THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No.: 2011-CP-10-00387
Appellate Case No. 2016-001140

PCS Nitrogen, Inc.,.....Appellant,

vs.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America),.....Respondents.

RECORD ON APPEAL
VOLUME 2 OF 6

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air emissions from the plant. [PCS Ex. 175 at DSMNV-000609].

64. Site data show that lead sulfate was released from the acid lines. These acid releases created conditions that allowed the redistribution of lead and arsenic through natural processes including chemical migration, leaching, and chemical dissolution followed by re-precipitation. Over time, periodic releases of acid, either from the washing out of the lead chambers or acid spills from line leaks and tank leaks, mobilized both lead and arsenic through the soil. [Trial Tr. 831:9-22, 840:13-16 and 842:23-843:7].

65. During 1968 and 1969, CNC constructed a new granulation plant. [Ash. Ex. 26 at 3]. CNC dismantled existing components of the old granulation plant and moved them to a new structure. [Ash. Ex. 26 at 2]. New construction involved over 120 tons of steel, creating heavier foundations and running over 4,500 feet of new underground piping, including 500 feet of piping from the acid plant to the new granulation plant. [Ash. Ex. 26 at 14,15 and 21; Ash. Ex. 28 at 1 and 14-15].

66. In 1969, the old granulation plant was converted to storage, which required the construction of concrete ramps, the removal of old equipment, and the replacement of support columns. [Ash. Ex. 26 at 15]. Two stories of the old granulation plant were removed and the roof replaced. [*Id.*].

67. In May of 1970, CNC reported that the acid plant was "in poor repair." [PCS Ex. 1 at 5-6 & n.2; Ash. Ex. 26 at 1; Ash. Ex. 30 at 3].

68. During CNC's ownership of the Site, material was brought onto the Site and used as fill. Locations at which fill material was placed are contaminated and require remediation. [Ash. Ex. 226 at 11 and 18; Ash. Ex. 229 at 23 and 26].

69. On April 23, 1971, a severe wind storm caused extensive damage to the roof of the sulfuric acid plant, the main building, and the plant protection chemicals storage building. [Ash. Ex. 32 at 6]. Estimated loss amounted to $45,000 to buildings, $28,000 to fertilizer, and $20,000 to chemicals. [Ash. Ex. 32 at 6]. This damage resulted in air dispersion of contaminated roof dust, the finished fertilizer product, and chemicals.

70. The acid plant was not repaired after this event. Demolition of the plant began in 1971 and was completed by February 28, 1972. [Ash. Ex. 32 at 6; Ash Ex. 33 at 4; Trial Tr. 1667:24-1668:1]. Demolition involved dismantling and washing out the acid chambers and acid towers, and excavating the acid tank and associated piping. Heavy equipment was required to demolish and remove the structures, and to remove the pilings on which the structure was built. Demolition of the plant would have disturbed the subsurface soil to a depth of at least two feet. [Ash. Ex. 272 at 2, Figure S-1; Trial Tr. 2561:4-19 and 2564:20-2565:1]. Underground piping was dug out with an excavator by digging a trench right over the pipe or next to it and removing the pipe to a staging area. [Trial Tr. 2561:4-2562:6].

71. By July 1972, the dismantling of all acid plant equipment was nearly complete. [Ash. Ex. 37 at 4]. By October of 1972, all fertilizer production at the Site had ceased. [Ash. Ex. 226 at 13; Ash. Ex. 37 at 4]. Between 1972 and 1977, the Site was inactive. [PCS Ex. 4 at 13-14]. An April 1973 aerial photograph indicates that the roof on the old granulation plant had collapsed. [PCS Ex. 4, Figs. 3-25 and 3-33].

72. Between February and September of 1977, CNC dismantled most of the remaining structures on the Site. [Trial Tr. 2005:23-25]. The dismantling of the acid and fertilizer plants left wooden timbers and poles on the Site from late 1977 until 1979. [Trial Tr. 2072:1-10; PCS

Ex. 4 at 14-15].

73. In April 1979, CNC's demolition contractor defaulted on his contract and walked off the Site leaving "a lot of rubble and some very difficult concrete structures to remove." [Ash. Ex. 40]. Access to the Site was not secure; fencing was down and a gate left open. [Ash. Ex. 40].

74. By January 11, 1981 the demolition of the fertilizer plant was completed. [Ash. Ex. 33 at 4; Ash. Ex. 40 at 1; PCS Ex. 4 at 15]. Demolition of the fertilizer plant required the use of substantial heavy equipment, such as large hydraulic excavators, a crane with a wrecking ball, front-end loaders, and bulldozers. [Trial Tr. 2556:19-2557:16]. Demolishing the large buildings on the Site required using an area around the buildings to position the equipment and to place pieces of the demolished building. [Trial Tr. 2558:9-2559:14]. In addition, grading was likely required to expand site access and prepare an area for staging. [Trial Tr. 2558:9-2559:14]. These processes disturbed the soil. [Trial Tr. 2564:20-2565:1].

75. The removal of three separate railroad tracks on the Site, including portions elevated on trussle-type structures, would have required the use of heavy excavation equipment to dig out the tracks. [Trial Tr. 2560:13-2561:3]. The piles would either be pulled out or broken off with a bulldozer, disturbing the soil. [Trial Tr. 2560:13-2561:3].

76. After demolition activities were completed, CNC did not implement a stormwater management system on the Site. By early 1981, most of the debris from the demolition process had been removed. [PCS Ex. 4 at 15; Ash. Ex. 272 at 3, fig. S-5].

77. The CNC demolition and Site preparation activities that occurred in the 1971-1981 time period impacted an area a little less than eighty percent of the area where contaminated soils

and sediments must be excavated. [Trial Tr. 1047:5-17]. Demolition and regrading of the Site by CNC significantly disturbed the soil at the Site. [Trial Tr. 939:2-6].

78. CNC operated three phosphate fertilizer plants located in: Charleston, South Carolina; Moultrie, Georgia; and Macon, Georgia. [Ash. Exs. 31-38]. According to the testimony of Thomas Blue, a PCS environmental expert who testified at the first trial, a company with expertise in the manufacturing of phosphate fertilizer would be aware that these processes result in lead and arsenic contamination. [2007 Trial Tr. 364:24-366:17]. If pyrite clinkers and pyrite slag were on the land surface of the Site, a person with expertise in the phosphate fertilizer business would know that lead and arsenic contamination were being released. [Trial Tr. 1600:2-1601:2]. CNC employed more stringent environmental practices at its phosphate fertilizer plant in Moultrie, Georgia than in Charleston, South Carolina. In Moultrie the lead sludge from the lead acid chambers was washed into a retention basin lined with calcitic lime rock, whereas in Charleston the lead sludge was washed onto the ground, sprinkled with soda ash, and then washed away with a fire hose. [O. Carter Dep. 74:21-75:3, 93:9-22, September 1, 2009]. The foregoing indicates that CNC knew that hazardous materials had been disposed of on the Site.

79. CNC continued to own the Site until 1985, roughly five years after CERCLA was enacted. CNC did not report any release of hazardous substances at the Site to EPA. [Ash. Ex. 258].

80. Prior to the purchase of the Site by Holcombe and Fair in 1985, all of the structures on the Site were demolished and "some grading of portions of the Site took place." [Trial Tr. 2565:17-2566:2; Ash. Ex. 258 at 5].

81. CNC did not disclose the presence of contamination on the Site to Holcombe and Fair prior

to the sale of the Site. [Ash. Ex. 47; Trial Tr. 2863:24-2864:12].

G. Holcombe and Fair Parties Ownership (1987-2003)

82. In November of 1984, Holcombe and Fair, and CNC executed an agreement for the sale of approximately thirty-nine acres of the Site. [PCS Ex. 58; Trial Tr. 2580:20-21].

83. Holcombe and Fair were represented by Smythe, a real estate lawyer. [Trial Tr. 311:18-19, 2584:3-4 and 2861:5-14].

84. On December 11, 1984, William Bivens ("Bivens"), counsel to CNC, sent Fair a letter enclosing the results of a soil sampling performed in 1968. [Ash. Ex. 44]. This soil sampling was performed for the purpose of assessing the suitability of the soil for construction purposes and did not assess the environmental condition of the soil. [*Id.*; Trial Tr. 2585:2-2587:11].

85. Prior to consummating the sale of the property, Holcombe and Fair agreed to sell a portion of the property to the Commissioner of Public Works for the City and agreed to enter into a like-kind exchange of property with Hyde. [Trial Tr. 2583:14-2584:5 and 2861:3-2863:13].

86. On January 4, 1985, Bivens sent Fair a letter describing an agreement between CNC and the City whereby the City planned to extend Milford Street and water and sewer utilities onto the Site. [PCS Ex. 59]. In the letter, CNC offered to assign its rights under the agreement with the City to Holcombe and Fair. [PCS Ex. 59]. Fair understood this letter to mean that the City would pay to extend Milford Street and the utility lines. [Trial Tr. 2581:6-2582:18].

87. On February 7, 1985, CNC conveyed the Site to Smythe, as counsel to Holcombe and Fair, for the sum of $588,168.00. [Entry 118 ¶ 5; Ash. Ex. 46]. Smythe then conveyed six acres

of the property she received from CNC to the Commissioner of Public Works. [Trial Tr. 2584:2-5 and 2861:3-2863:13]. On May 3, 1985, Smythe conveyed the remainder of the land at the Site to Hyde for the sum of $365,323.00. [Entry 118 ¶ 6; Ash. Ex. 48; Trial Tr. 2861:11-2862:15]. That same day, Hyde conveyed the property to Holcombe and Fair. [Entry 118 ¶ 7]. Holcombe and Fair, in turn, conveyed another property to Hyde through Smythe. [Ash. Ex. 49; Ash. Ex. 50; PCS Ex. 66; Trial Tr. 311:5-17, 313:11-314:3, 2583:14-2584:11 and 2861:3-2863:13]. Holcombe and Fair did not have knowledge of environmental contamination at the time of the like-kind exchange. [Trial Tr. 2584:11-2585:10 and 2863:24- 2864:12; Ash. Ex. 47].

88. No environmental site assessment was conducted by Holcombe and Fair prior to purchase because it was not customary at the time for purchasers of commercial property to investigate the property's environmental condition. [Entry 528 at 5:23-6:12 and Ex. 1; Trial Tr. 310:4-311:1, 471:16-474:18, 2588:20-2589:5, 2793:4-2794:12, 2868:24-2870:9 and 2885:10-16; Entry 527 at 16:5-17:21, 18:16-22, 22:2-9 and Ex. 1; Holcombe and Fair Parties Ex. 13].

89. When the Site was acquired by Holcombe and Fair, it was in a condition that did not require rough grading or the removal of buildings. [Trial Tr. 434:11-17, 2496:6-25, 2498:1-2499:7, 2685:6-14, 2699:1-18 and 2801:25-2802:7]. Witnesses who observed the Site at the time described the land as relatively flat, with some vegetation, but no trees. [Trial Tr. 434:11-17, 2496:6-25, 2498:1-2499:7, 2685:6-14, 2699:1-18 and 2801:25-2802:7].

90. On December 29, 1987, Holcombe and Fair conveyed three acres of the Site to the Masts by deed for the sum of $75,000.00. [Holcombe and Fair Parties Ex. 1, Trial Tr. 2593:2-10].

Holcombe and Fair did not perform any site work or construction on this parcel prior to the sale to the Masts. [Trial Tr. 2593:2-10].

91. Holcombe and Fair intended to divide their property up into parcels for lease. [Trial Tr. 2494:12-2495:3, 2590:3-9, 2598:7-25, 2681:23-2682:7 and 2695:6-2698:14].

92. In the summer of 1990, Holcombe and Fair began constructing the Milford Street extension. [Trial Tr. 2796:1-19]. Holcombe and Fair paid for the extension of Milford Street. [Trial Tr. 2656:10-2557:9]. The City did not contribute to the payment of these expenses. E.M. Seabrook Jr., Inc., a local engineering and surveying company, was hired by Holcombe and Fair to design and supervise the construction of the Milford Street extension. [Trial Tr. 2598:13-22, 2682:1-7 and 2687:6-8; PCS Ex. 79 at 3-6]. The design of the Milford Street extension included the addition of underground water and sewer lines as well as a drainage ditch. [Trial Tr. 2494:12-2495:3, 2582:19-22, 2598:7-25, 2681:23-2682:7, 2685:6-18 and 2695:6-2698:14]. These plans were approved by the South Carolina Coastal Council. [PCS Exs. 79, 80, 83, 84, 155, 157 and 165; Holcombe and Fair Parties Ex. 2].

93. During the construction of the Milford Street extension, a bulldozer was used to level and smooth the land. [Trial Tr. 1128:17-1129:6, 2694:14-2696:3 and 2699:1-18; PCS Ex. 157]. By the end of the summer of 1990, the Milford Street extension was roughed in. [Trial Tr. 2796:1-19]. ROC was put down as base material with asphalt placed on top. [Trial Tr. 1128:17-1129:6, 2494:12-2495:22, 2694:14-2696:3 and 2699:1-18; PCS Ex. 157]. A turnaround was constructed at the end of the road extension, but was left unpaved. [PCS Ex. 157; Trial Tr. 2686:12-25 and 2780:5-8]. The water and sewer utility extensions were constructed by excavating soil adjacent to the road extension, placing utility pipe in the

excavated trench, backfilling the trench with soil removed from the trench, and spreading any excess dirt in the immediate area of the excavation. [PCS Ex. 157; Trial Tr. 2696:4-2697:2]. The water line extension was placed on one of the road shoulders at an elevation of approximately three feet deep. [Trial Tr. 2731:15-16]. The sewer line was placed on the other road shoulder at a depth of four and one half feet. [Trial Tr. 2731:2-14]. A drainage ditch approximately two feet in depth and ten feet in width was constructed along the road extension and along the turnaround. [PCS Ex. 157; PCS Ex. 166 at PCS-0016120; City Ex. 17 at 6; Trial Tr. 2686:12-25, 2697:3-12 and 2746:23-2747:22]. The final portions of the water and sewer lines were installed in 1996. [PCS Ex. 259 at HF0001249; PCS Ex. 101]. The construction of the road, ditch, and utility lines proceeded through areas with discolored soils. [PCS Ex. 126; Trial Tr. 422:6-9 and 2800:18-25].

94. The asphalt on the Milford Street extension acted as a cap, preventing further environmental harm; and the addition of water and sewer lines prevented the use of contaminated groundwater, protecting human health. [Trial Tr. 439:15-440:3, 445:7-12, 479:15-22, 480:3-14 and 1731:2-1732:6].

95. In mid-1990, Charles Lane ("Lane"), a real estate professional working at Holcombe and Fair Realtors, recommended that Holcombe and Fair conduct an environmental assessment of the Site before leasing or selling portions of the property. [Trial Tr. 2491:8-2492:6 and 2589:9-15].

96. On July 31, 1990, Lane sent a letter to Tom Hutto ("Hutto") of General Engineering Laboratories, Inc. ("GEL") requesting an environmental investigation of the property "to the minimum extent necessary to show due diligence." [PCS Ex. 124].

97. Subsequently, Scott Smith ("Smith") and Hutto of GEL performed an environmental assessment of the property that included a review of historical information, interviews, and soil sampling and testing. [Ash. Ex. 53; PCS Ex. 126-127; Trial Tr. 314:1-323:12, 487:15-493:5 and 2795:9-2802:13].

98. Hutto and Smith performed a visual inspection of the Site in the summer of 1990. [Trial Tr. 2795:1-17 and 2797:13-20; PCS Ex. 126]. During this visual inspection, Smith noted a pile of material near the road construction that he believed was soil and building debris. [Trial Tr. 2800:6-15]. He did not sample this material. [Trial Tr. 2801:5-24]. Smith also noted the presence of discolored soils along the edge of the Milford Street extension and to the west of the turnaround. [PCS Ex. 126; Trial Tr. 2797:21-2798:2]. These discolored soils included a purple slag-like material. [Trial Tr. 2815:9-14]. Hutto observed waste materials spread across the land surface during the inspection. [Trial Tr. 510:23-511:8].

99. On October 3, 1990, a draft report of GEL's investigation was sent to Lane. [Ash. Ex. 53; Trial Tr. 317:6-16, 496:12-497:6 and 2493:8-16]. The report detailed the analytical results from several samples taken from sixteen on-site test pits that were seven to ten feet deep. [Ash. Ex. 53; Trial Tr. 320:5-321:1]. The results showed elevated metals, including lead and arsenic, and low pH conditions in several of the samples. [Ash. Ex. 53; Trial Tr. 316:10-323:24]. These results were not reported to DHEC because samples from test pits are not required to be reported. [Trial Tr. 489:16-490:5, 2838:12-14 and 2839:5-11]. The draft report indicated the presence a gray material that is considered characteristically hazardous as well as a purple slag material that is not considered characteristically hazardous. [PCS Ex.127 at 2-3].

100. On October 4, 1990, Smith faxed a copy of the draft report to Smythe. [PCS Ex. 128].

101. On December 12, 1990, Elizabeth Warner ("Warner"), an attorney representing Holcombe and Fair, sent a copy of the GEL draft report to an attorney at Arcadian Corporation, successor to CNC, and predecessor to PCS. [Ash. Ex. 55; PCS Ex. 129; Entry 118 at 8 and 22]. Warner's letter indicated that GEL's investigation of the Site revealed "significant contamination" involving phosphates and petroleum products. [PCS Ex. 129].

102. Ross was never contacted by the Holcombe and Fair Parties regarding the contamination or clean up costs despite Holcombe's knowledge that the Site had been owned by Planters. [Trial Tr. 2632:1-4 and 2880:23-2881:60; PCS Ex. 56].

103. GEL's final report on its subsurface investigation concluded that there were "materials in the subsurface which would be considered characteristically hazardous." [PCS Ex. 132 at iii]. Contamination was found at depths ranging from one and one half to eight feet below the land surface. [PCS Exs. 127 and 132]. The final report also indicated that stormwater presented a problem at the Site because it could carry contaminants that were on the land surface to the marsh and tidal pool at the western edge of the Site. [PCS Exs. 127, 132; Trial Tr. 2820:18-2821:21 and 2822:18-25].

104. Holcombe and Fair did not commission further soil sampling or analysis after the GEL report. [Trial Tr. 411:6-8, 2629:21-2630:22 and 2837:6-16], despite GEL's statement that additional sampling was appropriate. [PCS Exs. 127 and 132].

105. On December 29, 1990, Holcombe and Fair entered into a Contract of Sale with RHCE for three acres of land at the Site. [Holcombe and Fair Parties Ex. 3 at 3; Trial Tr. 2594:4-2597:8]. The Purchase and Sale Agreement stated, "There is no contamination on

the property at the time [RHCE] takes over the property, except as outlined in GEL letter dated December 20, 1990." [PCS Ex. 131]. The December 20, 1990 letter did not mention contamination on the Site besides that found on tracts one and two. [Trial Tr. 2836:3-21]. The letter mentioned the purple slag, but did not mention the gray characteristically hazardous material described in the draft report. [PCS Ex. 130]. The GEL letter indicated that the presence of contamination should not affect the use of the property for the purpose parking commercial vehicles on six inches of ROC. [PCS Ex. 130 at 2].

106. On January 23, 1991, an attorney for Arcadian Corporation responded to Warner's letter regarding the contamination at the Site denying responsibility. [Ash. Ex. 56]. Arcadian subsequently provided EPA with a copy of GEL's draft report in response to a request for information. [Ash. Ex. 62].

107. On May 22, 1991, Holcombe faxed additional information to Hood. [PCS Ex. 186; Trial Tr. 2594:25-2596:5]. The fax, which summarizes the findings of a July 22, 1987 environmental audit of a neighboring property by the Commissioner of Public Works, indicates that contaminants in the soil did not significantly impact the surface soils or the groundwater on the neighboring property and that current activities were not exacerbating the contamination of the neighboring property. [PCS Ex. 186 at 5].

108. On May 29, 1991, the Holcombe and Fair Parties commissioned GEL to analyze the groundwater at the Site. [PCS Ex. 133].

109. In July of 1991, GEL conducted groundwater sampling and analysis at the Site. [Ash. Ex. 59; PCS Exs. 134 and136]. In conducting this analysis, GEL took samples from a well not owned by Holcombe and Fair. [PCS Ex. 133; Trial Tr. 2806:5-12, 2838:7-25]. Because the

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well was owned by another entity, the test results from this sampling were not required to be reported to DHEC. [PCS Ex. 133; Trial Tr. 2806:5-12 and 2838:7-25]. The results of the analysis were provided to Holcombe, who forwarded the information to Hood on July 3, 1991. [Ash. Ex. 59; PCS Exs. 134-137]. The results revealed low pH conditions, [Trial Tr. 417:7-12] and that the groundwater at the Site failed to meet South Carolina groundwater standards for levels of nitrates as well as the secondary standard for sulfates, [PCS Ex. 134]. The report, however, stated that the groundwater results should not affect Holcombe and Fair's intended use of the property to park commercial vehicles and containers. [Ash. Ex. 59; Trial Tr. 2806:19-2807:16].

110. On September 30, 1991, the Holcombe and Fair Parties deeded the Milford Street extension, which covers 1.28 acres of the Site, to the City by quitclaim deed. [City Ex. 19].

111. On December 13, 1991, the City conveyed the land from the turnaround at the end of the Milford Street extension back to Holcombe and Fair by quit-claim deed. [Holcombe and Fair Parties Ex. 5; Trial Tr. at 2658:7-2659:3]. The deed to the Milford Street extension was recorded on December 19, 1991. [City Ex. 19].

112. Prior to leasing out parcels of the Site, Holcombe and Fair prepared each parcel by removing vegetation, filling any low spots, and putting down a four to six inch layer of ROC. [Trial Tr. 2496:6-2500:13, 2600:1-12 and 2600:24-2601:1, 2697:13-2699:18]. The contractor performing the site preparation work encountered concrete and steel rods. In order to prevent breaking the equipment, the contractor stopped using a bushog and used a bulldozer to clear vegetation. [Trial Tr. 2496, 2499 and 2632:19-2633:11]. Site preparation was conducted over approximately six years as leases were signed for the use of different parcels. [Trial Tr.

1174:7-24, 2495:23-2496:5, 2697:13- 2698:2; Ash. Ex. 229]. Portions of the Site were graded, proof rolled and cleared as late as 1998. [PCS Exs. 105-106].

113. Development of the parcels by Holcombe and Fair occurred on contaminated soil. [Ash. Ex. 194 and drawings 1-6].

114. On January 15, 1992, Holcombe and Fair conveyed two acres of the Site to Hood. [RHCE Ex. 2]. This parcel was then leased to RHCE, for the purpose of conducting a business for the storage of intermodal shipping containers on the parcel. [RHCE Exs. 5-7]. RHCE continues to operate its intermodal shipping container storage business. [RHCE Exs. 5-7].

115. Between February 1992 and May 1993, Holcombe and Fair placed ROC on the first parcel of land that it leased. [Ash. Ex. 229 at 29-32; Trial Tr. 1192:13-1197:7and 2026:19-2030:9; PCS Ex 4, Figs. 3-62 – 3-67].

116. Holcombe and Fair were required to have a master drainage plan for the Site approved by DHEC before they developed the Site. [Trial Tr. 2688:20-24; PCS Exs. 96; 97]. In 1992, Seabrook worked with DHEC to develop such a plan. [PCS Exs. 96-99]. The resultant plan involved the construction of four detention ponds. [PCS Ex. 4 at 17-18 and Fig. 4-1; PCS Ex. 99; PCS Ex. 142; PCS Ex. 144].

117. On February 5, 1993, EPA sent a letter to Holcombe and Fair requesting access to their property in order to conduct environmental assessment activities related to the neighboring Koppers facility. Holcombe and Fair granted access. [PCS Ex. 74; Trial Tr. 2602:13-25].

118. Holcombe and Fair placed ROC on the second leased parcel in February of 1994. [Ash. Ex. 229 at 29-32; PCS Ex 4, Figs. 3-62 – 3-67; Trial Tr. 1192:13-1197:7 and 2026:19-2030:9].

119. In 1995, EPA requested access to the Site to conduct environmental assessment activities,

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which Holcombe and Fair granted. [PCS Ex. 75; Trial Tr. 2603:1-18].

120. On July 12, 1995, EPA project manager Craig Zeller ("Zeller") sent the results of EPA's preliminary assessment to Hutto as representative of Holcombe and Fair. [Ash. Ex. 68; PCS Ex. 140; Trial Tr. 324:8-325:9].

121. In April of 1997, Holcombe and Fair placed ROC on a third leased parcel. [Ash. Ex. 229 at 29-32; Trial Tr. 1192:13-1197:7 and 2026:19-2030:9; PCS Ex 4, Fig. 3-62 – 3-67].

122. On December 17, 1997, Holcombe formed Holcombe Enterprises. [PCS Third-Party Complaint ¶ 81; Holcombe and Fair Parties Answer ¶ 3]. On December 23, 1997, Holcombe conveyed his ownership of the Site to Holcombe Enterprises. [Entry 118 ¶ 8; PCS Ex. 72].

123. In August 1998, an Expanded Site Inspection was performed for EPA by DHEC. The Expanded Site Inspection indicated that contamination existed at the Site, including elevated levels of arsenic, lead, and mercury. [Ash. Exs. 81 and 162].

