



807:Environmental Risk Management 101

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Faculty Biographies

Daniele Cervino

Daniele Cervino is the vice president of sales and general counsel for Environmental Waste Management Associates (EWMA) of Parsippany, New Jersey, an environmental consulting and remediation firm. She is the director for EWMA's fixed price remediation and insurance program, SECUR-IT®. Her environmental, real estate, and litigation expertise includes all aspects of Brownfields development, remediation, and regulatory compliance matters.

Prior to joining EWMA, Ms. Cervino was a partner in the environmental department of the law firm of Cole Schotz Meisel Forman & Leonard in Hackensack, New Jersey.

She is director of the environmental committee of the New Jersey State Bar Association and chair of the environmental committee of the Bergen County Bar Association.

Ms. Cervino received a BA from Muhlenberg College and is a graduate of Pace University School of Law.

Linda D. Kelley

Linda D. Kelley is vice president & senior counsel in the Viacom corporate law department's Pittsburgh office. Her responsibilities include providing advice regarding environmental, health, and safety compliance issues for a wide array of clients including Infinity radio stations, CBS/UPN television stations and networks, Viacom Outdoor, CBS Sports, and MTV. She assists in the negotiation of acquisitions and divestitures and directs environmental due diligence and compliance assessments. She is also responsible for managing Superfund and related liabilities at Viacom.

Prior to her current position, Ms. Kelley was a member of the law department of Westinghouse Electric Corporation and served in various capacities at Westinghouse, as well as CBS Corporation (following Westinghouse's acquisition of CBS), and continued with Viacom Inc., when it merged with CBS Corporation.


Ms. Kelley is a magna cum laude graduate of the University of Pittsburgh, and the Duquesne University School of Law.

Jamieson M. Schiff

Jamieson M. Schiff is assistant general counsel at Textron Inc., a \$10 billion diversified manufacturing company, in Providence, Rhode Island. His responsibilities include advising the company on environmental compliance issues, managing legal issues associated with contaminated sites, providing legal support to the company's environmental programs and training, and reviewing environmental issues in the company's acquisition or disposition of businesses or real estate.

Prior to joining Textron he was an attorney with the Boston law firm of Nutter, McClennen & Fish, where he practiced environmental law.

He is a graduate of Union College and Villanova University School of Law.



**ALLOCATING
ENVIRONMENTAL RISKS**


Linda D. Kelley
Vice President &
Senior Counsel

VIACOM INC.
Pittsburgh

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HOW THE GAMES BEGIN

**LETTERS OF INTENT
CONFIDENTIALITY AGREEMENTS
DUE DILIGENCE
AGREEMENTS OF SALE**

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LETTERS OF INTENT

- **May be drafted by non-lawyers**
- **Not shown to environmental counsel**
- **Contain broad, overreaching terms re environmental liabilities**

“What’s mine is mine; what’s yours is yours.”

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CONFIDENTIALITY AGREEMENT

- **Audits**
- **Insurance Surveys**
- **Phase I/II Reports**
- **Privileged Documents**
- **Due Diligence by Buyer**

Control the Data/Full Disclosure

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DUE DILIGENCE

- Time constraints
- Confidentiality
- Phase I Assessments
- Data Searches

“Recreational Sampling”

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CONFIDENTIALITY AGREEMENT

- As Seller, full disclosure to avoid fraud claims later
 - Evaluative only – No reps and warranties
 - Return/destroy if transaction does not take place
- As Buyer, streamline due diligence process using previously developed information
 - Do your own work

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THE AGREEMENT

- **Asset Purchase vs. Stock Purchase**
- **Key Provisions:**
 - **Reps and Warranties**
 - **Retained/Assumed Liabilities**
 - **Indemnification**
 - **Waiver and Release**

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REAL PROPERTY

- **Watch for:**
 - **Property Transfer Laws (NJ, CT, etc.)**
 - **Prior Uses**
 - **PCB Mega Rule**
 - **“Bounce Back”**
 - ≡ **Indemnity**
 - ≡ **Waiver and Release**
 - ≡ **Deed Restrictions**

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ASSET PURCHASE VS. STOCK

- **Little difference if environmental handled separately**
- **Best benefit is severance of responsibility to government**
- **Corporate veil issues**

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REPS AND WARRANTIES

- **Seller's Perspective:**
 - **Narrowly drafted**
 - **Material compliance/permits**
 - **Short-lived**
 - **Tied to Buyer's due diligence**
 - **Limited to Seller's knowledge**
 - **Watch definitions**

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RETAINED LIABILITIES

- **Past Environmental Conditions**
 - **Regulatory Action Required**
 - **Won't be continued by Buyer**
 - **Compliance or Agency trigger**

“Not a Day Care Center”

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RETAINED LIABILITIES

- **STAY AWAY FROM:**
 - **Asbestos Removal**
 - **Interior Surficial Cleaning**
 - **Capital Improvements**
 - **Permit Transfers**

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RETAINED LIABILITIES

- **Specific Remediation**
 - **Scheduled in Agreement**
 - **Controlled by Seller**
 - **Sign-off by Buyer**
 - **Waiver and Release**

Control Spending and Timing

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INDEMNIFICATION

- **CAPS AND BASKETS:**
 - **High threshold**
 - **Low cap**
 - **Specified triggers**
 - **Cost Sharing Arrangements**

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INDEMNIFICATION

- **MAKE SURE YOU HAVE:**
 - **Control of Indemnification Claims**
 - **Access to Property, Personnel, Records**
 - **Cooperation of Buyer**
 - **Ability to Negotiate with Agency**
 - **Sole and Exclusive Remedy**
 - **Cross-indemnity from Buyer**

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INDEMNIFICATION

- **MAKE SURE YOU EXCLUDE:**
 - **Purchaser's Exacerbation**
 - **Change of Law**
 - **Incidental, Consequential or Special Damages**
 - **Transfer or Assignment**

Not an Insurance Policy

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INDEMNIFICATION

● LIMITATIONS:

- Breach of Rep or Warranty
- Retained Liability
- Time
- Waiver and Release

“When it’s over, it’s really over.”

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For the reasons set out in the preamble, title 40 chapter I of the code of Federal Regulations is amended as follows:

1. Subchapter J is amended by amending Part 312 to read as follows:

Part 312 – Standards for Conducting All Appropriate Inquiries

Subpart A–Introduction

Sec.

- 312.1 Purpose, applicability, scope, and disclosure obligations

Subpart B – Definitions

Sec.

- 312.10 Definitions
- 312.11 References

Subpart C – Standards and Practices

Sec.

- 312.20 All appropriate inquiries
- 312.21 Results of inquiry by an environmental professional
- 312.22 Additional inquiries
- 312.23 Interviews with past and present owners, operators, and occupants
- 312.24 Reviews of historical sources of information
- 312.25 Searches for recorded environmental cleanup liens
- 312.26 Reviews of federal, state, tribal and local government records
- 312.27 Visual inspections of the facility and of adjoining properties
- 312.28 Specialized knowledge or experience on the part of the defendant
- 312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated
- 312.30 Commonly known or reasonably ascertainable information about the property
- 312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation

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Authority: Section 101(35)(B) of CERCLA, as amended, 42 U.S.C. 9601(35)(B).

Subpart A—Introduction

§312.1 Purpose, applicability, scope and disclosure obligations.

(a) **Purpose.** The purpose of this section is to provide standards and procedures for “all appropriate inquiries” for the purposes of CERCLA §101(35)(B).

(b) **Applicability.** The requirements of this part are applicable to:

(1) persons seeking to qualify for:

(i) the innocent landowner defense pursuant to CERCLA §§101(35) and 107(b)(3);

(ii) the bona fide prospective purchaser defense pursuant to CERCLA §§101(40) and 107(r);

(iii) the contiguous property owner defense pursuant to CERCLA §107(q); and

(2) persons conducting site characterization and assessments with the use of a grant awarded under CERCLA §104(k)(2)(B).

(c) **Scope.**

(1) Persons seeking to qualify for one of the liability defenses under §312.1(b)(1) must conduct investigations as required in this part, including an inquiry by an environmental professional, as required under §312.21, and the additional inquiries defined in §312.22, to identify conditions indicative of releases or threatened releases, as defined in CERCLA §101(22), of hazardous substances, as defined in CERCLA §101(14).

(2) Persons identified in §312.1(b)(2) must conduct investigations required in this part, including an inquiry by an environmental professional, as required under §312.21,

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and the additional inquiries defined in §312.22, to identify conditions indicative of releases and threatened releases, as defined in CERCLA §101(22), of:

- (i) hazardous substances, as defined in CERCLA §101(14);
- (ii) pollutants and contaminants, as defined in CERCLA §101(33);
- (iii) petroleum or petroleum products excluded from the definition of “hazardous substance” as defined in CERCLA §101(14); and
- (iv) controlled substances, as defined in 21 U.S.C. 802.

(d) **Disclosure obligations.** None of the requirements of this part limits or expands disclosure obligations under any federal, state, tribal, or local law, including the requirements under CERCLA §§101(40)(C) and 107(q)(1)(A)(vii) requiring persons, including environmental professionals, to provide all legally required notices with respect to the discovery of releases of hazardous substances. It is the obligation of each person, including environmental professionals, conducting the inquiry to determine his or her respective disclosure obligations under federal, state, tribal, and local law and to comply with such disclosure requirements.

Subpart B - Definitions

§312.10 – Definitions

(a) Terms used in this part and not defined below, but defined in either CERCLA or 40 CFR Part 300 (the National Oil and Hazardous Substances Pollution Contingency Plan) shall have the definitions provided in CERCLA or 40 CFR Part 300.

(b) When used **in this part**, the following terms have the meanings provided below:

Abandoned property means:

property that can presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a

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reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.

Adjoining properties means:

any real property or properties the border of which is (are) shared in part or in whole with that of the subject property, or that would be shared in part or in whole with that of the subject property but for a street, road, or other public thoroughfare separating the properties.

Data gap means:

a lack of or inability to obtain information required by the standards and practices listed in subpart C of Part 312 despite good faith efforts by the environmental professional or persons identified under §312.1(b), as appropriate, to gather such information pursuant to §312.20(d)(1) and §312.20(d)(2).

Environmental Professional means:

(a) a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases (per §312.1(c)) to the surface or subsurface of a property, sufficient to meet the objectives and performance factors in §§312.20(d) and (e).

(b) Such a person must:

(1) hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) and have the equivalent of three (3) years of full-time relevant experience; **or**

(2) be licensed or certified by the federal government, a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries as

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defined in §312.21 and have the equivalent of three (3) years of full-time relevant experience; **or**

(3) have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five (5) years of full-time relevant experience; **or**

(4) as of the date of the promulgation of this rule, have a Baccalaureate or higher degree from an accredited institution of higher education and the equivalent of ten (10) years of full-time relevant experience.

(c) An environmental professional should remain current in his or her field through participation in continuing education or other activities and should be able to demonstrate such efforts.

(d) The definition of environmental professional provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken as part of the inquiry identified in §312.21(b).

(e) A person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above.

Relevant experience, as used in the definition of environmental professional above, means:

Participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop

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opinions regarding conditions indicative of releases or threatened releases (per §312.1(c)) to the subject property.

Good faith means:

the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means:

non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy.

§312.11 – References

(a) When used in part 312 of this chapter, the following publications are incorporated by reference: [To be determined]

Subpart C – Standards and Practices

§312.20 All Appropriate Inquiries

- (a) "All appropriate inquiries" pursuant to CERCLA §101(35)(B) must include:
- (1) an inquiry by an environmental professional (as defined in §312.10), as provided in §312.21;
 - (2) the collection of information pursuant to §312.22 by persons identified under §312.1(b); and
 - (3) searches for recorded environmental cleanup liens, as required in §312.25.

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(b) All appropriate inquiries may include the results of and information contained in an inquiry previously conducted by, or on the behalf of, persons responsible for the inquiries for the subject property identified under §312.1(b), provided:

(1) such information was collected during the conduct of all appropriate inquiries in compliance with the requirements of this part (40 CFR Part 312) and with §§101(35)(B), 101(40)(B) and 107(q)(A)(viii);

(2) such information was collected or updated within one year prior to the purchase date of the subject property;

(3) notwithstanding §312.20(b)(2) above, the following components of the inquiries were conducted or updated within a 180 days of and prior to the date of purchase of the subject property:

(i) interviews with past and present owners, operators, and occupants (per §312.23);

(ii) searches for recorded environmental cleanup liens (per §312.25);

(iii) reviews of federal, tribal, state, and local government records (per §312.26);

(iv) visual inspections of the facility and of adjoining properties (per §312.27);

and

(v) the declaration by the environmental professional (per §312.21(d)).

(4) previously collected information is updated to include relevant changes in the conditions of the property and specialized knowledge, as outlined in §312.28, of the persons conducting the all appropriate inquiries for the subject property, including persons identified in §312.1(b) and the environmental professional, defined in §312.10.

(c) All appropriate inquiries can include the results of report(s) specified in §312.21(c), that have been prepared by or for other persons, provided that:

(1) the report(s) meets the purposes and objectives of this regulation as specified in §312.21(c); and

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(2) the person specified in §312.1(b) and seeking to use the previously collected information reviews the information and conducts the additional inquiries pursuant to §312.28, §312.29 and §312.30 and the all appropriate inquiries are updated per §312.20(b)(3), as necessary.

(d) Objectives. The standards and practices set forth in this part for All Appropriate Inquiries are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.

(1) In performing the all appropriate inquiries, as defined in §312.20 and provided in the standards and practices set forth this subpart, the persons identified under §312.1(b)(1) and the environmental professional, as defined in §312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

- (i) current and past property uses and occupancies;
- (ii) current and past uses of hazardous substances;
- (iii) waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;
- (iv) current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;
- (v) engineering controls;
- (vi) institutional controls; and
- (vii) properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances to the subject property.

(2) In the case of persons identified in §312.1(b)(2), the standards and practices for All Appropriate Inquiries set forth in this part are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous

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substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) on, at, in, or to the subject property. In performing the all appropriate inquiries, as defined in §312.20 and provided in the standards and practices set forth in this subpart, the persons identified under §312.1(b) and the environmental professional, as defined in §312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

- (i) current and past property uses and occupancies;
- (ii) current and past uses of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);
- (iii) waste management and disposal activities;
- (iv) current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);
- (v) engineering controls;
- (vi) institutional controls; and
- (vii) properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) to the subject property.

(e) Performance factors. In performing each of the standards and practices set forth in this subpart and to meet the objectives stated above in §312.20(d), the persons identified under §312.1(b) or the environmental professional as defined in §312.10 (as appropriate to the particular standard and practice) must seek to:

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(1) gather the information that is required for each standard and practice listed in this subpart that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed; and

(2) review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice listed in this subpart taking into account information gathered in the course of complying with the other standards and practices of this subpart.

(f) To the extent there are data gaps (as defined in §312.10) in the information developed as part of the inquiries per §312.20(e) that affect the ability of persons (including the environmental professional) conducting the all appropriate inquiries to identify conditions indicative of releases or threatened releases (such as in the historical record of property uses) in each area of inquiry under each standard and practice such persons should identify such data gaps, identify the sources of information consulted to address such data gaps, and comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of persons identified in §312.1(b)(2), hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property. Sampling and analysis may be conducted to develop information to address data gaps.

(g) Releases and threatened releases identified as part of the all appropriate inquiries should be noted in the report of the inquiries. These standards and practices however are not intended to require the identification of quantities or amounts, either individually or in the aggregate, of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) that because of said quantities and amounts, generally would not pose a threat to human health or the environment.

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§312.21 Results of inquiry by an environmental professional

(a) Persons identified under §312.1(b) must undertake an inquiry, as defined in §312.21(b) below, by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional, as defined in §312.10. Such inquiry is hereafter referred to as “the inquiry of the environmental professional.”

(b) The inquiry of the environmental professional must include the requirements set forth in §§312.23 (interviews with past and present owners...), 312.24 (reviews of historical sources...), 312.26 (reviews of government records), 312.27 (visual inspections), 312.30 (commonly known or reasonably attainable information), and 312.31 (degree of obviousness of the presence...and the ability to detect the contamination...). In addition, the inquiry should take into account information provided to the environmental professional as a result of the additional inquiries conducted by persons identified in §312.1(b) and in accordance with the requirements of §312.22.

(c) The results of the inquiry by an environmental professional must be documented in a written report that, at a minimum, includes the following:

(1) an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in §312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property;

(2) an identification of data gaps (as defined in §312.10) in the information developed as part of the inquiry that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in §312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property and comments regarding the significance of such data gaps on the

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environmental professional's ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases on, at, in, or to the subject property. If there are data gaps such that the environmental professional cannot reach an opinion regarding the identification of conditions indicative of releases and threatened releases, such data gaps must be noted in the environmental professional's opinion per §312.21(c)(1) above; and

(3) the qualifications of the environmental professional(s).

(d) The environmental professional must place the following statement in the written document identified in §312.21(c) above and sign the document:

[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in §312.10 of 40 CFR 312.

[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.

§312.22 Additional Inquiries

(a) Persons identified under §312.1(b) must provide the following information to the environmental professional responsible for conducting the activities listed in §312.21:

(1) as required by §312.25 and if not otherwise obtained by the environmental professional, environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law;

(2) as required by §312.28, specialized knowledge or experience of the person identified in §312.1(b);

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(3) as required by §312.29, the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated; and

(4) as required by §312.30, commonly known or reasonably ascertainable information about the subject property.

§312.23 Interviews with past and present owners, operators, and occupants

(a) Interviews with past and present owners, operators, and occupants of the subject property must be conducted for the purposes of achieving the objectives and performance factors of §§312.20(d) and (e).

(b) The inquiry of the environmental professional must include interviewing the current owner and occupant of the subject property. If the property has multiple occupants, the environmental professional shall interview major occupants, as well as those occupants likely to use, store, treat, handle or dispose of hazardous substances [and in the case of inquiries conducted for persons identified in §312.1(b)(2) pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)], or those who have likely done so in the past.

(c) The inquiry of the environmental professional also should include, to the extent necessary to achieve the objectives and performance factors of §§312.20(d) and (e), interviewing one or more of the following persons:

(1) current and past facility managers with relevant knowledge of uses and physical characteristics of the property,

(2) past owners, occupants, or operators of the subject property, or

(3) employees of current and past occupants of the subject property.

(d) In the case of inquiries conducted at “abandoned properties,” as defined in §312.10, where there is evidence of potential unauthorized uses of the subject property or evidence of uncontrolled access to the subject property, the environmental professional’s inquiry must include interviewing one or more (as necessary) owners or occupants of

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neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties for the purpose of gathering information necessary to achieve the objectives and performance factors of §§312.20(d) and (e).

§312.24 Reviews of historical sources of information

(a) Historical documents and records must be reviewed for the purposes of achieving the objectives and performance factors of §§312.20(d) and (e). Historical documents and records may include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

(b) Historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes. For the purpose of achieving the objectives and performance factors of §§312.20(d) and (e), the environmental professional may exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.

§312.25 Searches for recorded environmental cleanup liens

(a) All appropriate inquiries must include a search for the existence of environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law.

(b) All information collected regarding the existence of such environmental cleanup liens associated with the subject property must be provided to the environmental professional.

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§312.26 Reviews of Federal, Tribal, State, and local government records

(a) Federal, tribal, state, and local government records or data bases of government records of the subject property and adjoining properties must be reviewed for the purposes of achieving the objectives and performance factors of §§312.20(d) and (e).

(b) With regard to the **subject property**, the review of federal, tribal, and state government records or data bases of such government records and local government records and data bases of such records should include:

(1) records of reported releases or threatened releases, including site investigation reports for the subject property;

(2) records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases as defined in §312.1(c), including landfill and other disposal unit location records and permits, storage tank records and permits, hazardous waste handler and generator records and permits, federal, tribal and state government listings of sites identified as priority cleanup sites, and spill reporting records;

(3) CERCLIS records;

(4) public health records;

(5) Emergency Response Notification System records;

(6) registries or publicly available lists of engineering controls; and

(7) registries or publicly available lists of institutional controls, including environmental land use restrictions, applicable to the subject property.

(c) With regard to **nearby or adjoining properties**, the review of federal, tribal, state, and local government records or databases of government records should include the identification of the following:

(1) properties for which there are government records of reported releases or threatened releases. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

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(i) records of NPL sites or tribal- and state-equivalent sites (one mile);
(ii) RCRA facilities subject to corrective action (one mile);
(iii) records of federally-registered, or state-permitted or registered, hazardous waste sites identified for investigation or remediation, such as sites enrolled in state and tribal voluntary cleanup programs and tribal- and state-listed brownfields sites (one-half mile);

(iv) records of leaking underground storage tanks (one-half mile); and

(2) properties that previously were identified or regulated by a government entity due to environmental concerns at the property. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) records of delisted NPL sites (one-half mile);

(ii) registries or publicly available lists of engineering controls (one-half mile);

(iii) registries or publicly available lists of institutional controls (one-half mile);

and

(iv) records of former CERCLIS sites with no further remedial action notices (one-half mile).

(3) properties for which there are records of federally-permitted, tribal-permitted or registered, or state-permitted or registered waste management activities. Such records or data bases that may contain such records include the following:

(i) records of RCRA small quantity and large quantity generators (adjoining properties)

(ii) records of federally-permitted, tribal-permitted, or state-permitted (or registered) landfills and solid waste management facilities (one-half mile); and

(iii) records of registered storage tanks (adjoining property).

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(4) a review of additional government records with regard to sites identified under §312.26(c)(1)-(3) above may be necessary in the judgment of the environmental professional for the purpose of achieving the objectives and performance factors of §§312.20(d) and (e).

(d) The search distance from the subject property boundary for reviewing government records or databases of government records listed in §312.26(c) may be modified based upon the professional judgment of the environmental professional. The rationale for such modifications must be documented by the environmental professional. The environmental professional may consider one or more of the following factors in determining an alternate appropriate search distance:

- (1) the nature and extent of a release,
- (2) geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment,
- (3) land use or development densities,
- (4) the property type,
- (5) existing or past uses of surrounding properties,
- (6) potential migration pathways (e.g., groundwater flow direction, prevalent wind direction), or
- (7) other relevant factors.

§312.27 Visual inspections of the facility and of adjoining properties

(a) For the purpose of achieving the objectives and performance factors of §§312.20(d) and (e), the inquiry of the environmental professional must include:

- (1) a visual on-site inspection of the subject property and facilities and improvements on the subject property, including a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. Physical limitations to the visual inspection must be noted.

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(2) a visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point, including a visual inspection of areas where hazardous substances may be or may have been stored, treated, handled or disposed. Physical limitations to the inspection of adjacent properties must be noted.

(b) Persons conducting site characterization and assessments using a grant awarded under CERCLA §104(k)(2)(B) must include in the inquiries referenced in §312.27(a) visual inspections of areas where hazardous substances, pollutants and contaminants, petroleum and petroleum products, and controlled substances as defined in 21 U.S.C. 802 may be or may have been used, stored, treated, handled or disposed at the subject property and adjoining properties.

(c) Except as noted in this subsection, a visual on-site inspection of the subject property must be conducted. In the unusual circumstance where an on-site visual inspection of the subject property cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the property, provided good faith (as defined in §312.10) efforts have been taken to obtain such access, an on-site inspection will not be required. (The mere refusal of a voluntary seller to provide access to the subject property does not constitute an unusual circumstance.) In such unusual circumstances, the inquiry of the environmental professional must include:

(1) visually inspecting the subject property via another method (such as aerial imagery for large properties), or visually inspecting the subject property from the nearest accessible vantage point (such as the property line or public road for small properties);

(2) documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful; and

(3) documentation of other sources of information regarding releases or threatened releases at the subject property that were consulted in accordance with §312.20(e). Such documentation should include comments by the environmental professional on the significance of the failure to conduct a visual on-site inspection of the

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subject property with regard to the ability to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, if any.

§312.28 Specialized knowledge or experience on the part of the defendant

(a) Persons to whom this part is applicable per §312.1(b) must take into account, their specialized knowledge of the subject property, the area surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry, for the purpose of identifying conditions indicative of releases or threatened releases at the subject property, as defined in §312.1(c).

(b) All appropriate inquiries, as outlined in §312.20, are not complete unless the results of the inquiries take into account the relevant and applicable specialized knowledge and experience of the persons responsible for undertaking the inquiry (as described in §312.1(b)).

§312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated

(a) Persons to whom this part is applicable per §312.1(b) must consider whether the purchase price of the subject property reasonably reflects the fair market value of the property, if the property were not contaminated.

(b) Persons who conclude that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, should consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances.

(c) Persons conducting site characterization and assessments with the use of a grant awarded under CERCLA §104(k)(2)(B) and who know that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if

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the property were not contaminated, should consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and/or controlled substances as defined in 21 U.S.C. 802.

§312.30 Commonly known or reasonably ascertainable information about the property

(a) Throughout the inquiries, persons to whom this part is applicable per §312.1(b) and environmental professionals conducting the inquiry must take into account commonly known or reasonably ascertainable information within the local community about the subject property and consider such information when seeking to identify conditions indicative of releases or threatened releases, as set forth in §312.1(c), at the subject property.

(b) Commonly known information may include information obtained by the person to whom this part applies per §312.1(b) or by the environmental professional about releases or threatened releases at the subject property that is incidental to the information obtained during the inquiry of the environmental professional.

(c) To the extent necessary to achieve the objectives and performance factors of §§312.20(d) and (e), the environmental professional should gather information from varied sources whose input either individually or taken together may provide commonly known or reasonably ascertainable information about the subject property; the environmental professional may refer to one or more of the following sources of information:

(1) current owners or occupants of neighboring properties or properties adjacent to the subject property;

(2) local and state government officials who may have knowledge of, or information related to, the subject property;

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- (3) others with knowledge of the subject property; and
- (4) other sources of information (e.g., newspapers, websites, community organizations, local libraries and historical societies).

§312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation

(a) Persons to whom this part is applicable per §312.1(b) and environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under §§312.23 through 312.30 in considering the degree of obviousness of the presence of releases or threatened releases at the subject property.

(b) Persons to whom this part is applicable per §312.1(b) and environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under §§312.23 through 312.30 in considering the ability to detect contamination by appropriate investigation. The inquiry of the environmental professional should include an opinion regarding additional appropriate investigation, if any.

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ABC CORPORATION
Due Diligence Request

The following is a list of documents that you will need to provide to us in connection with the proposed transaction between ABC Corporation and XYZ, Inc. (together with all related entities, the "Company").

