



U.S. Department of Justice

Environment and Natural Resources Division

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5/16/97  
164397

90-11-3-290b

*Environmental Enforcement Section*  
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Washington, DC 20044-7611

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May 21, 1997

Branch Manager  
Mill Road Library  
6431 N. 76th Street  
Milwaukee, Wisconsin 53223

Re: Moss-American Superfund Site, Milwaukee, Wisc.

Dear Sir:

Enclosed please find a copy of a proposed consent decree (with appendices) that was lodged with the United States District Court for the Eastern District of Wisconsin on November 28, 1995. The consent decree sets forth the terms of a settlement in the matter of United States v. Union Pacific Railroad Company (No. 97-C-0578), a complaint concerning which was filed with the United States District for the Eastern District of Wisconsin on May 16, 1997.

An upcoming Federal Register notice will notify the public of the lodging of the consent decree and invite comments to be submitted to the Department of Justice. The notice will advise the public that a copy of the consent decree is available for review in your library. As such, I would appreciate your placing the enclosed document in an appropriate place in your public room.

Thank you for your cooperation in this matter. Should you have any questions, please call me at (202) 514-2068.

Sincerely,

  
Gregory L. Sukys  
Attorney, U.S. Department of Justice

Enclosure

cc: Maria Gonzalez w/o encl.  
Russell D. Hart w/encl.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

U.S. DIST. CT.  
MAY 16 1997  
AT \_\_\_\_\_ O'CLOCK \_\_\_\_\_  
SOFRON B. NEDILSKY

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNION PACIFIC RAILROAD  
COMPANY,

Defendant.

CIVIL ACTION NO. 97-0-0578

CONSENT DECREE

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. ) CIVIL ACTION NO. \_\_\_\_\_  
 )  
UNION PACIFIC RAILROAD )  
COMPANY, )  
 )  
Defendant. )  
\_\_\_\_\_ )

CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("U.S. EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA").

B. The United States' complaint seeks reimbursement from the Union Pacific Railroad Company ("Union Pacific," "UP," the "Railroad," or "Settling Defendant") of costs incurred by U.S. EPA and the U.S. Department of Justice in responding to the release or threatened release of hazardous substances at the Moss American Site in Milwaukee, Milwaukee County, Wisconsin ("Moss-American Site" or "Site," as specifically defined in Section IV of this Consent Decree).

C. The release or threatened release of hazardous substances at or from the Site has caused the United States to incur response costs.

D. U.S. EPA, pursuant to CERCLA Section 105, 42 U.S.C. § 9605, placed the Moss-American Site on the National Priorities List, which is set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register of September 8, 1983, 48 Fed. Reg. 40658;

E. Union Pacific is a current owner of a portion of the Site.

F. In response to a release or a threat of a release of a hazardous substance at or from the Facility, U.S. EPA in 1987 commenced a Remedial Investigation and Feasibility Study ("RI/FS") of the facility pursuant to 40 C.F.R. § 300.68;

G. U.S. EPA completed a Remedial Investigation ("RI") Report on January 9, 1990, and completed a Feasibility Study ("FS") Report on May 24, 1990;

H. A proposed plan for remedial action at the Facility was prepared by U.S. EPA;

I. On or about May 29, 1990, U.S. EPA, pursuant to CERCLA Section 117, 42 U.S.C. § 9617, published notice of the completion of the RI/FS and of the proposed plan for remedial action, in the Milwaukee Eagle, a major local newspaper of general circulation, and provided opportunity for public comment to be submitted in writing to U.S. EPA by July 5, 1990, or orally at a public

meeting held in the City of Milwaukee, Wisconsin, on June 21, 1990;

J. At the request of several commentors, and consistent with the National Contingency Plan, 40 C.F.R. Part 300, the public comment period was extended until August 6, 1990;

K. U.S. EPA, pursuant to CERCLA Section 117, 42 U.S.C. § 9617, has retained a transcript of the public meeting. This transcript is available for public review as part of the administrative record located at U.S. EPA, Region V, 77 W. Jackson Blvd., Chicago, Illinois, and at the Mill Road Library, 6431 North 76th Street, Milwaukee, Wisconsin;

L. Certain persons provided comments on U.S. EPA's proposed plan for remedial action, and to such comments U.S. EPA prepared a summary of responses, all of which have been included in the administrative record referred to above;

M. After considering the proposed plan for remedial action and the public comments received, U.S. EPA reached a decision on a final remedial action plan, which is embodied in a document called a Record of Decision ("ROD") signed by the Regional Administrator on September 27, 1990, to which the State of Wisconsin has given its concurrence, and which includes a discussion of U.S. EPA's reasons for selecting the final plan and for any significant changes from the proposed remedial action plan contained in the FS;

N. The ROD is attached as Appendix 1 hereto;

O. U.S. EPA, pursuant to CERCLA Section 117(b), 42 U.S.C. § 9617(b), has provided public notice of adoption of the final remedial action plan set forth in the ROD, including notice of the ROD's availability to the public for review in the same locations as the administrative record referred to above;

P. Pursuant to CERCLA Section 117(d), 42 U.S.C. § 9617(d), the notice was published in a major local newspaper of general circulation.

Q. On October 30, 1990, U.S. EPA, pursuant to CERCLA Section 122, 42 U.S.C. § 9622, notified certain parties that U.S. EPA had determined each notified party to be a potentially responsible party ("PRP") regarding the proposed remedial action at the Facility;

R. In accordance with CERCLA Section 121(f)(1)(F), 42 U.S.C. § 9621(f)(1)(F), U.S. EPA, on October 30, 1990, notified the State of Wisconsin of negotiations with the PRPs regarding the scope of the remedial design and remedial action for the Facility. U.S. EPA provided the State with an opportunity to participate in such negotiations and be a party to any settlement;

S. Pursuant to CERCLA Section 122(j), 42 U.S.C. § 9622(j), on October 30, 1990, U.S. EPA notified the Federal natural resource trustee of negotiations with PRPs on the subject of the release or threatened release of hazardous substances at the Facility;

T. On December 30, 1991, the United States lodged a Consent Decree in this Court documenting an agreement reached among the United States, the State of Wisconsin, and Kerr-McGee for performance of the remedy set forth in the ROD (hereinafter the "Remedial Action Decree").

