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By *dm*
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

#54

STATE OF MONTANA ex rel.)	Cause No. 88-141-H-CCL
DEPARTMENT. OF HEALTH AND)	
ENVIRONMENTAL SCIENCES,)	
)	
Plaintiff,)	MODIFIED PARTIAL
)	CONSENT DECREE, ORDER
v.)	AND JUDGMENT
)	
BURLINGTON NORTHERN, INC.,)	
BURLINGTON NORTHERN RAILROAD)	
COMPANY, and GLACIER PARK)	
COMPANY,)	
)	
Defendants.)	

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COMPANY, and GLACIER PARK)	
COMPANY,)	
)	
Defendants.)	

RECITALS

WHEREAS, on December 27, 1988, the State of Montana filed a Complaint against Burlington Northern, Inc. ("BNI"), Burlington Northern Railroad Company, ("BNRR") and Glacier Park Company ("GPC") for response costs, remedial action, declarative and injunctive relief, penalties and natural resource damages pursuant to federal and state environmental laws including the Comprehensive, Environmental Response, Compensation, and Liability

Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. § 9601 et seq., concerning the Livingston Facility and Mission Wye; and

WHEREAS, the state of Montana has authority to administer and enforce the Montana Hazardous Waste Act, Title 75, Chapter 10, Part 4, Montana Code Annotated ("MCA"), the Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"), Title 75, Chapter 10, Part 7, MCA, the Montana Water Quality Act, Title 75, Chapter 5, Parts 1-6, MCA, and the Montana Public Water Supplies, Distribution and Treatment Act (Safe Drinking Water Act), Title 75, Chapter 6, Part 1, MCA, as those acts apply to the terms of this Modified Partial Consent Decree; and

WHEREAS, the State of Montana filed a claim for response costs under CERCLA for costs incurred at the Livingston Facility, Mission Wye, Livingston Landfill and the Livingston Incinerator; and

WHEREAS, the parties agree that settlement and entry of this Modified Partial Consent Decree and the Stipulation for Dismissal is made in good faith to avoid expensive and protracted litigation and to settle and resolve specific claims against BNI and BNRR for certain documented past response costs incurred by the State as well as documented response costs at the Livingston Facility and Mission Wye, for investigation of and remedy selection at the Livingston Facility and investigation

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of Mission Wye, and for specified penalties, and for damage assessment which have been raised by the state's Complaint; and

WHEREAS, the parties desire to achieve the timely remedial investigation and feasibility study ("RI/FS") of the Livingston Facility, and to negotiate the implementation of an adequate, permanent and cost-effective remedy at the Livingston Facility that will effectively protect the public health and welfare and the environment and the timely development and execution of a Work Plan for a remedial investigation at Mission Wye; and

WHEREAS, the parties agree and acknowledge that the work conducted pursuant to this Modified Partial Consent Decree and the interim work plan is the initial phase of the entire remedial action that is necessary for the Livingston Facility. Therefore, pursuant to this Modified Partial Consent Decree, the parties do hereby commit to good faith negotiations and investigations to determine the full extent of remedial action that is necessary and appropriate pursuant to federal and state law at the Livingston Facility, and the Defendants' obligations with respect thereto, which will result in additional addenda to Exhibit I and additional work plans, which may result in Modified Partial Consent Decree modifications or separate consent decrees. This Modified Partial Consent Decree does not dispose of this lawsuit since the issues of natural resource damages and final remedy remain unresolved; and

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WHEREAS, all parties hereto agree that the terms, conditions and undertakings herein shall create mutual contractual rights and obligations between the parties; and

WHEREAS, the parties consent and agree that the Court may make the orders and findings set forth herein; and

WHEREAS, all parties to this Modified Partial Consent Decree consent to its entry hereof, and that it be construed and enforced as findings of fact, and an Order and Judgment of this Court.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. JURISDICTION

This Court has jurisdiction over the parties and the subject matter of this action and the Modified Partial Consent Decree pursuant to 28 U.S.C. §§ 1331, 2201, 42 U.S.C. § 9613(b), 9607 and pendent jurisdiction over State claims.

2. PARTIES BOUND

A. Defendants agree that this Modified Partial Consent Decree applies to and binds the following "Persons", as that term is defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), and in Sections 75-10-403(11), 75-5-103(10), MCA, and 75-10-701(9), MCA:

1. BNI and BNRR; and
2. the officers, directors, principals, employees, agents, successors, and assigns of BNI and BNRR.

B. Defendants further agree that no change in ownership, corporate or partnership status shall in any way alter the status or responsibility of the Defendants under this Modified Partial Consent Decree. Defendants shall be responsible for carrying out all actions required of Defendants by the terms and conditions of this Modified Partial Consent Decree. Defendants agree to be responsible for insuring that all contractors, consultants, firms and other persons or entities acting on behalf of Defendants with respect to matters included herein, agree to comply with the terms of this Modified Partial Consent Decree.

C. The state of Montana agrees to be bound by this Modified Partial Consent Decree acting through the Department of Health and Environmental Sciences.

3. DEFINITIONS

Words used in this Modified Partial Consent Decree are to be taken and understood in their natural and ordinary sense unless this Modified Partial Consent Decree indicates that a different meaning was intended. Whenever the following terms are used in this Modified Partial Consent Decree, or in documents incorporated herein or appended hereto, the following meanings shall apply:

A. "Approved" when used in connection with either a Work Plan or Corrective Action Plan promulgated pursuant to this Modified Partial Consent Decree, shall mean either:

1. a plan developed by Defendants pursuant to this Modified Partial Consent Decree, as such plan has been reviewed, (and if appropriate, modified), and finally Approved by the state; or

2. in the event the parties cannot agree upon the terms and conditions of any Work or Corrective Action Plan promulgated or required pursuant to this Modified Partial Consent Decree, then "Approved" shall apply to any such Work or Corrective Action Plan developed and promulgated by the state of Montana, as such plan may have been modified as a result of and during the course of the dispute resolution process set forth in this Modified Partial Consent Decree.

B. "CERCLA" shall mean the Comprehensive, Environmental Response, Compensation, and Liability Act of 1980, as amended in 1986, 42 U.S.C. § 9601-9675.

C. "CECRA" shall mean the Comprehensive Environmental Cleanup and Responsibility Act as implemented by Chapter 709, Laws of Montana 1989, Section 75-10-705, MCA.

D. "Containment" or "Containment Area" shall mean any structure used to hold, store, trap or detain any material or substance, including any lagoons, ditches, spillways, trenches, ponds, or other impoundments, and including any drum, tank, barrel or similar container.

E. "Contractor" shall mean the company or companies retained by or on behalf of Defendants to undertake and complete the Work or any part thereof. A Contractor and any subcontractors retained by the Contractor shall be deemed to be related by contract to the Defendants.

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F. "Defendants" shall mean BNI and BNRR, all successors and assigns and all persons acting with or through BNI's and BNRR's authority and on their behalf including their officers, directors, principals, employees and agents in their respective capacities.

G. "Day" shall mean calendar Day, unless business Day is specified. Any deliverables, notices or other written documents that under the terms of the Modified Partial Consent Decree would be due on a Saturday, Sunday or State of Montana holiday shall be due on the following business Day.

H. "Field Documents" shall mean all those documents identified in, and required by, Exhibit I.

I. "Fund" shall mean the Environmental Quality Protection Fund established in section 75-10-704, MCA.

J. "Hazardous or Deleterious Substance" shall mean substance as defined in Section 75-10-701, MCA.

K. "Hazardous Waste" shall have the meaning set forth in Section 75-10-403(7), MCA, and shall specifically include those materials identified or listed as Hazardous Wastes in Title 16, Chapter 44, Subchapter (3) of the Administrative Rules of Montana ("ARM").

L. "Impacted Area" shall mean any area identified in the Field Documents, Approved pursuant to this Modified Partial Consent Decree, or identified by any studies or monitoring programs conducted pursuant to the provisions of this Modified Partial

Consent Decree where a Hazardous or Deleterious Substance released from the Livingston Facility has been deposited, stored, disposed of, placed, or otherwise come to be located. For purposes of this Modified Partial Consent Decree, the term "impacted area" does not include the Livingston Incinerator or Park County Landfill.

M. "The Livingston Facility" shall mean the rail car maintenance and former refueling facility located near the center of the city of Livingston in Park County, Montana. The Facility is located within Township 2 South, Range 9 East, Section 13 and in a small portion of Section 12. The northeastern end of the Facility extends into Township 2 South, Range 10 East, Section 7 and Section 18. The Facility is approximately 90 acres in size and bounded on the south by Park Street and downtown Livingston, on the north by Gallatin Street, and a residential neighborhood and on the east and west by railroad tracks.

N. "The Mission Wye Facility" shall mean the Facility located in the northwest quarter of section 35, Range 10 East, Township 1 South, in Park County approximately four miles northeast of Livingston, Montana. The site is on the south side of the Yellowstone River inside the triangular area of a Y-shape junction or "Wye" of two Burlington Northern Railroad lines.

O. "National Contingency Plan" or "NCP" shall mean 40 C.F.R. Part 300.

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P. "Modified Partial Consent Decree" shall mean this document together with all exhibits, attachments hereto, submittals and appendices incorporated herein.