124. On November 5, 1998, Zeller, EPA project manager, contacted Hutto about the Site. [Ash. Ex. 77]. Zeller's letter indicates that future remedial actions would be necessary to adequately protect human health and the environment from the contamination at the Site. [Ash. Ex. 77]. The letter further indicates that EPA's greatest concern at the time was surface water runoff. [Ash. Ex. 77]. On or about November 12, 1998, Zeller met with Holcombe, Fair, and Hutto to discuss a surface water management plan. [Ash. Ex. 77; Trial Tr. 2605:1-2606:8 and 337:8-338:25]. To avoid an EPA Removal Action, the Holcombe and Fair Parties agreed that they would: 1) develop a comprehensive surface water management plan; 2) submit the plan to EPA; and 3) upon approval of the plan, complete the required work. [PCS Ex. 144].

125. As previously found in Paragraph 116, in 1992 Seabrook designed four stormwater detention ponds to control surface water runoff at the Site after the placement of the ROC. Coastal Council regulations required that the post-development rate of surface water runoff not exceed the pre-construction development rate of surface water runoff. [Trial Tr. 2599:18-25, 2685:15-22 and 2699:19-2702:11; Holcombe and Fair Parties Exs. 10a-10b; PCS Ex. 157]. Seabrook first learned about the contamination at the Site in 1998 while working with EPA to design a plan to control runoff. [Trial Tr. 2715:13-24].

126. On December 4, 1998, Holcombe and Fair wrote to Zeller that they had begun work on the detention ponds in response to his request. [Holcombe and Fair Parties Ex. 10; PCS Exs. 142, 144; Trial Tr. 423:4-424:1 and 2606:9-2608:10]. The Holcombe and Fair Parties did not submit the plan for approval from the EPA prior to beginning the work. [PCS Ex. 144]. The plan did not "[m]eet the substantive requirements for a NPL-Caliber site." [PCS Ex. 144 at A09_00400]. The Holcombe and Fair Parties' implementation of the plan destroyed wetlands along the Ashley River. [PCS Ex. 148 at HF000288]. The EPA informed the Holcombe and Fair Parties that by proceeding without oversight they failed to follow "protocols" for work in "coastal/critical areas." [PCS Ex. 144 at A09_00400].

127. DHEC approved the construction of ponds on the Site, "unaware of the serious contamination issues related to past uses in this area." [PCS Ex. 143]. When DHEC learned about the Site contamination in 1999, DHEC determined that the construction of the ponds might not have been appropriate. [Trial Tr. 2710:15-20; PCS Exs. 143 and 145].

128. Only three of the four ponds were built. [PCS Ex. 4, Figure 4-1; Trial Tr. 2709:5-9]. The fourth pond was not built because the area around it was not developed and no ROC was put

down. [Trial Tr. at 2709:1-17]. The ponds were constructed by excavating dirt in the footprint of the pond and using the excavated dirt to form embankment walls. [Trial Tr. 2601:19-24, 2703:12-24].

129. The Holcombe and Fair Parties did not maintain the three detention ponds that were constructed, as evidenced by DHEC's inability to locate the ponds during a 1998 inspection because the ponds were overgrown. [PCS Exs. 98, 145 and 148; Trial Tr. 2737:6-8 and 2737:12-23].

130. In 1998 and early 1999, the Holcombe and Fair Parties put down additional ROC on the property and relocated one of the detention ponds. [Trial Tr. 2608:11-2609:13 and 2710:18-2712:4]. In March 1999, DHEC's Department of Ocean and Coastal Resource Management ("OCRM") expressed concern to the Holcombe and Fair Parties that the detention pond that had been relocated was now seaward of the coastal area critical line established by OCRM. [Holcombe and Fair Parties Ex. 11; Trial Tr. 2608:13-7 and 2717:17-23]. The relocation of the detention pond seaward of the OCRM critical line was inadvertent due to the establishment of a new critical line. [Trial Tr. 2609:2-21 and 2717:17-2719:13; PCS Ex. 154]. As a result of OCRM's concern, the relocated detention pond was filled back in. [Trial Tr. at 2721:2-4]. Seabrook determined that another detention pond did not need to be constructed because his calculations showed that the ditch at the end of the road extension was adequate to serve the need for stormwater retention. [Trial Tr. 2717:24-2721:4].

131. Aerial photography taken in March of 1999 shows ROC covering almost the entire site. [Ash. Ex. 229 at 29-32; PCS Ex. 4, Figs. 3-62 – 3-67; Trial Tr. 1192:13-1197:7 and

2026:19-2030:9]. ROC can become contaminated in three ways: 1) wicking from the soil below, [Trial Tr. 1442:6-12]; 2) overland water flow or runoff, [Trial Tr. 1442:6-12], and 3) truck traffic carrying contaminated soil onto the rock or pushing the rock into the soil, [Trial Tr. 765:17-19; 1373:3-8, 1488:15-24]. The ROC on the Site may be contaminated above remediation levels.

132. At the direction of Zeller, EPA officials inspected the property in 1999 to evaluate the work conducted by the Holcombe and Fair Parties. [Ash. Ex. 80; PCS Ex. 144]. The findings of this inspection were documented in a letter dated March 23, 1999 from Zeller to an official at OCRM. [Ash. Ex. 80; PCS Ex. 144]. While this letter expressed concern that the Holcombe and Fair Parties had not submitted a work plan to EPA for approval prior to performing work at the Site, the letter concluded that the work performed was beneficial to the property because it mitigated some of the risks posed by contamination. [Trial Tr. 2609:22-2610]. Zeller acknowledged the benefits of the work as follows:

> On January 12, 1999, Mr. Don Rigger, EPA-OSC, visited the subject property to inspect the progress of work and to conduct a Removal Assessment. Based on the data available at that time, it was concluded that the Columbia Nitrogen site did not meet the established criteria in the National Contingency Plan (NCP) to initiate an EPA Removal Action. In other words, capping of the site with approximately 6 inches of crushed/compacted limestone has mitigated potential short-term risks posed to on-site workers/trespassers by exposure to site soils. Moreover, the construction of a surface water detention basin, regrading activities and silt-fence installation is an improvement from pre-existing conditions.

[Ash. Ex. 80].

133. In early to mid-1999, DHEC inspected the Site to examine the stormwater management features in place. [PCS Ex. 145]. DHEC concluded that Seabrook's original stormwater

management plan was never implemented. [PCS Ex. 145]. DHEC informed the Holcombe and Fair Parties that they would be fined $1,000 for "non-compliance with the original approvals from OCRM." [PCS Ex. 146]. Subsequently, around July 1999, Barbara Neale ("Neale"), an employee of DHEC conducted a site visit with Joe Fersner ("Fersner") and Holcombe. [PCS Ex. 148 at 1]. With regard to Pond 1, Fersner was able to recall an outfall pipe, and Neale observed that the Pond was constructed in a different shape from the approved plans. [*Id.*] Neale was able to locate an outfall pipe for Pond 3, which was in a different location than on the approved plans. [*Id.*]. Neale was unable to confirm whether or not Pond 2 existed, and noted that Pond 4 was never constructed because the associated parcel had not been built on. [*Id.* at 2]. Neale concluded that DHEC should "discuss rescinding the fine" based upon these findings. [*Id.*]. In March 2007, Neale wrote a memorandum to Fair in response to an inquiry, indicating that the fine was likely rescinded because DHEC had no record of receiving the fine. [Holcombe and Fair Parties Ex. 14].

134. From 1999 to 2001, Black and Veatch conducted Phase I and Phase II Remedial Investigations to characterize the contamination associated with the Site for EPA. [Ash. Exs. 87 and 91].

135. The Phase I Remedial Investigation Report concluded that "potentially unacceptable levels of risk are posed to ecological receptors exposed to inorganics, [semi-volatile organic compounds ("SVOCs")], and pesticides" in soils, surface water, and sediments at the Site. [Ash. Ex. 87 at 224]. The report also noted low pH levels in the groundwater and sediments. [*Id.*]. The report indicated that further testing on soils, surface water and sediments should be performed. [Ash. Ex. 87 at 225]. The Phase II Remedial Investigation Report concluded

that the surface soils, subsurface soils, sediments, groundwater, and surface water on the Site are contaminated with lead and arsenic. [Ash. Ex. 91 at Figs. 7-4 – 7-8].

136. There is no evidence that the Holcombe and Fair Parties introduced any hazardous substances to the Site.

137. Black and Veatch prepared a Final Feasibility Study Report for EPA, dated October 31, 2002, that analyzed alternative approaches for remediating the Site as well as the costs of these approaches. [Ash. Ex. 93].

138. On December 31, 2002, Holcombe Enterprises and Fair contracted with Ashley to sell the remaining property at the Site. [PCS Ex. 31; Ash. Ex. 94; Trial Tr. 75:25-76:9]. The Contract of Sale contemplated that the parties would enter into an environmental indemnity agreement that would be made part of the Contract of Sale. [Ash. Ex. 94 at A00435-6]. The Contract of Sale was amended four times. [PCS Exs. 32-35].

139. On November 24, 2003, Holcombe Enterprises, Fair, and Ashley entered into the Fourth Amendment to the Contract of Sale. [Ash. Ex. 94; Trial Tr. 80:8-16]. This amendment added section 5, titled "Environmental Indemnity," to the Contract of Sale. [Ash. Ex. 94 at A00456-62]. In significant part, the section 5 provided as follows:

> 5.b. Release of Claims by Purchaser. Purchaser has accepted the Property and for itself and its members and managers and their respective successors, assigns, officers, directors, employees and agents (collectively the "Releasing Parties") waives, releases and discharges the Seller from any and all liabilities, actions, causes of actions, claims and demands whatsoever, whether or not well founded in fact or in law, including without limit response costs incurred under the Environmental Laws, and from any suit or controversy arising from or in any way related to the existence of Hazardous Materials in or with respect to the Property and from any Hazardous Material Claims arising from or related in any way to the Property, except for matters relating to a breach of representation or warranty

under the Contract.

[Ash. Ex. 94 at 00458, ¶ 5(b)(emphasis added)]. In a separate provision, Ashley indemnified Holcombe Enterprises and Fair for any claim brought by EPA up to $2.7 million with $200,000 of the first $400,000 paid by the Holcombe and Fair Parties. [*Id.* at 5(d)]. The Agreement also includes a broader indemnification against claims brought by any third parties, on the condition that Ashley acquire cost cap and legal liability insurance to protect it from cost overruns in remediating the Site. [*Id.* at 5(e); Trial Tr. 47:3-9, 275:10-18]. The broad indemnity provision is not currently in effect because Ashley has not acquired the cost cap and legal liability insurance. [PCS Ex. 35 at 5(e); Trial Tr. 275:10-18, 47:3-9 and 726:8-12]. Ashley could still acquire the insurance necessary to make the broad indemnity effective. [Trial Tr. 726:5-7].

140. Ashley manager Robert Clement testified that the intent of the "Environmental Indemnity" provision was for Ashley not to sue Holcombe, Fair, or Holcombe Enterprises for any environmental contamination claims. [Trial Tr. 144:14-22]. Counsel for Ashley stipulated on the trial record that:

> Ashley does not dispute that its release of Holcombe and Fair was intended to extend to all of the Holcombe and Fair Parties, that is to Mr. Holcombe individually, as well as the Holcombe Enterprises, L.P. and to Mr. Henry Fair, and to all of the sites formerly owned by Holcombe and Fair. So our release extends to all of those parties and to all of that property.

[Trial Tr. 1410:24-1411:7].

141. Ashley does not contest that the release has the effect of preventing Ashley from recovering money from the Holcombe and Fair Parties to clean up the Site. [Trial Tr. 276:7-17 and 276:21-277:2]. Counsel for PCS stated that PCS has no objection to Ashley bearing

financial responsibility for any allocation of responsibility made to the Holcombe and Fair Parties. [Trial Tr. 3220:8-10].

142. On November 24, 2003, Holcombe Enterprises and Fair conveyed 27.62 acres of the Site to Ashley. [Entry 118 ¶ 9]. The contractual documents for the sale of this property provided that Ashley would assume existing leases with tenants. [Ash. Exs. 94 and 113].

143. The Holcombe and Fair Parties' cost basis in the portion of the Site sold to Ashley was $491,000. [Trial Tr. 2644:23-2645:1]. The Holcombe and Fair Parties sold their remaining property on the Site to Ashley for $2,700,000, [PCS Exs. 35 and 31], resulting in a profit of approximately $2,200,000. In addition, the Holcombe and Fair Parties received income from leasing the property. [Trial Tr. 2645:4-10].

H. Allwaste Ownership Period (1989-2008)

144. Allwaste was incorporated in Georgia in 1985 as Allwaste Tank Cleaning, Inc. [Allwaste Ex. 1; Ash. Ex. 200]. On January 25, 2008, Allwaste became PSC Container Services, LLC, a Delaware limited liability company. [Allwaste Ex. 1; Ash. Ex. 200].

145. Allwaste purchased three acres of the Site from the Masts by deed dated August 16, 1988, and recorded on January 11, 1989. [Allwaste Exs. 1 and 4; Ash. Ex. 200]. At the time of Allwaste's acquisition from the Masts, the parcel had already been covered with a layer of ROC and some buildings constructed. [Trial Tr. 2593; 3046:5-8]. Allwaste leased an additional two acres of the Site from the Holcombe and Fair Parties beginning in December of 1991 for the storage of trucks and containers. [PCS Ex. 28 at A04_01807; Trial Tr. 3043:11-14].

146. For twenty years, Allwaste operated a container cleaning and storage facility on its three-acre

parcel. [PCS Ex. 9 at A03_03149; Trial Tr. 3036-3043]. Allwaste parked trucks on the leased parcel before and after they were cleaned. [Trial Tr. 3060:9-15]. Allwaste cleaned both over-the-road tanker trucks and isocontainers. [Trial Tr. 3036:3-4]. Isocontainers hold a wide variety of hazardous and non-hazardous materials and can be shipped overseas. [PCS Ex. 9 at A03_03112; Trial Tr. 3036:3-10].

147. When the isocontainers were cleaned, residual material was first drained from the containers into a five gallon pail. [PCS Ex. 9 at A03_03149; Trial Tr. 3036:23-3037:2]. Materials cleared from tanks were classified as either hazardous or non-hazardous. [Trial Tr. 3037:4-6]. Hazardous materials were placed in drums and shipped to a hazardous waste site. [Trial Tr. 3037:6-8]. Non-hazardous materials were sent to a non-hazardous landfill. [Trial Tr. 3038:1-4]. Rinse water was directed into the Charleston sewer system. [Trial Tr. 3037:9-12, 3045:11-19 and 3049:22-3051:1]. The isocontainers were then cleaned in either one of three wash bays in the main building on the parcel, or in the exterior wash bay. [PCS Ex. 9 at A03_03149]. Cleaning solvents, including diesel fuel, caustic sodas, and sulfuric acid were stored in containers on the pads where they were used. [PCS Ex. 9 at A03_03118, A03_03147-9, A03_03358, Photograph 7; PCS Ex. 10 at A04_04642, Photograph 3]. Allwaste used up to 300 gallons of diesel fuel each day and cleaned twenty-five to thirty isocontainers per day on average. [PCS Ex. 9 at A03_03149; PCS Ex. 10 at A03_03347]. Wastewater generated by the cleaning process was collected in a trench and sumps located in the main wash building, and a sump in the exterior wash bay. [PCS Ex. 9 at A03_03145, 49]. The sumps were intended to capture spills of any hazardous materials until that material was pumped out and placed in a drum. [Trial Tr. 386:5-22 and 3067:4-12]. From the sumps,

the wastewater was pumped into a wastewater treatment system. [PCS Ex. 9 at A03_03145; *see also* Trial Tr. 3045:11-19, 3062:6-10]. The pumps did not remove all of the solid material that collected in the sumps. [PCS Ex. 9 at A03_03358, Photograph 9; *see also* Trial Tr. 3063:1-3064:3].

148. During its ownership period, Allwaste constructed a new building on its property, expanded existing structures, and modified the underground components of its wastewater collection system. [PCS Ex. 12 at Allwaste 0950, Allwaste 0952, Allwaste 0955, Allwaste 0960]. Allwaste's facility manager, Mr. Warren ("Warren"), testified that he did not know how much excavation this construction required. [Trial Tr. 3058:6-11].

149. On or about February 19, 2007, Ashley executed a Purchase and Sale Agreement with Allwaste. [Allwaste Exs. 1 and 2; Trial Tr. 293-94]. The agreement between Ashley and Allwaste included the following language:

> (i) Release. [Ashley] hereby fully and finally releases and discharges [Allwaste] from any and all Claims[] and Liabilities, whether for contribution or otherwise. [Ashley] intends for this release to be effective notwithstanding the negligence of [Allwaste] and regardless of whether the Claims and/or Liabilities arise in law, equity or under strict liability.
>
> (ii) Indemnity. Subject only to the exclusions specifically set forth in Section 23(c)(vi) below, to the fullest extent permitted by applicable law, [Ashley] will indemnify, defend and hold harmless [Allwaste] from and against any and all Claims, and Liabilities related to or arising in connection with Claims, and all costs and expenses incurred in connection therewith (including, without limitation, attorneys' fees and expenses, including those incurred by [Allwaste] in enforcing the terms of this Agreement), even if such Claims or Liabilities arise from or are attributed to the sole or concurrent negligence of [Allwaste]. It is the intent of [Ashley], in entering into this Agreement, to indemnify and defend [Allwaste] against (1) all Claims, and Liabilities arising in connection to the Claims, that are or may be based, in whole or in part, on the sole or concurrent

> negligence or strict liability of [Allwaste], and (2) Indefinite Claims, and Liabilities arising in connection with Indefinite Claims. This Indemnity is intended, among other things, to cover Claims and Liabilities between [Ashley] and [Allwaste] as contemplated by CERCLA, any successor federal statute, rule or regulation, and/or comparable state statute, rule or regulation. However, this indemnity is not intended, and shall not be construed, to abrogate or diminish [Ashley's] status as a bonafide prospective purchaser in accordance with section 107(r)(1) of CERCLA and any successor federal statute, rule or regulation, and/or comparable state statute, rule or regulation.

[Allwaste Ex. 2 at 22].

150. In 2007, Ashley hired GEL to perform a pre-purchase environmental assessment of the Allwaste parcel. [PCS Ex. 9]. GEL produced three reports in connection with its investigation. [PCS Exs. 9-11]. GEL summarized the results of its initial investigation in an April, 13, 2007 environmental assessment. [PCS Ex. 9 at A03_03116]. GEL summarized the results of the testing of the soil and groundwater in an April 16, 2007 report. [PCS Ex. 11]. GEL's environmental assessment was updated on February 29, 2008. [PCS Ex. 10]. In its environmental assessments, GEL identified the cement pads and sumps on the Allwaste parcel as recognized environmental conditions ("RECs"). [PCS Ex. 9 at A03_03115]. An REC denotes "the presence or likely presence of any hazardous substances or petroleum products on a 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, groundwater or surface water of the property." [PCS Ex. 9 at A03_03115]. At Allwaste's hazardous materials storage shed, GEL observed "significant staining and cracks . . . on the floor," [PCS Ex. 9 at A03_03112, A03_03359 and Photograph 16], noting that the staining "indicat[ed] spills have occurred in the past," [PCS Ex. 9 at A03_03147]. GEL concluded that "[t]he presence of spills and cracks in the

concrete slab increase the potential for a release to migrate to the subsurface and is therefore considered an REC." [PCS Ex. 9 at A03_03147 and A03_03119]. GEL also found RECs in the exterior wash bay. [PCS Ex. 9 at A03_03119]. GEL observed "[c]racks and significant staining by diesel fuel, detergents and container residues . . . on the concrete pad." [PCS Ex. 9 at A03_03113, A03_03136 and A03_03358, Photograph 11]. GEL noted that the berm around the pad did not prevent wash water from flowing off of the pad and into the soil. [PCS Ex. 9 at A03_03113 and A03_03147]. The sump in the exterior wash bay was "clogged with silt and container residue." [PCS Ex. 9 at A03_03147, A03_03358, Photograph 9]. In addition, "[t]ire tracks from trucks and/or trailers that had been cleaned were observed to pass through the sediment piles and stained areas suggesting residues and cleaning agents may potentially be tracked . . . onto the surrounding ROC surfaced parking areas." [PCS Ex. 9 at A03_03358, Photograph 10]. GEL also noted that in the main wash bay "[t]he concrete floor [was] etched by either the container contents and/or treatment chemicals used to clean the container interiors." [PCS Ex. 9 at A03_03145]. When GEL updated its report in 2008, the conditions were the same. [PCS Ex. 10 at A04_04626, A04_04642, Photograph 3]. GEL's soil and groundwater sampling, summarized in the April 16, 2007 report, indicated that there were elevated levels of iron and cadmium in the groundwater. [PCS Ex. 11 at A03_03367; Trial Tr. 380:25-381:8]. GEL also concluded that there were elevated levels of SVOCs and metals in the soil at the Allwaste parcel. [PCS Ex. 11 at A03_03366-67, A03_03373-5; Trial Tr. 380:17-24].

151. Allwaste's operations on the Site ceased on March 19, 2008. [Trial Tr. 3051:11-13]. On March 20, 2008, Allwaste moved to a new facility in North Charleston. [Trial Tr. 3051:11-

13; Allwaste Ex. 3]. Before leaving the Site, Allwaste pumped water out of the trenches and sumps. [Trial Tr. 1326:14-16]. According to Warren, the facility manager, Allwaste did not attempt to dig out the solid material that had accumulated in the sumps and trenches. [Trial Tr. 3064:4-13]. Allwaste removed its equipment from the Site between April and September 2008. [Trial Tr. 1326:8-16].

152. By deed recorded May 28, 2008, Allwaste conveyed its property at the Site to Ashley. [Allwaste Ex. 1].

153. Ashley's insurance policy covers both Allwaste and Allwaste's parent corporation as additional named insureds. [PCS Ex. 48 at A10_01242; PCS Ex. 49 at A10_01240; Trial Tr. 722:10-723:1]. Coverage under Ashley's policy is, however, excluded for certain contaminants identified in the policy including arsenic, iron, dieldrin, PAHs, cadmium and lead. [PCS Ex. 48 at A10_01243; Trial Tr. 729:2-11].

154. The Allwaste parcel and the two acres formerly leased by Allwaste are contaminated with lead and arsenic above the proposed remediation levels. [PCS Ex. 226 at PCS002_002580-81; PCS Ex. 227 at A 00287, A 00292 and Figs. 3-3a, 3-4a; PCS Ex. 120 at 1; Ash. Ex. 194 at Drawing 2, A04_04879; Trial Tr. 672:17-673:6].

155. If any leaks occurred from Allwaste's business activities, those releases contributed little to the need for remediation. [Ash Ex. 274 at 11-13; PCS Ex. 194, Drawings 8-11]. Allwaste did not introduce any lead, arsenic, or cPAHs to the Site.

I. RHCE Tenancy

156. On December 29, 1990, the Holcombe and Fair Parties entered into a Contract of Sale with RHCE for two acres of land at the Site. [Holcombe and Fair Parties Ex. 3 at 3; Trial Tr.

2594:4-2597:8]. This contract was executed by Hood, who is the President of RHCE. [PCS Ex. 71 at RCHE000071].

157. In July of 1991, Hood and RHCE were informed by way of a letter authored by GEL that the groundwater on the Site contained elevated levels of nitrates and sulfates "indicative of impact." [PCS Ex. 134 at HF000543]. The letter noted that agencies "could require further assessment," but indicated that this would not affect using the property for the parking of commercial vehicles and containers on a layer of ROC. [PCS Ex. 134].

158. In December 1991, Landmark Construction excavated a 1380 cubic foot pond, installed two fifty-foot asphalt driveways, stripped six inches of topsoil, graded and proof rolled the land, and extended sewer and water lines at the parcel RHCE contracted to purchase. [City Ex. 17 at 16; PCS Ex. 91 at 000030; PCS Ex. 93 at 000722]. This work was directed and paid for by RHCE. [PCS Ex. 90 at 000028; PCS Ex. 91 at 000030; PCS Ex. 93 at 000028]. The construction of a detention pond on the Site improved surface runoff. [Trial Tr. 479:7-14].

159. On January 15, 1992, the Holcombe and Fair Parties conveyed the two acres of the Site to Hood rather than RHCE. [RHCE Ex. 2; PCS Ex. 71 at RCHE000071-73].

160. Since 1992, RHCE has leased the parcel from Hood and operated a dropyard on the Site. [RHCE Exs. 5-7; Trial Tr. 1869:13-23; PCS Ex. 1 at 4]. EPA and DHEC are aware of this use and have not asked RHCE to cease operations. [Trial Tr. 505:5-12].

161. Sometime between 1994 and 1997, RCHE filled in the detention pond on the parcel and covered it with ROC. [Trial Tr. 2358:22-2359:23].

162. No evidence exists that a release of motor oil or gear oil occurred on the RHCE parcel. [Trial Tr. 1877:15-22]. There is also no evidence that hazardous materials or containers were ever

present on the RHCE parcel. [Trial Tr. 506:12-14]. RHCE did not introduce any lead, arsenic, or cPAHs to the Site.