U. Notice of the lodging of the proposed Remedial Action Decree was published in the Federal Register of February 12, 1992 (57 Fed. Reg. 5172), and a 30-day public comment period followed. The comment period was extended for an additional 14-day period (see, 57 Fed. Reg. 7939 (March 5, 1992)). In response to these notices, the United States received comments from Milwaukee County and Union Pacific (formerly known as the Chicago and Northwestern Transportation Corp. and as the Chicago and North Western Railway Co. ("CNW")). The United States responded to these comments on July 28, 1993, in the "Motion of the United States of America for Entry of Proposed Consent Decree," and the documents provided in support thereof, and on March 22, 1996, in the "Renewed Motion of the United States of America for Entry of Proposed Consent Decree;"

V. The United States conducted negotiations with Union Pacific subsequent to filing both its Motion to Enter the Remedial Action Decree and its Renewed Motion to Enter the Remedial Action Decree;

W. The Remedial Action Decree was entered by the Court on March 29, 1996;

X. The purposes of this Consent Decree include, but are not limited to:

1. resolving the civil claims against Union Pacific specifically alleged in the United States' Complaint;

2. reimbursing the United States for certain past costs incurred by the United States in connection with the Site;

3. providing Union Pacific contribution protection concerning certain past costs, in accordance with CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2);

4. resolving the Railroad's objections to entry of the Remedial Action Decree as raised by CNW in the comments that it provided the Attorney General;

5. resolving Union Pacific's claims, if any, against the United States relating to the Site;

6. providing the United States, the State of Wisconsin, Kerr-McGee Chemical Corporation and their representatives, including U.S. EPA and its contractors, access to those portions of the Site owned or controlled by Union Pacific, for implementation of the Remedial Action Decree, including implementation of the remedial design and remedial action selected for the Site in the ROD; and

7. providing for the imposition of certain temporary and permanent land use restrictions on certain lands owned or controlled by Union Pacific.

Y. This Consent Decree does not constitute any evidence or admission by any party thereof and without respect to any issue of law or fact alleged herein or in the Complaint.

Z. The United States and Union Pacific agree and this Court, by entering this Decree, finds that settlement of this matter will avoid prolonged and complicated litigation and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. § 9613(b). This Court also has personal jurisdiction over Union Pacific. Solely for the purposes of this Consent Decree, Union Pacific waives all objections and defenses that it may have to the jurisdiction of the Court or to venue in this District and shall not challenge the entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. Union Pacific hereby waives service of the summons and complaint in this action.

## III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, and upon Union Pacific and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to any transfer of assets or real or

personal property, shall in no way alter the status or responsibilities of Union Pacific under this Consent Decree. Until this Consent Decree is terminated, Union Pacific agrees to provide its successors and assigns written notice of this Consent Decree and to provide U.S. EPA, in accordance with Section XVI [Notices and Submissions]: (1) notice of any change in corporate or legal status; (2) notice of any transfer or assignment of a substantial portion of its assets, including but not limited to any portion of the Site; and (3) the name and address of such corporate successor; transferee, assignee, grantee, etc.

#### IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that 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 Consent Decree or in any appendix attached hereto the following definitions shall apply:

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

b. "Union Pacific Railroad Company" or "Union Pacific" (formerly the Chicago and North Western Railway Company or "CNW") is a corporation organized and existing under the laws of the State of Utah, and registered to do business in the State of Wisconsin, which owns a portion of the Site and currently uses

such property for the transport, off-loading and storage of automobiles.

c. "CNW/Kerr-McGee Access Agreement" shall mean the document executed by CNW (now Union Pacific) and Kerr-McGee on June 30, 1994, and attached hereto as Appendix 3.

d. "Consent Decree" shall mean this Decree and any attached appendices.

e. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, 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.

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

g. "Health and Safety Plan" shall mean the plan(s) prepared pursuant to 40 C.F.R. § 300.150 and 29 C.F.R. § 1910.120 to assure health and safety for Remedial Design/Remedial Action activities at the Site.

h. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26 of the U.S. Code, in accordance with 42 U.S.C. § 9607(a), compounded on an annual basis.

i. "Kerr-McGee Chemical Corporation" or "Kerr-McGee" shall mean the corporation organized and existing under the laws of the State of Delaware and registered to do business in the State of

Wisconsin, that is the Defendant in United States v. Kerr-McGee Chemical Corporation, (No. 91-CV-1396, E.D. Wisc.), and the Settling Defendant under the Remedial Action Decree.

j. "Matters Addressed" shall mean the payment of past response costs.

k. "National Contingency Plan," hereinafter "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to CERCLA Section 105, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including but not limited to any amendments thereto.

l. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

m. "Parties" shall mean the United States and Union Pacific.

n. "Past Response Costs" shall mean all costs, including direct and indirect costs incurred by U.S. EPA, or by the U.S. Department of Justice on behalf of U.S. EPA, in connection with the Site through January 31, 1991 (response costs incurred by the United States in connection with the Site after January 31, 1991, are addressed in Paragraph 49 of the Remedial Action Decree).

o. "Record of Decision" or "ROD" shall mean the U.S. EPA Record of Decision relating to the Site signed on September 27, 1990 by the Regional Administrator, U.S. EPA Region V, and all attachments and amendments thereto. Appendix 1 hereto is a copy of the ROD.

p. "Remedial Action Decree" shall mean the Consent Decree entered in United States v. Kerr-McGee Chemical Corporation (Case No. 91-CV-1396, E.D. Wisc.) on March 29, 1996, and any amendments thereto.

q. "Remedial Project Manager" or "RPM" shall mean the federal official designated by U.S. EPA to coordinate, monitor, or direct remedial or other designated response actions at the Site pursuant to 40 C.F.R. Part 300, Subpart E.

r. "Response Action(s)" shall mean activities conducted by either U.S. EPA or a private party pursuant to an agreement or consent decree with, or order by, U.S. EPA to investigate and address the contamination at the Moss-American Site, including activities set out in the Remedial Action Decree, the ROD, the Statement of Work, and amendments thereto.

s. "Response Action Component" shall mean any location, activity or containment, collection, generation, treatment, storage, disposal or other management unit which addresses the environmental media at the Site under the ROD and/or amendments or modifications thereto.

t. "Restricted Area" shall mean those areas of the Site owned by Union Pacific that the RPM approves as required for implementation of safe and secure Response Actions at the Site. The RPM may modify the boundaries of or move the Restricted Area as required for implementation of safe and secure Response Actions at the Site. However, the Restricted Area shall not include Uncontaminated Property owned by Union Pacific that is

located more than 100 feet west of the most westerly edge of Area 8 (as depicted on the map attached hereto as Appendix 4), except as necessary for implementation of safe and secure Response Actions to address contamination located west of said Area 8, including but not limited to Areas 2 and 9 (as depicted on the map attached hereto as Appendix 4). The RPM will consult with Union Pacific regarding:

- those portions of Union Pacific's property located west of said Area 8 where Union Pacific's operations will be restricted at any particular time; and

- the inclusion in the Restricted Area of Uncontaminated Property located more than 100 feet west of the most westerly edge of Area 8 (as depicted on the map attached hereto as Appendix 4).

