

E. 5
9/30/91

152350

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

IN THE MATTER OF:)
)
FADROWSKI DRUM DISPOSAL SITE)
Franklin, Wisconsin)
)
Respondents,)
)
Proceeding under Sections 104,)
122(a), and 122(d)(3) of the)
Comprehensive Environmental)
Response, Compensation, and)
Liability Act of 1980, as amended.)

U.S. EPA DOCKET NO.

ADMINISTRATIVE ORDER ON CONSENT RE:
REMEDIAL DESIGN

The United States Environmental Protection Agency ("U.S. EPA"), and the Respondents have agreed to the making and entry of this Administrative Order on Consent ("Consent Order").

I. JURISDICTION

A. This Consent Order is issued pursuant to the authority vested in the President of the United States by Sections 104, 122(a) and 122(d)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq., and delegated to the Administrator of the U.S. EPA on January 23, 1987, by Executive Order 12580, 52 Federal Register 2926 (January 29, 1987), further delegated to the Regional Administrators by U.S. EPA Interim Delegation No. 14-14-C on February 26, 1987, and further delegated to the Director of the Waste Management Division by Region V Delegation No. 14-14-C on September 14, 1987.

B. The Respondents to this Consent Order agree to undertake all actions required by the terms and conditions

hereunder, and consent to and will not contest or legally challenge the validity of this Consent Order or its terms, or the U.S. EPA's authority or jurisdiction to issue or enforce this Consent Order.

II. NOTICE OF ACTION

A. The U.S. EPA has notified all persons whom it considers to be potentially responsible parties ("PRPs") as of the date of entry of this Consent Order of this action and has provided each PRP with the names and addresses of the PRPs, pursuant to Section 122(e) of CERCLA.

B. The U.S. EPA has notified the Federal Natural Resource trustee of the negotiations in this action pursuant to the requirements of Section 122(j) of CERCLA.

III. PARTIES BOUND

A. This Consent Order applies to and binds the following persons as defined in Section 101(21) of CERCLA:

- (1) The U.S. EPA, through the Director of the Waste Management Division, Region V;
- (2) The following persons as defined in Section 101(21) of CERCLA, herein referred to as the Respondents:

Menard, Inc.

- (3) the successors and assignees of the Respondents; and,
- (4) the agents of the Respondents responsible for carrying out the Respondents' obligations under this Consent Order.

B. The undersigned representatives of the U.S. EPA, and Respondents each certifies that he or she is fully authorized to

enter into the terms and conditions of this Consent Order and to execute and legally bind the party he or she represents to this document. The Respondents shall be jointly and severally responsible for carrying out all actions required of the Respondents by the terms and conditions of this Consent Order.

C. No change in ownership, corporate, or partnership status shall in any way alter the status or responsibility of the Respondents under this Consent Order. The Respondents shall provide copies of this Consent Order to any and all subsequent owners or successors before ownership rights or stock or assets in a corporate acquisition are transferred. The Respondents shall be responsible for ensuring that all officers, directors, principals, contractors, consultants, firms and other persons or entities acting under or for the Respondents with respect to all matters herein comply with the terms of this Consent Order. The Respondents shall provide copies of this Consent Order to all contractors, subcontractors, laboratories, consultants, firms and other persons or entities retained to conduct any work under this Consent Order within fourteen (14) days after the effective date of this Consent Order or the date of retaining their services, whichever is later.

IV. STATEMENT OF PURPOSE

A. The objectives of this Consent Order, and the mutual objectives of the U.S. EPA, and the Respondents in entering this Consent Order, are for the Respondents to: (1) fully prepare the design to implement the Record of Decision for this Facility

which was signed by the Regional Administrator of Region V of the United States Environmental Protection Agency on June 10, 1991 in accordance with the ROD, U.S. EPA Superfund Remedial Design and Remedial Action Guidance, the approved Remedial Design (RD) Work Plan, the Scope of Work (SOW) and any additional guidance provided by U.S. EPA; (2) recover response and oversight costs incurred by the U.S. EPA and the WDNR with respect to this action.

B. The activities conducted pursuant to this Consent Order are subject to approval by the U.S. EPA in consultation with the WDNR, as provided herein, shall employ sound scientific, engineering and construction practices and shall be consistent with CERCLA, the National Contingency Plan ("NCP"), 40 CFR Part 300, as amended, and all other applicable laws.

C. The Respondents and U.S. EPA agree that settlement of this matter and entry of this Consent Order is made in good faith in an effort to avoid further litigation in this matter, without any admissions as to facts or liability for any purpose, to settle and resolve disputed claims.

V. FINDINGS OF FACT

Based upon information available on the effective date of this Consent Order, the Director of the Waste Management Division, Region V makes the following findings:

A. The Fadrowski Drum Disposal Site (FDDS) is located on approximately 20 acres of semi-rural land in the southeast quarter of Section 1, Township 5 North, Range 21 East, Milwaukee

County. The Site is situated within the boundaries of the City of Franklin, which is located just outside of the Milwaukee city limits. The area surrounding the site is a mixture of residential and commercial developments. There are several residences with private wells located within 2,000 feet of the site, but drinking water has not been impacted from the contamination at the Site.

B. Between 1970 and 1982, the FDDS was owned and operated by Fadrowski as an unregulated, unlicensed landfill. Pursuant to applicable state regulations, the operation would have been exempt from regulation (Chapters NR 151 and NR 180 of the Wisconsin Administrative Code) if Fadrowski had only disposed of solid waste consisting of clean earth fill, containing less than 25% by volume of brick, concrete, and building stone. During the same timeframe, Fadrowski was also the principal of a waste collection and transportation company called Ed's Masonry & Trucking, Inc. (Ed's Trucking). Ed's Trucking was licensed by the WDNR to collect and transport noncombustible waste, wood matter, refuse and garbage. The customers of Ed's Trucking consisted of a wide variety of local businesses and industries, which generated a variety of wastes.

