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BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES  
OF THE STATE OF MONTANA  
HELENA, MONTANA

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IN THE MATTER OF:	)	REMEDIAL INVESTIGATION/ FEASIBILITY STUDY
THE INVESTIGATION OF THE	)	ADMINISTRATIVE ORDER ON CONSENT
ENVIRONMENTAL CONDITIONS	)	
AT AND EMANATING FROM THE	)	
MONTANA POLE AND TREATING	)	DOCKET NO. SF-90-00001
PLANT IN BUTTE, MONTANA	)	

TO: ATLANTIC RICHFIELD COMPANY, a Delaware corporation, acting through its division ARCO Coal Company, authorized to transact business in the State of Montana through the ARCO Coal Company

Respondent.

6010501



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1 Whenever the following terms are used in this Consent Order, or  
2 in documents incorporated herein or appended hereto, the  
3 following meanings shall apply:

4       A. "CECRA" means the Comprehensive Environmental Cleanup  
5 and Responsibility Act, codified at MCA §§ 75-10-701 to -724  
6 (1989).

7       B. "Consent Order" shall mean this document together with  
8 all attachments hereto and appendices incorporated herein.

9       C. "Contractor" shall mean the company or companies  
10 retained by, or on behalf of, Respondent to undertake and  
11 complete the Work or any part thereof. A Contractor, and any  
12 subcontractors retained by the Contractor, shall be deemed to be  
13 related by contract to the Respondent.

14       D. "Day" shall mean calendar Day, unless business Day is  
15 specified. Any deliverables, notices or other written documents  
16 that under the terms of the Consent Order would be due on a  
17 Saturday, Sunday or State of Montana holiday (as identified by  
18 the Governor or by state law) shall be due on the following  
19 business Day.

20       E. "DHES" means the Montana Department of Health and  
21 Environmental Sciences.

22       F. "Dispose" or "Disposal" means the discharge, injection,  
23 deposit, dumping, spilling, leaking, or placing of any Hazardous  
24 or Deleterious Substances into or onto the land or water so that  
25 the Hazardous or Deleterious Substances may enter the environ-

1 ment or be emitted into the air or discharged into any waters,  
2 including ground waters.

3 G. "EPA" means the United States Environmental Protection  
4 Agency.

5 H. "Facility" means the Montana Pole National Priority  
6 List site, located at 220 Greenwood Avenue in Butte, Silver Bow  
7 County, Montana, in the southern 1/2 of Section 24, and the SE  
8 1/4 of Section 23, T3N, R8W. The Facility includes the  
9 remaining plant facilities, on-site storage buildings (pole  
10 barns) and contents, oil recovery system, and soils, surface  
11 water and ground water where contaminants associated with the  
12 operations of the Montana Pole and Treating Plant facility have  
13 come to be located.

14 I. "Fund" shall mean the Environmental Quality Protection  
15 Fund established in MCA § 75-10-704.

16 J. "Hazardous or Deleterious Substance" shall mean:

17 1. a substance that because of its quantity, con-  
18 centration, or physical, chemical, or infectious charac-  
19 teristics may pose an imminent and substantial threat to  
20 public health, safety, welfare or the environment and is:

21 a) a substance that is defined as a hazardous  
22 substance by Section 101(14) of the federal Comprehen-  
23 sive Environmental Response, Compensation, and  
24 Liability Act (CERCLA), 42 U.S.C. 9601(14), as amended;

25 b) a substance identified by the administrator of

1 the United States Environmental Protection Agency as a  
 2 hazardous substance pursuant to Section 102 of CERCLA,  
 3 42 U.S.C. 9602, as amended;

4 c) a substance that is defined as a hazardous  
 5 waste pursuant to Section 1004(5) of the Resource  
 6 Conservation and Recovery Act of 1976, 42 U.S.C.  
 7 6903(5), as amended, including all substances listed or  
 8 identified in 40 CFR 261; or

9 d) any petroleum product.

10 K. "NCP" means the National Oil and Hazardous Substances  
 11 Pollution Contingency Plan, 40 CFR, Part 300.

12 L. "Project Coordinator" shall mean the individual or  
 13 individuals appointed as the State's Project Coordinator(s) by  
 14 DHES, whose duties are described in Section XV of this Consent  
 15 Order.

16 M. (the) "Parties" collectively, shall mean the State of  
 17 Montana, acting by and through DHES, and the ARCO Coal Company.

18 N. "Release" means any spilling, leaking, pumping,  
 19 pouring, emitting, emptying, discharging, injecting, escaping,  
 20 leaching, dumping or disposing of any Hazardous or Deleterious  
 21 Substances into the environment.

22 O. "Respondent" shall mean the Atlantic Richfield Company,  
 23 a Delaware corporation, acting through its division the ARCO  
 24 Coal Company. The term "Respondent" shall include ARCO's  
 25 successors and assigns and all persons acting with or through

1 ARCO's authority and in ARCO's behalf, including ARCO's  
2 officers, directors, principals, employees, and agents, in their  
3 respective capacities where such persons otherwise meet the  
4 definitions of "owners" and "operators" under CECRA.

5 P. "Supplemental Work Plan" shall mean any Work Plan to be  
6 performed under the Additional Work Section, Section XI.  
7 Supplemental Work Plan(s) shall become attached and incorporated  
8 into this Consent Order.

9 Q. (the) "Work" shall mean all investigations, sampling,  
10 and other mitigative actions prescribed by this Consent Order,  
11 including any Work Plans, and any schedules or plans established  
12 by the terms of this Consent Order.

13 R. "Work Plan" means the plan to perform the Work develop-  
14 ed jointly by the Respondent and DHES, which is attached hereto  
15 and incorporated herein as Attachment 1 to this Consent Order.

16  
17 III.

18 FINDINGS OF FACT

19 The State of Montana, acting by and through DHES, has made  
20 the following Findings of Fact concerning the Montana Pole site:

21 A. Respondent ARCO is a corporation currently organized  
22 under the laws of the State of Delaware, with its corporate  
23 headquarters in Los Angeles, California. Respondent ARCO does  
24 business in the State of Montana. ARCO was the record owner of  
25 portions of the land upon which the Facility is situated from



1 1910 to 1958. During a portion this time, from 1946 to 1958,  
2 Respondent leased said property to Torger Oaas and the Montana  
3 Pole and Treating Plant and subsequently sold said property to  
4 Montana Pole and Treating Plant.

5 B. Torger and Martha Oaas, residing on Greenwood Avenue,  
6 owned and operated the Montana Pole and Treating Plant from 1946  
7 to May 17, 1984. The Oaases were in control of, and had  
8 responsibility for, the property during operation of the  
9 Facility.

10 C. The Montana Pole and Treating Plant is located at 220  
11 Greenwood Avenue in Butte, Silver Bow County, Montana, in the  
12 southern 1/2 of Section 24 and the SE 1/4 of Section 23, T3N,  
13 R8W. The Facility includes approximately 45 acres. A map of  
14 the site is attached as Attachment 5.

15 D. The Facility includes associated real property,  
16 remaining foundations, drainage channels, tanks and storage  
17 barns. It includes all soils, surface water and ground water at  
18 or adjacent to the Facility where a Hazardous or Deleterious  
19 Substance associated with the operations of the Montana Pole and  
20 Treating Plant has been Released, deposited, stored, Disposed  
21 of, placed or otherwise come to be located.

22 E. Respondent ARCO owned a portion of the real property  
23 on which the Facility is located during the first twelve (12)  
24 years of Facility operation. During that time, hazardous  
25 substances were Disposed of on site in such a way that they were

1 Released into the environment.

2 F. Bank of Montana Butte received a deed in lieu of  
3 foreclosure to a portion of the Facility on May 17, 1984.

4 G. Surface soils in the area where the Facility was  
5 located are visibly contaminated. In addition, approximately  
6 ten thousand (10,000) cubic yards of soil and sludge were  
7 excavated, bagged and stored in pole barns on Facility property  
8 by EPA as part of a removal action conducted in 1985.

9 H. The 1985 removal action conducted by EPA consisted of  
10 the installation of wells adjacent to Silver Bow Creek to  
11 intercept contaminated ground water prior to its entering Silver  
12 Bow Creek. Floating product is removed from the extracted  
13 ground water through an oil/water separator and the remaining  
14 ground water is reinjected on site through infiltration  
15 galleries. The State of Montana did not participate in the  
16 design or installation of the ground water system. EPA operated  
17 the system until September, 1988 when the State took over its  
18 operation. The State has not modified the design of the system  
19 since it assumed responsibility for its operation.

20 I. A fire at the facility in May, 1969 caused a heavy fuel  
21 oil storage tank to rupture, causing the release of an unknown  
22 quantity of diesel fuel, pentachlorophenol (PCP) and creosote.  
23 Significant spillage from a vat and both retorts was reported.

24 J. Ground water under the Facility is contaminated with  
25 pentachlorophenol, polynuclear aromatic hydrocarbons and diesel

1 fuel constituents. Floating product is present at the water  
2 table in some monitoring wells.

3 K. Oil seeps are visible along the banks of Silver Bow  
4 Creek. Surface water samples from the creek showed  
5 concentrations of pentachlorophenol and diesel fuel.

6 L. The oil recovery system designed to intercept oily  
7 product at the water table before it contaminated Silver Bow  
8 Creek recovered approximately six thousand (6,000) gallons of  
9 product between November, 1986 and December, 1988. This product  
10 is stored in tanks on Facility property.

11 M. Pentachlorophenol and creosote are Hazardous or  
12 Deleterious Substances as defined by MCA § 75-10-701(6). Sludge  
13 and tank bottoms are listed K001 RCRA wastes pursuant to 40 CFR  
14 261.32.

15 N. Dioxins and furans are known contaminants of pen-  
16 tachlorophenol and have been identified in samples from the  
17 Facility. These constituents are Hazardous or Deleterious  
18 Substances as defined by MCA § 75-10-701(6).

19 O. Petroleum products are a Hazardous or Deleterious  
20 Substance as defined by Section 75-10-701(6), MCA.

21 P. Polychlorinated Biphenyls (PCBs) are defined as a  
22 Hazardous or Deleterious substance pursuant to MCA § 75-10-  
23 701(6).

24 Q. Pentachlorophenol (PCP) is a Hazardous or Deleterious  
25 Substance that can cause damage to the human liver, kidney,

1 nervous system, and immune system with chronic exposure. PCP  
2 has been demonstrated to cause cancer in animals.