Q. "Parties" collectively shall mean the state of Montana, acting by and through The Department of Health and Environmental Sciences, and BNI and BNRR.

R. "Person or Persons" shall be as defined in 42 U.S.C. § 9601(21) and Section 75-5-103(10), MCA, section 75-10-403(11), MCA and Section 75-10-701, MCA.

S. "Project Coordinator" shall mean the individual or individuals appointed as the State's Project Coordinator(s) by The State whose duties are described in Section 17 of this Modified Partial Consent Decree.

T. "Release" shall have the meaning set forth for that term in Section 75-10-701, MCA.

U. "Remedial Action" shall mean remedy or remedial action as set forth in Sections 6 and 7 of this Modified Partial Consent Decree, or as otherwise described in any work plan implemented pursuant to this Modified Partial Consent Decree.

V. "State" or "Plaintiff" shall mean the State of Montana and the Department of Health and Environmental Sciences. Where action or decisions are to be made by the State, the specific decision maker shall be the director of the Department of Health and Environmental Sciences.

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W. "Submittal" shall mean all work plans, addenda to Exhibit I, reports, schedules, and other documents submitted by Defendants for review and approval by DHES.

x. "Waste" shall have the meaning set forth for the term "Solid Waste" in Section 75-10-203(8), MCA, but without regard to that section's exclusion for industrial waste water effluents.

Y. (the) "Work" shall mean all RI/FS work including interim removal, investigations, mitigative, sampling, corrective and other actions at the Livingston Facility and Mission Wye prescribed by this Modified Partial Consent Decree, including any Approved Field Documents, and any schedules, submittals or plans established by the terms of this Modified Partial Consent Decree.

4. FINDINGS

A. Defendants are "persons" as previously defined herein.

B. The Livingston Facility and Mission Wye Facility (hereinafter referred to collectively as the "Facilities"), are "Facilities" as defined in 42 U.S.C. 9601(9) and for all purposes of 42 U.S.C. § 9601 et seq., and Section 75-10-701, MCA.

C. Defendants are "persons" who at the time of disposal of any hazardous substance owned or operated the Livingston or Mission Wye Facility.

D. Diesel fuel and solvent constituents from the Livingston Facility have been released into the groundwater aquifer underlying

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the Livingston Facility, which may pose a threat to public health and the environment.

E. There may have been releases or threatened releases from the Mission Wye Facility.

F. The releases or threatened releases of diesel. fuel or solvent constituents from each Facility caused the incurrence of response costs by the state.

G. Defendants are liable for the reasonable costs of assessing injury, destruction or loss of natural resources and interest thereupon.

H. Defendants are liable for all reasonable costs of investigation, removal or remedial action pursuant to the terms of this Modified Partial Consent Decree. Defendants are liable for past reasonable response costs incurred and reasonable response costs to be incurred by the state of Montana at the Facilities and impacted areas pursuant to CERCLA, this Modified Partial Consent Decree, state law, and "remedial action costs" as defined in Section 75-10-701, MCA, as amended, applicable regulations and case law.

I. At the Livingston Facility and impacted areas, Defendants and DHES, shall, consistent with the terms of Section 7, enter good faith negotiations to implement the appropriate extent of remedy selected by the State, drawing upon CERCLA and the NCP, for guidance or as otherwise appropriate.

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J. The DHES recognizes that other potentially responsible parties may have released hazardous and deleterious substances into the environment at or near the Livingston Facility.

5. COMMITMENTS OF PLAINTIFF AND DEFENDANTS

A. The obligations imposed by this Modified Partial Consent Decree require the performance by Defendants of actions which are reasonably designed to protect the public health, welfare, and environment at or from the Livingston or Mission Wye Facilities. Any enforcement of the obligations imposed by this Modified Partial Consent Decree constitutes an action or proceeding by the State to enforce the State's police or regulatory power and, solely for purposes of 11 D.S.C. § 362(b) (5), is the enforcement of a judgment other than a money judgment.

B. Defendants shall perform, or cause to be performed, the Work required by this Modified Partial Consent Decree at the Livingston Facility and impacted areas, and at Mission Wye, on schedule and in accordance with the terms hereof at no cost to the State. Where Defendants are required by this Modified Partial Consent Decree to take any action, they may take such action through any person or firm they designate, provided that no such designation shall relieve Defendants of any of their obligations under this Modified Partial Consent Decree or Work hereunder.

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C. The state shall oversee, as provided herein, the

performance of the work for compliance with the provisions of this Modified Partial Consent Decree, and shall perform all obligations imposed on it by and in accordance with the Modified Partial Consent Decree.

D. The state and these Defendants shall cooperate under federal and state law to identify other potential sources of contamination and establish procedures to diligently pursue other responsible parties. Nothing herein shall limit the Defendants' responsibilities pursuant to state and federal law.

E. Defendants shall not, without complying with all applicable state and federal laws and obtaining. prior State approval pursuant to this Modified Partial Consent Decree, implement any Work Plan, conduct any new program of monitoring or sampling, or remedial action or undertake any corrective or interim remedial action.

F. In the event of a conflict between any requirement, f term or provision of this Modified Partial Consent Decree and any requirement, term or provision of the Work Plans, the provisions of this Modified Partial Consent Decree shall control.

G. Defendants further and completely and voluntarily waive their rights to and agree not to 1) challenge jurisdiction or (the essential facts that create jurisdiction) or authority of the Court to issue or enforce this Modified Partial Consent Decree; 2) contest the validity or enforceability of any and

all provisions, terms and conditions of this Modified Partial Consent Decree; or 3) appeal the issuance of this Modified Partial

*no
Sampling
etc report
DEG
approval*

Consent Decree.

Subject to the provisions set forth above, nothing in this Modified Partial Consent Decree shall be construed as an admission of liability by Defendants, nor as a limitation or restriction or waiver of any arguments or challenges which Defendants may have regarding the proper interpretation or construction of the provisions, terms and conditions of this Modified Partial Consent Decree.

Moreover, Defendants' agreement to comply with provisions, terms and conditions of this Modified Partial Consent Decree as set forth above does not constitute admission or acknowledgment as to any factual assertion, legal conclusions, determination or notices contained in this Modified Partial Consent Decree. This Modified Partial Consent Decree shall not operate as an admission by or as a binding precedent on Defendants as to any factual assertion or legal conclusion outside of the context of the proceedings to interpret or enforce this Modified Partial Consent Decree. Moreover, the parties agree that this Modified Partial Consent Decree shall not be admissible or used as evidence in any proceeding other than a proceeding to enforce or construe the provisions of this Modified Partial Consent Decree. //

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6. EXECUTION OF WORK PLAN FOR REMEDIAL INVESTIGATION AND DEVELOPMENT OF FEASIBILITY STUDY AT THE LIVINGSTON FACILITY; DEVELOPMENT AND EXECUTION OF WORK PLAN FOR REMEDIAL INVESTIGATION AND FURTHER STUDY, IF NECESSARY, AT MISSION WYE.

A. Defendants shall execute the Work Plan for a remedial investigation at the Livingston Facility (attached as Exhibit I) in a professional and workmanlike manner at their own expense and in full compliance with the terms and conditions of this Modified Partial Consent Decree, Exhibit I and schedules established in Exhibit I (Work Plan Developed by Envirocon and approved by the State or as developed by the State). As a part of interim remediation, Defendants will design and, upon State approval, implement a groundwater monitoring program to determine the full nature and extent of hazardous substance contamination at and emanating from the Livingston Facility, which will include monitoring of off-site municipal and private domestic and livestock water supply wells. If, in accordance with State law, the State determines an immediate hazard or public health problem is shown to exist from the monitoring, Defendants will undertake a State approved appropriate removal action which may include, but is not limited to, the supply of an alternate water source.

B. Upon completion of the remedial investigation, Defendants will submit to the State for approval a remedial investigation report which details the findings regarding contamination of the Livingston Facility. The final report submitted by Defendants will be subject to public review and comment. Following the remedial investigation report, a feasibility study will be performed pursuant to the elements of the feasibility study outline attached as Exhibit II. Alternatives will be screened in the feasibility

study for the following criteria: whether the alternative is consistent with applicable state or federal environmental requirements, criteria, or limitations; whether the alternative is consistent with substantive state or federal environmental requirements, criteria, or limitations that are well-suited to the site condition; whether the alternative is a permanent solution; whether the alternative uses alternative treatment technologies or resource recovery technologies to the maximum extent practicable; whether the alternative is cost-effective, taking into account the total short and long term costs of operation and maintenance accounts for the entire period during which the alternative will be required; and, whether the alternative protects public health, safety, and welfare and the environment. Concurrent with the conduct of the feasibility study, a health risk assessment will be conducted. The final remedy screening will follow completion of the health risk assessment. Following the feasibility study, the Defendants will submit a feasibility study report which identifies the final treatment options for the Livingston Facility. The feasibility study report will be subject to public review and comment and state approval.

C. Defendants shall 45 days from date of court approval develop and submit to the state a detailed and comprehensive Work Plan II for an RI of the Mission Wye Facility based on the requirements specified in Exhibit III. The initial submittal to the state shall include, at a minimum, acceptable field documents for the

investigation, monitoring, testing and analysis of Mission Wye.