C. A WDNR inspection of the FDDS conducted in February 1981, disclosed that Fadrowski had been disposing of non-exempt solid waste at the FDDS without a license. The WDNR had warned Fadrowski that he could not dispose of regulated solid waste at the FDDS; however, Fadrowski did not apply for a solid waste

disposal license. Later that same year, a former employee of Ed's Trucking, telephoned in a complaint to the WDNR in which she informed the agency of her belief that substantial quantities of non-exempt wastes were being disposed of at the FDDS by Fadrowski. WDNR employees again inspected the FDDS and found further evidence of non-exempt solid waste disposal, including metal, wood, foundry waste, crushed drums and slag-type boiler waste.

D. Later in 1981, the City of Franklin requested that Fadrowski provide a schedule for bringing the FDDS into compliance with the City's code. Fadrowski did not comply with the City code requirements.

E. In December 1982, Menard, Inc. purchased the FDDS. Menards also purchased the two other parcels adjacent to the FDDS to the north, on which it planned to build its store. Menard planned to use the FDDS as a source of fill material to change the grades of the other parcels and make all three properties suitable for commercial development. Excavation and grading work began in early May 1983. During this work, various-sized containers of waste and sludges were uncovered. On June 28, 1983, a bulldozer operator ran over a drum containing an unknown liquid material, the drum ruptured and the contents squirted out. The Franklin Fire Department was notified and it, in turn, contacted the WDNR. A hazardous waste investigator for the WDNR arrived at the FDDS and saw several drums exposed, all of which were crushed to some degree with their contents oozing out. The

WDNR investigator took pictures and sampled the waste at the FDDS for analysis by the State Laboratory of Hygiene.

F. The WDNR directed Menard to retain a consultant to perform waste analyses and arrange for containment and storage of exposed waste material until it could be properly disposed of. An environmental consulting firm retained by Menard arrived at the FDDS the next day to collect additional samples of the exposed materials. Samples were collected and split with WDNR. Menard's contractor constructed containment berms and covered exposed waste material with the soil.

G. Laboratory analyses of the WDNR waste samples indicated that the drum contents were hazardous, as defined by Chapter NR 181 of the Wisconsin Administrative Code (WAC). Samples contained high concentrations of lead (32,700 ppm), chromium (6,800 ppm), the pesticide DDT (1,450) and a trace of arsenic (less than 5 ppm). The samples were also analyzed for volatile organic compounds (VOCs) and were found to contain petroleum-derived hydrocarbons, but not chlorinated hydrocarbons. Ignitability test results for the WDNR waste samples indicated that other wastes sampled at the FDDS were characteristic hazardous wastes because their flash point was below 140° F.

H. U.S. EPA's Office of Health and Environmental Assessment has determined that carcinogenic risks from the principal threat (buried containerized wastes) exceeds 1×10^{-4} .

VI. CONCLUSIONS OF LAW

Based upon information available on the effective date of this Consent Order, the Director of the Waste Management Division, Region V makes the following conclusions of law:

A. The Fadrowski Drum Disposal Site is a "facility" as defined in Section 101(9) of CERCLA.

B. "Hazardous substances", as defined in Section 101(14) of CERCLA, have been deposited, stored, disposed of, placed, or otherwise located at the Facility;

C. Each Respondent is a "person" as defined in Section 101(21) of CERCLA, Wisconsin Statutes;

D. The presence of hazardous substances at the Facility or the past, present or potential migration of hazardous substances currently located at or emanating from the Facility constitutes a "release" or substantial threat of "release", as defined in Section 101(22) of CERCLA, into the environment of a hazardous substance from or at the Facility; and,

~~E. Each Respondent is a liable person pursuant to Section 107 of CERCLA and a potentially responsible party for the purposes of Section 122 of CERCLA.~~

Unless otherwise defined herein, terms used in this Consent Order shall have the meaning defined in CERCLA, the NCP or applicable U.S. EPA guidance and "days" shall mean calendar days.

VII. DETERMINATIONS

The Director of the Waste Management Division, Region V has determined that:

WMB

A. The Respondents will promptly and properly take appropriate response action at the Facility by conducting a Remedial Design and are qualified to perform the RD; and

B. The actions required by this Consent Order are in the public interest and are consistent with CERCLA and the NCP.

VIII. WORK TO BE PERFORMED

A. All work to be performed by the Respondents pursuant to this Consent Order shall be under the direction and supervision of a qualified professional architect or engineer. Prior to the initiation of work at the Facility, the Respondents shall notify the U.S. EPA and the WDNR, in writing, of the name, title, and qualifications of the proposed engineer or architect, and of the names of principal contractors and/or subcontractors proposed to be used in carrying out the work to be performed pursuant to this Consent Order. Selection of any such engineer, architect, contractor and/or subcontractor shall be subject to approval by the U.S. EPA in consultation with the WDNR. The Respondents reserve the right to replace the engineer, architect, contractor and/or subcontractor for cause, except that any such replacement shall be subject to the notice and approval requirements of this paragraph and shall not be cause for delay of performance of work required by this Consent Order.

B. Attachment I to this Consent Order provides a Scope of Work For Conducting a RD at the Fadrowski Drum Disposal Site, Franklin, Wisconsin, which is incorporated into and made a part of this Consent Order.

