U.S. EPA's decision, whichever occurs.

XVII. FORCE MAJEURE

43. Respondents agree to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondents' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance. This Section is subject to Paragraph 24.

44. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondents shall notify U.S. EPA orally within 24 hours of when Respondents first knew that the event might cause a delay. Within 7 calendar days thereafter, Respondents shall provide to U.S. EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim;

and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall be grounds for U.S. EPA to deny Respondents an extension of time for performance for any period prior to the time when notice is actually provided. Respondents shall have the burden of demonstrating by a preponderance of the evidence that the event is a force majeure, that the delay is warranted under the circumstances, and that best efforts were exercised to avoid and mitigate the effects of the delay.

45. If U.S. EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by U.S. EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If U.S. EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, U.S. EPA will notify Respondents in writing of its decision. If U.S. EPA agrees that the delay is attributable to a *force majeure* event, U.S. EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

46. Respondents shall be liable to U.S. EPA for stipulated penalties in the amounts set forth in Paragraphs 47 and 48 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondents shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of this Order within the specified time schedules established by and approved under this Order.

47. Stipulated Penalty Amounts - Work. Except as provided in Paragraph 48, Respondents shall pay \$ 500 per day for each day not in compliance with the terms of this Order for the first ten (10 days) and \$ 1000 per day for each day thereafter through the 30th day of non-compliance. For each day not in compliance with the Work to be performed under this Order after the 30th day, Respondents shall pay 4,000 per day of non-compliance.

48. Stipulated Penalty Amounts - Reports. Respondents shall pay \$ 100 per day for each day not in compliance with the requirement to submit reports or other documentation under this Order for the first ten (10 days) and \$1,000 per day for each day thereafter through the 30th day of non-compliance. For each day not in compliance with the the requirement to submit reports or other documentation after the 30th day, Respondents shall pay \$2,000 per day of non-compliance.

49. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the

period, if any, beginning on the 31st day after U.S. EPA's receipt of such submission until the date that U.S. EPA notifies Respondents of any deficiency; and 2) with respect to a decision by the Director of the Superfund Division, Region 5, under Paragraph 41 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after U.S. EPA submits its written statement of position until the date that the Director of the Superfund Division issues a final decision regarding such dispute. Stipulated penalties shall not be payable in respect of a delay occasioned by a dispute that is resolved in Respondents' favor under Section XVI. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

51. Following U.S. EPA's determination that Respondents have failed to comply with a requirement of this Order, U.S. EPA may give Respondents written notification of the failure and describe the noncompliance. U.S. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether U.S. EPA has notified Respondents of a violation.

52. All penalties accruing under this Section shall be due and payable to U.S. EPA within 30 days of Respondents' receipt from U.S. EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to U.S. EPA under this Section shall be paid by certified or cashier's check(s) made payable to "U.S. EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Program Accounting & Analysis Section, P.O. Box 70753, Chicago, Illinois 60673, shall indicate that the payment is for stipulated penalties, and shall reference the U.S. EPA Site/Spill ID Number B5AM, the U.S. EPA Docket Number, and the name and address of the party(ies) making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to U.S. EPA as provided in Paragraph 37(c).

53. The payment of stipulated penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Order.

54. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 30 days after the dispute is resolved by agreement or by receipt of U.S. EPA's decision and receipt of a demand for payment in accordance with Paragraph 52.

55. If Respondents fail to pay stipulated penalties when due, U.S. EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 52. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of U.S. EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), provided, however, that U.S. EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any

violation for which a stipulated penalty has been assessed and collected herein, except in the case of a willful violation of this Order. Should Respondents violate this Order or any portion hereof, U.S. EPA may carry out the required actions unilaterally, pursuant to Section 104 of CERCLA, 42 U.S.C. §9604, and/or may seek judicial enforcement of this Order pursuant to Section 106 of CERCLA, 42 U.S.C. §9606. Notwithstanding any other provision of this Section, U.S. EPA may, in its unreviewable discretion, waive in writing any portion of stipulated penalties that have accrued pursuant to this Order.

XIX. COVENANT NOT TO SUE BY U.S. EPA

56. In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, U.S. EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Future Response Costs paid hereunder. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondents of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY U.S. EPA

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

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

- a. claims based on a failure by any Respondent to meet a requirement of this Order applicable to it;
- b. liability for any Future Response Costs not paid under this Order and liability for costs not included within the definition of Future Response Costs;

- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

XXI. COVENANT NOT TO SUE BY RESPONDENTS

59. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs, or this Order, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Michigan Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 58 (b), (c), and (e) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation, or Paragraph 78 .