3 R. Creosote is a Hazardous or Deleterious Substance as  
4 defined by MCA § 75-10-701(6) and contains polynuclear aromatic  
5 hydrocarbons (PAH) which are Hazardous or Deleterious Substances  
6 as defined by MCA § 75-10-701(6). Some PAHs are known  
7 carcinogens.

8 S. Diesel fuel contains toluene, xylene, benzene, and  
9 ethylbenzene, which are considered Hazardous or Deleterious  
10 Substances. Benzene is considered a human carcinogen.

11 T. Actual and potential routes of exposure to PCP, dioxin,  
12 PAHs, diesel fuel constituents, PCBs, dioxin, and other  
13 Hazardous or Deleterious Substances include direct human or  
14 animal contact through ingestion or dermal absorption of soil,  
15 sediment, surface water or ground water, and inhalation of the  
16 Hazardous or Deleterious Substances in air.

17 U. Actual and potential routes of migration of Hazardous  
18 and Deleterious Substances include migration to ground water,  
19 surface water and air.

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IV.

CONCLUSIONS OF LAW

23 Based on the preceding Findings of Fact and the  
24 administrative record, the State of Montana, acting by and  
25 through DHES and in consultation with EPA, has made the

1 following Conclusions of Law:

2 A. Respondent is a "Person" as that term is defined by  
3 MCA § 1-1-201(1)(b) and 75-10-701(9).

4 B. The Montana Pole and Treating Plant and associated  
5 buildings, and all real property, including surface and ground  
6 water, where Hazardous or Deleterious Substances originating  
7 from the Montana Pole and Treating Plant have come to be  
8 located, is a "Facility" as that term is defined in MCA § 75-  
9 10-701(4)(a) or (b).

10 C. ARCO owned or operated the Facility or property at  
11 the time of disposal of a Hazardous or Deleterious Substance as  
12 provided in MCA § 75-10-715(1)(b).

13 D. Bank of Montana Butte was and is an owner or operator  
14 of the Facility at the time of a Release of a Hazardous or  
15 Deleterious Substance, as provided in MCA § 75-10-715 (1)(b).

16 E. The Respondent is, and is hereby notified that it is  
17 found to be a liable Person under MCA Section 75-10-715(1).

18 F. Pentachlorophenol, PAHs, PCBs, creosote and petroleum  
19 products are Hazardous or Deleterious Substances, as those terms  
20 are defined in MCA § 75-10-701(6).

21 G. There have been Releases of Hazardous or Deleterious  
22 Substances at the Facility, and there exists a substantial  
23 threat of continued and future Releases of Hazardous or Deleter-  
24 ious Substances at the Facility that DHES has reason to believe  
25 may present an imminent and substantial endangerment to the

1 public health, welfare, or safety or the environment.

2 H. The information and remedial action required by this  
3 Consent Order is necessary and appropriate to identify the  
4 existence, nature, origin, and extent of the Release or the  
5 threat of Release and the extent and imminence of the danger to  
6 public health, welfare, safety, or the environment.

7 I. The Bank accepted a deed in lieu of foreclosure for  
8 part of the Facility from the Montana Pole and Treating Plant on  
9 May 17, 1984. The offer and acceptance of this deed served to  
10 transfer legal title to part of the Facility to the Bank.  
11 Though the Bank did not record this deed, the transfer qualified  
12 as a legal transfer. Therefore, the Bank currently holds title  
13 to the property.

14

15 V.

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#### DETERMINATIONS

17 A. Based on the Findings of Fact and Conclusions of Law  
18 set forth above, the State of Montana, acting by and through  
19 DHES, and in consultation with EPA, has determined that the  
20 actions required by and undertaken pursuant to this Consent  
21 Order are necessary to protect the public health and welfare and  
22 environment, are in the public interest, are consistent with the  
23 NCP and State requirements, and are appropriate remedial actions  
24 to contain, remove and abate the past Release of Hazardous and  
25 Deleterious Substances and presently continuing Releases and

1 threatened Releases of Hazardous or Deleterious Substances, into  
2 the environment at and from the Facility.

3 B. The Respondent is qualified to perform the actions set  
4 forth in this Consent Order properly and expeditiously.

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VI.

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TERMS AND CONDITIONS OF CONSENT

8 A. In entering into this Consent Order, the Respondent  
9 and the State of Montana agree that the Respondent will conduct  
10 a Remedial Investigation (RI) and Feasibility Study (FS) for the  
11 purpose of:

12 1. evaluating the nature and extent of contamination  
13 and impacts on the public health, welfare, safety or  
14 environment due to the Release of Hazardous or Deleterious  
15 Substances at the Facility in accordance with the Work Plan  
16 and Supplemental Work Plans; and

17 2. identifying and evaluating alternatives for  
18 remediating contamination caused by the Release of  
19 Hazardous or Deleterious Substances at the Facility in  
20 accordance with the Work Plan and Supplemental Work Plans.

21 B. The Parties agree and acknowledge that the development  
22 and performance of a Remedial Investigation (RI) and Feasibility  
23 Study (FS) will be conducted through the retention and direction  
24 of Contractors, in accordance with sound scientific, engineering  
25 and construction practices and shall be consistent with all

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1 applicable federal and state laws and regulations. The  
2 Respondent has provided the State with information concerning  
3 the technical qualifications of the persons and organizations  
4 who have been designated by the Respondent to conduct the RI/FS  
5 activities required by this Consent Order. The State has  
6 determined that Respondent's Contractors are qualified to  
7 undertake the performance of the RI/FS. For any change by the  
8 Respondent in the primary engineering and/or consulting firm or  
9 its principal person in charge, the Respondent shall reaffirm  
10 this ability to carry out the task by notifying the State in  
11 writing of the name(s) of the engineering and/or consulting  
12 firm(s) who will be responsible for carrying out the Work under  
13 this Consent Order, and the principal person in charge of  
14 conducting the Work for each such firm to be used in carrying  
15 out such Work.

16 C. Respondent further completely and voluntarily waives  
17 its rights to, and agrees not to:

- 18 1. appeal the issuance of this Consent Order;
- 19 2. challenge the jurisdiction (or the essential facts  
20 which create jurisdiction) or authority of the State or  
21 DHES to enforce this Consent Order;
- 22 3. contest the validity or enforceability of any and  
23 all provisions, terms, and conditions of this Consent Order  
24 including the Work Plan and any Supplemental Work Plans  
25 adopted pursuant hereto, except as provided for by



1 paragraph I of Section XX.

2 D. Subject to the provisions of paragraph C of this  
3 Section VI, nothing in this Consent Order shall be construed as  
4 an admission of liability by Respondent nor as a limitation,  
5 restriction or waiver of any arguments or challenges which  
6 Respondent may have regarding the proper interpretation or  
7 construction of the provisions, terms and conditions of this  
8 Consent Order and attachments hereto.

9 E. Moreover, Respondent's agreement to comply with the  
10 provisions, terms and conditions of this Consent Order does not  
11 constitute an admission or acknowledgment of the facts asserted  
12 or implied herein. This Consent Order shall not operate as an  
13 admission by Respondent as to any factual assertion or legal  
14 conclusions outside of the context of proceedings to interpret  
15 or enforce this Consent Order. Respondent specifically does not  
16 admit or acknowledge the Findings of Fact or Conclusions of Law  
17 contained in Sections III and IV above, except to the limited  
18 extent noted in Subsection C, above.

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VII.

PARTIES BOUND

21  
22 A. All Parties are bound by the terms of this Consent  
23 Order. Respondent agrees that no change in ownership or  
24 corporate status shall in any way alter the status or  
25 responsibility of the Respondent under this Consent Order.

1 Respondent shall be responsible for carrying out all actions  
2 required of Respondent by the terms and conditions of this  
3 Consent Order. Respondent shall be responsible for insuring  
4 that all Contractors, consultants, firms and other Persons or  
5 entities acting on behalf of Respondent with respect to matters  
6 included herein, will comply with the terms of this Consent  
7 Order.

8  
9 VIII.

10 NOTICE

11 The State of Montana, acting by and through DHES, hereby  
12 notifies Respondent that DHES has determined that Respondent is  
13 a Person responsible for the Release(s) or threatened Release(s)  
14 of Hazardous or Deleterious Substances from the Facility.  
15 Moreover, Respondent is hereby notified by DHES that the Work  
16 required by this Consent Order, the attached Work Plan and any  
17 Supplemental Work Plans is the "appropriate remedial action"  
18 with regard to the Releases or threatened Releases at the  
19 Facility. Respondent is hereby notified that it may be required  
20 to reimburse the Fund for the costs of remedial actions,  
21 including enforcement actions, litigation costs, attorneys' fees  
22 and expert witness fees, taken or incurred by DHES either to  
23 implement itself, or to compel Respondent to implement an ap-  
24 propriate remedial action following its failure or refusal to do  
25 so, and the State may recover all costs incurred by the State in

1 connection therewith, including any punitive damages as set  
2 forth in MCA § 75-10-715(3).

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IX.

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ORDER

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NOW, THEREFORE, RESPONDENT AGREES, AND DHES HEREBY ORDERS, pursuant to MCA §§ 75-10-711 and 75-10-715, Respondent to fully and timely comply with all of the terms, conditions and requirements of this Consent Order.

X.

DEVELOPMENT AND EXECUTION OF WORK PLAN

A. Respondent is ordered and agrees to conduct an RI/FS for the Facility pursuant to the terms of this Consent Order. The Respondent shall conduct the RI/FS in accordance with CERCLA, the National Contingency Plan (NCP), applicable EPA RI/FS guidance (identified in Attachment 3, attached and incorporated herein), and applicable state law and regulation (attached and incorporated herein as Attachment 4). The Respondent shall conduct the RI/FS in accordance with the attached Montana Pole RI/FS Work Plan. The attached Work Plan is hereby incorporated into this Consent Order as an enforceable part hereof (Attachment 1). The Respondent shall also conduct the RI/FS in accordance with the specific activities and schedules for conducting RI/FS work set forth in the attached

1 schedule, Attachment 2. In the event of any inconsistency  
2 between the terms and conditions of this Consent Order, without  
3 reference to its attachments and appendices, and those contained  
4 in the Work Plan, and associated schedules, and attachments, or  
5 other documents incorporated herein, the terms and conditions of  
6 this Consent Order without reference to the attachments and  
7 appendices shall take precedence.