C. Respondents shall perform the following work:

1. Within sixty (60) days of the effective date of this Consent Order, the Respondents shall submit to the U.S. EPA and the WDNR a Work Plan for a complete RD for the Facility (hereinafter, "RD Work Plan"). The RD Work Plan shall be developed in conformance with the attached SOW, the standards set forth in Section 121 of CERCLA, applicable U.S. EPA guidance and any additional guidance documents provided by the U.S. EPA.

2. In addition to the requirements of the preceding paragraph, the RD Work Plan submittal shall include, but not be limited to, the following project plans: (1) costs estimate; (2) Remedial Design project schedule; (3) construction quality assurance objectives; (4) RD Health and Safety plan and; (5) operation and maintenance plan, to be prepared in accordance with applicable guidance and attached SOW.

3. The RD Work Plan shall be subject to review, modification, and approval by the U.S. EPA, in consultation with the WDNR.

4. Within forty-five (45) days of receipt of the RD Work Plan, the U.S. EPA Project Coordinator shall notify the Respondents, in writing, of approval, approval with modifications, or disapproval of the RD Work Plan, or any part thereof. If a longer review period is required, the U.S. EPA Project Coordinator shall notify the Respondents of that fact within thirty (30) days of receipt of the Work Plan. In the event of disapproval of the RD Work Plan, or any part thereof,

the U.S. EPA shall specify, in writing, any deficiencies and required modifications to the RD Work Plan.

5. Within fifteen (15) days of receipt of any U.S. EPA written disapproval of the RD Work Plan, or any part thereof, the Respondents shall submit a revised RD Work Plan to the U.S. EPA and the WDNR, which incorporates the U.S. EPA comments and specified modifications.

6. In the event of subsequent U.S. EPA disapproval of the revised RD Work Plan, or any part thereof, the U.S. EPA retains the right to terminate this Consent Order, conduct a complete RD and seek reimbursement from the Respondents. U.S. EPA also retains the right to amend or develop the plan, report or other item. In addition the U.S. EPA retains the right to enforce the terms of this Consent Order in the appropriate judicial or administrative forum.

7. The Respondents shall implement the Remedial Design work detailed in the RD Work Plan, according to the schedule contained therein, if and when the RD Work Plan is fully approved by the U.S. EPA, in consultation with the WDNR, or approved with modifications. Unless otherwise directed by the U.S. EPA, the Respondents shall not commence field activities until approval, in writing, by the U.S. EPA of the RD Work Plan. The final, U.S. EPA-approved RD Work Plan shall be attached hereto as Attachment II and shall be deemed incorporated into and made an enforceable part of this Consent Order. All work shall be conducted in accordance with the National Contingency Plan, applicable RD

guidance and the requirements of this Consent Order, including the standards, specifications and schedule contained in the RD Work Plan.

8. The Respondents shall include as part of the design proposed institutional controls in the form of deed restrictions in order to prohibit future use or development of the Facility in a manner that is inconsistent with or may defeat or impair the effectiveness of the remedial measure undertaken pursuant to this Consent Order and SOW.

IX. PLANS AND REPORTS

A. The Respondents shall provide preliminary, pre-final and final design phases, as well as any other plans or reports required by the RD Work Plan and SOW, to the U.S. EPA and the WDNR according to the schedule contained in the RD Work Plan. No documents or reports shall be titled or considered "final" until notification by U.S. EPA.

B. If the U.S. EPA, in consultation with the WDNR, disapproves any preliminary pre-final or final design phase, plan or report, the U.S. EPA shall specify, in writing, any deficiencies and required modifications to such design phase, plan or report. Within fifteen (15) days of receipt of U.S. EPA's comments or such longer period as the U.S. EPA Project Coordinator may establish, the Respondents shall submit a revised design phase, plan or report, which incorporates all U.S. EPA comments and modifications, to the U.S. EPA and the WDNR. Subsequent revisions of any plan or report may be requested and

approved by the U.S. EPA, in consultation with the WDNR, without modification to this Consent Order under Article XXIX.

C. In the event of subsequent U.S. EPA disapproval of the revised RD Work Plan, or any part thereof, the U.S. EPA retains the right to terminate this Consent Order, conduct a complete RD and seek reimbursement from the Respondents. U.S. EPA also retains the right to amend or develop the plan, report or other item. In addition the U.S. EPA and the WDNR each retains the right to enforce the terms of this Consent Order in the appropriate judicial or administrative forum.

D. The Respondents shall provide monthly written progress reports to the U.S. EPA and the WDNR according to the schedule contained in the RD Work Plan. At a minimum, these monthly written progress reports shall include the following:

1. A description and estimate of the percentage of the RD completed;
2. Summaries of all findings and sampling during the reporting period;
3. Summaries of all changes made in the RD during the reporting period, indicating U.S. approval of those changes;
4. Summaries of all contacts with representatives of the local community, public interest groups or State government during the reporting period;
5. Summaries of all problems or potential problems encountered during the reporting period;
6. Summaries of actions taken and being taken to rectify problems;
7. Changes in key personnel during the reporting period;
8. Projected work for the next reporting period; and

9. Copies of daily reports, inspection reports, laboratory/monitoring data, etc;
10. Summaries of all meetings, conference calls, and technical discussions with U.S. EPA and/or State personnel; and
11. Comparison of working schedule to project schedule.

The project reports shall be signed by the Settling Defendant(s) Project Coordinator.

E. The monthly written progress reports shall be submitted to the U.S. EPA and the WDNR by the fifth (5th) business day of each month following the date of commencement of the work detailed in the RD Work Plan.

F. Neither failure of the U.S. EPA to expressly approve or disapprove of a submission by the Respondents within the specified time period nor the absence of comments shall be construed as approval of such submission by the U.S. EPA.