D. In the event the state approves Defendants' Work Plan II for an RI at Mission Wye, Defendants shall execute the Work Plan II in a professional and workmanlike manner at their own expense and in full compliance with the terms and conditions of this Modified Partial Consent Decree and schedules established in the Work Plan II, and submit a report for state approval of the work accomplished pursuant to the Work Plan II, and conduct further study, if necessary. If a dispute arises concerning the need for further study, the matter will be submitted to dispute resolution.

E. In the event the state modifies the Work Plan II submitted by Defendants, Defendants shall have five (5) business Days from their receipt of the modified Work. Plan II to review and accept or reject the modifications proposed by the state. In the event Defendants do not accept all modifications proposed by the state, Defendants shall on or before the fifth business Day after receipt of the state's modifications, invoke the dispute resolution process set forth in Section 15 of this

Modified Partial Consent Decree. The dispute resolution process shall establish the actual elements of the Work Plan II to be implemented. In the event Defendants fail to timely invoke the dispute resolution provisions, they shall be deemed to have waived all objections to the state's proposed modifications and shall execute the modified Work Plan II in a professional and workmanlike manner at their own expense in full compliance with the requirements

of this Modified Partial Consent Decree and the schedules established in the Work Plan II.

F. In the event the state rejects the proposed Work Plan II submitted by Defendants pursuant to Exhibit III and paragraph D, the State shall notify Defendants of such rejection and the bases therefor and the State shall prepare the Work Plan II at Defendants' expense, except upon receipt of such notice, Defendants shall have seven (7) business Days to invoke the dispute resolution provisions set forth in section 15 of this Modified Partial Consent Decree. If the dispute resolution process is invoked, the dispute resolution process shall establish the actual elements of Work Plan II to be implemented. Once Work Plan II has been designed as a result of the dispute resolution process, Defendants shall execute the Work Plan II in a professional and workmanlike manner at their own expense and in full compliance with the terms and conditions of this Modified Partial Consent Decree and work activities and schedules established in the Work Plan II.

// replaced by following pages 19 & 20
per order dated 5-3-90

~~Modified Partial Consent Decree. The dispute resolution process shall establish the actual elements of the Work Plan II to be implemented. In the event Defendants fail to timely invoke the dispute resolution provision, the shall be deemed to have waived all objections to the State's proposed modifications and shall execute the modified Work Plan II in a professional and workmanlike manner at their own expense in full compliance with the requirements~~

of this Modified Partial Consent Decree and the schedules established in the Work Plan II

F. In the event the state rejects the proposed Work Plan II submitted by Defendants pursuant to Exhibit III and paragraph D, the State shall notify Defendants of such rejection and the bases therefor and the State shall prepare the Work Plan II at Defendants' expense, except upon receipt of such notice, Defendants shall have seven (7) business Days to invoke the dispute resolution provisions set forth in section 15 of this Modified Partial Consent Decree. If the dispute resolution process is invoked, the dispute resolution process shall establish the actual elements of Work Plan II to be implemented. Once Work Plan II has been designed as a result of the dispute resolution process, Defendants shall execute the Work Plan II in a professional and workmanlike manner at their own expense and in full compliance with the terms and conditions of this Modified Partial Consent Decree and work activities and schedules established in the Work Plan II.

// replaced by following pages 19 & 20
per order dated 5-3-90

~~G. DHES has established and will supplement all existing and future final work plans and reports concerning contamination at the site and impacted areas by filing them at a repository for public documents which is located in the Park County Public Library, Livingston, Montana. A list of data available at DHES, Helena, shall also be on file at the public repository. Further, all final reports such as the remedial investigation report, feasibility~~

study report and work plans for significant remedial measures not covered by Exhibit I at the Livingston site and impacted area, shall be subject to public review and comment prior to acceptance. The parties will establish a community relations plan which shall include the conduct of public informational meetings at Livingston concerning the progress and direction of activities under this Modified Partial Consent Decree.

H. If additional investigations or other interim actions are determined by DHES to be necessary~ DHES shall request in writing that the Defendants develop a Work Plan for the additional work and perform the additional work. The Defendants shall respond in writing to DHES's request for additional work, and if Defendants agree to undertake the additional work, the Work Plan developed for that additional work shall become a part of this Modified Partial Consent Decree. If the Defendants cannot agree on the additional work, they shall provide their rationale

G. DHES has established and will supplement all existing and future final work plans and reports concerning contamination at the site and impacted areas by filing them at a repository for public documents which is located in the Park County Public Library, Livingston, Montana. A list of data available at DHES, Helena, shall also be on file at the public repository. Further, all final reports such as the remedial investigation report, feasibility study report and work plans for significant remedial measures not



covered by Exhibit I at the Livingston site and impacted area, shall be subject to public review and comment prior to acceptance. The parties will establish a community relations plan which shall include the conduct of public informational meetings at Livingston concerning the progress and direction of activities under this Modified Partial Consent Decree.

H. If additional investigations or other interim actions are determined by DHES to be necessary~ DHES shall request in writing that the Defendants develop a Work Plan for the additional work and perform the additional work. The Defendants shall respond in writing to DHES's request for additional work, and if Defendants agree to undertake the additional work, the Work Plan developed for that additional work shall become a part of this Modified Partial Consent Decree. If the Defendants cannot agree on the additional work, they shall provide their rationale

to DHES in writing. If dispute continues unresolved, it is subject to dispute resolution under Section 15.

7. SELECTION AND IMPLEMENTATION OF THE REMEDY AT THE LIVINGSTON FACILITY

A. Upon consideration of the remedial investigation report and feasibility study report at the Livingston Facility and impacted area, the state shall select the proper remedy for the Livingston Facility and impacted area through a record of decision process, drawing upon CERCLA and NCP for guidance or as otherwise appropriate.

B. Following the selection of the remedy by the state, the parties will enter good faith negotiations to modify the Modified Partial Consent Decree or enter into a new consent decree to provide for implementation .of the remedy. If the parties cannot agree on selection or implementation of the remedy, they may proceed under appropriate state or federal law. Nothing herein shall be construed to be a waiver of the Defendants' rights to challenge the remedy selected by the state.

8. QUALITY ASSURANCE/QUALITY CONTROL

A. The Defendants shall comply with all approved quality assurance, quality control, and chain of custody procedures and requirements as they pertain to all sampling as set forth in the sampling plan and submitted to the State as required in the Work Plan attached as Exhibit I and as may be required in the Work Plan II.

B. In order to provide quality assurance and maintain quality control with respect to all samples collected pursuant to this Modified Partial Consent Decree, the Defendants shall:

1. Arrange for access for the state and its authorized representatives, upon reasonable notice to Defendants and during regular business hours, to any laboratories and personnel utilized by the Defendants for analyses;
2. Ensure that all sampling and analyses are performed according the methods set forth in the approved site sampling plan, including all field and laboratory quality

assurance/quality controls plans;

9. DEVELOPMENT AND EXECUTION OF EMERGENCY RESPONSE ACTIONS

A. If during the execution of an Approved Work Plan, Defendants ascertain that there has been an unanticipated Release which has not previously been identified, and for which emergency action is appropriate, Defendants shall immediately, but no later than 48 hours after discovery, notify the State through the State's Project Coordinator. If it is determined by the State that such Release poses an imminent threat to public health, welfare or the environment and requires an immediate response, Defendants shall within ten (10) working Days of such determination develop and submit to the State, a proposed Emergency Response Plan, together, with a detailed schedule for its implementation, which shall, at a minimum:

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1. set forth a program and schedule which will fully analyze the nature and extent of contamination resulting in whole or in part from such Release;

2. propose an appropriate exposure risk assessment to determine the extent of exposure or potential for exposure to individuals, which assessment shall be based on factors including the nature and extent of contamination, the existence of or potential for pathways of human exposure, the size of the community within the likely pathways of exposure, and the comparison of expected human exposure levels to short term and long-term health

effects associated with identified Hazardous or Deleterious Substances and any available recommended exposure or tolerance limits for such Substance and contaminants;

3. require the performance of a feasibility analysis of the results obtainable by, schedule required for, and costs of remedial alternatives which would adequately protect human health and the environment and minimize injury to or loss of natural resources of the State of Montana. The proposed Emergency Response Plan shall require the development and submission to the State of a detailed draft report following the completion of each of the foregoing stages.

B. Upon receipt of the Emergency Response Plan from Defendants pursuant to paragraph A of this Section 9, the State shall review and approve, modify or reject, with instructions for resubmittal, the Emergency Response Plan submitted by Defendants. In the event the state approves Defendants' initially submitted Emergency Response Plan, Defendants shall execute the plan in a professional and workmanlike manner at their own expense and in full compliance with the terms and conditions of this Modified Partial Consent Decree and schedules established in the Plan.

C. In the event the state modifies the Emergency Response Plan originally submitted by Defendants, Defendants shall have five (5) Days from receipt of the modified Emergency Response Plan to review and accept or reject the modifications proposed

by the State. In the event Defendants do not accept all modifications proposed by the State, Defendants shall on or before the fifth Day after receipt of the State's modifications, invoke the dispute resolution process set forth in Section 15 of this Modified Partial Consent Decree. In the event Defendants fail to timely invoke the dispute resolution provisions, they shall be deemed to have waived all objections to the State's proposed modifications and shall execute the modified Emergency Response Plan at their own expense in a professional and workmanlike manner in full compliance with the requirements of this Modified Partial Consent Decree and the schedules established in the Emergency Response Plan.