Provided, that the final and unreviewable authority regarding the timing of such restrictions and the location and boundaries of the restricted area shall rest with the RPM.

- u. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

- v. "Settling Defendant" or "Union Pacific" shall mean the Union Pacific Railroad Company.

- w. "Site," "Moss-American Superfund Site," or "Moss-American Site" shall mean the 88-acre location in the City of Milwaukee, County of Milwaukee, State of Wisconsin, where the manufacture, use, storage, disposal, or placement of hazardous substances was conducted by the Moss-American Co. and its

corporate predecessors and successors, those areas where such hazardous substances came to be located, and suitable areas in very close proximity to the contamination that are necessary for implementation of the response action. The Site is described in more detail in Appendix 1 hereto and depicted on the map attached as Appendix 2 hereto.

x. "Soil Cover" shall mean a permeable layer of 2 feet of soil and 6 inches of topsoil that will be constructed as part of the remedy selected under the ROD to contain various treated and untreated soils and sediments at the Site (See, ROD at 38, Appendix 1 hereto);

y. "State" shall mean the State of Wisconsin.

z. "Statement of Work" or "SOW" means the plan, set forth as Appendix 2 to the Remedial Action Decree, for completion of the remedial design and remedial action at the Site pursuant to the Record of Decision.

aa. "Uncontaminated Property" for purposes of Paragraph 3.t. (above), shall mean property at the Moss-American Site where contamination does not exceed action levels or background, whichever is greater, as set forth in the Record of Decision and/or amendments or modifications thereto.

ab. "United States" shall mean the United States of America and all its departments, agencies and instrumentalities.

#### V. REIMBURSEMENT OF RESPONSE COSTS

##### 4. Payment of Past Response Costs to the United States.

Within 30 days of the effective date of this Consent Decree, Settling

Defendants shall pay to the U.S. EPA Hazardous Substance Superfund \$300,000 in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 9600963, U.S. EPA Region V, Site/Spill ID No. 05-M7, and DOJ case number 90-11-3-590b. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Eastern District of Wisconsin following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXVI (Notices and Submissions) and Ms. Mary Ellen Ryan (MF10J), Supervisor, Program Accounting Comptroller Branch, U.S. EPA Region V, 77 West Jackson Blvd., Chicago, IL 60604.

**VI. FAILURE TO MAKE TIMELY PAYMENTS**

5. Interest on Late Payments. In the event that any payment required by Section V [Reimbursement of Response Costs] is not made when due, Interest, as defined in Section IV, shall continue to accrue on the unpaid balance, through the date of payment.

6. Stipulated Penalty. If any amounts due to the United States under this Consent Decree are not paid within 30 days after entry of the Consent Decree, the Settling Defendant shall pay as a stipulated penalty, in addition to the Interest required by Paragraph 5, \$200 for each day that such payment is

late. Stipulated penalties are due and payable within 30 days of the Settling Defendant's receipt from U.S. EPA of a demand for payment of the penalties. All payments under this Paragraph shall be paid by certified check made payable to "U.S. EPA Hazardous Substance Superfund," shall be mailed to U.S. EPA, Superfund Accounting, P.O. Box 70753, Chicago, Illinois 60673, and shall bear CERCLA number 05-M7 and DOJ Case Number 90-11-2-590b. Copies of check[s] paid pursuant to this Paragraph, and any accompanying transmittal letter, shall be sent to the United States as provided in Section XVI [Notices and Submissions].

7. If the United States commences any proceeding to collect any payment required by this Consent Decree, the Settling Defendant shall reimburse the United States for all costs and expenses of such action, including but not limited to costs of attorney time.

8. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments required by this Decree.

**VII. COVENANT NOT TO SUE BY PLAINTIFF**

**9. Covenant Not to Sue.**

a. Except as provided in Paragraph 10, the United States covenants not to sue Union Pacific or its successors or assigns, under CERCLA Section 107, 42 U.S.C. § 9607, to recover Past Response Costs as defined under this Consent Decree; provided, this covenant not to sue shall not apply to Union Pacific's successors or assigns if such parties: (1) bring a claim against

the United States in contravention of Section VIII of this Consent Decree; or (2) are independently liable at the Moss-American Site. This covenant not to sue extends only to Union Pacific, its successors and assigns, and does not extend to any other person or parties.

b. This covenant not to sue shall take effect upon receipt by the United States of all payments required by Sections V and VI [Reimbursement of Response Costs and Failure to Make Timely Payments]; provided, that the continuing effectiveness of the covenant not to sue is conditioned upon compliance by Union Pacific and its successors and assigns with the terms of the Consent Decree, including but not limited to compliance with Sections XIII and XIV [Land Use Restrictions and Application to Subsequent Grantees] and Appendix 5 of this Consent Decree, and the provision of an irrevocable right of access (in favor of U.S. EPA and its designees) to the Site and any other property owned or controlled by Union Pacific and its successors and assignees where access is required by Section X [Site Access].

#### 10. Reservation of Rights

a. General. The covenant not to sue set forth in the preceding Paragraph No. 9 does not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Union Pacific with respect to all other matters. Except as provided in the preceding Paragraph, nothing contained herein shall in any way limit or restrict the response and enforcement authority of the United States to initiate

appropriate action, either judicial or administrative, under CERCLA Sections 104, 106, and 107, 42 U.S.C. §§ 9604, 9606, and 9607; Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973; or any other provision of law, against Union Pacific, or against any other person or entity not a party to this Decree.

b. Specific reservations. The covenant not to sue set forth in Paragraph No. 9 above does not apply, to inter alia, the following:

1. claims based upon failure of Union Pacific to meet the requirements of this Consent Decree;
2. claims for damages to natural resources, as defined in CERCLA Section 101(6), 42 U.S.C. § 9601(6);
3. claims for costs incurred by any natural resources trustee;
4. claims based upon criminal liability;
5. claims under CERCLA Section 106, 42 U.S.C. § 9606;
6. claims for response costs incurred or to be incurred by the United States in connection with the Site, other than Past Response Costs as defined in Paragraph 3.n. of this Consent Decree; and
7. liability for releases caused or increased due to the use of (or activities at) the Site by Union Pacific, its successors or assigns, or their contractors or representatives.