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

XXII. OTHER CLAIMS

61. By issuance of this Order, the United States and U.S. EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or U.S. EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

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

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

XXIII. CONTRIBUTION PROTECTION

64. The Parties agree that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Order. The "matters addressed" in this Order are the Work and Future Response Costs. "Matters addressed" excludes, for purposes of Contribution Protection provided for herein, any agreements between or among any two or more of the following: Bay Harbor Golf Club, Inc., Boyne USA Inc., Bay Harbor Company, L.L.C. and/or CMS Energy Corporation and their predecessors and affiliates, the effective date of which agreements predate the date of this AOC, thus preserving all rights and obligations of the parties under said agreements. Nothing in this Order precludes the United States or Respondents from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

XXIV. INDEMNIFICATION

65. Respondents shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondents agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States

shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Order. Neither Respondents nor any such contractor shall be considered an agent of the United States. The Federal Tort Claims Act (28 U.S.C. §§ 2671, 2680) provides coverage for injury or loss of property, or injury or death caused by the negligent or wrongful act or omission of an employee of U.S. EPA while acting within the scope of his or her employment, under circumstances where U.S. EPA, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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

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

XXV. MODIFICATIONS

68. For good cause, the OSC may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by U.S. EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any provision or other requirements of this Order may be modified in writing by mutual agreement of the parties.

69. If Respondents seek permission to deviate from any approved work plan or schedule, Respondents' Project Coordinator shall submit a written request to U.S. EPA for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 68.

70. No informal advice, guidance, suggestion, or comment by the OSC or other U.S. EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

XXVI. ADDITIONAL WORK

71. If U.S. EPA or Respondents determine that work consistent with this Order that is not included in the Work Plan and is necessary to protect human health or the environment, that party shall notify in writing the other party of the additional work necessary and the reasons for the additional work. Respondents must complete any additional work requested or approved by U.S. EPA according to U.S. EPA's specifications. Respondents must propose and submit a schedule for additional work for U.S. EPA's approval. The Parties shall confer in good faith to achieve agreement on the need for additional work. Should Respondents object to a U.S. EPA determination that additional work is necessary or U.S. EPA's failure to approve a request by Respondents for additional work, Respondents may object to such determination pursuant to Section XVI. U.S. EPA may modify or determine the schedule for additional work. This Section does not alter or diminish the OSC's authority under Paragraph 68 of this Order.

XXVII. NOTICE OF COMPLETION OF WORK

72. When U.S. EPA determines, after U.S. EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including, *e.g.*, post-removal site controls, payment of Future Response Costs, and record retention, U.S. EPA will provide written notice to Respondents. If U.S. EPA determines that any such Work has not been completed in accordance with this Order, U.S. EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the Work Plan if appropriate in order to correct such deficiencies. Respondents shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the U.S. EPA notice. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Order.

XXVIII. SEVERABILITY/INTEGRATION/ATTACHMENTS

73. If a court issues an order that invalidates any provision of this Order or finds that Respondents have sufficient cause not to comply with one or more provisions of this Order, each Respondent shall remain bound to comply with all provisions of this Order applicable to it not invalidated or determined to be subject to a sufficient cause defense by the court's order.

74. This Order and its attachments constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order.

XXVIII-A. OBLIGATIONS OF RESPONDENT BAY HARBOR COMPANY

75. It is agreed that only the following provisions of this Order apply to, and are binding on, Respondent Bay Harbor Company: 2, 3, 4, 5, 6(last sentence), 8, 23, 25, 26, 27, 28, 29, 30, 31, 32, 57, 58, 59, 60, 61, 62, 63, 73, 74 and 80. Respondent Bay Harbor Company will cooperate with CMS in providing information that may be reasonably necessary to obtain access for areas owned or in possession of persons other than Respondent Bay Harbor Company. Persons with

access under Paragraph 23 will provide identification upon request to Respondent Bay Harbor Company's authorized security personnel upon entry to property owned or controlled by Respondent Bay Harbor Company.

76. It is agreed that Respondent Bay Harbor Company will also have the benefits of Paragraphs 4, 40-42 (provided that these paragraphs do not apply to any dispute arising over access under Paragraph 23), 43-45, 56 and 64.

77. Respondent Bay Harbor Company shall be liable to U.S. EPA for stipulated penalties in the amount of \$ 4,000 per day for each day access is not granted pursuant to Paragraph 23 above commencing on the fourth day after access is denied. Stipulated penalties will not accrue unless telephonic notice is given of the denial of access, which notice will be complete upon calling Dennis Brya (231-439-2541 or 231-838-2541(cell)) or, in his absence, Robert Carson (248-644-4840 ext. 227). Paragraphs 49-52 and 54-55 shall be applicable to any stipulated penalties accruing under this paragraph. The payment of stipulated penalties shall not alter in any way Respondent Bay Harbor Company's obligation to comply with the provisions of this Order as set forth in Paragraph 75 above.