163. The RHCE parcel is currently covered with a layer of ROC. [PCS Ex. 4, Fig. 9-9].

164. The RHCE parcel is currently zoned heavy industrial by the City. [Trial Tr. 501:5-9, 773:5-7]. However, the RHCE parcel is contaminated with lead and arsenic above the proposed residential remediation levels [PCS Ex. 120 at 3; PCS Ex. 226 at PCS002_002580-81; PCS Ex. 227 at A 00287, A 00292, Fig 3-3a & 3-4a; Trial Tr. 672:17-673:2 and 1875], and the proposed remediation plan includes remediation of the RHCE parcel to residential standards. [PCS Ex. 200 at 3; PCS Ex. 213, Drawing 8]. The residential standards are 22.5 parts per million for arsenic and 400 parts per million for lead. [Trial Tr. 771:21-25].

J. City of Charleston Ownership Period (1991-present)

165. On October 22, 1991, the Charleston City Council approved a bill authorizing the Mayor to accept a quitclaim deed on behalf of the City for the Milford Street extension. [PCS Ex. 70 at C000024]. The bill stated that the City would own "all of Milford Street." [PCS Ex. 70 at C000024].

166. The Holcombe and Fair Parties, as grantors, transferred the Milford Street extension to the City by quitclaim deed dated September 30, 1991. [PCS Ex. 69]. Through the deed, the Holcombe and Fair Parties "remised, released, and forever quit-claimed" the property to the City. [PCS Ex. 69 at 1]. The Holcombe and Fair Parties retained no interest in the premises, as the deed provided that the Grantors shall not "at any time hereafter, by any way or means, have, claim, or demand any right or title to the aforesaid premises or appurtenances, or any

part or parcel thereof, forever." [PCS Ex. 69 at 2]. The deed makes no provision for the property to revert back to the Holcombe and Fair Parties. Fair testified that the 1991 deed resulted in the City owning the "road and the land under it." [Trial Tr. 2658:23-2659:3].

167. The City's interest does not include the turnaround at the end of the Milford Street extension. [Trial Tr. 2779:17-2780:8]. In the 1991 deed, the City agreed to abandon the turnaround in exchange for "owning all of Milford Street as shown on the plat" attached to the deed. [PCS Ex. 69 at 1].

168. The Milford Street extension is fifty feet wide and consists of 1.28 acres. [PCS Ex. 1 at 4; PCS Ex. 69; PCS Ex. 188; Ash. Ex. 194 at 2]. The Milford Street extension includes a twenty-five foot wide, paved roadway and drainage swales on either side of the road. [PCS Exs. 69 and 188]. The Milford Street extension runs through the Site and allows access to the leased and sold tracts. [PCS Ex. 4, Fig. 9-9]. A portion of Milford Street runs through soil contaminated with lead and arsenic above the proposed remediation levels because of the historic fertilizer manufacturing operations at the site. [PCS Ex. 226 at PCS002_002580-81; PCS Ex. 120 at 2; PCS Ex. 227 at A 00287, A 00290, A 00292-6, Figs. 3-3a, 3-3d, 3-4a, 3-4b, 3-4c, 3-4d and 3-4e; PCS Ex. 4 at Fig. 6-1; Ash. Ex. 194 at A04_04879]. No part of the construction of the road was paid for or directed by the City. [Trial Tr. 2656:2-2657:9].

169. The City continues to have an interest in the Milford Street extension. [Trial Tr. 129:17-22].

170. There is no evidence that anyone notified the City of the contamination on the Site prior to the City's acquisition of the road. [*See* Trial Tr. 129:2-5]. In addition, the City did not investigate the environmental condition of the property before taking its interest in the

Milford Street extension because it was not customary for a municipality to conduct an environmental investigation prior to accepting a dedication of a right-of-way or deed of a road at the time. [Trial Tr.127:22-128:21].

171. No regulatory agency has called on the City to take any action with regard to the contamination under the Milford Street extension. [Trial Tr. 129:6-9].

172. The pavement on the Milford Street extension acts as a cap over that portion of the Site, precluding erosion of the contaminated soil, preventing human contact with the soil under the road, and preventing stormwater from reaching the soils under the road, which would cause contaminants to leach into the groundwater. [Trial Tr. 479:15-22].

173. Although the pavement on the Milford Street extension will be removed as part of the remediation of the Site, the expected future use of the Site requires the removal of the Milford Street extension for the construction of new roads. [Trial Tr. 296:3-297:5].

174. There was no evidence presented at trial that the City has contributed any arsenic, lead, or other contaminant of concern to the Site, or has engaged in earth moving activities on the Site.

175. The City did not acquire the Milford Street extension to make a profit. [Trial Tr. 129:17-22].

176. The City has taken substantial steps to enable the Magnolia Development project to put the Site back to productive use. [Trial Tr. 101:10 - 102:13]. This includes the passing of a Tax Increment Financing ("TIF") ordinance to provide funds for the redevelopment, to be repaid with the incremental increase in taxes from the improved property. [Trial Tr. 65:12-24, 68:23, 69:16, 103:21-105:2 and 108:21-109:7]. As of the date of trial, the City had issued $15,600,000 worth of TIF bonds for the project, out of an available $140,000,000 in TIF

bonds, and $30,000,000 in municipal improvement bonds. [Trial Tr. 65:12-24, 68:23, 69:16, 103:21-105:2 and 108:21-109:7].

177. At the time of trial, the City's budget was experiencing a significant deficit due to decreased revenues. [Trial Tr. 3087:15-3088:12]. The City's deficit for fiscal year 2009 was $2,200,000, which required the City to expend reserves in that amount. [Trial Tr. 3087:15-3088:12]. To avoid further invading its reserves in 2010, the City cut services in several areas and has imposed minimum five-day furloughs on all City employees. [Trial Tr. 3089:4-13 and 3090:8-3092:9].

K. Ashley's Ownership (2002-Present)

178. Ashley is a South Carolina limited liability company. The principals of Ashley are Cherokee Investment Partners ("Cherokee"), Craig Briner, Jim Lumsden, and Robert Clement. [Trial Tr. 63:14-20; Ash. Ex. 116 at A01_00281 and A01_00282]. Cherokee is a large investment fund, [Trial Tr. 149:19-23, 183:21-23], that has dedicated a billion dollar fund to the acquisition of Brownfields[3] properties, [Trial Tr. 520:9-20].

179. In 2002, after the passage of the Brownfields Amendments, Ashley initiated its participation in the Magnolia Development project. [Ash. Ex. 224 at 1]. Magnolia is planned as a sustainable, mixed-use development. [Ash. Ex. 224 at 1]. To date, Cherokee has invested more than $50,000,000 in acquiring properties for the Magnolia Development project. [Trial Tr. 184:11-16].

180. To oversee the environmental aspects of all of the parcels of land comprising the Magnolia

[3] CERCLA defines a brownfields property as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C. § 9601(39)(A).

Development project, including the Site, Ashley retained the services of Scott Freeman ("Freeman"), an environmental engineer with experience on over thirty Superfund sites and familiarity with the Brownfields Amendments relating to the Bonafide Prospective Purchaser ("BFPP") defense. [Trial Tr. 139:10-13, 538:8-25, 582:18-583:10, 583:21-584:17]. Ashley assigned Freeman the responsibility of ensuring that Ashley complied with all BFPP requirements. [Trial Tr. 534:24-535:5].

181. Since purchasing the Site, Ashley has provided security and conducted periodic inspections of the Site. [Trial Tr. 595:10-22; Ash. Ex. 227]. The Site has been fenced, gated, and placarded with no-trespassing signs to prevent unauthorized entry and potential exposure to contaminants. [Trial Tr. 140:3-8].

182. GEL prepared a September 25, 2003 Phase I Environmental Site Assessment for Ashley prior to Ashley's purchase of the Site. [Ash. Ex. 110]. This Environmental Site Assessment incorporated EPA's October 31, 2002 Final Feasibility Study Report. [Ash. Ex. 110].

183. On November 23, 2003, Ashley notified EPA that it had acquired a portion of the Site and explicitly requested that EPA inform Ashley if EPA desired "specific cooperation, assistance, access or the undertaking of any reasonable steps with respect to the Site." [Ash. Ex. 114].

184. On November 24, 2003, Holcombe Enterprises and Fair conveyed 27.62 acres of the Site to Ashley. [Entry 118 ¶ 9]. The contractual documents for this sale provided that Ashley would assume existing leases with tenants. [Ash. Exs. 94, 113].

185. On February 26, 2004, Ashley responded to a request for information from EPA. [Ash. Ex. 116].

186. In 2004, GEL conducted a pre-design site characterization study for Ashley, collecting 452

soil samples from 159 soil boring locations on the Site at depths of one to five feet for the purpose of more fully characterizing and delineating the areas of elevated arsenic and lead at the Site. [Ash. Ex. 140 at A00271-A00273]. The GEL report does not mention the various construction activities undertaken by the Holcombe and Fair Parties on the property, such as the construction of the road and the capping of the Site with ROC. [Trial Tr. 465:9-15; PCS Ex. 259]. The GEL report also does not address the Holcombe and Fair Parties' construction of three detention ponds on the Site between 1992 and 1999. [PCS Ex. 4 at Fig. 4-1].

187. A triangular lot to the west of the Allwaste parcel, leased by Ashley to Allwaste from 2003 to 2008, was not completely covered in crushed rock in 2004. [PCS Ex. 22 at A 00283, Fig. 1-2]. On other portions of the Site, the crushed rock cover was degraded. [Trial Tr. 2031:14-2032:10].

188. Ashley knew "there were occasions of midnight dumping" on the Site. [Trial Tr. 265:1-2]. Although the leased parcels were fenced, the gates were not locked until after the tenants vacated. [Trial Tr. 263:8-23; Ash. Ex. 169 at A01_07422].

189. In June 2006, Freeman walked the Site with Ashley Expert Jack Riggenbach ("Riggenbach") and noticed a thirty foot by five foot area of stained soil. [Trial Tr. 554:10-555:3 and 1291:10-1292:5; Ash. Ex. 169; Ash. Ex.172 at A01_05742 and A01_05748]. Freeman thought that it "looked like . . . a surface spill . . . or was related to the Site." [Trial Tr. 554:22-25; Ash. Ex. 169 at A01_07422]. Freeman acknowledged that "[he] wasn't sure at the time whether that was a stain or a spill" and that he asked GEL to assess the problem. [Trial Tr. 610:8-14 and 806:19-807:6]. GEL took a sample of the soil and tested it for lead

and arsenic, but no other contaminants. [Ash. Ex. 172 at A01_05742; Trial Tr. 1359:14-1360:10]. Because the sample was found to contain lead and arsenic, Freeman concluded that the stain was not a spill, but instead was related to the past contamination of the Site and covered it with ROC. [Trial Tr. 610:8-21].

190. Freeman, testified that he began "paying attention" to a pile of debris onsite in 2006. [Trial Tr. 552:8-14 and 552:24-553:15]. However, "there was no effort . . . made to identify what was in the trash pile, what were the characteristics of that trash pile, or to remove the trash pile." [Trial Tr. 2439:3-6]. The trash pile contained a barrel, tires, and discarded vehicles. [PCS Ex. 18 at A01_05783, A01_05787, A01_05790 and A01_05794; Trial Tr. 733:3-23].

191. Ashley granted Site access to EPA in 2007. [Ash. Ex. 188 at 2].

192. On April 13, 2007, a Phase I Environmental Site Assessment was conducted on the Allwaste Parcel. [Ash. Ex. 179]. On April 16, 2007, a Soil and Groundwater Investigation was conducted on the Allwaste Parcel. [Ash. Ex. 180]. On February 29, 2008 the Phase I Environmental Site Assessment on the Allwaste Parcel was updated. [Ash. Ex. 193].

193. In March 2008, PCS experts Wayne Grip ("Grip") and Dr. Brian Murphy ("Murphy") conducted an investigation of the Site, excluding the Allwaste parcel, on behalf of PCS. [Trial Tr. 1488:25-1489:1]. The investigation included taking soil and sediment samples from the surface and subsurface. [Trial Tr. 1488:25-1489:1]. During this investigation, Murphy observed areas where the ROC had eroded away, exposing contaminated soil. [Trial Tr. 1488:25-1489:1].

194. On March 27, 2008, Ashley submitted a Removal Action Work Plan for the soil and sediment at the Site to EPA and DHEC. [Ash Ex. 195].

195. In June 2008, Ashley retained an environmental consulting firm to demolish all remaining structures on the Allwaste parcel. [Trial Tr. 561:14-565:1]. No underground demolition activities were conducted. [Trial Tr. 561:14-565:1]. When the buildings were demolished, Ashley left in place the cement pads, sumps, trench, and underground pipes. [Trial Tr. 564:5-565:1]. The demolition of the buildings permitted runoff to collect in the pads, the sumps, and the trench. [Trial Tr. 400:20-23 and 3054:11-17]. This is because there was no longer any pumping equipment in place to remove the water. [Trial Tr. 400:20-23 and 3054:11-17].

196. Hutto testified that releases could occur from the sumps. [Trial Tr. 400:20-401:13]. Freeman knew that the sumps and pads posed a threat to the environment in the summer of 2008. [Trial Tr. 766:13-16]. According to Freeman, Ashley had a protocol in place that required it to demolish concrete slabs and to look under the slabs "to make sure that there weren't any more environmental conditions that we need to be concerned about." [Trial Tr. 565:17-21, 761:2-5; Ash. Ex. 170]. This protocol was not followed on the Allwaste parcel. [Trial Tr. 565:2-566:16]. After the buildings were torn down, Freeman walked the Allwaste parcel, [Trial Tr. 756:7-15], but he did not stop to take a "detailed look" at the pads, sumps, or trenches, [Trial Tr. 758:18]. In passing, he saw what "appeared to be some dirt around or in those trenches," [Trial Tr. 567:3-23, 757:11-20], and cracks in the cement pads, [Trial Tr. 757:21-22]. Freeman left the property without taking additional action to protect against potential releases of hazardous substances. [Trial Tr. 757:23-758:17]. PCS expert Marie BenKinney ("BenKinney") testified that there was a threat of release of hazardous substances from the sumps at the Allwaste parcel. [Trial Tr. 2419:20-2421:19].

197. In 2008, Ashley removed the debris pile from the main portion of the Site and completed hazardous waste manifests. [PCS Ex. 19]. The hazardous waste manifests show that Ashley removed hazardous substances from the Site, including a cleaning liquid containing hydrochloric acid and waste paint. [PCS Ex. 19 at A05_01238, A04_05365, A04_05368, A04_05370, A04_05376 and A04_05380].

198. On September 3, 2008, Ashley wrote a letter to the EPA acknowledging that the Holcombe and Fair Parties could be liable for response costs, and that EPA has "insiste[d] on asserting a claim for cost reimbursement against Holcombe and Fair." [PCS Ex. 256 at 2]. The basis of that claim is their "installation of a roadway and storm water detention ponds, and covering the Site with crushed limestone rock." [PCS Ex. 256 at 6]. In this letter, Ashley stated that because of the contract between Ashley and the Holcombe and Fair Parties, Ashley would ultimately be responsible for "substantially all expenditures for EPA's past costs that EPA would recover from Holcombe and Fair." [PCS Ex. 256 at 2]. Ashley stated that if the EPA insisted on pursuing a claim against the Holcombe and Fair Parties it would discourage Ashley's future development efforts. [PCS Ex. 256 at 6]. Ashley stated that its "actions to secure an alternative source of repayment of past costs [through the within lawsuit] should provide adequate consideration to secure a release of Ashley's indemnitees." [PCS Ex. 256 at 5].

199. In July 2009, PCS's consultant, Exponent, conducted a second round of sampling focusing on the land where the debris pile was located, and the Allwaste parcel. [PCS Ex. 1 at 13; PCS Ex. 3 at 1; PCS Ex. 4 at 8]. Exponent took three samples of soil that had been under the debris pile. [PCS Ex. 3 at 6; Trial Tr. 858:12-14, 859:15-20 and 1490:17-1491:16]. The

sampling results indicated the presence of hydrocarbons, and elevated levels of benzo(a)pyrene and other contaminants. [PCS Ex. 3 at 6; Trial Tr. 858:12-14, 859:15-20 and 1490:17-1491:16]. When these samples were taken, debris including buckets, tires, and a bottle of engine oil that contained fluid remained on the Site. [PCS Ex. 3 at 2; PCS Ex. 7 at 5].

200. Exponent also conducted surface and subsurface soil sampling, and investigated the condition of the cement pads, sumps, and trench on the Allwaste parcel. [PCS Ex. 3 at 1]. Hazardous substances were found in the soil, sediment, and water on the Allwaste parcel. [PCS Ex. 7 at Table 2; PCS Ex. 3 at Table 4]. The sump contamination was not limited to petroleum products. [Trial Tr. 2433:25-2434:1; PCS Ex. 7 at Table 2; PCS Ex. 3 at Table 4]. The sediments in the main building sump were contaminated with metals, volatile organic compounds ("VOCs"), and semi-volatile organic compounds ("SVOCs"). [Trial Tr. 2418:14-25]. The water was contaminated with metals and VOCs. [Trial Tr. 2419:1-3]. Sediment and water from the sump in the hazardous materials storage shed were contaminated with VOCs, solvents, chlorinated solvents, and phthalates. [Trial Tr. 2419:10-15]. "[I]n the sumps there are other chemicals that are also considered hazardous substances under the regulations. . . . That would mean that the material [i]n that sump is co-mingled and would not be subject to the petroleum exclusion." [Trial Tr. 862:6-9, 2465:18-2466:2]. The exterior wash bay sump contained similar constituents. [Trial Tr. 2419:4-9].

201. It is likely that there were releases from the sumps and the pads on the Allwaste property after Ashley tore down the protective structures in 2008. [Ash. Ex. 271 at A01_07865,

A01_07867; Trial Tr. 761:2-5]. This is because there was standing water on the pads and in the sumps, which overflowed with some regularity. [Trial Tr. 2422:13-22 and 2436:20-2437-8; Ash. Ex. 271 at A01_07866; PCS Ex. 3 at 2-3; PCS Ex. 7 at 5]. When the sumps overflowed, the water reached cracks in the pads and even the edge of the pads. [PCS Exs. 3 at 2-3; 7 at 5].

202. In September 2009, Ashley retained GEL to perform an evaluation of the sumps on the Allwaste parcel. [Ash. Ex. 271]. GEL's investigation entailed the following: 1) observing the sumps for eight hours to see if the water levels remained constant; and 2) analyzing the depth of cracks in sumps. [Ash. Ex. 271 at A01_07866 and A01_07867]. After completing these tasks, GEL washed the sumps and filled them with concrete. [Ash. Ex. 271 at A01_07865 and A01_07867].

203. GEL concluded that the only water loss was due to evaporation and that the sumps were not leaking into the subsurface. [Ash. Ex. 271 at A01_07866]. GEL's report indicated a "potential for leakage" in three sumps and the trench. [Ash. Ex. 271 at A01_07867-8; Trial Tr. 398:6-18 and 405:23-25]. Hutto acknowledged at trial that there is a crack at least twelve inches deep in one sump. [Trial Tr. 406:5-20].

204. GEL's investigation was insufficient to establish that the structures did not leak. GEL measured the water levels in only some of the sumps and did not analyze the trench in the main wash bay or the sump in the eastern portion of that building. [Trial Tr. 402:9-24, 403:9-19]. GEL also disregarded its measurements for the sump in the hazardous materials storage shed because the water level rose in that sump during the course of the test. [Trial Tr. 404:3-405:7]. Despite acknowledging that there were cracks in the cement pads, and

evidence of water on the pads, GEL did not evaluate the cracks or the possibility that hazardous substances had penetrated those cracks. [Trial Tr. 405:13-18]. Because GEL did not evaluate the sumps over a more extended period of time, it could not measure "any kind of loss that might be occurring through leaching or leaking through the sumps." [Trial Tr. 2437:15-20].

205. On October 8, 2009, Ashley submitted to EPA and DHEC a revised cost estimate for the removal action at the Site. [Ash. Ex. 214]. This revised cost estimate proposed to dispose of all soils and sediments contaminated above remediation levels off-site as opposed to consolidating some contaminated soils and sediments on-site for treatment. [Ash. Ex. 214]. The cost estimate for the new approach was $8,021,240. [Ash. Ex. 214]. The estimated cost of the old approach involving the on-site consolidation of some contaminated soils and sediments was $8,778,221.

206. No manufacturing operations have been conducted on the Site during Ashley's ownership of the Site. [Ash. Ex. 258 at 3; Trial Tr. 140:23-141:1].

207. Ashley has no direct or indirect familial relationship with other PRPs. [Trial Tr. 141:14-145:2 and 181:13-182:9].

II. CONCLUSIONS OF LAW

A. Rule 52(c) Motions

1. Allwaste's Motion for Judgment on Partial Findings

At issue in Allwaste's Motion for Judgment on Partial Findings is whether the release and indemnity provisions of the February 19, 2007 Purchase and Sale Agreement between Allwaste and Ashley bar all actions against Allwaste. The parties do not dispute that Ashley has indemnified

Allwaste against "any and all claims" related to the Site. [Entry 517 at 2; PCS Proposed Findings ¶ 381]. PCS contends that the effect of this indemnification is to shift the financial responsibility for any environmental contamination that Allwaste is found responsible for to Ashley. [PCS Proposed Findings ¶ 388].

CERCLA permits parties to shift the burden for paying response costs through contractual indemnification and release agreements. *See* 42 U.S.C. § 9607(e)(1) ("Nothing in [CERCLA § 107(e)(1)] shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under [CERCLA § 107]."); *see also C.P. Chem., Inc. v. Exide Corp., Inc.*, 14 F.3d 594 (Table), No. 93-1426, at *1 (4th Cir. Dec. 28, 1993) (stating that CERCLA liability can be allocated by contract); *Dent v. Beazer*, 993 F. Supp. 923, 939 (D.S.C. 1995) ("Under CERCLA, parties are free to contractually shift the burden for liability for response costs among themselves."). "A private party contract which apportions CERCLA liability must contain a provision which allocates risks of this nature to one of the parties." *Dent*, 993 F. Supp. at 939 (citing *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1456 (N.D. Ind. 1990)). This is because "[s]uch agreements cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability." *Vill. of Fox River Grove v. Grayhill, Inc.*, 806 F. Supp. 785, 792 (N.D. Ill. 1992).

Federal law governs the validity of releases of federal causes of action. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1453 (4th Cir. 1990) (citing *Gamewell Mfg., Inc. v. HVAC Supply, Inc.*, 715 F.2d 112, 114 & n. 4 (4th Cir. 1983)). Federal courts are competent to formulate a federal rule of decision that incorporates state law when making determinations related to the adjudication of federal claims. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-95 (1973).

A joint tortfeasor may recover from another joint tortfeasor "unless the other previously had a valid settlement and release from the plaintiff." Restatement (Third) of Torts § 23(a). This means that an individual or entity that settles with the plaintiff before final judgment is not liable for contribution to others for the injury. Restatement (Third) of Torts § 23 cmt i. According to the Restatement, where a tortfeasor has settled with the plaintiff before the initiation or conclusion of a law suit, the settling tortfeasor should be dismissed even if contribution claims have been made against the settling tortfeasor, because these contribution claims are barred by law. Restatement (Third) of Torts § 24 cmt. e. South Carolina law contains a similar rule: "When a release . . . is given in good faith to one of two or more persons liable in tort for the same injury . . . [the release] discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." S.C. Code Ann. § 15-38-50. Thus, if Allwaste has been released from liability by Ashley, it must be dismissed from the case as no contribution claim may be made against Allwaste.

A release is interpreted according to the general principles of contract construction. *Dent*, 993 F. Supp. at 939 (citing *Campbell v. Beacon Mfg Co.*, 438 S.E.2d 271, 272 (S.C. Ct. App. 1993). If the language of the release is "clear and unambiguous, a court should interpret the release according to its plain meaning." *Acstar Ins. Co. v. Harden*, 16 F. App'x 213, 216 (4th Cir. 2001); *see also Ecclesiastes v. Outparcel Assoc., LLC*, 649 S.E.2d 494, 502 (S.C. Ct. App. 2007). However, if the terms of the release are ambiguous, a court may look to extrinsic evidence to determine the meaning of a release. *Acstar*, 16 F. App'x at 216; *Ecclesiastes*, 649 S.E.2d at 502.

The release between Ashley and Allwaste "fully and finally releases and discharges [Allwaste] from any and all Claims and Liabilities, whether for contribution or otherwise." [Ash. Ex. 177 at 22]. The word "claim" is defined in the Purchase and Sale Agreement to include: "any

proceeding . . . arising out of (1) the Columbia Nitrogen CERCLA site . . . and/or (4) the pending litigation styled *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, Civil Action No. 2:05-2782." [Ash. Ex. 177 at 19]. The indemnity provision of the Purchase and Sale Agreement provides that Ashley shall "indemnify, defend and hold harmless" Allwaste against "any and all claims, and liabilities related to or arising in connection with claims" and specifically states that it is intended to cover CERCLA claims. [Ash. Ex. 177 at 22]. Based upon the foregoing, the court finds that the language of the February 19, 2007 Purchase and Sale Agreement between Ashley and Allwaste unambiguously releases Allwaste from any liability associated with the Site. Allwaste's Motion for Judgment on Partial Findings [Entry 517] is **granted.** All claims for contribution against Allwaste are dismissed and Ashley must bear any allocation assessed against Allwaste.