### VIII. COVENANTS BY UNION PACIFIC

11. Union Pacific hereby covenants not to sue, and agrees not to assert any claims or causes of action against, the United States, with respect to response costs, the Site, or this Consent Decree, including, but not limited to: any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, or 113, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law; any claims arising out of Response Actions at the Site; any claims arising out of activities by U.S. EPA or its contractors at the Site; or any claims for monetary relief of any kind under any provision of law, including the Tucker Act, 28 U.S.C. § 1491; except that, as to property that was not contaminated prior to the lodging of this Decree and is located at least 100 feet west of the most westerly edge of Area 8 (as depicted on the map attached hereto as Appendix 4), Union Pacific, or its successor entities that legally comply with the Assignment of Claims Act, 31 U.S.C. § 3727, may pursue a claim pursuant to the Tucker Act, 28 U.S.C. § 1491, but may not recover unless all economically viable use of the entirety of that property by Union Pacific, or its successor entities that legally comply with the Assignment of Claims Act, 31 U.S.C. § 3727, has been permanently and totally lost due solely to Response Actions; provided that, if Union Pacific or its successor brings a claim under the Tucker Act pursuant to this provision, the United States shall be entitled to assert any defenses to which it is

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

11.a. Through its entering into this Consent Decree, Union Pacific stipulates that it has no objection to, and agrees not to oppose or seek reversal of, the Court's entry of the Remedial Action Decree.

b. All comments and objections on the Remedial Action Decree or the Site remedy that were provided by CNW (now Union Pacific) to the Assistant Attorney General, Environment and Natural Resources Division, by letter dated March 30, 1992, shall remain on file with the U.S. Department of Justice under No. 90-11-2-590.

12. Union Pacific agrees not to oppose the remedy embodied in the ROD or the Remedial Action Decree. Union Pacific further agrees not to oppose any subsequently selected remedy or remedy amendment, or any component of any remedy or amendment, provided however that nothing in this sentence shall alter any rights that Union Pacific may have as a member of the public to submit comments to the Executive Branch of the United States on any proposed amendment to the ROD and/or remedial action.

**IX. EFFECT OF SETTLEMENT: CONTRIBUTION PROTECTION**

13. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited

to, any right to contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

14. With regard to claims for contribution against Union Pacific for Matters Addressed in this Consent Decree, the Parties hereto agree that Union Pacific is entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

15. Union Pacific agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree or the Remedial Action Decree, Union Pacific shall notify the United States in writing no later than 60 days prior to the initiation of such suit or claim. Union Pacific also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, Union Pacific shall notify the United States in writing within 10 days of service of the complaint on Union Pacific. In addition, Union Pacific shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial for matters related to this Consent Decree or the Remedial Action Decree.

16. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Union Pacific shall not assert, and may not

maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph shall affect the enforceability of the covenants not to sue set forth in Section VII [Covenant Not to Sue by Plaintiff].

#### **X. SITE ACCESS**

17.a. Commencing upon the date of lodging of this Consent Decree, Union Pacific agrees to provide the United States, the State, Kerr-McGee and their representatives, including U.S. EPA and its contractors, access at all reasonable times to all parts of the Site owned or controlled by Union Pacific and any other property owned or controlled by Union Pacific ("Property") to which access is required for the implementation of the Remedial Action Decree. On the same basis, Union Pacific also agrees to provide access to U.S. EPA and its contractors for purposes of assessing compliance with this Consent Decree and the Remedial Action Decree.

b. The Health and Safety Plan, shall include a requirement that, prior to the commencement of any work to be conducted on or near the railroad tracks, Union Pacific and its successors and assigns shall be: (1) notified of the proposed commencement of work; (2) consulted as to the schedule of railway operations; and (3) given an opportunity to have a representative

present when such work is being conducted, provided that such representative shall comply with the Health and Safety Plan.

c. Attached hereto as Appendix 3 is the CNW/Kerr-McGee Access Agreement, through which Union Pacific (formerly CNW) has agreed to provide Kerr-McGee and U.S. EPA access to property owned or controlled by Union Pacific at the Site for purposes associated with implementing the SOW. Such access agreement will control access disputes involving only Union Pacific and Kerr-McGee Chemical Co.

d. The terms of this Consent Decree, excluding the provisions of the CNW/Kerr-McGee Access Agreement (Appendix 3 hereto), shall control any disputes or discrepancies between U.S. EPA and Union Pacific concerning access to Union Pacific's property for purposes of implementing, monitoring or assessing compliance with this Consent Decree or the Remedial Action Decree.

18. Nothing herein shall limit U.S. EPA's right to enter and/or inspect the Site under federal law. U.S. EPA shall retain all of its information gathering and enforcement authorities and rights under CERCLA, RCRA, and any other applicable statutes and regulations.

19. The obligations of Union Pacific with respect to providing access under this Consent Decree shall be binding upon Union Pacific and all persons who subsequently acquire the Property or any such interest or portion thereof. Within 15 days after the entry of this Consent Decree, Union Pacific shall record with the Milwaukee County Register of Deeds a notice of

obligation to provide access under this Section. Each instrument through which Union Pacific conveys an interest in any portion of the Property shall: (a) reference the recorded location of such notice; (b) recite the covenants applicable to the Property; and (c) require all future conveyance documents by subsequent grantors, lessors, etc., to reference such notice and recite such covenants.

#### **XI. ACCESS TO INFORMATION**

20. Union Pacific shall provide U.S. EPA, upon request, access to all documents and information within its possession or control or that of its contractors or agents relating to response activities and environmental conditions at the Site, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site. Following U.S. EPA's examination of such documents and information, Union Pacific shall provide U.S. EPA copies of documents requested by U.S. EPA.

#### **21. Confidential Business Information and Privileged Documents**

a. Union Pacific may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with CERCLA Section 104(e)(7), 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by U.S. EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim

of confidentiality accompanies documents or information when they are submitted to U.S. EPA, or if U.S. EPA has notified Settling Defendant that the documents or information are not confidential under the standards of CERCLA Section 104(e)(7), 42 U.S.C. § 9607(e)(7), the public may be given access to such documents or information without further notice to Settling Defendant.

b. Union Pacific 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 Union Pacific asserts such a privilege in lieu of providing documents, it shall provide the Plaintiff 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. However, no documents, reports or other information created or generated pursuant to the requirements of this or any other consent decree (including any Administrative Order on Consent) with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff in redacted form to mask the privileged information only.

22. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or

engineering data, or any other documents or information evidencing environmental conditions at or around the Site.

#### **XII. INDEMNIFICATION**

23.a. Union Pacific agrees to indemnify, save and hold the United States and its contractors and representatives harmless from any and all claims or causes of action, of whatever nature or kind by whomsoever brought or asserted, arising in whole or in part from the acts or omissions of Union Pacific, or its agents, employees, contractors and guests, in conducting activities at the Site.

b. The United States does not assume any liability of Union Pacific by virtue of entering into this agreement, nor shall any liability of any sort extend to the United States as a result of its allowing any use or activities at the Site by or on behalf of Union Pacific. The United States shall not be construed as a party to any contract entered into by Union Pacific to carry out any activities of any sort at the Site.

#### **XIII. LAND USE RESTRICTIONS**

24.a. Within 15 days after the entry of this Consent Decree, Union Pacific shall have recorded a certified copy of this Consent Decree with the Milwaukee County Register of Deeds, Milwaukee County, State of Wisconsin. Thereafter, except as set forth in Paragraph 25.b., below, each deed, title, or other instrument conveying an interest in any property included in the Site shall: (1) contain a notice stating that the property is subject to this Consent Decree; (2) reference the recorded location of this Consent Decree and the Remedial Action Decree;

and (3) recite the land use restrictions set forth in Appendix 5 hereto, both temporary and permanent, applicable to the property under this Consent Decree.

b. Within 30 days after U.S. EPA issues the Certificate of Completion required by Section XXVI of the Remedial Action Decree, U.S. EPA shall provide a copy of such Certificate of Completion to Union Pacific in accordance with Section XVI [Notices and Submissions], or to a successor, assignee, transferee or grantee who has been identified in accordance with Section III [Parties Bound]. Upon receipt of such Certificate of Completion, Union Pacific or its corporate successor or assignee may file with the Milwaukee County Register of Deeds, Milwaukee County, State of Wisconsin, a notice terminating the temporary land use restrictions set forth in Appendix 5, and the need to recite such restrictions in subsequent conveyance documents. Any such notice shall state that the permanent land use restrictions set forth in Appendix 5, including, but not limited to restrictions governing the Soil Cover, will remain in effect.

#### **XIV. APPLICATION TO SUBSEQUENT GRANTEEES**

25. The obligations of Union Pacific with respect to the implementation of the Land Use Restrictions under Section XIII shall be binding upon Union Pacific and all persons who subsequently acquire any interest or portion thereof in the Land (hereinafter, "Successors-in-Title").

26. Union Pacific and any Successor-in-Title shall, at least 30 days prior to the conveyance of any such interest in the Land, give written notice of this Consent Decree to the grantee

and written notice to U.S. EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree was given to the grantee.

27. Union Pacific shall ensure that each deed, title, or other instrument through which Union Pacific conveys any of its interest in the Site, or in any portion thereof, or in any of its property that is subject to the access provisions of this Consent Decree, shall: (a) contain a notice stating that the property is subject to this Consent Decree and the Remedial Action Decree; (b) reference the recorded location of this Consent Decree and the Remedial Action Decree; (c) recite the land use restrictions set forth at Appendix 5 hereto (consistent with the procedures outlined in Paragraph 25); and (d) require subsequent conveyance documents to conform to the requirements of subparagraphs (a), (b), (c), and (d) of this Paragraph.

#### **XV. RETENTION OF RECORDS**

28. Until 5 years after the termination of all aspects of the Remedial Action Decree, Union Pacific shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to Response Actions taken at the Site or the liability of any person for Response Actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

29. At the conclusion of this document retention period, Union Pacific shall notify the United States at least 90

days prior to the destruction of any such records or documents, and, upon request by the United States, Union Pacific shall deliver any such records or documents to the U.S. EPA. As provided in Paragraph 28.b., above, Union Pacific may allege privileges concerning documents, records or information; if such privileges are asserted, Union Pacific shall comply with the requirements set forth in that Paragraph.

30. Union Pacific hereby certifies that, to the best of its knowledge and belief, it has conducted a thorough, comprehensive, good faith search for information and documents, and for any evidence of destruction or tampering with information or documents, and has fully and accurately disclosed to U.S. EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership or control of the Site or to the ownership, operation, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site. Union Pacific further certifies that it has disclosed to U.S. EPA any and all evidence of destruction or tampering with any documents or other information relating to its potential liability regarding the Site and that it has fully and accurately complied with any and all U.S. EPA requests for information pursuant to CERCLA Sections 104(e) and 122(e), 42 U.S.C. §§ 9604(e) and 9622(e), and RCRA Section 3007, 42 U.S.C. § 6927. Provision of false, fictitious or fraudulent statements or

representations to the United States may subject Union Pacific to criminal penalties under 18 U.S.C. § 1001.

**XVI. NOTICES AND SUBMISSIONS**

31. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to all individuals listed below, and their successors. Receipt of written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, U.S. EPA, and Union Pacific, respectively.

**As to Plaintiff, the United States:**

[By U.S. Mail]  
Chief, Environmental Enforcement Section  
U.S. Department of Justice  
Re: 90-11-2-590b  
P.O. Box 7611  
Washington, D.C. 20044

or

[By Overnight/Courier]  
Chief, Environmental Enforcement Section  
Re: 90-11-2-590b  
U.S. Department of Justice  
1425 New York Ave., N.W.  
13th Floor  
Washington, D.C. 20005

Russell Hart  
Remedial Project Manager  
Moss-American Superfund Site  
U.S. EPA - Region V  
77 W. Jackson, HSRW-6J  
Chicago, IL 60604; and

Maria Gonzalez  
Office of Regional Counsel  
U.S. EPA - Region V  
77 W. Jackson, CS-3T  
Chicago, IL 60604

As to Settling Defendant, Union Pacific:

Paul Conley, Esq.  
Asst. Vice President - Law  
Union Pacific Railroad Company  
1416 Dodge St.  
Room 810  
Omaha, NE 68179

Thomas Greenland, Esq.  
Environmental Counsel  
Union Pacific Railroad Company  
Law Department  
1416 Dodge St.  
Room 810  
Omaha, NE 68179

Barbara Magel, Esq.  
Karaganis & White Ltd.  
414 North Orleans Street  
Suite 810  
Chicago, Illinois 60610

**XVII. RETENTION OF JURISDICTION**

32. This Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

**XVIII. APPENDICES**

33. The following appendices are attached to and incorporated into this Consent Decree: "Appendix 1" is the Record of Decision; "Appendix 2" is the description and/or map of the Site; "Appendix 3" is the CNW/Kerr-McGee Access Agreement; Appendix 4 is a map of the Site depicting some of its contaminated soil areas as Areas 1 through 9; and "Appendix 5" is a "Notice of Property Subject to Consent Decree," filed with the Milwaukee County Register's office on July 12, 1996, which sets

forth Temporary and Permanent Land Use Restrictions Applicable to property owned by Union Pacific that comprises a portion of the Site.