78. Notwithstanding any provision of this Order, and without limitation on the reservations set forth in Paragraphs 57 and 58, U.S. EPA reserves all rights against Respondent Bay Harbor Company, including, but not limited to, the right to take further enforcement action to perform the Work, in the event of non-compliance by any party with the terms of this Order.

79. In the event U.S. EPA takes action against Respondent Bay Harbor Company under any reservation of rights herein, Respondent Bay Harbor Company reserves the right to contest and defend against any such action.

XXIX. EFFECTIVE DATE

80. This Order shall be effective upon signature by the Director, Superfund Division, U.S. EPA Region 5. Upon such signature, U.S. EPA shall immediately deliver a copy of the executed Order to Respondents.

The undersigned representatives of Respondents each certify that they are fully authorized to enter into the terms and conditions of this Order and to bind the party they represent to this document.

For Respondent CMS Land Company

By Michael D. Van Hement

Title Vice President and Secretary

Date: 2-8-05

For Respondent CMS Capital, ^{LLC changed by} ~~Corp.~~ _{af goodman 2/08/2005}

By Michael D. Van Hement

Title VP, General Counsel & Secretary

Date: 2-8-05

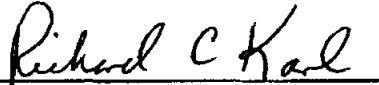
For Respondent Bay Harbor Company

By 

Title Chairman

Date: 2-05-05

It is so ORDERED and Agreed this 22 day of February, 2005

BY: 

Richard Karl, Director
Superfund Division
United States Environmental Protection Agency
Region 5