2. The Holcombe and Fair Parties' Motion for Judgment as a Matter of Law[4]

At issue in the Holcombe and Fair Parties' Motion for Judgment as a Matter of Law is whether the release provision of the November 24, 2003, Fourth Amendment to the Contract of Sale among Holcombe Enterprises, Fair, and Ashley bars all contribution claims against the Holcombe and Fair Parties related to the Site.

As was previously stated, CERCLA permits parties to shift the burden for paying response costs through contractual indemnification and release agreements. *See* 42 U.S.C. § 9607(e)(1). The same legal principles that applied to the Allwaste release and indemnification agreements apply here.

The release between Ashley and the Holcombe and Fair Parties provides:

[4] The court recognizes that the Holcombe and Fair Parties' Motion for Judgment as a Matter of Law is actually a motion for judgment on partial findings made pursuant to Federal Rule of Civil Procedure 52(c) because a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50 is not a proper motion in a non-jury case. *In re Modanlo*, 413 B.R. 262, n.5 (Bankr. Md. 2009).

> Release of Claims by Purchaser: Purchaser . . . waives, releases and discharges the Seller from *any and all liabilities, actions, causes of actions, claims and demands whatsoever*, whether or not well founded in fact or in law, *including without limit response costs incurred under the Environmental Laws*, and from any suit or controversy arising from or in any way related to the existence of Hazardous Materials in or with respect to the Property and from any Hazardous Material Claims arising from or related in any way to the Property. . . .

[Ash. Ex. 94 at 00458, ¶ 5(b)(emphasis added)].[5]

Prior to trial, the court denied the Holcombe and Fair Parties' motion for summary judgment based upon the release from Ashley because the scope of the release was unclear. [Entry 385]. However, Ashley does not contest that the release has the effect of preventing Ashley from recovering money from any of the Holcombe and Fair Parties to clean up the Site. Ashley's manager, Robert Clement, testified that the intent of the release was that Ashley would not be able to sue Holcombe, Fair, or Holcombe Enterprises for any environmental contamination claims. [Trial Tr. 276:7-17 and 276:21-277:2]. Counsel for Ashley stipulated on the trial record that:

> Ashley does not dispute that its release of Holcombe and Fair was intended to extend to all of the Holcombe and Fair Parties, that is to Mr. Holcombe individually, as well as the Holcombe Enterprises, L.P. and to Mr. Henry Fair, and to all of the sites formerly owned by Holcombe and Fair. So our release extends to all of those parties and to all of that property.

[Tr. at 1410:24-1411:7]. PCS has no objection to Ashley bearing financial responsibility for any remediation costs allocated to the Holcombe and Fair Parties. [Trial Tr. 3220:8-10].

The court notes that in many CERCLA cases, courts have found release and indemnification agreements to shield parties from financial responsibility when the release language was much less specific than in the present case. In *Dent*, this court found that under South Carolina law, a lease

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[5] In a separate provision, Ashley indemnified Fair and Holcombe Enterprises for any claim brought by EPA up to $2.7 million with $200,000 of the first $400,000 to be paid by the Holcombe and Fair Parties. [PCS Ex. 35 at § 5(d)]. This provision is inapplicable in this case because this case was not brought by the EPA.

agreement that the lessee would save the lessor harmless from "any and all claims arising from [the lessor's] use of the leased property" covered CERLCA claims even though the agreement was entered into prior to the enactment of CERCLA. 993 F. Supp. at 939-40. In *Rodenbeck*, the Northern District of Indiana upheld a contractual provision which provided that one of the parties would be released "from all claims and obligations of any character or nature whatsoever arising out of or in connection with said agreement" as being sufficient to indemnify against claims arising under CERCLA. 742 F. Supp. at 1448. In *Village of Fox River Grove*, the Northern District of Illinois held that a general release between a CERCLA plaintiff and a third-party defendant, which was entered into prior to the enactment of CERCLA, barred third-party contribution claims. 806 F. Supp. at 785. In *Joslyn Mfg. Co. v. Koppers*, 40 F.3d 750 (5th Cir.1994), the Fifth Circuit found that broad language in indemnification agreements indicated that the agreements were intended to cover all forms of liability, including liability under CERCLA, even though environmental liability under CERCLA was not contemplated at the time of contracting. *Id.* at 754. *See also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 327 (7th Cir. 1994) (recognizing that a party may contract to indemnify another for environmental liability even though CERCLA was not in existence at the time of contracting); *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1026-27 (N.D. Cal. 1990) (holding that an indemnification agreement that encompassed "all losses, damages and costs" resulting from any violation of law was sufficient to release the indemnitee from CERCLA liability even though the agreement was entered into prior to the enactment of CERCLA and did not specifically mention CERCLA).

The court finds that the language of the November 24, 2003, Fourth Amendment to the Contract of Sale among Holcombe Enterprises, Fair, and Ashley was intended to release all of the

Holcombe and Fair Parties from liability to Ashley for CERCLA claims related to the Site. The release at issue expressly states that the release includes response costs incurred by Ashley under the "Environmental Laws," which term is defined in the contract to include CERCLA. Because the Holcombe and Fair Parties have been released from liability by Ashley, the Holcombe and Fair Parties have been discharged "from all liability for contribution to any other tortfeasor." *See* S.C. Code § 15-38-50. The Holcombe and Fair Parties' Motion for Judgment as a Matter of Law [Entry 520] is **granted**. All claims against the Holcombe and Fair Parties for contribution are dismissed. The court finds that Ashley must bear any allocation assessed against the Holcombe and Fair Parties.

3. RHCE's Motion for Judgment on Partial Findings

At issue in RHCE's motion for judgment on partial findings is whether the RHCE parcel is contaminated and requires remediation, and whether RHCE is a PRP under CERCLA § 107.

i. *Whether RHCE's Property is Contaminated and Requires Remediation*

RHCE contends that its parcel is not a part of the Site at issue. As a result, RHCE contends that it cannot not be held liable for response costs. RHCE also contends that because its parcel is zoned heavy industrial and is not contaminated above heavy industrial remediation levels, it need not be remediated. The court disagrees.

Other courts have determined the scope of a CERCLA facility based upon such factors as the scope of response actions, the EPA's determination of what land is included in a facility, where hazardous substances have been disposed of, and how the plaintiff defines the scope of the facility in the complaint. *See e.g. United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (location where hazardous substances were disposed of and where government concentrated cleanup efforts was facility); *United States v. Atchison, Topeka & Santa Fe. Ry. Co.*, Nos.

CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW, 2003 WL 25518047, at *47 (E.D. Cal. July 15, 2003) (rejecting arguments similar to those made by RHCE); *Akzo Coatings Inc. v. Aigner Corp.*, 960 F. Supp. 1354, 1358-59 (N.D. Ind. 1996)(noncontiguous areas were one facility because EPA treated them as such); *United States v. Ottati & Goss*, 694 F. Supp. 977, 984 (D.N.H. 1988) (listing of two sites on the National Priorities List for unified response action determined facility).

The RHCE parcel is indeed part of the Site. Ashley's allegations in the complaint include the RHCE parcel as part of the Site. [Entry 209 ¶ 21]. In addition, EPA's investigations of the Site included investigation of the RHCE parcel. [PCS Exs. 216 at A 00858, 226 at Figs 2-1 and 2-2]. CERLCA affords EPA the authority to create and adopt a remediation plan. *See* 42 U.S.C. § 9617. While EPA has not yet adopted a final remediation plan for the Site, EPA's proposed remediation plan uses the residential standards for lead and arsenic as its remediation levels. [PCS Ex. 216 at 60]. EPA's proposed remediation plan includes remediation of RHCE's parcel because it is contaminated with lead and arsenic above the residential standards. [PCS Ex. 120 at 3; PCS Ex. 226 at PCS002_002580-81; PCS Ex. 227 at A 00287, A 00292, Figs. 3-3a and 3-4a]. Regardless of the RHCE parcel's zoning classification, EPA has the authority to decide and has decided that RHCE's parcel requires remediation. 42 U.S.C. § 9617.

ii. *Whether RHCE is a PRP*

RHCE argues that it cannot be held liable for contribution under CERCLA § 113 because it does not fall into any of the four categories of PRPs listed in 42 U.S.C. § 9607(a), CERCLA § 107(a). RHCE specifically argues that 1) it is a lessee, not an owner of the property; and 2) it cannot be held liable as an operator of the property because no release of a hazardous substance occurred

on its parcel during its tenancy.

In making its contribution claim against RHCE under § 113(f) of CERCLA, PCS must prove that RHCE is a responsible party under § 107(a) of CERCLA and demonstrate RHCE's equitable share of costs. *Minyard Enter., Inc. v. Se. Chem. & Solvent Co.*, 184 F.3d 373, 385 (4th Cir. 1999). The four categories of PRPs under CERCLA are:

> (1) the owner and operator of a facility;[6]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of;
>
> (3) any person who, by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances; and
>
> (4) any person who accepts, or accepted, any hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person.

42 U.S.C. § 9607(a)(1)-(4) (CERCLA § 107(a)(1)-(4)). RHCE currently leases of two acres of land on the Site. Thus, the issue is whether RHCE is an "owner" or "operator" under CERCLA § 107(a)(1) or (2). The statutory definition of "owner and operator" refers to "any person owning or operating [a] facility." 42 U.S.C. § 9601(20)(A).

Several district courts have found that lessees can be held liable as owners of facilities. *See, e.g., Louisiana v. Braselman Corp.*, 78 F. Supp. 2d 543, 551 (E.D. La. 1999) ("Even though [defendant] did not have title to the property, [defendant] was a lessee who asserted control over the property, and, as such, was an 'owner' under CERCLA § 107(a)(1)."); *Burlington N. Ry. Co. v.*

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[6] Although § 9607(a)(1) (CERCLA § 107(a)(1)) is written in the conjunctive, it has been interpreted in the disjunctive. *See, e.g., Long Beach Unified Sch. Dist. v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364, 1367 (9th Cir. 1994); *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 328 (2d Cir. 2000) (stating that "owner" liability and "operator" liability are "two statutorily distinct categories of potentially responsible parties.").

Woods Indus., Inc., 815 F. Supp. 1384, 1391-92 (E.D. Wash. 1993) ("Since [defendant] asserted control over the use of the property, [defendant] is an 'owner' for purposes of CERCLA § 107(a)(1) even though it is only a lessee."); *Pape v. Great Lakes Chem. Co.*, No. 93 C 1585, 1993 WL 424249 (N.D. Ill. Oct. 19, 1993) (". . . the lessee of a site where a release or threatened release of hazardous substances occurred is considered the 'owner' for purposes of CERCLA liability."); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1986) (holding that a lessee that operated a landfill was an "owner" under CERCLA because the lessee "had control over and responsibility for, the use of the property and, essentially, stood in the shoes of the property owner"). However, the Second Circuit in addressing this issue stated: "while the imposition of liability [on lessees] is surely correct, imposing owner liability instead of operator liability threatens to conflate two statutorily distinct categories of potentially responsible parties." *See Barlo*, 215 F.3d at 328. The court agrees with the Second Circuit that interpreting lessees as owners for the purposes of CERCLA makes CERCLA's imposition of liability on operators redundant and is contrary to the intentions of the drafters of CERCLA. Thus, RHCE, as a lessee, is not an "owner" for the purpose of imposing liability under CERCLA.

The court next considers whether RHCE is an "operator" for the purpose of imposing liability under CERCLA. In *United States v. Bestfoods*, 524 U.S. 51 (1998), the Supreme Court addressed the issue of whether parent corporations could be held liable under CERCLA for operating facilities that appeared to be under the control of subsidiaries, and clarified when a party can be held liable as an "operator" under CERCLA § 9607(a)(2). *See id.* at 65-67. The Court stated: "under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods*, 524 U.S. at 66. The Court went on to state that because of "CERCLA's concern

with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

The *Bestfoods* decision does not make clear whether the requirement that an operator must conduct operations related to pollution applies also to § 9607(a)(1). At least two federal courts have interpreted *Bestfoods* to require that all operators held liable for response costs under CERCLA must have conducted operations related to pollution. *See Barlo*, 215 F.3d at n.3 (stating that under no version of facts could the defendant be an operator under § 9607(a)(1) [CERCLA § 107(a)(1)] because it did not manage, direct or conduct operations specifically related to pollution); *United States v. Newmont U.S.A. Ltd.*, No. CV-05-020-JLQ, 2007 WL 2477361, at *2 (E.D. Wash. Aug. 28, 2007) (finding that the *Bestfoods* interpretation of operator liability applies to both CERCLA § 107(a)(1) and (2)).

The District Court of Maryland, however, has found that operators under § 9607(a)(1) need not conduct operations related to pollution, stating: "As a current owner and operator of the site where hazardous substances have been released, [the plaintiff] is itself a potentially responsible party (PRP), even if [the plaintiff] did not own the property at the time the hazardous waste disposal occurred." *Sherwin-Williams Co. v. ARTRA Grp., Inc.*, 125 F. Supp. 2d 739, 745 (D. Md. 2001) (citing 42 U.S.C. § 9607(a)(1); *Trinity Amer. Corp. v. EPA*, 150 F.3d 389, 395 (4th Cir. 1998)); *see also New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 16 F. Supp. 2d 460 (D.N.J. 1998) ("Compare CERCLA, 42 U.S.C. § 9607(a)(1) and (2) (including in its definition of PRP both the person who owned or operated the facility at the time of the disposal of a hazardous substance and the current owner or operator of a facility, regardless of when the disposal took place).") (decided prior to

Bestfoods).

The Fourth Circuit's ruling in *Trinity Amer. Corp. v. EPA*, 150 F.3d 389, 395 (4th Cir. 1998), indicates that CERCLA § 107(a)(1) does not require a disposal of hazardous materials by a current operator for liability to be imposed. In *Trinity*, a case decided after the *Bestfoods* decision, the Fourth Circuit stated that current owners need not have owned the property when pollution took place. *Id.* at 395. This implies that the same is true of current operators because they are listed in the same statutory category, § 9607(a)(1). There is no reason to distinguish between current owners and current operators when it comes to the extent of liability. The court finds that current operators of a CERCLA facility need not direct operations related to pollution to be held liable for response costs under CERCLA § 107(a)(1). *See* § 9607(a)(1). The court's conclusion is consistent with the mandate that courts construe CERCLA's provisions broadly to avoid frustrating the remedial purpose of the statute. *See Westfarm Assoc. Ltd. P'ship v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 677 (4th Cir. 1995) ("CERCLA is a comprehensive remedial statutory scheme, and [] the courts must construe its provisions liberally to avoid frustrating the legislature's purpose.").

Pursuant to *Bestfoods*, CERCLA § 107(a)(2), unlike § 107(a)(1), requires that a former operator direct operations related to pollution. 524 U.S. at 66-67. This distinction from § 107(a)(1) conforms with the text of CERCLA because in order for a party to be liable for response costs under § 107(a)(2), it must have owned or operated the facility "at the time of disposal of any hazardous substance." 42 U.S.C. § 9607(a)(2); *see also Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992) (a tenant can be held liable as "operator" under CERCLA § 107(a)(2) if it had "authority to control operations or decisions involving the disposal of hazardous substances at the Site" whether or not it exercised that authority).

The court turns to the issue of whether RHCE is a current "operator" of the Site and therefore a PRP. The record indicates that RHCE operates a drop yard on the Site. Because RHCE directs the day-to-day workings of the parcel it leases, RHCE is a current operator of the Site pursuant to CERCLA § 107(a)(1) and is a PRP.

In addition, under CERCLA § 107(a)(2), RHCE can be held liable as an operator of the Site at a time when the disposal of hazardous wastes occurred. The term "disposal" means the

> discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3); 42 U.S.C. § 9601(29). The Fourth Circuit has ruled that "§ 9607(a)(2) imposes liability not only for active involvement in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was 'spilling' or 'leaking.'" *Nurad*, 966 F.2d at 846. Disposals are not limited to one-time occurrences, but instead include times when hazardous materials are moved or dispersed. *See Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992). Specifically, "a 'disposal' may occur when a party disperses contaminated soil during the course of grading and filling a construction site." *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1511-12 (11th Cir. 1996).

The RHCE parcel is currently contaminated with lead and arsenic above EPA's proposed residential remediation levels. [PCS Ex. 120 at 3; PCS Ex. 216 at A 00861; PCS Ex. 226 at PCS002_002580-81; PCS Ex. 227 at A 00287, A 00292, Figs. 3-3a and 3-4a; Trial Tr. 672:17-673:2, 1875, 1879:20-1880:24 and 1597:4-9]. Black and Veatch's final feasability study indicates that most of the RHCE property will need to be remediated due to arsenic contamination. [PCS Ex. 226 at

PCS002_002580-81]. In 1991, RCHE commissioned the construction of a detention pond, two asphalt driveways, and grading and proof rolling of the parcel. Because the majority of the RHCE parcel is currently contaminated and the contamination on the Site is spotty, the court finds that the construction work commissioned by RHCE, which redistributed the soil, spread the contamination on the Site. RHCE's earth moving activities constitute a "disposal" under CERCLA. Thus, RHCE is a PRP pursuant to CERCLA § 107(a)(2). RHCE's Motion for Judgment on Partial Findings [Entry 521] is **denied**.

B. Ashley's CERCLA § 107(a) Claim

"Congress enacted CERCLA to protect public health and the environment from inactive hazardous waste sites." *Westfarm*, 66 F.3d at 677 (citing H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6119)). "CERCLA is a comprehensive remedial statutory scheme, and [] the courts must construe its provisions liberally to avoid frustrating the legislature's purpose." *Id.* CERCLA actions can be brought by the government or by private parties. *See* 42 U.S.C. § 9607(a).

To succeed in its claim against PCS under § 107(a) of CERCLA, Ashley must prove the following: 1) that the defendant [PCS] falls within one of the four classes of persons subject to CERCLA liability, 42 U.S.C. § 9607(a); 2) that a CERCLA "facility" exists, 42 U.S.C. § 9601(9); 3) that a "hazardous substance" has been "released" (or threatens to be released) from the defendant's facility, 42 U.S.C. §§ 9601(14), (22); 42 U.S.C. § 9607(a)(4); and 4) that the release or threatened release has caused the plaintiff to incur response costs that are "'necessary' and 'consistent with the national contingency plan,'" 42 U.S.C. § 9607(a)(4).

The term "hazardous substance" is defined in the Act as any substance that appears on any

one of six statutory lists of substances. *See* 42 U.S.C. § 9601(14). Based on sampling and analysis conducted by Ashley, PCS, and EPA, "hazardous substances," as defined pursuant to § 101(14) of CERCLA, 42 U.S.C. § 9601(14), including but not limited to, arsenic and lead, are present in the soil and groundwater on the Site. 40 C.F.R. § 302.4 at Table at 50. A "facility" is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). Because there are hazardous materials on the Site, the Site is a "facility" as defined by CERCLA.

As was previously noted, the list of PRPs includes "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). The record makes clear that CNC, predecessor to PCS, released arsenic and lead on the Site. Thus, PCS is a "person" subject to CERCLA liability because it is the successor of a corporation that owned and operated the facility when hazardous substances were disposed of. Entry 118 (PCS found to be successor to CNC); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992).

To recover response costs, Ashley must show that its claimed response costs were "necessary" and "consistent with the national contingency plan [NCP]." 42 U.S.C. § 9607(a)(4)(B). "Costs are 'necessary' if incurred in response to a threat to human health or the environment." *IIIT Indus., Inc. v. Borgwarner, Inc.*, File No. 1:05-CV-674, 2010 WL 1172533, at *26 (W.D. Mich. Mar. 24, 2010) (citing *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 703 (6th Cir. 2006)). Ashley's response costs in this case, which involved conducting Site assessments and submitting a remediation plan to EPA, were necessary to protect human health and the environment. The record demonstrates that the acidic conditions on the property and the presence of arsenic and

lead are harmful to the environment and pose a danger to human health.

A response action is "consistent with the NCP" if the action is in "substantial compliance" with 40 C.F.R. § 300.700(c)(5)-(6), and results in a "CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(I). "An 'immaterial or insubstantial' deviation, however, will not result in a cleanup that is 'not consistent' with the NCP." *IIIT Indus.*, 2010 WL 1172533, at * 26 (citing 40 C.F.R. § 300.700(c)(4)). Litigation-related costs are not recoverable under CERCLA. *Young v. United States*, 394 F.3d 858, 865 (10th Cir. 2005); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 482 (6th Cir. 2004); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 461 (1st Cir. 1992). "Costs otherwise necessary and consistent with the NCP may be unrecoverable if the steps taken were extravagant or otherwise unreasonably costly." *Nw. Mut. Life Ins. Co. v. Atl. Research Corp.*, 847 F. Supp. 389, 401 (E.D. Va. 1994).

The court has reviewed the submissions of Ashley in pursuing the remediation of the property. Ashley has separated out its litigation costs and does not seek recovery of these expenditures. [*See* Ash. Ex. 247]. The court finds that the past response costs incurred by Ashley were consistent with the NCP and were reasonable. [Ash Ex. 227; Trial Tr. 176:18-24, 584:25-587:2, 611:7-615:3 and 1295:11-1296:7]. The court finds that Ashley is entitled to recover its past response costs. With regard to future response costs, the court notes that there is no final remediation plan for the Site that has been approved by EPA. However, a government-approved remediation plan is not a prerequisite for the court's entry of an order allocating liability allocation. *Dent*, 993 F. Supp. at 949. To the extent that it later becomes disputed whether the final remediation plan for the Site is consistent with the NCP, the court will retain jurisdiction over the case to decide this issue.

C. Divisibility of Harm

Liability under CERCLA § 107(a) is joint and several if the harm is indivisible. *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988). Divisibility is a legal defense to joint and several liability under CERCLA in which a party makes "a causation-based argument that the cleanup costs at a single CERCLA facility should be divided between [a defendant] and [other] responsible part[ies]." *IIIT Indus.*, 2010 WL 1172533, at *24. PCS seeks a court finding that the harm at the Site is divisible. The burden is on PCS in seeking to avoid joint and several liability to prove that a reasonable basis for apportionment of the remediation costs exists. *Burlington Northern and Santa Fe. Ry. Co. v. United States*, 129 S. Ct. 1870, 1880-81 (2009).

The scope of liability under CERCLA § 107, 42 U.S.C. § 9607, is determined from "traditional and evolving principles of common law." *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983); *see also Burlington Northern*, 129 S. Ct. at 1881. "The universal starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts." *Burlington Northern*, 129 S. Ct. at 1881 (internal citations omitted).

> Under the Restatement, "when two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.

Id. (citing Restatement (Second) of Torts, §§ 433A, 881 (1976)).[7] Comment d to § 433A of the

[7] While comment c to § 875 of the Restatement indicates that a plaintiff must prove that each defendant was a "substantial factor" in causing a single harm in order for joint and several liability to attach, courts have not imposed this requirement in CERCLA cases due to "inconsistency with CERCLA's relaxed causation requirement." *See United States v. Atchison, Topeka & Santa Fe Ry. Co.*, Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228, 2003 WL 25518047, at *82 (E.D. Cal. July 15, 2003).

Restatement (Second) of Torts indicates that some harms are capable of division on a reasonable and rational basis when the evidence provides a divisor over which the harm can be divided.[8] Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After* Burlington Northern, 11 VT. J. ENVTL. L. 307, 332 (2009) (Restatement (Second) of Torts, § 433A cmt. d).

Not all harms can be apportioned. *Burlington Northern*, 129 S. Ct. at 1881. A party invoking the doctrine of divisibility is required to show that "(a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." *IIIT Indus.*, 2010 WL 1172533, at *24; *see also Burlington Northern*, 129 S. Ct. at 1881 (citing Restatement (Second) of Torts § 433A(1)(b) at 434 (1963-1964)).

Proving divisibility of harm at a CERCLA site in accordance with the Restatement approach can be difficult because of "the commingling of wastes, the migration of contamination over time, and other complex fact patterns." 8 Bus. & Com. Litig. Fed. Cts. § 95:24 (2d ed.) (citing *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985)). "Where causation is unclear, courts should not hasten to 'split the difference' in an attempt to achieve equity. Courts lacking a

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[8] Section 443 A, comment d states:

> There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. Thus where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can be made without injustice to any of the parties, the court may require it to be made. Such apportionment is commonly made in cases of private nuisance, where the pollution of a stream, or flooding, or smoke or dust or noise, from different sources, has interfered with the plaintiff's use or enjoyment of his land. Thus where two or more factories independently pollute a stream, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream.

Restatement (Second) of Torts § 433A cmt. d

reasonable basis for dividing causation should avoid apportionment altogether by imposing joint and several liability." *Atchison*, 2003 WL 25518047, at *84 (citing *United States v. Hercules, Inc.*, 247 F.3d 706, 718-19 (8th Cir. 2001); *United States v. Township of Brighton*, 153 F.3d 307, 319 (6th Cir. 1998)); *see also Burlington Northern*, 129 S. Ct. at 1881 (citing Restatement (Second) of Torts § 433A, cmt i. at 440 (1963-1964)) (when two or more causes produce a single, indivisible harm, "courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.").[9]

The divisibility issue presents an intensely factual analysis. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992). Divisibility can be based on a variety of factors including volumetric, chronological, or geographic considerations, as well as contaminant-specific considerations. *IIIT Indus.*, 2010 WL 1172533 at *878. (citing *Burlington Northern*, 129 S. Ct. at 1883). Equitable considerations are not taken into account in the apportionment analysis. *Burlington Northern*, 129 S. Ct. at 1882 & n.9.