I. CORPORATE DOCUMENTS.

- A. Copies of the current charter documents and by-laws of the Company and any subsidiaries. Also include copies of all amendments of these documents.
- B. Minutes of meetings held during the last three years of (i) the boards of directors, (ii) committees of the boards of directors, and (iii) stockholders of the Company and any subsidiaries. Also include copies of written consents (actions taken without a meeting) for any of these over the last three years.
- C. Stock ledger and evidence that all outstanding stock of the Company and its subsidiaries is fully paid and non assessable.
- D. Copies of any agreements, arrangements or understandings (including proxies, voting trusts and other voting or stockholder agreements) relating to the ownership, voting, sale or issuance of securities of the Company and its subsidiaries.
- E. Copies of all agreements under which any person has registration rights, preemptive rights, or any rights of first refusal for securities of either Company or its subsidiaries, a joint venture, a partnership or another business in which either Company or any subsidiary has an interest.
- F. Stock option plans, forms of stock option agreements and list of option holders.
- G. Copies of all disclosure documents or offering circulars relating to the sales of securities of the Company and its subsidiaries.

II. CREDIT AND RELATED DOCUMENTS.

- A. Copies of all indentures, agreements, bank lines of credit or other documents that constitute debt obligations of the Company and its subsidiaries. Also include copies of all amendments, consents and waivers issued in connection with these.
- B. Copies of all other material financing documents (such as sale and leaseback arrangements, capitalized leases and installment purchases).
- C. Copies of all material guarantees, indemnifications or loans by the Company or its subsidiaries.

III. LITIGATION.

- A. Litigation files, including pleadings, opinions of counsel, and correspondence.
- B. Copies of all consent decrees, judgments, injunctions, other decrees or orders, settlement agreements and other agreements presently applicable to either Company, its subsidiaries or any of its officers, directors, key employees or controlling stockholders.
- C. Copies of all correspondence during the last five years dealing with actual or alleged infringement (either by one or both of the Companies, their subsidiaries or another party) of patents, trademarks or copyrights and misuse of trade secrets.

IV. INSURANCE COVERAGE.

- A. Copies of insurance policies, including policies covering real or personal property, workers' compensation and life insurance policies owned by the Company and its subsidiaries.

V. MATERIAL CONTRACTS.

- A. Copies of all agreements relating to a material acquisition or disposition of assets or stock or a merger, reorganization or consolidations.
- B. Copies of all material royalty, licensing, marketing, sales, sales agent, sales representative, dealer, distributor, consignment, pricing, franchise and participation agreements.
- C. Copies of all joint venture, R&D and similar agreements.
- D. Copies of all form purchase, sale, distribution, etc., contracts.
- E. Copies of all leases of any substantial amount of personal property to which the Company or its subsidiaries are a party, either as lessor or lessee.
- F. Copies of all contracts entered into outside the ordinary course of business of the Company or its subsidiaries.

VI. EMPLOYEE MATTERS.

- A. Most recent copies of all employment, consulting, and compensation contracts, agreements, arrangements, plans and programs (*e.g.*, bonus, incentive, compensation, severance, stock option, deferred compensation, capital accumulation), and qualified plans and programs (*e.g.*, pension, profit sharing, stock bonus) entered into,

contributed to, or maintained by the Company and its subsidiaries, including the following related documents and all amendments:

1. Trust agreements, insurance contracts or other funding vehicles;
 2. Summary plan descriptions;
 3. Investment management agreements;
 4. Annual reports (Form 5500 series), including, in the case of pension plans, certified actuarial reports;
 5. Valuations of plan assets;
 6. SEC filings;
 7. Employee data (name, job title, date of hire, sex, marital status, social security number, annual salary/wage, location; 401(k) contributions; welfare plan participation (individual or family coverage));
 8. Information relating to any litigation, proceeding, prohibited transaction or other unusual event relating to any plan, program or arrangement described above; and
 9. Historical cost figures under any such plan, program or arrangement described above.
- B. List of executive employees with a breakdown of compensation, severance and other benefits.
- C. Collective bargaining agreements (specifically identify when each is due for negotiation) and history of labor disputes and grievances.
- D. Copies of all non-competition, secrecy, confidentiality and nondisclosure agreements with employees and third parties.
- E. Copies of all documents pertaining to any accounts receivable from, accounts payable to or any guarantee agreements with or which benefit, any director, officer or owner of more than 5% of the equity securities of either Company.
- F. Copies of all personnel policies, personnel manuals and employees hand books and other employee communications relating to benefits.
- G. Copies of all indemnification arrangements with officers and directors of the Company and its subsidiaries.

VII. REAL ESTATE.

- A. A listing of properties owned by the Company or its subsidiaries showing the following information:
 - 1. Location (including street address and county in which such property is located);
 - 2. Size of the land and building in which the facility is located; and
 - 3. Fee or other form of ownership and percentage of ownership interest of the Company.
- B. Copies of all material deeds, mortgages, title reports and policies, and all material leases and related agreements concerning all real property owned or occupied by the Company or its subsidiaries.
- C. Copies of all material leases (including capitalized leases) and mortgages to which either Company or its subsidiaries are a party.

VIII. FINANCIAL STATEMENTS AND ACCOUNTING; TAXES.

- A. Copies of all accountant reports and correspondence for the past five years. Copies of all management letters to the Company and its subsidiaries and responses.
- B. Audited financial statements for the Company (and subsidiaries, if applicable) for the last three years, and interim unaudited financial statements for the most recent period ended since the end of the last fiscal year.
- C. Copies of internal financial plans, budgets and projections for the current year.
- D. Copies of federal, state and foreign tax returns (including schedules and exhibits) filed by the Company and its subsidiaries for the latest closed and all open years.
- E. Tax audits and results thereof.

IX. ENVIRONMENTAL MATTERS.

- A. For all underground storage tanks that (a) are currently owned or operated by either Company or are located on real property currently owned or operated by either Company or (b) were previously owned or operated by either Company or were located on real property previously owned or operated by either Company, provide the following:

1. A list identifying each current and former tank location, giving age, capacity, type, and current or past usage;
 2. Copies of EPA Notification Forms (tank registrations) for each tank; and
 3. Records of any tank removals.
- B. For all above-ground storage tanks that are currently owned or operated by either Company, provide the following:
1. A list identifying tank locations; and
 2. Copies of registration forms and permits (if any).
- C. Copies of water discharge (NPDES) permits (if any).
- D. Location of any sites where either Company has stored hazardous wastes (e.g. waste oil, spent solvents, etc.) in volumes in excess of 100 kilograms.
- E. Copies of all permits or applications for permits relating to the generation, storage, handling, transportation, or disposal of hazardous wastes, and a description of any past or present involvement in any such activities.
- F. Locations of electric transformers.
- G. Copies of air emission permits or registrations (if any).
- H. Copies of notices of violation received in the last five years regarding any violation of, or non-compliance with, environmental laws or regulations.
- I. List of all claims against either Company in the last five years for damages or clean-up costs arising out of any environmental condition.
- J. Location of, and copies of any records concerning, any spill or release of hazardous substances (a) by either Company or (b) on any real property currently or previously owned or operated by either Company.
- K. Copies of inquiries and descriptions of investigations of environmental conditions by federal, state, or local agencies.
- L. Copies of any Phase I or Phase II environmental site assessments performed at any property currently or previously owned or operated by either Company.

X. INTELLECTUAL PROPERTY MATTERS.

- A. Schedule of United States and foreign patents, trademarks, servicemarks and copyrights, including pending applications, of the Company and its subsidiaries.
- B. Documents issued by PTO or equivalent foreign organization.
- C. Licensing agreements to which the Company or any subsidiary is a party, whether as licensor or licensee, including research and development, manufacturing, distribution or marketing agreements.
- D. Copies of all notices and correspondence relating to allegations of infringement of rights of third parties by the Company or any subsidiary or of the Company or any subsidiary's rights by third parties.
- E. Copy of the Company's policies or written summary of oral policies regarding the protection of trade secret and other proprietary information.
- F. Copy of the Company's policies or written summary of oral policies regarding information brought with them by employees from former employers.
- G. Assignment agreements with employees and with any other persons, with respect to proprietary information.
- H. Confidentiality/non-disclosure agreements, with employees and with any other persons, with respect to proprietary information.

XI. OTHER.

- A. Any independent valuations of the assets and businesses of the Company and its subsidiaries.
- B. Any document not covered above restricting the sale or transfer of any of the material assets or stock of either Company or its subsidiaries.
- C. Any restrictions on either Company or its subsidiaries carrying on its business anywhere in the world.
- D. Any document not covered above which would require a consent upon, or which would be triggered or otherwise affected by, a merger or change of control of either Company or its subsidiaries.
- E. Any other documents or information which either Company believes is material with respect to any portion of its business or which should be considered and reviewed in order to adequately disclose the business and financial condition of the Company.

Guidance on Settlements with Prospective Purchasers
of Contaminated Property

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W.
Washington, DC 20460

Guidance on Settlements with Prospective Purchasers of Contaminated Property

I. Purpose

This document supersedes EPA's policy on agreements with prospective purchasers of contaminated property as set forth in the June 6, 1989, policy document entitled "Guidance on Landowner Liability under Section 107(a) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property"¹ ("the 1989 guidance"). This revised guidance reflects both Agency experience in implementing the 1989 guidance and changes to that guidance that EPA believes are needed.

During the past several years, EPA has entered into a number of prospective purchaser agreements to enable purchasers to buy contaminated property for cleanup, redevelopment or reuse. The 1989 guidance required EPA to receive substantial benefits in terms of work or reimbursement of response costs that otherwise would not have been available. While some agreements required performance of cleanup work on contaminated parcels prior to their redevelopment, others provided covenants not to sue for purchase of uncontaminated portions of larger Superfund sites. EPA's experience has demonstrated that prospective purchaser agreements might be both appropriate and beneficial in more circumstances than contemplated by the 1989 guidance. The Agency now believes that it may be appropriate to enter into agreements resulting in somewhat reduced benefits to the Agency through cleanup or response costs or in benefits that also may be available from other parties. These agreements in turn should provide substantial benefits to the community through the creation or retention of jobs, productive use of abandoned property, or revitalization of blighted areas.

While this new guidance restates much of the 1989 guidance, it revises two of the original criteria used to determine whether a prospective purchaser agreement is appropriate. The revised criteria allow the Agency greater flexibility to consider agreements with covenants not to sue to encourage reuse or development of contaminated property that would have substantial benefits to the community (e.g., through job creation or productive use of abandoned property), but also would be safe, consistent with site remediation, and have direct benefits to the Agency. A "model" prospective purchaser agreement, which should be used as a starting point for negotiation of agreements, is included at the end of the document.

¹OSWER Directive No. 9835.9 and 54 F.R. 34235 (Aug. 18, 1989).

II. Statement of Policy

Because of the clear liability which attaches to landowners who acquire property with knowledge of contamination, the Agency has received numerous requests for covenants not to sue from prospective purchasers of contaminated property.² It is the Agency's policy not to become involved in private real estate transactions. However, an agreement with a covenant not to sue a prospective purchaser might appropriately be considered if it will have substantial benefits for the government and if the prospective purchaser satisfies other criteria³.

The Agency recognizes that entering into an agreement containing a covenant not to sue with a prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a payment for cleanup or a commitment to perform a response action. EPA's experience has shown that prospective purchaser agreements have also benefitted the community where the site is located by encouraging the reuse or redevelopment of property at which the fear of Superfund liability may have been a barrier. The Agency believes that it is necessary to provide greater flexibility in offering covenants not to sue. Through this guidance, the Agency adopts a policy which expands the circumstances under which prospective purchaser agreements may be considered.

III. Criteria for entering into covenants not to sue with prospective purchasers of contaminated property

The following criteria should be met before the Agency considers entering into agreements with prospective purchasers. These criteria are intended to reflect EPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment. The Agency may also reject any offer if it determines that entering into an agreement with a prospective purchaser is not sufficiently in the public interest to warrant expending the resources

² Since settlements with typical prospective purchasers (i.e., those who do not currently own the property, are not otherwise involved with the site, and are, therefore, not yet liable under Section 107) will not be reached under Section 122, the procedures and restrictions in that section, such as those relating to covenants not to sue, will not apply.

³This guidance is also applicable to persons seeking prospectively to operate or lease contaminated property. Agreements with prospective lessees/operators will be evaluated using the criteria set forth in this guidance, and will require the current owner's signature.

necessary to reach an agreement. Regions should consider the following criteria when evaluating prospective purchaser agreements.

1. An EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the Agency.

This criterion is meant to ensure that EPA does not become unnecessarily involved in purely private real estate transactions or expend its limited resources in negotiations which are unlikely to produce a sufficient benefit to the public. EPA, however, recognizes the potential gains in terms of clean up and public benefit that may be realized with broader application of prospective purchaser agreements. Therefore, this criterion has been expanded beyond the limitation in the 1989 guidance to sites where enforcement action is anticipated, to now include sites where federal involvement has occurred or is expected to occur.

Accordingly, when requested, the Agency may consider entering into prospective purchaser agreements at sites listed or proposed for listing on the National Priorities List (NPL), or sites where EPA has undertaken, is undertaking, or plans to conduct a response action. If the Agency receives a request for a prospective purchaser agreement at a site where EPA has not yet become involved, Regions should first evaluate the realistic possibility that a prospective purchaser may incur Superfund liability when determining the appropriateness of entering into a prospective purchaser agreement. This evaluation should clearly show that EPA's covenant not to sue is essential to remove Superfund liability barriers and allow the private party cleanup and productive use, reuse, or redevelopment of the site.

The Agency should consider the following factors when evaluating the appropriateness of entering into an agreement with a prospective purchaser at any site:

- a. Whether information regarding releases or potential releases of hazardous substances at the site indicates that there is a substantial likelihood of federal response or enforcement action at the site that would justify EPA's involvement in entering into the prospective purchaser agreement. EPA should consider information that is available through EPA's data systems, such as the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS"), a state agency, or through submissions from the prospective purchaser, such as the results of an environmental audit or site assessment.
- b. Whether other available avenues (e.g., private indemnification agreements) may exist to sufficiently alleviate the threat of Superfund liability at the site without the need for EPA involvement. In most cases EPA will decline to

consider an agreement at a site that is currently undergoing cleanup through a state program, since future EPA activity at such a site is extremely unlikely.

Prospective purchaser agreements generally will not be appropriate at sites screened out using the above criteria. For example, sites designated by EPA as No Further Response Action Planned (NFRAP) and removed from CERCLIS will rarely be deemed appropriate for a prospective purchaser agreement. Even at such sites, however, EPA may, in extremely unusual circumstances, consider a prospective purchaser agreement if it is in the public interest and the agreement is essential to achieve a ~~very~~ significant public benefit.

2. The Agency should receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA.

A cornerstone of the Agency's evaluation process under this policy is the measurement of environmental benefit, in the form of direct funding, or cleanup, or a combination of reduced direct funding or cleanup and an indirect public benefit. The Agency believes that its past practice of limiting prospective purchaser agreements to those situations where substantial benefit was measured only in terms of cost reimbursement or work performed may have decreased the effectiveness of this tool.

This guidance encourages a more balanced evaluation of both the direct and indirect benefits of a prospective purchaser agreement to the government and the public. EPA recognizes that indirect benefits to a community is an important consideration and may justify the commitment of the Agency's resources necessary to negotiate a prospective purchaser agreement, even where there are reduced direct benefits to the Agency in terms of cleanup and cost reimbursement.

Therefore, EPA may continue to consider entering into prospective purchaser agreements where there is a substantial direct benefit to EPA in terms of a commitment to conduct the cleanup or to reimburse EPA's cost of cleanup. Furthermore, Regions may now consider negotiating prospective purchaser agreements that will result in substantial indirect benefits to the community as long as there is still some direct benefit to the Agency. Both direct and indirect benefits should be measurable to enable EPA to evaluate them effectively and to ensure they are substantial. Examples of indirect benefits to the community include measures that serve to reduce substantially the risk posed by the site, creation or retention of jobs, development of abandoned or blighted property, creation of conservation or recreation areas, or provision of community services (such as improved public transportation and infrastructure.) Examples of reduced but measurable benefits to EPA include partial cleanup or compensation.

While this policy is intended to provide greater flexibility in providing prospective purchaser agreements, EPA is not reducing its commitment to

environmental protection or environmental justice. The Agency intends to carefully weigh the public interest considerations of creating jobs in the inner city, where older contaminated industrial properties are often located, against the possibility of further environmental degradation of industrial property in mixed industrial/residential areas. EPA is committed to working with purchasers of such property, to the extent possible, to ensure proper cleanup and promote responsible land use.

3. The continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with EPA's response action.

Information which should be considered by the Agency to evaluate the effect of new site development or continued operation of the facility could include site assessment data and the Engineering Evaluation Cost Analysis (EE/CA) or remedial investigation/feasibility study (RI/FS), if available, and all other information relevant to the condition of the facility. If the prospective purchaser intends to continue the operations of an existing facility, the prospective purchaser should submit information sufficient to allow the Agency to determine whether the continued operations are likely to aggravate or contribute to the existing contamination or interfere with the remedy. If the prospective purchaser plans to undertake new operations or development of the property, comprehensive information regarding these plans should be provided to EPA. If the planned activities of the prospective purchaser are likely to aggravate or contribute to the existing contamination or generate new contamination, EPA generally will not enter into an agreement, or will include restrictions in the agreement which prohibit those operations or portions of those operations which are likely to aggravate or contribute to the existing contamination or interfere with the remedy.

The Agency will determine on a case-by-case basis whether the available information is sufficient for purposes of this evaluation. One key factor to be considered is whether the remedial investigation or other site evaluation has been completed and the extent of information which has been generated in that process. EPA may not enter into an agreement if the available information is insufficient for purposes of evaluating the impact of the proposed activities.

4. The continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site.

EPA believes it is important to consider the environmental implications of site operations on the surrounding community and to those likely to be present or have access to the site.

5. The prospective purchaser is financially viable.

A settling party, including a prospective purchaser of contaminated property, should demonstrate that it is financially viable and capable of fulfilling any obligation under the agreement. In appropriate circumstances, EPA may structure payment or work to be performed to avoid or minimize an undue financial burden on the purchaser.

IV. Consideration

As a matter of law, it is necessary for EPA to obtain adequate consideration when entering into a prospective purchaser agreement. In determining what constitutes adequate consideration, Regions should consider a number of factors. Initially, Regions should examine the amount of past and future response costs expected to be incurred at the site, whether there are other potentially responsible parties who can perform the work or reimburse EPA's costs, and whether there is likely to be a shortfall in recovery of costs at the site. Regions should then consider the purchase price to be paid by the prospective purchaser, the market value of the property, the value of any lien on the property under Section 107(1) of CERCLA, whether the purchaser is paying a reduced price due to the condition of the property, and if so, the likely increase in the value of the property attributable to the cleanup (e.g. compare purchase price or market price with the estimated value of the property following completion of the response action). Finally, Regions should consider the size and nature of the prospective purchaser and the proposed use of the site (e.g. whether the purchaser is a large commercial or industrial venture, a small business, a non-profit or community-based activity). The analysis of any benefits received by the Agency also should contemplate any projected "windfall" profit to the purchaser when the government has unreimbursed response costs, and whether it is appropriate to include in the agreement some provision to recoup such costs. This analysis should be coupled with an examination of any indirect benefit that the Agency may receive (e.g., demolition of structures, implementation of institutional controls) in determining whether a prospective purchaser agreement provides a substantial benefit.

V. Public Participation

In light of EPA's new policy of accepting indirect public benefit as partial consideration, and the fact that the prospective purchaser agreements will provide contribution protection to the purchaser, the surrounding community and other members of the public should be afforded opportunity to comment on the settlement, wherever feasible. Because settlements with prospective purchasers are not expressly governed by CERCLA Section 122, there is no legal requirement for public notice and comment. Whenever practicable, however, Regions should publish notices in the Federal Register to ensure adequate notification of the agreement to all interested parties. Notice of a proposed settlement, in the Federal register alone, however, will rarely be sufficient to appropriately involve a community in the process concerning an agreement with a prospective purchaser. Particularly in urban communities and at facilities where environmental justice is an issue, Regions should provide sufficient

opportunities for public information dissemination and facilitate public input. Seeking cooperation with state and local government may also facilitate public awareness and involvement. Additionally, Regions should make a case-by-case determination of the need and level of additional measures to ensure meaningful community involvement with respect to the agreement. Because of business considerations some prospective purchaser agreements may be subject to relatively short deadlines. In these circumstances, Regions should allow sufficient time for appropriate approvals and public comment prior to the deadline.

VI. Process

A mandatory consultation with the Director of the Regional Support Division, Office of Site Remediation Enforcement, is required for any agreement entered with a prospective purchaser of contaminated property. Any prospective purchaser agreement can only be entered into with the express concurrence of the Assistant Attorney General. It is important that Regions involve EPA Headquarters and the Department of Justice at an early point in the process, and keep them involved throughout the negotiations. In particular, any draft settlement document should be forwarded to Headquarters and the Department of Justice prior to being sent to a prospective purchaser. When seeking approval for a settlement, it is important to explain the consideration for the covenant not to sue, whether direct or a combination of direct and indirect benefits, how it was determined, and why the Region considers it to be adequate.

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency and creates no substantive rights in any persons. Case specific inquiry should be directed to the Regional Support Division. Additional information on this policy is available from Lori Boughton ((703) 603-8959), Elisabeth Freed ((703) 603-8936) in the Policy and Program Evaluation Division, and Helen Keplinger ((202) 260-7116) in the Regional Support Division.

Attached Model Agreement

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION ____

IN THE MATTER OF: [name]
[Docket Number]

UNDER THE AUTHORITY OF THE _____) AGREEMENT AND COVENANT
COMPREHENSIVE ENVIRONMENTAL _____) NOT TO SUE [Insert
RESPONSE, COMPENSATION, AND _____) Settling Respondent's
LIABILITY ACT OF 1980, 42 U.S.C. _____) Name]
§ 9601, et seq., as amended. _____)
[state law, if appropriate] _____)

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States Environmental Protection Agency ("EPA") [state of ____] and _____ [insert name of Settling Respondent] (collectively the "Parties").

EPA enters into this Agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq. [If the state is a party, insert "The State of _____, enters into this Agreement pursuant to [cite relevant state authority.]" and make appropriate reference to state with respect to affected provisions, including payment or work to be performed].

[Provide introductory information, consistent with Definitions and Statement of Facts, about the party purchasing the contaminated property including, name ("Settling Respondent"), address, corporate status if applicable and include proposed use of the property by prospective purchaser. Provide name, location and description of Site.]

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VII, VIII, IX, and X [If this Agreement contains a separate section for Settling Respondent's reservations, add section number], the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA [and the state] of a substantial benefit, is in the public interest.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
2. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants, present or existing on or under the Site as of the effective date of this Agreement.

3. "Parties" shall mean EPA, [State of _____], and the Settling Respondent.
4. "Property" shall mean that portion of the Site which is described in Exhibit 1 of this Agreement.
5. "Settling Respondent" shall mean _____.
6. "Site" shall mean the [Superfund] Site, encompassing approximately _____ acres, located at [address or description of location] in [name of city, county, and State], and depicted generally on the map attached as Exhibit 2. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located [provide a more specific definition of the Site where possible; may also wish to include within Site description structures, USTs, etc].
7. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

III. STATEMENT OF FACTS

8. [Include only those facts relating to the Site that are relevant to the covenant being provided the prospective purchaser. Avoid adding information that relates only to actions or parties that are outside of this Agreement.]
9. The Settling Respondent represents, and for the purposes of this Agreement EPA [and the state] relies on those representations, that Settling Respondent's involvement with the Property and the Site has been limited to the following: [Provide facts of any involvement by Settling Respondent with the Site, for example performing an environmental audit, or if Settling Respondent has had no involvement with the Site so state.].

IV. PAYMENT

10. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein [and Removal of Lien in Section XXI herein if that is part of the consideration for the agreement], Settling Respondent agrees to pay to EPA the sum of \$_____, within ___ days of the effective date of this Agreement. [A separate section should be added if the consideration is work to be performed.] The Settling Respondent shall make all payments required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing the EPA Region, EPA Docket number, and Site/Spill ID#_____ [insert 4-digit no.; first 2 numbers represent Region, second 2 numbers are Region's Site/Spill ID no.], [DOJ case number_____, if applicable] and name and address of Settling Respondent. [insert Regional Superfund Lockbox address where payment should be sent]. Notice of payment shall be sent to those persons listed in Section XV (Notices and Submissions) and to EPA Region ___ Financial Management Officer [insert address].

11. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

[_____] [WORK TO BE PERFORMED]

[Include this section and other appropriate provisions relating to performance of the work, such as financial assurance, agency approvals, reporting, etc., where work to be performed is the consideration for the Agreement.

____. Statement of Work attached as Exhibit 3.]

V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

12. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA [and the state] its authorized officers, employees, representatives, and all other persons performing response actions under EPA [or state] oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by the Settling Respondent, for the purposes of performing and overseeing response actions at the Site under federal [and state] law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, ("RCRA") et. seq., and any other applicable statute or regulation, including any amendments thereto.

13. Within 30 days after the effective date of this Agreement, the Settling Respondent shall record a certified copy of this Agreement with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____. Thereafter, each deed, title, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to this Agreement. A copy of these documents should be sent to the persons listed in Section XV (Notices and Submissions).

14. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees, of the Property shall provide the same access and cooperation. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement [and where appropriate, Section __ (Work to be Performed)].

VI. DUE CARE/COOPERATION

15. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all

appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA of such release or threatened release.

VII. CERTIFICATION

16. By entering into this agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA [and the state] all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States [and the state] determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States [and the state] reserves all rights it [they] may have.

VIII. UNITED STATES' COVENANT NOT TO SUE⁴

⁴ Since the covenant not to sue is from the United States, Regions negotiating these Agreements should advise the Department of Justice of any other federal agency involved with the Site, or which may have a claim under CERCLA with respect to the Site and use best efforts to advise such federal agency of the proposed settlement.

17. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment), of this Agreement [if consideration for Agreement is work to be performed, insert, as appropriate, "and upon completion of the work specified in Section __ (Work to Be Performed) to the satisfaction of EPA"], the United States [and the state] covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) [and state law cite] with respect to the Existing Contamination.

