

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF:

Ashland/NSP Lakefront Superfund Site  
Ashland, Wisconsin

RESPONDENT:

Northern States Power Company,  
a Wisconsin Corporation (d/b/a Xcel  
Energy, a subsidiary of Xcel Energy Inc.)

ADMINISTRATIVE ORDER ON  
CONSENT FOR REMEDIAL  
INVESTIGATION/FEASIBILITY STUDY

U.S. EPA Region 5  
CERCLA Docket No.

Proceeding Under Sections 104, 107 and  
122 of the Comprehensive Environmental  
Response, Compensation, and Liability Act,  
as amended, 42 U.S.C. §§ 9604, 9607 and  
9622.

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ADMINISTRATIVE ORDER ON CONSENT  
FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY

**I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent (“Order”) is entered into by the United States Environmental Protection Agency (“EPA”) and Northern States Power Company (“NSP”), a Wisconsin corporation d/b/a Xcel Energy, a subsidiary of Xcel Energy Inc. (“Respondent”). The Order concerns the preparation and performance of a remedial investigation and feasibility study (“RI/FS”) as described more fully in the attached Statement of Work for Remedial Investigation/Feasibility Study (“SOW”) at the Ashland/NSP Lakefront Superfund Site located at Ashland, Wisconsin (“Site”), and the reimbursement of all Future Response Costs incurred by EPA in connection with and as defined by this Order.

2. This Order is issued pursuant to the authority vested in the President of the United States by Sections 104, 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9607 and 9622 (“CERCLA”). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994, by EPA Delegation Nos. 14-14-C and 14-14-D, and to the Director, Superfund Division, Region 5 (“Director”), by Regional Delegation Nos. 14-14-A, 14-14-C, and 14-14-D. A hazardous substance has been released or there is a threat of such a release into the environment at the Site, and it is necessary to undertake an RI/FS in order to protect public health or welfare or the environment. The Director further determines that the Respondent will undertake the RI/FS in a proper and timely manner.

3. In accordance with Section 121(f)(1)(F), EPA has notified the State of Wisconsin of negotiations with potentially responsible parties regarding the implementation of the RI/FS for the Site and an opportunity to participate in such negotiations. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the federal natural resources trustee on August 5, 2003, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship.

4. EPA and Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability, culpability or wrongdoing whatsoever. Respondent does not admit, and retains the right to controvert in any other or subsequent proceedings, other than proceedings to implement or enforce this Order, the validity of the findings of fact, conclusions of law and determinations in this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms. Respondent hereby reserves any and all rights and defenses not otherwise waived herein or by the

operation of this Order.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon EPA and upon Respondent and its heirs, successors and assigns. 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. The undersigned representative of the Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Order and to execute and legally bind such party to this document.

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

## **III. STATEMENT OF PURPOSE**

8. In entering into this Order, the objectives of EPA and Respondent are: (a) to determine the nature and extent of contamination and any threat to the public health, welfare, or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site or facility, by conducting a Remedial Investigation as more specifically set forth in the SOW attached as Attachment A to this Order; (b) to determine and evaluate alternatives for remedial action (if any) to prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants, or contaminants at or from the Site or facility, by conducting a Feasibility Study as more specifically set forth in the SOW attached as Attachment A to this Order; (c) to collect sufficient data for developing and evaluating effective remedial alternatives; and (d) to recover Future Response Costs incurred by EPA with respect to this Order.

9. The activities conducted under this Order are subject to approval by EPA and shall provide all appropriate and necessary information to assess site conditions and evaluate alternatives to the extent necessary to select a remedy that is consistent with CERCLA and the National Contingency Plan ("NCP"), 40 C.F.R. Part 300. Respondent shall conduct all activities under this Order in compliance with CERCLA, the NCP, 40 C.F.R. Part 300, and all applicable EPA guidance, policies, procedures, and any applicable state law and rules.

#### IV. DEFINITIONS

10. 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:

“ARARs” means all applicable local, state, and Federal laws and regulations, and all “applicable requirements” or “relevant and appropriate requirements” as defined at 40 CFR § 300.5 and 42 U.S.C. § 9261(d).

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

“Day” shall mean a calendar day. 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 of the next working day.

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

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

“WDNR” shall mean the Wisconsin Department of Natural Resources and any successor departments or agencies of the State.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs after the Effective Date of this Order in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 33 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 20(c) (Emergency Response), and Paragraph 61 (Work Takeover).

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

“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.

“Order” shall mean this Administrative Order on Consent, the Statement of Work, all appendices attached hereto (listed in Section XXVI) and all documents incorporated by reference into this document including without limitation EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become a part of the Order upon approval by EPA. In the event of conflict between this Order and any appendix, this Order shall control.

“Paragraph” shall mean a portion of this Order identified by an Arabic numeral.

“Parties” shall mean EPA and Respondent.

“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).

“Respondent” shall mean Northern States Power Company, a Wisconsin Corporation d/b/a Xcel Energy, a subsidiary of Xcel Energy Inc.

“Section” shall mean a portion of this Order identified by a Roman numeral.