8 B. In the event that subsequent amendments to CERCLA, the  
9 NCP, applicable EPA RI/FS guidance, or applicable state laws or  
10 regulations are promulgated after the effective date of this  
11 Consent Order which materially affect the rights or obligations  
12 of either party with respect to the substantive nature of the  
13 Work to be performed in the RI/FS, the State and the Respondent  
14 agree to negotiate in good faith an amendment to this Consent  
15 Order to provide for such changes.

16 C. The State, in consultation with EPA, shall prepare all  
17 necessary draft and final endangerment assessments, public  
18 health evaluations, and analyses of "Applicable or Relevant and  
19 Appropriate" federal and state standards, requirements, criteria  
20 and limitations (ARARs) required for the RI/FS work, and provide  
21 them to the Respondent in a timely manner for incorporation into  
22 the draft and final RI/FS reports as described below. The  
23 Respondent may submit a preliminary scoping document addressing  
24 endangerment assessment, public health evaluation, or ARARs  
25 issues to the State no later than one hundred eighty (180)

1 calendar Days after the effective date of this Consent Order.  
2 The Respondent agrees that no formal State response to the  
3 Respondent's documents is needed before draft State documents  
4 are published for public comment. The State shall use its best  
5 efforts to complete and deliver these reports to the Respondent  
6 within the time periods projected for completion and delivery in  
7 the RI/FS Work Plan. These projected time periods are estimates  
8 and are not binding upon the State. The State shall notify the  
9 Respondent as early as possible if the State intends to complete  
10 and deliver the reports before the dates projected in the Work  
11 Plan and Schedule, Attachments 1 and 2.

12 D. Respondent shall incorporate the endangerment  
13 assessment(s), public health evaluation(s) and ARARs analysis  
14 prepared by the State in the deliverables described in  
15 paragraphs X.E through X.I below. Where Respondent disagrees  
16 with all or portions of the endangerment assessment(s), public  
17 health evaluation(s) or ARARs analysis prepared by the State,  
18 such disagreement shall not be expressed in the referenced  
19 deliverables. The Respondent shall provide any comments or  
20 objections concerning such documents separately, but not later  
21 than the public comment period described in Section XXIV. Any  
22 comments received from the Respondent, complete with any  
23 responses provided by the state or federal government, shall be  
24 included in the administrative record.

25 E. Draft RI and Preliminary Draft RI/FS Reports: The

1 Respondent shall submit a draft RI report and a preliminary  
 2 draft RI/FS report to the State for review and comment as  
 3 provided in the Work Plan schedule. Upon receipt of the drafts,  
 4 the State shall prepare and transmit comments to the Respondent  
 5 concerning any necessary revisions to be made in the final draft  
 6 RI/FS report before it is made available for public comment.

7 F. Final Draft RI/FS Report: The Respondent shall revise  
 8 the draft RI and preliminary draft RI/FS reports to address the  
 9 State's comments and submit a final draft RI/FS report to the  
 10 State for review and approval. Within thirty (30) days  
 11 following receipt of the State's comments on the draft RI report  
 12 and again within thirty (30) days following receipt of the  
 13 State's comments on the preliminary draft RI/FS report, DHES  
 14 shall hold meetings with the Respondent to review the State's  
 15 comments. Within thirty (30) days of the meeting on the  
 16 preliminary draft RI/FS report, the Respondent shall submit the  
 17 final draft RI/FS report. If the State disapproves the final  
 18 draft RI/FS report, Respondent shall be notified in writing and  
 19 the basis of the disapproval shall be specified. The dispute  
 20 resolution procedures in Section XX shall apply to disputes  
 21 arising from the State's disapproval. Respondent may cure the  
 22 dispute and terminate the dispute resolution process by agreeing  
 23 to the State's changes to the final draft RI/FS report at any  
 24 time during the dispute resolution process.

25 If the State disapproves the final draft RI/FS report, the

1 State may complete the final draft RI/FS, and recover the costs  
2 of such an effort pursuant to federal or state law, upon a  
3 determination by the State, subsequent to the dispute resolution  
4 process, that the RI/FS is not being conducted properly and that  
5 the public interest can only be served by the State taking over  
6 the RI/FS process. Such a decision shall be in writing and  
7 shall be part of the administrative record.

8 G. The State may make the draft RI report available to the  
9 public for review only, and shall make the final draft RI/FS  
10 report available to the public for review and comment for at  
11 least a thirty (30) day period.

12 H. Draft Final RI/FS Report: Following the public review  
13 and comment period, the Respondent shall submit a draft final  
14 RI/FS report to the State within thirty (30) days of receipt of  
15 the State's directions for revision and completion. The  
16 Respondent shall adequately address or incorporate the State's  
17 comments and directions in the draft final RI/FS report.

18 I. Final RI/FS Report: The Respondent shall have thirty  
19 (30) days after receipt of the State's comments on the draft  
20 final RI/FS report to submit the final RI/FS report to the State  
21 for review and approval. If the Respondent does not adequately  
22 respond to State comments in the final RI/FS report, the State  
23 may notify the Respondent in writing that the State disapproves  
24 the final RI/FS report. The dispute resolution procedures in  
25 Section XX, with the exception of the informal negotiation





1 and request in writing that the Respondent develop a  
2 Supplemental Work Plan for the additional Work as soon as  
3 possible and no later than thirty (30) Days after such  
4 notification, and request in writing that the Respondent perform  
5 the additional Work. The supplemental scope of Work shall  
6 specify the basis and reasons for determining that additional  
7 Work is necessary. Prior to delivery of a supplemental scope of  
8 Work to the Respondent, the State shall provide the opportunity  
9 for a scoping meeting to discuss the form and substance of the  
10 Supplemental Work Plan. The Respondent shall respond in writing  
11 to DHES's request for additional Work, and if Respondent agrees  
12 to undertake the additional Work, a Supplemental Work Plan shall  
13 be prepared by the Respondent and submitted to the State for  
14 review and comment. The State shall provide one round of  
15 comments to Respondent which will be incorporated into the  
16 Supplemental Work Plan unless the dispute resolution process  
17 found in Section XX is invoked. The Supplemental Work Plan  
18 developed for that additional Work shall become incorporated  
19 into this Consent Order.

20 B. If the Respondent does not agree to perform the  
21 additional Work and/or does not prepare an acceptable  
22 Supplemental Work Plan, it shall provide its rationale to DHES  
23 in writing. The State shall respond in writing to the  
24 Respondent's comments. If the State and Respondent cannot agree  
25 on the additional Work within thirty (30) Days of Respondent's

1 receipt of the State's response, the dispute shall be subject  
2 to the dispute resolution process in Section XX. The Respon-  
3 dent hereby agrees to perform any additional Work within the  
4 scope of the original Work Plan which is determined, pursuant  
5 to the dispute resolution process, to be necessary. Any fail-  
6 ure by the Respondent to perform additional Work within the  
7 scope of the original Work Plan shall be deemed to be a viola-  
8 tion of this Consent Order. Any failure by the Respondent to  
9 perform additional Work outside the scope of the original Work  
10 Plan shall not constitute a violation of this Consent Order.  
11 For the purposes of this Section, "the scope of the original  
12 Work Plan" shall mean the investigation of contamination asso-  
13 ciated with the Facility, the approximate boundaries of which  
14 are shown in Figures 2-7 of Volume I of the Work Plan (Attach-  
15 ment 1), except that any investigation of organic contamina-  
16 tion in Silver Bow Creek shall be limited to a distance down-  
17 stream to the USGS gauging station located at the Interstate I  
18 15/90 overpass. If organic contamination associated with the  
19 Montana Pole site is found at this location, downstream inves-  
20 tigation will be included as part of investigations associat-  
21 ed with the Silver Bow Creek NPL site. If the Respondent does  
22 not perform the additional Work required of it following the  
23 conclusion of the dispute resolution process, it shall be sub-  
24 ject to statutory penalties for each Day it fails to comply with  
25 the requirements of this Consent Order. In addition, the

1 State reserves the right to conduct the RI/FS activities  
2 described in the supplemental scope of Work and/or pursue any  
3 other actions authorized by applicable state or federal law.

4 C. Respondent agrees that if contaminants are detected  
5 in the deep well to be installed pursuant to the Work Plan,  
6 an additional two deep wells will be installed and sampled  
7 without resort to the additional Work procedures described in  
8 paragraph XI.A. The locations for these two wells will be  
9 determined by the State following a meeting with the Respon-  
10 dent to discuss the appropriate well locations.

11 XII.

12 SITE ACCESS AND SAMPLING

13 A. Respondent agrees to permit the State and its autho-  
14 rized representatives to have unrestricted access to portions  
15 of the Facility that may be owned or controlled by Respondent  
16 which are either impacted by Releases, or utilized to conduct  
17 any activities required by this Consent Order. Such grant of  
18 access shall be for the purpose of conducting, overseeing and  
19 inspecting any and all activities which have been or are being  
20 conducted or overseeing and inspecting conditions which are  
21 addressed under or impacted by the activities required to be  
22 undertaken pursuant to this Consent Order. Nothing herein  
23 shall limit or restrict any statutory inspection, site access,  
24 or sampling authorities vested in DHES by applicable federal  
25 or state law.

1           B. The Respondent hereby consents to observation by DHES  
2 representatives at any time during the performance of Work  
3 required under, performed in connection with, or undertaken in  
4 furtherance of the purposes of this Consent Order. The Respon-  
5 dent consents to DHES taking samples or split samples on any  
6 property owned or controlled by Respondent which is part of the  
7 Facility at any time at DHES's discretion.

8           C. The Respondent shall notify the State not less than  
9 seven (7) days in advance of any sample collection activity to  
10 be conducted by the Respondent or its representatives at the  
11 Facility. Upon the request of the State, the Respondent shall  
12 provide split or duplicate samples to the State of any samples  
13 collected by or on behalf of the Respondent, provided that a  
14 sufficient quantity of materials to be sampled are available on  
15 the day of sampling. The procedures for collecting such split  
16 or duplicative samples will be the procedures set forth in the  
17 Quality Assurance Project Plan (QAPP) for the Montana Pole and  
18 Treating Plant Site, set forth as Attachment 6.