IX. RESERVATION OF RIGHTS

18. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States [and the State] reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation), Section XIV (Payment of Costs, [and, if appropriate, Section __ (Work to be Performed)]);

(b) any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;

(c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;

(d) any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;

(e) criminal liability;

(f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and

(g) liability for violations of local, State or federal law or regulations.

19. With respect to any claim or cause of action asserted by the United States [or the state], the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

20. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States [or the state] may have against any person, firm, corporation or other entity not a party to this Agreement.

21. Nothing in this Agreement is intended to limit the right of EPA [or the state] to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA [or the state] in exercising

its authority under federal [or state] law. Settling Respondent acknowledges that it is purchasing property where response actions may be required. X.

SETTLING RESPONDENT'S COVENANT NOT TO SUE

22. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States [or the state], its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

23. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XI. PARTIES BOUND/TRANSFER OF COVENANT

24. This Agreement shall apply to and be binding upon the United States, [and the state], and shall apply to and be binding on the Settling Respondent, its officers, directors, employees, and agents. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

25. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA [and the state] in its sole discretion.

26. The Settling Respondent agrees to pay the reasonable costs incurred by EPA [and the state] to review any subsequent requests for consent to assign or transfer the Property.

27. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA [the state] and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to

any assignees or transferees who fail to provide such written consent to EPA [and the state].

XII. DISCLAIMER

28. This Agreement in no way constitutes a finding by EPA [or the state] as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA [or the state] that the Property or the Site is fit for any particular purpose.

XIII. DOCUMENT RETENTION

29. The Settling Respondent agrees to retain and make available to EPA [and the state] all business and operating records, contracts, site studies and investigations, and documents relating to operations at the Property, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, the Settling Respondent shall notify EPA [and the state] of the location of such documents and shall provide EPA [and the state] with an opportunity to copy any documents at the expense of EPA [or the state]. [Where work is to be performed, consider providing for document retention for ten years or until completion of work to the satisfaction of EPA, whichever is longer.]

XIV. PAYMENT OF COSTS

30. If the Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment), [or Section -- (Work to be Performed)] of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States [and the state] to enforce this Agreement or otherwise obtain compliance.

XV. NOTICES AND SUBMISSIONS

31. [Insert names, titles, and addresses of those to whom notices and submissions are due, specifying which submissions are required.]

XVI. EFFECTIVE DATE

32. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA [and the state] has fully executed the Agreement after review of and response to any public comments received.

XVII. ATTORNEY GENERAL APPROVAL

33. The Attorney General of the United States or her designee has issued prior written approval of the settlement embodied in this Agreement.

XVIII. TERMINATION

34. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XIX. CONTRIBUTION PROTECTION

35. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. §

9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are [all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination].

36. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States [and the state] in writing no later than 60 days prior to the initiation of such suit or claim.

37. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States [and the state] within 10 days of service of the complaint on them.

XX. EXHIBITS

38. Exhibit 1 shall mean the description of the Property which is the subject of this Agreement.

39. Exhibit 2 shall mean the map depicting the Site.

[--. Exhibit 3 shall mean the Statement of Work.]

XXI. REMOVAL OF LIEN

40. [Use this provision only when appropriate.] Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment) [or upon satisfactory completion of work to be performed specified in Section __ (Work to be Performed)], EPA agrees to remove any lien it may

have on the Property under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), as a result of response action conducted by EPA at the Property.

XXII. PUBLIC COMMENT

41. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

Regional Administrator, Region __


Date

IT IS SO AGREED:

BY:

Name

Date




Session 807
Environmental Risk Management 101
Remediation Issues

Daniele Cervino, Esq.
Environmental Waste Management Associates, LLC
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The in-house bar association.™



Overview of Superfund Process

- **CERCLA 104 (e) Requests** – To gather information on company's hazardous substance activities to determine if a company is a Potentially Responsible Party (PRP)
- **PRP Notification** – USEPA advises of potential liability and requests for cooperation (ACO Settlement/Joint and Several Liability)
- **Preliminary Assessment / Site Inspection** – Identification of Areas of Concern that may cause contamination
- **NPL Site Listing Process** – Rank hazards at a site to determine priority for cleanup with public funding
- **Remedial Investigation** – Field and other studies to define extent of contamination

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Superfund Overview (Cont.)

- Feasibility Study – Engineering analysis of technologically available alternative methods to cleanup and the degree of cleanup
- Record of Decision – USEPA prepares an evaluation of remedial methods and sets forth the agency's decision on recommendation
- Remedial Design – Specific engineering designs for remedial action
- Remedial Action – Implementation of treatment
- Post Remedial Action – Safe guarding and compliance with engineering and institutional controls
- Public Participation at All Levels of the Process

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How to Select a Remediation Contractor

- Area of expertise in geographic location and nature of contamination (ask for case studies)
- Insurance – general liability, environmental impairment, contractor's pollution liability
- Loss History – viability of carrier, coverage
- Obtain an indemnity clause, in the event that the contractor's actions cause or exacerbate contamination
- Beware of limitation to liability (limit to fees generated from the project)

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Identifying Regulatory Initiative/Programs

- Voluntary Cleanup Program – available in most states, pay oversight fees, can withdraw from program at most stages
- Petroleum/Navigation Laws – some states handle petroleum cleanups separately (federal petroleum exclusion)
- Administrative Consent Orders – used in civil enforcement actions, no admission of liability, tight schedules, and stipulated penalties for failure to comply
- Prospective Purchasers Agreements – covenants not to be sued prior to remedial action (even if innocent purchaser defense may not be available), requires remedial action by purchaser
- USEPA Comfort Letter – confirmation not considered a PRP

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Remedial Action Selection

- Timing and Cost Variables Based Upon Contaminant and Site Specific Issues
- Remedial Options:
 - Pump and Treat – longest, least effective
 - Air Stripping – VOCs
 - Capping – Engineering Controls
 - Excavation – Onsite and Offsite Treatment and Disposal
 - Incineration – Onsite and Offsite Treatment and Disposal
 - Soil Vapor Extraction – VOCs
 - Bioremediation – ORC, HRC, Chemical oxidation

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Evaluation of Cleanup Standards - How Clean is Clean?

- Soil/Ground Water Standard (criteria based upon site use and risk)
- Factors in Remedy Selection – time, cost, access, future use
- Institutional Engineering Controls – impact use, financing, cost to monitor effectiveness
- Offsite Migration – Who is responsible? (NY – voluntary cleanup participant not responsible for chasing contamination offsite)
- Natural Resource Damage Evaluation – sometimes assessed long after NFA or insurance settlement

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Reasons and Applications for Guaranteed Fixed-Price Remediation

- Purchase
- Sale
- Refinance
- Litigation Settlement
- Tax Consequences – Finite Risk

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Level of Inquiry Needed to Obtain a Guarantee

- Need to delineate soil and ground water impacts, a trial approach (systematic planning, dynamic workplan, real-time data)
- Remedy Selection Considerations – future use, timing
- How long does study take?

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Evaluate Cost Recovery Options

- Indemnification in contracts, access agreements
- Prior Owner/Operators – claim letters, assignment of insurance proceeds
- Insurance Policies – (pre-1986 commercial & general liability) or new environmental products
- Public Funding – Grants/Loans
- Reimbursements – Tax reimbursements
- Tax Credits – income, sales, property taxes
- Exclusion from Natural Resource Damage liability insurance related issues

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Environmental Insurance Products

- Types of Coverage:
 - Pollution Legal Liability
 - Cleanup Cost Cap Remediation Stop Loss
 - Finite Risk
 - Secured Creditor Protection
- Coverage Limits/Policy Period:
 - Very High Coverage Limits
 - Restriction for Term >10 Years
 - Costs for CCC Coverage 8-15% of Cleanup Costs

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Environmental Insurance Products (cont.)

- Exclusions:
 - Known Contaminant (PLL Policy)
 - Mold, War, Terrorism
 - Engineering & Institutional Controls, Compliance
 - Capital Improvement
 - Material Change in Use

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FIXED PRICE CLEANUPS AS USEFUL TOOLS IN BROWNFIELDS REDEVELOPMENT AND LITIGATION SETTLEMENT

By: Daniele Cervino & Dr. Richard S. Greenberg

Daniele Cervino, Esq. is Vice President and General Counsel of Environmental Waste Management Associates, LLC (EWMA) and runs their SECUR-IT[®] fixed price program. Dr. Richard S. Greenberg is President of EWMA. Dr. Greenberg contributed the case studies for this article.

Introduction

Stringent environmental regulations that impose significant and costly requirements for the cleanup of contamination from historical operations previously created an atmosphere where developers, inventors and lenders are hesitant to involve themselves with environmentally impaired Brownfields properties. Traditional risk shifting mechanisms such as contractual indemnity and escrow provisions are being replaced or supplemented by new innovative environmental liability and Brownfields restoration insurance products. Environmental cleanup cost cap and pollution liability policies can protect developers, sellers, investors and lenders from third party claims, costs associated with addressing areas of unknown contamination discovered after closing and during development, legal defense costs, as well as cleanup costs that exceed a guaranteed cost estimate. Environmental Waste Management Associates, LLC (EWMA) has pioneered a fixed-price cleanup program known as SECUR-IT[®], backed by a combination cleanup cost cap and pollution liability insurance policy. The program is used by developers to effectively eliminate the environmental risks and unexpected cost of developing Brownfields because the insurance policy covers all risks both known and unknown. The program can be used for cleanups that have less than \$1 million in cleanup costs. Carriers have been hesitant to insure the smaller cleanups due to loss history.

This article will outline case studies of Brownfields redevelopment projects in which the SECUR-IT[®] program worked to successfully allocate environmental risks associated with redevelopment of contaminated properties. EWMA has assisted national developers in the rehabilitation of former manufacturing facilities.

The ability to quantify environmental risks can make or break a real estate or commercial transaction and promote settlement of cost recovery litigation. Clean properties are becoming more and more difficult to locate in desirable urban and suburban areas across the United States since the mid 1990's. NJDEP, environmentalists and open space advocates are pressuring governmental authorities and developers to target urban center for redevelopment. Local government has the power to condemn underutilized properties and to designate developers to replan and rebuild them to revitalize the area and the tax base. Former abandoned or obsolete manufacturing facilities are continually being converted to mixed-use residential/retail or commercial office and industrial parks. Parties on both sides of the transaction and their lenders are now hesitant to give or rely solely on the traditional contractual protections such as defense and indemnification provisions. This is so because many assets and properties are being sold by single asset entities, government entities and financial institutions through foreclosure or condemnation.

Innovative Environmental Insurance Products:

Environmental liability insurance policies, known as Pollution Legal Liability or PLL policies, provide coverage for onsite third party bodily injury, first party property damage and offsite third party bodily injury and property damage resulting from pollution conditions. Onsite coverage may also include loss of rental value, business interruption costs or diminution in property value in the event contamination causes operations to be reduced or closed. These products are relatively new and have become commercially available in the 1990's. There was a need for this product because traditional general liability policies have contained absolute pollution exclusion clauses since the late 1980's.

In most commercial settings, buyers require contractual defense and indemnification through sale contract or insurance if any contamination is discovered after closing. Sellers are generally not willing to offer an indemnity and are single asset entities that cannot guarantee coverage. Developer's concerns in acquiring and developing contaminated properties include availability of financing, delays in construction and unexpected construction costs, including costs of addressing existing or newly discovered contamination. Contamination is usually discovered during trenching for utilities and foundations and results in difficulty in renting the project due to the stigma of the contamination or default under loan terms.

Known liabilities and costs covered by a remedial action plan to address existing contamination are typically excluded from a PLL policy coverage. Therefore, insurers created the Remediation Stop Loss, Cleanup Cost Cap or CCC policy to cover cost overruns. Environmental insurance policies also cover additional cleanup costs incurred after a governmental clearance due to a change in government action levels. This is commonly known as reopener coverage. For cost effective coverage insurers typically require a government approved remedial plan prior to providing CCC coverage and that the remedial costs at least \$1 million. EWMA's SECUR-IT[®] program allows for coverage prior to governmental approval of a remedial plan and for remediations under \$1 million.

The benefits of combined Pollution Legal Liability/Cleanup Cost Cap (PLL/CCC) insurance is that it virtually eliminates the risks and uncertainty involved with redevelopment projects requiring extensive environmental remediation. Developers can enhance and secure their investments by purchasing land at a lower cost and capping the cleanup cost and mitigating environmental risks. The insurance provides protection to lenders, tenants and subsequent owners who can be named as additional insurers on the policy. Insurance coverage secures the developer's financial position as well as the lender's collateral. Coverage terms can extend up to 20 years with limits up to \$100 million. Typical coverage periods for PLL/CCC policies run three year, five year and ten year terms with limits of liability at \$2 million, \$5 million or \$10 million with deductibles of \$25,000, \$50,000 and \$100,000. Premiums for PLL/CCC policies generally range from \$50,000 to \$250,000, depending upon the nature of the use of the property and the type and extent of contamination present, as well as the projected cleanup costs, costs of natural resource damages, legal defense costs, loss of rent, delay in store openings or diminution in property values can be covered by the new environmental insurance products.

Environmental insurance can also cover the unexpected cost of offsite disposal and liability at disposal sites or capping of newly discovered contaminated soil encountered during development or delays in the completion of construction due to contamination. Developer's risks include a change in cleanup standards by a governmental authority after an initial acceptance and sign off a cleanup. Once the developer has cleaned up the contamination at the property to the appropriate governmental standards and has been issued a No Further Action letter, the

developer does not want to be responsible for further cleanup actions in the event the state or federal authority changes its cleanup standards and orders the property owner or developer to conduct further remediation. There is a type of insurance coverage known as regulatory reopener coverage that covers costs of conducting additional required remediation after a No Further Action Letter is issued. This coverage is included in most PLL/CCC policies. The provisions and endorsements of the policies are negotiated to protect buyers, sellers or third parties such as lenders or tenants to cover a variety of risks, including lost rent or business interruption. The large insurance companies in the market include American International Group, XL, ECS, Zurich Insurance and Chubb. The carriers are competitive. There are no standard policies or premiums, but specimen policies and products available are provided in the insurance companies' literature and websites. Policy language can be manuscripted to cover exceptional circumstances. The field is rapidly changing and the programs are flexible. Premium costs for cleanup cost cap policies typically range from 6 to 10 percent of the estimated cleanup with minimum premiums of \$50,000 for CCC coverage. Coverage for cleanup cost cap is typically two times the projected cleanup cost or more. However, it is increasingly more difficult to secure insurance for cleanups under \$1million and where a remedial action work plan has not yet been approved by governmental authorities due to a large volume of claims in these types of cases. The SECUR-IT[®] program was set up to service this market.

Fixed Price Cleanups With Insurance:

Innovative insurance policies alone do not always allow a complex transaction or litigation settlement proceed. Environmental consulting and remediation firms need to provide services that are geared towards quantifying the risks and costs of a cleanup some times long before a remedial action plan is approved and insurance is commercially available. Fixed-priced guaranteed cleanups provide an exact figure on the developer's environmental costs. Only a few progressive consulting and remediation firms like EWMA provide cleanup guarantee and combined insurance CCC/PLL environmental services in the early stages of an investigation. These guarantees typically address the known conditions at the property. A PLL policy is needed to cover unknown conditions that arise after the closing or during construction and to cover third party claims for bodily injury and property damage arising out of the contamination. The CCC portion of the insurance policy is designed to cover cost overruns, typically at a level of two times the anticipated cleanup cost with the fixed price cost as the self insured retention (terminology for deductible in the CCC market.) For these reasons fixed price cleanups together with innovative insurance products are needed to allow complex transactions to proceed.

The remainder of this article reviews SECUR-IT[®] program case studies where fixed price environmental cleanups backed by a PLL/CCC insurance policy were instrumental in the redevelopment of contaminated properties.

Case Studies:

Cosmetic Manufacturer Facility:

A prominent developer, a joint venture of a local developer and an out-of-state capital investment group was negotiating the purchase of a 63-acre former cosmetic-manufacturing complex. Redevelopment plans called for demolition of most of the vacant 750,000 square foot plant and replacing it with a new 390,000 square foot industrial space for the cosmetic manufacturer and a new 150,000 square foot retail and warehouse development on 18 acres of

previously undeveloped land. The seller did not want to assume the liability for the discovery of contamination during excavation for the new building foundations.

The owner of the property, the manufacturer of cosmetics, was going through the transaction triggered Industrial Site Recovery Act (ISRA) investigation and remediation process for industrial property transfers, during which 23 areas of environmental concern were identified. While a majority of these areas of concern were addressed to the satisfaction of the NJDEP, some soil and ground water issues were outstanding. As such, the owner was concerned with potential liability associated with future discovery of unknown contamination, and was unwilling to sell the property without certain types of assurances.

EWMA was retained by the developer to provide those assurances, while investigating and remediating any of the remaining areas of concern. The file information reviewed by EWMA indicated that shallow, intermediate and deep ground water underlying the site was contaminated with chlorinated organic compounds. A pump and treat system was previously installed at the property to address this contamination issue, and the consultants for the owner projected the ground water remediation costs to be in excess of \$3 million. Additionally, arsenic was found during previous sampling activities, but the extent of contamination had not been fully delineated.

After reviewing pertinent site data regarding the ground water contamination, and conducting a minimal amount of site investigation work to completely delineate the extent of arsenic contamination, EWMA was able to provide a guaranteed fixed-price to remediate the remaining areas of concern. The guaranteed, fixed-price for remediation was then used by EWMA to obtain a Cleanup Cost Cap insurance policy for the developer in an amount five times greater than the cleanup cost; something that is typically provided by insurance carriers only after receipt of governmental remedial action workplan approval. EWMA was also able to assist the owner of the property in the procurement of insurance coverage to protect against the future liability associated with unknown contamination.

EWMA's remediation proposal included the installation of enhancements to the ground water pump and treat system, along with the installation of additional wells to optimize the recovery rates in both the shallow and intermediate zones. To further accelerate the process, EWMA proposed the use of vacuum-enhanced total fluids recovery combined with a chemical oxidation process. To remediate volatile organic contaminants from the soil, EWMA would use the recovery wells for soil vapor extraction (SVE) purposes.

To complete the \$49 million purchase and redevelopment transaction, the developer purchased an \$8 million Pollution Legal Liability/ Cleanup Cost Cap environmental insurance policy to cover any unexpected cleanup costs. The seller, wanted to limit its exposure for cleanup cost overruns and the legal liabilities involved in the \$1million cleanup of the property. The developers agreed to purchase the \$8 million insurance policy for a premium from \$100,000 to \$200,000. The cleanup involved the treating of chlorinated solvent groundwater contamination. EWMA was able to reduce the overall cost and time for the remediation at a guaranteed price. Without the guarantee and insurance, the seller was hesitant to sell the property for redevelopment.

Airport Redevelopment:

Another experienced national developer used environmental insurance and a fixed price cleanup guarantee by EWMA to purchase a 62 acre portion of an existing 188 acre city owned

airport. The parcel was under utilized, contaminated and formerly used by light industrial failing local businesses. The property was redeveloped into a 650,000 square foot mixed use center, comprising of a hotel, movie theatre and retail stores rented by prominent national retailers such as Home Depot and Wal-Mart. The city had been trying to redevelop the property for three decades.

The \$60 million project had a 60-day due diligence period. EWMA estimated the cost of the cleanup of the petroleum and chlorinated solvent groundwater contamination (various jet fuel, gasoline and other petroleum storage facilities for airport and plane maintenance) at \$1.2 million. The cleanup approach and cost needed to be determined prior to state environmental agency approval.

The partners paid a \$100,000 premium for PLL/CCC environmental insurance policy that covers \$1 million of unexpected soil cleanup cost overruns or newly discovered contamination. The developer is also taking advantage of a state cleanup cost reimbursement program known as a Redevelopment Agreement to recoup up to 75% of its cleanup costs once the project generated sufficient state tax revenue to reimburse cleanup costs.

The soil cleanup and development were to be conducted simultaneously and were expected to take 18 months. The groundwater phase is ongoing and additional insurance will be purchased for that aspect of the project.

Paper Cup Manufacturer:

A 1 million square foot plant was used for almost 40 years to manufacture paper cups. The plant closed in 1990 and the building remained vacant for nearly ten years. The blighted facility plagued the predominantly residential community and was contaminated with asbestos, underground storage tanks, oils, solvents and ash piles. An enterprising developer saw this project as a great opportunity and decided to assume the cleanup responsibilities.

EWMA's client, the new owner of a 1-million square foot manufacturing facility built in the 1960s, triggered New Jersey's Industrial Site Recovery Act (ISRA). The client planned to redevelop the industrial 121-acre site into a mixed-use residential and commercial property. This site was one of the first to be eligible for New Jersey's Brownfield and Contaminated Site Remediation Act, which allows developers to recoup up to 75% of the environmental cleanup costs through a Redevelopment Agreement. Before the site could be developed, however, both the town where the site is located, and many of the site developers required the client to obtain a "No Further Action" (NFA) letter. EWMA was retained to complete the ISRA process, investigate and remediate the areas of environmental concern, and obtain the required NFA letter for the contamination at the site from the NJDEP.

After a long history of agricultural use as an orchard and vineyard, the site was developed in 1961 for use as a waxed paper product manufacturing facility. More recently, the property has been used for the disassembly and reclamation of electronic computer components. During the ISRA process, a total of 70 areas of concern were identified, including a waste water treatment area consisting of two lined settling lagoons, one classifier/activated sludge/chlorination basin, one treatment shed, and three sludge drying beds. Additional areas of concern consisted of underground and above ground storage tanks, hazardous material storage areas, railroad spurs, floor drains, trenches, sumps, incinerators, incinerator ash disposal area, and a one-mile long tunnel system that piped electricity, compressed air, non-contact cooling water and process waste water. Numerous impacts to both soil and ground water were identified at the facility by EWMA.

A major portion of EWMA's investigation and remediation of the site included the closure of the wastewater treatment area. Items of concern within the waste water treatment area

included ground water impacts associated with settling lagoons, discharge points associated with treated waste water, the process waste water settling lagoons and associated sludge drying beds, and a sanitary waste clarified/activated sludge/chlorination basin. Large piles of sludge generated during the operation of the wastewater treatment area were also identified within the wastewater treatment area.

EWMA created significant disposal cost savings for the client by pre-treating the remaining process wastewater within the wastewater treatment area. The use of a portable treatment system to pre-treat the remaining 30,000 gallons of wastewater reduced contaminant concentrations to levels that could be safely discharged to the municipal sanitary sewer system. Additionally, EWMA coordinated the removal and disposal of over 1,000 tons of residual sludge material within the wastewater treatment area. Following wastewater treatment area closure and demolition, EWMA performed the required sediment and surface water sampling to demonstrate that the treated wastewater had not adversely impacted the stream that received the waste.

EWMA also investigated and remediated floating product and soil impacts associated with the fuel oil underground and above ground storage tanks, soil and ground water impacts associated with chlorinated solvents used during the manufacturing activities, and impacts associated with over 2,000 tons of residual incinerator ash contaminated with metals.

Since EWMA began working on the project, additional investigation and delineation has been completed, the entire 1-million square foot building has been demolished, work on the areas of concern identified at the site has been completed, and the property has been redeveloped. By developing and implementing creative solutions to contamination identified at the site, EWMA has been able to cost-effectively investigate and remediate the areas of concern in a timely manner, allowing the client to proceed with the redevelopment and reclamation of the site. In fact, the project has progressed so well that it has been included in the NJ State Brownfields Redevelopment Task Force Resource Guide as well as other documents featuring brownfield redevelopment success stories.

The developer converted the factory into a mix of commercial and residential use. The new site will consist of an office building, a retail center with 20 stores and restaurants, 158 units of adult community housing, 110 assisted living (nursing) units and a 130-bed nursing home.

The cleanup will cost approximately \$2 million and up to 75% of the costs will be reimbursed by a state cleanup cost Redevelopment Agreement when the project generates sufficient state tax revenue that exceeds the cost of the cleanup.

Conclusion:

There are multiple risks that need to be carefully managed and preferably mitigated when developers purchase and redevelop contaminated property or parties settle a cost recovery litigation. Property owners and developers have to finance the development and manage the risks of known and unknown contamination. They prefer to place the "liability" on the asset side of the balance sheet. The innovative new environmental insurance products, together with guaranteed fixed price cleanups discussed in the article are now available to protect developers, owners, subsequent owners and their tenants from environmental liabilities at a property and that emanate from the property, whether these conditions are known or unknown at the time of acquisition. The SECUR-IT[®] program pioneered by EWMA covers those "uninsurable" cleanups under \$1 million which have been rejected by insurers due to past claim and loss history. Over a dozen transactions closed last year because of EWMA's program. EWMA recently won an Environmental Business Journal Business Achievement Award for significant growth attributable to its SECUR-IT[®] program.

AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY

POLLUTION LEGAL LIABILITY SELECT® POLICY

MANY OF THE COVERAGES CONTAIN CLAIMS-MADE-AND-REPORTED REQUIREMENTS. PLEASE READ CAREFULLY. ADDITIONALLY, THIS POLICY HAS CERTAIN PROVISIONS AND REQUIREMENTS UNIQUE TO IT AND MAY BE DIFFERENT FROM OTHER POLICIES THE INSURED MAY HAVE PURCHASED. DEFINED TERMS, OTHER THAN HEADINGS, APPEAR IN BOLD FACE TYPE.

NOTICE: THE DESCRIPTIONS IN ANY HEADINGS OR SUB-HEADINGS OF THIS POLICY ARE INSERTED SOLELY FOR CONVENIENCE AND DO NOT CONSTITUTE ANY PART OF THE TERMS OR CONDITIONS HEREOF.

In consideration of the payment of the premium, in reliance upon the statements in the Declarations and the Application annexed hereto and made a part hereof, and pursuant to all of the terms of this Policy, the Company agrees with the Named Insured as follows:

I. INSURING AGREEMENTS

1. COVERAGES:

THE FOLLOWING COVERAGES ARE IN EFFECT ONLY IF SCHEDULED IN THE DECLARATIONS.

COVERAGE A - ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS

1. To pay on behalf of the Insured, Clean-Up Costs resulting from Pollution Conditions on or under the Insured Property that commenced prior to the Continuity Date, if such Pollution Conditions are discovered by the Insured during the Policy Period, provided:
 - (a) The discovery of such Pollution Conditions is reported to the Company in writing as soon as possible after discovery by the Insured and in any event during the Policy Period in accordance with Section III. of the Policy.