“Site” shall mean the Ashland/NSP Lakefront Superfund Site, encompassing approximately 20 acres, located in Ashland, Wisconsin, and depicted generally on the map attached as Appendix B, and areas where hazardous substances, pollutants or contaminants have or may have come to be located therefrom.

“State” shall mean the State of Wisconsin.

“Statement of Work” or “SOW” shall mean the Statement of Work for development of an RI/FS for the Site as set forth in Appendix A to this Order. The Statement of Work is incorporated into this Order and is an enforceable part of this Order as are any modifications made thereto in accordance with this Order.

“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); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous substance” under Section 292.01(5) of the Wisconsin Statutes, or “hazardous waste” under Section 292.01(7) of the Wisconsin Statutes.

“Work” shall mean all activities Respondent is required to perform pursuant to this Order and the SOW.

## V. FINDINGS OF FACT

11. Based on available information, including the Administrative Record in this matter, EPA hereby finds, and, for purposes of enforceability of this Order only, the Respondent stipulates that the factual statutory prerequisites under CERCLA necessary for issuance of this Order have been met. EPA's findings and this stipulation include the following:

- a) The Site encompasses approximately 20 acres in Ashland, Wisconsin, including a former manufactured gas plant ("Former MGP") located on property owned by Respondent, a portion of property owned by the City of Ashland and generally known as Kreher Park, Chequamegon Bay of Lake Superior, and a railroad corridor. Approximately 2,810 people live within a 1-mile radius of the Site.
- b) The Respondent is the current owner of the Former MGP that is part of the Site.
- c) From approximately 1885 to 1947, gas was generated for heating and lighting at the Former MGP. Manufactured gas plant wastes containing hazardous substances were released during the gas manufacturing process at the Former MGP. The Former MGP property was transected on the north by a ravine that ended at the historic shoreline of Chequamegon Bay. Historical maps show that the ravine was open at the start-up of gas production at the Former MGP in the late 1880s, and was filled by the early 1900s.
- d) The lakefront portion of the Site has been the location of historic industrial activities, and currently consists of an area owned by the City of Ashland generally known as Kreher Park. Kreher Park was created in the late 1800s and early 1900s by the placement of various fill materials into Chequamegon Bay.
- e) Site assessments and investigations conducted at the Site by WDNR, U.S. EPA, and Respondent, have identified high levels of coal tar and other waste materials in groundwater, soil and sediment throughout the Site. Hazardous substances, including VOCs, SVOCs, and PAHs, are present in an aquifer underneath the Former MGP, in soil and a former seep area in Kreher Park, and in sediments in Chequamegon Bay.
- f) Pursuant to Section 105(a)(8)(B) of CERCLA, 42 U.S.C. §9605(a)(8)(B), the Site was added to the National Priorities List ("NPL"), 40 C.F.R. Part 300, App. B, on October 7, 2002 (67 FR 56757, Sept. 5, 2002).

## VI. CONCLUSIONS OF LAW AND DETERMINATIONS

12. Based on the Findings of Fact set forth above, and the Administrative Record in this matter, EPA has determined that:

- a) The Ashland/NSP Lakefront Site is a "facility" as defined in 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, include "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

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

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

e) The Respondent is the current owner of the Former MGP within the meaning of Section 107(a) of CERCLA, 42 U.S.C. §9607(a).

f) The actions required by this Order are necessary to protect the public health, welfare or the environment, are in the public interest, 42 U.S.C. § 9622(a), are consistent with CERCLA and the NCP, 42 U.S.C. §§ 9604(a)(1), 9622(a), and will expedite effective remedial action and minimize litigation, 42 U.S.C. § 9622(a).

g) EPA has determined that Respondent is qualified to conduct the RI/FS within the meaning of Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), and will carry out the Work properly and promptly if Respondent complies with the terms of this Order and the attached SOW.

## **VII. ORDER**

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

## **VIII. DESIGNATION OF CONTRACTORS AND PROJECT COORDINATORS**

14. Selection of Contractors, Personnel. All Work performed pursuant to this Order shall be under the direction and supervision of qualified personnel. Respondent designates the following contractor to undertake, subcontract for, or otherwise complete the Work required by this Order:

URS Corporation

EPA retains the right to disapprove of any other designated contractor according to the terms and conditions of this Order and attached SOW. Respondent shall notify EPA and WDNR in writing of the names, titles, and qualifications of any other personnel, contractors, subcontractors, consultants and laboratories to be used in carrying out Work under this Order at least 10 calendar days prior to commencement of such Work. Respondent shall demonstrate that URS has a quality system which complies with ANSI/ASQC E4-1994, "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 in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. The qualifications of the persons undertaking the Work for Respondent shall be subject to EPA's review, for verification that such persons meet minimum technical background and experience requirements. If EPA disapproves of any person(s)' technical qualifications, EPA shall do so in writing, specifying the grounds for such disapproval. Respondent shall notify EPA of the identity and qualifications of the replacement(s) within 30 days of receipt of the EPA's written notice. If EPA subsequently disapproves of the replacement(s), EPA shall do so in writing, specifying the grounds for such disapproval. Subject to the terms and conditions of this Order, EPA reserves the right to terminate this Order and to conduct a complete RI/FS, and to seek reimbursement for costs and penalties from Respondent. During the course of the RI/FS, Respondent shall notify EPA in writing of any changes or additions in the personnel used to carry out such Work, providing their names, titles, and qualifications. EPA shall have the same right to approve changes and additions to personnel as it has hereunder regarding the initial notification.