19           D. To the extent access to property owned by third Parties  
20 is required in order for the Respondent to carry out the  
21 requirements of this Order, Respondent agrees to and shall use  
22 its best efforts to obtain access for itself and DHES. Any  
23 agreement must allow Respondent and DHES to sample or monitor  
24 environmental media, including the right to split samples, on  
25 property owned by third parties pursuant to the requirements of

1 the Consent Order and attached Work Plan. The State shall,  
2 consistent with its authority under MCA § 75-10-707, obtain  
3 access for the Respondent if the Respondent provides  
4 documentation to DHES demonstrating that it has used its best  
5 efforts to obtain access on its own and failed to obtain access.  
6 The Respondent agrees that it will reimburse the State for all  
7 expenses not inconsistent with the NCP which the State incurs in  
8 gaining access for the Respondent, at the request of the  
9 Respondent, and will indemnify the State as provided in Section  
10 XXV of this Consent Order.

11 E. When working on property owned by third parties, the  
12 Respondent shall provide the opportunity for the third party to  
13 request and obtain a split sample. The Respondent shall  
14 document that such an opportunity was provided.

15 F. The State shall notify the Respondent, orally or in  
16 writing, not less than seven (7) calendar Days in advance of any  
17 sample collection activity by or on behalf of the State. Upon  
18 the request of the Respondent, the State shall provide split or  
19 duplicate samples to the Respondent of any samples collected by  
20 or on behalf of the State at or in the vicinity of the property  
21 which is the subject of the Work Plans, provided that a  
22 sufficient quantity of the materials to be sampled is available  
23 on the Day of sampling. The procedures for collecting such  
24 split or duplicative samples will be the procedures set forth in  
25 the Quality Assurance Project Plan (QAPP) for the Montana Pole

1 and Treating Plant site, set forth as Attachment 6.

2  
3 XIII.

4 COMPLIANCE WITH OTHER LAWS

5 All actions carried out by the Respondent pursuant to this  
6 Consent Order shall be done in full compliance with all ap-  
7 plicable federal, state and local laws and regulations. The  
8 Respondent shall be responsible for obtaining all federal, state  
9 or local permits which are necessary for the performance of any  
10 Work hereunder. Pursuant to the State's authority under MCA §  
11 75-10-721(3), the State agrees to exempt all remedial actions  
12 conducted entirely on site pursuant to this Consent Order from  
13 State and local administrative or procedural permit  
14 requirements, if necessary to complete the requirements of this  
15 Consent Order in a timely fashion.

16  
17 XIV.

18 QUALITY ASSURANCE/QUALITY CONTROL

19 A. The Respondent shall comply with all approved quality  
20 assurance, quality control, and chain of custody procedures and  
21 requirements as they pertain to all sampling as set forth in the  
22 Quality Assurance Project Plan (QAPP) and the Laboratory  
23 Analytical Protocol (LAP) established under this Consent Order.

24 B. Respondent, the State and their respective contractors  
25 and consultants shall cooperate and make available to each other

1 in monthly data reports a summary of site activities including  
2 the results of sampling and testing, and upon request other data  
3 generated by any of them or on their behalf, including raw data,  
4 field notes, data validation reports and any other relevant  
5 information in their possession regarding the actions called for  
6 by this Consent Order, except as exempt by law from such  
7 disclosure. Monthly data reports shall include data received  
8 during each calendar month and shall be due no later than the  
9 15th day of the succeeding month.

10 C. In order to provide quality assurance and maintain  
11 quality control with respect to all samples collected pursuant  
12 to this Consent Order, the Respondent shall:

13 1. Arrange for access for DHES and its authorized  
14 representatives, upon reasonable notice to Respondent and  
15 during regular business hours, to any laboratories and  
16 personnel utilized by the Respondent for analyses;

17 2. Ensure that all sampling and analyses are performed  
18 according to the methods set forth in the Sampling and  
19 Analysis Plans (SAPs) attached and incorporated herein as  
20 Attachment 7, the QAPP and the LAP established under this  
21 Consent Order;

22 3. Ensure that any laboratories utilized by the  
23 Respondent for analyses prepare and maintain adequate  
24 documentation of compliance with the requirements described  
25 in XIV.C.2. (above) and that such documentation be made

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available to DHES and the Respondent upon request;

4. Ensure that any laboratories utilized by the Respondent for analyses participate in a quality assurance/quality control program equivalent to that which is followed by EPA under CERCLA. As part of such a program, and upon request by DHES, such laboratories shall perform such analyses of samples provided by DHES as are necessary to demonstrate the quality of each laboratory's analytical data.

5. If Respondent utilizes a laboratory which participates in EPA's Contract Laboratory Program, paragraphs 1 and 4 of this Section XIV shall be inapplicable.

XV.

PROJECT COORDINATORS AND REPORTING

A. On or before the effective date of this Consent Order, the Respondent shall designate one or more Project Coordinators and alternate Project Coordinators. The State Project Coordinator will be Brian Antonioli, and the alternate Project Coordinator will be Karen Zackheim. The Project Coordinator for the Respondent will be Robert D. Montgomery. The alternate Project Coordinator for the Respondent will be William R. Williams. Each Project Coordinator shall be responsible for overseeing the implementation of this Consent Order. To the



1 maximum extent practicable, communications between the  
2 Respondent and the State, and all documents, reports, ap-  
3 provals, and other correspondence concerning the activities  
4 performed pursuant to or required by the terms and conditions of  
5 this Consent Order, shall be directed through the Project  
6 Coordinators. If the Project Coordinator is unavailable, such  
7 information shall be directed through the alternate Project  
8 Coordinator. During implementation of the Work Plans and any  
9 supplemental Work Plans, the Project Coordinators shall,  
10 whenever possible, attempt in good faith to resolve disputes  
11 informally through discussion of the issues.

12 B. The State and the Respondent shall each have the right  
13 to change their respective Project Coordinators. Such a change  
14 shall be accomplished by notifying the other Party as soon as  
15 possible after making the change.

16 C. The State Project Coordinator shall have, and may  
17 exercise, the authority vested in DHES by MCA §§ 75-5-621 and  
18 75-10-712. In addition, he shall have the authority to  
19 immediately halt any activities at the Facility which are being  
20 or may be undertaken pursuant to this Consent Order, which  
21 violate, threaten to violate, or which cause or threaten to  
22 cause, a public nuisance or a violation of any requirements of  
23 applicable federal or state law, this Consent Order, or a Work  
24 Plan or Supplemental Work Plan established under this Consent  
25 Order.

1           D. When the State Project Coordinator takes action under  
2 paragraph XV.C, the State Project Coordinator may orally direct  
3 a substantive change not inconsistent with the NCP to the  
4 requirements of the Work Plan. Such a change shall be followed  
5 up in writing by the State within three (3) business days of the  
6 oral direction. "Substantive change," for the purposes of this  
7 paragraph, shall be defined as any change that contradicts the  
8 written language in the Work Plan attached hereto, and any  
9 Supplemental Work Plans, provided, however, that any substantive  
10 change which substantially increases the cost to, or obligations  
11 of, the Respondent, other than substantive changes to address  
12 emergency conditions, shall be proposed as Additional Work under  
13 Section XI of this Consent Order. Such direction shall be  
14 subject to dispute resolution after receipt of written notice  
15 specified above, unless covered under the conditions described  
16 in Section XX.J. Once a final determination has been made  
17 pursuant to the dispute resolution process described in this  
18 Consent Order, the Parties agree to incorporate such change into  
19 this Consent Order by written amendment. Any substantive change  
20 ordered by the State Project Coordinator which affects the  
21 Schedule of activities set forth in Attachment 2, shall be  
22 treated as a Force Majeure event pursuant to Section XVI of this  
23 Consent Order. If dispute resolution procedures are not  
24 initiated within 10 business days of receipt by the Respondent  
25 of the written notice referenced in paragraph XV.D above, the

1 written notice shall be incorporated into this Consent Order as  
2 a modification and shall become a fully enforceable part  
3 thereof.

4 E. The absence of the State Project Coordinator from the  
5 Facility shall not be cause for stoppage of the Work to be  
6 performed pursuant to this Consent Order.

7 F. One copy of all plans, reports, notices and other Work  
8 products required under the terms of this Consent Order shall be  
9 sent by certified mail, return receipt requested, or equivalent  
10 service to each of the following:

11 Brian Antonioli  
12 Solid and Hazardous Waste Bureau  
13 Montana Department of Health and  
14 Environmental Sciences  
15 Cogswell Building, Room B201  
16 Helena, MT 59620

17 Thomas L. Eggert, Esq.  
18 Special Assistant Attorney General  
19 Legal Division  
20 Montana Department of Health and  
21 Environmental Sciences  
22 Cogswell Building, Room C216  
23 Helena, MT 59620

24 Michael Bishop  
25 U.S. Environmental Protection Agency  
Region VIII  
Federal Building  
301 South Park  
Helena, MT 59626-0096

26 G. Except for initial oral notices specified in Sections  
27 XV.D., XVI.B. and XX.A., all notices given pursuant to this  
28 Consent Order shall be given in writing.

29 H. Copies of all plans, reports, notices and other Work

1 products to be given to ARCO shall be sent to the following  
2 address:

3 Robert D. Montgomery  
4 ARCO Coal Company  
5 307 East Park Avenue, Suite 301  
6 Anaconda, MT 59711

7 with copies to:

8 Jeffrey H. Desautels, Esq.  
9 ARCO Coal Company  
10 555 Seventeenth Street, Suite 2000  
11 Denver, CO 80202

12 and

13 Linda L. Rockwood, Esq.  
14 Parcel, Mauro, Hultin & Spaanstra, P.C.  
15 1301 California, Suite 3600  
16 Denver, CO 80202

17 XVI.

18 FORCE MAJEURE

19 A. Failure of the Respondent to comply with the require-  
20 ments of this Consent Order, including the Work Plan and  
21 Supplemental Work Plans shall be excused only to the extent such  
22 delay or failure of performance is caused by reasonably  
23 unforeseeable occurrence(s) beyond the control of the Respondent  
24 and which the Respondent could not have prevented, or avoided  
25 by the exercise of due diligence, (hereinafter: "Force  
Majeure"). Force Majeure shall include but not be limited to:  
Acts of God, war, revolution, riots, strikes, fires, or floods.  
Such circumstances also include, but are not limited to, delays  
or failures of governmental agencies in issuing necessary  
permits or approvals, provided such permits are required and the

1 Respondent has timely submitted complete applications and  
2 provided all required information. Such circumstances may also  
3 include delays in obtaining access to property of third Parties,  
4 provided that the Respondent has made a good faith and timely  
5 effort to secure such access, and provided that the Respondent  
6 has requested assistance from the State in a timely manner.  
7 Finally, Force Majeure may include delays, beyond time periods  
8 estimated in the Work Plan, by the State in providing comments  
9 or other key documents, provided that the delay shortens the  
10 period allowed for the Respondent to comply with a deadline.  
11 Such circumstances shall not include increased cost of perfor-  
12 mance, changed economic circumstances, or normal inclement  
13 weather. The Respondent shall bear the burden of proving by a  
14 preponderance of the evidence that any failure to comply with  
15 the requirements of this Consent Order, the Work Plan or a  
16 Supplemental Work Plan is due to Force Majeure.