**XIX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

34. This Consent Decree shall be lodged with the Court. Subsequent to such lodging, the United States shall publish in the Federal Register a notice of such lodging and of the opportunity for the public to provide comments on this Consent Decree for at least thirty (30) days. Final approval of this Consent Decree by the United States is subject to the United States' right to withdraw or withhold its consent to this Consent Decree if the public comments regarding the Consent Decree disclose facts or considerations which indicate to the United States that this Consent Decree is inappropriate, improper, or inadequate. All written comments received, along with any responses by the United States to these comments, will be provided to the Court with the motion of the United States for judicial action on this Consent Decree. Settling Defendant consents to the entry of this Consent Decree without further notice.

35. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**XX. SIGNATORIES/SERVICE**

36. The undersigned representative of Union Pacific and the Chief, Environmental Enforcement Section, Environment and

Natural Resources Division, United States Department of Justice, each certifies that he is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

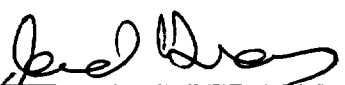
37. Union Pacific shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Union Pacific with respect to all matters arising under or relating to this Consent Decree.


38. This Consent Decree is intended to be executed on separate pages.

FOR PLAINTIFF, UNITED STATES OF AMERICA

Date: \_\_\_\_\_

2/25/97

  
\_\_\_\_\_  
JOEL M. GROSS  
Chief, Environmental Enforcement  
Section  
Environment and Natural Resources  
Division  
U.S. Department of Justice

  
\_\_\_\_\_  
GREGORY L. SUKYS  
Attorney  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-2068/616-6584 (FAX)

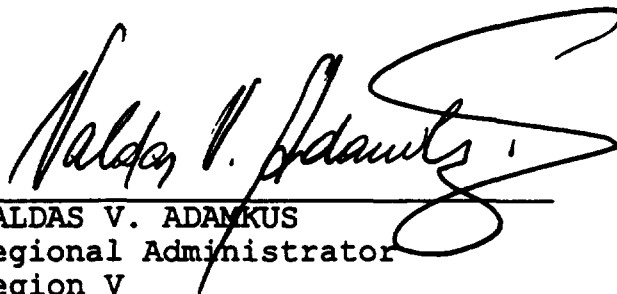
THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Chicago and Union Pacific Railroad Company, relating to the Moss-American Superfund Site.

THOMAS P. SCHNEIDER  
United States Attorney  
Eastern District of Wisconsin

---

MATTHEW RICHMOND  
Assistant United States Attorney  
Eastern District of Wisconsin  
Room 330, U.S. Courthouse  
517 East Wisconsin Ave.  
Milwaukee, WI 53202-4580  
(414) 297-1700

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Union Pacific Railroad Company, relating to the Moss-American Superfund Site.



VALDAS V. ADAMKUS  
Regional Administrator  
Region V  
U.S. Environmental Protection  
Agency  
77 W. Jackson Blvd.  
Chicago, IL 60604



MARIA GONZALEZ  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency, Region V  
77 W. Jackson Blvd.  
Chicago, IL 60604  
(312) 886-6630 / 0747 (FAX)

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Union Pacific Railroad Company, relating to the Moss-American Superfund Site.

FOR UNION PACIFIC RAILROAD COMPANY

Date: March 21, 1997



PAUL CONLEY  
Asst. Vice President - Law  
Union Pacific Railroad Company  
1416 Dodge St.  
Omaha, Nebraska 68179

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Thomas E. Greenland  
Title: Environmental Counsel  
Address: Union Pacific Railroad Co. Rm. 830  
1416 Dodge Street  
Omaha NE 68179

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_.

RUDOLPH T. RANDA  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. ) CIVIL ACTION NO. \_\_\_\_\_  
 )  
UNION PACIFIC RAILROAD )  
COMPANY, )  
 )  
Defendant. )  
\_\_\_\_\_ )

CONSENT DECREE

APPENDICES

1. Record of Decision
2. Description and/or Map of the Site
3. CNW/Kerr-McGee Access Agreement
4. Map of Site, With Contaminated Soil Areas Depicted Thereon
5. Notice of Property Subject to Consent Decree, with Land Use Restrictions

L 5  
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**APPENDIX 3**

**ACCESS AGREEMENT**

## ACCESS AGREEMENT

THIS AGREEMENT, dated June 30, 1994, is entered by and between Chicago and North Western Railway Company and Kerr-McGee Chemical Corporation.

WHEREAS, Kerr-McGee Chemical Corporation ("Kerr-McGee), the United States of America (the "United States") and the State of Wisconsin (the "State") have entered into a Consent Decree in *United States v. Kerr-McGee Chemical Corp.*, Nos. 91-C-1396, 92-C-0006, (E.D. Wis.); and

WHEREAS, that Consent Decree requires Kerr-McGee to undertake certain remedial actions described in a Statement of Work ("SOW") attached to the Decree as Appendix 2; and

WHEREAS, that Consent Decree requires Kerr-McGee to obtain agreement from the owners of property within the area, defined by the United States Environmental Protection Agency ("U.S. EPA") as the Moss-American Superfund Site, to allow access to their property for purposes of implementing that SOW; and

WHEREAS, the Consent Decree also requires Kerr-McGee to obtain the property owners' agreement to allow authorized representatives of the United States and the State access to the property for purposes of overseeing Kerr-McGee's implementation of the SOW; and

WHEREAS, Chicago and North Western Railway Company (formerly Chicago and North Western Transportation Company) ("CNW") is the owner of approximately twenty-three acres which U.S. EPA has included within the Moss-American Superfund Site;

NOW, THEREFORE, Kerr-McGee and CNW hereby agree as follows:

1. CNW shall allow Kerr-McGee and its authorized contractors and subcontractors (for purposes of this Agreement "Kerr-McGee" includes its authorized

officers, employees, agents, attorneys, contractors and subcontractors) access to its property for the following purposes:

- a. Implementing the activities described in the SOW attached to the Consent Decree entered in Civil Action Nos. 91-C-1396 and 92-C-0006 as that document may be properly amended from time to time.
- b. Monitoring the work or any other activities taking place at the property;
- c. Verifying any data or information submitted to the United States or the State;
- d. Conducting investigations relating to contamination at or near the CNW property;
- e. Obtaining samples;
- f. Assessing the need for, planning, or implementing additional response actions at or near the CNW property;
- g. Ingress and egress to other portions of the U.S. EPA defined Moss-American Superfund Site for purposes of implementing the SOW.