ATTACHMENT A

RESPONDENTS

(1) CMS LAND COMPANY

(2) CMS CAPITAL, ~~CORP.~~ ^{LLC} Changed by
afgadhnan 2/08/2005

(3) BAY HARBOR COMPANY

ATTACHMENT B

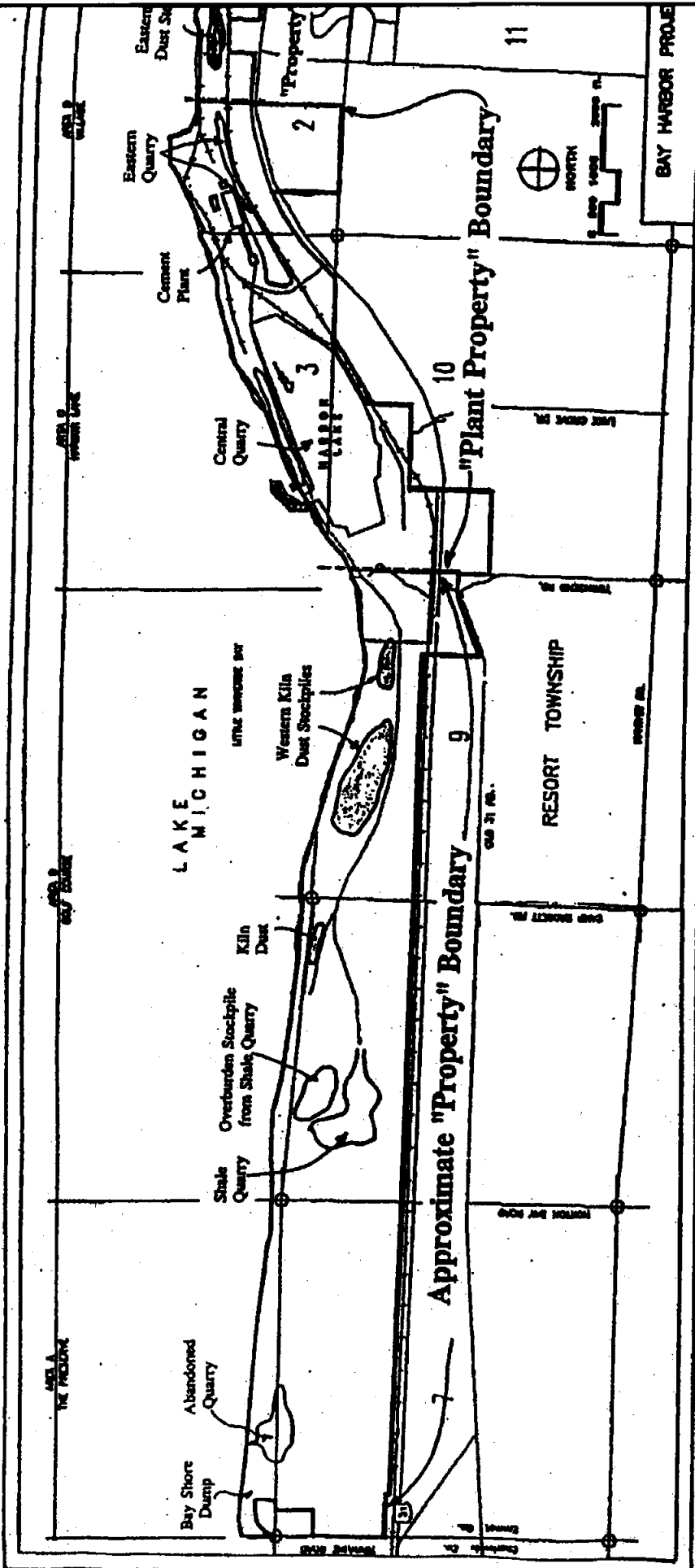
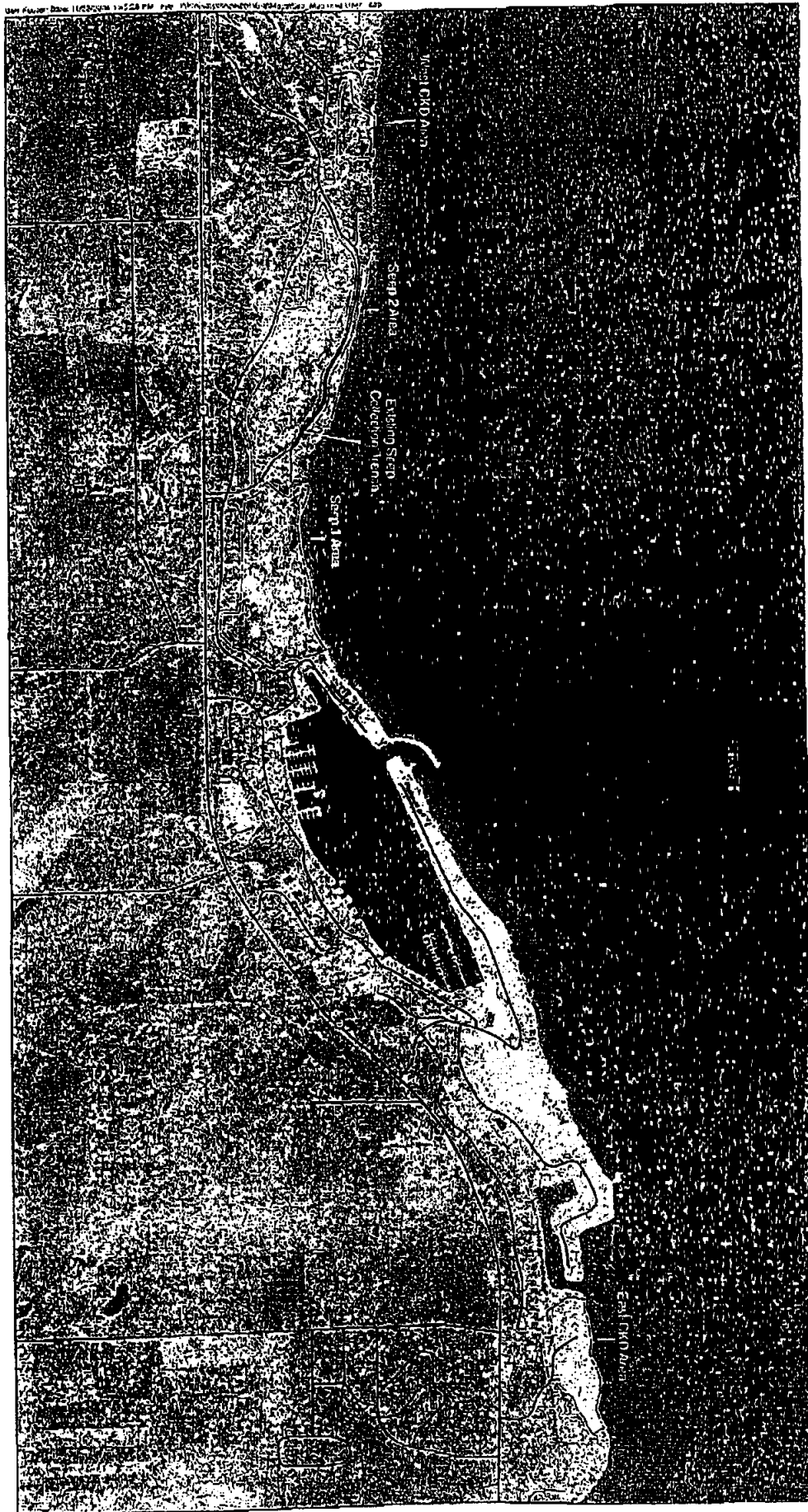


Figure 2



CKD Release areas are approximately shown as Seep 1 Area and Seep 2 Area

Figure 2
 REMEDIAL INVESTIGATION
 AREA LOCATION
 Bay Harbor, MI

Attachment C