17 B. The Respondent shall notify the State's Project  
18 Coordinator(s) orally, within 48 hours of the time Respondent  
19 learns of the circumstances, and shall, within seven (7) Days of  
20 oral notification to the State, notify the State in writing of  
21 the anticipated length and cause of delay, the measures taken  
22 and to be taken to prevent or minimize the delay, and the  
23 timetable by which the Respondent intends to implement those  
24 measures. Oral notification to the State must occur in no event  
25 more than 48 hours after Respondent or Respondent's contrac-

1 tor(s) become aware of the occurrence or event causing the delay  
2 or failure in whole or in part. Oral notification shall be to  
3 the State Project Coordinator, Brian Antonioli, or his designee,  
4 at (406) 444-2821. After business hours, oral notification  
5 shall be to Brian Antonioli at (406) 442-6130, Karen Zackheim at  
6 (406) 449-6366 or Vic Andersen at (406) 458-5118. Failure to  
7 timely make the oral and written notifications to the State  
8 required by this paragraph B of any event for which Force  
9 Majeure is claimed shall waive the defense otherwise provided by  
10 this paragraph, but only for the event for which notice has not  
11 been made.

12 C. If the Respondent demonstrates to the State that the  
13 delay has been or will be caused by circumstances beyond the  
14 reasonable control of the Respondent and that it exercised due  
15 diligence to prevent the delay, the time for performance for  
16 that element of the Work Plan or Supplemental Work Plan shall be  
17 extended for a period equal to the delay. The extension of time  
18 may include any reasonable additional time necessary, not to  
19 exceed 15 Days, to mobilize manpower or machinery after the  
20 elimination of the Force Majeure event. This shall be ac-  
21 complished through written notice or through an amendment to  
22 this Consent Order, as appropriate. Such an extension does not  
23 alter the schedule for performance or completion of other tasks  
24 required by the Work Plan or Supplemental Work Plans unless  
25 these are specifically altered by amendment of the Consent

1 Order, or unless the Work on those other tasks depends on  
2 continued Work on the tasks delayed by the Force Majeure event.  
3 In the event further Work depends on the Work delayed by the  
4 Force Majeure event, the time for performance of the further  
5 Work shall be extended only for a period equal to that of the  
6 delay caused by the Force Majeure event and any reasonable  
7 additional time necessary, not to exceed fifteen (1 ) Days, to  
8 mobilize manpower or machinery.

9 D. In the event that the State and Respondent cannot agree  
10 that any delay or failure has been or will be caused by cir-  
11 cumstances beyond the reasonable control of the Respondent, or  
12 if there is no agreement on the length of the extension, the  
13 dispute shall be resolved in accordance with the provisions of  
14 Section XX of this Consent Order. If Respondent does not  
15 prevail in the dispute resolution pursuant to the dispute  
16 resolution process, any stipulated penalties which would apply  
17 by operation of Section XIX of this Consent Order shall apply  
18 during the term of the dispute resolution procedures, as  
19 provided for in Section XX.

20 E. If the late receipt of State comments or documents  
21 results in Respondent's inability to comply with a deadline due  
22 to inclement weather conditions which substantially adversely  
23 affect the specific activity to be performed, the State and the  
24 Respondent agree to negotiate a schedule extension.

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XVII.

RECORD PRESERVATION AND EXCHANGE

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3       A. The Respondent agrees that it shall preserve and make  
4 available to DHES, during the pendency of this Consent Order and  
5 for a period of six (6) years from the date of termination of  
6 this Consent Order, all records or documents in its possession  
7 or in the possession of its employees, agents, accountants,  
8 contractors, or attorneys that relate to the Work performed at  
9 the site pursuant to this Consent Order. Upon written request  
10 by the State, Respondent shall within twenty (20) Days make all  
11 such documents not exempt from disclosure by law available to  
12 the State. At the end of this six (6) year period, the  
13 Respondent may destroy any such records, but only after notify-  
14 ing DHES at least thirty (30) Days in advance and allowing DHES  
15 to inspect and copy any such records. At any time before the  
16 end of the six (6) year period, Respondent may discharge its  
17 obligations under this Section with respect to documents not  
18 exempt from disclosure by law by notifying the State in writing  
19 and providing the State with originals, if available, or  
20 unaltered reproductions of copies in possession of Respondent  
21 of all such reports and documents not already provided to the  
22 State and not exempt from disclosure by law. If unaltered  
23 reproductions of copies are provided, the custodian of the  
24 records shall certify that to the best of the custodian's  
25 knowledge, the copies were made contemporaneously with the



1 original and that the copies are an accurate reproduction of the  
2 original. Thereafter, the records may be destroyed except that  
3 the Respondent must preserve all records and documents which the  
4 Respondent claims are exempt by law from disclosure for the  
5 entire six (6) year period referenced above.

6 B. All records, documents, raw data, and other information  
7 (including, but not limited to, field notes, daily ledgers,  
8 diaries, and memoranda), not otherwise exempt from disclosure by  
9 law, which are within the custody or control of Respondent or  
10 its Contractors relating to performance of any of the activities  
11 required by or undertaken pursuant to this Consent Order or  
12 plans established thereunder shall be available to DHES for  
13 inspection and copying upon notice to the Respondent as provided  
14 for herein.

15  
16 XVIII.

17 ADMISSIBILITY OF DATA

18 A. Except for objections as to relevance, the Parties  
19 hereby stipulate to and waive any objection to the admissibility  
20 into evidence of the results of any final data generated by the  
21 Respondent in the performance of the requirements of this  
22 Consent Order. For purposes of this Section, the term "final  
23 data generated" shall be interpreted to mean only analytical  
24 data that have been verified and approved by the State, or  
25 verified by the Respondent and approved by the State, pursuant

1 to the QAPP and the data assessment and data validation plans as  
2 being in full compliance with the quality assurance/quality  
3 control ("QA/QC") requirements of the QAPP, LAP, and SAPs in  
4 effect at the time the samples were collected. Additionally,  
5 except for objections as to relevance, the Parties stipulate to  
6 and waive any objection to the admissibility into evidence of  
7 final data generated and contained in, or referenced in, reports  
8 generated by any of the Parties or their Contractors pursuant to  
9 this Consent Order.

10 B. If the State determines that analytical data are still  
11 usable in the RI/FS (and supporting documents), or in a natural  
12 resource damage context, for certain specific purposes, and  
13 QA/QC requirements that were in place at the time the data were  
14 gathered were not completely satisfied, or no QA/QC requirements  
15 existed, the State shall identify such data in a written report  
16 which describes the acceptable uses for the data, including any  
17 limitations on such uses and the reasons why they are still  
18 usable. The State shall transmit the report to the Respondent  
19 with a request that the Respondent stipulate to and waive any  
20 objection as to the admissibility into evidence (with the  
21 reservation described above) of the data if offered by the State  
22 as evidence in any enforcement proceeding. The Respondent shall  
23 respond in writing no later than thirty (30) days following  
24 receipt of the report to each issue and data point discussed by  
25 the State. The Respondent shall negotiate in good faith and, if

1 agreement is reached, enter into a written stipulation and  
2 waiver concerning the data. If the State and the Respondent do  
3 not agree to a written stipulation covering certain data, the  
4 Respondent waives its rights to object to expenditures of funds  
5 (either required of Respondent or made by the State) necessary  
6 for the collection of new data to replace that which was not  
7 stipulated to; however, Respondent reserves any objections it  
8 may have as to the necessity or use of the data not stipulated  
9 to or the new data.

10 C. The Respondent may also submit a report to the State  
11 identifying data that does not fully comply with QA/QC  
12 requirements, describing acceptable uses for the data,  
13 describing the reasons why it is still usable, and proposing a  
14 written stipulation and waiver of the right to raise evidentiary  
15 objections in any further enforcement proceeding by the State.

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XIX.

18

STIPULATED PENALTIES

19 A. In the event that the Respondent's completion of the  
20 tasks set forth in this Section and called for in the Work Plan  
21 is not timely according to the schedule in Attachment 2, and  
22 such delay is not excused by operation of Section XVI (Force  
23 Majeure), or if the Respondent violates the following provisions  
24 of this Consent Order, DHES may assess and Respondent shall pay,  
25 by tendering to DHES within ten (10) Days of the Respondent's

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1 receipt of a written demand from DHES for payment of such  
 2 penalties, the sum(s) set forth below as stipulated penalties  
 3 for each stipulated penalty event (i.e., violation, delay,  
 4 refusal or failure). Stipulated penalties may be assessed for  
 5 each Day during which such violation, delay, or failure occurs  
 6 or continues. The demand shall specify the events giving rise  
 7 to Respondent's asserted liability for stipulated penalties and  
 8 the amount of such penalties.