15. Respondent designates the following Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Order:

Jerry C. Winslow  
Xcel Energy  
414 Nicollet Mall (RS-8)  
Minneapolis, MN 55401  
phone: (612) 330-2928  
FAX: (612) 330-6357

EPA approves of Respondent's designated Project Coordinator. EPA retains the right to disapprove any other designated Project Coordinator. If EPA disapproves of any other designated Project Coordinator, EPA shall do so in writing, specifying the grounds for such disapproval. Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number and qualifications within 14 days following receipt of EPA's written disapproval.

16. EPA has designated Sharon Jaffess of the Remedial Response Branch, Region 5, (U.S. EPA (SR-6J), 77 West Jackson, Chicago, Illinois 60604), as its Remedial Project Manager

("RPM") for the Site. Except as otherwise provided in this Order, Respondent shall direct all submissions required by this Order to the RPM. The WDNR has designated Jamie Dunn from the WDNR Region Spooner Office as WDNR's Project Manager ("WDNR PM"). Respondent shall direct copies of all submissions required by this Order to the WDNR PM:

Jamie Dunn  
State Project Manager  
810 W. Maple Street  
Spooner, WI, 54801

Respondents are encouraged to make their submissions to EPA and WDNR on recycled paper (which includes significant post-consumer waste paper content where possible) and using two-sided copies. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by Respondent. Receipt by the RPM of any notice or communication from Respondent relating to this Order shall constitute receipt by EPA. Receipt by the WDNR PM of any notice or communication from Respondent relating to this Order shall constitute receipt by the State.

17. The RPM shall have the authority lawfully vested in a Remedial Project Manager and On-Scene Coordinator (OSC) by the NCP. In addition, the RPM shall have the authority consistent with the National Contingency Plan, to halt any Work required by this Order, and to take any necessary response action when s/he determines that conditions at the Site may present an immediate endangerment to public health or welfare or the environment. The absence of the the RPM from the area under study pursuant to this Order shall not be cause for the stoppage or delay of Work.

18. EPA shall have the right, subject to Paragraph 15, to change its respective RPM, and WDNR and Respondent shall have the right, subject to Paragraph 15, to change their respective Project Manager and Project Coordinator. Respondent shall notify EPA and WDNR as early as possible before such a change is made, but in no case less than 24 hours before such change. EPA and/or WDNR shall notify Respondent as early as possible of any change of RPM or WDNR PM. The Respondent's initial notification may be made orally, but shall be followed by a written notice within 10 calendar days of oral notification.

19. EPA shall arrange for a qualified person to assist in its oversight and review of the conduct of the RI/FS, as required by Section 104(a) of CERCLA, 42 U.S.C. Section 9604(a). The oversight assistant may observe Work and make inquiries in the absence of EPA, but is not authorized to modify the Work Plan.

## **IX. WORK TO BE PERFORMED**

20. Activities and Deliverables. Respondent shall conduct activities and submit

deliverables as provided for in this Order and the attached SOW, which is incorporated by reference, for the completion of the RI/FS. All such Work shall be conducted in accordance with CERCLA, the NCP, and EPA guidance including, but not limited to, the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive # 9355.3-01), "Guidance for Data Usability in Risk Assessment" OSWER Directive #9285.7-05), and guidance referenced therein, and guidances referenced in the SOW, as may be amended or modified by EPA. Respondent acknowledges that WDNR and Respondent have separately conducted sampling and other activities to assess conditions at the Site and to identify the extent and concentration of contamination at the Site. Respondent shall, to the extent practicable, not duplicate the sampling and other activities that have been performed by Respondent and/or WDNR. The general activities and specific deliverables required of Respondent by this Order are identified in the attached SOW. All Work performed pursuant to this Order shall be in accordance with the schedules herein or established in the SOW, and in full accordance with the standards, specifications, and other requirements of the Work Plan and Sampling and Analysis Plan, as initially approved by EPA, and as may be amended or modified by EPA from time to time. Respondent shall submit to EPA and WDNR copies of all plans, reports, submittals and other deliverables required by this Order, the SOW and the RI/FS Work Plan in accordance with the approved schedule set forth in the SOW for review and approval pursuant to Section X (EPA Approval of Plans and Other Submissions). Respondent shall submit in electronic form all portions of any report or other deliverable Respondent is required to submit pursuant to the provisions of this Order.

a. Modification of the Work Plan.

(1) If at any time during the RI/FS process, Respondent identifies a need for additional data, Respondent shall submit a memorandum documenting the need for additional data to the RPM, with a copy to the WDNR PM, within 14 days of identification. EPA in its discretion will determine whether the additional data will be collected by Respondent and whether it will be incorporated into reports and deliverables, such approval not to be unreasonably withheld.