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D. In the event the state rejects the original proposed Emergency Response Plan submitted by Defendants pursuant to paragraph A of this Section 9, the state shall notify Defendants of such rejection and shall specify the bases upon which the state has determined that the Emergency Response Plan is not adequate or does not fulfill the requirements of paragraph A of this Section 9. The state shall then prepare the Emergency Response Plan at Defendants expense, except upon receipt of such notice, Defendant shall have seven (7) Days to invoke the dispute resolution provisions set forth in Section 15 of this Modified Partial Consent Decree. The Emergency Response Plan shall then be designed according to decisions made by the State and/or Defendants during the dispute

resolution process. Once the Emergency Response Plan has been established as a result of the dispute resolution process, Defendants shall execute the Emergency Response Plan in a professional and workmanlike manner at their own expense and in full compliance with the terms and conditions of this Modified Partial Consent Decree and work activities and schedules established in the Emergency Response Plan.

10. RECORD PRESERVATION

The Defendants agree that they shall preserve and make available to the State, during the pendency of this Modified Partial Consent Decree and for a period of ten (10) years from the date of termination of this Modified Partial Consent Decree,

all nonprivileged records or documents in their possession or in the possession of their employees, agents, accountants, Contractors, or attorneys that relate, directly or indirectly, to the Work performed at the site pursuant to this Modified Partial Consent Decree. At the end of this ten (10) year period, the Defendants may destroy any such records, but only after notifying the State at least thirty (30) calendar Days in advance and allowing the State to inspect and copy any such records.

11. REIMBURSEMENT OF COSTS, AND ASSESSMENT OF DAMAGES

A. The terms and provisions of the Stipulation for Dismissal filed contemporaneously herewith, control the disposition of past response costs incurred by the State in connection with the investigation of or response to releases or threatened

releases at the Livingston or Mission Wye Facilities or the Livingston Landfill or Livingston Incinerator occurring prior to the approval of this Modified Partial Consent Decree.

B. On or before the beginning of each calendar quarter (i.e., January 1, April 1, July 1, October 1) beginning on the effective date of this Modified Partial Consent Decree, the state shall submit an accounting, including all applicable documentation or summaries thereof, to the Defendants covering all response costs and/or remedial actions costs incurred by the State in connection with, or arising out of, its response to releases or threatened releases from the Livingston or Mission Wye Facilities, specifically including all activities

and oversights undertaken in discharge of the state's role and responsibilities under this Modified Partial Consent Decree. Within thirty (30) Days of receipt of documentation from the State, the Defendants shall, subject to its right to invoke the provisions in paragraph D of this Section 11, reimburse the State for all such costs.

C. Payment to the State for its costs described in paragraph B shall be by certified or cashier's check, made payable to "State of Montana, Department of Health and Environmental Sciences" and shall be tendered to: Centralized Services Division, Montana Department of Health and Environmental Sciences, Cogswell Building, Room C123, Helena, Montana 59620. Payments should be identified as "Remedial Response and Natural Resource Assessment Reimbursement".

Copies of all payments to the state shall be provided at the time of such payment to: Donald E. Pizzini, Director, Montana Department of Health and Environmental Sciences, Cogswell Building; Helena, Montana 59620.

D. If the Defendants conclude that the state has made an accounting error or has included response costs that are not recoverable under this Modified Partial Consent Decree or CECRA, Chapter 709, Laws of Montana 1989, CERCLA Section 107, 42 U.S.C. § 9607, they may contest payment and withhold the disputed amount by notifying the state of these conclusions, together with the factual basis and arguments upon which the Defendants rely to support their conclusion, in writing within

thirty (30) Days of receipt of the accounting. Any objection to the State's response costs or supporting arguments not made within that time is waived. Following receipt of the Defendants' objections and supporting arguments, the state and the Defendants shall then have fifteen (15) Days to resolve their differences. Upon request of Defendants, the state shall supply all applicable documentation in lieu of summaries for those issues which are disputed by the Defendants. If agreement cannot be reached within the 15-Day period, the dispute shall be submitted to dispute resolution.

E. For purposes of paragraphs A through D, inclusive, of this Section 11, the term "response cost" and "remedial action costs" shall include all costs of all activities included within the definitions of the terms "remove" or "removal," "remedy" or

"remedial action," and "respond" or "response" in CERCLA sections 101(23), (24), and (25), respectively, 42 U.S.C. §§ 9601 (23), (24) and (25), or "remedial action costs" in CECRA, Section 75-10-701, MCA.

F. Defendants shall pay for an assessment of injury, destruction, or loss of natural resources upon selection of the remedy for the Livingston Facility, pursuant to CERCLA as amended. The process to be followed will be set forth in a State approved work plan and will be subject to the dispute resolution process set forth in Section 15.

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12. REPORTING, RECORD EXCHANGE AND PRESERVATION

A. One copy of all plans, reports, notices and other Work products required under the terms of this Modified Partial Consent Decree shall be sent by overnight express mail to each of the following:

Project Coordinator
Solid and Hazardous Waste Bureau
Montana Department of Health and
Environmental Sciences
Cogswell Building, Room B201
Helena, MT 59620

Donald E. Pizzini
Director
Department of Health
and Environmental Sciences
Cogswell Building
Helena, MT 59620

B. Defendants and their Contractors shall make available to the state in a timely manner, the results of sampling and

testing, and other data generated by them or on their behalf, including raw data and field notes, and any other relevant information in their possession regarding the actions called for by this Modified Partial Consent Decree, except as protected by the attorney/client and work product privileges. It shall be the burden of the Defendants to establish any attorney/client or work product privilege as it relates to technical data.

C. All records, documents, information, and raw data of whatever kind, nature and description (including but not limited to field notes, daily ledgers, diaries, memoranda, and notes), within the custody or control of Defendants or their Contractors

relating, directly or indirectly, to the Work Plans, response or corrective actions, or performance of any of the activities required by or undertaken pursuant to this Modified Partial Consent Decree or Approved Work shall be available at all times to the state for inspection and copying, except as protected by the attorney/client and attorney work product privileges. Any assertion of attorney/client or attorney work product privilege is subject to dispute resolution.

13. FORCE MAJEURE

A. Failure of the Defendants to comply with the requirements of this Modified Partial Consent Decree, including any approved Work Plan shall be excused only to the extent such delays or failures of performance are caused by reasonably unforeseeable occurrence(s) beyond the control of the Defendants and which delays or failures the Defendants, by the exercise of due diligence, could not have

prevented, avoided, or substantially minimized (hereinafter: "Force Majeure"), including but not 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 that the Defendants have timely submitted complete applications and provided all required information. Such circumstances may also include delays in obtaining access to property of third Parties, provided that the Defendants have made a good faith and timely effort to secure such access, and provided that the Defendants have requested assistance from the state in a timely manner. Such circumstances shall not include increased cost of performance, changed economic circumstances, or normal precipitation events. The Defendants shall bear the burden of proving by clear and convincing evidence that any failure to comply with the requirements of this Modified Partial Consent Decree or of Approved Work Plans or submittals is due to Force Majeure. B. The Defendants shall notify the state's Project Coordinator(s) orally, within 24 hours, and shall, within three (3) Days of oral notification to the State, notify the state in writing the anticipated length and cause of delay, the measures taken and to be taken to prevent or minimize the delay, and the timetable by which the Defendants intend to implement those measures. Oral notification to the State must occur in no event more than 24 hours after Defendants become aware of the occurrence or event causing the delay, or failure in whole or in

part. Failure to timely make the oral and written notifications to the State required by this paragraph B of any event for which Force Majeure is claimed shall waive the defense otherwise provided by this Section, but only for the event for which notice has not been made.

C. If the D C. If the Defendants demonstrate to the State that the delay has been or will be caused by circumstances beyond the reasonable control of the Defendants and that they exercised due diligence to prevent the delay, the time for performance for that element of Approved Plans or submittals shall be extended for a period equal to the delay. The extension of time may include any reasonable additional time necessary, not to exceed 15 Days, to mobilize manpower or machinery after the elimination of the Force Majeure event. This shall be accomplished through written notice or through an amendment to this Modified Partial Consent Decree, as appropriate. Such an extension does not alter the schedule for performance or completion of other tasks required by Approved Plans or submittals unless these are specifically altered by amendment of the Modified Partial Consent Decree, or unless the Work on those other tasks depends on continued Work on the tasks delayed by the Force Majeure event. In the event further Work depends on the Work unavoidably delayed by the Force Majeure event, the time for performance of the further Work shall be extended only for a period equal to that of the delay caused by the Force Majeure event.

D. In the event that. the state and Defendants cannot agree that any delay or failure has been or will be caused by circumstances beyond the reasonable control of the Defendants or if there is no agreement on the length of the extension, the dispute shall be resolved in accordance with provisions of Section 15 of this Modified Partial Consent Decree.