Discovery of Pollution Conditions happens when a Responsible Insured becomes aware of Pollution Conditions.
 - (b) Where required, such Pollution Conditions have been reported to the appropriate governmental agency in substantial compliance with applicable Environmental Laws in effect as of the date of discovery.
2. To pay on behalf of the Insured, Loss that the Insured is legally obligated to pay as a result of Claims for Clean-Up Costs resulting from Pollution Conditions on or under the Insured Property that commenced prior to the Continuity Date, provided such Claims are first made against the Insured and reported to the Company in writing during the Policy Period, or during the Extended Reporting Period if applicable.

COVERAGE B - ON-SITE CLEAN-UP OF NEW CONDITIONS

1. To pay on behalf of the Insured, Clean-Up Costs resulting from Pollution Conditions on or under the Insured Property that commenced on or after the Continuity Date, if such Pollution Conditions are discovered by the Insured during the Policy Period, provided:
 - (a) The discovery of such Pollution Conditions is reported to the Company in writing as soon as possible after discovery by the Insured and in any event during the Policy Period in accordance with Section III. of the Policy.

Discovery of Pollution Conditions happens when a Responsible Insured becomes aware of Pollution Conditions.

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- (b) Where required, such **Pollution Conditions** have been reported to the appropriate governmental agency in substantial compliance with applicable **Environmental Laws** in effect as of the date of discovery.
2. To pay on behalf of the **Insured**, Loss that the **Insured** is legally obligated to pay as a result of **Claims** for **Clean-Up Costs** resulting from **Pollution Conditions** on or under the **Insured Property** that commenced on or after the **Continuity Date**, provided such **Claims** are first made against the **Insured** and reported to the Company in writing during the **Policy Period**, or during the **Extended Reporting Period** if applicable.

COVERAGE C - THIRD - PARTY CLAIMS FOR ON-SITE BODILY INJURY AND PROPERTY DAMAGE

To pay on behalf of the **Insured**, Loss that the **Insured** becomes legally obligated to pay as a result of **Claims** for **Bodily Injury** or **Property Damage** resulting from **Pollution Conditions** on or under the **Insured Property**, if such **Bodily Injury** or **Property Damage** takes place while the person injured or property damaged is on the **Insured Property**, provided such **Claims** are first made against the **Insured** and reported to the Company in writing during the **Policy Period**, or during the **Extended Reporting Period** if applicable.

COVERAGE D - THIRD - PARTY CLAIMS FOR OFF-SITE CLEAN-UP RESULTING FROM PRE-EXISTING CONDITIONS

To pay on behalf of the **Insured**, Loss that the **Insured** becomes legally obligated to pay as a result of **Claims** for **Clean-Up Costs** resulting from **Pollution Conditions**, beyond the boundaries of the **Insured Property**, that commenced prior to the **Continuity Date**, and migrated from the **Insured Property**, provided such **Claims** are first made against the **Insured** and reported to the Company in writing during the **Policy Period**, or during the **Extended Reporting Period** if applicable.

COVERAGE E - THIRD - PARTY CLAIMS FOR OFF-SITE CLEAN-UP RESULTING FROM NEW CONDITIONS

To pay on behalf of the **Insured**, Loss that the **Insured** becomes legally obligated to pay as a result of **Claims** for **Clean-Up Costs** resulting from **Pollution Conditions**, beyond the boundaries of the **Insured Property**, that commenced on or after the **Continuity Date**, and migrated from the **Insured Property**, provided such **Claims** are first made against the **Insured** and reported to the Company in writing during the **Policy Period**, or during the **Extended Reporting Period** if applicable.

COVERAGE F - THIRD - PARTY CLAIMS FOR OFF-SITE BODILY INJURY AND PROPERTY DAMAGE

To pay on behalf of the **Insured**, Loss that the **Insured** becomes legally obligated to pay as a result of **Claims** for **Bodily Injury** or **Property Damage** resulting from **Pollution Conditions**, beyond the boundaries of the **Insured Property**, that migrated from the **Insured Property**, provided such **Claims** are first made against the **Insured** and reported to the Company in writing during the **Policy Period**, or during the **Extended Reporting Period** if applicable.

COVERAGE G - THIRD - PARTY CLAIMS FOR ON-SITE BODILY INJURY, PROPERTY DAMAGE OR CLEAN-UP COSTS - NON-OWNED LOCATIONS

To pay on behalf of the **Insured**, Loss that the **Insured** becomes legally obligated to pay as a result of **Claims** for **Bodily Injury** or **Property Damage** of parties other than the owners, operators or contractors of the **Non-Owned Location**, or their employees, or **Clean-Up Costs** resulting from **Pollution Conditions** on or under the **Non-Owned Location**, provided such **Claims** are first made against the **Insured** and reported to the Company in writing during the **Policy Period**, or during the **Extended Reporting Period** if applicable.

COVERAGE H - THIRD - PARTY CLAIMS FOR OFF-SITE BODILY INJURY, PROPERTY DAMAGE OR CLEAN-UP COSTS - NON-OWNED LOCATIONS

To pay on behalf of the Insured, Loss that the Insured becomes legally obligated to pay as a result of Claims for Bodily Injury, Property Damage or Clean-Up Costs resulting from Pollution Conditions, beyond the boundaries of the Non-Owned Location, that migrated from the Non-Owned Location, provided such Claims are first made against the Insured and reported to the Company in writing during the Policy Period, or during the Extended Reporting Period if applicable.

COVERAGE I - POLLUTION CONDITIONS RESULTING FROM TRANSPORTED CARGO

To pay on behalf of the Insured, Loss that the Insured becomes legally obligated to pay as a result of Claims for Bodily Injury, Property Damage or Clean-Up Costs resulting from Pollution Conditions caused by Transported Cargo, provided such Claims are first made against the Insured and reported to the Company in writing during the Policy Period, or during the Extended Reporting Period if applicable. This coverage shall not be utilized to evidence financial responsibility of any Insured under any federal, state, provincial or local law.

COVERAGE J - BUSINESS INTERRUPTION COVERAGE - ACTUAL LOSS OR RENTAL VALUE (ONLY AVAILABLE IF COVERAGE A, COVERAGE B OR BOTH COVERAGES A AND B ARE PURCHASED)

To pay the Insured's Actual Loss or loss of Rental Value, and Extra Expense to the extent it reduces Actual Loss or loss of Rental Value otherwise payable under this coverage section, resulting from an Interruption caused directly by Pollution Conditions on or under the Insured Property. If the Interruption is caused by such Pollution Conditions and any other cause, the Company shall pay only for that portion of Actual Loss or loss of Rental Value, and Extra Expense resulting from an Interruption caused solely and directly by such Pollution Conditions.

- (a) Such Pollution Conditions must:
1. (a) commence prior to the Continuity Date, if the Named Insured has purchased Coverage A, under this Policy, or
 - (b) commence on or after the Continuity Date, if the Named Insured has purchased Coverage B under this Policy; and
 2. be first discovered by the Insured during the Policy Period. Discovery of Pollution Conditions happens when a Responsible Insured becomes aware of Pollution Conditions.
- (b) An Interruption must be reported to the Company, no later than thirty (30) days after its commencement. The Insured shall, as soon as practicable, resume normal operation of the business and dispense with Extra Expense.
- (c) In determining Actual Loss or loss of Rental Value, the Report/Worksheet annexed to this Policy and made a part of it shall be utilized. If the Insured could reduce the Actual Loss or loss of Rental Value, or Extra Expense resulting from an Interruption:
1. by complete or partial resumption of operations; or
 2. by making use of other property at the Insured Property, or elsewhere,
- such reductions shall be taken into account in arriving at Actual Loss or loss of Rental Value or Extra Expense.

2. LEGAL EXPENSE AND DEFENSE

The Company shall have the right and the duty to defend any Claims covered under Coverages A through I provided the Named Insured has purchased such Coverage. The Company's duty to defend or continue defending any such Claim, and to pay any Loss, shall cease once the applicable limit of liability, as described in Section V. (Limits of Coverage; Deductible) has been exhausted. Defense costs, charges and expenses are included in Loss and reduce the applicable limit of liability, as described in Section V., and are included within the Deductible amount for the Coverage Section that applies and is shown in Item 3 of the Declarations.

The Company will present any settlement offers to the **Insured**, and if the **Insured** refuses to consent to any settlement within the limits of liability of this Policy recommended by the Company and acceptable to the claimant, the Company's duty to defend the **Insured** shall then cease and the **Insured** shall thereafter negotiate or defend such **Claim** independently of the Company and the Company's liability shall not exceed the amount, less the Deductible or any outstanding Deductible balance, for which the **Claim** could have been settled if such recommendation was consented to.

3. INDEPENDENT COUNSEL

In the event the **Insured** is entitled by law to select independent counsel to defend the **Insured** at the Company's expense, the attorney fees and all other litigation expenses the Company must pay to that counsel are limited to the rates the Company would actually pay to counsel that the Company retains in the ordinary course of business in the defense of similar **Claims** in the community where the **Claim** arose or is being defended.

Additionally, the Company may exercise the right to require that such counsel have certain minimum qualifications with respect to their competency, including experience in defending **Claims** similar to the one pending against the **Insured**, and to require such counsel to have errors and omissions insurance coverage. As respects any such counsel, the **Insured** agrees that counsel will timely respond to the Company's request for information regarding the **Claim**. The **Insured** may at any time, by its signed consent, freely and fully waive its right to select independent counsel.

II. EXCLUSIONS

1. COMMON EXCLUSIONS - APPLICABLE TO ALL COVERAGES

This Policy does not apply to Clean-Up Costs, Claims, Loss, Actual Loss, Extra Expense, or loss of Rental Value:

A. CRIMINAL FINES, PENALTIES, AND ASSESSMENTS:

due to any criminal fines, penalties or assessments.

B. CONTRACTUAL LIABILITY:

arising from liability of others assumed by the **Insured** under any contract or agreement, unless the liability of the **Insured** would have attached in the absence of such contract or agreement or the contract or agreement is an **Insured Contract**.

C. TRANSPORTATION:

except with respect to Coverage I, arising out of **Pollution Conditions** that result from the maintenance, use, operation, loading or unloading of any conveyance beyond the boundaries of the **Insured Property**.

D. INTENTIONAL NONCOMPLIANCE:

arising from **Pollution Conditions** based upon or attributable to any **Responsible Insured's** intentional, willful or deliberate noncompliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any governmental agency or body.

E. INTERNAL EXPENSES:

for costs, charges or expenses incurred by the **Insured** for goods supplied or services performed by the staff or salaried employees of the **Insured**, or its parent, subsidiary or affiliate, except if in response to an emergency or pursuant to **Environmental Laws** that

require immediate remediation of **Pollution Conditions**, or unless such costs, charges or expenses are incurred with the prior written approval of the Company in its sole discretion.

F. INSURED vs. INSURED:

by any **Insured** against any other person or entity who is also an **Insured** under this Policy. This exclusion does not apply to **Claims** initiated by third parties or **Claims** that arise out of an indemnification given by one **Named Insured** to another **Named Insured** in an **Insured Contract**.

G. ASBESTOS AND LEAD:

solely with respect to Coverages A, B, D, E, G, H and J, arising from asbestos or any asbestos-containing materials or lead-based paint installed or applied in, on or to any building or other structure. This exclusion does not apply to **Clean-Up Costs** for the remediation of soil and groundwater.

H. EMPLOYER LIABILITY:

arising from **Bodily Injury** to an **Insured** or its parent, subsidiary or affiliate arising out of and in the course of employment by the **Insured** or its parent, subsidiary or affiliate. This exclusion applies whether the **Insured** may be liable as an employer or in any other capacity and to any obligation to share damages with or repay third parties who must pay damages because of the injury.

I. PRIOR KNOWLEDGE/NON-DISCLOSURE:

arising from **Pollution Conditions** existing prior to the **Inception Date** and known by a **Responsible Insured** and not disclosed in the application for this Policy, or any previous policy for which this Policy is a renewal thereof.

J. IDENTIFIED UNDERGROUND STORAGE TANK:

arising from **Pollution Conditions** resulting from an **Underground Storage Tank** whose existence is known by a **Responsible Insured** as of the **Inception Date** and which is located on the **Insured Property** unless such **Underground Storage Tank** is scheduled on the Policy by endorsement.

2. COVERAGE I EXCLUSIONS

The following exclusions apply to Coverage I.

This Policy does not apply to **Loss**:

A. PROPERTY DAMAGE TO CONVEYANCES:

for **Property Damage** to any conveyance utilized during the **Transportation of Transported Cargo**. This exclusion does not apply to **Claims** made by third-party carriers of the **Insured** for such **Property Damage** arising from the **Insured's** negligence.

B. POLLUTION CONDITIONS PRIOR OR SUBSEQUENT TO TRANSPORTATION OF CARGO:

arising from **Pollution Conditions**:

- (1) that commence prior to the **Transportation of Transported Cargo**; or
- (2) that commence after **Transported Cargo** reaches its final destination, or while **Transported**

Cargo is in storage off-loaded from the conveyance that was transporting it.

C. **THIRD-PARTY CARRIER CLAIMS:**

made by a third-party carrier, its agents or employees, for **Bodily Injury, Property Damage or Clean-Up Costs**, whether or not the **Bodily Injury, Property Damage or Clean-Up Costs** were directly incurred by such third-party carrier. This exclusion does not apply to **Claims** arising from the **Insured's** negligence.

III. **NOTICE REQUIREMENTS AND CLAIM PROVISIONS**

The **Insured** shall provide the Company with notice of **Pollution Conditions, Claims** or an **Interruption** as follows:

A. **NOTICE OF POLLUTION CONDITIONS, CLAIMS AND AN INTERRUPTION**

1. In the event of **Pollution Conditions** or **Claims** under Coverages A through I, or an **Interruption** under Coverage J, the **Insured** shall give written notice to:

Manager, Pollution Insurance Products Unit
 AIG Technical Services, Inc.
 Environmental Claims Department
 80 Pine Street, Sixth Floor
 New York, New York 10005
 Fax: (212) 344-2761

or other address(s) as substituted by the Company in writing.

2. The **Insured** shall give written notice of **Pollution Conditions** as soon as possible. Notice under all coverages shall include, at a minimum, information sufficient to identify the **Named Insured**, the **Insured Property**, the names of persons with knowledge of the **Pollution Conditions** and all known and reasonably obtainable information regarding the time, place, cause, nature of and other circumstances of the **Pollution Conditions**.

3. The **Insured** shall give notice of **Claims** as soon as possible, but in any event during the **Policy Period** or during the **Extended Reporting Period**, if applicable. The **Insured** shall furnish information at the request of the Company. When a **Claim** has been made, the **Insured** shall forward the following to the Company as soon as possible:

- (a) All reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the claimant(s) and available witnesses.
- (b) All demands, summonses, notices or other process or papers filed with a court of law, administrative agency or an investigative body;
- (c) Other information in the possession of the **Insured** or its hired experts which the Company reasonably deems necessary.

B. **NOTICE OF POSSIBLE CLAIM**

1. If during the **Policy Period**, the **Insured** first becomes aware of a **Possible Claim**, the **Insured** may provide written notice to the Company during the **Policy Period** containing all the information required under paragraph 2. below. Any **Possible Claim** which subsequently becomes a **Claim** made against the **Insured** and reported to the Company within five (5) years after the end of the **Policy Period** of this Policy or any continuous, uninterrupted renewal thereof, shall be deemed to have been first made and reported

during the **Policy Period** of this Policy. Such **Claim** shall be subject to the terms, conditions and limits of coverage of the policy under which the **Possible Claim** was reported.

2. It is a condition precedent to the coverage afforded by this Section III. B that written notice under paragraph 1. above contain all of the following information: (a) the cause of the **Pollution Conditions**; (b) the **Insured Property** or other location where the **Pollution Conditions** took place; (c) the **Bodily Injury, Property Damage or Clean-Up Costs** which has resulted or may result from such **Pollution Conditions**; (d) the **Insured(s)** which may be subject to the **Claim** and any potential claimant(s); (e) all engineering information available on the **Pollution Conditions** and any other information that the Company deems reasonably necessary; and (f) the circumstances by which and the date the **Insured** first became aware of the **Possible Claim**.

IV. RIGHTS OF THE COMPANY AND DUTIES OF THE INSURED IN THE EVENT OF POLLUTION CONDITIONS

A. The Company's Rights

The Company shall have the right but not the duty to clean up or mitigate **Pollution Conditions** upon receiving notice as provided in Section III. of this Policy. Any sums expended in taking such action by the Company will be deemed incurred or expended by the **Insured** and shall be applied against the limits of coverage and deductible under this Policy.

B. Duties of the Insured

The **Named Insured** shall have the duty to clean up **Pollution Conditions** to the extent required by **Environmental Laws**, by retaining competent professional(s) or contractor(s) mutually acceptable to the Company and the **Named Insured**. The Company shall have the right but not the duty to review and approve all aspects of any such clean-up. The **Named Insured** shall notify the Company of actions and measures taken pursuant to this paragraph.

V. LIMITS OF COVERAGE; DEDUCTIBLE

Regardless of the number of **Claims**, claimants, **Pollution Conditions** or **Insureds** under this Policy, the following limits of liability apply:

A. Policy Aggregate Limit

The Company's total liability for all **Loss**, under Coverages A through I, and all **Actual Loss**, loss of **Rental Value** and **Extra Expense** under Coverage J, shall not exceed the "Policy Aggregate" stated in Item 4 of the Declarations. The Company's internal expenses do not erode the limit of liability available for any **Loss**.

B. Each Incident Limit - Coverages A Through I

- (1) Subject to Paragraph V.A. above, the most the Company will pay for all **Loss** under each Coverage in Coverages A through I arising from the same, related or continuous **Pollution Conditions** is the "Each Incident" limit of coverage for that particular coverage stated in Item 3 of the Declarations.
- (2) If the **Insured** first discovers **Pollution Conditions** during the **Policy Period** and reports them to the Company in accordance with Section III., all continuous or related **Pollution Conditions** reported to the Company under a subsequent **Pollution Legal Liability Policy** issued by the Company or its affiliate providing substantially the same coverage as this Policy shall be deemed to have been first discovered and reported during the **Policy Period**.

- (3) If a Claim for **Bodily Injury, Property Damage, or Clean-Up Costs** is first made against the **Insured** and reported to the Company during the **Policy Period**, all Claims for **Bodily Injury, Property Damage or Clean-Up Costs**, arising from the same, continuous or related **Pollution Conditions** that are first made against the **Insured** and reported under a subsequent **Pollution Legal Liability Policy** issued by the Company or its affiliate providing substantially the same coverage as this Policy, shall be deemed to have been first made and reported during the **Policy Period**. Coverage under this Policy for such Claims shall not apply, however, unless at the time such Claims are first made and reported, the **Insured** has maintained with the Company or its affiliate **Pollution Legal Liability** coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such Claim was made against the **Insured** and reported to the Company.

C. Coverage Section Aggregate Limit

Subject to Paragraph V.A. above, the Company's total liability for all **Loss** under each Coverage in Coverages A through I, shall not exceed the "Coverage Section Aggregate" limit of coverage for that particular coverage stated in Item 3 of the Declarations.

D. Maximum for All Business Interruption

Subject to Paragraph V.A. above, the maximum amount for which the Company is liable for all **Actual Loss** or loss of **Rental Value**, and **Extra Expense** under Coverage J is 80% of the lesser of:

- (1) the **Actual Loss** and **Extra Expense**, or loss of **Rental Value** and **Extra Expense**, whichever is applicable, incurred during the number of days of interruption of business stated in Item 3 of the Declarations, and
- (2) the amount stated in Item 3 of the Declarations.

It is a condition of Coverage J that the remaining 20% of such amount be borne by the **Insured** at its own risk and remain uninsured.

E. Multiple Coverages

Subject to Paragraph V.A. above, if the same, related or continuous **Pollution Conditions** result in coverage under more than one Coverage under Coverages A through J, every applicable "Each Incident," "Coverage Section Aggregate," and "Maximum for All Business Interruption" limit of coverage among such coverage sections shall apply to the **Clean-Up Costs, Loss, Actual Loss** and **Extra Expense**, or loss of **Rental Value** and **Extra Expense**, whichever is applicable, resulting from such **Pollution Conditions**.

F. Deductible

- (1) Coverages A through I

Subject to Paragraphs V.A. through V.E. above, this Policy is to pay covered **Loss** in excess of the Deductible amount stated in Item 3 of the Declarations for the applicable coverage, up to but not exceeding the applicable "Each Incident" limit of coverage.

If the same, related or continuous **Pollution Conditions** result in coverage under more than one coverage section in Coverages A through I, only the highest Deductible amount stated in Item 3 of the Declarations among all the coverage sections applicable to the **Loss** will apply. A separate Deductible applies under Coverage J.

The **Insured** shall promptly reimburse the Company for advancing any element of **Loss** falling within the Deductible.

(2) Coverage J

Subject to Paragraphs V.A. through V.E. above, this Policy is to pay the **Actual Loss** or loss of **Rental Value**, and **Extra Expense** under Coverage J in excess of the **Actual Loss** or loss of **Rental Value**, and **Extra Expense** sustained during the first seven (7) days of an **Interruption** during the **Period of Restoration**. The Deductible amount applies to all **Actual Loss**, or loss of **Rental Value**, and **Extra Expense** arising from the same, related or continuous **Pollution Conditions**.

VI. CONDITIONS

- A. **Assignment** - This Policy may be assigned with the prior written consent of the Company, which consent shall not be unreasonably withheld or delayed. Assignment of interest under this Policy shall not bind the Company until its consent is endorsed thereon.
- B. **Subrogation** - In the event of any payment under this Policy, the Company shall be subrogated to all the **Insured's** rights of recovery therefor against any person or organization and the **Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights including without limitation, assignment of the **Insured's** rights against any person or organization who caused **Pollution Conditions** on account of which the Company made any payment under this Policy. The **Insured** shall do nothing to prejudice the Company's rights under this paragraph subsequent to **Loss**. Any recovery as a result of subrogation proceedings arising out of the payment of **Loss** covered under this Policy shall accrue first to the **Insured** to the extent of any payments in excess of the limit of coverage; then to the Company to the extent of its payment under the Policy; and then to the **Insured** to the extent of its Deductible. Expenses incurred in such subrogation proceedings shall be apportioned among the interested parties in the recovery in the proportion that each interested party's share in the recovery bears to the total recovery.
- C. **Cooperation** - The **Insured** shall cooperate with the Company and offer all reasonable assistance in the investigation and defense of **Claims** under the applicable Coverages purchased. The Company may require that the **Insured** submit to examination under oath, and attend hearings, depositions and trials. In the course of investigation or defense, the Company may require written statements or the **Insured's** attendance at meetings with the Company. The **Insured** must assist the Company in effecting settlement, securing and providing evidence and obtaining the attendance of witnesses.
- D. **Changes** - Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy or estop the Company from asserting any rights under the terms of this Policy; nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy.
- E. **Voluntary Payments** - No **Insured** shall voluntarily enter into any settlement, or make any payment or assume any obligation unless in response to an emergency or pursuant to **Environmental Laws** that require immediate remediation of **Pollution Conditions**, without the Company's consent which shall not be unreasonably withheld, except at the **Insured's** own cost.
- F. **Concealment or Fraud** - This entire Policy shall be void if, whether before or after **Clean-Up Costs** are incurred or a **Claim** is first made, the **Named Insured** has willfully concealed or misrepresented any fact or circumstance material to the granting of coverage under this Policy, the description of the **Insured Property**, or the interest of the **Insured** therein.
- G. **Cancellation** - This Policy may be cancelled by the **Named Insured** by surrender thereof to the Company or any of its authorized agents or by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This Policy may be cancelled by the Company only for the reasons stated below by mailing to the **Named Insured** at the address shown in the Policy, written notice stating when not less than 60 days (10 days for nonpayment of premium) thereafter such cancellation shall be effective. Proof of mailing of such notice shall be sufficient proof of notice.

(1) Material misrepresentation by the Insured;

- (2) The **Insured's** failure to comply with the material terms, conditions or contractual obligations under this Policy, including failure to pay any premium or Deductible when due;
- (3) A change in operations at an **Insured Property** during the **Policy Period** that materially increases a risk covered under this Policy.

The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the **Policy Period**. Delivery of such written notice either by the **Named Insured** or by the Company shall be equivalent to mailing. If the **Named Insured** cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

- H. **Other Insurance** - Where other insurance may be available for **Loss, Actual Loss** or loss of **Rental Value**, and **Extra Expense** covered under this Policy, the **Insured** shall promptly upon request of the Company provide the Company with copies of all such policies. If other valid and collectible insurance is available to the **Insured** for **Loss Actual Loss** or loss of **Rental Value**, and **Extra Expense** covered by this Policy, the Company's obligations are limited as follows:
 - (1) This insurance is primary, and the Company's obligations are not affected unless any of the other insurance is also primary. In that case, the Company will share with all such other insurance by the method described in Paragraph (2) below.
 - (2) If all of the other insurance permits contribution by equal shares, the Company will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first. If any of the other insurance does not permit contribution by equal shares, the Company will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.
- I. **Right of Access and Inspection** - Any of the Company's authorized representatives shall have the right and opportunity but not the obligation to interview persons employed by the **Insured** and to inspect at any reasonable time, during the **Policy Period** or thereafter, the **Insured Property**. Neither the Company nor its representatives shall assume any responsibility or duty to the **Insured** or to any other party, person or entity, by reason of such right or inspection. Neither the Company's right to make inspections, sample and monitor, nor the actual undertaking thereof nor any report thereon shall constitute an undertaking on behalf of the **Insured** or others, to determine or warrant that property or operations are safe, healthful or conform to acceptable engineering practices or are in compliance with any law, rule or regulation. The **Named Insured** agrees to provide appropriate personnel to assist the Company's representatives during any inspection.
- J. **Access to Information** - The **Named Insured** agrees to provide the Company with access to any information developed or discovered by the **Insured** concerning **Loss** covered under this Policy, whether or not deemed by the **Insured** to be relevant to such **Loss** and to provide the Company access to interview any **Insured** and review any documents of the **Insured**.
- K. **Representations** - By acceptance of this Policy, the **Named Insured** agrees that the statements in the Declarations, the Application and the Report/Worksheet are their agreements and representations, that this Policy is issued in reliance upon the truth of such representations and that this Policy embodies all agreements existing between the **Insured** and the Company or any of its agents relating to this insurance.
- L. **Action Against Company** - No third-party action shall lie against the Company, unless as a condition precedent thereto there shall have been full compliance with all of the terms of this Policy, nor until the amount of the **Insured's** obligation to pay shall have been finally determined either by judgment

against the **Insured** after actual trial or by written agreement of the **Insured**, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by the Policy. No person or organization shall have any right under this Policy to join the Company as a party to any action against the **Insured** to determine the **Insured's** liability, nor shall the Company be impleaded by the **Insured** or his legal representative. Bankruptcy or insolvency of the **Insured** or of the **Insured's** estate shall not relieve the Company of any of its obligations hereunder.