(2) Respondent shall notify the RPM by telephone within 24 hours of discovery of unanticipated or changed circumstances at the Site. In addition to the authorities in the NCP, in the event that EPA determines, in consultation with WDNR, that the immediate threat posed by the unanticipated or changed circumstances warrant changes in the Work Plan, EPA shall modify or amend the Work Plan in writing accordingly. Respondent shall perform the Work Plan as modified or amended, subject only to Respondent's right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution).

(3) EPA may determine that in addition to tasks defined in the initially approved Work Plan, other additional Work may be necessary to accomplish the objectives of the RI/FS as set forth in the SOW for this RI/FS. EPA may require that Respondent perform these

response actions in addition to those required by the initially approved Work Plan, including any approved modifications, if it determines that such actions are necessary for a complete RI/FS.

(4) Respondent shall confirm its willingness to perform the additional Work in writing to EPA within 7 days of receipt of the EPA request. If Respondent objects to any modification determined by EPA to be necessary pursuant to this Paragraph, Respondent may seek Dispute Resolution pursuant to Section XV (Dispute Resolution). The SOW and/or RI/FS Work Plan shall be modified in accordance with the final resolution of the dispute.

(5) Respondent shall complete the additional Work according to the standards, specifications, and schedule set forth or approved by EPA in a written modification to the Work Plan or written Work Plan supplement. EPA reserves the right to conduct the Work itself at any point, to seek reimbursement from Respondent, and/or to seek any other appropriate relief.

(6) Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Order. Respondent reserves all rights and defenses not otherwise waived herein or by operation of this Order.

b. Off-Site Shipment of Waste Material.

(1) Respondent shall, prior to any off-site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to EPA and WDNR. 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.

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

(3) The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the remedial investigation and feasibility study. Respondent shall provide the information required by Subparagraph 20(b)(1) and (2) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

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

c. Emergency Response and Notification of Releases.

(1) 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, Respondent shall immediately take all appropriate action. Respondent 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. Respondent shall immediately notify the RPM, the WDNR PM, the U.S. EPA, Regional Duty Officer, Emergency Response Branch, Region 5 at (312) 353-2318, and the Wisconsin spill reporting hotline at (800) 943-0003, of the incident and Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVIII (Payment of Response Costs).

(2) In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify the RPM, the WDNR PM, the U.S. EPA, Regional Duty Officer, Emergency Response Branch, Region 5 at (312) 353-2318, the National Response Center at (800) 424-8802, and the Wisconsin spill reporting hotline at (800) 943-0003. Respondent shall submit a written report to EPA and WDNR within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

## **X. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

21. After review of any plan, report or other submittal that is required to be submitted for approval pursuant to this Order, EPA, in consultation with WDNR, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing

that Respondent modify the submission; or (e) any combination of the above. EPA's approval shall not be unreasonably withheld. However, EPA shall not modify a submission pursuant to Subparagraph 21(c) without first providing Respondent at least one notice of deficiency and an opportunity to cure within 21 days thereof, except where to do so would cause serious disruption to the Work or where previous submission(s) of the same plan, report or other submittal have been disapproved due to material defects and the deficiencies in the latest submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

22. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Subparagraph 21(a), (b), or (c), Respondent shall proceed to take any action required by the plan, report or other submittal, as approved or modified by EPA subject only to Respondent's right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Subparagraph 21(c) and the submission has a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XVI (Stipulated Penalties) and to perform its own studies, complete the RI/FS (or any portion of the RI/FS) under CERCLA and the NCP, and seek reimbursement from Respondent for its costs; and/or seek any other appropriate relief.

23. Resubmission of Plans.

a. Subject only to Respondent's right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution), upon receipt of a notice of disapproval pursuant to Subparagraph 21(d) or (e), Respondent shall, within 21 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other submittal for approval. Any stipulated penalties applicable to the submission, as provided in Section XVI, shall accrue during the 21-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 24 and 25.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Subparagraph 21(d) or (e), Respondent shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Respondent of any liability for stipulated penalties under Section XVI (Stipulated Penalties).

c. Respondent shall not proceed further with any subsequent activities or tasks until receiving EPA approval for the following deliverables: RI/FS Work Plan and Sampling and Analysis Plan, Draft Remedial Investigation Report, Treatability Testing Work Plan and Sampling and Analysis Plan, if required, and Draft Feasibility Study Report. While awaiting EPA approval on these deliverables, Respondent shall proceed with all other tasks and activities which may be conducted independently of these deliverables, in accordance with the schedule set forth in this Order.

d. For all remaining deliverables not enumerated above in subparagraph 23.c., or otherwise addressed in the SOW, Respondent shall proceed with all subsequent tasks, activities and deliverables without awaiting EPA approval on the submitted deliverable. EPA reserves the right to stop Respondent from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS and Respondent reserves all rights and defenses not otherwise waived herein.

24. In the event that a resubmitted plan, report or other submittal, or portion thereof, is disapproved by EPA, EPA may again require Respondent to correct the deficiencies, in accordance with the preceding Paragraphs subject only to Respondent's right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution). EPA also retains the right to modify or develop the plan, report or other submittal. Respondent shall implement any such plan, report, or submittal as modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XV (Dispute Resolution).