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14. APPROVALS

A. The State shall review all work plans, reports, schedules and other documents submitted in accordance with this Modified Partial Consent Decree ("submittal") made by Defendants within, a reasonable amount of time based on -the public health and the complexity of the review. Defendants, as part of this Modified Partial Consent Decree, shall allow for review on a timely basis. The review format shall also allow for public review and comment of the remedial investigation report, the feasibility study report and for significant remedial action not covered by Exhibit I. The format for the review will provide for an initial DHES evaluation of suitability. Acceptance of the submittal for review will require DHES to provide review and approval within a period of time specified by DHES. If the specified time period is not adhered to, the Defendants may invoke dispute resolution actions. If the submittal is rejected such rejection will be based upon gross deficiencies within the submittal.

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B. Upon submission of the submittal to DHES, an initial evaluation shall be made of the submittal for gross deficiencies and the resource requirements for adequate review. The DHES shall perform this review and provide a written response of the findings within 10-working Days of the date received. The written response shall either provide acceptance of the submittal for further review, approval or rejection of the submittal. If

the submittal is judged to be deficient, it shall be returned to the Defendants with a written description of the principal deficiencies. The Defendants shall correct the deficiencies and resubmit the submittal to DRES for additional review. If the submittal review indicates that adequate review and approval cannot be provided within a reasonable time frame, an estimate of the resources necessary for review shall be submitted to the Defendants. The Defendants shall then be responsible for providing funding for the resources required for suitable review or provide an acceptable alternative for the review schedule. If the Defendants and the DHES cannot agree upon the basis for an alternative review schedule, or the basis for additional resource funding, then the dispute resolution provisions of Section 15 shall be invoked.

Formal review will commence and proceed on submittals, or portions thereof, which are not deficient and for which resource limitation issues have been resolved. Formal review will not

commence and proceed on any portions of a submittal which are deficient or for which resource limitation issues have not been resolved.

C. Once the submittal has been accepted for formal review, if required under Section A or otherwise under the terms of this Modified Partial Consent Decree, the submittal shall be distributed to the public information facilities to begin a 30 Day public comment period. During the public comment period, DHES shall begin

review of the submittal and work with the Defendants to identify the need for modifications, revisions or additional information. Upon completion of the public comment period, the DHES and the Defendants shall consider appropriate public comments and finalize the submittal within 30 Days.

D. The schedule established for review of the submittal by the public and DHES may be modified by both the Defendants and DHES. For actions not requiring public comment or those which constitute an emergency, the time period for review may be reduced. For the remedial investigation report, the feasibility study report and significant remedial actions outside Exhibit I, the time period for review may be extended to meet the level of review effort required with the available manpower. Any reductions or extensions of the specified periods for review shall be approved by both the DRES and the Defendants. If joint approval is not made, the dispute resolution process may be invoked.

E. The state and Defendants shall provide the opportunity

to consult with each other during the review of submittals or modifications under this part. It is envisioned that on site coordinators will, in the first instance, attempt to resolve disputes before referring them to dispute resolution.

F. At the completion of a specified review period, if the DHES has not completed the review and approval process and an amended schedule cannot be agreed to by the parties, or if DHES //

has rejected the submittal, the Defendants may invoke the dispute resolution process.

15. RESOLUTION OF DISPUTES

Except as otherwise provided herein, in the event there is a dispute arising under this Modified Partial Consent Decree, the dispute shall be resolved in the following manner: A. The parties agree to submit any dispute arising under this section to mediation. Within 30 business Days of the effective date of this Modified Partial Consent Decree, the parties shall submit to each other lists of at least three neutral persons nominated to serve as mediators. All listed persons not rejected within 10 business Days following receipt of such list shall be deemed to be acceptable mediators. If all nominated persons are rejected or if an existing mediator must be replaced, the nomination process shall be repeated until at least two mediators acceptable to the parties are identified. Mediation nomination lists shall set forth the name, business, affiliation, address, telephone number and a

statement of the qualifications of the proposed mediators. A mediator may be replaced at any time at the request of any party following the foregoing mediator selection procedures.

B. The State and the Defendants shall each select one mediator from the list of eligible mediators. Non-binding neutral mediation may extend for up to 14 business days. Agendas and procedures shall be as the parties agree, but

suggestions by the mediators shall be given full consideration in good faith. The mediators may meet or talk with the State or the Defendants separately, in the mediators' sole discretion. It is the intent of the parties that mediation be flexible and informal, in order to facilitate the resolution of any dispute to the greatest extent possible.

C. The State or the Defendants may withdraw from mediation at any time, but only after participating in at least one meeting or conference convened by the mediator. The right to withdraw from mediation shall be considered a last resort and should be exercised only on a good faith belief that mediation will serve no useful purpose. Withdrawing parties remain bound by protocol provisions on confidentiality.

D. Meetings or conferences with the mediators shall be treated as settlement negotiations within the meaning of Rule 408 of the Federal Rules of Evidence. Statements made by any person during any such meetings or conferences shall, likewise, be deemed to have been made in compromise negotiations and shall not be

offered in evidence in any proceeding by any person. The mediators will be disqualified as witnesses, consultants, or experts in any pending or future action relating to the subject matter of the mediation, including those between persons not party to the mediation.

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*replaced by following page 38
per order dated 5-3-90*

E. The mediators shall make no written findings or recommendations. Mediation sessions shall not be recorded verbatim and no formal minutes or transcripts of sessions shall be maintained.

F. If the -dispute cannot be resolved by mediation, the Director of DHES shall decide the matter and make written findings supporting the decision. The Director may request an informal, private consultation with the mediators prior to rendering his decision. Such decision will be "final agency action" reviewable by the Court on the basis that the decision is arbitrary and capricious or not supported by the record.

G. Subject to the State's authority to grant waivers or exemptions under applicable law, nothing in this Modified Partial Consent Decree, or any approval granted pursuant to this Modified Partial Consent Decree shall be interpreted so as to waive or modify Defendants' responsibility to comply with all permit application and permit requirements and any other applicable regulations pursuant to applicable local, state or federal laws.

H. Implementation of these Dispute Resolution procedures shall not provide a basis for delay for any schedule for activities required by any approved work plan or addendum unless the DHES agrees in writing to a schedule extension. Any stipulated penalties which arise out of or are the subject of the dispute resolution shall accrue during dispute resolution procedures.

E. The mediators shall make no written findings or

recommendations. Mediation sessions shall not be recorded verbatim and no formal minutes or transcripts of sessions shall be maintained.

F. If the -dispute cannot be resolved by mediation, the Director of DHES shall decide the matter and make written findings supporting the decision. The Director may request an informal, private consultation with the mediators prior to rendering his decision. Such decision will be "final agency action" reviewable by the Court on the basis that the decision is arbitrary and capricious or not supported by the record.

G. Subject to the State's authority to grant waivers or exemptions under applicable law, nothing in this Modified Partial Consent Decree, or any approval granted pursuant to this Modified Partial Consent Decree shall be interpreted so as to waive or modify Defendants' responsibility to comply with all permit application and permit requirements and any other applicable regulations pursuant to applicable local, state or federal laws.

H. Implementation of these Dispute Resolution procedures shall not provide a basis for delay for any schedule for activities required by any approved work plan or addendum unless the DHES agrees in writing to a schedule extension. Any stipulated penalties which arise out of or are the subject of the dispute resolution shall accrue during dispute resolution procedures.

In the event this process ends in favor of the state, all penalties shall be immediately due and owing unless either the Administrator of the Environmental Sciences Division or the Director of DHES finds that the Defendants' position was substantially justified. If it is found that the Defendants' position was substantially justified, then the Director, as appropriate, may waive part or all of the stipulated penalties incurred. Such a decision shall be solely at the discretion of the Director. In the event the Defendants prevail on issues arising hereunder, no stipulated penalties will be imposed.

I. The Defendants may not challenge provisions of this Modified Partial Consent Decree to which they have already agreed by resorting to these dispute resolution procedures. Implementation of these dispute resolution procedures shall not provide the basis for any schedule extension for any activities required in this Modified Partial Consent Decree unless the State agrees in writing to a scheduled extension.

J. The state shall have authority to suspend these dispute resolution procedures in matters arising under Sections 9 and 30.

16. SITE AND INFORMATION ACCESS AND SAMPLING

A. Where Defendants do not own the property at the Livingston Facility, Defendants agree to and shall attempt to gain unrestricted access to all portions of the Livingston Facility

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either impacted by releases, or utilized to conduct any activities required by this Modified Partial Consent Decree, and/or any Approved Work, for the purpose of overseeing and inspecting any and all activities or conditions which have been or are being conducted or are addressed under or impacted by the activities required to be undertaken pursuant to this Modified Partial Consent Decree. Nothing herein shall limit or restrict any statutory inspection, site access, or sampling authorities vested in the state by applicable federal or state law.

B. Where Defendants own property at the Livingston and Mission Wye Facilities access to and use of the Livingston and Mission Wye Facilities is hereby granted and ordered to the state, its representatives or Contractors, or any other person(s) or entity(ies), including any potentially responsible party and its response action Contractors for the purposes of performing or causing another to perform Work or any other activities required by this Modified Partial Consent Decree or any other approved Work or submittal taken by or at the direction of the State at the Facilities. This grant of access includes, but it is not limited to, the right to oversee, perform, or cause to be performed any and all actions designed to accomplish the purposes of this Modified Partial Consent Decree or any other approved Work or submittal.