X. ADDRESSES FOR ALL CORRESPONDENCE

Documents, including reports, approvals, disapprovals and other correspondences to be submitted pursuant to this Consent Order shall be sent by certified mail, overnight courier or personal delivery to the following addresses, or to such other addresses or addressees as the Respondents, the WDNR or the U.S. EPA may hereafter designate in writing:

A. Five (5) copies (or such other number as the U.S. EPA Project Coordinator may designate) of all documents to be submitted to the U.S. EPA should be sent to:

Remedial Response Branch (5HS-11)
U.S. Environmental Protection Agency, Region V
230 S. Dearborn Street
Chicago, Illinois 60604
attn: Terese Van Donsel, Superfund
Fadrowski Drum Disposal Site

In addition, two copies of all documents to be submitted to the U.S. EPA should be sent to an oversight contractor identified by the U.S. EPA Project Coordinator.

B. Documents to be submitted to the WDNR should be sent to:

Wisconsin Department of Natural Resources
Emergency and Remedial Response Section SW/3
101 S. Webster Street
Madison, Wisconsin 53707-7921
attn: Sue Bangert
Fadrowski Drum Disposal Site

C. Documents to be submitted to the Respondents should be sent to a name and address to be designated by the Respondents within ten (10) days of the effective date of this Consent Order.

XI. ADDITIONAL WORK

A. In the event that the U.S. EPA, or the Respondents determine that additional work, including remedial investigatory work and/or engineering evaluation, is necessary to accomplish the objectives of this Consent Order, notification of such additional work shall be provided to each of the other parties.

B. Any additional work determined to be necessary by the Respondents shall be subject to written approval by the U.S. EPA, in consultation with the WDNR.

C. Any additional work determined to be necessary by the Respondents and approved in writing by the U.S. EPA, or

determined to be necessary by the U.S. EPA in consultation with the WDNR and requested of the Respondents by U.S. EPA in writing, shall be completed by the Respondents in accordance with the standards, specifications and schedule determined or approved in writing by the U.S. EPA in consultation with the WDNR.

XII. COMPLIANCE WITH APPLICABLE LAWS

All work undertaken by the Respondents pursuant to this Consent Order shall be performed in compliance with all applicable Federal, State and local laws, ordinances and regulations, including all Occupational Health and Safety Administration and Department of Transportation regulations. In the event of a conflict in the application of Federal, State, or local laws, ordinances and regulations, the Respondents shall comply with the more/most stringent such law, ordinance or regulation, unless provided otherwise in writing by the U.S. EPA. The Respondents shall be responsible for obtaining all State or local permits which are necessary for the performance of any work hereunder.

XIII. ACCESS AND HEALTH AND SAFETY PLAN

A. Within sixty (60) days after the effective date of this Consent Order, the Respondent shall submit to the U.S. EPA and the WDNR a draft health and safety plan designed to protect the health of all persons involved in response activities at the Facility and of the community surrounding the Facility, consistent with applicable U.S. EPA, state and Occupational Health and Safety Administration regulations and guidance.

Within forty-five (45) days of receipt of the draft health and safety plan, the U.S. EPA and the WDNR shall provide the Respondents with comments to the health and safety plan. It is not the responsibility of U.S. EPA and WDNR to approve Health and Safety Plan contained therein.

B. To the extent that the Facility or other areas where work is to be performed hereunder is presently owned by parties other than the Respondents, the Respondents shall obtain, or shall use their best efforts to obtain, access agreements from the present owners within thirty (30) days of approval of the RD Work Plan. The Respondents' best efforts shall include, when necessary, the proffer of reasonable compensation to such other parties. Such agreements shall provide access for the U.S. EPA, the WDNR, and all authorized representatives of the U.S. EPA and the WDNR, as specified below, and shall be attached to this Consent Order as Attachment III. In the event that such access agreements are not obtained within the time referenced above, the Respondents shall so notify the U.S. EPA and the WDNR in writing.

The U.S. EPA reserves the right to terminate this Consent Order, perform a complete or partial RD and seek reimbursement from the Respondents should the Respondents' inability to gain access to the Facility or other areas materially affect the Respondents' ability to perform all the work required herein.

C. Authorized representatives of the U.S. EPA and the WDNR shall be allowed access to the Facility, and to other areas where work is to be performed hereunder, by the Respondents, and as

part of any agreement obtained under paragraph A above, for purposes including, but not limited to: inspecting records, operating logs and contracts related to the Facility; reviewing the progress of the Respondents in carrying out the terms of this Consent Order; conducting such tests, inspections, and sampling as the U.S. EPA, in consultation with the WDNR, may deem necessary; using a camera, sound or video recording, or other documentary type equipment; and verifying the data submitted to the U.S. EPA and the WDNR by the Respondents pursuant to this Consent Order. The Respondents shall permit such authorized representatives to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, which pertain to this Consent Order, subject to Paragraph C of Article XV of this Consent Order (Sampling and Data/Document Availability) regarding confidentiality. All persons with access to the Facility pursuant to this Consent Order shall comply with the revised health and safety plan prepared by the Respondents.

D. Nothing herein shall be construed as restricting the inspection or access authority of the U.S. EPA or the WDNR under any applicable law, permit or regulation.

XIV. PROJECT COORDINATORS

A. On or before the effective date of this Consent Order, the Respondents shall designate a Project Coordinator, who shall have primary responsibility for implementation of all the work at the Facility, and the U.S. EPA and the WDNR shall each designate

a Project Coordinator responsible for overseeing the implementation of the work. The Project Coordinators will serve as the designated representatives at the Facility for their respective parties. To the maximum extent possible, communications between the Respondents, the WDNR and the U.S. EPA, and all documents, reports, approvals and other correspondences concerning the activities performed pursuant to the terms and conditions of this Consent Order, shall be directed through the Project Coordinators.