25. If upon resubmission, a plan, report, or submittal is disapproved or modified by EPA due to a material defect, Respondent shall be deemed to have failed to submit such plan, report, or submittal timely and adequately unless Respondent invokes the Dispute Resolution procedures set forth in Section XV (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XV (Dispute Resolution) and Section XVI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVI.

26. In the event that EPA takes over some of the tasks, but not the preparation of the RI/FS Report, Respondent shall incorporate and integrate information supplied by EPA into the final RI/FS Report.

27. All plans, reports, and other items required to be submitted to EPA pursuant to this Order shall, upon approval or modification by EPA, be enforceable under this Order. In the event EPA approves or modifies a portion of a plan, report, or other submittal required to be submitted to EPA pursuant to this Order, the approved or modified portion shall be enforceable pursuant to this Order.

## **XI. QUALITY ASSURANCE, SAMPLING, AND DATA AVAILABILITY**

28. Quality Assurance. Respondent shall assure that Work performed, samples taken and analyses conducted conform to the requirements of the SOW, the QAPP and guidances identified therein. Respondent will assure that field personnel used by Respondent are properly trained in the use of field equipment and in chain of custody procedures. Respondent shall only use laboratories which have a documented quality system that complies with ANSI/ASQC E4-1994,

“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 EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) to meet the quality system requirements.

29. Sampling.

a. All results of sampling, tests, modeling or other data (including raw data) generated by Respondent, or on Respondent's behalf, during implementation of this Order, shall be submitted to EPA and WDNR in the subsequent monthly progress report as described in the attached SOW. EPA will make available to Respondent validated data generated by EPA unless it is exempt from disclosure by any federal or state law or regulation.

b. Respondent shall verbally notify the RPM and the WDNR PM at least 14 business days prior to conducting significant field events as described in the SOW, Work Plan or sampling and analysis plan. At EPA's verbal or written request, or the request of EPA's oversight assistant, Respondent shall allow split or duplicate samples to be taken by EPA (and its authorized representatives) of any samples collected by Respondent in implementing this Order. All split samples of Respondent shall be analyzed by the methods identified in the QAPP.

30. Data Availability.

a. The Respondent shall submit to EPA and WDNR all data or other information generated by the RI/FS activities required by this Order in a manner consistent with the schedules and submittals set forth in this Order and the SOW. Along with the data, Respondent 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 this data, the information submitted is true, accurate, and complete.

b. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA and WDNR 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 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 it is submitted to EPA and WDNR, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent. Respondent agrees not to assert

confidentiality claims with respect to any data related to Site conditions, sampling, or monitoring. Respondent shall segregate and clearly identify all documents or information submitted under this Order for which Respondent asserts business confidentiality or attorney work-product or attorney-client privilege claims.

31. In entering into this Order, Respondent and EPA waive any objections to any data collected or generated by EPA, the State or Respondent in the performance or oversight of the Work that has been verified according to the quality assurance/quality control (QA/QC) procedures required by the Order or any EPA-approved Work Plans or Sampling and Analysis Plans and historic data for the Site that has met EPA validation requirements. If Respondent objects to any other data relating to the RI/FS, Respondent shall submit to EPA a report that identifies and explains its objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. The report must be submitted to EPA within 15 days of the monthly progress report containing the data.

## **XII. SITE ACCESS AND INSTITUTIONAL CONTROLS**

32. If the Site, or any other property where access is needed to implement this Order, is owned or controlled by Respondent, commencing on the Effective Date, Respondent shall, at all reasonable times, provide EPA, WDNR, and their authorized employees, contractors, agents, consultants, designees, and representatives access to enter and freely move about all property at the Site and off-site areas where Work, if any, is being performed, for the purposes of inspecting conditions, activities, the results of activities, records, operating logs, and contracts related to the the Site or Work pursuant to this Order; reviewing the progress of Respondent in carrying out the terms of this Order; conducting tests as EPA or its authorized representatives deem necessary; using a camera, sound recording device or other documentary type equipment; and verifying the data submitted to EPA by Respondent. Respondent shall allow these persons to inspect and copy all records, files, photographs, documents, sampling and monitoring data, and other writings related to Work undertaken in carrying out this Order. Nothing herein shall be interpreted as limiting or affecting EPA's right of entry or inspection authority under federal law. All parties with access to the Site under this paragraph shall comply with all approved Health and Safety Plans.

33. Where any action undertaken pursuant to this Order is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within 30 days after the Effective Date, or as otherwise specified in writing by the RPM. Respondent shall immediately notify the RPM and the WDNR PM if after using its best efforts it is unable to obtain such agreements. For purposes of this Paragraph, "best efforts" include the payment of reasonable sums of money in consideration of access, but only to the extent such payments are requested by parties that are not potentially liable persons pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). Respondent shall describe in writing their efforts to obtain access. EPA may then assist Respondent in gaining

access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XVIII (Payment of Response Costs). If after using its best efforts to obtain access pursuant to this Paragraph, and such access is delayed or denied due to the actions of someone other than Respondent, then Respondent may claim *force majeure* pursuant to Section XVII (Force Majeure), to toll or extend any deadlines affected by the delayed or denied access.