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C. Defendants shall not directly or indirectly take any action or authorize another to take any action which interferes with, hinders, or delays implementation of the Modified Partial Consent Decree or any approved Work or submittals taken by, at the direction of, or subject to oversight by the state or its representatives; nor shall Defendants take any action to allow another to take any action which interferes with, diminishes, or frustrates the effectiveness, purposes or integrity of any investigative, corrective action or remedial action taken pursuant to the grant of access herein.

D. All new or previously undisclosed records, documents, information, and raw data of whatever kind, nature and description within the custody or control of Defendants or their Contractors relating to the clean-up at the Livingston Facility shall be available at all reasonable times to any representative of the state for inspection and copying.

E. Nothing herein shall be deemed to preempt, limit or restrict in any way any and all rights to site access at the Livingston or Mission Wye Facilities including the right to inspect and copy documents, take samples, and obtain evidence, which the state, or any of its officers, agencies or departments or instrumentalities may have pursuant to any and all applicable laws or rules of procedure.

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F. No conveyance of title, easement, or any other legal interest in any portion of the Livingston or Mission Wye Facilities shall be consummated without a provision permitting the continued unimpeded operation and maintenance of all components of and all structures and improvements resulting from or related to the Work, the timely performance of any Work to be done pursuant to this Modified Partial Consent Decree, and the access to the Livingston and Mission Wye Facilities granted to the State herein, and all such conveyances of title or legal interest in any portion of the Livingston or Mission Wye Facilities shall contain a covenant to permit such access and the unimpeded operation and maintenance of such structures and improvements and performance of such Work. At least forty-five (45) Days prior to any conveyance of title of any interest in all or any portion of the Livingston or Mission Wye Facilities, the person(s) owning such property or legal interest shall notify the state by registered mail of the intent of such person (s) to convey title or any legal interest in such property. This notice shall contain a detailed description of the legal interest and property intended to be conveyed, an identification of and current mailing address for the person(s) to whom such legal interest will be conveyed, .and an exact copy of the provision(s) of the conveyance instrument permitting the continued operation, maintenance, performance and access prescribed herein. The restrictions and obligations set forth in this paragraph F shall run with the land and shall be binding upon any and all persons

who acquire title or any legal interest in all or any portion of the Livingston or Mission Wye Facilities.

G. Defendants shall file at their cost a copy of this Modified Partial Consent Decree at the Public Library in Livingston, Montana.

H. The Defendants hereby consent to observation by State representatives, subject to the site health and safety plan, at any time during the performance of Work required under, performed in connection with, or undertaken in furtherance of the purposes of this Modified Partial Consent Decree. The Defendants consent to the State taking samples or split samples at any time at the State's discretion.

I. To the extent access to property owned by third parties is required in order for the Defendants to carry out the requirements of this Modified Partial Consent Decree, and approved Work or submittals, the Defendants shall use their best efforts to obtain such access. The State shall use its best efforts to obtain access for the Defendants if the Defendants provide documentation to the State demonstrating that they have used their best efforts to obtain access on their own and failed to obtain access. The Defendants agree that they will reimburse the State for all expenses the State incurs in gaining access for the Defendants, at the request of the Defendants,

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and will indemnify the state as provided in section 24 of this Modified Partial Consent Decree.

17. DESIGNATION OF PROJECT COORDINATOR

A. On or before the, effective date of this Modified Partial Consent Decree, the Defendants shall designate one or more Project Coordinators and Alternate Project Coordinators. The State Project Coordinator will be John Wadhams. Each Project Coordinator shall be responsible for overseeing the implementation of this Modified Partial Consent Decree. To the maximum extent practicable, communications between the Defendants and the State, and all documents, reports, approvals, and other correspondence concerning the activities performed pursuant to or required by the terms and conditions of this Modified Partial Consent Decree, shall be directed through the Project Coordinators. If the Project Coordinator is unavailable, such information shall be directed through the Alternate Project Coordinator. During implementation of the Work Plans, the Project Coordinators shall, whenever possible, attempt in good faith to resolve disputes informally through discussion of the issues.

B. The State, and the Defendants shall each have the right to change their respective Project Coordinators. Such a change shall be accomplished by notifying the other party in writing at least ten (10) calendar Days prior to the change.

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C. The state Project Coordinator shall have, and may exercise, the authority vested in the state by Sections 75-5-621 and 75-10-

712, MCA. In addition, he or she shall have the authority to immediately halt any activities at the Facilities which are being or may be undertaken pursuant to this Modified Partial Consent Decree, which violate, threaten to violate, or which cause or threaten to cause, a public nuisance or a violation of any requirements of applicable federal or state law, this Modified Partial Consent Decree, or an Approved Work Plan.

D. The absence of the State Project Coordinator from the Facilities shall not be cause for stoppage of the Work to be performed pursuant to this Modified Partial Consent Decree.

18. ADMISSABILITY OF DATA

Except as provided herein, Defendants hereby stipulate to the admissibility of and waive all evidentiary objection(s) to the admissibility of any validated data and all reports generated or evaluated pursuant to this Modified Partial Consent Decree in any administrative or judicial proceeding brought by the State and arising out of or related to the subject matter of this Modified Partial Consent Decree. For purposes of this Section 18, the term "validated data... generated or evaluated" shall mean data that has been verified by the quality assurance/quality control ("QA/QC") procedures required by this Modified Partial Consent Decree.

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19. EXTENSIONS

Defendants may request an extension of any schedule,

deadline or time to make any submittal provided for in this Modified Partial Consent Decree or exhibit hereto.

20. STIPULATED PENALTIES

A. In the event that the Defendants violate the following provisions of this Modified Partial Consent Decree, the Defendants shall pay, by tendering to the State within ^{Thirty (30)}~~ten (10)~~ Days of the Defendants' receipt of a written Demand from the State for payment of such penalties, which Demand shall specify the events giving rise to Defendants asserted liability for stipulated penalties and the amount of such penalties, the sum(s) set forth below to the State as stipulated penalties for each stipulated penalty event (i.e., violation, delay, refusal or failure) for each calendar Day during which such violation, delay, or failure occurs or continues:

1. For Each Failure or Refusal to Perform the Actions Required in Sections 6, 9, 10, II, 12, 16, 20 and ~~30~~ (for failure: calendar Days after failure to perform):

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		Amount/Day
1 - 7 Days	\$	500.00
8 - 14 Days		2,000.00
15 - 30 Days		5,000.00
Over 30 Days		10,000.00

2. For Each Violation of Sections 8 (QA/QC), 18 (Admissibility of Data), and 24 (Indemnification) of this Modified Partial Consent Decree:

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		Amount/Day
1 - 7 Days	\$	500.00
8 - 14 Days		2,000.00
15 - 30 Days		5,000.00
Over 30 Days		10,000.00

B. The Parties agree, and the state hereby finds that the provisions of this Section 20 are designed to protect the public health, welfare and environment by achieving a prompt, complete and efficient assessment of the nature and extent of, and plan for remediation of, the serious environmental degradations present at the site; and are integral and essential to the Parties' desire that the provisions of this Modified Partial Consent Decree be, to the maximum extent achievable, self-executing and self-enforcing. Defendants waive their right to challenge, on legal grounds, the validity of stipulated penalties, except Defendants retain the right to dispute the factual basis regarding any alleged failure to comply with the provisions of this Modified Partial Consent Decree to which stipulated penalties apply. Defendants also specifically retain the right to assert as an affirmative defense that the violation is excused under the Force Majeure provisions of Section 13. All stipulated penalties not specifically rejected by the dispute resolution process shall be paid on or before the thirtieth (30th) Day following final resolution of the dispute pursuant to Section 15 of this Modified Partial Consent Decree.

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C. The State may, in its discretion, impose a lesser penalty for minor violations. Any reduction in the stipulated penalty imposed shall be solely at the State discretion and shall not be subject to dispute resolution.

D. The checks for payment of the stipulated penalties shall be mailed within thirty (30) Days of Defendants' receipt of a written demand for payment. Payment of stipulated penalties pursuant to this Section 20 to the State shall be by certified or cashier's check, made payable to the order of "State of Montana, Department of Health and Environmental Sciences" and tendered to:

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

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

Donald E. Pizzini, Director
Cogswell Building
Helena, MT 59620

E. The stipulated penalties set forth in the paragraph A of this Section 20 shall not preclude the State from electing to pursue any other remedy or sanction which may be available to the State because of the Defendants' violation, delay, or failure or refusal to comply with any of the terms of this Modified Partial Consent Decree, including an action for injunctive relief to enforce the terms of this Modified Partial Consent Decree. The demand

for or payment of stipulated penalties under this Section 20 shall not preclude the State from seeking statutory penalties pursuant to Sections 75-5-631(1) and 75-10-417(1), MCA, or punitive damages pursuant to Section 75-10-715(2), MCA.

F. Delay caused by formal dispute resolution requested by Defendants under section 15 in which the State prevails shall not constitute "a circumstance beyond the control of the Defendants" for purposes of being excused from payment of stipulated penalties under this Section 20.