2. CNW also agrees to allow the authorized representatives of the United States and State access to monitor or oversee the implementation of the SOW activities by Kerr-McGee under terms that are mutually acceptable to CNW and to the United States and the State.

3. To the extent practicable and consistent with the timely and cost-effective fulfillment of its obligations under the Consent Decree, Kerr-McGee will coordinate its activities on CNW's property with CNW and Rail Services, Inc. ("RSI") so as to minimize unreasonable interference with CNW's and/or RSI's day-to-day operations on that property. Kerr-McGee shall inform CNW and RSI's designated representative ("RSI Representative") on a monthly basis of the activities that it anticipates

undertaking on the property over the coming month. Prior to drilling or use of heavy equipment on the property, Kerr-McGee shall discuss its plans with the RSI Representative and, to the extent practicable and consistent with the timely and cost-effective fulfillment of its obligations under the Consent Decree, Kerr-McGee shall accommodate the reasonable operating requirements of RSI. At least twenty-four (24) hours prior to entry on any portion of the property on which railroad tracks are located or railroad operations conducted ("rail property"), Kerr-McGee shall notify CNW's representatives at (414) 535-4210 or (414) 535-4133 and shall, to the extent practicable and consistent with the timely and cost-effective fulfillment of the obligations imposed by the Consent Decree, accommodate CNW's rail operations. All on-site activities by or on behalf of Kerr-McGee shall be conducted in accordance with U.S. EPA-approved health and safety-plans.

4. In allowing Kerr-McGee access to the property, CNW agrees not to interfere with implementation of the SOW activities. More specifically, CNW agrees as follows:

- a. CNW shall not tamper with any borings or monitoring wells installed on its property or the Moss-American Superfund Site;
- b. CNW shall not tamper with any collection device or treatment system, equipment or structures installed or located on its property or the Moss-American Superfund Site;
- c. CNW shall not interfere with any Site security arrangements or installations at the Moss-American Superfund Site; and
- d. CNW shall not interfere with the integrity of any soil cover or cap to be constructed on a portion of its property pursuant to the SOW. If the EPA-approved design for the disposal area is compatible with the parking or storage of vehicles, then CNW, with the approval of U.S. EPA, may pave all or portions of the cover. If

CNW should use the disposal area for the parking or storage of vehicles, CNW shall thereafter be responsible, at its own cost and expense, to maintain the paved portion of the cover as required by U.S. EPA. CNW shall also thereafter indemnify Kerr-McGee and hold Kerr-McGee harmless from any and all claims, of whatsoever nature or kind, by whomsoever brought or asserted arising from any failure or alleged failure of the cover resulting from the construction or performance of the paved portion.

5. Subject to the approval of the United States, Kerr-McGee agrees to restore the existing paved portion of CNW's property to its pre-SOW implementation condition following any investigatory or characterization boring, trenching, or drilling within that paved area at Kerr-McGee's sole cost. Kerr-McGee does not agree, however, that the site can or will be restored to its pre-SOW implementation condition during or after the completion of remedial action.

6. Kerr-McGee hereby agrees to indemnify and hold CNW and RSI, including their respective successors and assigns, harmless from any and all claims, of whatever nature or kind by whomsoever brought or asserted, for personal injury (including, but not limited to death) or personal property damage (including, but not limited to any damage to motor vehicles stored at or transported from the property) arising from Kerr-McGee's negligence or willful misconduct in any design, sampling, investigation, characterization, or remediation activities on CNW's property. Kerr-McGee does not agree or represent, however, that CNW will necessarily be able to use its property during remediation activities or thereafter for the storage or transport of vehicles, or for any other purpose.

7. CNW hereby agrees to indemnify and hold Kerr-McGee, including any successors and assigns, harmless from any and all claims, of whatever nature or kind by whomsoever brought or asserted, for personal injury (including, but not limited to

death) or personal property damage arising from CNW or RSI's negligence or willful misconduct in their operation of the transfer station during Kerr-McGee's conduct of any design, sampling, investigation or characterization or remediation activities on CNW's property.

8. Both CNW and Kerr-McGee expressly reserve any and all claims, of whatever nature or kind, that are not released by this Agreement. In particular, Kerr-McGee does not hereby release CNW, and CNW does not hereby release Kerr-McGee from any claims for contribution under 42 U.S.C. §9613(f) or under other statutory or common law relating to response actions at the Moss-American Superfund Site, nor do the parties to this access agreement release any third parties with respect to any claims of whatever nature or kind, that either or both parties may have with respect to the Moss-American Superfund Site.

**KERR-McGEE CHEMICAL  
CORPORATION,**

**CHICAGO AND NORTH WESTERN  
RAILWAY COMPANY,**

By: George B. Rice  
Date: June 21, 1994

By: [Signature]  
Date: June 30, 1994

PCCNW004.DOC

**APPENDIX 5**

**NOTICE OF PROPERTY SUBJECT TO CONSENT DECREE  
WITH LAND USE RESTRICTIONS**

**NOTICE OF PROPERTY SUBJECT TO CONSENT DECREE**

Pursuant to a Consent Decree to be filed with the United States District Court for the Eastern Division of Wisconsin and that certain Remedial action Decree dated March 29, 1996, filed with the United States District Court for the Eastern Division of Wisconsin, Union Pacific Railroad Company, a Utah corporation ("UP") (successor by merger of the Chicago and North Western Railway Company, formerly named Chicago and North Western Transportation Company, into the Union Pacific Railroad Company), the present owner of certain real estate situated in Milwaukee County, Wisconsin described in Exhibit "A" attached hereto and made a part hereof (the "Site"), which includes that portion of the Site shown by diagonal lines and designated as Areas 8 and 9 on Exhibit "B" attached hereto and made a part hereof (the "Restricted Area") does hereby state that the Site is subject to the Consent Decree and to the following temporary and permanent deed restrictions;