9 1. For each Day of delay of the delivery of the  
 10 draft and final sampling and analytical plans, the  
 11 technology screening document, the Alternatives Screening  
 12 Document (ASD report), the treatability study Work Plan,  
 13 the draft RI report, the preliminary draft RI/FS report,  
 14 the final draft RI/FS report, the draft final RI/FS  
 15 report, and the final RI/FS report:

	<u>Amount/Day</u>
1-14 Days	\$ 3,000.00
15-30 Days	6,000.00
31 or more Days	12,000.00

16 2. For failure to pay uncontested portion of  
 17 reimbursable costs on time as specified in Section XXI:

	<u>Amount/Day</u>
1-14 Days	\$ 1,000.00
15-30 Days	3,000.00
31 or more Days	6,000.00

18 3. For each instance of unintentional destruction  
 19 of a document(s) in violation of Section XVII (Respondent  
 20 shall bear the burden of establishing that any destruc-  
 21 tion was unintentional):

22 \$2,500 per instance  
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quantity of the document  
being filmed

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4. For each instance of willful destruction of a document in violation of Section XVII, failure to provide access under Section XII, or failure to comply with the agreement not to contest jurisdiction in Section VI:

\$20,000 per instance

B. DHES hereby finds that the provisions of this Section XIX are designed to protect the public health, welfare, safety and environment by achieving a prompt, complete and efficient assessment of the nature and extent of, and the development of, a plan for remediation of environmental degradation that may be present at the site. Stipulated penalties are also integral and essential to DHES's desire that the provisions of this Consent Order be, to the maximum extent achievable, self-executing and self-enforcing. All stipulated penalties not specifically rejected by the dispute resolution process shall be paid on or before the tenth (10th) Day following final resolution of the dispute pursuant to Section XX of this Consent Order.

C. DHES may, in its discretion, impose a lesser penalty for minor violations. Any such decision to reduce stipulated penalties otherwise due pursuant to Section XIX.A. of this Consent Order shall be solely at DHES's discretion and shall not be subject to dispute resolution.

D. Stipulated penalties shall begin to accrue as of the date of receipt by Respondent of written notice from the State specifying the violation of the Consent Order requirement and specifying the applicable penalty provision. The check for

1 payment of the stipulated penalties shall be mailed within ten  
2 (10) days of Respondent's receipt of a written demand for  
3 payment. Payment of stipulated penalties pursuant to this  
4 Section XIX to DHES shall be by check, made payable to the order  
5 of "State of Montana, Department of Health and Environmental  
6 Sciences" and tendered to:

7 Centralized Services Division  
8 Department of Health and Environmental Sciences  
9 Cogswell Building, Room C123  
10 Helena, MT 59620

11 A copy of the transmittal letter and copy of the check shall be  
12 sent to the legal division at the following address:

13 Thomas L. Eggert, Esq.  
14 Department of Health and Environmental Sciences  
15 Legal Division, Room C216  
16 Cogswell Building  
17 Helena, MT 59620

18 E. If Respondent fails or refuses to comply with the  
19 requirements and schedules of this Consent Order, the State may  
20 pursue any other remedy or sanction which may be available to  
21 the State because of the Respondent's failure or refusal to  
22 comply with any of the terms of this Consent Order, including an  
23 action for statutory penalties or for injunctive relief to  
24 enforce the terms of this Consent Order.

25 F. Delay caused by formal dispute resolution requested by  
Respondent under Section XX in which DHES prevails shall not  
constitute "a circumstance beyond the control of the Respondent"  
for purposes of being excused from payment of stipulated  
penalties under Section XVI (Force Majeure).

1 G. With respect to stipulated penalties, the State shall  
2 have the burden of proving non-compliance, except as specified  
3 in Section XIX.A.3., and the Respondent shall have the burden  
4 of proving the occurrence of a Force Majeure event.

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XX.

DISPUTE RESOLUTION

8 A. In the event of any dispute pertaining to any of the  
9 requirements of this Consent Order, including the Work Plan and  
10 any Supplemental Work Plans, the Parties shall initiate an  
11 informal dispute resolution period not to exceed ten (10) Days.  
12 During this time period, representatives of the State and the  
13 Respondent shall meet informally to make a good faith attempt  
14 to resolve the dispute. At the conclusion of the informal  
15 dispute resolution process, DHES shall immediately notify the  
16 Respondent orally of its decision. The conclusion of the  
17 informal dispute resolution process shall be documented by DHES,  
18 and a notice shall be sent to Respondent within three (3) days  
19 of the documented conclusion. Any agreement between the Parties  
20 resolving a dispute shall be in writing and made a part of the  
21 administrative record. It is understood that neither the  
22 Director of the Department of Health and Environmental Sciences  
23 nor the Administrator of the Environmental Sciences Division  
24 will be present at these meetings.

25 B. In the event the dispute cannot be resolved through

1 this informal process, the Respondent may submit, on or before  
2 the tenth (10th) Day after conclusion of the informal dispute  
3 resolution process, a notice describing the nature of the  
4 dispute to the Administrator of the Environmental Sciences  
5 Division. This notice shall include all arguments and  
6 authority, both statutory and common law, and other facts and  
7 conclusions upon which the Respondent relies in support of its  
8 position.

9 C. Any dispute or argument in support of a dispute not  
10 submitted to the Administrator of the Environmental Sciences  
11 Division within this ten-Day period shall be waived.

12 D. Within ten (10) Days following receipt of the  
13 aforementioned notice to the State, the Administrator of the  
14 Environmental Sciences Division shall schedule and hold a  
15 hearing addressing the subject matter of the dispute. The  
16 Administrator of the Environmental Sciences Division or his duly  
17 designated representative shall attempt to schedule the hearing  
18 for a time which is convenient to the Parties. The  
19 Administrator shall notify in writing all Parties of the time  
20 and place of the hearing. This hearing shall take place before  
21 the Administrator or his duly designated representative and  
22 shall be transcribed or recorded. At this hearing, all Parties  
23 may present their respective arguments and any evidence in  
24 support of their position. The Administrator of the  
25 Environmental Sciences Division or his duly designated



1 representative shall then consider all arguments and all  
2 evidence submitted and shall render a written decision upon the  
3 dispute within seven (7) Days of the hearing.

4 E. In the event the Respondent does not agree with the  
5 decision of the Administrator, it may appeal, in writing within  
6 five (5) Days of its receipt of the decision, to the Director  
7 of the Department of Health and Environmental Sciences. At this  
8 time, the Respondent can request and the Director may, at his  
9 discretion, schedule a meeting with the Respondent and  
10 representatives of the State of Montana, at which time both  
11 Parties may make an oral presentation of their respective  
12 positions. It is to be understood, however, that this meeting  
13 is to be scheduled solely at the discretion of the Director and  
14 nothing in this Section entitles the Respondent to such a  
15 meeting as a matter of right. Only those arguments and posi-  
16 tions originally presented at the hearing before the  
17 Administrator will be considered at this appeal stage. The  
18 Director shall render a written decision within seven (7) Days  
19 on the appeal following receipt of the request from the  
20 Respondent. In the event the Director decides to hold a  
21 meeting as provided above, the period for rendering a written  
22 decision may be extended for an additional seven (7) days;  
23 however, no stipulated penalties shall accrue during that  
24 period. The decision of the Director is final and shall be  
25 made part of the administrative record.

1 F. In the event the Administrator or his duly designated  
2 representative fails to render a written decision within the  
3 time period stated in paragraph XX.D or the Director fails to  
4 render a written decision within the time period stated in  
5 paragraph XX.E, stipulated penalties shall be tolled for each  
6 day that such written decision is delayed.

7 G. Any stipulated penalties which arise out of or are the  
8 subject of the dispute resolution shall accrue during the  
9 dispute resolution period, unless tolled by paragraph XX.E or  
10 XX.F. In the event this process ends in favor of the  
11 Respondent, no stipulated penalties shall be due for that  
12 particular violation. In the event this process ends in favor  
13 of the State, all penalties shall be immediately due and owing  
14 and shall be paid by Respondent in accord with the procedures  
15 set forth in paragraph XIX.D, unless either the Administrator  
16 or the Director finds that the Respondent's position was  
17 substantially justified. If it is found that the Respondent's  
18 position was substantially justified or that the Respondent  
19 acted in good faith in advancing an event as a Force Majeure,  
20 then the Administrator or the Director, as appropriate, may  
21 forgive part or all of the stipulated penalties incurred. Such  
22 a decision shall be solely at the discretion of the  
23 Administrator or Director.

24 H. In the event the dispute resolution process ends in  
25 favor of the State, the Respondent understands and agrees to

1 reimburse the State for all costs incurred by the State because  
2 of the utilization of this resolution process. These costs  
3 shall include but are not limited to costs incurred by the State  
4 through the utilization of its own employees, attorneys,  
5 laboratories or scientific studies.

6 I. The Respondent may not challenge provisions of this  
7 Consent Order to which it has already agreed by resorting to  
8 these dispute resolution procedures, except that a good faith  
9 dispute as to interpretation of the Consent Order shall be  
10 subject to such procedures. Implementation of these dispute  
11 resolution procedures shall not provide the basis for any  
12 schedule extension for any activities required in this Consent  
13 Order unless the Department of Health and Environmental Sciences  
14 agrees in writing to a scheduled extension.

15 J. The Director of the Department of Health and  
16 Environmental Sciences shall have authority to suspend these  
17 dispute resolution procedures during any period in which an  
18 immediate action is required to prevent an imminent and  
19 substantial threat to public health, welfare or the environment.  
20 In the event of such a suspension, any stipulated penalties  
21 otherwise accruing shall be tolled until Respondent's receipt of  
22 notification of resumption of the dispute resolution process.

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REIMBURSEMENT OF COSTS

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3 A. The Respondent agrees to reimburse the State within  
4 forty-five (45) Days of receipt of an accounting which iden-  
5 tifies all costs incurred by the Department of Health and  
6 Environmental Sciences and its contractor the Montana Bureau of  
7 Mines and Geology (hereafter DHES costs) prior to the effective  
8 date of this Consent Order. Such past costs include costs  
9 incurred in connection with the investigation of or response to  
10 Releases or threatened Releases from the Facility. The  
11 accounting will include all costs incurred under, or in  
12 connection with, the drafting, negotiation and execution of this  
13 Consent Order. The Respondent agrees to pay all DHES costs,  
14 excluding those provided by U.S. EPA pursuant to cooperative  
15 agreements covering the Montana Pole NPL Site. Past DHES costs  
16 shall not exceed twenty-three thousand dollars (\$23,000).  
17 Payment of this amount by Respondent shall constitute a full and  
18 final settlement by Respondent and the State of State response  
19 costs at the Montana Pole site arising under CECRA and CERCLA  
20 prior to the effective date of this Consent Order.