- M. **Arbitration** - It is hereby understood and agreed that all disputes or differences that may arise under or in connection with this Policy, whether arising before or after termination of this Policy, including any determination of the amount of **Loss**, may be submitted to the American Arbitration Association under and in accordance with its then prevailing commercial arbitration rules. The arbitrators shall be chosen in the manner and within the time frames provided by such rules. If permitted under such rules, the arbitrators shall be three disinterested individuals having knowledge of the legal, corporate management, or insurance issues relevant to the matters in dispute.

Any party may commence such arbitration proceeding and the arbitration shall be conducted in the **Insured's** state of domicile. The arbitrators shall give due consideration to the general principles of the law of the **Insured's** state of domicile in the construction and interpretation of the provisions of this Policy; provided, however, that the terms, conditions, provisions and exclusions of this Policy are to be construed in an evenhanded fashion as between the parties. Where the language of this Policy is alleged to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant terms, conditions, provisions or exclusions of the Policy (without regard to the authorship of the language, the doctrine of reasonable expectation of the parties and without any presumption or arbitrary interpretation or construction in favor of either party or parties, and in accordance with the intent of the parties.)

The written decision of the arbitrators shall set forth its reasoning, shall be provided simultaneously to both parties and shall be binding on them. The arbitrators' award shall not include attorney fees or other costs. Judgment on the award may be entered in any court of competent jurisdiction. Each party shall bear equally the expenses of the arbitration.

- N. **Service Of Suit** - Subject to paragraph M above, it is agreed that in the event of failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the **Insured**, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of the Company's rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon Counsel, Legal Department, American International Specialty Lines Insurance Company, 70 Pine Street, New York, New York 10270, or his or her representative, and that in any suit instituted against the Company upon this contract, the Company will abide by the final decision of such court or of any appellate court in the event of any appeal.

Further, pursuant to any statute of any state, territory, or district of the United States which makes provision therefor, the Company hereby designates the Superintendent, Commissioner, Director of Insurance, or other officer specified for that purpose in the statute, or his or her successor or successors in office as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the **Insured** or any beneficiary hereunder arising out of this contract of insurance, and hereby designates the above named Counsel as the person to whom the said officer is authorized to mail such process or a true copy thereof.

- O. **Acknowledgment of Shared Limits** - By acceptance of this Policy, the **Named Insureds** understand, agree and acknowledge that the Policy contains a Policy Aggregate Limit that is applicable to, and will be shared by, all **Named Insureds** and all other **Insureds** who are or may become insured hereunder. In view of the operation and nature of this shared Policy Aggregate Limit, the **Named Insureds** and all other **Insureds** understand and agree that prior to filing a **Claim** under the Policy, the Policy Aggregate Limit may be exhausted or reduced by prior payments for other **Claims** under the Policy.
- P. **Separation of Insureds** - It is hereby agreed that except with respect to the Limit of Liability, Section II. F. (Insured vs. Insured exclusion), and any rights and duties specifically assigned to the first **Named Insured**, this insurance applies: (1) As if each **Named Insured** were the only **Named Insured**; and (2) Separately to each **Named Insured** against who a **Claim** is made. Misrepresentation, concealment, breach of a term or condition, or violation of any duty under this Policy by one **Named Insured** shall not prejudice the interest of coverage for another **Named Insured** under this Policy. Provided, however, that this Condition shall not apply to any **Named Insured** who is a parent, subsidiary or affiliate of the first **Named Insured**.

VII. EXTENDED REPORTING PERIOD FOR CLAIMS - COVERAGES A THROUGH I

The **Named Insured** shall be entitled to an Automatic Extended Reporting Period, and (with certain exceptions as described in paragraph B. of this Section) be entitled to purchase an Optional Extended Reporting Period for Coverages A through I collectively, upon termination of coverage as defined in Paragraph B.(3) of this Section. Neither the Automatic nor the Optional Extended Reporting Period shall reinstate or increase any of the limits of liability of this Policy.

A. Automatic Extended Reporting Period

Provided that the **Named Insured** has not purchased any other insurance to replace this insurance and which applies to a **Claim** otherwise covered hereunder, the **Named Insured** shall have the right to the following: a period of sixty (60) days following the effective date of such termination of coverage in which to provide written notice to the Company of **Claims** first made and reported within the Automatic Extended Reporting Period.

A **Claim** first made and reported within the Automatic Extended Reporting Period will be deemed to have been made on the last day of the **Policy Period**, provided that the **Claim** arises from **Pollution Conditions** that commenced before the end of the **Policy Period** and is otherwise covered by this Policy. No part of the Automatic Extended Reporting Period shall apply if the Optional Extended Reporting Period is purchased.

B. Optional Extended Reporting Period

The **Named Insured** shall be entitled to purchase an Optional Extended Reporting Period upon termination of coverage as defined herein (except in the event of nonpayment of premium), as follows:

- (1) A **Claim** first made and reported within the Optional Extended Reporting Period, if purchased in accordance with the provisions contained in Paragraph (2) below, will be deemed to have been made on the last day of the **Policy Period**, provided that the **Claim** arises from **Pollution Conditions** that commenced before the end of the **Policy Period** and is otherwise covered by this Policy.
- (2) The Company shall issue an endorsement providing an Optional Extended Reporting Period of up to forty (40) months from termination of coverage hereunder for all **Insured Properties** and **Non-Owned Locations**, if applicable, or any specific **Insured Property** or **Non-Owned Location**, provided that the **Named Insured**:

- (a) makes a written request for such endorsement which the Company receives within thirty (30) days after termination of coverage as defined herein; and
 - (b) pays the additional premium when due. If that additional premium is paid when due, the **Extended Reporting Period** may not be cancelled, provided that all other terms and conditions of the Policy are met.
- (3) Termination of coverage occurs at the time of cancellation or nonrenewal of this Policy by the **Named Insured** or by the Company, or at the time of the Company's deletion of a location which previously was an **Insured Property** or **Non-Owned Location**.
 - (4) The **Optional Extended Reporting Period** is available to the **Named Insured** for not more than 200% of the full Policy premium stated in the Declarations.

VIII. DEFINITIONS

A. **Actual Loss** means the:

- (1) Net income (net profit or loss before income taxes) the **Insured** would have earned or incurred had there been no **Interruption**; and
- (2) Continuing normal operating expenses incurred, including **Ordinary Payroll Expense**.

B. **Bodily Injury** means physical injury, or sickness, disease, mental anguish or emotional distress, sustained by any person, including death resulting therefrom.

C. **Claim** means a written demand received by the **Insured** seeking a remedy or alleging liability or responsibility on the part of the **Insured** for **Loss** under Coverages A through I. For purposes of this Policy, a **Claim** does not include a **Possible Claim** that was reported under a prior policy but which has become a **Claim** during the **Policy Period** of this Policy as described in Section III. B.

D. **Clean-Up Costs** means reasonable and necessary expenses, including legal expenses incurred with the Company's written consent which consent shall not be unreasonably withheld or delayed, for the investigation, removal, remediation including associated monitoring, or disposal of soil, surfacewater, groundwater or other contamination:

- (1) to the extent required by **Environmental Laws**; or
- (2) that have been actually incurred by the government or any political subdivision of the United States of America or any state thereof or Canada or any province thereof, or by third parties.

Clean-Up Costs also include **Restoration Costs**.

E. **Continuity Date** means the date stated in Item 8 of the Declarations.

F. **Environmental Laws** means any federal, state, provincial or local laws (including, but not limited to, statutes, rules, regulations, ordinances, guidance documents, and governmental, judicial or administrative orders and directives) that are applicable to **Pollution Conditions**.

G. **Extended Reporting Period** means either the automatic additional period of time or the optional additional period of time, whichever is applicable, in which to report **Claims** following termination of coverage, as described in Section VII. of this Policy.

H. **Extra Expense** means necessary expenses the **Insured** incurs during the **Period of Restoration**:

- (1) That would not have been incurred if there had not been an **Interruption**; and

(2) That avoid or minimize an **Interruption**,

but only to the extent such expenses reduce **Actual Loss** or loss of **Rental Value**, whichever is applicable, otherwise covered under this Policy.

Extra Expense will be reduced by any salvage value of property obtained for temporary use during the **Period of Restoration** that remains after the resumption of normal operations.

- I. **Inception Date** means the first date set forth in Item 2 of the Declarations.
- J. **Insured** means the **Named Insured**, and any past or present director, officer, partner or employee thereof, including a temporary or leased employee, while acting within the scope of his or her duties as such.
- K. **Insured Contract** means a contract or agreement submitted to and approved by the Company, and listed on an Endorsement to this Policy.
- L. **Insured Property** means each of the locations identified in Item 5 of the Declarations.
- M. **Interruption** means the necessary suspension of the **Insured's** business operations at an **Insured Property** during the **Period of Restoration**.
- N. **Loss** means, under the applicable Coverages: (1) monetary awards or settlements of compensatory damages; where allowable by law, punitive, exemplary, or multiple damages; and civil fines, penalties, or assessments for **Bodily Injury** or **Property Damage**; (2) costs, charges and expenses incurred in the defense, investigation or adjustment of **Claims** for such compensatory damages or punitive, exemplary or multiple damages, and civil fines, penalties or assessments, or for **Clean-Up Costs**; or (3) **Clean-Up Costs**.
- O. **Named Insured** means the person or entity named in Item 1 of the Declarations acting on behalf of all other **Insureds**, if any, for the payment or return of any premium, payment of any deductible, receipt and acceptance of any endorsement issued to form a part of this Policy, giving and receiving notice of cancellation or nonrenewal, and the exercise of the rights provided in the **Extended Reporting Period** clause.
- P. **Natural Resource Damage** means physical injury to or destruction of, including the resulting loss of value of, land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)), any state or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.
- Q. **Non-Owned Location** means a site that is not owned or operated by the **Named Insured**, and that is identified in a Non-Owned Covered Locations Schedule attached to and made a part of this Policy by endorsement.
- R. **Ordinary Payroll Expense** means the entire payroll expense for all employees of the **Insured**, except officers, executives, department managers and employees under contract.
- S. **Period of Restoration** means the length of time as would be required with the exercise of due diligence and dispatch to restore the **Insured Property** to a condition that allows the resumption of normal business operations, commencing with the date operations are interrupted by **Pollution Conditions** and not limited by the date of expiration of the **Policy Period**. The **Period of Restoration** does not include any time caused by the interference by employees or other persons with restoring the property, or with the resumption or continuation of operations.

- T. **Policy Period** means the period set forth in Item 2 of the Declarations, or any shorter period arising as a result of:
- (1) cancellation of this Policy; or
 - (2) with respect to particular **Insured Property(s)** or **Non-Owned Location(s)** designated in the Declarations, the deletion of such location(s) from this Policy by the Company at the **Named Insured's** written request, but solely with respect to that **Insured Property** or **Non-Owned Location**.
- U. **Pollution Conditions** means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the amounts or concentrations discovered.
- V. **Possible Claim** means **Pollution Conditions** that commenced on or after the **Inception Date** that the **Insured** reasonably expects may result in a **Claim**.
- W. **Property Damage** means:
- (1) Except with respect to Coverage C, physical injury to or destruction of tangible property of parties other than the **Insured**, including the resulting loss of use and diminution in value thereof;
 - (2) Loss of use, but not diminution in value, of tangible property of parties other than the **Insured** that has not been physically injured or destroyed;
 - (3) Solely with respect to Coverage C, physical injury to or destruction of tangible property of parties other than the **Insured**, including the resulting loss of use thereof; and
 - (4) **Natural Resource Damage**.
- Property Damage** does not include **Clean-Up Costs**.
- X. **Rental Value** means the:
- (1) Total anticipated rental income from tenant occupancy of the **Insured Property** as furnished and equipped by the **Insured**;
 - (2) Amount of all charges that are the legal obligation of the tenant(s) pursuant to a lease and that would otherwise be the **Insured's** obligations; and
 - (3) Fair rental value of any portion of the **Insured Property** that is occupied by the **Insured** during the **Period of Restoration**, less any rental income the **Insured** could earn:
 - (1) by complete or partial rental of the **Insured Property**, or
 - (2) by making use of other property on the **Insured Property** or elsewhere.
- Y. **Responsible Insured** means the manager or supervisor of the **Named Insured** responsible for environmental affairs, control or compliance, or any manager of the **Insured Property**, or any officer, director or partner of the **Named Insured**.

- Z. **Restoration Costs** means reasonable and necessary costs incurred by the **Insured** with the Company's written consent, which consent shall not be unreasonably withheld or delayed, to repair, replace or restore real or personal property to substantially the same condition it was in prior to being damaged during work performed in the course of incurring **Clean-Up Costs**. However, such **Restoration Costs** shall not exceed the net present value of such property prior to incurring **Clean-Up Costs**. **Restoration Costs** do not include costs associated with improvements or betterments.
- AA. **Transportation** means the movement of **Transported Cargo** by a conveyance, from the place where it is accepted by a carrier until it is moved:
- (1) to the place where the carrier finally delivers it; or
 - (2) in the case of waste, to a waste disposal facility to which the carrier delivers it.
- Transportation** includes the carrier's loading or unloading of **Transported Cargo** onto or from a conveyance provided that the loading or unloading is performed by or on behalf of the **Named Insured**.
- BB. **Transported Cargo** means goods, products, or waste transported for delivery by a carrier properly licensed to transport such goods, products, or waste.
- CC. **Underground Storage Tank** means any tank in existence at the **Inception Date**, or installed thereafter and scheduled to the Policy by Endorsement, including associated underground piping connected to the tank, that has at least ten (10) percent of its volume below ground.

IN WITNESS WHEREOF, the Company has caused this Policy to be signed by its president and secretary and signed on the Declarations page by a duly authorized representative or countersigned in states where applicable.

Secretary

President

Sent via Telecopier & Regular Mail

Re: *Proposal for a Phase I Environmental Site Assessment*

Dear Mr.:

We are pleased to submit herewith our proposal for the Phase I Environmental Site Assessment (Phase I ESA) to be performed at the above-referenced property (Property) by Environmental Waste Management Associates, LLC (EWMA) in accordance with the ASTM standard practice for environmental site assessments (Designation: E 1527-00). The findings of the Phase I will be presented in the form of a written report that will be available within three (3) to four (4) weeks after the site visit. If an expedited turnaround time is required, additional charges will be incurred.

We request that you provide a survey depicting the property boundaries prior to our site visit. In addition, please let us know if you have extended a purchase and sale agreement that stipulates any specific requirements for environmental due diligence. Finally, if you have any conceptual plans for site development, please let us know so that our recommendations can be tailored to your specific needs.

Our estimate for the work to be performed at the above-referenced facility is as follows:

I. Phase I Environmental Site Assessment:

The goal of the Phase I ESA process is to identify recognized environmental condition(s). The term recognized environmental condition means the presence or likely presence of any hazardous substance or petroleum products on the Property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the Property or into the ground, the ground water, or surface water of the Property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws. The term is not intended to include de minimus conditions that generally do not present a material risk of harm to public health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.

EWMA's Phase I ESA Report will be based on information collected during a review of relevant environmental and historical data, a site inspection, and interviews with knowledgeable parties. EWMA's Phase I ESA will be conducted according to the Standard Practice for Phase I Environmental Site Assessments, ASTM Designation: E 1527-00.

Please note: According to ASTM Designation: E 1527-00, specific information must be obtained regarding the Property from the owner, the site manager, and the occupants of the Property. Additionally, if you are aware of any specialized knowledge or experience that is material to the identification of potential environmental concerns in connection with the property, it is your responsibility to provide EWMA with this information prior to the site visit.

a.) Environmental Records Review:

EWMA will obtain and review the latest information from federal, state and local agencies concerning the Property and sites with potential environmental contamination within the approximate minimum search distance specified in ASTM E 1527-00. Specifically, EWMA will review information from the following sources: The Federal National Priorities List (NPL); The Federal Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS); The Federal CERCLIS No

Further Remedial Action Planned (CERCLIS-NFRAP); The Federal Resource Conservation and Recovery Act Corrective Action Report facilities list (RCRA-CORRACTS); The Federal RCRA non-CORRACTS Treatment, Storage, and Disposal (TSD) facilities list; The Federal RCRA Generators list; The Federal Emergency Response Notification System (ERNS) list; Facility Index System (FINDS); nuclear facilities; open dumps; State Registered Underground Storage Tanks (UST); State list of Leaking Underground Storage Tanks (LUST); The State Solid Waste Landfill (SWL) Report; The State Comprehensive Sites List Report; The National Pollution Discharge Elimination System Report (NPDES); and any applicable <State *Environmental Agency*> sources or lists.

EWMA will review a current United States Geological Survey (USGS) 7.5 Minute Topographic Map showing the area on which the Property is located. EWMA will review USGS and/or State Geological Survey surficial geology maps, ground water maps, bedrock geology maps and Soil Conservation Service maps (if readily available). EWMA will review historical aerial photographs and property tax files, provided that they are readily available from local government agencies. Additionally, EWMA will purchase and review Sanborn Fire Insurance Maps. In addition, if aerial photographs are not readily available from public sources, if necessary EWMA will purchase these materials at an additional cost.

EWMA will check additional environmental record sources for supplementary information from one or more of the following local agencies: Department of Health/Environmental Division; Fire Department; Planning Department; Building Department/Inspection Department; Local/Regional Pollution Control Agency; Local/Regional Water Quality Agency; and Local Electric Utility Companies.

b.) Site Inspection:

EWMA will conduct one (1) site inspection of the Property. Prior to the site visit, the client must provide EWMA with a clear and accurate description of the property. During the inspection, EWMA will visually and physically observe the Property and any structure(s) located on the Property. The site inspection will include the periphery of the Property, as well as the periphery of all structures on the Property, and accessible areas inside all structures (lobbies, hallways, utility rooms, recreation areas, maintenance and repair areas, boiler rooms and a representative sample of occupant spaces). EWMA will identify the following uses and conditions at the Property to the extent that they may be visually and physically observed during the visit.

- | | |
|---|--|
| (1.) current use(s) of the Property | (2.) past use(s) of the Property |
| (3.) current operations on adjoining properties | (4.) condition of adjoining properties |
| (5.) current/past uses in the surrounding area | (6.) topographical conditions |
| (7.) general description of structures | (8.) roads |
| (9.) potable water supply | (10.) sewage disposal system |
| (11.) hazardous substances used on-site | (12.) storage tanks |
| (13.) odors | (14.) pits, ponds, or lagoons |
| (15.) drums | (16.) hazardous substance containers |
| (17.) unidentified substance containers | (18.) polychlorinated biphenyls |
| (19.) heating/cooling systems | (20.) stains or corrosion |
| (21.) drains or sumps | (22.) stained soil or pavement |
| (23.) stressed vegetation | (24.) solid waste |

c.) ASTM Non-Scope Issues:

There may be evidence of suspected potential environmental hazards or conditions at the property that are beyond the scope of the standard ASTM site assessment practice (non-scope considerations). Non-scope issues, if present, may be business environmental risks. The term "business environmental risk" means a

risk that can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of a parcel of commercial real estate, not necessarily limited to those environmental issues required to be investigated according to ASTM Designation: E 1527-00.

Non-scope issues include such items as: (1) asbestos; (2) radon; (3) lead paint; (4) lead in drinking water; (5) wetlands; (6) regulatory compliance; (7) cultural and historical resources; (8) industrial hygiene; (9) health & safety; (10) ecological resources; (11) endangered species; (12) indoor air quality; and (13) high voltage power lines. The identification of these issues requires additional assessment, or the implementation of a site-specific sampling investigation. At the client's request, EWMA will provide a separate cost proposal to conduct an assessment of these non-scope issues.

d.) Interviews:

EWMA may conduct interviews with current or past owners, occupants, neighbors, property managers, or government officials to obtain information regarding the site history and existing environmental conditions. Persons or agencies with relevant information about the Property may be contacted in writing, via telephone or interviewed in person. EWMA will identify the source of any relevant information that is included in the final written report.

e.) Evaluation and Report Preparation:

The final report will include documentation to support the findings, opinions, and conclusions. All sources, including those that revealed no findings, will be documented to facilitate reconstruction of the research at a later date. All evidence that was used to identify recognized environmental conditions will be described in detail and photographic documentation will be provided. EWMA will state the findings, opinions and conclusions and either make recommendations for specific additional actions (such as liability/risk evaluations, Phase II testing, remediation techniques, etc.) or state that no further action is warranted.

II. Estimated Project Costs:

The Phase I Environmental Site Assessment, in accordance with ASTM standards, will be billed **as one Lump Sum of \$2,500.00.**

Note: The turnaround time is based upon the date of the Phase I investigation site visit.

III. Terms and Conditions:

The reports developed by EWMA in conjunction with the outlined scope of work, including text, recommendations, conclusions, analytical results, site plans, and data reports are for the sole use of the client. Distribution to or use by third parties is not permitted without the prior written consent of EWMA.

Due to the variability of local procedures, EWMA has not included in its cost estimate any miscellaneous administrative fees or charges required by local or state governmental agencies. If applicable, these fees will be charged directly to the client.

In the event any of EWMA's employees are required to testify as a fact witness in a litigation, the client will be responsible for payment to EWMA for the employee's preparation time, travel time, deposition time and trial time.

This proposal is valid for a period of sixty (60) days from the date it is written. After a period of 60 days, EWMA will not be held to the terms and prices quoted herein. Additionally, once this proposal is accepted by the client, the scope of work outlined in this proposal is subject to any annual rate increases that may be implemented by EWMA.

EWMA, at its discretion, may require adequate proof of financial surety. All invoices are due and payable in full immediately upon presentation. Any payment due which is not received within 30 days will be subject to a service charge of 1.5% monthly. Any payments not received within sixty (60) days will be put out for collection.

The work performed pursuant to this proposal will be undertaken in a professional manner in accordance with prevailing industry standards. EWMA shall not be liable for direct, indirect, incidental, special or consequential damages or liability caused by pollutants remaining on the property or adjacent property due to acts or omissions by EWMA or its subcontractors unless such damages or liabilities are caused by EWMA's or its subcontractors' failure to act in a professional manner in accord with prevailing industry standards. EWMA's liability for such failure to act shall not exceed the value of this contract measured by the fees paid by client or due under this contract and fees previously paid or due for work performed at the property or in connection therewith.

This Agreement and the right and duties of the parties, shall be governed by and construed in accordance with the laws of the State of New Jersey. The parties consent to the jurisdiction of the State courts of the State of New Jersey, and agree that venue shall be proper in any such courts to the exclusion of the courts in any other State or Country. The parties further agree that such designated forum is proper and convenient. The parties hereby unconditionally and irrevocably waive any and all right to trial by jury in any suit, counterclaim, or cross-claim arising in connection with, out of, or otherwise relating to this Agreement.

We hope that this proposal will meet your needs and look forward to working with you on this project to a satisfactory completion. We trust that you find this proposal acceptable and indicate so by signing in the space provided below. In addition, EWMA requires a retainer in the amount of \$875.00, to be returned with the signed proposal prior to the initiation of work. This retainer will be carried throughout the course of the work and will be applied in conjunction with the final invoice. Full payment of all invoices may be required prior to submission of a final report. If you have any questions or need additional information, please contact me at our Parsippany office.

Very truly yours,
Environmental Waste Management Associates, LLC

ACKNOWLEDGED AND ACCEPTED:

By: _____ Dated: _____

Terms and Conditions:

This proposal is valid for a period of sixty (60) days from the date it is written. After a period of 60 days, EWMA will not be held to the terms and prices quoted herein. Additionally, once this proposal is accepted by the client, the scope of work outlined in this proposal is subject to any annual rate increases that may be implemented by EWMA.

Due to the variability of local procedures, EWMA has not included in its cost estimate any miscellaneous administrative fees, permit fees or oversight or administrative charges required by local or state governmental agencies. If applicable, these fees will be charged directly to the client.

In the event any of EWMA's employees are required to testify as a fact witness in a litigation, the client will be responsible for payment to EWMA for the employee's preparation time, travel time, deposition time and trial time.

EWMA, at its discretion, may require adequate proof of financial surety. All invoices are due and payable in full immediately upon presentation. Failure to pay may result in suspension of the work until all outstanding balances are paid in full. Any payment due which is not received within 30 days will be subject to a service charge of 1.5% monthly until paid. If collection proceedings are necessary, client shall be responsible for the costs of collection.

The work performed pursuant to this proposal will be undertaken in a professional manner in accordance with prevailing industry standards. EWMA shall not be liable for direct, indirect, incidental, special or consequential damages or liability caused by pollutants remaining on the property or adjacent property due to acts or omissions by EWMA or its subcontractors unless such damages or liabilities are caused by EWMA's or its subcontractors' failure to act in a professional manner in accord with prevailing industry standards. EWMA's liability for such failure to act shall not exceed the value of this contract measured by the fees paid by client or due under this contract and fees previously paid or due for work performed at the property or in connection therewith.

This Agreement and the right and duties of the parties, shall be governed by and construed in accordance with the laws of the State of New Jersey. The parties consent to the jurisdiction of the State courts of the State of New Jersey, and agree that venue shall be proper in any such courts to the exclusion of courts in any other State or Country. The parties further agree that such designated forum is proper and convenient. The parties hereby unconditionally and irrevocably waive any and all right to trial by jury in any suit, counterclaim, or cross-claim arising in connection with, out of, or otherwise relating to this Agreement.

We hope that this proposal will meet your needs and look forward to working with you on this project to a satisfactory completion. We trust that you find this proposal acceptable and indicate so by signing in the space provided below. In addition, EWMA requires a retainer in the amount of \$.00, to be returned with the signed proposal prior to the initiation of work. This retainer will

be carried throughout the course of the work and will be applied to the final invoice. Full payment of all invoices may be required prior to submission of a final report. If you have any questions or need additional information, please contact me at our Parsippany office.