34. Notwithstanding any provision of this Order, EPA and WDNR retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

35. EPA may obtain access for Respondent, perform those tasks or activities with EPA contractors, or terminate the Order in the event that Respondent cannot obtain access agreements. In the event that EPA performs those tasks or activities with EPA contractors and does not terminate the Order, Respondent shall perform all other activities not requiring access to that Site, and shall reimburse EPA for all costs incurred in performing such activities. Respondent additionally shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables. Furthermore, Respondent agrees to indemnify the U.S. Government as specified in Section XXIV of this Order.

### **XIII. COMPLIANCE WITH OTHER LAWS**

36. Respondent shall comply with all applicable local, state and federal laws and regulations when performing the RI/FS. No local, state, or federal permit shall be required for any portion of any action conducted entirely on-site, including studies, if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621. Where any portion of the activities is to be conducted off-site and requires a federal or state permit or approval, Respondent shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

### **XIV. RETENTION OF RECORDS**

37. During the pendency of this Order and for a minimum of 10 years after completion of construction of any remedial action, Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work under this Order, to work performed at the Site prior to this Order, or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 10 years after commencement of construction of any remedial action, Respondent shall also instruct their contractors and agents to preserve all

documents, records, and information of whatever kind, nature or description relating to performance of the Work.

38. At the conclusion of this document retention period, Respondent shall notify EPA and WDNR at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or WDNR, Respondent shall deliver any such records or documents to EPA and WDNR. Respondent 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 Respondent asserts such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondent.

39. 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 EPA or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XV. 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 concerning this Order and the SOW. The Parties shall attempt to resolve any disagreements concerning this Order and SOW expeditiously and informally.

41. If Respondent objects to any EPA action taken pursuant to this Order, including billings for Future Response Costs, Respondent shall notify EPA in writing of its objection(s) within 10 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 and opinion supporting the Respondent's position, and all supporting documentation on which Respondent relies ("Statement of Position"). Unless the Respondent's objection(s) has/have been resolved informally, EPA shall provide Respondent a written response specifically addressing the points raised in the Statement of Position. EPA and Respondent shall have 90 days from EPA's receipt of Respondent's Statement of Position to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended by agreement of both the Respondent and EPA.

42. Any agreement reached by the Parties pursuant to this Section shall be in writing and

shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, the Superfund Division Director will issue a written decision on the dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondent's obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with the Superfund Division Director's decision, whichever occurs. As provided in Section XVI (Stipulated Penalties) of this Order, penalties shall continue to accrue during any dispute resolution period, but Respondent shall be liable for only those penalties required by the agreement reached or by the Superfund Division Director's decision, whichever occurs.

### **XVI. STIPULATED PENALTIES**

43. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 44 for failure to comply with the requirements of this Order specified below unless excused under Section XVII (Force Majeure) or under XV (Dispute Resolution). "Compliance" by Respondent shall include completion of the activities pursuant to this Order or any Work Plan or other plan approved pursuant to this Order identified below in accordance with all applicable requirements of law, this Order, the SOW, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved pursuant to this Order.

44. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per day for any noncompliance identified in Subparagraph 44(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 250.00	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 500.00	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 1000.00	31 <sup>st</sup> day and beyond

b. Compliance Milestones

- i) Failure to submit the RI/FS Work Plan/Field Sampling Plan, Quality Assurance Project Plan or Health and Safety Plan;
- ii) Failure to submit the RI/FS Report;

- iii) Failure to submit any treatability study, if required;
- iv) Failure to submit the Remedial Alternatives Technical Memorandum, Alternatives Screening Technical Memorandum, Comparative Analysis of Alternatives Technical Memorandum (Remedial Alternatives Evaluation);
- v) Failure to submit the Feasibility Study Report;
- vi) Failure to submit monthly progress reports;
- vii) Failure to meet any scheduled deadline in the Order or attached SOW.
- viii) Failure to meet any other obligation, including timely payment of Future Response Costs, required by this Order.

45. 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 X (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 21<sup>st</sup> day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and (2) with respect to a decision by the EPA, Region 5 Superfund Division Director, under Paragraph 42 of Section XV (Dispute Resolution), during the period, if any, beginning on the 1st day after the Negotiation Period begins until the date that the Superfund Division Director issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

46. Following EPA's determination that Respondent has failed to comply with a requirement of this Order, EPA shall give Respondent written notification of the same and describe the noncompliance with particularity. EPA shall also send Respondent a written demand for the payment of any penalties. Penalties shall accrue as provided in Paragraph 45 regardless of whether EPA has notified Respondent of a violation.

47. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XV (Dispute Resolution). All payments to EPA under this Section shall be paid by corporate check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to: U.S. EPA, Superfund Accounting, P.O. Box 70753, Chicago, IL 60673, shall indicate that the payment is for stipulated penalties, and shall reference the Site Spill ID Number B5 N5, the EPA Docket Number of this Order, and the name and address of the party making payment, or by electronic transfer as follows: payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. EPA account in

accordance with current EFT procedures, referencing the EPA Region and Site Spill ID Number B5 N5, and EPA Account # 1113399. Payment shall be made to Bank One ABA # 071000013. Respondent shall send notice of electronic transfers to EPA that payment has been made to:

Financial Management Officer  
U.S. Environmental Protection Agency — Region 5  
Mail Code MF 10-J  
77 W. Jackson Blvd.  
Chicago, IL 60604.