21 B. On or after the beginning of each calendar quarter  
22 (i.e., January 1, April 1, July 1 and October 1) beginning on  
23 the effective date of this Consent Order, the State shall submit  
24 an accounting, including all applicable documentation, to the  
25 Respondent covering all remedial action costs incurred by the

1 XXI.

2 REIMBURSEMENT OF COSTS

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4 forty-five (45) Days of receipt of an accounting which iden-  
5 tifies all costs incurred by the Department of Health and  
6 Environmental Sciences and its contractor the Montana Bureau of  
7 Mines and Geology (hereafter DHES costs) prior to the effective  
8 date of this Consent Order. Such past costs include costs  
9 incurred in connection with the investigation of or response to  
10 Releases or threatened Releases from the Facility. The  
11 accounting will include all costs incurred under, or in  
12 connection with, the drafting, negotiation and execution of this  
13 Consent Order. The Respondent agrees to pay all DHES costs,  
14 excluding those provided by U.S. EPA pursuant to cooperative  
15 agreements covering the Montana Pole NPL Site. Past DHES costs  
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18 final settlement by Respondent and the State of State response  
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20 prior to the effective date of this Consent Order.

21 B. On or after the beginning of each calendar quarter  
22 (i.e., January 1, April 1, July 1 and October 1) beginning on  
23 the effective date of this Consent Order, the State shall submit  
24 an accounting, including all applicable documentation, to the  
25 Respondent covering all remedial action costs incurred by the

1 State in connection with, or arising out of, its response to  
2 Releases or threatened Releases from the Facility. However, the  
3 State agrees not to seek, solely on the basis of this Consent  
4 Order, cost recovery for any action defined as a remedial action  
5 by CERCLA Section 101(24), 42 U.S.C. § 9601(24). The Respondent  
6 agrees to and shall reimburse the State for all activities and  
7 oversight undertaken by the State or its Contractors which are  
8 consistent with the scope of the State's role and  
9 responsibilities under this Consent Order. The State's  
10 accounting shall itemize State costs which have not been covered  
11 by funding provided by the EPA through a cooperative agreement,  
12 and shall include, at a minimum, the following information: the  
13 names and titles of State employees and retained legal counsel,  
14 date(s), time and other direct charges; indirect charges; and  
15 State Contractor vouchers and/or invoices for Work performed for  
16 State activities and oversight related to implementation of  
17 this Consent Order, except for any privileged information  
18 contained in such vouchers or invoices.

19 C. Within thirty (30) Days of receipt of documentation  
20 from the State, the Respondent shall, subject to its right to  
21 invoke the provisions in Paragraph E of this Section XXI,  
22 reimburse the State for all such costs which have not been  
23 covered by funding provided by the EPA through a cooperative  
24 agreement.

25 D. Payment to the State for its costs described in

1 paragraphs A and B shall be by check and shall include a  
2 notation that the amount is a contribution to the Environmental  
3 Quality Protection Fund. The check shall be made payable to  
4 "State of Montana, Department of Health and Environmental  
5 Sciences" and shall be tendered to: Centralized Services  
6 Division, Montana Department of Health and Environmental  
7 Sciences, Cogswell Building, Room C123, Helena, Montana 59620.  
8 The contributions should be identified as being for the Montana  
9 Pole site. Copies of all payments to the State shall be  
10 provided at the time of such payment to: Thomas L. Eggert,  
11 Esq., Montana Department of Health and Environmental Sciences,  
12 Legal Division, Room C216, Cogswell Building, Helena, Montana  
13 59620.

14 E. If the Respondent concludes that the State has made an  
15 accounting error, has not included the documentation described  
16 in paragraph B. above, or has included remedial action costs  
17 that are not recoverable under this Consent Order, it may  
18 contest payment by notifying the State of these conclusions,  
19 together with the facts and arguments upon which Respondent  
20 relies to support its conclusions, in writing within thirty (30)  
21 Days of receipt of the accounting. Any objection to the State's  
22 remedial action costs or supporting arguments not made within  
23 that time is waived. Following receipt of the Respondent's  
24 objections and supporting arguments, the State and the  
25 Respondent shall then have thirty (30) Days to resolve their

1 differences. If agreement cannot be reached within the 30-Day  
2 period, the State reserves all rights it has to bring an action  
3 against Respondent under applicable federal or state law, to  
4 recoup all recoverable costs as set forth in the accounting,  
5 together with allowable interest and damages and penalties, not  
6 reimbursed by the Respondent. Respondent reserves its right to  
7 contest all such claims.

8 F. If the Respondent contests payment of any of the  
9 State's remedial action costs included within an accounting  
10 submitted pursuant to paragraph B of this Section XXI and such  
11 costs are subsequently found to be due and owing the State, the  
12 Respondent may be liable to the State for damages in an amount  
13 of two (2) times the amount of the remedial action costs in  
14 dispute, plus two (2) times the costs incurred in bringing such  
15 suit, including attorneys' and expert witness fees and expenses.

16 G. The State reserves all rights it has to recover any  
17 future costs incurred by the State in connection with investiga-  
18 tion, remedial or response activities at the Facility pursuant  
19 to applicable federal and state law (including state common  
20 law).

21 H. Upon payment of all past costs due the State as  
22 described in paragraph A. of this Section, the State releases  
23 Respondent from any further liability for costs incurred at the  
24 Facility prior to the effective date of this Consent Order.  
25 This paragraph shall in no way affect Respondent's liability for



1 costs incurred subsequent to the effective date of this Consent  
2 Order, except for costs paid by the Respondent pursuant to this  
3 Section.

4 I. For purposes of paragraphs A through E, inclusive, of  
5 this Section XXI, the term " remedial action cost" shall  
6 include:

7 1. all costs of all activities included within the  
8 definitions of the terms "removal," "remedial action," and  
9 "response" in CERCLA Sections 101(23), (24) and (25),  
10 respectively, 42 U.S.C. §§ 9601(23), (24) and (25); which  
11 are consistent with the NCP; and

12 2. all costs that fall within the definition of  
13 remedial action costs as defined in MCA § 75-10-701(15)  
14 which are consistent with the NCP.

15  
16 XXII.

17 NATURAL RESOURCE DAMAGE ASSESSMENT

18 The Parties agree that it is cost efficient and desirable  
19 to perform a natural resource damage assessment on the Facility  
20 prior to issuance of the record of decision. The Parties also  
21 agree that to the extent determined by the State, the Respondent  
22 should be allowed to participate in the natural resource damage  
23 assessment. Within sixty (60) days of the effective date of  
24 this Consent Order, the State agrees to provide the Respondent  
25 the opportunity to participate in a scoping meeting to discuss

1 the proposed study, and the State will subsequently offer the  
2 Respondent the opportunity to conduct environmental data  
3 sampling that will be used in assessing the environmental injury  
4 to natural resources at the Facility.

5 The Respondent agrees to provide the State \$100,000 (one  
6 hundred thousand dollars) within thirty (30) days of the  
7 effective date of this Consent Order to perform a natural  
8 resource damage assessment at the Facility. Any money not  
9 expended by the State for the natural resource damage assessment  
10 shall be returned to the Respondent. The State shall include  
11 documentation, as described in paragraph XXI.B., regarding the  
12 expenditure of the funds provided for natural resource damage  
13 assessment in the quarterly accounting required by paragraph  
14 XXI.B. Validated environmental sampling data and natural  
15 resource damage assessment reports generated by the State or its  
16 contractor(s) for which the State seeks to recover costs under  
17 this Consent Order will be shared with the Respondent when  
18 available and no later than ten (10) Days in advance of the next  
19 quarterly meeting between the State and Respondent to be held  
20 pursuant to Section X.J. However, nothing in this Section shall  
21 require the State to make documents available to the Respondent  
22 which are otherwise privileged under State law and regulation.  
23 The amount provided under this Section shall not represent a cap  
24 on expenditures for natural resource damage assessment  
25 activities, but rather represents only the amount the Respondent

1 is agreeing to provide pursuant to this Consent Order.  
2 Notwithstanding Section XXXI, the State reserves all of its  
3 rights to seek additional agreements from Respondent, or to  
4 recover funds expended on natural resource damage assessment  
5 activities that exceed the amount identified above provided  
6 pursuant to this Consent Order.

7 The Respondent agrees not to use the terms of this Consent  
8 Order, or the fact that money was provided for natural resource  
9 damage assessment activities pursuant to this Consent Order, as  
10 a defense to reimbursement of such costs. The Respondent's  
11 payment of funds for a natural resource damage assessment  
12 pursuant to the terms of this Consent Order is not an admission  
13 of liability for any such damages. The Respondent reserves its  
14 rights to deny liability for natural resource damages and to  
15 contest the activities and conclusions of the State in  
16 connection with the natural resource damage assessment as well  
17 as any additional assessment costs incurred by the State which  
18 exceed the amount identified above. This Section of this  
19 Consent Order shall not be admissible into evidence or otherwise  
20 used by the State in any proceeding other than a proceeding to  
21 enforce the terms of this Section.

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XXIII.

24

RESERVATION OF RIGHTS

25

A. The State retains the right to conduct other investiga-

1 tions and activities at the Facility. Subject to Section XXXI,  
2 nothing herein shall preclude the State from undertaking any  
3 additional enforcement actions it may deem necessary for any  
4 purpose, including the prevention or abatement of an imminent  
5 and substantial danger to health, welfare or the environment  
6 arising from site conditions. The State further retains all  
7 rights against Parties not privy to this Consent Order which may  
8 arise out of the facts on which this Consent Order is based.  
9 Notwithstanding compliance with the terms of this Consent Order,  
10 the Respondent is not released from liability for any actions  
11 for which the Respondent is otherwise liable under law.

12 B. The State reserves the right to take appropriate  
13 enforcement action, including the right to seek injunctive  
14 relief, monetary penalties, and all other appropriate relief  
15 available, pursuant to all applicable federal or state statutory  
16 and common law, for any violation, failure, or refusal to comply  
17 with this Consent Order. In addition, if the Respondent fails  
18 to remedy noncompliance with this Consent Order in a timely  
19 manner, the State may, after notification to the Respondent,  
20 initiate State- or EPA-funded response actions and may  
21 subsequently pursue cost recovery against Respondent, including  
22 actions for punitive damages.