Very truly yours,
Environmental Waste Management Associates, LLC

Name, Title

ACKNOWLEDGED AND ACCEPTED:

By: _____ Dated: _____

Subject: Pollution Legal Liability Premium Indication

The following summary provides estimates of possible insurance costs for environmental risks at the above-captioned location. Only a comprehensive review of the data available for this location by underwriters at the time a decision is made to pursue coverage will allow the preparation of a detailed proposal for environmental insurance and more comprehensive estimates of premiums for the risks associated with this site. This report has been prepared to assist the prospective purchaser of this property to develop a budget and work plan that incorporates the use environmental insurance as risk management tool. It should not be relied upon by any other parties for any other purpose.

Introduction

We are pleased to provide the following premium indications for the above-captioned account for the location(s) listed below in Section IV. Coverage contemplates the use of the Insurance Company Policy No. _____ Coverage will only be offered for those coverage sections listed below in Section II.

SECTION I - Coverages:

The following Coverage Sections can be offered:

- Coverage A- ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS
- Coverage B- ON-SITE CLEAN-UP OF NEW CONDITIONS
- Coverage C- THIRD-PARTY CLAIMS FOR ON-SITE BODILY INJURY AND PROPERTY DAMAGE
- Coverage D- THIRD-PARTY CLAIMS FOR OFF-SITE CLEAN-UP RESULTING FROM PRE-EXISTING CONDITIONS
- Coverage E- THIRD-PARTY CLAIMS FOR OFF-SITE CLEAN-UP RESULTING FROM NEW CONDITIONS
- Coverage F- THIRD-PARTY CLAIMS FOR OFF-SITE BODILY INJURY AND PROPERTY DAMAGE

SECTION II - Premium Options for Coverages, Limits, Deductibles, and Terms:

Option	Coverages	Each Incident Limit	Coverage Section Aggregate Limit	Deductible SIR Amount	Term (Yrs)	Premium
1	A, B, C, D, E, F	\$10,000,000	\$10,000,000	\$50,000	10	\$ _____
						\$10,000,000 Policy Aggregate

The Premium amount(s) stated above does not include the premium for Terrorism Risk Insurance Act Coverage. Please see the attached Disclosure Statement regarding Terrorism Risk Insurance Act Coverage and the premium for such coverage. In the event that you choose to purchase Terrorism Risk Insurance Act Coverage along with one of the options above, the total premium shall be the premium shown above for the option chosen plus the Terrorism Risk Insurance Act Coverage premium shown on the attached Disclosure Statement for that option.

For multi-year policies, the limit of liability stated in the chart above is shared over the policy term indicated. The limit of liability is not an annual limit of liability and is therefore not reinstated each year within the policy term.

SECTION III - Additional Policy Information:

Policy Period: From: TBD To: TBD
 Retroactive Date: None
 Continuity Date: Inception Date

SECTION IV - Insured Property(s) :**SECTION V - Policy Form Modifications:**

The Insurance Company, _____ Form will be modified as follows:

1. War Exclusion will apply as per form # _____.
2. Microbial Matter Exclusion Endorsement will apply as per form # _____.
3. 100% Minimum Earned Premium Endorsement will apply as per form # _____. Coverage A - 3rd Party Claims Only Endorsement.
4. Definition of Clean-Up Cost to Exclude Third Parties Endorsement will apply as per form _____.
5. Notice of Possible Claim Deletion Endorsement will apply as per form _____.*
6. Intentional Noncompliance Endorsement will apply as per manuscript.
7. Extended Reporting Period Endorsement will apply as per manuscript
8. Broad Named Insured Endorsement will apply as per manuscript.
9. Mortgagee Insured Endorsement will be added to name lender if needed
10. Known Contaminant Exclusion for known pre-existing pollution conditions to apply to clean-up costs only (Coverage A and D). Will not apply to third-party claims.
11. Named Insured Endorsement will apply.
12. Coverage A- Third Party Claims Only

* Only if 10 year term is purchased

SECTION VI - Terrorism Risk Insurance Act Notice:

The Proposal for insurance will include the following notice of insurance available for terrorism risks under the TRIA:

NOTICE: PLEASE READ CAREFULLY THE ATTACHED POLICYHOLDER DISCLOSURE STATEMENT UNDER TERRORISM RISK ACT OF 2002. AN OFFICER OF THE INSURED MUST COMPLETE, SIGN AND RETURN SUCH DISCLOSURE STATEMENT TO THE UNDERWRITER PRIOR TO BINDING, IF CERTIFIED ACTS OF TERRORISM COVERAGE UNDER TERRORISM RISK INSURANCE ACT OF 2002 IS REJECTED BY THE INSURED. IF SUCH COVERAGE IS ACCEPTED BY THE INSURED, THE BROKER MUST ADVISE THE COMPANY IN WRITING PRIOR TO BINDING.

The policy will be issued by _____ Insurance Company, which is a member company of _____ If coverage is bound, the premium must be remitted to _____ within 30 days of the effective date of the policy, or within 15 days of billing, whichever is later.

**POLICYHOLDER DISCLOSURE STATEMENT
UNDER
TERRORISM RISK INSURANCE ACT OF 2002**

You are hereby notified that under the federal Terrorism Risk Insurance Act of 2002 (the "Act") effective November 26, 2002, you now have a right to purchase insurance coverage for losses arising out of an Act of Terrorism, which is defined in the Act as an act certified by the Secretary of the Treasury (i) to be an act of terrorism, (ii) to be a violent act or an act that is dangerous to (A) human life; (B) property or (C) infrastructure, (iii) to have resulted in damage within the United States, or outside of the United States in case of an air carrier or vessel or the premises of a U.S. mission and (iv) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion. You should read the Act for a complete description of its coverage. The Secretary's decision to certify or not to certify an event as an Act of Terrorism and thus covered by this law is final and not subject to review. There is a \$100 billion dollar annual cap on all losses resulting from Acts of Terrorism above which no coverage will be provided under this policy and under the Act unless Congress makes some other determination.

For your information, coverage provided by this policy for losses caused by an Act of Terrorism may be partially reimbursed by the United States under a formula established by the Act. Under this formula the United States

pays 90% of terrorism losses covered by this law exceeding a statutorily established deductible that must be met by the insurer, and which deductible is based on a percentage of the insurer's direct earned premiums for the year preceding the Act of Terrorism.

Unless you sign this form and return it to us rejecting Terrorism Coverage under the Federal Act, you will be covered for Terrorism as defined in the Act and your premium for that coverage is based upon which coverage option you choose (Coverage options setting forth limits, policy term, etc. are set forth in the attached letter of indication). The premium stated herein does not include any surplus lines taxes or fees that may be applicable, which are the responsibility of the insured. It is the broker's responsibility to follow applicable state surplus lines laws and, in particular, to see that the appropriate premium tax (and stamping office fee, if applicable) is collected from you and paid.

- | | |
|---------------------------------|---------------------------------|
| Option 1 Terrorism Act Premium: | Option 5 Terrorism Act Premium: |
| Option 2 Terrorism Act Premium: | Option 6 Terrorism Act Premium: |
| Option 3 Terrorism Act Premium: | Option 7 Terrorism Act Premium: |
| Option 4 Terrorism Act Premium: | Option 8 Terrorism Act Premium: |

_____ I hereby reject coverage in accordance with the Act.

Signature of Insured

Print Name/Title

Date

ENDORSEMENT NO. 1

This endorsement, effective 12:01 AM,
Forms a part of Policy No:
Issued to:
By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COVERAGE A - THIRD - PARTY CLAIMS ONLY ENDORSEMENT

It is hereby agreed that Section I. **INSURING AGREEMENTS, 1. COVERAGES: COVERAGE A - ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS**, is deleted in its entirety and replaced with the following:

COVERAGE A - THIRD-PARTY CLAIMS FOR ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS

To pay on behalf of the Insured, Loss that the Insured is legally obligated to pay as a result of Claims for Clean-Up Costs resulting from Pollution Conditions on or under the Insured Property that commenced prior to the Continuity Date, provided such Claims are first made against the Insured and reported to the Company in writing during the Policy Period, or during the Extended Reporting Period if applicable.

ENDORSEMENT NO. 2

This endorsement, effective 12:01

AM,

Forms a part of Policy No:

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

MICROBIAL MATTER EXCLUSION ENDORSEMENT

It is hereby agreed as follows:

1. Section VIII., DEFINITIONS, paragraph U. is deleted in its entirety and replaced with the following:

U. **Pollution Conditions** means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the amounts and concentrations discovered. **Pollution Conditions** shall not include **Microbial Matter**.

The following is added to Section VIII., DEFINITIONS, as paragraph DD., **Microbial Matter**.

DD. **Microbial Matter** means fungi or bacterial matter which reproduces through the release of spores or the splitting of cells, including but not limited to, mold, mildew and viruses, whether or not such **Microbial Matter** is living.

ENDORSEMENT NO. 3

This endorsement, effective 12:01

AM,

Forms a part of Policy No:

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

100% MINIMUM EARNED PREMIUM ENDORSEMENT

1. It is hereby agreed that the following minimum earned premium applies:

Inception Date Minimum Premium Earned = 100 %

2. It is hereby agreed that Section VI. **CONDITIONS**, Paragraph G., **Cancellation** is deleted in its entirety and replaced with the following:

G. **Cancellation** - This Policy may be cancelled by the **Named Insured** by surrender thereof to the Company or any of its authorized agents or by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This Policy may be cancelled by the Company only for the reasons stated below by mailing to the **Named Insured** at the address shown in the Policy, written notice stating when not less than 60 days (10 days for nonpayment of premium) thereafter such cancellation shall be effective. Proof of mailing of such notice shall be sufficient proof of notice.

1. Material misrepresentation by the **Insured**;
2. The **Insured's** failure to comply with the material terms, conditions or contractual obligations under this Policy, including failure to pay any premium or Deductible when due;
3. A change in operations at an **Insured Property** during the **Policy Period** that materially increases a risk covered under this Policy.

The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the **Policy Period**. Delivery of such written notice either by the **Named Insured** or by the Company shall be equivalent to mailing. If the **Named Insured** cancels, no return premium will be calculated and the premium shall be 100% earned at the **Inception Date**. If the Company cancels, earned premium shall be computed on a pro rata basis. Premium adjustment may be either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

ENDORSEMENT NO. 4

This endorsement, effective 12:01
AM,
Forms a part of Policy No:
Issued to:
By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COVERAGE A - THIRD - PARTY CLAIMS ONLY ENDORSEMENT

It is hereby agreed that Section I. INSURING AGREEMENTS, 1. COVERAGES: COVERAGE A - ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS, is deleted in its entirety and replaced with the following:

COVERAGE A - THIRD-PARTY CLAIMS FOR ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS

To pay on behalf of the Insured, Loss that the Insured is legally obligated to pay as a result of Claims for Clean-Up Costs resulting from Pollution Conditions on or under the Insured Property that commenced prior to the Continuity Date, provided such Claims are first made against the Insured and reported to the Company in writing during the Policy Period, or during the Extended Reporting Period if applicable.

ENDORSEMENT NO. 5

This endorsement, effective 12:01
AM,
Forms a part of Policy No:
Issued to:
By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DEFINITION OF CLEAN-UP COSTS TO EXCLUDE THIRD-PARTIES ENDORSEMENT

It is hereby agreed that solely with respect to Section I. INSURING AGREEMENTS, 1. COVERAGES: COVERAGE A - ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS, the definition of Clean-Up Costs under Section VIII. DEFINITIONS, Paragraph D., Clean-Up Costs, is deleted in its entirety and replaced with the following:

D. **Clean-Up Costs** means reasonable and necessary expenses, including legal expenses incurred with the Company's written consent which consent shall not be unreasonably withheld or delayed, for the investigation, removal, remediation including associated monitoring, or disposal of soil, surfacewater, groundwater or other contamination:

1. To the extent required by **Environmental Laws**; or
2. That have been actually incurred by the government or any political subdivision of the United States of America or any state thereof or Canada or any province thereof.

Clean-Up Costs also include **Restoration Costs**.

ENDORSEMENT NO. 6

This endorsement, effective 12:01

AM,

Forms a part of Policy No:

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NOTICE OF POSSIBLE CLAIM DELETION ENDORSEMENT

(ONLY ATTACHED IF TEN-YEAR POLICY TERM IS ELECTED)

It is hereby agreed that Section III. NOTICE REQUIREMENTS AND CLAIM PROVISIONS, Paragraph B. NOTICE OF POSSIBLE CLAIM is deleted in its entirety.

ENDORSEMENT NO. 7

This endorsement, effective 12:01

AM,

Forms a part of Policy No:

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXTENDED REPORTING PERIOD - MULTIPLE INSURED ENDORSEMENT

It is hereby agreed that Section VII. **EXTENDED REPORTING PERIOD** Paragraph B. **Optional Extended Reporting Period**, is deleted in its entirety and replaced by the following:

B. Optional Extended Reporting Period

A **Named Insured** shall be entitled to purchase an **Optional Extended Reporting Period** upon termination of coverage as defined herein (except in the event of nonpayment of premium), as follows:

1. A **Claim** first made and reported within the **Optional Extended Reporting Period**, if purchased in accordance with the provisions contained in Paragraph 2. below, will be deemed to have been made on the last day of the **Policy Period**, provided that the **Claim** arises from **Pollution Conditions** that commenced before the end of the **Policy Period** and is otherwise covered by this Policy.
2. The Company shall issue an endorsement providing an **Optional Extended Reporting Period** of up to forty (40) months from termination of coverage hereunder for all **Insured Properties** and **Non-Owned Locations**, if applicable, or any specific **Insured Property** or **Non-Owned Location**, provided that the **Named Insured** requesting the **Optional Extended Reporting Period**:
 - (a) makes a written request for such endorsement which the Company receives within thirty (30) days after termination of coverage as defined herein; and
 - (b) pays the additional premium when due. If that additional premium is paid when due, the **Extended Reporting Period** may not be cancelled, provided that all other terms and conditions of the Policy are met.
3. Termination of coverage occurs at the time of cancellation or nonrenewal of this Policy by the **Named Insured** or by the Company, or at the time of the Company's deletion of a location which previously was an **Insured Property** or **Non-Owned Location**.
4. The **Optional Extended Reporting Period** is available to a **Named Insured** for not more than 150% of the full Policy premium stated in the Declarations.

ENDORSEMENT NO. 8

This endorsement, effective 12:01

AM,

Forms a part of Policy No:

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

INTENTIONAL NONCOMPLIANCE EXCLUSION ENDORSEMENT

It is hereby agreed that Section II. EXCLUSIONS, COMMON EXCLUSIONS - APPLICABLE TO ALL COVERAGES, Paragraph D. INTENTIONAL NONCOMPLIANCE, is deleted in their entirety and replaced by the following:

D. INTENTIONAL NONCOMPLIANCE:

Arising from Pollution Conditions based upon or attributable to any Responsible Insured's intentional, willful or deliberate noncompliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any governmental agency or body, subject to Condition P. Separation of Insureds.

ENDORSEMENT NO. 9

This endorsement, effective 12:01

AM,

Forms a part of Policy No:

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BROAD NAMED INSURED ENDORSEMENT
INCLUDING ENTITIES ACQUIRED UP TO 90 DAYS OF ACQUISITION

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

It is hereby agreed that Section VIII., DEFINITIONS, Paragraph S. is deleted in its entirety and replaced with the following:

S. **Named Insured** means:

1. The persons or entities named in Item 1. of the Declarations and their respective successors, and, subject to paragraphs 2. below, any and all corporations, partnerships, companies or other entities as have existed at any time, or as now or may hereafter exist during the **Policy Period**, including the **Extended Reporting Period** if applicable and in which the **Named Insured** did or does have more than a 50% ownership interest or otherwise has controlling interest.
2. Any entity acquired by the **Named Insured** shall be considered a **Named Insured** for a period of ninety (90) days following the acquisition date. A retroactive date of the legal acquisition date of the entity by the **Named Insured** will apply for that entity. However, no coverage will be provided after the ninetieth (90th) day unless the entity is specifically endorsed to the Policy as a **Named Insured**. Underwriting information as requested must be submitted and approved. Additional premiums may be required in order to endorse the acquired entity on to the Policy as a **Named Insured**.

ENDORSEMENT NO. 10

This endorsement, effective
12:01AM,
Forms a part of Policy No:
Issued to:
By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

MORTGAGEE/INSURED/ASSIGNMENT ENDORSEMENT

It is hereby agreed the following entity(s) is (are) included as a **Named Insured(s)** but solely as respects liability arising out of the ownership, operation, maintenance or use of the **Insured Property(s)** designated in Item 5 of the Declarations.

Mortgagee/Insured
Address

It is also agreed that Section VI. **CONDITIONS**, Paragraph A. **Assignment**, is deleted in its entirety and replaced with the following:

- A. **Assignment** -This Policy may be assigned with the prior written consent of the Company, which consent shall not be unreasonably withheld or delayed. Assignment of interest under this Policy shall not bind the Company until its consent is endorsed thereon.

The Company will waive this provision only in the event of foreclosure upon an **Insured Property(s)** by the **Mortgagee/Insured** listed above, under which circumstance assignment of this Policy to the **Mortgagee/Insured** will automatically occur on the date of foreclosure. All of the terms and conditions of this Policy will then apply to the **Mortgagee/Insured**. The **Mortgagee/Insured** must notify the Company of the foreclosure within fourteen (14) days of the date of foreclosure.

ENDORSEMENT NO. 11

This endorsement, effective 12:01 AM, November 4, 2002

Forms a part of Policy No: PLS 0000000

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

NAMED INSURED ENDORSEMENT

It is hereby agreed that Section **VIII., DEFINITIONS**, Paragraph **O. Named Insured** is deleted in its entirety and replaced with the following:

- O. Named Insured** means the person or entity named in Item 1. of the Declarations acting on behalf of all other **Insureds**, if any, for the payment or return of any premium, payment of any deductible, receipt and acceptance of any endorsement issued to from a part of this Policy, giving and receiving notice of cancellation or nonrenewal, and the exercise of the rights provided in the **Extended Reporting Period** clause.

Furthermore, it is hereby agreed that the following entity(s) are included as **Named Insureds** but solely as respects liability arising out of the ownership, operation, maintenance or use of the **Insured Property(s)** designated in Item 5. of the Declarations. The first **Named Insured**, previously designated in Item 1. of the Declarations shall remain unchanged as such.

NAMED INSURED(S)**ENDORSEMENT NO. 12**

This endorsement, effective 12:01

AM,

Forms a part of Policy No:

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

KNOWN CONTAMINANT EXCLUSION ENDORSEMENT

It is hereby agreed that solely with respects to Coverages A & D, this insurance does not apply to **Clean-Up Costs, Claims, Loss, Actual Loss, Extra Expense or loss of Rental Value due Pollution Conditions** previously documented as follows: {To be completed}

**Environmental Services Agreement For Guaranteed
Fixed-Price Cleanup**

By and Between

**Environmental Waste Management Associates, LLC
100 Misty Lane
P.O. Box 5430
Parsippany, New Jersey 07054**

-and-

Dated: _____,
EWMA Proposal No. _____

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ENVIRONMENTAL SERVICES AGREEMENT FOR GUARANTEED
FIXED-PRICE CLEANUP

This Agreement, effective this ____ day of _____ 2002, by and between

Environmental Waste Management Associates, LLC
100 Misty Lane
P.O. Box 5430
Parsippany, New Jersey 07054 (“EWMA”)

-and-

(Customer)

WHEREAS, EWMA is in the business of providing environmental services, including analysis and remediation of hazardous substances and wastes, surface and subsurface investigations; environmental engineering; environmental consulting and design; and emergency services reasonably required to mitigate oil and hazardous substances released into the environment; and

WHEREAS, Customer owns real estate described in Section 1.16 (herein referred to as the “Project Site”); and

WHEREAS, the Customer desires to engage EWMA to perform the environmental services set forth in this Environmental Services Agreement for Guaranteed Fixed-Price Cleanup (herein referred to as the “Agreement”) and EWMA desires to perform such services in accordance with the terms and conditions of this Agreement; and

WHEREAS, the Customer seeks to transfer and assign responsibility it may have under Environmental Laws to EWMA for the remediation of specified Pre-Existing Pollution Conditions (described in Appendices A and B hereto) at the Project Site as well as specified Pre-Existing Pollution Conditions (also described in Appendix A hereto) emanating from the Project Site, if any, and from compliance liability it may have for these Pollution Conditions under Environmental Laws.

NOW, THEREFORE, for valuable consideration and intending to be legally bound, the parties agree as follows:

ARTICLE I. DEFINITIONS

1.1 “Acceptable No Further Action Letter” means the issuance of a No Further Action Letter pursuant to Environmental Laws, in accordance with the terms hereof, which may be

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subject to Engineering and Institutional Controls as those and the following terms are defined herein, including Unlimited Duration CEAs, and Fixed Duration CEAs with Voluntary Additional Work or compliance monitoring, but not Interim CEAs or Fixed Duration CEAs with Mandatory Additional Work other than compliance monitoring.

- 1.2 “Applicable Law” means each and every federal, state, local municipal or other governmental statute, law, ordinance, rule, regulation or legally enforceable policy, including, without limitation, Environmental Laws.
- 1.3 “BSCRA” means the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq., and the regulations promulgated pursuant thereto.
- 1.4 “CEA” means Classification Exception Area, Well Restriction Area or both, as those terms are defined in the BCSRA or WPCA.
- 1.5 “Engineering Controls” shall have the meaning defined in the BCSRA and ISRA, namely, any mechanism to contain or stabilize contamination or ensure the effectiveness of a remedial action. Engineering Controls may include, without limitation, caps, covers, dikes, trenches, leachate collection systems, signs, fences and physical access controls.
- 1.6 “Environmental Laws” means all federal, state and local laws, ordinances, rules and regulations governing Hazardous Substances, including, without limitation BCSRA, ISRA, WPCA, and the groundwater quality standards.
- 1.7 “Fixed Duration CEA with Mandatory Additional Work” means a CEA with a specified time for establishing compliance with the groundwater quality standards, which requires further investigation or remediation at the expiration of the specified time for establishing compliance. Mandatory additional work does not include biennial compliance monitoring.
- 1.8 “Fixed Duration CEA with Voluntary Additional Work” means a CEA with a specified time for establishing compliance with the groundwater quality standards, but which does not require any further investigation or remediation at the expiration of the specified time for establishing compliance, instead giving the party responsible for compliance the option to enter the voluntary cleanup program to do whatever investigation and remediation is required to demonstrate that the groundwater meets the groundwater quality standards.
- 1.9 “Groundwater quality standards” shall have the meaning defined in N.J.A.C. 7:9-6.1 et seq.
- 1.10 “Hazardous Substances” means any and all elements, compounds, substances, materials or wastes defined as hazardous or toxic, or as a pollutant or contaminant, in any of the Applicable Laws.

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- 1.11 “Hazardous Substances Condition” means any discharge, release, emission, leak, spill or migration of Hazardous Substances, including any and all sources of such a discharge, release, emission, leak, spill or migration of Hazardous Substances.
- 1.12 “Interim CEA” means a CEA issued on a temporary basis where the party performing the investigation and remediation has not yet had a RAW approved. The Interim CEA remains in place at least until the RAW is approved.
- 1.13 “Institutional Controls” shall have the meaning defined in the BCSRA, ISRA, and WPCA, namely, a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time, when contaminants remain at a contaminated site in levels or concentration above the applicable remediation standard that would allow unrestricted use of that property. Institutional Controls may include, without limitation, structure, land, and natural resources use restriction, deed notices, and CEAs.
- 1.14 “ISRA” means the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., and the regulations promulgated pursuant thereto.
- 1.15 “ISRA Compliance” means the issuance of a No Further Action Letter pursuant to ISRA, in accordance with the terms hereof, which may be subject to Engineering and Institutional Controls as defined herein, including Unlimited Duration CEAs and Fixed Duration CEAs with Voluntary Additional Work, but not Interim CEAs or Fixed Duration CEAs with Mandatory Additional Work.
- 1.16 “Limited Restricted Use Remedial Action” shall have the meaning defined in the BCSRA, namely, any remedial action that requires the continued use of Institutional Controls but does not require the use of an Engineering Control.
- 1.17 “NJDEP” means the New Jersey Department of Environmental Protection.
- 1.18 “No Further Action Letter” means a letter issued by the NJDEP indicating that no further investigation or remediation is required to comply with Environmental Laws.
- 1.19 “Project Site” means **Enter Property Description Here.**
- 1.20 “Pre-Existing Pollution Conditions” means the presence, migration, discharge, dispersal, release or escape of any Pollutants (as defined in the Cleanup Cost Cap/Pollution Legal Liability Select policy) on, under or emanating from the Project Site, in all cases provided that such conditions are: (i) not naturally present conditions; (ii) present above background levels for a constituent naturally occurring in the environment at the Project Site; and (c) in existence at the time this Agreement is executed.

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- 1.21 “Public Authority” includes the United States Environmental Protection Agency, the New Jersey Department of Environmental Protection (“NJDEP”), and any other state, local or regional agency which has jurisdiction or authority under Applicable Law over any Hazardous Substances Condition.
- 1.22 “RAW” means Remedial Action Workplan, as defined in Environmental Laws, including NJDEP Technical Requirements for Site Remediation, N.J.A.C. 7:26E.
- 1.23 “Unlimited Duration CEA” is a CEA used when NJDEP closes a case by approving a CEA with no time limit and no mandatory investigation or remediation, other than biennial compliance monitoring, despite the fact that groundwater does not meet groundwater quality standards: the NJDEP indicates in the letter that the party responsible for compliance could remove the CEA by entering the voluntary cleanup program and doing whatever investigation and remediation are required to demonstrate that the groundwater meets the groundwater quality standards.
- 1.24 “Unrestricted Use Remedial Action” shall have the meaning defined in the BCSRA, namely, any remedial action that does not require the continued use of Engineering Controls or Institutional Controls in order to meet the established health risk or environmental standards.
- 1.25 “Work” means the activities described in Appendix A.
- 1.26 “WPCA” means the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the regulations promulgated pursuant thereto.

ARTICLE II. EWMA’S RESPONSIBILITIES AND WARRANTIES

- 2.1 EWMA will provide all supervision, labor, materials, tools and equipment necessary for the performance and completion of the Work, unless otherwise specified herein or modified by written agreement of the parties.
- 2.2 Customer hereby transfers and assigns to EWMA, and EWMA hereby agrees to accept and assume, subject to the terms of this Agreement: (1) full responsibility for the performance of the Work, including remediation of all specified Pre-Existing Pollution Conditions (described in Appendix A hereto) and to obtain an Acceptable No Further Action Letter for such conditions; and (2) all liability for losses or expenses arising out of the specified Pre-Existing Pollution Conditions or arising out of the Work, as limited by the CCC/PLL Policy described in Article V, Section 5.4.
- 2.3 EWMA shall be responsible for the payment of all taxes covering the services to be performed, including without limitation, the payment of all applicable taxes covering its employees. To the extent that EWMA shall be responsible for the collection or payment of

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any taxes, including without limitation, such sales, use or similar tax, such tax is deemed to be included in EWMA's contract price.