B. The U.S. EPA, the WDNR and the Respondents shall have the right to change their respective Project Coordinators. Such a change shall be accomplished by notifying the other parties in writing. To the extent possible, such notification shall occur at least ten (10) days prior to the change.

C. The U.S. EPA Project Coordinator shall have all the authorities vested in an On-Scene Coordinator and a Remedial Project Manager ("OSC", "RPM") by the NCP, including the authority to halt, conduct, or direct any work required by this Consent Order or any response action taken by the U.S. EPA when conditions at the Facility may present an imminent and substantial endangerment to human health or welfare or the environment. The Respondents shall notify the U.S. EPA and the WDNR Project Coordinators immediately of any conditions at the Facility which may present and imminent and substantial endangerment to human health or welfare of the environment. If the U.S. EPA Project Coordinator halts work pursuant to this

paragraph, the Respondents may request a modification of the schedule described in the RD Work Plan and this Consent Order.

D. The absence of the U.S. EPA or WDNR Project Coordinator from the Facility shall not be cause for stoppage of work.

E. The Project Coordinator for the Respondents shall be on-site during all hours of work at the Facility and shall be on call throughout the pendency of this Consent Order.

XV. SAMPLING AND DATA/DOCUMENT AVAILABILITY

A. The Respondents shall make the results of all sampling, tests and other data generated by or on behalf of the Respondents pursuant to implementation of this Consent Order available to the U.S. EPA and the WDNR, and shall submit these results in written monthly progress reports, as required by Article IX of this Consent Order (Plans and Reports).

B. At the request of the U.S. EPA or the WDNR, the Respondents shall provide the requester with split or duplicate samples of any samples collected by the Respondents pursuant to the implementation of this Consent Order. The Respondents shall notify the U.S. EPA and the WDNR at least ten (10) business days in advance of any sample collection activity.

C. Pursuant to applicable Federal laws and regulations, (Section 104(e) of CERCLA and 40 CFR Part 2), the Respondents may assert a confidentiality claim with respect to any or all of the information requested or submitted pursuant to the terms of this Consent Order. Such an assertion must be adequately substantiated when the assertion is made. Analytical data and

other information described in Section 104(e)(7)(F) of CERCLA shall not be claimed as confidential by the Respondents. Information determined to be confidential by the U.S. EPA in accordance with applicable federal laws and regulations will be afforded the full protection provided by such laws and regulations. Information determined to be confidential by the WDNR pursuant to applicable State laws and regulations will be afforded the full protection provided by such laws and regulations. If no confidentiality claim accompanies information when it is submitted to the U.S. EPA and the WDNR, or if information claimed as confidential is determined by the U.S. EPA or the WDNR not to be confidential, the information may be made available to the public by the recipient.

XVI. QUALITY ASSURANCE

A. The Respondents shall prepare preliminary and final Quality Assurance Project Plan ("QAPP") for submittal to the U.S. EPA and the WDNR according to the schedule in the SOW. The Respondents shall participate in a pre-QAPP meeting with the U.S. EPA prior to submission of the preliminary QAPP to discuss the contents of the QAPP.

B. The QAPPs shall be subject to review, modification and approval by the U.S. EPA, in consultation with the WDNR, in accordance with Article IX (Plans and Reports).

C. The Respondents shall use quality assurance, quality control and chain of custody procedures in accordance with the "EPA NEIC Policies and Procedures Manual" (May 1978, revised

1984, EPA-330/9-78-001-R), the U.S. EPA "Interim Guidelines and Specifications for Preparing Quality Assurance Project Plans" (December, 1980, QAMS-005/80), the "Final Standard Quality Assurance Project Plan Content Document" June 1989, and other applicable documents throughout all data collection activities.

D. The Respondents shall consult with the U.S. EPA and the WDNR Project Coordinators in planning for, and prior to, all sampling and analysis detailed in the RD Work Plan. In order to provide quality assurance and maintain quality control with respect to all samples collected pursuant to this Consent Order, the Respondents shall:

1. Ensure that the U.S. EPA and WDNR personnel and/or authorized representatives are allowed access to any laboratories and personnel utilized by the Respondents for analyses;

2. Ensure that all sampling and analyses are performed according to the U.S. EPA methods or other methods deemed satisfactory by the U.S. EPA and include all protocols to be used ; for analyses in the Quality Assurance Project Plan; and,

3. Ensure that any laboratories utilized by the Respondents for analyses participate in a documented U.S. EPA Quality Assurance/Quality Control program equivalent to that followed by the U.S. EPA and consistent with U.S. EPA guidance (including document QAMS-005/80). As part of such a program, and upon request by the U.S. EPA, such laboratories shall perform analyses of samples provided by the U.S. EPA to demonstrate the quality of analytical data for each such laboratory.

E. The Respondents waive any objection to the validity of data generated during the performance of the work required by this Consent Order provided that such data have been verified according to the Quality Assurance/Quality Control procedures contained in the approved QAPP.

XVII. TIMELINESS OF PERFORMANCE

A. The Respondents shall cause all work required under this Consent Order and Attachments, including Additional Work required pursuant to Article XI and any work required pursuant to a modification to this Consent Order under Article XXIX, to be performed within the time limits set forth in this Consent Order and Attachments or modifications or in a written approval or determination of Additional Work pursuant to Article XI. C, unless performance is delayed by a force majeure. For purposes of this Consent Order, a "force majeure" is an event entirely beyond the control of the Respondents. Neither increase in costs, Respondents' inability to pay costs, nor failure of a contractor to perform constitutes a force majeure.