23 C. Nothing herein shall be construed to release the  
24 Respondent from any liability for failure of the Respondent to  
25 perform the required activities in accordance with the require-

1 ments of this Consent Order, the Work Plan and Supplemental Work  
2 Plans. Except for claims covered by paragraph XXI.H. of this  
3 Consent Order, the Parties further expressly recognize that this  
4 Consent Order and the successful completion of activities  
5 required by this Consent Order and plans established thereunder  
6 do not represent satisfaction, waiver, release of, or covenant  
7 not to sue with regard to any claim of the State of Montana  
8 against the Respondent relating to the Facility (including  
9 claims to require the Respondent to undertake further response  
10 actions and claims to seek reimbursement of response costs  
11 incurred subsequent to the effective date of this Consent  
12 Order).

13 D. Except as provided in Section XXIII.E., Respondent  
14 retains all rights to claim contribution as permitted by CECRA  
15 and CERCLA against any person, including the United States as  
16 the owner or operator of a facility releasing Hazardous or  
17 Deleterious Substances into the environment. Nothing in this  
18 Consent Order is intended to create any private causes of action  
19 in favor of any Persons not a Respondent.

20 E. Based upon the assertions in Section III.I, Respondent  
21 agrees to waive contribution claims against the State which may  
22 arise out of or relate to its operation of the ground water  
23 system at the Facility described in paragraph III.I, provided  
24 that the State does not alter or modify the existing system  
25 without the concurrence of the Respondent.

1 F. Respondent denies any and all legal or equitable  
2 liability under any federal or state statute, regulation,  
3 ordinance or common law for any response costs, damages or other  
4 liability caused by or arising out of conditions at or arising  
5 from the Facility except as agreed to in Section VI. Except as  
6 provided in paragraph VI.C, XIX.A, XX.I, and this paragraph,  
7 Respondent specifically denies all Findings of Fact, Conclusions  
8 of Law and Determinations or any other allegations contained in  
9 this Consent Order and attachments thereto and such findings,  
10 conclusions of law and determinations shall not be used in any  
11 other proceeding by the State, other than proceedings to enforce  
12 this Consent Order or for any purpose in this proceeding except  
13 to establish jurisdiction. This Consent Order shall not create  
14 in any third party any rights which would not otherwise exist;  
15 nor shall this Order be relied upon by third parties to assert  
16 a cause of action or claim against Respondent. Nothing in this  
17 Consent Order shall preclude, however, the Respondent from using  
18 this Consent Order, or the fact of its entry, against any person  
19 for contribution or for recovery of costs expended in complying  
20 with this Consent Order, except as specifically waived in this  
21 Consent Order.

22 G. No payment made by Respondent to pay for and implement  
23 the Work or any other activities required under this Consent  
24 Order, other than payment of stipulated penalties, shall be  
25 deemed to be a fine, penalty, or monetary sanction.

XXIV.

PUBLIC COMMENT AND COMMUNITY RELATIONS

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3 A. Within ten (10) days of the date of signature of this  
4 Consent Order by the Respondent, the State shall announce the  
5 availability of this Consent Order to the public for review and  
6 comment. The State shall accept comments from the public for a  
7 minimum of thirty (30) Days after such announcement. At the end  
8 of the comment period, the State shall review all such comments  
9 and shall either:

10 1. determine that this Consent Order should be made  
11 effective in its present form, in which case the Respon-  
12 dent shall be so notified in writing; or

13 2. determine that modification of this Consent Order  
14 is necessary, in which case the Respondent will be informed  
15 in writing as to the nature of all changes deemed necessary  
16 by the State. If the Respondent agrees to the  
17 modifications, the Consent Order shall be so modified. In  
18 the event that the Respondent does not agree to modifica-  
19 tions required by the State as a result of public comment,  
20 the dispute as to the modification shall be submitted to  
21 the Chief of the Solid and Hazardous Waste Bureau for  
22 attempted resolution. No modification to this Consent  
23 Order shall be made except by agreement of the Parties. In  
24 the event that the Respondent does not agree to  
25 modifications required by the State as a result of public

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comment. this Consent Order shall be null and void.

B. The Respondent shall cooperate with the State in providing FS information to the public. Upon the reasonable request of the State, the Respondent 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 State to explain activities at the Montana Pole Site or concerning the FS process at the site.

XXV.

INDEMNIFICATION

A. The Respondent agrees to indemnify and save and hold harmless the State of Montana, its agencies, departments and employees acting in their capacity as regulatory agencies overseeing actions required by this Consent Order from any and all claims or causes of action arising from, or on account of, acts or omissions of the Respondent, its agents, or assigns, in carrying out the activities performed pursuant to this Consent Order.

B. For purposes of this Section only, the phrase "claims or causes of action" shall be deemed to include, but not be limited to all claims of officers, agents, and employees of the State for personal injury or property damage.



1 XXVI.

2 DISCLAIMERS

3 No Party shall be held as a Party to any contract entered  
4 into by another Party or its employees, agents, or Contractors  
5 in carrying out activities pursuant to this Consent Order. In  
6 addition, no Party shall be liable for any injuries or damages  
7 to Persons or property resulting from acts or omissions of  
8 another Party or its employees, agents or contractors in  
9 carrying out the activities pursuant to this Consent Order.

10  
11 XXVII.

12 NOTICE OF RIGHT TO CLAIM  
13 CONFIDENTIALITY OF BUSINESS INFORMATION

14 The Respondent may, if it desires, assert a business  
15 confidentiality privilege covering part or all of the informa-  
16 tion requested by this Consent Order. In order to assert the  
17 privilege, Respondent may either obtain a declaratory judgment  
18 from a court of competent jurisdiction or label the information  
19 as confidential pursuant to Section 16.44.1008 of the Ad-  
20 ministrative Rules of Montana. A label of confidentiality is  
21 subject to acceptance by the State. If no such designation or  
22 judgment accompanies the information when it is received by the  
23 State, the State may make it available to the public without  
24 further notice to the Respondent. This provision shall not  
25 limit any other claims of privilege by Respondent with respect

1 to documents or information exempt from disclosure by law.

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XXVIII.

4

ADMINISTRATIVE RECORD

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6 A. The State shall maintain the administrative record for  
7 the Facility, including documents generated as a result of this  
8 Consent Order, and the Respondent agrees to cooperate with the  
9 State in the preparation of the administrative record. The  
10 administrative record shall include, but not be limited to, all  
11 documents and data submitted by the Respondent pursuant to this  
12 Consent Order, all correspondence between the State and the  
13 Respondent relating to implementation of this Consent Order, and  
14 all documents described in EPA's Administrative Record Guidance  
15 (Attachment 3). The administrative record shall also include,  
16 but not be limited to, all correspondence between EPA and the  
17 State as provided under CERCLA, the NCP, and applicable EPA  
18 guidance.

19 B. Notwithstanding the preceding sentence, EPA and the  
20 State reserve the right to protect from disclosure to the  
21 Respondent and the public any documents and communications  
22 protected from disclosure under applicable federal and state  
23 law. A list of confidential documents included in the ad-  
24 ministrative record shall be maintained in the administrative  
25 record available to the public.

25

1 XXIX.

2 SUBSEQUENT MODIFICATION AND EFFECTIVE DATE

3 This Consent Order may be amended by the mutual agreement  
4 of the State in consultation with EPA and the Respondent.

5 Such amendments shall be in writing and shall be effective as of  
6 the date the amendment is signed by the State.

7 In the event the State determines that this Consent Order  
8 should be made effective in its present form following public  
9 comment, the effective date shall be the date on which Respon-  
10 dent receives written notice pursuant to Section XXIV. In the  
11 event that this Consent Order is modified by agreement of the  
12 State and the Respondent following public comment, the  
13 effective date of such modified Consent Order shall be the  
14 date on which it is signed by the State.

15  
16 XXX.

17 CONTRIBUTION PROTECTION

18 Pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C.  
19 §9613(f)(2) and MCA 75-10-719(1), Respondent shall not be  
20 liable to other persons or entities for contribution claims  
21 regarding the Work required by or costs covered by this  
22 Consent Order.

23 XXXI.

24 COVENANT NOT TO SUE

25 So long as Respondent is performing the work required by

1 this Consent Order and is in compliance with this Consent Order,  
 2 the State covenants not to sue, issue any order, or take other  
 3 administrative or judicial action against, or assert any claim  
 4 against Respondent with respect to the Work. However, nothing  
 5 in this Section, or in this Consent Order, shall limit the  
 6 State's ability to respond to an imminent and substantial  
 7 endangerment to public health, welfare, safety, or the  
 8 environment.

9

XXXII.

10

TERMINATION AND SATISFACTION

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12 This Consent Order shall terminate when the Respondent  
 13 certifies that all activities required under this Consent Order  
 14 have been performed (the "Certification"), and the State, in  
 15 consultation with EPA, has accepted the Certification. The  
 16 State shall accept or reject the Certification by the Respondent  
 17 within six (6) months of submittal of the Certification of the  
 18 Respondent. Sections VI(C) and (D), XVII, XVIII, XXI, XXIII,  
 19 XXV, XXIX, XXX, XXXI, and this Section shall survive termina-  
 20 tion of this Consent Order. If the State accepts the  
 21 Certification, Respondent shall not be liable for any additional  
 22 investigation of the Facility except, if, subsequent to the  
 23 Certification:

- 24 1. conditions at the Facility, previously unknown to DHES,
- 25 are discovered; or

1 2. new information is received by DHES, in whole or in  
2 part, and DHES, based upon these previously unknown  
3 conditions or this new information determines that the  
4 Remedial Investigation/Feasibility Study is not adequate to  
5 choose a remedy which is protective of public health,  
6 welfare or safety, or the environment. In the event such  
7 a determination is made by DHES, a written opinion shall be  
8 prepared by DHES which sets forth all factual information,  
9 analytical data and previously unknown conditions upon  
10 which DHES may rely in determining that the RI/FS is not  
11 adequate. The written opinion shall be made part of the  
12 administrative record. This Section XXXII shall in no way  
13 affect the right of the State to respond to an imminent and  
14 substantial endangerment to public health, welfare, safety  
15 or the environment by either ordering Respondent to  
16 undertake a removal action, or undertaking a removal action  
17 itself and seeking the recovery of costs expended from the  
18 Respondent.

19  
20 XXXIII.

21 AUTHORITY OF SIGNATORIES

22 Each of the signatories of this Consent Order states that  
23 he or she is fully authorized to enter into the terms and  
24 conditions of this Consent Order and to bind legally the Party  
25 represented by him or her to the Consent Order.