Prior to the Supreme Court's ruling in *Burlington Northern*, the burden of proving divisibility was considered high and defendants were rarely successful establishing this defense. *See, e.g., United States v. Capital Tax Corp.*, 545 F.3d 525, 535 n.9 (7th Cir. 2008) ("[D]ivisibility is a 'rare scenario.'"); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 n.4 (8th Cir. 1995) (stating that it is difficult to establish that harm is divisible); *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901 (5th Cir. 1993)(defendants "rarely succeed" in proving a reasonable basis for apportionment); *Alcan*, 964 F.2d at 269 ("Alcan's burden in attempting to prove the divisibility of harm . . . is

[9] Comment i to § 433A indicates that certain kinds of harms are incapable of reasonable division and that courts should not make arbitrary apportionments in such cases. Restatement (Second) of Torts, § 433A, cmt. i. As examples of such harms, Comment i lists death, a broken leg, the destruction of a house by fire, and the sinking of a barge.

substantial, and the analysis will be factually complex. . . ."); *O'Neil v.* Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989) ("[P]ractical effect of placing the burden on defendants has been that responsible parties rarely escape joint and several liability . . . ."); *United States v. Washington State Dep't of Transp.*, No. C05-5447RJB, 2007 WL 445972, at *26 (W.D. Wash. 2007)(burden of providing a reasonable basis for apportioning harm is high). In May of 2009, however, the Supreme Court reinstated a district court's finding of divisibility after a reversal by the Ninth Circuit. *Burlington Northern*, 129 S. Ct. at 1882-83. The Supreme Court found that a calculation based upon the percentage of land area owned by a party, the party's period of ownership, and types and amounts of hazardous materials requiring remediation, including a fifty percent margin of error was supported by the record and sufficiently reasonable to provide a basis for apportionment. *Id.* at 1882-83.

Some legal commentary and case law have interpreted *Burlington Northern* to lessen the burden on defendants seeking to avoid joint and several liability by demonstrating a reasonable basis for apportionment. *See Superfund and Natural Res. Damages Litig*, 2009 ABA Env't Energy & Resources L.: Year in Rev. 132; ABA Envtl., Energy, and Res. Law: The Year in Review, Environmental Committee, at 138 (2009) (*Burlington Northern* "essentially lowered the evidentiary standard for divisibility."); Kevin A. Gaynor, Benjamin S. Lippard, Sean M. Lohnquist, *Unresolved CERCLA Issues After* Atlantic Research *and* Burlington Northern, SR053 ALI-ABA 77, 91 (2010) (stating that the Supreme Court in *Burlington Northern* rejected the approach making it nearly impossible for a CERCLA PRP to demonstrate divisibility and expanded the situations in which divisibility will allow CERCLA litigants to avoid joint and several liability); *Reichhold, Inc. v. United States Metals Ref. Co.*, No. 03-453(DRD), 2009 U.S. Dist. LEXIS 52471, at *131-33 (D.N.J. 2009) (apportioning liability for the single harm of metals contamination on a portion of property

when two causes of the contamination were both sufficient to require the proposed remediation).

In *United States v. Iron Mountain Mines, Inc.*, No. 91-0768-JAM-JFM, 2010 WL 1854118 (E.D. Cal. May 6, 2010), however, the District Court for the Eastern District of California found that *Burlington Northern* was not a change in the law, but simply a reiteration of established law applied to the specific facts of the case. *Id.* at 3. The *Iron Mountain* court also stated that *Burlington Northern* did not mandate that district courts apportion harm. *Id.* The court concurs with the *Iron Mountain* court that *Burlington Northern* did not change the law with regard to divisibility, but merely recognized a reasonable basis for apportionment based on the facts of that particular case.

The court finds that the contamination of the Site, which has caused the need for remediation constitutes a single harm. *See Monsanto*, 858 F.2d at 172-73 (finding that environmental contamination on a piece of property requiring remediation constitutes a single harm). The remedy selected by EPA to clean up the contaminated soil and sediments at the Site involves excavation and off-site disposal. The volume of contaminated soil is directly related to how much the remediation is going to cost. [*See supra* ¶ 6]. The predominant factors that contribute to the volume of contaminated soil and thus drive the cost of the remediation are the volume of hazardous materials and the spread of these hazardous materials throughout the Site. [*Id.*]. The question becomes, then, whether there is a reasonable basis for apportioning the harm at the Site based upon these factors. In an attempt to meet its burden of demonstrating divisibility, PCS presented the court with five proposed methods of apportionment. In determining whether the harm at the Site is divisible, the court will address each of PCS's proposals and will consider any other possible bases for apportionment contained in the record.

1. Method 1

PCS's first method of apportionment is based upon Grip's calculation of the amount of fill or other material added to the Site during each PRP's ownership period. Grip used aerial photography to calculate the amount of material added to the Site as of certain dates and used these calculations to allocate shares of the remediation cost to Ross, PCS, and the Holcombe and Fair Parties. Grip then allocated shares of responsibility to RHCE and Allwaste based upon the size of their parcels and the depth of excavation.

The court finds that Method 1 does not provide a reasonable basis for apportionment. PCS has not shown a reasonable relationship between the addition of material to the Site and the spread of contamination on the Site. This is because aerial photography does not detect contamination. [*See* Trial Tr. 2102:2-6 (Grip confirming that aerial photography cannot identify whether or not material is contaminated); 2249:17-20 (aerial photography cannot detect contamination); 2250:5-8 (aerial photography cannot detect contamination)]. In addition, although PCS contends that the record provides a reasonable basis for assuming "virtually all" of the material added to the Site was contaminated, no evidence has been presented to the court indicating that all or even most changes in elevation or new materials identified in aerial photography were contaminated. [*See, e.g., supra* ¶ 68]. It was PCS's burden to show a relationship between the changes in elevation identified by Grip and the contamination. This it did not do.

Moreover, assuming that no significant filling with uncontaminated materials occurred, Grip's analysis is still not sufficiently related to the cause of the contamination to be a reasonable basis for apportionment. Grip's calculations are based upon two assumptions. First, Grip's calculations assume that the contaminants on the Site would not have moved through the soil due

to chemical migration, which is contradicted by the record in this case. [Trial Tr. 842:23-843:11 (Brown testifying about chemical migration]. Second, Grip's calculations assume that Planters is responsible for all contributions to the volume of contaminants on the Site prior to 1945. [*See* Trial Tr. 2140:18-20 (Grip has no information on whether fill was put on the Site prior to 1907); 2320:8-11 (Grip has no information on how the Site looked prior to Planters' ownership); 2322:3-7 (Grip does not have information on whether or not materials he attributes to Planters is actually material Planters put there); 2333:3-10 (Grip stating: "I can't tell you how much pyrite was placed there before or during Planters' operations."); 2331:20-2332:6 (Grip cannot rule out whether there was pyrite on the property prior to Planters' purchase); 2116:6-12 (Grip's calculations assume that "anything below the 1945 surface has to be Planters.") and 2137:11-21 (Grip assuming that anything below the 1945 surface would have been Planters)]. This second assumption is significant given the large time period that Grip is unable to account for. The second assumption is not reasonable in the face of evidence that: 1) the Site had prior ownership, [*see supra* ¶ 29 (citing Ash. Ex. 72 at A 001879)]; 2) the site would have required extensive grading and filling prior to Planters beginning operations, [*supra* ¶ 30 (citing PCS Exs. 4, 168), *see also* Trial Tr. 2329:23-2330:6 (Grip testifies that the Planters buildings would have required extensive filling and grading prior to construction) and 2323:11-15 (Grip testifying that filling and grading were necessary prior to the construction of the plant)]; 3) burnt pyrite was a common fill material during the relevant time, [Ash Ex. 72 at 4 (former plant manager at CNC states that burnt pyrite was used as fill on the Site for road stabilization and used to line roads in the area); Trial Tr. 1623:22 to 1624:10 (Murphy testimony that pyrite clinkers had a useful value as fill and roadbed material)]; and 4) seven other phosphate fertilizer plants were in operation from 1884 to the early 1900's in close proximity to the Site, all of

which were potential sources of contaminated fill, [*supra* ¶ 31 (citing Trial Tr. 1665:6-10, 1564:23-1565:3; Ash. Ex. 72 at A 001879-80, A 001882-84, A 001888)]. This evidence distinguishes this case from *Burlington Northern* because in that case, there was no indication that any of contamination at issue could have come from any source other than the operations of the main polluting entity, B&B. Based upon the foregoing, Grips's calculations are afforded little weight by the court.

The court also notes that even if Grip's calculations are accurate enough to fall within a fifty percent margin of error, as contended by PCS, the Supreme Court's approval of a fifty percent margin of error in the *Burlington Northern* case was fact-specific and did not indicate that a fifty percent margin of error will always be appropriate in apportionment calculations. *See Burlington Northern*, 129 S. Ct. at 1883.

The court also notes that Grip changed his methodology in the middle of his analysis to assign shares of the allocation to RHCE and Allwaste. [*Cf.* PCS Ex. 4A; Trial Tr. 2369:12-15]. Grip apportions all materials to be excavated on the RHCE and Allwaste parcels to these two entities without regard to historical changes in elevation. Although PCS contends that the amounts attributed to Allwaste and RHCE were not intended to result in double counting and that these amounts could be subtracted from the allocation to the Holcombe and Fair Parties, it remains unclear whether the change in methodology is appropriate. It is not clear that RHCE and Allwaste contributed all of the contaminated materials to be excavated on their parcels. In addition, it is not clear whether the materials to be excavated on the RHCE and Allwaste parcels were originally attributed to the Holcombe and Fair Parties or to another party in Grip's original analysis. PCS's first method of apportionment is not reasonable.

2. Method 2

PCS's second method of apportionment is based upon the volume of contaminants introduced to the Site. PCS argues that data in the record allow the court to determine the approximate amount of arsenic and lead Planters and CNC each contributed to the Site. Using stoichiometry, Murphy sought to calculate the volume of contamination added to the Site by Planters and CNC. [Entry 569-1 at 11]. PCS contends that this is a reasonable method of apportioning harm at the Site. [*Id.* at 12].

The starting point of Murphy's volumetric calculations was the assumption that Planters operated at full capacity. [*See* Trial Tr. 1571:15-25, 1572:18-25 and 1808:25-1812]. However, Murphy also performed a check on this calculation by performing the calculation again, assuming that Planters only operated at fifty percent capacity. According to Murphy, this second calculation only changed CNC's allocation from one percent to two percent of the harm at the Site. [Trial Tr. 1812:23-1813 and 1899:2-22]. It is reasonable to assume that Planters operated at between fifty percent and one hundred percent of its maximum capacity. [Trial Tr. 1816: 5-8]. Murphy also performed a "reality check" on his calculations in which he checked his volumetric calculations for the amount of pyrite produced by Planters against the volume of pyrite that he and GEL estimated was on the Site. [Trial Tr. 1572:5012, *see also* Trial Tr. 1573:22-1574:10. (Murphy testifying that the amount of soil that is contaminated and the degree to which it is contaminated is consistent with his volumetric calculations); 1625:9-22 and 1818:1-2 (Murphy testifying that his calculations are consistent with the GEL report as to how much material needs to be excavated); PCS ex. 2 at 2-3 ("The total volume of soil and sediments estimated by Entact to be treated is . . . 35,848 m3 . . . . The total amount of pyrite slag and cinder generated over Planters' occupancy was estimated . . . as

46,539 m3. Thus the planned remediation will treat a volume of material that is 35,848/ 46,539= 77% of the estimated pyrite generated from 1906 to 1933.")].

Both Murphy's volumetric calculations and the "reality check" assume that Planters deposited all waste from its manufacturing operations on Site and thus is responsible for all pyrite on the Site. [Trial Tr. 1573:5-18, 1623:16-25 (volumetric calculations); 1572:5-12 (reality check)]. This assumption, which was also made by Grip in Method 1, is significant because of the large time period that is unaccounted for. As was previously stated, this assumption is not reasonable in the face of evidence that: 1) the Site had prior ownership; 2) the Site would have required grading and filling prior to Planters beginning operations; 3) burnt pyrite was a common fill material during the relevant time; and 4) seven other phosphate fertilizer plants were in operation from 1884 to the early 1900's in close proximity to the Site, all of which were potential sources of contaminated fill. This evidence distinguishes this case from *Burlington Northern* because in that case, there was no indication that any of the contamination at issue could have come from any source other than the operations of the polluting company.

Assuming that Method 2 is a reasonable volumetric calculation despite the assumption that Planters contributed all pyrite slag to the Site, Method 2 is not by itself a sufficient basis for a divisibility finding. In order for a divisibility finding to be appropriate based upon the facts of this case, PCS must prove that a reasonable method that accounts for the spread of contamination across the Site also exists. This is because the spread of the contamination across the Site due to earth moving activities significantly contributed to the extent of the contamination at the Site. *See Monsanto*, 858 F.2d at 173 n.27 ("Volumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that

independent factors had no substantial effect on the harm to the environment."). As the remainder of the court's analysis demonstrates, PCS has not met its burden of proving by a preponderance of the evidence that a reasonable method for accounting for the spread of contamination across the Site exists.

3. Method 3

PCS's third method of apportionment is based upon the period of time Planters and CNC each operated the fertilizer plant. The court finds that although a time period method of apportionment was part of the court's analysis in *Burlington Northern*, such an approach is not reasonable based upon the facts in this case. The *Burlington Northern* case did not embrace apportioning harm based upon periods of operations in all cases. Instead, the Supreme Court found that the district court's use of this information was appropriate as a "starting point for its analysis" based upon factual findings that

> ma[d]e it abundantly clear that the primary pollution at the . . . facility was contained in an unlined sump and an unlined pond [on a] portion of the facility most distant from the Railroads' parcel and that the spills of hazardous chemicals that occurred on the Railroad parcel contributed to no more than 10% of the total site contamination, some of which did not require remediation.

Burlington Northern, 129 S.Ct. at 1182.

There are significant differences between *Burlington Northern* and the case before the court that indicate that apportionment based upon periods of operations is inappropriate in this case. First, in *Burlington Northern*, only one company conducted the operations leading to the contamination, making it more reasonable to assume that contamination occurred at reasonably constant levels over time. In this case, two different companies, Planters and CNC, conducted operations at the Site and there is evidence indicating that these companies did not uniformly disposed of contaminants on the

Site. [Ash. Ex. 76 at 4]. At times during Planters' ownership period, pyrite cinders from the Site were used to line roadbeds in the area. [Ash Ex. 76 at 4]. In addition, CNC's operations differed from those of Planters. [Trial Tr. 1492:21-23, 1524:12-13, 1481:2-12, 1850:1-15]. Second, unlike in *Burlington Northern*, the evidence in this case does not place the bulk of the contamination on a part of the Site far away from CNC's or Planters's operations. Third, in *Burlington Northern*, there was no evidence that earth moving activities such as grading, filling, and demolition substantially affected the extent of the contamination on the site as is the case here. *See Atchison*, 2003 WL 25518047, at ¶ 479 (cited by PCS because it states that the site was graded towards a waste pond, but giving no indication that grading took place after contamination was disposed of on the site or through contaminated soils). Based upon the foregoing, the court concludes that Method 3 is not a reasonable basis for apportioning the harm in this case.

4. Method 4

PCS's fourth method of apportionment is based upon an analysis of the PRPs who first physically disturbed the different portions of the remediation area. In this analysis, Grip used aerial photography to determine which party first engaged in filling, grading, or other development activities on the Site. Grip then used this information to determine the percent of the remediation area attributable to each party. [PCS Ex. 4A].

PCS's fourth method of apportionment also fails to provide a reasonable basis for apportionment. First, this method fails to take into account the original sources of the contaminants, which is one of the driving factors of the remediation. Second, the use of aerial photography to determine when areas of the Site were first impacted by contamination is problematic because aerial photography cannot show when contaminants were moved across the Site; it can only show when

earth moving activities took place. [*See* Trial Tr. 2157:18-2158:10 (Grip testifying that the area of first impact method is related to disturbances of soil and is not directly related to contamination)]. Therefore, this method does not have a reasonable relationship to the amount of contaminated soil at the Site.

Third, the area of first impact does not take into account the total volume of soil affected by earth moving activities. Subsequent, more invasive, earth moving activities in an area where earth moving has already occurred may disturb a greater volume of soil, which would not be taken into account in this calculation. As a result, any allocation based upon Method 4 would involve a substantial risk that the wrong PRP will be held liable for contamination. This point is illustrated by Grip's testimony. [Trial Tr. 2305:14-18 ("Yes, because this exercise simply shows the first time that in the photography a tract of land was disturbed by one of the periods of ownership. Just so happened that Columbia Nitrogen operated on areas that have already been disturbed for the most part by Planters."); 2294:25-2295:3 ("It may have been impacted by Planters prior to the first date of aerial photography. I can't rule that out. But the first visual impact that I see to that area is during the Holcombe and Fair period."); 2320:17-20 ("Okay. And when you're talking about areas of first impact, you're also not telling us that Planters was the only one that had any impact in that area; correct? Correct. I'm just identifying the areas of first impact as detected in the aerial photography.")]. Moreover, Grip implied at trial that Method 4 is not a reliable method for apportioning the harm at the Site. [*See* Trial Tr. 2306:11-12 ("I don't know that I would recommend using it by itself, that's right."); 2158:8-10 ("I'm not recommending that you use that as a measurement all by itself, however. That just one of the - - one of the clues to unraveling the puzzle.")].

5. Method 5

PCS's fifth method of allocation is based upon the number of contaminated soil samples taken by GEL that Stout attributed to CNC, and that Murphy attributed to Allwaste, RHCE and the Holcombe and Fair Parties; divided by the total number of contaminated soil samples taken by GEL. Stout testified that it would be reasonable to determine CNC's contribution to the contamination on the Site based upon the contaminated soil samples that Stout attributed to CNC. [Trial Tr. 1136:10-23].

There are a number of problems with Method 5. First, it should be noted that Stout's testimony that Method 5 is a reasonable way to divide up the harm at the Site is not dispositive because whether or not a method of apportionment is reasonable is a determination to be made by the court. Second, although EPA and GEL did use soil samples to estimate the volume of contaminated soil, the simple division of soil samples attributed to each PRP by the total number of contaminated soil samples is not an appropriate method of apportionment. This is because how the EPA and GEL made their volume calculation is unclear. [*See* Trial Tr. 641:8-21 (Freeman testimony that an isoconcentration map shows the contours of concentration levels of a given contaminant between data points); Ash. Ex. 93 at Figs. 2-1, 2-2 (Final Feasibility Study conducted by Black and Veatch for the EPA showing isoconcentration maps); PCS Ex. 22]. What is clear is that the EPA and GEL's estimates of contaminated soil were not obtained through a simple attribution of a certain amount of soil per soil sample. *See* PCS Ex. 22 at 14 ("Contaminant mass for the sample area was estimated in 1 foot increments from 0 to 5 feet bls using data from the appropriate sample interval. . . . The area for each concentration contour was estimated and the corresponding volume (1-foot soil increment) was calculated. The soil mass was then calculated (1 cubic yard = 1.5 ton) and the

lead and arsenic mass was estimated using the median concentration value for the specified contour interval."); Ash. Ex. 93 at A01_06771 ("Information concerning the nature and extent of contamination in soil, groundwater and marsh sediment was used to estimate the volume of contaminated media that would need to be remediated."). Therefore, division of the number of soil samples attributed to each party by the number of contaminated soil samples does not bear a reasonable relationship to the estimated volume of contaminated soil.

Third, the grid pattern of sampling used by GEL, upon which Method 5 is based, was not consistent such that a uniform volume of contaminated soil can be reasonably attributed to every contaminated sample. [PCS Ex. 22 at 9 ("A 50-foot sampling grid was established over the most highly contaminated areas. . . . A 100-foot sampling grid was established over the remainder of the site. . . .")]. This further indicates that Method 5 does not bear a reasonable relationship to the volume of contaminated soil at the Site. Fourth, Stout's allocation of soil samples to CNC is suspect due to the limited information that may be obtained from aerial photography. Stout was not able to determine from aerial photographs whether or not any earth moving activities occurred in between the dates of photography and was not able to detect whether or not the earth moving activities that she did detect resulted in the spread of contamination. [*See* Trial Tr. 1098:14-25 (Stout testifying that she cannot determine from aerial photography whether or not slag has been placed and redistributed); *see also* Trial Tr. 1100:11-17 and 1203:14-23]. Fifth, the allocation of samples presented by PCS in Method 5 involves the double counting of two samples, making Method 5 unreliable as a basis for apportionment. Specifically, Murphy attributed contamination at sample 555 to both the Holcombe and Fair Parties and Robin Hood. [*See* Trial Tr. 1455:16-1456:11; 1457:5-9]. In addition, sample 415 is attributed to CNC by Stout and to the Holcombe and Fair Parties by

Murphy. [*Cf.* Ash. Ex. 226 at 19 and Trial Tr. 1456:9]. This double counting is significant given the small number of contaminated soil samples attributed to these parties. [*See* Ash. Ex. 226 at 19; Trial Tr. 1455:16-1456:11 and 1457:5-9]. Method 5 is not a reasonable basis for apportionment of the harm at the Site.

6. Conclusions With Regard to Divisibility

While the harm at the Site is theoretically divisible based upon: 1) how much contamination each party contributed to the Site, and 2) how much soil each party caused to be included in the remediation area by spreading the contamination throughout the Site, the court finds that the record does not provide the court with a reasonable basis for apportioning this harm.

Although PCS attempted to provide the court with a reasonable basis for determining the approximate volume of contaminants introduced to the Site by Planters and CNC, these calculations are based upon a significant assumption in favor of PCS. However, even if the court had a reasonably accurate calculation of the volume of contaminants released on the Site by Planters and CNC, this is only half of the equation; the other main factor contributing to the cost of the remediation is the spread of contamination across the Site. None of PCS's methods of apportionment provides a reasonable estimate of the additional volume of soil contaminated by earth moving and development activities. While the record reveals that construction and earth moving activities occurred throughout the history of the Site, significantly contributing to the cost of the remediation of the Site, the record provides the court with no reasonable basis for determining approximately how much each party contributed to the volume of contaminated soil through such activities. In addition, evidence in the record suggests that the acidic (low pH) conditions on the Site led to the migration of lead and arsenic through the soil. This consequence of commingling

contaminants on the Site indicates that the volume of hazardous materials and the amount of earth moving and construction activities on the Site do not have a direct cause/effect relationship with the amount of harm at the Site. The court concludes that the record does not provide the court with a reasonable basis for apportioning the harm at the Site, and that therefore, the harm at the Site is indivisible. The court declines to make a divisibility determination without a reasonable basis. *See Burlington Northern*, 129 S. Ct. at 1881 (citing Restatement (Second) of Torts § 433A, cmt i. at 440 (1963-1964)) (when two or more causes produce a single, indivisible harm, "courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.").

D. Contribution

1. Introduction

Title 42, United States Code, Section 9613(f) enables "[a]ny person [to] seek contribution from any other person who is liable or potentially liable under section 9607(a) [CERCLA § 107(a)] of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title." 42 U.S.C. § 9613(f) (CERCLA § 113(f)). A party making a claim under CERCLA § 113(f) bears the burden of proving: 1) that the defendant is a responsible party under § 107(a) of CERCLA; and 2) the defendant's equitable share of costs. *Minyard*, 184 F.3d at 385. With regard to responsibility under § 107(a), the Court has already determined that the Site is a "facility," that there has been a release of a hazardous substance at the facility, and that the releases have caused Ashley to incur response costs. Thus, PCS need only prove that each party being sued for contribution is a PRP. *IIIT Indus.*, 2010 WL 1172533, at *35.

Contribution claims require courts to make an equitable allocation of responsibility among

the liable parties. *IIIT Indus.*, 2010 WL 1172533, at 37. In enacting the contribution section of CERCLA, Congress was concerned "that the relative culpability of each responsible party be considered in determining the proportionate share of costs each must bear." *Monsanto*, 858 F.2d at 173 & n.29.

In resolving a contribution claim, the court allocates response costs among the liable parties using such equitable factors as it deems appropriate. 42 U.S.C. § 9613(f); *see also Weyerhaeuser Co. v. Koppers Co., Inc.*, 771 F. Supp. 1420, 1426 (D. Md. 1991); *Dent*, 993 F. Supp. at 923. The Gore Factors are six equitable factors derived from the legislative history of CERCLA that are relevant in most CERCLA cases. *Dent*, 993 F. Supp. at 950. The Gore Factors are: 1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; 2) the amount of hazardous waste involved; 3) the toxicity of the hazardous waste involved; 4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste, especially waste driving the remediation; 5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and 6) the degree of cooperation by the parties with Federal, State, or local officials to prevent harm to the public health or the environment. *Dent*, 993 F. Supp. at 950. Other courts have also considered: 1) the economic benefit to each party associated with releases of hazardous wastes, and 2) each party's ability to pay its share of the cost. *See Weyerhaeuser*, 771 F. Supp. at 1427; *United States v. Davis*, 31 F. Supp. 2d 45, 63 (D.R.I. 1998). Liability under § 113(f) is several, not joint and several. *Minyard*, 184 F.3d at 385. The court will proceed by considering the defenses raised by each party and weighing the equitable factors it deems relevant with respect to each liable party's equitable share. Then, taking

all of this information into account, the court will equitably allocate the past and future response costs for the remediation among the liable parties.