21. MUTUAL RELEASE AND COVENANT NOT TO SUE

A. In addition to the terms and provisions of the release and covenant not to sue set forth in the Stipulation for Dismissal filed contemporaneously herewith, but subject to the limitations of this section, Defendants and Glacier Park Company, and their respective officers, directors, employees and agents of any kind, will be released from and the State will covenant not to sue Defendants and Glacier Park Company as to the following claims:

1. Work Performed.

Whenever the Defendants conclude that any work as identified in a work plan has been fully performed, the Defendants, or their authorized representative, shall notify DHES in writing certifying that the work contemplated by any work plan has been fully performed in accordance with the requirements of this Modified Partial Consent Decree. Upon such notification, the DHES will review the work within a reasonable period of time.

If after review, the DHES determines that the work, or any portion thereof, has not been completed in accordance with this Modified Partial Consent Decree, or does not satisfy the requirements of this Modified Partial Consent Decree, the state shall notify the Defendants in writing of the activities which must be performed to complete the work in accordance with the requirements of the work plan and this Modified Partial Consent Decree, and shall set forth a schedule for performance of such activities. Any disputes arising hereunder are subject to dispute resolution.

If the State concludes, following the initial or any subsequent notification of completion by the Defendants, that the work has been fully performed in accordance with this Modified Partial Consent Decree, the state shall so certify in writing to Defendants. Upon approval by the state of any work performed by the Defendants under any Work Plan implemented pursuant to this Modified Partial Consent Decree, the Defendants are released from any and all claims of any nature which the State could assert against the Defendants as to the adequacy of the performance of the activities described in any such Work Plan and/or the results obtained from such work. Notwithstanding such approval of the work by DHES, the Defendants are not released from claims arising from hidden or latent defects, or other conditions at the Facility, previously unknown and which could not reasonably have been discovered by DHES at the time of approval.

2. Natural Resource Damages Assessment.

Upon payment by Defendants for a natural resource damage assessment in accordance with the provisions of this Modified Partial Consent Decree, Defendants are released from any claim by the State for the cost of assessment of impact of releases at and emanating from the Livingston Facility on natural resources.

B. Upon the date of lodging, Defendants hereby release and covenant not to sue the state as to all: (i) common law claims; (ii) contribution or indemnification claims; (iii) claims for monetary damages; and (iv) civil, state and federal statutory or regulatory claims and causes of action available to be asserted by Defendants which have been, or could have been asserted against the state as of the date of lodging of this Modified Partial Consent Decree, arising out of all matters relating to or arising from the Livingston and Mission Wye Facilities.

C. This Mutual Release and Covenant Not to Sue shall not apply to:

1. A claim by any person other than the parties to this Modified Partial Consent Decree;

2. Any costs incurred, not previously covered by the terms of this Modified Partial Consent Decree, by the State as a result of the exercise of its response authority under common law, federal or state statutes or regulations

due to a future release or substantial threat of a release at or from the Livingston or Mission Wye Facilities;

3. Any damages incurred by the state as a result of any future release or substantial threat of release at or from the Livingston or Mission Wye Facilities.

D. Nothing within this Modified Partial Consent Decree shall be construed to limit the authority of the state to undertake any action against any defendant or all of them in response to or to recover the costs of responding to conditions at or from the Livingston or Mission Wye Facilities which may present an imminent and substantial endangerment to the public health, welfare or the environment resulting from or in connection with either the occurrence or discovery after execution by the parties of this Modified Partial Consent Decree of (i) previously unknown or undetected conditions at or emanating from the Livingston or Mission Wye Facilities; or (ii) other previously unknown or new facts; or (iii) scientific knowledge regarding the toxicity of conditions at the Livingston or Mission Wye Facilities, except to the extent such conditions, facts or scientific knowledge relate to releases identified as of the date of lodging this Modified Partial Consent Decree.

E. Defendants agree and nothing in this Modified Partial Consent Decree shall limit, subject to the state's authority to grant waivers, Defendants' duty to comply fully with all applicable

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federal, state and local environmental laws, regulations, and standards.

F. Nothing within this Modified Partial Consent Decree shall be construed to relieve Defendants of:

1. any liability for natural resources damages at the Livingston and Mission Wye Facilities.

2. any liability for assessment of impact of releases to natural resources at the Mission Wye Facility.

3. Any liability for response costs incurred by the state at any of the Facilities (Livingston, Mission Wye, Livingston Landfill, Livingston Incinerator) not specifically settled by operation of this Modified Partial Consent Decree, or the Stipulation for Dismissal filed contemporaneously herewith.

4. any liability of Defendants for implementation of the remedy selected at the Livingston Facility or Mission Wye.

22. RESERVATION OF RIGHTS

A. The State retains the right to conduct other investigations and activities at the Facilities. The State further retains all rights against Parties not privy to this Modified Partial Consent Decree which may arise out of the facts on which this Modified Partial Consent Decree is based. Notwithstanding compliance with the terms of this Modified Partial Consent Decree, the Defendants are not released from liability for any

actions arising out of matters not covered by the terms of this Modified Partial Consent Decree or the Stipulation for Dismissal filed contemporaneously herewith.

B. The State shall have the right to enforce this Modified Partial Consent Decree by any appropriate action taken pursuant to available legal authority, including the right to seek injunctive relief and/or monetary penalties for any violations, failure or refusal to comply with this Modified Partial Consent Decree. In addition, if the Defendants fail to remedy noncompliance with this Modified Partial Consent Decree in a timely manner, the State may, after notification to the Defendants, initiate State-funded response actions and pursue cost recovery against Defendants, including actions for punitive damages.

C. Nothing herein shall be construed to release the Defendants from any liability for failure of the Defendants to perform the required activities in accordance with the requirements of this Modified Partial Consent Decree.

23. DISCLAIMERS

No party shall be held as a party to any contract entered into by another party or its employees, agents, or Contractors in carrying out activities pursuant to this Modified Partial Consent Decree.

24. INDEMNIFICATION

A. The Defendants agree to indemnify and save and hold harmless the State of Montana, its agencies, departments and

employees from any and all claims or causes of action arising from, or on account of, negligent acts or omissions of the Defendants, their agents, or assign, in carrying out the activities performed pursuant to this Modified Partial Consent Decree. In no event will the Defendants have to indemnify or reimburse the state for any costs it may sustain as a result of the payment of workers' compensation benefits to its employees.

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

25. NOTICE OF RIGHT TO CLAIM
CONFIDENTIALITY OF BUSINESS INFORMATION

The Defendants may, if they desire, assert a business confidentiality privilege covering part or all of the information requested by this Modified Partial Consent Decree. In order to assert the privilege, Defendants may either obtain a declaratory judgment from a court of competent jurisdiction or label the information as confidential pursuant to 16.44.1008 of the Administrative Rules of Montana. If no such designation or judgment accompanies the information when it is received by the State, the State may make it available to the public without further notice to the Defendants.

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26. COMPLIANCE WITH OTHER LAWS

All actions carried out by the Defendants pursuant to this Modified Partial Consent Decree shall be done in full compliance with all applicable federal, state and local laws and regulations. The Defendants shall be responsible for obtaining all federal, state or local permits which are necessary for the performance of any Work hereunder.

27. SUBSEQUENT MODIFICATION

This Modified Partial Consent Decree may be amended by the mutual agreement of the State and the Defendants. All modifications, excluding those to Exhibit I, will be filed with the Court and made available at the public repository for documents in Livingston, Montana prior to their effective date. Such amendments shall be in writing and shall be effective as of the date the amendment is approved by the Court.

28. RETENTION OF JURISDICTION

Subject to the provisions of Section 31 (Termination), this Court shall retain jurisdiction over the parties to this Modified Partial Consent Decree for purposes of ensuring compliance with its terms and provisions, to consider amendments under Section 27, and to adjudicate disputes as provided in Sections 11, and 15 of this Modified Partial Consent Decree.

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29. SURETY FOR PERFORMANCE

A. Defendants shall post and maintain full surety by submitting to the State within thirty (30) Days after the date of lodging of this Modified Partial Consent Decree a financial surety arrangement acceptable to the State, for the amount required to maintain full surety. Compliance with 40 C.F.R. §264.143(f) (3) (i) (ii) and (iii) shall constitute an acceptable financial surety arrangement. If Defendants cannot meet the requirements of 40 C.F.R. §264.143(f) (3) (i) (ii) and (iii), Defendants must meet the remaining requirements of §264.143(f).

B. Upon written determination by the State that the Work has been satisfactorily completed, the Defendants shall be released from their obligations to provide surety for performance as described in this section, and the State shall take any and all actions necessary to effect the withdrawal, release, transfer, or liquidation or any outstanding surety arrangement.

30. SPECIAL RESPONSE AUTHORITY

A. Notwithstanding any other provision of this Modified Partial Consent Decree, if it is determined that an unanticipated condition or occurrence not addressed by the work plan, or a condition or occurrence created by nonperformance of the Work Plan, existing at the Livingston or Mission Wye Facilities poses an imminent and substantial threat to public health, welfare or the environment and requires an immediate response, the State shall immediately notify Defendants to undertake

corrective action pursuant to Section 9. In providing such notice, the state shall recommend appropriate corrective action and Defendants shall implement the corrective action. If Defendants disagree with the terms, conditions or scope of the state's recommended corrective action, the Defendants shall implement those portions of the corrective action they deem appropriate, consistent and feasible to perform, and additionally:

1. The state may perform such work or implement such actions as it deems fit pursuant to this Section, and the state shall be entitled to seek reimbursement of such costs in accordance with Section 11 of this Modified Partial Consent Decree.