Copies of check(s) or notice of electronic transfers paid pursuant to this Section, and any accompanying transmittal letter(s) shall be sent to:

Sharon Jaffess  
Remedial Project Manager  
United States Environmental Protection Agency  
77 West Jackson Blvd., Mail Code SR-6J  
Chicago, Illinois 60604-3590

AND

Craig Melodia  
Associate Regional Counsel  
U.S. EPA - Region 5  
77 West Jackson Boulevard, C-14J  
Chicago, Illinois 60604-3590.

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

49. Penalties shall continue to accrue as provided in Paragraph 45 during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of the Superfund Division Director's decision.

50. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 47.

51. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9722(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. §

9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of willful violation of this Order or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX (Reservation of Rights by EPA), Paragraph 61. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

## **XVII. FORCE MAJEURE**

52. Respondent agrees 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, *force majeure* is defined as any event arising from causes beyond the control of Respondent or of any entity controlled by Respondent, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

53. 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, Respondent shall notify EPA orally within 5 days of when Respondent's Project Coordinator first had actual knowledge that the event might cause a delay. Within 10 days thereafter, Respondent shall provide to EPA in writing, with a copy to WDNR, an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

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

## **XVIII. PAYMENT OF RESPONSE COSTS**

### **55. Payments for Future Response Costs.**

a. Respondent shall pay EPA all Future Response Costs not inconsistent with the NCP until EPA issues the notice of completion of the Work pursuant to Section XXX. On a periodic basis, EPA will send Respondent a bill requiring payment that consist of an itemized cost summary report. Respondent shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 57 of this Order. Respondent shall make all payments required by this Paragraph by corporate check or electronic transfer pursuant to the instructions for payment of stipulated penalties in Paragraph 47.

The total amount to be paid by Respondent shall be deposited in the Ashland Lakefront/NSP Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the Hazardous Substance Superfund.

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

Sharon Jaffess  
Remedial Project Manager  
United States Environmental Protection Agency  
77 West Jackson Blvd., Mail Code SR-6J  
Chicago, Illinois 60604-3590

AND

Craig Melodia  
Associate Regional Counsel  
U.S. EPA - Region 5  
77 West Jackson Boulevard, C-14J  
Chicago, Illinois 60604-3590

56. Subject to Respondent's right to contest payment of any Future Response Costs as provided in Paragraph 57, in the event that the payment for Future Response Costs are not made within 30 days of Respondent's receipt of a bill, Respondent 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 Respondent's failure to make timely payments under this Section, including but not limited to, payments of stipulated penalties pursuant to Section XVI. Respondent shall make all

payments required by this Paragraph in the manner described in Paragraph 55.

57. Respondent may contest payment of any Future Response Costs under Paragraph 55 if it determines that EPA has made an accounting or invoicing error or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the RPM. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondent shall within the 30 day period pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 55. Simultaneously, Respondent shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Wisconsin and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondent shall send to the RPM a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondent shall initiate the Dispute Resolution procedures in Section XV (Dispute Resolution). If EPA prevails in the dispute, within 5 days of the resolution of the dispute, Respondent shall pay from the escrow account established for that purpose pursuant to Paragraph 57, the sums due (with accrued interest) to EPA in the manner described in Paragraph 55. If Respondent prevails concerning any aspect of the contested costs, Respondent shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to EPA in the manner described in Paragraph 55. Respondent shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondent's obligation to reimburse EPA for its Future Response Costs.

#### **XIX. COVENANT NOT TO SUE BY EPA**

58. In consideration of the actions that will be performed and the payments that will be made by Respondent pursuant to the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to otherwise take any administrative action against Respondent, its heirs, successors and assigns, 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. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondent of all obligations pursuant to this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XVIII. This covenant not to sue extends only to Respondent, its heirs, successors and assigns, and does not extend to any other person.

## XX. RESERVATIONS OF RIGHTS

59. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law. Respondent reserves any and all rights and defenses not otherwise waived herein or by operation of this Order.

60. The covenant not to sue set forth in Section XIX (Covenant Not to Sue by EPA) above does not pertain to any matters other than those expressly identified therein. EPA and Respondent reserve, and this Order is without prejudice to, all rights of EPA against Respondent, and all defenses of Respondent, with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondent to meet a requirement of this Order;
- b. 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.

61. Work Takeover. In the event EPA determines that Respondent (i) has ceased implementation of any portion of the Work and such cessation is not agreed to by EPA, (ii) is seriously or repeatedly deficient or late in their performance of the Work, or (iii) is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XV (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted. Costs incurred by EPA in performing the Work pursuant to this Paragraph shall be considered Future Response Costs

that Respondent shall pay pursuant to Section XVIII (Payment of Response Costs). Notwithstanding any other provision of this Order, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XXI. COVENANT NOT TO SUE BY RESPONDENT**

62. Except as otherwise reserved herein, Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States or its contractors or employees, with respect to the Work, 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 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.

63. 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**

64. 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 Respondent.