2. Ross

PCS must demonstrate that Ross is a PRP under § 107(a) of CERCLA and prove Ross's equitable share of costs. *Minyard*, 184 F.3d at 385. As was previously noted, the categories of responsible parties include "any [party] who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Planters was the owner and operator of the fertilizer plant on the Site from 1906-1966. The evidence in this case shows that Planters disposed of hazardous wastes on the Site when it dumped pyrite slag on the Site and cleaned out the lead acid chambers. As the successor to Planters, Ross is subject to CERCLA liability under 42 U.S.C. § 9607(a)(2). *See Carolina Transformer Co.*, 978 F.2d at 832.

Ross urges the court to take into account its alleged inability to pay a judgment in determining its equitable share of the response costs. Ross argues that as a dissolved corporation, it has no readily-available assets.

An orphan share is created when a party otherwise qualifying as a responsible party under CERCLA is "defunct, bankrupt, uninsured, or otherwise lacks[] the resources to bear its ideal measure of responsibility in monetary terms." *Newmont*, 2008 WL 4621566, at *62 (quoting *United States v. Kramer*, 953 F. Supp. 592, 595 (D.N.J. 1997)). When a so-called orphan share exists, a court may take this fact into account to increase the equitable share of others. *Id.* However, when the record does not make clear that a party is defunct, bankrupt, uninsured, or otherwise lacking of resources, courts have declined to take ability to pay into account in determining the equitable

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allocation among the parties. *See id.* The court concludes that it is not clear from the record that Ross will be unable to pay any share allocated to it. Ross has a case pending against its insurers, for coverage of any liability imposed in this suit. *See Ross Dev. Corp. v. Firemans Fund Ins. Co.*, 2:08-CV-03672-MBS. In addition, there are cases pending against the Ross Directors and shareholders that seek to disgorge distributions made by Ross prior to dissolution.[10] These cases may make funds available to pay a judgment entered against Ross. In addition, the court finds that the existence of any orphan share is irrelevant for the purposes of allocation in light of evidence which suggests that Ross took steps to make itself judgment proof. *See supra* ¶¶ 44-48. The court will not take Ross's alleged inability to pay into account in making an equitable allocation. Should Ross later be determined to be defunct, each liable party will be responsible for its proportional share of Ross's allocated amount. *See* 42 U.S.C. § 9613(f); *see also Newmont*, 2008 WL 4621566, at *62.

In determining Ross's equitable share of the response costs, the court deems the following facts important:

i. Planters manufactured fertilizer on the Site for sixty of the sixty-six years the fertilizer plant was in operation. *See supra* ¶¶ 19 and 20.

ii. As the only known property owner that burned pyrite slag, Planters generated the majority of arsenic that is found on the Site today. *See supra* ¶ 34.

iii. Planters introduced much of the lead contamination to the Site. *See supra* ¶ 34.

iv. Planters constructed several buildings on the Site during its ownership period. *See supra* ¶¶ 30, 32, 37, 38, and 39.

v. Planters owned and operated the site prior to the enactment of CERCLA

[10] In *PCS Nitrogen, Inc. v. Buhrmaster et al.*, 2008-CP-10-5269, S.C. Court of Common Pleas, PCS has sued the Ross shareholders under South Carolina's dissolution statute for disgorgement of assets distributed by Ross. In *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 2:09-CV-03171-MBS, PCS has sued the Ross Directors alleging claims for fraudulent conveyance, civil conspiracy, and breach of fiduciary duty.

when the issue of environmental contamination was not well known. There is no evidence that Planters' actions were illegal or contrary to industry standards at the time. *See supra* ¶¶ 20 and 78.

vi. Planters benefitted economically from its operations on the Site that caused the contamination. *See supra* ¶ 32.

vii. The evidence suggests that the Ross Directors knew that Ross might be held liable for contamination at the Site and took action to make the company judgment proof. *See supra* ¶¶ 43-53.

3. PCS

The court found above that PCS is subject to liability as the successor to CNC under CERCLA § 107(a)(1). The court deems the following factors important in determining PCS's equitable share of the response costs:

i. CNC conducted manufacturing operations on the Site for six out of the sixty-six years the fertilizer plant was in operation. *See supra* ¶¶ 91, 21 and 55.

ii. CNC generated no pyrite slag. *See supra* ¶ 58.

iii. All of the lead and arsenic on the Site that was introduced after the Planters period of operations was introduced by CNC.

iv. When CNC ceased operations, it demolished all of the structures on the Site. This demolition was highly disruptive to the Site and took place over several years, leaving contaminants open to the elements. *See supra* ¶¶ 70-77.

v. Prior to selling the property to the Holcombe and Fair Parties, CNC graded the Site. *See supra* ¶ 80.

vi. CNC knew that its manufacturing operations contaminated the Site and yet did not notify the Holcombe and Fair Parties or EPA of the contamination. *See supra* ¶¶ 78 and 81.

vii. CNC took more steps to protect the environment than did Planters, but it did not follow the more stringent environmental standards it imposed at its Moultrie, Georgia plant. *See supra* ¶ 63 and 78.

viii. CNC left lead sheeting discarded on the Site. *See supra* ¶ 61.

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ix. CNC benefitted economically from manufacturing fertilizer on the Site. *See supra* ¶ 55.

x. PCS's predecessor, Arcadian reported the contamination of the Site found by GEL to EPA in response to a request for information. *See supra* ¶ 106.

4. Holcombe and Fair Parties

i. *Whether the Holcombe and Fair Parties are PRPs*

As previously noted, a PRP includes "any person who, at the time of disposal of a hazardous substance, owned or operated any facility at which such hazardous substances were disposed." 42 U.S.C. § 9607(a)(2). Title 42, United States Code, Section 6903(a) defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." The Fourth Circuit has ruled that "§ 9607(a)(2) imposes liability not only for active involvement in placing hazardous waste on a facility, but for ownership of a facility at a time that hazardous waste was 'spilling' or 'leaking.'" *Nurad*, 966 F.2d at 846. Thus, in *Nurad*, the Fourth Circuit recognized that a "disposal" could involve merely passive conduct, specifically stating that "Congress intended the 42 U.S.C. § 6903(3) definition of disposal 'to have a range of meanings,' including not only active conduct, but also the reposing of hazardous waste and its subsequent movement through the environment." *Id.* at 845, 846 (citing *United States v. Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984)). Thus, hazardous materials can be disposed of multiple times such as when hazardous materials are moved or dispersed. *See Tanglewood*, 849 F.2d at 1573; *Kaiser*, 976 F.2d at 1342. "[A] 'disposal' may occur when a party disperses contaminated soil during the course of grading and filling a construction site." *Redwing*, 94 F.3d at 1511-12.

The record establishes that at the time the Holcombe and Fair Parties purchased the Site, it was already contaminated with lead and arsenic from the operations of the fertilizer plant. In constructing the Milford Street extension and extending water and sewer lines through the area where the fertilizer plant was once located, the Holcombe and Fair Parties engaged in earth moving activities that redistributed contaminants and caused the disposal of hazardous wastes on the property. [*See* Trial Tr. 2070:20-24 (Grip testimony based upon aerial photography that the Holcombe and Fair Parties' excavation and grading activities caused an "intense disturbance" at the Site); 1587:9-15 (Murphy testifying that the distribution of contamination across the Site is driving the remedy); 1943:11-15 (Murphy agreeing that the fact that contamination was mixed up with clean soil increased the volume of soil that had to be removed); 791:7-18 (Freeman testifying that man-made activities can redistribute contamination)]. The Holcombe and Fair Parties are subject to CERCLA liability under 42 U.S.C. § 9607(a)(2) as owners of the Site at a time when a disposal of hazardous substances occurred.[11]

ii. *Innocent Landowner Defense*

The Holcombe and Fair Parties seek to avoid liability for response costs associated with the Site by asserting CERCLA's innocent landowner defense. *See* 42 U.S.C.A. § 9607(b)(3). To establish the innocent landowner defense, a property owner must demonstrate "(1) that another party was the 'sole cause' of the release of hazardous substances and the damages caused thereby; (2) that the other, responsible party did not cause the release in connection with a contractual, employment,

[11] Holcombe, Holcombe Enterprises and Fair are not liable under CERCLA §107(a)(1) as current owners and operators of the facility because they did not own any portion of the Site at the time this action was commenced. The Fourth Circuit has held that CERCLA §107(a)(1) applies only to the owner and operator at the time the enforcement action or complaint for response costs is filed. *See Trinity*, 150 F.3d at 395 (CERCLA imposes strict liability on the owner of a site "at the time of the enforcement action"); *see also United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 (11th Cir. 1990) ("Within the meaning of Section 107(a)(1) of CERCLA, the current owner means the owner at the time of filing of the complaint.").

or agency relationship with the [property owner]; and (3) that the [property owner] exercised due care and guarded against the foreseeable acts or omissions of the responsible party." *Trinity*, 150 F.3d at 396 (quoting *Westfarm*, 66 F.3d at 682 (quoting 42 U.S.C.A. § 9607(b)(3))).

In *United States v. Honeywell Int'l, Inc.*, 542 F. Supp. 2d 1188, 1200 (E.D. Cal. 2008), the District Court for the Eastern District of California denied a party the innocent landowner defense because the party's affirmative steps in grading and excavating the property agitated the soil and caused the release of contaminants during the party's ownership period. The record indicates that the Holcombe and Fair Parties constructed the Milford Street extension and extended water and sewer lines through contaminated soil. These actions agitated the soil, causing new releases of hazardous substances. Therefore, the Holcombe and Fair Parties have not established the first element of the innocent landowner defense.

The Holcombe and Fair Parties also cannot establish the due care element of the innocent landowner defense. The due care element is satisfied by taking precautionary action against the foreseeable actions of third parties responsible for the hazardous substances in question. *See Monsanto*, 858 F.2d at 169. The record discloses the after discovering the contaminated state of the Site, the Holcombe and Fair parties made no effort to inform environmental authorities of the contamination. Although the placement of ROC on the Site by the Holcombe and Fair Parties was an environmental benefit to the Site, the Holcombe and Fair Parties only placed ROC on parcels of the Site as they were leased. Due care would have involved the Holcombe and Fair Parties capping the entire Site with ROC upon learning of the contamination in order to prevent air dispersion and human contact with contaminants. In addition, after environmental authorities became involved with the Site, the Holcombe and Fair Parties failed to follow their instructions. For example, instead of

submitting a plan to control surface water runoff to EPA as agreed, the Holcombe and Fair Parties began the construction of detention ponds without approval. The Holcombe and Fair Parties also exhibited a lack of due care by failing to maintain the detention ponds on the Site. The court finds that the Holcombe and Fair Parties have not established the innocent landowner defense and will be allocated an equitable share of response costs for the remediation of the Site.

iii. *Allocation*

The court deems the following factors important in determining the equitable share of the response costs to be allocated to the Holcombe and Fair Parties:

a. The Holcombe and Fair Parties did not know of the contamination at the time they purchased the Site. *See supra* ¶ 87.

b. There is no evidence that the Holcombe and Fair Parties introduced any hazardous substances to the Site. *See supra* ¶ 136.

c. The Holcombe and Fair Parties contributed to the spread of the contamination on the Site by constructing the Milford Street extension and extending utility lines. *See supra* ¶¶ 92-93.

d. The addition of water and sewer lines on the Site prevented the use of contaminated groundwater thereby protecting human health. *See supra* ¶ 94.

e. The Holcombe and Fair Parties did not disclose the contamination of the Site to the City prior to deeding it the Milford Street extension despite knowledge of the contamination. *See supra* ¶¶ 99-101, 110, and 170.

f. After learning of the contamination, the Holcombe and Fair Parties left the contaminated soil exposed to the elements until each parcel of property was leased and capped with ROC. *See supra* ¶¶ 112, 113, 115, 118, 121, and 130.

g. The ROC covering the majority of the Site provided important benefits to the Site. *See supra* ¶ 132.

h. The Holcombe and Fair Parties did not commission additional soil sampling despite GEL's advice that additional testing was appropriate. *See supra* ¶ 104.

i. The Holcombe and Fair Parties' actions in response to requests from EPA and DHEC were not fully compliant. *See supra* ¶¶ 124, 126, 132 and 133.

j. The Holcombe and Fair Parties profited from leasing out and later selling the Site despite knowing of the contamination and doing little to fix it. *See supra* ¶ 143.

5. RHCE

i. *Innocent Landowner Defense*

The court ruled above that RHCE is a PRP under §§ 107(a)(1) and (2) of CERCLA. RHCE seeks to avoid liability for response costs associated with the Site by asserting the innocent landowner defense. *See* 42 U.S.C.A. § 9607(b)(3). The record indicates that RHCE commissioned the following construction on its parcel: 1) the excavation of a 1380 cubic foot pond; 2) the installation of two fifty-foot asphalt driveways; 3) the stripping of six inches of topsoil and storing of this soil on an adjacent parcel; and 4) grading and proof rolling of the parcel. These actions agitated the soil, causing new releases of hazardous substances. *See supra* ¶ 155. Therefore, RHCE cannot meet the first element of the innocent landowner defense.

The second prong of the innocent landowner defense requires that RHCE not know and have no reason to know that any hazardous substance had been released at that facility. *See United States v. A&N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317, 1329-30 (S.D.N.Y. 1992) (citing 42 U.S.C. § 9601(35)(A)). The record indicates that the Holcombe and Fair Parties disclosed at least some of the contamination to RHCE before the parcel was conveyed to Hood, President of RHCE. *See supra* ¶ 105. In addition, the grading and proof rolling of the RHCE parcel indicates a lack of due care on the part of RHCE when it had knowledge of the contamination. RHCE has not established the innocent landowner defense and will be allocated an equitable share of response costs for the remediation of the Site.

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ii. *Allocation*

The court deems the following factors important in determining the equitable share of RHCE:

a. RHCE did not introduce any lead, arsenic or cPAHs to the Site. *See supra* ¶ 162.

b. RHCE only leases a two-acre parcel on the Site, which amounts to at most, 5.9% (2.00 acres/33.94 acres = 5.9%) of the remediation area. *See supra* ¶¶ 28 and 159.

c. If releases of motor oil or gear oil occurred on RHCE's parcel, such releases are not driving the remediation and will not affect the cost of remediation. *See supra* ¶¶ 160 and 162.

d. RHCE engaged in some construction on its parcel. *See supra* ¶¶ 158 and 161.

e. The placement of ROC and construction of a detention pond on the RHCE parcel were of some benefit to the environment. *See supra* ¶¶ 132 and 158.

f. EPA is aware of RHCE's dropyard operation and has not requested that RHCE cease operations. *See supra* ¶ 160.

6. Allwaste

i. *Whether Allwaste is a PRP*

Current owners and operators of a facility are covered persons under CERCLA. 42 U.S.C. § 9607(a)(1). Ownership status in CERCLA cases is determined at the time of the filing of the complaint. *See Trinity*, 150 F.3d at 395 ("Generally, CERCLA imposes strict liability on the owner of the property at the time an enforcement action is brought, even if that party did not own the property when the pollution took place."); *see also Fleet Factors Corp.*, 901 F.2d at 1554 ("Within the meaning of Section 107(a)(1) of CERCLA, the current owner means the owner at the time of filing of the complaint."). This action was filed in 2005. Allwaste did not sell its parcel to Ashley until 2008. Thus, Allwaste is potentially responsible for response costs as a current owner of the

Site. *See* 42 U.S.C. §§ 9613(g), 9607(a)(1).

ii. *Allocation*

The court deems the following factors important in determining the equitable share of Allwaste:

a. Allwaste did not introduce any lead, arsenic or cPAHs to the Site. *See supra* ¶¶ 144-155.

b. Allwaste only owned a three-acre parcel and leased a two-acre parcel on the Site, which amounts to at most, 14.7% (5.00 acres/33.94 acres = 14.7%) of the remediation area. *See supra* ¶ 145.

c. If releases of motor oil or gear oil occurred on Allwaste's parcel, such releases are not driving the cost of remediation. *See supra* ¶ 155.

d. During its ownership period, Allwaste constructed a new building on its property, expanded existing structures, and modified the underground components of its wastewater collection system. *See supra* ¶ 148.

e. Stained cement indicates that some leaks of cleaning solvents occurred during Allwaste's operations. If any leaks occurred from Allwaste's business activities, however, those releases contributed little to the need for environmental remediation. *See supra* ¶ 150.

f. Allwaste allowed the sumps and pads in its facility to deteriorate to the point where they were identified as RECs. *See supra* ¶ 150.

7. The City

i. *Whether the City is a PRP*

Current owners and operators of a facility are liable for response costs under CERCLA. 42 U.S.C. § 9607(a)(1). The City contends that it is not a current owner or operator of the Site because it owns a right-of-way and does not manage any part of the Site. To determine whether the City has a current ownership interest in the Site, the court looks to the deed transferring the Milford Street extension to the City. [PCS Ex. 69].

"The construction of a clear and unambiguous deed is a question of law for the court." *Bennett v. Inv. Title Ins. Co.*, 635 S.E.2d 649, 655 (S.C. Ct. App. 2006). In ascertaining the meaning of a deed, the court looks to the intention of the grantor. *See id.* To determine the intention of the grantor, the court must construe the deed as a whole. *Id.* When a deed is ambiguous as to intention, extrinsic evidence may be considered to explain it. *Gardner v. Mozingo*, 358 S.E.2d 390, 391-92 (S.C. 1987); *see Bellamy v. Bellamy*, 355 S.E.2d 1, 3 (S.C. Ct. App. 1987).

In the 1991 deed, the City agreed to abandon the turnaround at the end of the Milford Street extension in exchange for "owning all of Milford Street as shown on the plat" attached to the deed. [PCS Ex. 69 at 1]. The Holcombe and Fair Parties "remised, released, and forever quit-claimed" the Extension of Millford Street to the City. [PCS Ex. 69 at 1]. The Holcombe and Fair Parties retained no interest in the premises, as the deed provided that the grantors shall not "at any time hereafter, by any way or means, have, claim, or demand any right or title to the aforesaid premises or appurtenances, or any part of parcel thereof, forever." [PCS Ex. 69 at 2]. The deed uses the term "right-of-way" numerous times to describe the Milford Street extension. [PCS Ex. 69 at 1]. The court finds that the deed is ambiguous as to whether it grants a right-of-way or a fee simple in the Milford Street extension. Therefore, the court will consider extrinsic evidence to determine the intention of the grantors, the Holcombe and Fair Parties.

The deed makes no provision for the property to revert to the Holcombe and Fair Parties, indicating that the deed transferred all ownership rights to the City. Fair testified at trial that the deed resulted in the City owning the "road and the land under it." [Trial Tr. 2658:23-2659:3]. Based upon this evidence, the court finds that the intent of the grantor was to grant to the City the Milford Street extension in fee simple. Therefore, the City is an owner of part of the Site and is a PRP

pursuant to 42 U.S.C. § 9607(a)(1).

Ownership is not required by CERCLA where a party is an "operator" for purposes of the statute. *See Atchison*, 2003 WL 25518047, at *58-59. In order for a party to be held liable as an operator, the person must have participated in the day-to-day or operational management of the facility. *Acme Fill Corp. v. Althin CD Med., Inc.*, 1995 WL 597300 at *7 (N.D. Cal. Aug. 22, 1995); *see also United States v. Dart Indus., Inc.*, 847 F.2d 144 (4th Cir. 1988). The court finds that the City's ownership of the Milford Street extension does not meet the definition of "operator" because once the Milford Street extension was built, it did not require day-to-day management. In fact, there is no evidence in the record that the City performed any management activities related to the Milford Street extension. The City is not an operator for purposes of CERCLA liability. However, as found above, the City is a PRP because of its ownership status.

ii. *Allocation*

The court deems the following factors important in determining the equitable share of the City:

a. The City did not introduce any lead, arsenic, or cPAHs to the Site. *See supra* ¶ 174.

b. The City did not engage in any construction activities on the Site. *See supra* ¶ 168.

c. The City only owns 1.28 acres, which comprises about 3.7% (1.28 acres/33.95 acres = 3.7%) of the Site. *See supra* ¶ 28.

d. The asphalt road acts as a cap over some of the contamination at the Site, preventing human contact with contamination. *See supra* ¶ 172.

e. There is no evidence that the City was notified of the contamination at the Site prior to taking ownership of the road. *See supra* ¶ 170.

f. The City has taken an active role in financing the remediation by issuing

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bonds. *See supra* ¶ 176.

g. The City did not acquire the Milford Street extension for profit. *See supra* ¶ 175.

The court concludes that the City took no active part in introducing contamination to the Site or in spreading contamination throughout the parcel. Any releases that occurred on the City's parcel during its period of ownership were due to the passive migration of chemicals or runoff, which would have occurred during all ownership periods.

8. Ashley

i. *Bona Fide Prospective Purchaser Defense*

To establish the bona fide prospective purchaser defense ("BFPP"), Ashley must have acquired ownership of the facility after 2002 and prove each of the following eight elements by a preponderance of the evidence:

(A) Disposal prior to acquisition

All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(B) Inquiries

(i) In general

The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).

(ii) Standards and practices

The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) of this section shall be considered to satisfy the requirements of this subparagraph.

. . .

(C) Notices

The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(D) Care

The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to--

(i) stop any continuing release;

(ii) prevent any threatened future release; and

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(E) Cooperation, assistance, and access

The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a . . . or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(F) Institutional control

The person--

(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a . . . facility; and

(ii) does not impede the effectiveness or integrity of any institutional control employed at the . . . facility in connection with a response action.

(G) Requests; subpoenas

The person complies with any request for information or administrative subpoena issued by the President under this chapter.

(H) No affiliation

The person is not--

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through--

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

42 U.S.C. § 9601(40). Ashley first acquired a portion of the Site in 2003. Therefore, Ashley is eligible for the BFPP defense if it establishes all eight elements by a preponderance of the evidence.

a. *Whether All Disposals Of Hazardous Substances Occurred Before Ashley Acquired Part of the Site*

This element requires Ashley to prove that all disposals of hazardous substances occurred before it acquired the Site. 42 U.S.C. § 9601(40)(A). As previously noted, "disposal" is defined as

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3); 42 U.S.C. § 9601(29). The Fourth Circuit has ruled that disposals include not only active involvement in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was 'spilling' or 'leaking.' *Nurad*, 966 F.2d at 846. Disposals are not limited to one-time occurrences, but instead include times when hazardous materials are moved or dispersed. *See Tanglewood*, 849 F.2d at 1573; *Kaiser*, 976 F.2d at 1342. A "disposal" "may occur when a party disperses contaminated soil. . . ." *Redwing*, 94 F.3d at 1511-12.

It is likely that there were disposals on the Allwaste property after Ashley tore down the structures on the Allwaste parcel in 2008 because the sumps contained hazardous substances, were cracked, and were allowed to fill with rainwater. [Trial Tr. 760:14-761:1]. Ashley did not conduct testing to determine whether disposals occurred on the Allwaste parcel during its ownership period. Specifically, Ashley did not test under the concrete pads, sumps, or trench to see if the soil under those structures was contaminated. Ashley attempted to introduce evidence that no disposals occurred after its acquisition of the property through the testimony of Riggenbach. However, the court struck this testimony at trial because Riggenbach's opinion on this issue was not disclosed prior to trial. [Trial Tr. 1399:1-17]. The court concludes that Ashley did not prove that no disposals occurred on the Site after its acquisition of the Site.

b. *All Appropriate Inquiries ("AAI")*

This element requires Ashley to prove that it performed AAI prior to acquiring the Site. 42 U.S.C. § 9601(40)(B). At the time Ashley would have been performing its pre-purchase inquiry on the Holcombe and Fair Parties' parcel, prior to 2003, interim standards were in place to meet the AAI standard.[12] 42 U.S.C. § 9601(40)(B); 68 FR 24888-01. The AAI standard could be met for the Holcombe and Fair Parties' parcel by complying with ASTM Standard E1527-00.[13] At the time Ashley performed its pre-purchase inquiry on the Allwaste parcel, a final standard for AAI's had been promulgated, 40 C.F.R. §§ 312, *et seq.*; this is the standard applicable to the Allwaste parcel.

Ashley acquired a portion of the Site from the Holcombe and Fair Parties on November 24,

[12] The final standard for performing all appropriate inquiries became effective on November 1, 2006. 40 C.F.R. §§ 312, *et seq.*

[13] Ashley could also have satisfied the AAI standard with ASTM Standard E1527-97. However, the only ASTM Standard admitted at trial was ASTM Standard E1527-00.