2. Alternatively, the State may seek an order compelling compliance with the provisions of this Modified Partial Consent Decree.

B. Whenever the state undertakes any work and/or corrective or mitigative action pursuant to paragraph A above, Defendants shall not interfere with, impede or otherwise hinder or delay the state's performance of such work and/or actions. Defendants shall not be entitled to obtain any order which interferes with or otherwise hinders or delays the State's performance. Any delay resulting from such State action shall constitute a force majeure event under Section 13. Nothing in this Section shall be construed to limit or impair any rights Defendants may have under federal or state law to seek, following the final conclusion

of the dispute resolution process authorized by Section 15, appropriate relief based on activities or expenditures undertaken by the State pursuant to this Section 30.

C. Subject to limitations in all other provisions of this Modified Partial Consent Decree, the State may also take other action within its authority under Montana or federal statutes, rules and regulations.

31. TERMINATION AND SATISFACTION

When the Defendants believe that the actions required by this Modified Partial Consent Decree, including operation and maintenance activities have been completed, they shall petition the State for agreement to terminate this Modified Partial Consent Decree. This petition shall be filed with the Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620. The petition shall reference Cause. CV-88-141. If the State accepts the petition, the State and the Defendants shall jointly petition the Court for termination of the Decree. If the State rejects the petition, it shall explain its reasons in writing, and the dispute resolution procedures of Section 15 shall apply. If the State fails to either accept or reject the petition of the Defendants within ninety days of filing of the petition, the Defendants may unilaterally petition the Court for termination of the Decree, with proper notice to counsel of record for the State. Termination shall not affect the provisions

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which relate to indemnification, mutual release, or covenants not to sue.

32. STATE PERMIT EXEMPTIONS

The Defendants may apply for permit exemptions for any work performed under this Modified Partial Consent Decree, conducted entirely on site as provided by state or federal law. DHES shall review the application for permit exemption within a reasonable time and within the timetable estimated. Section 75-1-721, MCA, authorizes permit exemptions for on site activity which is consistent with applicable state and federal law. This Modified Partial Consent Decree is not nor shall it act as a blanket approval for permit exemptions.

33. AUTHORITY OF SIGNATORIES

Each of the signatories of this Modified Partial Consent Decree states that he or she is fully authorized to enter into the terms and conditions of this Modified Partial Consent Decree and to bind legally the party represented by him or her to the Modified Partial Consent Decree.

FOR BURLINGTON NORTHERN, INC.:

By _____ Dated _____

Leo Berry
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
139 North Last Chance Gulch
Post Office Box 1697
Helena, MT 59624
Attorneys for Defendant Burlington Northern, Inc

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FOR BURLINGTON NORTHERN RAILROAD COMPANY:

By _____ Dated _____

Leo Berry
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
139 North Last Chance Gulch
Post Office Box 1697
Helena, MT 59624
Attorneys for Defendant Burlington
Northern Railroad Company

FOR THE PLAINTIFF, STATE OF MONTANA:

By _____ Dated _____

Donald E. Pizzini, Director
Department of Health and Environmental
Sciences
Cogswell Building
Capitol Station
Helena, MT 59620

By _____ Dated _____

John W. Larson
Post Office Box 8206
Missoula, MT 59807
Attorney for Plaintiff State of Montana

ORDER AND JUDGMENT

THIS MATTER, having come before the Court upon the parties request for entry of this Modified Partial Consent Decree, and the parties having been specifically advised and given the opportunity to object and be heard, and the Court having fully reviewed this matter, including the State of Montana's Brief in Support of the Motion, it is hereby

FOUND that the terms and provisions of this Modified Partial Consent Decree in their entirety, and the Exhibits, represent a fair, reasonable, final and equitable settlement of specifically described matters which have been raised between the parties in this Modified Partial Consent Decree and it is therefore

ORDERED that the foregoing Modified Partial Consent Decree is adopted by the Court and made an order and final judgment of this Court.

Done this 27 day of April, 1989.

BY THE COURT:

CHARLES C. LOVELL
United States District Judge
For the District of Montan

EXHIBIT II

Feasibility Study Report Outline

- 1.0 Introduction
- 2.0 Remedial Alternative Considerations
 - 2.1 Remedial Action Objectives
 - List applicable and substantive state or federal environmental requirements, criteria, or limitations that are applicable to the Livingston Facility site.
 - 2.2 Summary of Remedial Alternatives
 - Summary of treatment/destruction processes
 - Requirements for implementation
 - Regulatory requirements for implementation
 - Potential environmental impacts
 - Viability of process for implementation
 - 2.3 Alternatives for Detailed Analysis
 - Screen alternatives against applicable standards in accordance with Section 75-10-721, MCA
- 3.0 Treatability Studies
 - 3.1 Technology Evaluation
 - Treatability considerations
 - Literature evaluation
 - Laboratory evaluation
 - Pilot scale evaluation
 - Summary of results
 - Field Scale implementation considerations
 - Projected effectiveness
- 4.0 Analysis of Alternatives
 - 4.1 Summary of Alternative(s)
 - 4.2 Comparison of Alternative(s)
 - 4.3 Recommended Technology

EXHIBIT III

Remedial Investigation for Mission Wye includes, where appropriate:

A. A Site History Report, including:

1. facility history (including description of facility operation);
2. hazardous substances suspected;
3. location and site description (provide map);
4. current property ownership map;
5. prior activities or incidences at the site that might have impacted the suspected contamination;
6. aerial photos, if available;
7. area population;
8. site geology;
9. hydrogeology and hydrology, including:
 - a) groundwater use;
 - b) groundwater characteristics;
 - c) surface water -location and use;
 - d) water quality;
 - e) area wells and well log information; and
 - f) potential for contamination.
10. meteorology.

B. A sampling plan, including:

1. objectives;
2. schedules and task assignments;
3. access;
4. QA/QC plan;

5. samples, including:
 - a) sampling methods (identify standard operating procedures;
 - b) locations and ID numbers (map);
 - c) list order of samples collections;
 - d) sample media and objectives;
 - e) QA/QC samples and chain-of-custody methods;
 - f) shipping and handling arrangements;
 - g) split sampling opportunity; and
 - h) analytical parameters, including:
 - 1) justifications for analyses;
 - 2) laboratory and analytical method identification, including detection limits;
 - 3) sample containers preservation and holding times; and
 - 4) laboratory QA/QC program.
6. list of supplies and equipment;
7. instrument calibration;
8. decontamination procedures, including:
 - a) entry and exit controls; and
 - b) disposal of wastes resulting from sampling efforts.
9. field verifications, including:
 - a) direction of groundwater flow;
 - b) identification of wells;
 - c) identification of all physical hazards;

- d) identification of all plumbing, pipeways, vent lines, manways, French drains, recovery sumps, and all other drainage conduits at the Facility;
- 10. Health and safety plan;
- C. A commitment to provide monthly reports on sampling activities and analytical results, to be followed by a final report, which will include:
 - 1. general field observations, including;
 - a) groundwater characterization, including flow (maps);
 - b) location of nearby wells and well log information;
 - c) soil conditions;
 - d) surface water; and
 - e) well driller logs and observations.
 - 2. changes in sample collections from sample plan, including:
 - a) opportunity samples; and
 - b) other changes.
 - 3. sample location map, including:
 - a) approximate distances;
 - b) sample media; and
 - c) sample numbers.
 - 4. table of results;
 - 5. discussion of results, including:
 - a) nature of the contamination;
 - b) extent of the contamination, including volume

of material needing remediation;

c) hazards and risks to the environment and population, including physical hazards.

6. quality assurance, data validation, which includes detailed evaluation of data according to approved QA/QC plan;
7. maps identifying contaminant concentrations, including field sampling results;
8. full data package as appendix including QA/QC information and field log with date, time and activity information;
9. recommendations for further study, if necessary; and
10. recommendations of remedial alternatives to be investigated.

D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

STATE OF MONTANA, ex rel. Department of Environmental Quality, Plaintiff, v. BNSF Railway Company, Defendants.	Case No. CV-88-141-H-CCL ORDER
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Before the Court are the Parties' Stipulation and Joint Motion to Amend Caption and Modified Partial Consent Decree, Order and Judgment, and the Parties' Status Report. Based upon the Status Report, no public comment was received by the State of Montana on the proposed changes to the Modified Partial Consent Decree. The Court having reviewed the Parties' Stipulation and Joint Motion to Amend Caption and Modified Partial Consent Decree, Order and Judgment, and their subsequent Status Report, and good cause appearing:

IT IS HEREBY ORDERED that:

1. The caption in this case be amended to read "State of Montana, ex rel. Department of Environmental Quality, Plaintiff, v. BNSF Railway Company, Defendant";
2. Exhibit A to the Stipulation and Joint Motion becomes Exhibit IV to the Modified Partial Consent Decree; and
3. The Modified Partial Consent Decree is amended and modified as follows:
 - a. The following be added to the Recitals Section of the Modified Partial Consent Decree:

ORDER

30613/156.181

THE PAGES FOLLOWING THIS WERE ALREADY AVAILABLE IN A SEARCHABLE
FORMAT PER KATHERINE HAQUE-HAUSRATH