B. The Respondents shall notify the U.S. EPA and the WDNR in writing no later than two (2) days after any event which causes a delay in performance, whether or not the Respondents contends such event constitutes a force majeure. Such notification shall describe the anticipated length of the delay, the cause or causes of the delay, the measures taken and to be taken by the Respondents to minimize the delay, and the timetable by which these measures will be implemented. If the Respondents

contend that a force majeure caused the delay, the Respondents shall set forth the reasons for such contention in the notification. In any administrative or judicial proceeding concerning this Consent Order, the Respondents shall have the burden of demonstrating that a force majeure caused any delay in performance.

C. If the U.S. EPA, in consultation with the WDNR, determines that a delay in performance is attributable to a force majeure, U.S. EPA may, in writing, extend the time period for performance under this Consent Order for a time period not to exceed that attributable to the force majeure.

XVIII. STIPULATED PENALTIES

A. The Respondents shall be liable for payment into the Hazardous Substances Superfund administered by the U.S. EPA of the sums set forth below as stipulated penalties for each week or part thereof that the Respondents fail to submit a report or document or comply with a schedule in accordance with the requirements contained in this Consent Order, and Attachments or modifications, unless U.S. EPA determines that such delay is attributable to a force majeure as defined in Article XVII (Timeliness of Performance) above. Such sums shall be due and payable within fifteen (15) days of receipt of notification from the U.S. EPA assessing the penalties. These stipulated penalties shall accrue in the amount of \$5,000.00 for the first week or part thereof, and \$10,000.00 for each week or part thereof thereafter. Stipulated penalties shall begin to accrue on the

day that performance is due or a violation occurs and extend through the period of correction. Payment shall be made in the manner described in Article XXIV below (Reimbursement of Costs).

B. The stipulated penalties set forth in paragraph A of this section shall not preclude the U.S. EPA from electing to pursue any other remedy or sanction because of the Respondents' failure to comply with any of the terms of this Consent Order, including a suit to enforce the terms of this Consent Order. Said stipulated penalties shall not preclude the U.S. EPA from seeking statutory penalties up to the amount authorized by law if Respondents fail to comply with any requirements of this Consent Order.

XIX. DISPUTE RESOLUTION

A. The parties shall use their best efforts to resolve all disputes or differences of opinion arising with regard to this Consent Order informally and in good faith. The resolution of any dispute regarding this Consent Order must be in writing and signed by the U.S. EPA.

B. If a dispute arises concerning this Consent Order, which the parties are unable to resolve informally, U.S. EPA's position shall prevail unless Respondents invokes the following procedures:

1. If, after ten (10) days, informal negotiations have not resolved the dispute, Respondents shall present a written notice of such dispute by certified mail, overnight courier or personal delivery to the other

parties. Such notice shall set forth the specific points of dispute, the position of the Respondents and the technical basis therefor, and any actions which the Respondents considers necessary to resolve the dispute;

2. Within ten (10) days of receipt of such a written notice, U.S. EPA, in consultation with WDNR shall provide a written response to the Respondent and other parties setting forth its positions and the basis therefor. During the five (5) business days following receipt of the response, the parties shall attempt to negotiate, in good faith, a resolution of their differences; and,

3. Following the expiration of the time periods described in Subparagraph 2 above, if the U.S. EPA concurs with the position of the Respondents, the U.S. EPA shall so notify the Respondents and the WDNR in writing and the parties shall modify this Consent Order pursuant to Article XXIX to include any necessary extensions of time or variances of work. If the U.S. EPA does not concur with the position of the Respondents, the U.S. EPA shall resolve the dispute, based upon and consistent with the terms and objectives of this Consent Order, and shall provide written notification of such resolution to the Respondents.

F. The pendency of dispute resolution set forth in this Article shall not affect the time period for completion of work and/or obligations to be performed under this Consent Order, except that upon mutual agreement of the U.S. EPA, in consultation with the WDNR, and the Respondents, any time period may be extended not to exceed the actual time taken to resolve the dispute in which case elements of work and/or obligations not affected by the dispute shall be completed in accordance with the current approved schedule contained in the RD Work Plan.

G. Upon written resolution of any dispute, whether informally or using the procedures in this Article, any additions or modifications required as a result of such dispute resolution shall immediately be incorporated, if necessary, into the appropriate plan or procedure and into this Consent Order. The Respondents shall proceed with all remaining work according to the modified plan or procedure and this Consent Order.

H. In any administrative or judicial proceeding concerning this Consent Order, the party or parties disputing U.S. EPA's position shall have the burden of proving that U.S. EPA's position is arbitrary and capricious or inconsistent with this Consent Order. The provisions regarding dispute resolution contained in this Consent Order shall supersede any other dispute resolution provisions which are potentially applicable to any of the parties, including any dispute resolution provisions contained in a Superfund Memorandum of Agreement between the State and the U.S. EPA.

XX. COMMUNITY RELATIONS

The Respondents shall cooperate with the U.S. EPA and the WDNR in providing RD information to the public. To the extent requested by the U.S. EPA, the Respondents shall participate in the preparation of all appropriate information disseminated to the public and in public meetings which may be held or sponsored by the U.S. EPA or the WDNR to explain activities at or concerning the Facility, including the results of the RD.