2003. Prior to the acquisition of the Holcombe and Fair Parties' parcel, Ashley hired GEL to conduct AAI. GEL prepared a September 25, 2003 Phase I Environmental Site Assessment, and certified that its inquiry was in compliance with ASTM E1527-00. [Ash. Ex. 110 at 1-2]. Ashley also hired GEL to conduct a Phase I Environmental Site Assessment on the Allwaste parcel prior to purchase. [Ash. Ex. 179]. GEL certified in its report on the Allwaste parcel that its inquiry was in compliance with ASTM E1527-05.[14] [Ash. Ex. 179 at 4]. While PCS points to some inconsistencies between GEL's Phase I Reports and the relevant ASTM Standards, the court finds that such inconsistencies lack significance. What is important is that Ashley acted reasonably; it hired an expert to conduct an AAI and relied on that expert to perform its job properly. The court finds that Ashley properly conducted AAI.

c. *All Legally Required Notices*

Title 42, United States Code, Section 9603(a) requires that any person in charge of a facility immediately notify the National Response Center of any release of a hazardous substance once it has knowledge of a release. Ashley contends that there have been no releases of hazardous substances at the Site since Ashley's acquisition of the property that required notice to EPA or DHEC. The record does not establish that any releases occurred on the Site subsequent to Ashley acquiring ownership. The court finds that Ashley has met its burden of proving that it made all legally required notices.

[14] EPA has stated that ASTM Standard E1527-05 is consistent with the AAI final rule. Environmental Protection Agency, *Comparison of the Final All Appropriate Inquiries Standard and the STM E1527-00 Environmental Site Assessment Standard*, at 1 (2005), http://www.epa.gov/brownfields/aai/compare_astm.pdf.

d. *Whether Ashley has Exercised Appropriate Care*

To demonstrate that it has exercised appropriate care, Ashley must prove that it took reasonable steps to: 1) stop any continuing release; 2) prevent any threatened future release; and 3) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance. 42 U.S.C. § 9601(40)(D). According to EPA, Congress intended the "reasonable steps" requirement to be "consonant with traditional common law principles and the existing CERCLA due care requirement." [Ash. Ex. 100, at 9 & n.9]. Under the CERCLA due care requirements, a party must establish by a preponderance of the evidence that it "exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts or circumstances." [Ash. Ex. 100 at 11]. "[E]xisting case law on due care provides a reference point for evaluating the reasonable steps requirement." [Ash. Ex. 100, at 11]. According to EPA, "doing nothing in the face of a known or suspected environmental hazard would likely be insufficient." [Ash. Ex. 100, Attachment B at 5].

EPA's Interim Guidance on BFPP status states as follows:

> The pre-purchase "appropriate inquiry" by the [BFPP] will most likely inform the [BFPP] as to the nature and extent of contamination on the property and what might be considered reasonable steps regarding the contamination – how to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental and natural resource exposures. Knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a [BFPP].

[Ash. Ex. 100 at 11].

The court concludes the Ashley did not exercise appropriate care with regard to hazardous substances. First, GEL identified the sumps and concrete pads at the Allwaste parcel as RECs. When Ashley demolished all of the above-ground structures on the Allwaste parcel, but failed to

clean out and fill in the sumps, leaving them exposed to the elements, it may have exacerbated these conditions. At trial, experts testified that Ashley should have capped, filled, or removed the sumps at the time it demolished the above-ground structures. [Trial Tr. 401:14-402:2, 2419:20-2421:19, 2434:18-2436:4]. Ashley's later action commissioning GEL to test, clean, and fill the sumps with concrete came too late to prevent possible releases.

Second, Ashley's failure to 1) prevent a debris pile from accumulating on the Site, 2) investigate the contents of the debris pile, and 3) remove the debris pile for over a year indicates a lack of appropriate care. [Trial Tr. 552:8-14 and 552:24-553:15; PCS Ex. 3 at 1; PCS Ex. 19 at A05_01238, A04_05365, A04_05368, A04_05370, A04_05376 and A04_05380]. Third, Ashley failed to adequately maintain the ROC cover on the Site. For example, the ROC cover on the parcel Ashley leased to Allwaste from 2003 to 2008, was deteriorated in 2004. [PCS Ex. 22 at A 00283, Fig. 1-2].

e. *Whether Ashley Provided Full Cooperation, Assistance and Access*

This element requires that Ashley prove that it provided "full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a . . . facility." 42 U.S.C. § 9601(40)(E). Ashley has provided the court with sufficient evidence to meet its burden of proof on this element of the BFPP defense. When Ashley acquired the Holcombe and Fair Parties' parcel, it immediately notified EPA of its ownership and asked EPA to advise Ashley if EPA desired Ashley to take specific action. [Ash. Ex. 114]. The record demonstrates that Ashley's cooperation with EPA has been ongoing since it purchased the Site. [Ash. Exs. 187 and 188].

f. *Institutional Controls*

This element requires that Ashley prove that it: 1) is in compliance with any land use restrictions at the facility, and 2) is not impeding any institutional control employed at the facility in connection with a response action. 42 U.S.C. § 9601(40)(F). Freeman testified at trial that there are no land use restrictions or unusual institutional controls in place at the Site, and that Ashley is in compliance with any controls in place. [Trial Tr. 594:16-24]. This testimony has not been contradicted. The court finds that Ashley has met its burden of proof on this element.

g. *Compliance with Requests and Subpoenas*

This element requires that Ashley prove that it has complied with any request for information or administrative subpoena directed to it. 42 U.S.C. § 9601(40)(G). Freeman testified at trial that Ashley has complied with all information requests and subpoenas that it has received from EPA. [Trial Tr. 599:12-16]. Ashley's Exhibit 116 is an example of Ashley responding to a request for information by the EPA. [Ash. Ex. 116]. The court finds that Ashley has met its burden of proof on this element.

h. *No Affiliation*

This element requires that Ashley prove that it is not: 1) a potentially liable for response costs at the Site through: a) any direct or indirect familial relationship; b) any contractual, corporate, or financial relationship "(other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services);" 2) affiliated with persons who are potentially liable, for response costs at the Site through: a) any direct or indirect familial relationship; b) any contractual, corporate, or financial relationship "(other than a contractual, corporate, or financial relationship that is created by the

instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services)"; or 3) "the result of a reorganization of a business entity that was potentially liable." 42 U.S.C. § 9601(40)(H). EPA has stated that in deciding which "affiliations" are prohibited by CERCLA, courts should be guided by "Congress's intent of preventing transactions structured to avoid liability." [Ash. Ex. 100 at 5]. There is no allegation in this case that Ashley is the result of a reorganization of a business entity that was potentially liable.

1. Whether Ashley is Potentially Liable for Response Costs at the Site through any Familial Relationship, or any Contractual, Corporate, or Financial Relationship

As previously noted, current owners and operators of a facility are liable for response costs under CERCLA. 42 U.S.C. § 9607(a)(1). There is no allegation in this case that Ashley is potentially liable for response costs at the Site based upon a familial relationship. However, Ashley is potentially liable for response costs at the Site due to contractual relationships. Ashley has released the Holcombe and Fair Parties and Allwaste from environmental liability for contamination at the Site. [Ash. Ex. 94, 113; Allwaste Exs. 1-2]. These releases were given in connection with the purchases of parcels of property on the Site. Because of its release of the Holcombe and Fair Parties, Ashley attempted to persuade EPA not to take enforcement action to recover for any harm at the Site caused by the Holcombe and Fair Parties. [PCS Ex. 256 at 2]. In releasing the Holcombe and Fair Parties, Ashley took the risk that the Holcombe and Fair Parties might be liable for response costs. Ashley's efforts to discourage EPA from recovering response costs from the Holcombe and Fair Parties reveals just the sort of affiliation Congress intended to discourage. The court finds that Ashley's contractual release of the Holcombe and Fair Parties makes Ashley potentially liable for response costs at the Site and is a prohibited affiliation, which precludes the application of the BFPP

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defense.

2. Whether Ashley is Affiliated with Others Who are Potentially Liable for Response Costs at the Site Through any Familial Relationship, or any Contractual, Corporate, or Financial Relationship

Ashley has no direct or indirect familial relationship with any of the other PRPs in this case. [Trial Tr. 141:14-145:2 and 181:13-182:9]. Moreover it does not appear that Ashley is affiliated with others who are potentially liable for response costs at the Site through any familial, contractual, corporate or financial relationship. For example, although Ashley is affiliated with the Holcombe and Fair Parties, there is no evidence that the Holcombe and Fair Parties are potentially liable for response costs at the Site due to any familial, contractual, corporate or financial relationship.

i. *Conclusion*

Ashley has failed to meet its burden of proving several of the elements of the BFPP defense and will be held liable for an equitable share of response costs.

ii. *Allocation*

The court deems the following factors important in determining the equitable share of Ashley:

a. Ashley did not engage in any manufacturing activities on the Site. *See supra* ¶ 206.

b. Ashley has made efforts to secure and restrict access to the Site. *See supra* ¶ 181.

c. Ashley performed extensive environmental testing at the Site and performed AAI. *See supra* ¶¶ 182, 186, 189, 192, 194, and 202; Part II.D.8.i.b.

d. Ashley has cooperated with EPA. *See supra* Part II.D.8.i.e.

e. Ashley's ultimate goal in remediating the Site and conducting the Magnolia Development project is to cleanup the Site for productive use and ultimately

make a profit. *See supra* ¶¶ 178-79.

f. Ashley has attempted to discourage EPA from pursuing recovery for response costs caused by the Holcombe and Fair Parties. *See supra* ¶ 198.

g. Ashley failed to exercise appropriate care with regard to the Site. *See supra* Part II.D.8.i.d.

h. Ashley may have permitted additional releases of hazardous materials to occur on the Allwaste parcel. *See supra* Part II.D.8.i.a.

9. Equitable Shares

Taking all of the foregoing into account, the court finds that in accordance with equity, the parties shall be liable for the following percentages of the past and future response costs to clean up the Site:

i. Ross is responsible for forty-five percent (45%);

ii. PCS is responsible for thirty percent (30%);

iii. The Holcombe and Fair Parties are responsible for sixteen percent (16%);[15]

iv. RHCE is responsible for one percent (1%);

v. Allwaste is responsible for three percent (3%);[16]

vi. The City of Charleston is responsible for zero percent (0%);[17] and

vii. Ashley is responsible for five percent (5%).

If it is subsequently determined that any liable party is adjudged unable to pay all or a portion

[15] In accordance with the court's ruling on the Holcombe and Fair Parties' Motion for Partial Judgment on the Findings [Entry 520], Ashley is responsible for this share.

[16] In accordance with the court's ruling on Allwaste's Motion for Partial Judgment on the Findings [Entry 517], Ashley is responsible for this share.

[17] Based on the facts and equities, the court determines that the City should be allocated a zero percent share of liability for the cost of remediation at the Site. *Alcan*, 964 F.2d at 845 (a PRP can avoid liability with proof that its release of hazardous substances did not contribute to the response costs).

of its equitable share, that share, less recovered amounts, shall be reallocated to the other liable parties on a pro rata basis in accordance with the above percentage shares. *See, e.g., United States v. Stringfellow*, No. CV-83-2501-JMI, 1995 WL 450856 (C.D. Cal. Jan. 24, 1995) (the court first allocates to each responsible party; if one party is later adjudicated bankrupt, the court then reallocates this share to the other parties).

E. Ross Indemnification of PCS

PCS argues that it, as successor to CNC, has a valid indemnification agreement with Ross, as successor to Planters.

1. Whether the Planters-CNC Indemnification Agreement is in Effect

PCS contends that the Planters-CNC indemnification agreement ("Indemnification Agreement") is in effect because: 1) the parties expressly provided that the Indemnification Agreement would remain in effect after closing; and 2) the Indemnification Agreement is unqualified in that it reaches all of the assets in the transaction between Planters and CNC. [Entry 569-1 at 21]. PCS contends that because the deed transferring the Site from Planters to CNC only partially performed the provisions in the January 7, 1996 Letter of Agreement ("Letter of Agreement"), the Letter of Agreement, which contains the Indemnification Agreement, was not merged into the deed at closing. [Entry 596 at 4]. Ross contends that because the deed does not contain or incorporate the Indemnification Agreement, and the Bill of Sale that incorporates the Indemnification Agreement specifically excludes the land, PCS is not entitled to indemnification from Ross. [Entry 578 at 1-3].

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co.*, No. 4794, 2011 WL 692226, at *3 (S.C. Ct. App. Feb. 23, 2011) (citing *Schulmeyer v. State Farm*

Fire & Cas. Co., 579 S.E.2d 132, 134 (S.C. 2003)). "If [a] contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." *Id.* (citing *Schulmeyer*, 579 S.E.2d at 134). Only when a contract is ambiguous may extrinsic evidence be admitted to aid interpretation. *Rhame v. Nat'l Grange Mut. Ins. Co.*, 121 S.E.2d 94, 97 (S.C. 1961). Whether a contract's language is ambiguous is a question of law. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 550 S.E.2d 299, 302-03 (S.C. 2001). A contract is ambiguous "only when it may fairly and reasonably be understood in more ways than one." *Hansen v. United Servs. Auto. Assoc.*, 565 S.E.2d 114, 117 (S.C. Ct. App. 2002).

Generally speaking, the merger by deed doctrine provides that "a deed made in full execution of a contract of sale of land merges the provisions of the contract therein. . . ." *Charleston & W. Carolina Ry. Co. v. Joyce*, 99 S.E.2d 187, 193 (S.C. 1957). "[T]his rule extends to and includes all prior negotiations and agreements leading up to the execution of the deed." *Id.*; *see also Wilson v. Landstrom*, 315 S.E.2d 130, 133 (S.C. Ct. App 1984) ("A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract. . . .") (citing *Charleston & W.*, 99 S.E.2d at 187).

There are two exceptions to the merger by deed doctrine. First, if a deed "constitutes only part performance of a preceding contract, other distinct and unperformed provisions of the contract are not merged in the deed." *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 429 S.E.2d 791, 792 (S.C. 1993) (citing 26 C.J.S. Deeds § 91 (1956)). Second, agreements that are not intended to be merged in a deed, are also not merged into the deed. *Hughes v. Greenville Country Club*, 322 S.E.2d 827, 828 (S.C. Ct. App. 1984) (citing *Charleston & W.*, 99 S.E.2d at 193)). Under the second exception, "the party denying merger has the burden of proving by clear and convincing

evidence that merger was not intended." *Hughes*, 322 S.E.2d at 828 (citing *Knight v. Hedden*, 146 S.E.2d 556, 558 (Ga. Ct. App. 1965)).

In the Letter of Agreement, Planters agreed to sell its business to CNC and promised to indemnify CNC. [PCS Ex. 276]. The Letter of Agreement contains sixteen terms and conditions involving such topics as obtaining board approval of the sale by CNC, maintenance of adequate insurance, continuance of operations, indemnification, covenants not to compete, and termination of employment relationships with employees. [*Id.* ¶ I, IV, VII, VIII, X, and XII]. The Letter of Agreement's indemnification provision states:

> Seller [Planters] agrees to indemnify and hold harmless Buyer [CNC] in respect to all acts, suits, demands, assessments, precedings and cost and expenses resulting from any acts or omission of the Seller [Planters] occurring prior to the closing date and pertaining herein, provided the Seller [Planters] receives prompt notice in writing of such claim or demand and Seller [Planters] shall have the right to litigate or contest such claim.

[PCS Ex. 276 at 10 ¶ VIII]. The Letter of Agreement also states: "the sale, conveyance and transfer of the assets of the business of the Seller [Planters] which are to be transferred to the Buyer [CNC], shall be effected by Deed, Bill of Sale, and other instruments of transfer and conveyances in such form as the Buyer [CNC] shall reasonably request." [*Id.* at 4, ¶ V].

On June 30, 1966, the Planters plant and equipment were transferred from Planters to CNC by way of a Bill of Sale. [PCS Ex. 15]. The real estate on which the plant was located was transferred through a deed on the same date. [Ash. Ex 23]. The deed did not explicitly incorporate the Letter of Agreement or the indemnification provision. [*See id.*]. However, the Bill of Sale states:

> It is the intention of the Seller by this instrument to fully and effectually implement its obligation to deliver to the Buyer certain tangible personal property **and interest in certain real and personal property** pursuant to a certain Letter of Agreement dated January 7, 1966, as supplemented by a letter dated March 31, 1966, and it is accordingly declared that the Letter of Agreement above referred to as so

> supplemented, shall survive the execution and delivery of this Bill of Sale, so that it shall be the continuing obligation of the Seller to execute and deliver such further instruments of conveyance and assurance as may be required in order that the Seller shall faithfully and fully implement its obligation above referred to.

[PCS Ex. 15 ¶ VIII (emphasis added)]. Because the Letter of Agreement clearly contains provisions that are not addressed in the deed or performed by the deed, the doctrine of merger by deed is inapplicable. In addition, the language of the Bill of Sale that incorporates the Letter of Agreement explicitly mentions the sale of real property, and not just the plant and equipment, indicating that the indemnification agreement is applicable to the land. Based upon the foregoing, the court finds that the Indemnification Agreement between Planters and CNC remains in effect.

1. Effect of the Indemnification Agreement

a. *Whether PCS is Entitled to Payment of Its Costs by Ross*

PCS contends that the court should find that the Indemnification Agreement requires Ross to reimburse PCS for the costs of this litigation that arise from Ross' acts and omissions. [Entry 569-1 at 23]. PCS contends that these costs include litigation costs incurred by PCS to date to identify Ross as a liable party and to bring Ross into this litigation. [*Id.*].

As a preliminary matter, the court finds that the broad language of the Indemnification Agreement, which covers "all acts, suits, demands, assessments, precedings and cost and expenses resulting from any acts or omission of the Seller [Planters] occurring prior to the closing date," encompasses CERCLA claims. *See Joslyn Mfg. Co.*, 40 F.3d at 754 (5th Cir.1994) (holding that broad language in indemnity clauses indicated that the agreements were intended to cover all forms of liability, including liability under CERCLA, even though environmental liability under CERCLA was not contemplated at the time of contracting); *Kerr-McGee*, 14 F.3d at 327 (recognizing that a party may contract to indemnify another for environmental liability even though CERCLA was not

in existence at the time of contracting); *Vill. of Fox River Grove*, 806 F. Supp. at 792 (holding that a general release between a CERCLA plaintiff and a third-party defendant, which was entered into prior to the enactment of CERCLA, barred third-party contribution claims); *Jones-Hamilton Co.*, 750 F. Supp. at 1026-27 (holding that an indemnification agreement that encompassed "all losses, damages and costs" resulting from any violation of law was sufficient to release the indemnitee from CERCLA liability even though the agreement was entered into prior to the enactment of CERCLA and did not specifically mention CERCLA). In addition, based upon the plain language of the Indemnification agreement, the court finds that Ross must reimburse PCS for the costs and expenses of this case resulting from any acts or omissions that occurred "prior to the closing date" of the sale of the Planters business to CNC. [*See* PCS Ex. 276 at 10 ¶ VIII].

b. *Whether the Indemnification Agreement Bars Ashley from Holding PCS Liable for Ross's Equitable Share of the Harm at the Site*

PCS contends that the Indemnification Agreement prevents any entity from recovering from PCS any response costs allocated to Ross, including part of any orphan share, because PCS has been released from such claims and indemnified from such costs. [Entry 569-1 at 20]. The court disagrees.

As previously stated, CERCLA permits parties to shift the burden for paying response costs through contractual agreements. *See* 42 U.S.C. § 9607(e)(1) ("Nothing in [CERCLA § 107(e)(1)] shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under [CERCLA § 107]."). An individual or entity that settles with a CERCLA plaintiff before final judgment is not liable for contribution to others for the injury. Restatement (Third) of Torts § 23 cmt i. However, contrary to PCS's contention, this principle does not apply to indemnification agreements among joint tortfeasors.

Generally speaking, when two or more parties have engaged in tortious conduct that is a legal cause of indivisible harm, as in this case, each joint tortfeasor can be held liable for the entire harm. Restatement (Second) of Torts § 875. A plaintiff then has the right to decide which joint tortfeasor(s) to sue for recovery. *Chester v. S. Carolina Dept. of Pub. Safety*, 698 S.E.2d 559, 560 (S.C. 2010) (citing *Doctor v. Robert Lee, Inc.*, 55 S.E.2d 68 (1949)). The affect of a contractual indemnification agreement among joint tortfeasors, does not affect a plaintiff's right to decide which joint tortfeasor(s) to sue. Instead, a contractual indemnity agreement among joint tortfeasors allows the indemnitee tortfeasor to recover from the indemnitor tortfeasor. *See First Gen. Servs. of Charleston, Inc. v. Miller*, 445 S.E.2d 446, 449 (S.C. 1994) ("Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.") (quoting *Winnsboro v. Wiedeman-Singleton, Inc.*, 398 S.E.2d 500 (S.C. Ct. App. 1990)); *see also McCain Mfg. Corp. v. Rockwell Intern. Corp.*, 695 F.2d 803 (4th Cir. 1982) (finding that in South Carolina, if a joint tortfeasor could prove that it had a contractual indemnification agreement with another joint torfeasor, it would be able to recover from the other joint tortfeasor for damages paid to a harmed party). Therefore, the Indemnification Agreement does not change the fact that PCS is jointly and severally liable for all costs of the remediation of the Site pursuant to CERCLA. With regard to PCS's claim that it cannot be apportioned any part of any orphan share left by Ross due to the Planters-CNC indemnification agreement, any ruling on this issue would be speculative until such time as an orphan share is established. Therefore, the court declines to address PCS's claim at this time.

III. CONCLUSION

Allwaste's Motion for Judgment on Partial Findings [Entry 517] is **granted**. The Holcombe and Fair Parties' Motion for Judgment as a Matter of Law [Entry 520] is **granted**. RHCE's Motion for Judgment on Partial Findings [Entry 521] is **denied**. PCS is liable to Ashley for response costs pursuant to § 107(a)(2) of CERCLA. The harm at the Site is indivisible and PCS's liability is joint and several.

Judgment shall be entered for Ashley in the amount of $147,617.02 plus interest against PCS, which represents the amount of $194,232.94 that Ashley spent in past response costs for which PCS is jointly and severally liable minus applicable set-offs. Judgment shall be entered for PCS in the amount of $87,404.82 plus interest against Ross; and in the amount of $1,942.32 plus interest against RHCE, which represents those parties' respective shares of Ashley's past response costs.

Declaratory judgment shall be entered for Ashley against PCS for 76% of future response costs at the Site, which represents the percentage of future response costs for which PCS is jointly and severally liable minus applicable set-offs. Declaratory judgement shall be entered for PCS against Ross and RHCE in the respective percentages of 45% and 1% for future response costs at the Site. PCS is entitled to reimbursement from Ross for PCS's costs and expenses in this litigation resulting from any acts or omissions of Planters that occurred prior to the closing date of the sale of the Planters business to CNC. The court retains jurisdiction over the case should it become necessary to determine whether the final remediation plan for the Site is consistent with the National Contingency Plan.

IT IS SO ORDERED.

s/ Margaret B. Seymour
The Honorable Margaret B. Seymour
United States District Judge

Columbia, South Carolina
May 27, 2011



2 of 15 DOCUMENTS



Caution
As of: Sep 13, 2013

PCS NITROGEN INCORPORATED, successor through purchase, name change and merger to Columbia Nitrogen Corporation, Defendant and Third Party Plaintiff-Appellant, v. ASHLEY II OF CHARLESTON LLC, Plaintiff-Appellee, ROSS DEVELOPMENT CORPORATION; J HOLCOMBE ENTERPRISES LP; KONINKLIJKE DSM NV; DSM CHEMICALS OF NORTH AMERICA INCORPORATED; ROBIN HOOD CONTAINER EXPRESS INCORPORATED; ALL WASTE TANK CLEANING INCORPORATED, f/k/a PSC Container Services, LLC, now known as QualaServices, LLC; J HENRY FAIR, JR., Third Party Defendants-Appellees, and JAMES H. HOLCOMBE; CITY OF CHARLESTON, SOUTH CAROLINA, Third Party Defendants. ROSS DEVELOPMENT CORPORATION, Third Party Defendant-Appellant, v. PCS NITROGEN INCORPORATED, successor through purchase, name change and merger to Columbia Nitrogen Corporation, Defendant and Third Party Plaintiff-Appellee, and ASHLEY II OF CHARLESTON LLC, Plaintiff, J HOLCOMBE ENTERPRISES LP; KONINKLIJKE DSM NV; ROBIN HOOD CONTAINER EXPRESS INCORPORATED; DSM CHEMICALS OF NORTH AMERICA INCORPORATED; ALL WASTE TANK CLEANING INCORPORATED; J HENRY FAIR, JR.; CITY OF CHARLESTON, SOUTH CAROLINA; JAMES H. HOLCOMBE, Third Party Defendants, PSC CONTAINER SERVICES LLC, Defendant. ROBIN HOOD CONTAINER EXPRESS ü INCORPORATED, Third Party Defendant-Appellant, v. PCS NITROGEN INCORPORATED, successor through purchase, name change and merger to Columbia Nitrogen Corporation, Defendant and Third Party Plaintiff-Appellee, ASHLEY II OF CHARLESTON LLC, Plaintiff-Appellee, ROSS DEVELOPMENT CORPORATION; J HOLCOMBE ENTERPRISES LP; KONINKLIJKE DSM NV; DSM CHEMICALS OF NORTH AMERICA INCORPORATED; ALL WASTE TANK CLEANING INCORPORATED; J HENRY FAIR, JR., Third Party Defendants-Appellees, and CITY OF CHARLESTON, SOUTH CAROLINA; JAMES H. HOLCOMBE, Third Party Defendants, PSC CONTAINER SERVICES LLC, Defendant. J HOLCOMBE ENTERPRISES LP; J HENRY FAIR, JR., Third Party Defendants-Appellants, v. PCS NITROGEN INCORPORATED, successor through purchase, name change and merger to Columbia Nitrogen Corporation, Defendant and Third Party Plaintiff-Appellee, ASHLEY II OF CHARLESTON LLC, Plaintiff-Appellee, ROBIN HOOD CONTAINER EXPRESS INCORPORATED; ROSS DEVELOPMENT CORPORATION; KONINKLIJKE DSM NV; DSM CHEMICALS OF NORTH AMERICA INCORPORATED; ALL WASTE TANK CLEANING INCORPORATED, Third Party Defendants-Appellees, and CITY OF CHARLESTON, SOUTH CAROLINA; JAMES H. HOLCOMBE, Third Party Defendants, PSC CONTAINER SERVICES LLC, Defendant. ASHLEY II OF CHARLESTON LLC, Plaintiff-Appellant, v. PCS NITROGEN INCORPORATED, successor through purchase, name change and merger to Columbia Nitrogen Corporation, Defendant and Third Party Plaintiff-Appellee, ROBIN HOOD CONTAINER EXPRESS INCORPORATED; ROSS

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76 ERC (BNA) 1683; 43 ELR 20078

DEVELOPMENT CORPORATION; KONINKLIJKE DSM NV; DSM CHEMICALS OF NORTH AMERICA INCORPORATED; ALL WASTE TANK CLEANING INCORPORATED; J HOLCOMBE ENTERPRISES LP; J HENRY FAIR, JR., Third Party Defendants-Appellees, and CITY OF CHARLESTON, SOUTH CAROLINA; JAMES H. HOLCOMBE, Third Party Defendants, PSC CONTAINER SERVICES LLC, Defendant.