65. Except as expressly provided in Section XIX (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondent 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.

66. No action or decision by U.S. EPA pursuant to this Order shall give rise to any right to judicial review.

### **XXIII. CONTRIBUTION PROTECTION**

67. The Parties agree that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Order. The “matters addressed” in this Order are the Work and Future Response Costs. Nothing in this Order precludes the United States or Respondent from asserting any claims, causes of action, or demands against any person not parties to this Order for indemnification, contribution, or cost recovery.

### **XXIV. INDEMNIFICATION**

68. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on Respondent’s behalf or under Respondent’s control, in carrying out activities pursuant to this Order. The United States and the State of Wisconsin shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Order. Neither Respondent 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 EPA while acting within the scope of his or her employment, under circumstances where 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. If an EPA employee is injured while acting within the scope of his or her employment, government liability for that injury will generally be dictated by the provisions of the Federal Employees Compensation Act, 5 U.S.C. § 1801.

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

70. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any

person for performance of Work on or relating to the Site. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site.

## **XXV. FINANCIAL ASSURANCE**

71. Upon the written request of EPA to Respondent, Respondent shall establish and maintain within 30 days of such request financial security for the benefit of EPA in the amount of \$ 1.5 million in one or more of the following forms, in order to secure the full and final completion of Work by Respondent:

- a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;
- b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA equaling the total estimated cost of the Work;
- c. a trust fund administered by a trustee acceptable in all respects to EPA;
- d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;
- e. a corporate guarantee to perform the Work provided by one or more parent corporations or subsidiaries of Respondent, or by one or more unrelated corporations that have a substantial business relationship with at least one of Respondents; including a demonstration that any such company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f);
- f. a corporate guarantee to perform the Work by Respondent, including a demonstration that Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f); and/or
- g. a demonstration that Respondent possesses sufficient net worth to complete the Work required by this Order as evidenced by audited financial statements determined by EPA to be sufficient for these purposes.

72. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section

(including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondent shall, within thirty (30) days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 71, above. Respondent's inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Order.

73. If Respondent seeks to ensure completion of the Work through a guarantee pursuant to Subparagraph 71.e. or 71.f. of this Order, Respondent shall (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date, to EPA. For the purposes of this Order, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the current cost estimate of \$1,500,000 for the Work at the Site shall be used in relevant financial test calculations.

74. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work had diminished below the amount set forth in Paragraph 71 of this Section, Respondent may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA. In the event of a dispute, Respondent may reduce the amount of security in accordance with the written decision resolving the dispute.

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

## **XXVI. SEVERABILITY/INTEGRATION/APPENDICES**

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

77. This Order and its appendices 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. The following appendices are

attached to and incorporated into this Order:

“Appendix A” is the SOW.

“Appendix B is the map of the Site

## **XXVII. SUBSEQUENT MODIFICATION**

78. The RPM may, in consultation with WDNR, make modifications to any plan or schedule or SOW in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the RPM’s oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

79. If Respondent seeks permission to deviate from any approved Work Plan or schedule or SOW, Respondent’s Project Coordinator shall submit a written request to the RPM, with a copy to the WDNR PM, for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the RPM pursuant to Paragraph 78.

80. No informal advice, guidance, suggestion, or comment by the RPM or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent 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.

## **XXVIII. PUBLIC COMMENT**

81. The administrative record file for the proposed remedial action, including the Remedial Investigation Final Report and the Feasibility Study Final Report, the Risk Assessment, and documents considered by EPA in developing the Proposed Plan, will be available for public review and comment pursuant to 40 C.F.R. § 300.430, and EPA’s Community Relations Plan. Following the public review and comment period, EPA will notify Respondent of the remedial action alternative(s) selected by EPA for implementation at the Site.

## **XXIX. EFFECTIVE DATE**

82. This Order shall be effective upon signature by the Director, Superfund Division, U.S. EPA Region 5.

### **XXX. NOTICE OF COMPLETION OF WORK**

83. When EPA determines, after EPA's review of the Final Feasibility Study Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, EPA will provide written notice of such completion to Respondent. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Feasibility Study Report in accordance with the EPA notice, subject to Respondent's right to invoke the procedures set forth in Section XV (Dispute Resolution). Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Order subject to Respondent's right to invoke the procedures set forth in Section XV (Dispute Resolution).

**Signature Page for  
Ashland Lakefront Superfund Site  
Administrative Order by Consent  
for Remedial Investigation/Feasibility Study  
Docket No. \_\_\_\_\_**

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2003.

For Respondent Northern States Power Company, a Wisconsin corporation, (d/b/a Xcel Energy, a subsidiary of Xcel Energy Inc.)

\_\_\_\_\_  
Michael L. Swenson

Title: President

**Signature Page for  
Ashland Lakefront Superfund Site  
Administrative Order by Consent  
for Remedial Investigation/Feasibility Study  
Docket No. \_\_\_\_\_**

It is so ORDERED AND AGREED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

BY: \_\_\_\_\_ DATE: \_\_\_\_\_

William E. Muno  
Director, Superfund Division  
Region 5  
U.S. Environmental Protection Agency

EFFECTIVE DATE: \_\_\_\_\_