XXI. RECORD PRESERVATION

The Respondents shall preserve, during the pendency of this Consent Order, and for a minimum of ten (10) years after termination of this Consent Order, all records and documents in the possession of the Respondents, or in the possession of any division, employees, agents, accountants, contractors, or attorneys of the Respondents, which relate in any way to the selection of remedial action at the Facility, whether or not prepared pursuant to this Consent Order and despite any document retention policy to the contrary. After this ten year period, the Respondents shall notify the U.S. EPA in writing within sixty (60) days prior to destruction or disposal of any such documents. Upon request of the U.S. EPA, the Respondents shall make available to the requester all or any such records, or copies of all or any such records, subject to Paragraph C of Article XV of this Consent Order (Sampling and Data/Document Availability).

XXII. WAIVER OF CLAIMS

A. The Respondents hereby waive any claims or demands for compensation or payment under Sections 106, 111 and 112 of CERCLA against the United States or the Hazardous Substances Superfund established by Section 9507 of Title 26 of the United States Code for or arising out of any activity performed or expenses incurred pursuant to this Consent Order.

B. This Consent Order does not constitute, and shall not be construed to constitute, approval or certification of response costs for purposes of Section 111(a)(2) of CERCLA.

XXIII. RESERVATION OF RIGHTS

A. The U.S. EPA reserves all rights and defenses that it may have individually or collectively pursuant to any available legal authority, except as expressly waived herein.

B. Nothing herein shall waive the right of the U.S. EPA to enforce this Consent Order, or the right of U.S. EPA to take action pursuant to Sections 104, 106(a) and 107 of CERCLA or any other available legal authority. The U.S. EPA also reserves the right to take any enforcement action pursuant to CERCLA and/or any other available legal authority, including the right to seek injunctive relief, monetary penalties, and punitive damages. In addition, the U.S. EPA reserves the right to undertake any RD work, and/or any removal, remedial and/or response actions relating to the Facility, and to seek recovery from the Respondents for any and all costs incurred in undertaking such actions.

C. Nothing herein is intended to release, discharge, or in any way affect any claims, causes of action or demands in law or equity which the parties may have against any person, firm, partnership or corporation not a party to this Consent Order for any liability it may have arising out of, or relating in any way to, the generation, storage, treatment, handling, transportation, release or disposal of any materials, hazardous substances, hazardous wastes, contaminants, or pollutants at, to, or from the Facility. The parties to this Consent Order expressly reserve all rights, claims, demands, and causes of action they may have against any and all other persons and entities who are not parties to this Consent Order, and as to each other for matters not covered hereby.

D. The U.S. EPA recognizes that the Respondents may have the right to seek contribution, indemnity and/or any other available remedy against any person not a party to this Consent Order found to be responsible or liable for contributions, indemnity or otherwise for any amounts which have been or will be expended by the Respondents in connection with the Facility.

E. Nothing herein shall be construed to release the Respondents from any liability for failure of the Respondents to perform the RD in accordance with this Consent Order and the RD Work Plan attached hereto and incorporated herein. The parties further expressly recognize that this Consent Order and the successful completion and approval of the RD do not represent satisfaction, waiver, release, or covenant not to sue, of any

claim of the United States or the State of Wisconsin against the Respondents relating to the Facility, including, but not limited to, claims to require Respondents to undertake further response actions, claims to seek reimbursement of response costs pursuant to Section 107 of CERCLA and claims for damages to natural resources under Section 107 of CERCLA, except that, upon receipt of written notice of satisfaction as provided in Article XXX (Termination and Satisfaction) of this Consent Order, Respondents shall have no further obligations under this Consent Order other than record preservation under Article XXI.

F. Nothing herein is intended to be a release or settlement of any claim for personal injury or property damage by any person not a party to this Consent Order against the Respondents.

XXIV. REIMBURSEMENT OF COSTS

A. The U.S. EPA will provide the Respondents with a computer-generated report known as an annotated SPUR, including, but not limited to, all indirect costs, incurred by U.S. EPA prior to the effective date of this Consent Order. Within thirty (30) days of receipt of any such report, the Respondents shall pay to U.S. EPA the total sum of U.S. EPA's response costs incurred prior to the effective date of this Consent Order, including any interest which may have accrued thereon since the demand for costs at the rate specified for the Hazardous Substances Superfund in Section 107(a) of CERCLA.

B. At the end of each twelve (12) month period beginning with the effective date of this Consent Order, the U.S. EPA will

provide the Respondents with a summary of all oversight costs incurred by U.S. EPA (an annotated SPUR from the U.S. EPA), including, but not limited to, all indirect costs, incurred by U.S. EPA with respect to this Consent Order during such twelve month period including, but not limited to, the costs incurred by the U.S. EPA in having a qualified person oversee the conduct of this RD pursuant to Section 104(a) of CERCLA. Within thirty (30) days of receipt of any such summary, the Respondents shall pay to U.S. EPA the total sum of U.S. EPA's oversight costs incurred during such twelve month period. Failure of the U.S. EPA to submit any such summary within the period specified shall not waive the Respondents' liability for any such oversight costs.

C. Payment to the U.S. EPA for response and oversight costs incurred by the U.S. EPA shall be made by certified or cashier's check or money order payable to the order of the Hazardous Substances Superfund and referencing the Facility name and state as well as the following identification number: 1TJB05B5T1

Such payment shall be remitted to:

U.S. Environmental Protection Agency, Region V
Superfund Accounting
P.O. Box 70753
Chicago, Illinois 60673

Copies of the transmittal letter and check for each payment to the U.S. EPA shall be provided at the time of such payment to the U.S. EPA Project Coordinator and to: U.S. EPA, Region V, Office of Regional Counsel, 5CS-TUB-3, 230 S. Dearborn Street, Chicago, IL 60604, attn: SWER Branch Secretary.