- 2.4 EWMA shall properly maintain, as required by Applicable Law, necessary safeguards for the protection of the general public, EWMA's employees and subcontractors for the performance of EWMA's activities as described herein.
- 2.5 EWMA shall keep such records as may be necessary to reflect in reasonable detail: (1) costs and expenses incurred by EWMA hereunder; (2) the Work performed at the Project Site, including, when applicable, all testing, sampling, investigatory, remediation, transporting or disposal services performed or subcontracted by EWMA and documentation of proper chain of custody of all samples and photographs, if any, pursuant to reasonable standards of chain of custody. All such records will be provided to Customer upon its request or as required by Applicable Laws.
- 2.6 EWMA shall provide insurance for the Work as provided in Article V hereof.
- 2.7 To the extent reasonably possible, all actions taken by EWMA pursuant to this Contract shall be accomplished without unreasonable interference with, or inconvenience to, the ongoing operations at the Project Site.
- 2.8 EWMA shall prepare and maintain a complete record of any material transported from the Project Site, including: (1) a waste manifest for all Hazardous Substances for which a waste manifest is required by Applicable Laws and (2) an Origin and Destruction document for all Hazardous Substances for which a waste manifest is not required by Applicable Laws. EWMA shall utilize the Customer's EPA identification number where applicable and Customer shall cooperate with EWMA to obtain, and if necessary shall sign, any other documentation necessary under Applicable Laws to identify Customer as the generator of material generated by EWMA's activities hereunder.
- 2.9 EWMA shall be responsible for repairing any damage to the Project Site, and all roadways and rights-of-way leading to or from the Project Site, arising out of EWMA's performance of the Work to a condition substantially the same as that before the damage. EWMA shall not be responsible for any damage to or injury to unmarked underground structures or utilities.
- 2.10 EWMA shall pay for all necessary registrations, permits, licenses, government oversight fees and other charges required for the Work to be performed in accordance with this Agreement, to the extent such costs are included in EWMA's quoted prices for the Work, except those which are excluded in Section 4.1(d).
- 2.11 EWMA will obtain and maintain in force all registrations, permits, licenses and approvals which are necessary under Applicable Law in order for EWMA to properly undertake the

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Work. Customer shall execute all documents necessary for EWMA to obtain and maintain such registrations, permits, licenses and approvals.

- 2.12 EWMA represents that it has received copies of all documents regarding the Pre-Existing Hazardous Substances Conditions listed in Appendix B.
- 2.13 EWMA shall perform and/or supervise the Work and assure it is conducted in a workman like manner, and in accordance with professional and industry standards prevailing at the time the Work is performed and in accordance with all applicable laws. EWMA shall diligently pursue the completion of the Work, including making a diligent effort to obtain a response from any Public Authority who is overseeing, or must approve, any aspect of the Work.

ARTICLE III. CUSTOMER'S RESPONSIBILITIES & WARRANTIES

- 3.1 Customer warrants that there are no outstanding judicial or administrative orders and no litigation or proceeding pending before any court or Public Authority, relating to the Project Site or the Customer, which in any way affects the performance of the Work, except as set forth in Appendix B.
- 3.2 Customer agrees that it will apply for and maintain an EPA Identification Number for the transport and disposal of hazardous materials.
- 3.3 Customer shall be responsible to provide access to the Project Site, without unreasonable delay and to ensure, to the extent possible, that access to EWMA's work areas is limited in a manner that prevents interference with EWMA's activities, provided that EWMA shall provide the Customer with commercially reasonable notice of the times it requires access and the activities it intends to perform.
- 3.4 Customer will promptly inform EWMA of the presence of any Hazardous Substances Conditions at the Project Site about which it obtains knowledge. Customer represents that it has provided to EWMA all documents listed on Appendix B, which is all documents known to Customer concerning Hazardous Substance Conditions at the Project Site and that Customer knows of no other Hazardous Substance Conditions at the Project Site. In the event other Hazardous Substance Conditions are discovered by Customer after the date of this Agreement, Customer shall promptly inform EWMA and provide copies of any documents relating to such conditions.
- 3.5 Customer acknowledges that EWMA does not and will not have or acquire any legal, equitable, or economic interest in the Project Site and that EWMA shall have no liability or obligation in respect thereto other than the obligation to provide the services as called for under this Agreement.

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- 3.6 Any increased costs of developing the Project Site which arise from the presence of Pre-Existing Pollution Conditions shall be the responsibility of the Customer.

ARTICLE IV. COMPENSATION

Customer agrees to pay EWMA up to a maximum aggregate amount of **Total Not-to-Exceed Dollar Amount (\$Amount)** for all costs, direct or indirect, to comply with all the terms in this Agreement, including, without limitation, the Remedial Action Cost for performance of the Work described in Appendix A and to address the known Preexisting Pollution Condition in Appendix B and the cost of the insurance policy premium under Section 5.4 hereof (the "Not-to-Exceed Cost"). The only costs not included with EWMA's obligations under the Not-to-Exceed Cost shall be those specifically excluded in this Agreement. Terms of payment shall be as follows:

- (a) Upon entry into this Agreement, Customer shall pay an initial payment of **\$0.00** to be applied to initial invoices. Customer shall pay the sum of **Enter Sum of Initial Payment Here** to **Enter Name of Escrow Agent Here** ("Escrow Agent") to be held in escrow and deposited into a non-interest bearing trust account (the "EWMA Escrow"). EWMA shall provide Customer and Escrow Agent with invoices for activities it has conducted pursuant to this Agreement. Escrow Agent will use diligent efforts to provide payment for such invoices to EWMA within thirty (30) days provided that the activities were performed and billed in accordance with this Agreement. In the event EWMA's invoice exceeds the amount set forth in the Remedial Action Cost Estimate, or includes activities not set forth within the Remedial Action Cost Estimate, Escrow Agent shall use diligent efforts to pay the invoice amount within thirty (30) days, except to the extent the amounts in excess of the Remedial Action Cost Estimate could not reasonably have been used in an attempt to accomplish the Work. Customer shall have the burden to prove that the activities to which an invoice pertains could not reasonably have been used in an attempt to accomplish the Work.
- (b) In the event EWMA deems it necessary to perform activities other than those to address the known Preexisting Pollution Conditions in Appendix B such as unknown preexisting pollution conditions are discovered after the date of this Agreement or new conditions arise subsequent to the date of this Agreement, it shall submit a change order proposal to Customer. Customer shall have ten days after receipt of any change order proposal to object to such change order proposal. Customer shall agree to pay the cost of EWMA's services charged on a time and materials basis pursuant to the rates in Appendix C.
- (c) **Upon NJDEP's issuance of an Acceptable No Further Action Letter for the Work if the Actual Cost charged by EWMA is less than the Not-to-Exceed Cost, Escrow Agent shall pay in accordance with the terms of the Escrow Agreement (A) any**

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unpaid Actual Costs; and (B) fifty percent (50%) of the difference between the Actual Cost and the Not-to-Exceed Cost (this amount shall be the “EWMA Bonus”) to EWMA within fifteen (15) days of the release of the final payment of Actual Costs from the Escrow Account.

- (d) Notwithstanding the provisions of Sections 4.1(a), (b), (c), in no event shall EWMA be paid more than the Not-to-Exceed Cost for its performance of this Agreement. In the event the cost to complete the Work exceeds the Not-to-Exceed Cost, EWMA shall complete the Work at its sole cost and expense. Customer shall be solely responsible for: **(1) all NJDEP oversight costs and costs of all necessary registrations, permits, and licenses for the work;** (2) utility charges; (3) Natural Resource Damages, to the extent that they are not insured by the CCC/PLL Policy; (4) any Hazardous Substances which are not part of the Pre-Existing Pollution Conditions (as defined in Appendix B), to the extent the cost of removal or remediation is not insured by the CCC/PLL Policy; and (5) any Hazardous Substances Conditions which are not the responsibility of the Customer under Environmental Laws, including those which arise from an off-site source (i.e., not on the Project Site).

4.1 In the event EWMA or its representatives are subpoenaed to testify in any litigation concerning or related to its performance under this Agreement, Customer shall compensate EWMA for preparing for and providing such testimony at EWMA’s normal hourly rates for consulting services, including reasonable costs, with no premiums being charged because the services relate to litigation. However, if the litigation concerns or is related to a breach by EWMA of any of its obligations under this Agreement, Customer shall not be obligated to compensate EWMA for preparing for and providing such testimony to the extent that it relates to such breach, unless the decision in the litigation indicates that EWMA did not breach its obligations under this Agreement as alleged.

4.2 Customer agrees that all invoices are to be submitted for payment to:

Enter Name & Address of Customer Here

With copy to:

Enter Additional Names & Addresses, as Necessary

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ARTICLE V. EWMA INSURANCE

5.1 EWMA shall carry, at its own expense, during the term of this Agreement, the minimum insurance coverages set forth below:

<u>Coverage</u>	<u>Limits</u>
(a) Worker's Compensation	Statutory
(b) Employer's Liability	\$5,000,000 each occurrence/aggregate
(c) General Liability (Bodily Injury & Property Damage)	\$1,000,000 each occurrence/aggregate
(d) Automobile Liability (Bodily Injury & Property Damage)	\$1,000,000 each occurrence/aggregate
(e) Professional Liability, including Pollution coverage	\$2,000,000 each occurrence/\$4,000,000 aggregate
(f) Errors and Omissions	\$2,000,000 each occurrence/aggregate

5.2 General Liability Insurance shall include coverage for completed operations, contractual liability and independent contractor coverage under this Agreement. Prior to beginning work at the Project Site, EWMA shall promptly furnish to Customer an insurance certificate naming Customer and such other parties in interest specified by Customer as an additional insured. The providing of insurance as set forth herein shall not be construed as EWMA's assumption of any liability arising out of any act or omission of Customer. Customer shall be included as additional insured with respect to negligence or acts of EWMA, its employees, agents and subcontractors, and any breach of this Agreement by EWMA, and not with respect to negligence or acts of Customer or such other parties in interest specified by Customer

5.3 EWMA shall require all subcontractors to obtain, maintain and keep in force during the time in which they are engaged in performing Work hereunder equivalent insurance coverage and furnish Customer acceptable evidence of such insurance prior to the time any such subcontractor becomes involved in the performance of the Work. EWMA shall use

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diligent efforts to have Customer named as an additional insured by all such subcontractors.

- 5.4 After entry into this Agreement, EWMA will submit the necessary documents to apply for an AIG Cleanup Cost Cap/Pollution Legal Liability Insurance Policy ("CCC/PLL Policy"). The Customer will allow EWMA a reasonable time frame in which to obtain underwriting approval on the CCC/PLL policy from AIG. In the event EWMA is unable to obtain underwriting approval from AIG within thirty (30) days after signing of this Agreement, EWMA and the Customer will have the option to cancel the terms of this Agreement. In the event that EWMA obtains such CCC/PLL Policy, the Customer shall pay the cost of the policy premium to EWMA or its insurance broker, for remittance to the Insurer, prior to binding. Customer shall not be directly responsible for the payment of any deductibles or self-insured retentions. Additionally, EWMA shall use its best efforts to (i) have the underwriters name (A) the Customer and (B) **Enter other Additional Named Insureds (if any) Here** and (C) any future owner of the subject property(ies) of which the Project Site(s) is(are) a part as Additional Named Insured on the CCC/PLL Policy; and (ii) to obtain coverage for Natural Resource Damages related to the Pre-Existing Pollution Conditions described in the documents listed in Appendix B.

ARTICLE VI. INDEMNIFICATION

- 6.1 EWMA agrees to indemnify, defend and save harmless Customer, its subsidiaries, affiliates, directors, officers, agents, employees and subcontractors from and against any and all liabilities, claims, demands, penalties, causes of action, costs and expenses of every nature whatsoever arising from EWMA's breach of this Agreement or the negligent acts or omissions, or willful misconduct, of EWMA or its agents, representatives, employees, or subcontractors, except to the extent such liabilities, demands, penalties, causes of action, costs and expenses are caused by, or result from (a) Customer's breach of its obligations under this Agreement; or (b) the negligent acts or omissions, or willful misconduct, of Customer.
- 6.2 Customer shall indemnify, defend and hold harmless EWMA, its subsidiaries, affiliates, directors, officers, agents, employees and subcontractors from and against any and all liabilities, claims, demands, penalties, causes of action, costs and expenses of every nature whatsoever arising from Customer's breach of this Agreement or the negligent acts or omissions, or willful misconduct, of Customer or its agents, representatives, employees or subcontractors, except to the extent that such liabilities, claims, demands, penalties, causes of action, costs and expenses are caused by, or result from, (a) EWMA's breach of its obligations under this Agreement or (b) the negligent acts or omissions, or willful misconduct, of EWMA, its directors, officers, agents, employees or subcontractors.

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ARTICLE VII. CONFIDENTIAL INFORMATION

- 7.1 EWMA shall, and EWMA shall have its directors, officers, employees, agents and subcontractors treat as confidential and proprietary, and not disclose to others during or subsequent to the terms of this Agreement (except as is necessary to perform Work under this Agreement and then only on a confidential basis satisfactory to both parties), any information, whether verbal or written, of any description whatsoever (including any technical information, experience or data) regarding the plans, programs, costs, equipment, operations which may come within the knowledge of EWMA, its directors, officers, employees, agents or subcontractors in the performance of the Work and this Agreement, without securing the prior written consent of the Customer.
- 7.2 EWMA shall be permitted to use a generic description of the Work, its financial, management and technical approach, and the results of its performance hereunder for marketing and sales purposes provided that EWMA does not identify the Client, Project Site, Developer or exact location of the site.
- 7.3 Except for Section 7.2 above, EWMA shall not release, or cause or allow the release of, any information concerning the existence of this Agreement and its Attachments, without securing the prior written consent of the Customer. Notwithstanding the foregoing, Customer hereby agrees that EWMA may release information concerning this Agreement and its attachments to its insurance carriers, including any insurance carrier from which EWMA seeks to obtain CCC/PLL insurance.
- 7.4 In the event that EWMA or its directors, officers, employees, agents or subcontractors shall be required by subpoena, court, or administrative order or other legal process to disclose any of the information deemed by this Agreement to be confidential and/or proprietary, EWMA shall give immediate written notice to the Customer. Upon receipt of same, the Customer expressly reserves the right to interpose all objections it may have to the disclosure of such information. The obligation of this Article VII shall survive the termination or expiration of this Agreement.
- 7.5 Notwithstanding the foregoing confidentiality provisions of this Article VII, if Customer interposes any objections to the disclosure of information as provided in Article VII hereof, but does not obtain a protective order regarding disclosure of same by EWMA, EWMA may furnish the information which it is legally required to disclose.

ARTICLE VIII. WORK ON PROJECT SITE

- 8.1 EWMA shall, and EWMA shall have its directors, officers, employees, agents or subcontractors, while working on the Project Site, comply with any reasonable written safety procedures applicable to employees and subcontractors at the Project Site.

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ARTICLE IX. INSPECTIONS, PERMITS, ETC.

9.1 EWMA shall provide to Customer copies of all applicable written registrations, permits, licenses, approvals or other communications issued by any Public Authority to EWMA or its subcontractors for performance of the Work under this Agreement.

ARTICLE X. EXCUSE OF PERFORMANCE

10.1 The performance of this Agreement, except for the payment of money for services already rendered, may be suspended by either party in the event performance of this Agreement is prevented by a cause or causes beyond the control of either party. Such causes shall include, but not be limited to: acts of God; acts of war; riot; fire; explosion; accident; flood; or sabotage; injunctions or restraining orders; labor trouble, strike, lockout or injunction (provided that neither party shall be required to settle a labor dispute against its own best judgment). The failure of any Public Authority to issue any registration, permits, licenses or approvals required or necessary for performance of the Work after the party required to obtain such registration, permit, license or approval has used its best efforts to obtain same, or any suspension or revocation of any such registration, permit, license or approval may suspend performance of this Agreement, but the party obligated to obtain same shall be in breach of this Agreement if it failed to use best efforts.

10.2 The party asserting a right to suspend performance under this Agreement must, within a reasonable time after it has knowledge of the effective cause, notify the other party of the cause for suspension, the performance suspended, and the anticipated duration of the suspension.

10.3 Upon receipt of notice as provided in Section 10.2, advising the other party of a suspension of performance, the parties shall endeavor to agree on one of the following alternatives:

- a. Demobilization of affected personnel and equipment from the Project Site with remobilization to the Project Site occurring at a mutually agreeable time after the end of the suspending event; or
- b. Placement of affected personnel and equipment in a standby mode until the end of the suspending event.

If the parties agree to either option (a), or (b) above, the parties shall attempt to agree to schedule adjustment and adjustment to compensation as set forth in Article IV.

10.4 The party asserting a right to suspend performance hereunder shall advise the other party when the suspending event has ended, at which time the parties shall agree to a date when performance shall be resumed. If the duration of the suspension of performance exceeds eighteen (18) months, EWMA shall have the right to an adjustment of the Not-to-Exceed

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Cost, provided the Not-to-Exceed Cost shall only be increased to the extent EWMA can demonstrate that EWMA's costs to perform the Work (other than increases in time and materials costs as provided in Subsection 4.1(b)) have increased during the duration of the suspension of performance for reasons beyond EWMA's control.

ARTICLE XI. – TERMINATION

11.1 The Customer may terminate this Agreement for cause only for the following reasons:

- a. The work is not being performed in substantial compliance with the provisions of this Agreement;
- b. Any material representation or warranty of EWMA is untrue or incomplete;
- c. EWMA fails to comply with Applicable Laws or with the Customer's reasonable requirements or procedures in performing the Work; or
- d. EWMA declares bankruptcy or becomes insolvent, there is a material risk of bankruptcy or insolvency.

11.2 EWMA may terminate this Agreement only if the Customer materially fails to perform its obligations hereunder and such failure directly results in EWMA's inability to perform the Work. Notice of such termination shall be provided to the Customer in writing with at least thirty (30) days advance notice.

11.3 In the event that EWMA terminates this Agreement, EWMA shall assign all of its rights in any subcontracts to the Customer if requested by the Customer to do so. EWMA shall be entitled to payment for all work completed in accordance with the requirements of this Agreement up to and including the effective date of the termination. EWMA will also be paid for all non-cancelable commitments to third parties unless the Customer contractually assumes the obligations and indemnifies EWMA for any costs or claims associated with the future compliance by the Customer with the terms thereof.

ARTICLE XII. INDEPENDENT CONTRACTOR

12.1 EWMA agrees that EWMA and its subcontractors shall perform the Work herein as independent contractors and not as employees or agents of the Customer, and all persons employed by EWMA or by its subcontractors in connection with the Work shall be EWMA's employees or employees of such subcontractors, as the case may be, and not employees or agents of Customer.

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ARTICLE XIII. STANDARD OF CARE

- 13.1 EWMA warrants that the services to be provided by EWMA under this Agreement will be performed in accordance with the highest professional and industrial standards prevailing at the time such services are rendered.

ARTICLE XIV. – ADDITIONAL GENERAL PROVISIONS

- 14.1 Waiver. Any waiver by either party of any provision or condition of this Agreement shall not be construed or deemed to be a waiver of any other provision or condition of this Agreement, nor a waiver of a subsequent breach of the same provision or condition, unless such waiver be so expressed in writing and signed by the party to be bound. The provisions of this Section 14.1 cannot be orally waived.
- 14.2 Construction. The validity, interpretation and performance of this Agreement shall be governed and construed in accordance with the laws of New Jersey. All paragraph headings herein are for convenience only and are in no way to be construed as part of this Agreement or as a limitation of the scope of the particular sections to which they may refer.
- 14.3 Severability. If any section, subsection, sentence or clause of this Agreement shall be finally adjudged illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect the legality, validity or enforceability of this Agreement as a whole or of any section, subsection, sentence or clause hereof not so adjudged.
- 14.4 Successors and Assigns. The covenants and agreements contained in this Agreement shall apply to, inure to the benefit of and be binding upon the parties hereto and upon their respective successors and assigns; provided, however, neither party shall assign its rights and obligations under this Agreement without prior written consent. Any purported assignment without such consent shall be null and void and without force and effect. In the event that Customer assigns its rights under this Agreement, Customer shall remain liable for payments required hereunder in the event its assignee fails to make such payments.

SPECIMEN

- 14.5 Notice. Any notice, communication, statement or invoice required or permitted to be given or sent hereunder shall be in writing and deemed to have been sufficiently given when: (i) delivered in person; (ii) by registered or certified mail, postage prepaid, return receipt requested, or (iii) by a nationally recognized overnight delivery service, to the addresses of the respective parties as follows:

Customer:

Enter Name and Address Here

With copy to:

Enter Name and Address Here (if applicable)

EWMA

Environmental Waste Management Assoc., LLC
100 Misty Lane
P.O. Box 5340
Parsippany, NJ 07054

Either party may, by notice to the other, change the addresses and names given above.

- 14.6 Entire Agreement. This Agreement with its attachments represents the entire understanding and agreement between the parties hereto and supersedes any and all prior and contemporaneous agreements, whether written or oral, that may exist between the parties.
- 14.7 The Agreement Documents. The Agreement Documents consist of this Agreement and the Attachments. The Agreement Documents do not include any other documents unless specifically enumerated in this Agreement or through an amendment hereto.

SPECIMEN

14.8 Counterparts. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original.

In Witness Whereof, the parties have caused this Agreement to be executed by their duly authorized representatives as of the day and year as set forth below.

ATTEST:

Name of Customer

By: _____

Name: _____

Title: _____

ATTEST:

Environmental Waste Management Associates, LLC

By: _____

Name: _____


Title: _____

SPECIMEN

Appendix A – Description of the Work

**Appendix B – Environmental Documents Provided to
Document Pre-Existing Pollution Conditions**

Appendix C – EWMA's Rates




**Session 807 Environmental Risk
Management 101**

Environmental Compliance/Performance

Jamieson Schiff
Assistant General Counsel
Textron Inc.

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The in-house bar association.™



Environmental Compliance/Performance

- Environmental Management System
 - Assist
 - Assess
 - Assure

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Environmental Compliance/Performance

- Assist
 - Set and document expectations
 - Role and responsibilities
 - Senior Management
 - Speak "Language of the Business"
 - Operations Personnel
 - Incentives/Objectives
 - Environmental Manager
 - Report through operations
 - Input into capital appropriation requests

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Environmental Compliance/Performance

- Assist
 - Training
 - "It's as important that you said it as it is what you said"
 - Community Relations

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Environmental Compliance/Performance

- Assess
 - Metrics (“What’s measured gets managed”)
 - Gap analysis
 - Internal company standards
 - waste management
 - secondary containment for raw chemicals
 - underground tank systems
 - international operations
 - Root cause analysis

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Environmental Compliance/Performance

- Assess
 - Audits
 - Which facilities should be audited –hazard profile
 - Who should perform audits
 - What subject areas should be audited
 - “Dig where the taters are”
 - Compliance only versus risk management

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Environmental Compliance/Performance

- Assure
 - Tracking of compliance/risk management issues
 - trends, time to completion, elevate laggards
 - Prompt reporting of major issues to legal dept
 - Reward the good, punish the bad and investigate the ugly
 - Emergency preparedness & incident response
 - public relations

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Environmental Compliance/Performance

- Top Ten Reasons for Major Environmental Non-Compliance/Problems in Performance
 - Wrong person hired for the environmental manager job
 - technical skills vs. people/management skills
 - Misunderstanding of the regulations or of company's operations
 - Environmental program is compliance oriented only

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Environmental Compliance/Performance

- Top Ten Reasons for Environmental Non-Compliance/Problems in Performance
 - Inattention to neighbor concerns
 - Allowing known issues to linger
 - acquisition integration, plant closure, lack of tracking
 - Differing interpretations by government agencies
 - The Fed. is always right
 - Subsurface conduits

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Environmental Compliance/Performance

- Top Ten Reasons for Environmental Non-Compliance/Performance Problems
 - Mistaken belief that certain operations, e.g., R&D, are exempt from environmental management system
 - Ineffective reporting structure for environmental professional
 - Plant culture
 - Indifference of plant management
 - Shoot the messenger mentality

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EHS POLICY AND PROCEDURE #5**REPORTING OF URGENT & IMMEDIATE ISSUES**

- I. POLICY:** Immediately report to Textron senior management all reportable governmental or private inquiries, fatalities, severe injuries, reportable fires, explosions, property losses, business interruption, spills and releases, as defined below. Reporting under this policy does not fulfill or replace reporting required by any governmental agency.
- II. SCOPE:** This policy will be applied to all operations where Textron has operating control.
- III. OBJECTIVE:** This policy ensures that timely and consistent information regarding a severe injury, fatality, fires, property losses, business interruption, spills, and releases are communicated to senior management and appropriate legal counsel for consideration and follow-up. Proper resolution of any of these matters may require the company to obtain specialized legal and/or technical expertise in addition to the resources available at the operation.
- IV. DEFINITIONS:**

Reportable Governmental or Private Inquiries: Any alleged or suspected violation of EHS law, regulation, permit, etc. which could result in government action or a need to self report the violation. Any complaint, citation or notice of violation (NOV) or non-routine request for information or inspection by a government agency or other third party, including a neighbor of a Textron facility.

Fatality: Any death involving an employee (permanent or temporary), contractor, visitor on Textron property, and/or any employee in transit on company business.

Severe Injury: Any acute *occupational injury/illness* to an employee (permanent or temporary), contractor, visitor on Textron property, and/or any employee in transit on company business, that causes 1) admission to a hospital requiring medical treatment beyond simple wound closure; OR 2) any medical treatment combined with an overnight stay. **NOTE:** this policy is not intended to include 1) hospital emergency room visits only involving simple wound closure and same day release; OR 2) admission to a hospital solely for the purpose of observation; OR 3) follow-up admittance to a hospital for surgery or medical treatment related to a previous condition (i.e. hernia operation).

Reportable Fires, Explosions, Property Losses or Business Interruption: All fires, explosions, property losses or business interruptions over \$50,000 U.S. Dollars which resulted from an accidental or unexpected occurrence. These conditions may include theft, "acts of god", operator error, equipment failure, vandalism, utility outages, etc.