**a. Temporary Land Use Restrictions**

I. Union Pacific Railroad Company, its employees, representatives, contractors, successors and assigns shall not:

A. Permit any use of the property located within the Restricted Area that would interfere with the "Response Action" (as such term is used in the Record of Decision, the "ROD") performed or to be performed under the ROD, Consent Decree and/or the Scope of Work ("SOW") for the Moss-American Superfund Site, or any activity which may interfere with or damage any "Response Action Component." (as such term is used in the ROD) contracted or installed pursuant to the ROD, the Consent Decree or SOW, or otherwise impair the effectiveness of any work to be performed pursuant to the ROD, Consent Decree or SOW;

B. In the absence of any prior written approval from the "Remedial Project Manager" (as such term is used in the Remedial Action Consent Decree), install, construct or remove any buildings, wells, pipes, roads, ditches or any other structures within the Restricted Area;

C. Permit any use of those portions of the Site containing any cut-off wall, collection trench, collection sump, treatment systems, drains, or barriers as defined in Sections II.B.5 and 7 of the SOW or those portions of the Site where a Soil Cover may be constructed pursuant to Section II.B.8 of the SOW that would result in the presence of humans on these parcels other than any presence necessary for implementation and maintenance of the remedial action under the

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ROD and the Remedial Action Decree or such presence as is specifically authorized in writing by the Remedial Project Manager; or

D. Conduct or permit any use of the Site that would interfere with the remedy or does not comply with the Final Interim Site Health and Safety Plan dated October 22, 1991.

II. Within thirty (30) days after the Environmental Protection Agency ("EPA") issues the Certificate of Completion required by Section XXVI of the Remedial Action Decree, EPA shall provide a copy of such Certificate of Completion to UP in accordance with Section XVI (Notices and Submissions), or to a successor, assignee, transferee or grantee who has been identified in accordance with Section III (Parties Bound). Upon receipt of such Certification of Completion, UP or any successor, assignee, transferee, or grantee may file with the Milwaukee County Register of Deeds, Milwaukee County, State of Wisconsin, a notice terminating Temporary Land Use restrictions A, B and C above, and the need to recite such restrictions in subsequent conveyance documents. Any such notice shall state that the deed restrictions set forth in Paragraph b., below, including, but not limited to restrictions governing the "Soil Cover" (as such term is used in the SOW), will remain in effect.

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RECORD

**b. Permanent Land Use Restrictions**

1. There shall be no consumption use of the groundwater underlying the Site for drinking water purposes unless and until a demonstration is made to the United States Environmental Protection Agency and the Wisconsin Department of Natural Resources that such groundwater meets drinking water standards.

2. There shall be no residential or commercial use or development for residential or commercial use of that portion of the Site containing the Soil Cover unless approved by the United States Environmental Protection Agency.

3. Except to the extent allowed by EPA, the record owner shall prohibit any use or penetration of the installed Soil Cover, including but not limited to any excavation, drilling, mining, piercing, digging, or boring.

4. There shall be no use which damages or restricts the operation of any remedial action component installed pursuant to the ROD, Remedial Action Decree or SOW.

7241563

REGISTER'S OFFICE } 88 -11 00 AM  
Milwaukee County, WI }  
RECORDED AT  
JUL 12 1996 711 to  
REEL 3839 IMAGE 715 incl.  
Dana Angell REGISTER  
OF DEEDS

IN WITNESS WHEREOF, Union Pacific Railroad Company has executed this Notice of Property Subject to Consent Decree as of this 14<sup>th</sup> day of June, 1996.

UNION PACIFIC RAILROAD COMPANY

By: 

Assistant Vice President

ATTEST:

By: 

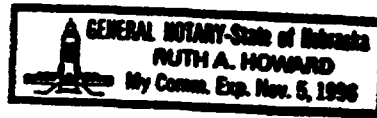
Assistant Secretary

STATE OF NEBRASKA )  
COUNTY OF DOUGLAS )

I, Ruth A. Howard, a Notary Public, duly commissioned and qualified in and for the County and State aforesaid and residing therein, DO HEREBY CERTIFY that R. O. Whitch and C. W. Sawyer to me personally known and known to me to be, respectively, Assistant Vice President and Assistant Secretary of Union Pacific Railroad Company, a Utah corporation, and the identical persons who names are subscribed to the foregoing instrument, appeared before me this day in person, and being instrument, appeared before me this day in person, and being first duly sworn by me, severally acknowledged to me that they are, respectively, Assistant Vice President and Assistant Secretary of said corporation; that as such officers they signed, sealed and delivered said instrument on behalf of said corporation and as their own free and voluntary act; that the seal affixed to said instrument is the seal of said corporation; and that said corporation executed said instrument for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as such Notary Public, at Omaha, Nebraska, this 14<sup>th</sup> day of June, 1996.

Ruth A. Howard  
Notary Public in and for the County  
of Douglas, in the State of Nebraska



My Commission Expires: 11/5/96

ENW  
Refer to:

This instrument was prepared by:  
Union Pacific Railroad Company  
1416 Dodge Street  
Omaha, Nebraska 68179

smcnw018

## EXHIBIT "A"

That part of the North West One-Quarter (1/4) of Section Eight (8), in Township Eight (8) North, Range Twenty-One (21) East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin, which is bounded and described as follows: Commencing at the Northwest corner of said 1/4 Section; thence South 34° 25' 00" East along the center line of North Granville Road 514.10 feet to the point of beginning of the land to be described; thence North 88° 17' 09" East and parallel to the North line of said 1/4 Section 232.93 feet to a point; thence North 34° 25' 00" West and parallel to the center line of North Granville Road 423.23 feet to a point on the Southerly line of the Chicago and North Western Transportation Company right-of-way; thence South 86° 20' 28" East along said right-of-way line 1714.51 feet to a point, said point being 298.13 feet South 00° 03' 33" East and 651.34 feet North 36° 20' 28" West of the Northeast corner of said 1/4 Section; thence South 00° 03' 33" East along a line which is 650.00 feet Westerly of, and measured at right angles, to the East line of said 1/4 Section 873.80 feet to a point on the Northerly right-of-way line of the Chicago, Milwaukee, St. Paul and Pacific Railroad; thence North 70° 33' 56" West along said right-of-way line 1784.31 feet to a point on the center line of North Granville Road; thence North 34° 25' 00" West along the center line of North Granville Road 40.50 feet to the point of beginning, excepting therefrom the Westerly 24.75 feet taken for highway purposes.

SUBJECT TO: Easements of record and possible widening of adjoining Granville Road pursuant to notice and plat filed in office of Register of Deeds, Milwaukee, Wisconsin, on November 12, 1926, as No. 1410.