D. Nothing in this Consent Order waives, or shall be construed to waive, the right of the United States or the State of Wisconsin to bring an action against the Respondents for recovery of any future costs incurred by the United States or the State of Wisconsin in connection with any response activities conducted or to be conducted at the Facility, other than those response activities completed pursuant to this Consent Order to the satisfaction and approval of the U.S. EPA in consultation with the WDNR.

E. The Respondents agree to limit any disputes concerning costs to accounting errors and the inclusion of costs outside the scope of this Consent Order. The Respondents shall pay a sum equivalent to that of the disputed costs into an escrow account pending the resolution of the dispute. In any judicial or administrative proceedings concerning disputed costs, the Respondents shall bear the burden of establishing that costs assessed by the United States are attributable to an accounting error or include costs outside the scope of this Consent Order. Interest shall begin to accrue on the unpaid balance of disputed costs found to be payable on the day following the date the payment was originally due. Pursuant to 31 U.S.C. § 3717, interest shall accrue on any amounts overdue at a rate established by the Department of Treasury for any period after the date of billing.

XXV. INDEMNIFICATION OF THE UNITED STATES
AND THE STATE OF WISCONSIN

A. The Respondents agree to indemnify and save and hold the United States Government and its officers, agencies, departments, agents, and employees, harmless from any and all claims or causes of action arising from, or on account of, acts or omissions of the Respondents, its officers, employees, receivers, trustees, agents, or assigns, in carrying out the activities pursuant to this Consent Order.

B. The U.S. EPA is not a party to any contract involving the Respondents at the Facility.

XXVI. NOTIFICATION OF OUT-OF-STATE SHIPMENTS

As soon as possible after the identification of any location outside the State in which the Facility is located and to which a shipment of hazardous substances of greater than ten (10) cubic yards from the Facility is expected to be made and, in all cases, prior to any such shipment, the Respondents shall provide written notification of such shipment to the appropriate environmental official of the State receiving the substances and to the U.S. EPA and the WDNR Project Coordinators. The notification shall include, at a minimum: 1) the name and location of the facility to which the hazardous substances are being shipped; 2) the type and quantity of the hazardous substances being shipped, including the Department of Transportation shipping code, if any; 3) the schedule for shipment of the hazardous substances; 4) the method of transportation; and 5) any other relevant information, including any special procedures necessary to respond to an

accidental release of the substances during transportation. The Respondents shall promptly notify the official of the receiving State and the U.S. EPA and the WDNR Project Coordinators in writing of any changes to the shipment plan.

XXVII. FINANCIAL ASSURANCE AND LIABILITY INSURANCE

A. The Respondents shall establish and maintain a financial instrument or trust account or other financial mechanism acceptable to the U.S. EPA funded sufficiently to perform the work and any other obligations required under this Consent Order, including a margin for cost overruns. Within fifteen (15) days after the effective date of this Consent Order, the Respondents shall fund the financial instrument or trust account sufficiently to perform the work and other obligations required under this Consent Order projected for the period ending on the last day of the calendar-year quarter in which falls the date six month after the effective date of this Consent Order. On or before the fifteenth (15th) day of each calendar-year quarter beginning with and including the calendar-year quarter in which falls the date six months after the effective date of this Consent Order, the Respondents shall fund the financial instrument or trust account sufficiently to perform the work and other obligations required under this Consent Order projected for the succeeding calendar-year quarter.

B. If at any time the net worth of the financial instrument or trust account is insufficient to cover the costs of performing the work and other obligations under this Consent Order for the

succeeding quarter, the Respondents shall provide written notice to the U.S. EPA and the WDNR within seven (7) days after such time, explaining why the funding is insufficient how the Respondents will restore adequate funding.

C. Prior to the commencement of any work under this Consent Order, the Respondents shall ensure that the contractor or subcontractor performing such work maintains Comprehensive General Liability insurance in the amount of at least \$2 million dollars per occurrence with an annual aggregate as at least \$4 million. At least seven (7) days prior to the commencement of any work under this Consent Order, the Respondents shall certify to the U.S. EPA and the WDNR that the required insurance has been obtained by the contractor or subcontractor performing that work. The Respondents shall provide the U.S. EPA and the WDNR with current copies of each insurance policy throughout the duration of the work performed under this Consent Order.

XXVIII. EFFECTIVE DATE OF CONSENT ORDER

This Consent Order shall become effective upon the date of signature by the Director of the Waste Management Division, U.S. EPA, Region V.

XXIX. MODIFICATION OF CONSENT ORDER

In addition to the procedures set forth in Articles XI (Additional Work), XIV (Project Coordinators), XVII (Timeliness of Performance), and XIX (Dispute Resolution) of this Consent Order, this Consent Order may be modified by mutual agreement of the U.S. EPA, in consultation with the WDNR, and the Respondents.

Any modification of this Consent Order shall be in writing, signed by the U.S. EPA shall have as the effective date that date on which such amendment is signed by the U.S. EPA. The U.S. EPA Project Coordinator does not have the authority to modify this Consent Order or to sign modifications to this Consent Order.

XXX. TERMINATION AND SATISFACTION

A. The provisions of this Consent Order shall be deemed satisfied upon receipt by the Respondents of written notice from the U.S. EPA that the Respondents have demonstrated that all of the terms of this Consent Order, including any additional work, modifications or amendments but excluding record preservation pursuant to Article XXI, have been completed in accordance with the terms hereof to the satisfaction of the U.S. EPA in consultation with the WDNR.

XXXI. PRECEDENCE OF CONSENT ORDER

In the event that a conflict arises among the terms and conditions of this Consent Order and those of the Scope of Work, the Approved RI Work Plan and/or the approved FS Work Plan, this Consent Order shall govern and the terms and conditions hereunder shall determine the parties' rights and responsibilities.