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Revised: June 2003	
By: Corporate EHS Staff	

*EHS POLICY AND PROCEDURE #5***REPORTING OF URGENT & IMMEDIATE ISSUES**

Spills and Releases: All releases of hazardous substances (as defined below) to land, air, or water which are reportable under federal, state, or governmental laws or regulations; and all releases which are off-site or migrate off-site even if these releases are not otherwise reportable; and all complaints from the public or regulatory agencies concerning releases or perceived releases of hazardous, toxic or noxious substances.

V. PROCEDURE

1. Textron *facilities* will provide urgent and immediate reports to the Corporate EHS Counsel as follows: Promptly report any *Reportable Governmental or Private Inquiries* to appropriate internal legal counsel and corporate EHS counsel. For most inquiries, this report should be submitted **within one business day** after you become aware of the inquiry. Your division or segment may have internal counsel with appropriate EHS expertise to direct your response to the inquiry.

NOTE: Do not prepare any written documentation or attempt to provide any response (verbal or written) to the inquiry until you have been instructed by counsel. Submit any reports as requested by counsel.

2. Textron facilities will provide urgent and immediate reports to the Corporate EHS Group as follows:

- **Preliminary Verbal Report (immediately)**
- **Preliminary Written Report (within 24 hours)**
- **Root Cause Analysis and Corrective Action (within 30 days)**

- a) **Preliminary Verbal Report** : Contact a member of the Corporate Environmental, Health & Safety staff at the following number, 800-790-5067. From locations outside the United States and Canada, call 011-401-457-2686. Examples of Immediately Reportable EHS issues can be found in Section 5.1 of this Policy. This preliminary report must be in English.

During business hours (8:30 AM – 5:00 PM Eastern Standard Time), someone will answer the phone from the Textron EHS Group. During off-hours, the phone will be answered by an authorized answering service and the information will be forwarded to a Textron EHS person.

The preliminary verbal report must include the following as appropriate:

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By: Corporate EHS Staff	

*EHS POLICY AND PROCEDURE #5***REPORTING OF URGENT & IMMEDIATE ISSUES**

- Reporting facility and location;
 - Description of event;
 - Date and time of occurrence;
 - Name of injured person(s) and job title (if applicable);
 - Corporate assistance requested (if any);
 - Control measures taken at time of incident;
 - Name of person reporting;
 - Name of chemical released (if applicable); and
 - Estimated loss in U.S. Dollars (if applicable).
- b) **Preliminary Written Report:** Provide the requested information (in English) using the attached forms (listed below), or any other report that provides essentially the same information.
- Severe Injury & Fatality Report for severe injuries and/or fatalities,
 - Spills and Discharges Report for reportable releases per this policy, and
 - Fire and Loss Report for reportable losses.

Preliminary reports must be faxed (401-457-6028) or e-mailed to the attention of the Corporate Director Environmental, Health & Safety as soon as possible, but no later than 24 hours after the occurrence.

- c) **Report of Root Cause Analysis and Corrective Actions:** Provide a written report (in English) for all urgent and immediate issues (severe injuries, fatalities, reportable fires and losses, and spills and releases) outlining the root cause analysis of the incident, the corrective actions to be undertaken to prevent a recurrence, and the schedule for completion of corrective actions.

The written report must be sent to the attention of the Corporate Director Environmental, Health & Safety within 30 calendar days of the incident. If a written report has not been received within 30 calendar days, then the issue will be added to the Issues Tracking Program (see Policy 10) and tracked until completed.

VI. IMPLEMENTATION: This policy and procedure is effective July 1, 1999.

Issued: September 1998	
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By: Corporate EHS Staff	

EHS POLICY AND PROCEDURE #5**REPORTING OF URGENT & IMMEDIATE ISSUES**

FOR IMMEDIATE DISTRIBUTION

**SEVERE INJURY & FATALITY REPORT
FACSIMILE TRANSMISSION SHEET**

DATE:		PAGES (Including this sheet)	
TO: CORPORATE EHS GROUP			
FACSIMILE #: 1-401-457-6028 or e-mail to a member of the corporate staff			
FROM:			
DIVISION/PLANT:			

NAME OF INJURED:		AGE:	
Job Title:		Length of Employment:	
		Time in Occupation:	
Contractor/Visitor:			
Supervisor (Name/Title)			
Plant Mgr. (Name/Title)			
Plant Health & Safety Coordinator :			

INCIDENT							
Time of Incident:	Date of Incident	Shift	Department and Location Employee Assigned To:				
_____ AM _____ PM	___/___/___						
Description Of Incident:							
Preliminary Medical Diagnosis:							
Assistance Requested:							
Facts Revealed and Control Measures Taken During Investigation:							
Actions To Prevent Recurrence:							
Responsibility Assigned to:							
Target Date for Completion:							
Status:							
Investigated by (Name & Title)						Date:	
Follow-Up (Days)	30	_____	60	_____	90	_____	Other _____ days

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By: Corporate EHS Staff	

EHS POLICY AND PROCEDURE #5**REPORTING OF URGENT & IMMEDIATE ISSUES**

FOR IMMEDIATE DISTRIBUTION

**SPILL/RELEASE REPORT
FACSIMILE TRANSMISSION SHEET**

DATE:		PAGES (Including this sheet)	
TO: CORPORATE EHS GROUP			
FACSIMILE #: 1-401-457-6028			
FROM:			
DIVISION/PLANT:			

DESCRIPTION OF RELEASE (What, how, where, when):	
Amount of Chemical(s) Released	
Name(s) of Chemical Released and CAS #'s (if available)	
Did release enter a waterway or sewer?	
Response measures implemented	
Describe any Related Injuries or Damage to Offsite Receptors (People, Wildlife, Property, etc.)	
Preventive Measures Necessary to Avoid Another Release	

Responsibility Assigned to:									
Target Date for Completion:									
Status:									
Investigated by (Name & Title)								Date:	
Follow-Up (Days)	30	_____	60	_____	90	_____	Other	_____	days

NOTE: IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS.

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*EHS POLICY AND PROCEDURE #5***REPORTING OF URGENT & IMMEDIATE ISSUES****INSTRUCTIONS FOR COMPLETING FIRE AND LOSS REPORT****1. Incident Description**

Describe the incident in detail answering the following questions:

- A. What event(s) led to the incident?
- B. What equipment was involved?
- C. What was the root cause of the incident?
- D. Has this type of incident occurred in the past? How many times? When?
- E. Were employees injured? To what extent?
- F. If a fire was involved:
 - Did the fire department respond?
 - What fire protection equipment was used?
 - Did any equipment fail to operate?
 - How long did it take to extinguish the fire?

2. Corrective Action Taken

List the actions taken to assure that this type of incident will not recur. Please provide actual or estimated completion dates.

3. Loss Report

List the losses associated with the incident. Fax the preliminary report to Corporate EHS within 8 hours of the incident. A final report must be prepared and submitted to the Business Segment, with copies to the Corporate EHS staff within 30 days of the incident, or no later than 10 days following the completion of the report.

- A. **Property Damage:** All damages and losses associated directly with the incident such as equipment or building damage, raw material losses, product losses, maintenance labor, and clean up costs.
- B. **Business Interruptions:** All continuing expenses such as loss of scheduled production, unutilized variable costs, additional energy expenses, or increased raw material costs. Loss scheduled production is net sales less the variable costs.

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By: Corporate EHS Staff	

EHS POLICY AND PROCEDURE #5

REPORTING OF URGENT & IMMEDIATE ISSUES

FIRE AND LOSS REPORT

Location:	Department:	Supervisor:
Date and Time of Incident:	Discovered By:	Reported By:

Description of Incident:

Corrective Action:	Completion Date:
---------------------------	-------------------------

Losses: <i>Estimated</i>	Final
---------------------------------	--------------

Property Damage:	Estimated Loss (\$US):
-------------------------	-------------------------------

Total Property Damage: _____

Business Interruption:	Estimated Loss (\$US):
-------------------------------	-------------------------------

Total Business Interruption: _____

Loss Total: _____

Reported By (signature) _____ **Losses Calculated By (signature)** _____

Date: _____ **Date:** _____

Approved By (signature) _____

Date: _____

<p>Issued: September 1998</p> <p>Revised: June 2003</p> <p>By: Corporate EHS Staff</p>	
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EHS POLICY AND PROCEDURE #5**REPORTING OF URGENT & IMMEDIATE ISSUES****5.1 Examples of Environmental Health & Safety Issues Immediately Reportable Under Policy 5****ENVIRONMENTAL**

1. Receipt of government notice of violation/non-compliance, order, or penalty.
2. Receipt of notice of Federal, State, or local government investigation of a facility or process or request for information other than a routine inspection.
3. Discovery of a discharge to air or water that is greater than 5 times the limit contained in a State or Federal permit or regulation.
4. Discovery of unpermitted discharge, emission, or process.
5. Receipt of neighbor/citizen complaint regarding emission, discharge, noise, odor, vibration, or other alleged nuisance.
6. Chemical spills and releases as defined under Textron P/P #5.
7. Discovery of imminent and significant hazard to the environment that is not corrected immediately (e.g., within 24 hours).
8. Media contact involving adverse or potentially adverse publicity to Textron facility's environmental program.

HEALTH & SAFETY

1. Receipt of government notice of violation/non-compliance, order, or penalty.
2. Receipt of notice of government investigation of a facility or process other than a routine inspection.
3. Occurrence of severe injury or fatality as defined in Textron P/P #5.
4. Discovery of an imminent and significant hazard to health and safety that is not corrected immediately (e.g., within 24 hours).
5. Media contact involving adverse or potentially adverse publicity to Textron facility's health and safety program.

FIRES, EXPLOSIONS, PROPERTY LOSS AND BUSINESS INTERRUPTION

1. Reportable fire, explosion or loss as defined under Textron Policy/Procedure #5.
2. Discovery of imminent and significant fire risk that is not corrected immediately (e.g., within 24 hours).
3. Process that has resulted in repeated fires within a six months period (even if each occurrence resulted in less than \$50,000 loss).
4. Catastrophic machine failure resulting in business interruption greater than \$50,000.
5. Wind or water damage to property, equipment or finished goods.
6. Damage due to earth movement (earthquake, subsidence, mudslide, etc).

Issued: September 1998**Revised: June 2003****By: Corporate EHS Staff**

Textron Environmental, Health & Safety Hazard Profile Answer Template

Facility Name/Location _____
 Division Name _____
 Segment _____
 Date Completed _____

Section/
 Question Rating x Weighting = Score

Section/
 Question Rating x Weighting = Score

I. EHS Setting

I.A		3	
I.B		2	
I.C		2	
I.D		2	
I.E		2	
I.F		2	
I.G		3	
I.H		3	
I.I		3	
I.J		1	
I.K		1	

II. General Environmental and Health & Safety

II.A		10	
II.B		10	

III. Air Pollution

III.A		6	
III.B		4	
III.C		4	
III.D		2	

IV. Waste Management

IV.A		4	
IV.B		12	

V. Soil and Groundwater

V.A		1	
V.B		1	
V.C		1	
V.D		1	
V.E		1	
V.F		3	
V.G		3	

VI. Water Pollution

VI.A		3	
VI.B		2	
VI.C		3	
VI.D		3	
VI.E		3	
VI.F		2	

VII. Product Stewardship

VII.A		2	
VII.B		2	
VII.C		1	
VII.D		1	

VIII. Materials Handling

VIII.A		2	
VIII.B		1	
VIII.C		2	
VIII.D		2	
VIII.E		5	

IX. Industrial Hygiene

IX.A		4	
IX.B		5	
IX.C		5	
IX.D		2	

X. Processes and Equipment

X.A		1	
X.B		1	
X.C		2	
X.D		2	
X.E		3	
X.F		2	
X.G		3	
X.H		1	
X.I		2	
X.J		3	
X.K		3	

XI. Transportation

XI.A		2	
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XII. Ergonomic Exposure

XII.A		1	
XII.B		2	
XII.C		3	
XII.D		2	
XII.E		2	
XII.F		1	

Question	Rating	x	Weight
I. EHS Setting (Section 1 of 13)			
1. Site Surroundings/Use			3
Industrial / derelict	1		
Agricultural / greenfield	2		
Amenity Area (e.g. town park, sports field)	3		
Conservation / forested area	4		
Residential property / public buildings	5		
Unknown	5*		
2. Total Number of Employees			2
<200	1		
201 – 399	2		
400 – 599	3		
600 – 999	4		
>1000	5		
Unknown	5*		
3. Employee Turnover Annually (%)			2
0% - 2.5%	1		
2.6% - 5.0%	2		
5.1% - 10%	3		
10.1% - 15%	4		
> 15%	5		
Unknown	5*		
4. Number of Shifts			2
1	1		
2	2		
3	4		
Continuous (7 days 24 hrs)	5		
Unknown	5*		

Question	Rating	x	Weight
5. Average % of Total Workforce Working Overtime (in past year)(%)			2
< 2%	1		
2% - 5%	2		
6% - 10%	3		
11% - 15%	4		
> 15%	5		
Unknown	5*		
6. Temporary Employees (% of total workforce)			2
< 2%	1		
2% - 5%	2		
6% - 10%	3		
11% - 15%	4		
> 15%	5		
Unknown	5*		
7. HPR facility (highly protected risk)			3
Yes	1		
No	5		
Unknown	5*		
8. Number of Different Hazardous Materials Used (as defined by applicable law) or Material is Flammable, Reactive or Corrosive			3
<5	1		
6 - 10	2		
11 - 20	3		
21 - 30	4		
> 30	5		
Unknown	5*		

Question	Rating	x	Weight
9. Total Hazardous Materials Stored on site (litres)			3
< 10,0000	1		
10,000 – 100,000	2		
100,000 – 500,000	3		
500,000 – 1,000,000	4		
> 1,000,000	5		
Unknown	5*		
10. PCBS			1
No PCBs on site 2%	1		
PCB containing capacitors on site	3		
PCB containing transformers on site	5		
Unknown	5*		
11. Asbestos			1
No asbestos on site	1		
High-density asbestos limited to cement roofs or other inaccessible places	2		
High-density asbestos located in low level elevations	3		
Low density asbestos lagging around/remote inaccessible pipes, etc.	4		
Low-density asbestos situated in accessible locations	5		
Unknown	5*		

Question	Rating	x	Weight
----------	--------	---	--------

II. GENERAL ENVIRONMENT (Section 2 of 13)

1. Number of Environmental Actions within the last three years including noise complaints from the public) 10

No permit breaches. No action by the regulatory authorities. (letters, warnings, enforcement notices, etc.). No complaints from the public.	1		
>= 1 Breaches identified by site	2		
>= 1 Complaint received from the public OR >= regulatory actions from the authorities	3		
>= 1 Prosecution/civil actions brought	4		
>= 5 Prosecution/civil actions brought	5		
Unknown	5*		

Question	Rating	x	Weight
III. <u>Air Pollution</u> (Section 3 of 13)			
1. Annual quantity of VOCs emitted (metric tons)			7
0 - 5	1		
6 - 10	2		
11 - 25	3		
26 - 100	4		
> 100	5		
Unknown	5*		
2. Annual quantity of Greenhouse Gases (List II) emitted (metric tons)			4
0	1		
1 - 20	2		
> 20	5		
Unknown	5*		
3. Number of Ozone Depleting Chemicals (List I) handled (metric tons)			4
0	1		
1 - 2	2		
3 - 4	3		
4 - 5	4		
> 5	5		
Unknown	5*		
4. On site Boilers and Fuel Type			2
No on-site boilers	1		
All boilers fueled by gas	2		
Some/all boilers fueled by heavy fuel oil or coal	5		
Unknown	5*		

Question	Rating	x	Weight
IV. <u>Waste Management</u> (Section 4 of 13)			
1. Monthly volume of Non-Hazardous Solid Waste (trash) generated (metric tons)			4
< 50	1		
51 - 100	2		
101 - 300	3		
301 - 1000	4		
> 1000	5		
Unknown	5*		
2. Monthly quantity of Hazardous/Industrial Waste generated (Kilograms (e.g. plating sludge, oil, solvents)			12
50	1		
51 - 100	2		
101 - 300	3		
301 - 1000	4		
> 1000	5		
Unknown	5*		

Question	Rating	x	Weight
V. <u>Soil & Ground Water</u> (Section 5 of 13)			
1. History of site operations			1
Site built on green-field site, no historic operations	1		
Historic operations comprise light to medium industry only	3		
Historic operations include heavy industry	5		
Unknown	5*		
2. Date original operations started			1
Post 1985	1		
1985 - 1970	2		
1950 - 1969	3		
1900 - 1949	4		
Pre 1900	5		
Unknown	5*		
3. Depth to groundwater (meters)			1
> 50	1		
11 - 50	2		
6 - 10	3		
2 - 5	4		
< 2	5		
Unknown	5*		
4. Groundwater quality/use			1
Not suitable for drinking	1		
Low to medium quality	2		
Low to medium quality aquifer. Abstraction for process water <5k from site	3		
High quality aquifer	4		
High quality aquifer. Extraction for drinking water <5k distance from site	5		
Unknown	5*		

Question	Rating	x	Weight
5. Known soil & groundwater contamination			1
Phase I assessment conducted and no contamination identified	1		
Minor contamination of soil found (no List V substances identified)	2		
Minor contamination of groundwater found (no List V substances identified)	3		
Contamination of soil with List V substances identified	4		
Contamination of groundwater with List V substances identified	5		
Unknown	5*		
6. Underground Storage Tanks (USTs)			3
No USTs on site	1		
All USTs secondarily contained with leak detection and overfill alarm	2		
All USTs secondarily contained with leak detection OR overfill alarm	3		
At least 1 UST with no containment, but has leak detection OR overfill alarm	4		
At least 1 UST with no containment, no leak detection and no overfill alarm	5		
Unknown	5*		
7. Containment of surface stored hazardous Materials (above ground storage tanks, drums, etc.)			3
>= 100% containment on all stored materials	1		
All materials contained, but not >= 100%	2		
Some containment >= 100% provided for materials stored	3		
Some containment < 100% provided for materials stored	4		
No containment facilities	5		
Unknown	5*		

Question	Rating	x	Weight
VI. <u>Water Pollution</u> (Section 6 of 13)			
1. Distance to nearest surface water body			3
> 1000 m	1		
500m – 1000m	2		
< 500 m	3		
Adjacent to site	4		
On-site/across site	5		
Unknown	5*		
2. Surface water quality/use			2
No use / extraction for process water	1		
Recreational	2		
Conservation area	3		
Fish Farming	4		
Extraction for drinking water	5		
Unknown	5*		
3. Quantity of process wastewater discharged per day (litres)			3
< 20,000	1		
20,000 – 200,000	2		
200,000 – 1,000,000	3		
1 – 2 million	4		
> 2 million	5		
Unknown	5*		
4. Quality of process wastewater discharged before treatment			3
No List IV or V Substances	1		
List IV substances	3		
List V substances	5		
Unknown	5*		

Question	Rating	x	Weight
5. Discharge route of process wastewater			3
On site treatment or monitoring prior to municipal sewer	1		
Direct to municipal sewer	2		
On site treatment prior to discharge to surface water	3		
Discharge to septic tanks and /or equivalent	4		
Direct to surface water	5		
Unknown	5*		
6. Discharge route of sanitary wastewater			2
On site treatment prior to discharge to municipal sewer	1		
Direct to municipal sewer	2		
On site treatment prior to discharge to surface water	3		
Discharge to septic tanks	4		
Direct to surface water, or equivalent	5		
Unknown	5*		

Question	Rating	x	Weight
VII. <u>Product Stewardship</u> (Section 7 of 13)			
1. Product disposal and take back legislation			2
No applicable legislation in place or planned for in the future	1		
General legislation in place/planned potentially making manufacturers responsible for product disposal	3		
Specific legislation in place for taking back product types (e.g. electronic equipment, car components, etc.)	5		
Unknown	5*		
2. Packaging disposal and take back legislation			2
No applicable legislation in place or planned for in the future	1		
General legislation in place/planned potentially making manufacturers responsible for product packaging	3		
Specific legislation in place/planned requiring manufacturers to take back product packaging	5		
Unknown	5*		
3. Product or parts of product that can be recycled (%)			1
100	1		
50 - 99	2		
30 - 49	2		
< 20	3		
None	2		
Unknown	5*		
4. Packaging Reused/Recycled as % of Quantity used			1
100	1		
50 - 99	2		
30 - 49	2		
< 20	3		
None	2		
Unknown	5*		

Question	Rating	x	Weight
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VIII. General Health & Safety (Section 8 of 13)

1. Number of Health & Safety actions within the last three years 10

No permit breaches. No action by the regulatory authorities. (letters, warnings, enforcement notices, etc.). No complaints from the public.	1		
>= 1 Breaches identified by site	2		
>= 1 Complaint received from the public OR >= regulatory actions from the authorities	3		
>= 1 Prosecution/civil actions brought	4		
>= 5 Prosecutions/civil actions brought	5		
Unknown	5*		

Question	Rating	x	Weight
IX. <u>Materials Handling</u> (Section 9 of 13)			
1. Number of Powered Industrial Trucks defined as fork trucks, pallet jacks			2
None	1		
< 5	2		
6 - 10	3		
11 - 49	4		
> 50	5		
Unknown	5*		
2. Number of Cranes and Hoists			1
1 - 3	1		
4 - 7	2		
8 - 12	3		
13 - 20	4		
> 20	5		
Unknown	5*		
3. Loading Docks			2
None	1		
All docks with automatic dock levelers AND dock locks	2		
All docks with automatic dock levelers OR dock locks	3		
Some docks with automatic dock levelers OR dock locks	4		
All docks without automatic dock levelers or dock locks	5		
Unknown	5*		
4. Bulk materials load/unload			2
None	1		
Non hazardous (plastic resins, sheet steel, etc.)	2		
Any 1 hazardous (flammable, corrosive, reactive, toxic)	3		
Any 1 hazardous AND any 1 non hazardous	4		
>= 2 hazardous	5		
Unknown	5*		

Question	Rating	x	Weight
5. Frequency of bulk loading and unloading			5
Never	1		
Annually	2		
Monthly	3		
Weekly	4		
Daily	5		
Unknown	5*		

Question	Rating	x	Weight
X. Industrial Hygiene (Section 10 of 13)			
1. Percent (%) of employees potentially exposed to chemical/physical/biological hazards			4
< 10%	1		
11 – 19%	2		
20 – 30%	3		
31 – 49%	4		
> 50%	5		
Unknown	5*		
2. Number of List III Chemicals handled			6
< 5	1		
5 - 10	2		
11 - 15	3		
16 - 20	4		
> 20	5		
Unknown	5*		
3. Number of processes involving manufacturing, compounding or mixing of chemicals			5
None	1		
1 - 2	2		
3 - 5	3		
5	4		
> 5	5		
Unknown	5*		
4. Noise exposure exceeding 90dbA time weighted average in one area			2
< 85 dbA	1		
85 – 90 dbA	3		
> 90 dbA	5		
Unknown	5*		

Question	Rating	x	Weight
XI. Process and Equipment (Section 11 of 13)			
1. Percent (%) of shop floor employees involved in manufacturing (exclude non-routine tasks)			1
< 20%	1		
21 – 45%	2		
46 – 50%	3		
51 – 75%	4		
> 75%	5		
Unknown	5*		
2. Percent (%) of shop floor employees involved in non-routine tasks (i.e. maintenance/set up)			1
< 20%	1		
21 – 45%	2		
46 – 50%	3		
51 – 75%	4		
> 75%	5		
Unknown	5*		
3. Number of different following processes (heat treat, painting, plating, cutting, stripping, metal-working, compounding & chemical manufacturing molding, forming & stamping, assembly)			2
1 – 3	1		
4 - 6	2		
7 - 8	3		
9 - 12	4		
> 12	5		
Unknown	5*		
4. Frequency of hot work activities (excluding designated maintenance areas)			2
None	1		
Annually	2		
Monthly	3		
Weekly	4		
Daily	5		
Unknown	5*		

Question	Rating	x	Weight
5. Frequency of lock out / tag out activities			3
None	1		
Annually	2		
Monthly	3		
Weekly	4		
Daily	5		
Unknown	5*		
6. Number of confined spaces			2
None	1		
1 - 25	2		
26 - 50	3		
51 - 100	4		
> 100	5		
Unknown	5*		
7. Frequency of confined space entries (including contractors)			3
None	1		
Annually	2		
Monthly	3		
Weekly	4		
Daily	5		
Unknown	5*		
8. Maximum height of elevated work (>1.3 meters)			1
None	1		
1 - 3	3		
> 3	5		
Unknown	5*		

Question	Rating	x	Weight
9. Frequency of work at elevated heights			2
None	1		
Annually	2		
Monthly	3		
Weekly	4		
Daily	5		
Unknown	5*		
10. Frequency of work on energized electrical equipment			3
None	1		
Annually	2		
Monthly	3		
Weekly	4		
Daily	5		
Unknown	5*		
11. Frequency of handling flammable liquids (flash point of <100°F or <38° C)			4
None	1		
Annually	2		
Monthly	3		
Weekly	4		
Daily	5		
Unknown	5*		

Question	Rating	x	Weight
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XII. Transportation (Section 12 of 13)

- 1. Total number of vehicles – owned and leased (cars, trucks, trailers, golf cars, tugs, including fleet vehicles) 2**

None	1		
1 - 15	2		
16 - 30	3		
31 - 50	4		
> 51	5		
Unknown	5*		

Question	Rating	x	Weight
XIII. Ergonomics (Section 13 of 13)			
How many of the following ergonomic hazards at the facility assembly, manual material handling, exposure to vibration, extreme heat or cold			1
None	1		
1 - 2	2		
3 - 4	3		
5	4		
> 5	5		
Unknown	5*		
2. Percent (%) workforce exposed to assembly or manual material handling (MMH)			2
< 10%	1		
11% - 49%	3		
50% - 100%	5		
Unknown	5*		
3. Percent (%) workforce exposed to use of air tools			2
< 10%	1		
11% - 49%	3		
50% - 100%	5		
Unknown	5*		
4. Percent (%) workforce exposed to data entry activities >50% of the time they are working			2
< 10%	1		
11% - 49%	3		
50% - 100%	5		
Unknown	5*		
5. Percent (%) workforce exposed to vibration			2
< 10%	1		
11% - 49%	3		
50% - 100%	5		
Unknown	5*		

Question	Rating	x	Weight
6. Percent (%) workforce exposed to extreme heat or cold			1
< 10%	1		
11% – 49%	3		
50% - 100%	5		
Unknown	5*		