No. 11-1662, No. 11-2087, No. 11-2099, No. 11-2104, No. 11-2297

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

714 F.3d 161; 2013 U.S. App. LEXIS 6815; 76 ERC (BNA) 1683; 43 ELR 20078

December 5, 2012, Argued
April 4, 2013, Decided

SUBSEQUENT HISTORY: Petition for certiorari filed at, 07/29/2013
Later proceeding at Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 2013 U.S. Dist. LEXIS 111813 (D.S.C., Aug. 8, 2013)

PRIOR HISTORY: [**1]
Appeals from the United States District Court for the District of South Carolina, at Charleston. (2:05-cv-02782-MBS). Margaret B. Seymour, Chief District Judge; C. Weston Houck, Senior District Judge.
Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 2011 U.S. Dist. LEXIS 57441 (D.S.C., 2011)
Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 746 F. Supp. 2d 692, 2010 U.S. Dist. LEXIS 104772 (D.S.C., 2010)

COUNSEL: ARGUED: Brian J. Murray, JONES DAY, Chicago, Illinois, for PCS Nitrogen Incorporated.

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JUDGES: Before MOTZ, KING, and DIAZ, Circuit Judges. Judge Motz wrote the opinion, in which Judge King and Judge Diaz joined.

OPINION BY: DIANA GRIBBON MOTZ

OPINION

[*167] DIANA GRIBBON MOTZ, Circuit Judge:

These appeals arise from disputes as to liability for cleanup of hazardous substances at a former fertilizer manufacturing site in Charleston, South Carolina. After incurring response costs, Ashley II of Charleston, Inc., the current owner of a portion of the site, brought a cost recovery action against PCS Nitrogen, Inc., under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§

9601-9675 (2006). PCS counterclaimed and also brought third-party contribution actions against parties with past and current connections to the site. The district [**3] court bifurcated the case for trial. At the conclusion of the first bench trial, it found PCS a potentially responsible party jointly and severally liable for response costs at the site. At the conclusion of the second bench trial, the court found some of the other parties, including Ashley, potentially responsible parties, each liable for an allocated portion of the site's response costs. PCS, Ashley, and many of the other parties now appeal. For the reasons that follow, we affirm the judgment of the district court in all respects.

I.

A.

Congress enacted CERCLA in response to "the increasing environmental and health problems associated with inactive hazardous waste sites." *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992). CERCLA "was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602, 129 S. Ct. 1870, 173 L. Ed. 2d 812 (2009) (internal quotation marks omitted).

In furtherance of these goals, CERCLA allows "private parties to recover the costs of cleaning up hazardous wastes from certain defined types of [**4] person." *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 413 (4th Cir. 1999). A private-party plaintiff establishes a prima facie case for cost recovery under CERCLA by establishing that (1) the defendant is a potentially responsible person ("PRP"); (2) the site constitutes a "facility"; (3) a "release" or a threatened release of hazardous substances exists at the "facility"; (4) the plaintiff has incurred costs responding to the release or threatened release of hazardous substances ("response [*168] costs"); and (5) the response costs conform to the National Contingency Plan. 42 U.S.C. §§ 9601(9), (22), 9607(a); *see ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 356 (2d Cir. 1997).

Section 9607(a) establishes strict liability. *See United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988). This liability under CERCLA is subject only to a few narrow defenses and exemptions. *See* 42 U.S.C. § 9607(b) (defenses); *id.* § 9607(o)-(r) (exemptions). Liability is, by default, joint and several. *See Monsanto*, 858 F.2d at 171-72.

However, in some circumstances a PRP may mitigate the sting of CERCLA's imposition of joint and several liability by apportionment or allocation [**5] of harm. *See Axel Johnson*, 191 F.3d at 413. Apportionment--also known as division of damages--assigns a several share of liability to each PRP based on "traditional and evolving principles of federal common law." *Monsanto*, 858 F.2d at 171-72. Under these principles, apportionment is available only when a PRP proves that "there is a reasonable basis for determining the contribution of each cause to a single harm." *Burlington Northern*, 556 U.S. at 614 (quoting *Restatement (Second)* of Torts § 433A(1)(b) (1963-64)).

In contrast, allocation of harm--also known as contribution--is available to any party sued under § 9607(a), and allows the party to "seek contribution from any other person who is liable or potentially liable under [§] 9607(a)." 42 U.S.C. § 9613(f). The district court may then allocate several liability for "response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.*; *see Minyard Enters., Inc. v. Se. Chem. & Solvent Co.*, 184 F.3d 373, 385 (4th Cir. 1999).[1]

[1] In addition to the fact that apportionment rests on causation principles and allocation rests on equity principles, the two also differ in function. Although both technically [**6] negate CERCLA's joint liability by assigning shares of liability, *see Minyard Enters.*, 184 F.3d at 385; *Monsanto*, 858 F.2d at 171-72, they differ in how they determine liability for so-called "orphaned" shares--those shares of "liability attributable to a party who is insolvent, cannot be located, or cannot be identified," *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 303 (5th Cir. 2010). If a court apportions harm, the party that incurred the response costs bears the burden of orphaned shares because the apportioned orphan share is necessarily unrecoverable. *See Burlington Northern*, 556 U.S. at 605, 618-19 (upholding apportionment that left over ninety percent of the harm as an orphaned share ultimately borne by the government). But when a court allocates shares it retains the equitable discretion to allocate orphaned shares (or re-allocate newly orphaned shares) to solvent, available PRPs, thus shifting the burden of orphaned shares from the party that incurs the response costs. *See Lyondell Chem. Co.*, 608 F.3d at 303; *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997), *overruling on other grounds recognized by Kotrous v. Goss-Jewett Co. of N. Cal.*, 523 F.3d 924, 927 (9th Cir. 2008).

B.

Central [**7] to this CERCLA case is the history of the site at issue here--approximately forty-three acres located in Charleston, South Carolina. As a result of decades of phosphate fertilizer production, the westernmost thirty-four acres of the site require remediation of soils contaminated with arsenic, lead, and other hazardous substances. The evidence presented at the two bench trials established the following facts.

1.

From 1884 to the early 1900s, seven phosphate fertilizer plants operated in close proximity to the site and provided [*169] potential sources for pyrite waste that may have been disposed of on the site prior to 1906.

Planters Fertilizer & Phosphate Company, now known as Ross Development Corporation, purchased the site in 1906. Planters manufactured phosphate fertilizer at the site by reacting sulfuric acid with phosphate rock. Planters produced the sulfuric acid for the process on-site, and stored the acid in lead-lined tanks. Prior to the 1930s, Planters used pyrite ore as the primary fuel for its sulfuric acid production. The burning of pyrite ore generated a pyrite slag byproduct containing high concentrations of arsenic and lead. Planters spread the slag byproduct to stabilize roads [**8] on the site. This accounts for the vast majority of arsenic and lead contamination found on the site today.

Planters continued operating its fertilizer production plant on the site until 1966. During that time, Planters constructed and repaired several minor buildings and, after a fire destroyed a significant portion of its original acid plant, constructed a modernized acid plant. On June 30, 1966, Planters sold the site--including the plant and its equipment--to Columbia Nitrogen Corporation ("Old CNC").

Old CNC continued operations of the acid and fertilizer plants until 1970 and 1972, respectively. Although Old CNC did not use pyrite ore, its superphosphate fertilizer production generated dust that contained elevated levels of arsenic and lead, and contributed to arsenic and lead soil contamination on the site. During its operations, Old CNC constructed a new granulation plant and converted the former granulation plant into storage.

In April 1971, a wind storm extensively damaged many buildings on the site, including the acid plant, and dispersed contaminated materials across the site. Old CNC chose not to repair, and instead demolished, the damaged acid plant. In the process, Old CNC [**9] disturbed the subsurface soil to a depth of at least two feet. By October 1972, Old CNC had ceased all fertilizer production on the site.

The site remained inactive until 1977, when Old CNC began to dismantle the remaining structures, a process completed in January 1981. All told, Old CNC's construction and demolition activities between 1971 and 1981 affected nearly eighty percent of the area of contaminated soils that needs to be remediated as part of the site's cleanup. In May 1985, Old CNC sold the site to James H. Holcombe and J. Henry Fair (collectively "Holcombe and Fair"[2]). But in doing so, Old CNC apparently did not transfer any of its corporate liabilities for past actions on the site; thus, as the parties agree, Old CNC--if still in existence--would be a PRP with respect to the site. *See infra* § II.A.

2 Holcombe formed Holcombe Enterprises, Inc., on December 17, 1997 and conveyed his share of the site to Holcombe Enterprises six days later. Holcombe, Fair, and Holcombe Enterprises are all parties to this appeal, and were treated as one entity by the district court. For the sake of simplicity, we identify the owners of the site as Holcombe and Fair, both before and after Holcombe's [**10] conveyance of his share of the property to Holcombe Enterprises.

2.

Old CNC did not limit its fertilizer production to the site. Rather, while owning the site, Old CNC also owned and operated an ammonia and nitrogen fertilizer plant in Augusta, Georgia. In 1986, over a year after Old CNC had sold its Charleston site, Old CNC's parent corporations, Koninklijke DSM N.V. and DSM Chemicals North America (collectively "DSM [*170] Parties"), decided to shut down Old CNC to benefit from a $100 million tax advantage in the Netherlands. To do so, Old CNC sought a buyer for certain "Assets" and its "Acquired Business," including its Augusta plant and operation. Andlinger & Company, Inc., a firm specializing in the acquisition of businesses, incorporated CNC Corp. ("New CNC") to purchase Old CNC's "Assets" and "Acquired Business."

Old CNC and New CNC entered into a series of agreements, and the acquisition closed on November 6, 1986. Under the Acquisition Agreement, New CNC purchased certain "Assets" and the "Acquired Business" for $50 million, an approximately sixty percent discount from book value. In exchange for an additional $5 million discount, New CNC accepted the acquired business and assets "as [**11] is." After closing, New CNC immediately changed its name to "Columbia Nitrogen Corporation" -- the same name under which Old CNC operated. At the same time, Old CNC initiated the process of liquidation and dissolution.

After the acquisition, New CNC continued producing ammonia- and nitrogen-based fertilizers at the Au-

gusta plant. By virtue of a series of mergers and acquisitions, PCS Nitrogen, Inc., is a successor to New CNC. Neither New CNC nor PCS ever owned or operated any portion of the Charleston site at issue in this appeal.

3.

Meanwhile, Holcombe and Fair, who had acquired the Charleston site from Old CNC in 1985, were unaware of any contamination at the site. They first became aware of the presence of hazardous substances at the site in 1990.

Holcombe and Fair intended to subdivide and lease the site, and the record contains no evidence that Holcombe and Fair introduced any new hazardous substances to the site. However, even after learning of the possibility (and ultimate existence) of hazardous substances on the site, Holcombe and Fair undertook site-wide earth-moving activities, including the construction of a street extension, the addition of water and sewer lines, excavation [**12] and grading, and the construction of several detention ponds. As late as 1998, Holcombe and Fair undertook earth-moving activities in areas with "discolored" and "contaminated" soils, and destroyed on-site wetlands along the Ashley River. However, they also added a four-to-six inch limestone run of crusher cover over the majority of the site, which mitigated risks of acute exposure to the site's contaminated soils.

During their ownership, Holcombe and Fair subdivided and conveyed several parcels from the original site. First, in December 1987, Holcombe and Fair sold three acres of the site to Max and Marlene Mast. The Masts sold their parcel to Allwaste Tank Cleaning, Inc., in August 1988. Allwaste operated a shipping container cleaning and storage business and in 1991 leased two additional acres from Holcombe and Fair for storage. As part of its operations, Allwaste utilized an underground sump system to capture wastewater generated by the container-cleaning process and pump it into a treatment system. Allwaste allowed the sumps to deteriorate during its ownership of the parcel to the extent that the sumps presented a threat of a release of hazardous substances. Although Allwaste did [**13] not introduce arsenic or lead to its parcel, both contaminate the soils in its parcel. Allwaste still owned the parcel at the commencement of this action.

In December 1990, Holcombe and Fair contracted to sell two acres of the site to Robin Hood Container Express ("RHCE"). In December 1991, RHCE directed and paid for the excavation of a 1380-cubic-foot pond, two asphalt driveways, and extended [*171] sewer and water lines on the site. Contractors for RHCE also stripped six inches of topsoil and graded and proof-rolled the land. A month later, Holcombe and Fair conveyed the two-acre parcel to RHCE's president, Robin Hood, who leased it to RHCE to operate a dropyard. During its tenure, RHCE filled in the pond, and limestone run of crusher now covers the entire parcel. Although RHCE did not introduce any arsenic or lead to its leasehold, both contaminate its leasehold's soil. Robin Hood continued to own, and RHCE continued to lease, this parcel at the commencement of this action.

In December 1991, Holcombe and Fair conveyed the street extension they had constructed, totaling 1.28 acres, to the City of Charleston by quitclaim deed. The City remains the owner of the street extension today.

Finally, [**14] in November 2003, Holcombe and Fair sold their remaining 27.62 acres of the site to Ashley II of Charleston, Inc., for $2.7 million. Ashley purchased the site to include it as a portion of its Magnolia Development--a sustainable, mixed-use project. As with other parcels within the project, Ashley purchased the site with knowledge of, and the intent to remediate, the contaminated soils.

By the time of Ashley's ownership, the run of crusher cover had degraded, leaving contaminated soil exposed in many areas. For several years, Ashley allowed a trash pile to accumulate on its parcel.

In February 2007--well after the commencement of this action--Ashley contracted with Allwaste to purchase Allwaste's three-acre parcel. Ashley engaged in extensive pre-purchase environmental assessments of the parcel, and Allwaste conveyed the parcel to Ashley in May 2008.

In investigating and remediating the site, Ashley to date has incurred response costs totaling at least $194,000.[3]

3. Since 1998, state and federal experts have comprehensively investigated environmental conditions at the site, and have documented arsenic-and lead-contaminated soils and low soil pH conditions across the site, as well as two carcinogenic [**15] polycyclic aromatic hydrocarbon "hotspots." Although EPA considered undertaking removal actions during Holcombe and Fair's ownership of the site, it did not do so. After Ashley purchased the site, it asked EPA to notify it if the agency desired "specific cooperation, assistance, access or the undertaking of any reasonable steps with respect to the Site." In October 2005, EPA determined that the site qualified for a non-time-critical removal action and described its preferred removal alternatives. To date, however, EPA has not ordered Ashley to take any remedial actions on the site.

C.

On September, 26, 2005, Ashley filed this action, seeking a declaratory judgment that PCS was jointly and severally liable for response costs as a PRP for the site, and recovery of response costs already incurred. *See* 42 U.S.C. § 9607(a)(4)(B). Ashley contended that PCS was a successor corporation to Old CNC, and thus liable as a PRP in Old CNC's stead.

PCS denied liability as a successor corporation to Old CNC, and in the alternative filed a contribution counterclaim under 42 U.S.C. § 9613(f) against Ashley and third-party claims against Ross, the DSM Parties, Holcombe and Fair, Allwaste, RHCE, and the [**16] City of Charleston. Those parties in turn filed counter- and cross-claims against one another under § 9613(f), and also sought determination of their rights to future cost recovery and contribution.

The district court bifurcated the proceedings. The first trial would determine if PCS was liable to Ashley under [*172] § 9607(a). If so, the second trial would allocate the ultimate responsibility of each party for response costs at the site under § 9613(f).

On September 28, 2007, after a bench trial on PCS's liability, the court held that PCS was a corporate successor to Old CNC, and thus jointly and severally liable to Ashley for response costs as a PRP for the site. A year later, the presiding judge disqualified himself from further participation in the case, and the case was reassigned to another judge. On June 2, 2009, the successor judge denied PCS's motion to vacate the original judge's order as to PCS's liability. Shortly thereafter, the court granted summary judgment to the DSM Parties, holding them not liable because "no basis existed" for imputing Old CNC's acts to them.

Then, between October 2009 and January 2010, the district court held a sixteen-day bench trial on the allocation phase. [**17] The court ultimately allocated liability for past and future response costs at the site to PCS, Ashley, Ross, Holcombe and Fair, RHCE, and Allwaste in various amounts.

These appeals followed. On appeal, no party disputes that Ashley incurred response costs for the cleanup of hazardous substances at the site that were consistent with the National Contingency Plan. Rather, the parties solely dispute whether and to what amount each is liable for response costs at the site.

II.

We first address the appeals of the district court's determinations as to which parties constitute PRPs for the site.

CERCLA defines four non-mutually exclusive classes of PRPs liable for costs incurred in responding to a "release" of hazardous substances at any "facility." 42 U.S.C. § 9607(a); *see Nurad*, 966 F.2d at 841. These PRPs include (1) the current "owner" or "operator" of a "facility"; (2) any "person" who "owned" or "operated" the "facility" at the time of disposal of a hazardous substance; (3) any "person" who "arranged for disposal or treatment" of hazardous substances at the "facility"; and (4) any "person" who accepts hazardous substances "for transport to disposal or treatment facilities, incineration [**18] vessels or sites." 42 U.S.C. § 9607(a)(1)-(4); *Nurad*, 966 F.2d at 841. The classes of PRPs have an undeniably broad reach. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 136, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007). But they nonetheless remain subject to the limitations of derivative liability inherent in corporate law. *See United States v. Bestfoods*, 524 U.S. 51, 62-64, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998).

A PRP's strict liability for response costs is subject only to CERCLA's limited defenses and exemptions. *Axel Johnson*, 191 F.3d at 413. Courts do not consider equity in determining whether a party is a PRP. Congress, however, did provide for equitable allocation of liability under § 9613(f) to mitigate any inequity arising from CERCLA's strict liability scheme. *Id.* at 415.

With these principles in mind, we review the district court's determinations of PRP status de novo. *See Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 773 (4th Cir. 1998). We first consider PCS's appeal of the determination that it is a PRP. Then, we turn to the multiple challenges to the determinations of the other parties' PRP status in the second trial.

A.

The district court held that PCS is a PRP for the Charleston site as the corporate [**19] successor to Old CNC. Although PCS never owned or operated the site, it admits [*173] that it is a successor to New CNC, and that Old CNC--despite dissolving decades ago--would be a PRP.

Under CERCLA, successor corporations may be liable for the actions of their predecessors. *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992). However, as at common law, a corporation that acquires the assets of another corporation typically does not acquire its liabilities, unless "(1) the successor expressly or impliedly agrees to assume the liabilities of the predecessor; (2) the transaction may be considered a de facto merger; (3) the successor may be considered a 'mere continuation' of the predecessor; or (4) the transaction is fraudulent." *Id.* at 838. In the past, we have also

recognized successor liability where "substantial continuity" exists between a predecessor and successor corporation. *Id.*

The district court held PCS liable as a successor to Old CNC under three theories. We need only address one--that New CNC either unambiguously, or based on extrinsic evidence, assumed Old CNC's liabilities for the site under the 1986 Acquisition Agreement. In doing so, we review the district [**20] court's applications of contract principles de novo, and its findings of fact with respect to extrinsic evidence for clear error. *Hendricks v. Cent. Reserve Life Ins. Co.*, 39 F.3d 507, 512-13 (4th Cir. 1994). Under the Acquisition Agreement's choice of law provision, we apply New York contract law.

New York law enforces unambiguous contracts in accordance with their plain terms. *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 566 N.E.2d 639, 642, 565 N.Y.S.2d 440 (N.Y. 1990). In determining whether a contract is ambiguous, a court must

> examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance, and a sensible meaning of words should be sought.

William C. Atwater & Co. v. Panama R.R. Co., 246 N.Y. 519, 159 N.E. 418, 419 (N.Y. 1927). Thus, when considering isolated, potentially conflicting provisions, so long as a contract "makes clear the parties' over-all intention," a court "should then choose that construction which will carry out the plain purpose and [**21] object of the [agreement]." *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174, 181, 673 N.Y.S.2d 350 (N.Y. 1998) (internal quotation marks omitted). In harmonizing pro-visions, however, "no provision of a contract should be left without force and effect." *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 133 N.E.2d 688, 690, 150 N.Y.S.2d 171 (N.Y. 1956).

1.

Applying these principles, the district court initially held, as Ashley maintained, that New CNC unambiguously assumed Old CNC's CERCLA liabilities for the Charleston site under the Acquisition Agreement. We cannot agree.

Section 3.4 of the Agreement, on which the district court relied, does unambiguously transfer "[a]ll obligations required to be performed under all court, administrative and regulatory orders." But § 3.4 does not address, let alone unambiguously provide, that it covers CERCLA "obligations" arising *after* execution of the Agreement.

Ashley alternatively argues that New CNC unambiguously assumed Old CNC's CERCLA liability for the site in § 3.6 of [*174] the Agreement. This argument fares no better. All parties recognize that under § 3.6 New CNC did assume unknown, future CERCLA liability. The liability assumed, however, was only that "arising out of or in connection with the Acquired Business or the [**22] Purchased Assets."

It is undisputed that the phrase "arising out of or in connection with" would transfer liabilities from businesses or assets no longer owned by a seller in a *stock* sale. But typically this phrase does not transfer such liabilities in an *asset* sale. *See Honeywell Int'l, Inc. v. Phillips Petroleum Co.*, 415 F.3d 429, 435-36 (5th Cir. 2005). The Acquisition Agreement does not clearly establish whether the parties intended an ordinary asset sale or an atypical asset sale that was to be treated as a stock sale. Rather, the Agreement ambiguously provides that New CNC "assume[s] all obligations and liabilities relating to the Acquired Business . . . *as if* [Old CNC] were to sell and [New CNC] *were to purchase the stock* of [Old CNC] on the open market." This ambiguity prevents us from concluding that under the Agreement New CNC unambiguously assumed Old CNC's CERCLA liabilities for the Charleston site.

This ambiguity also defeats PCS's contention that the Acquisition Agreement clearly provides that New CNC did not assume Old CNC's CERCLA liabilities for the site. For PCS can point to no language in the Agreement which clarifies that, even if this were an atypical stock-like [**23] asset sale, New CNC assumed no CERCLA liabilities for the site.

At its outset, § III of the Agreement does, as PCS contends, limit the transfer of liabilities and obligations to New CNC to those "*relating* to the Acquired Business and Purchased Assets." But PCS's heavy reliance on the narrowness of this "relating to" language at the beginning of § III ignores language at the end of that same section that provides that transferred liabilities include "*without limitation*, the liabilities and obligations described below" in §§ 3.1-3.7. Among the liabilities "described below" are those in § 3.4, which provides that New CNC will assume not only the certain obligations "relating to the Acquired Business and Purchased Assets" but also those "*applicable to the Seller*." Where a general provision like that at the outset of § III conflicts with a specif-

ic provision like that in § 3.4, "the specific provision controls." *Muzak Corp.*, 133 N.E.2d at 690.

Therefore, we cannot accept either party's arguments that the Agreement unambiguously determines whether New CNC assumed Old CNC's CERCLA liability for the site.

2.

Usually, when we conclude that a district court has erred in holding a contract unambiguous, **[**24]** we must remand for a factual determination of the parties' intent based on consideration of extrinsic evidence. *See, e.g., Atalla v. Abdul-Baki*, 976 F.2d 189, 195 (4th Cir. 1992). However, in this case, the district court has already analyzed the extrinsic evidence offered by the parties during the bench trial, and alternatively found based on that evidence that New CNC intended to and did acquire CERCLA liabilities for the site under the Acquisition Agreement. We review a district court's factual finding as to intent for clear error. *See Hendricks*, 39 F.3d at 512. We can reverse only if, after reviewing the entire record, we are "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (internal quotation **[*175]** marks omitted). This rigorous standard does not permit reversal here.

The district court based its ultimate factual finding that extrinsic evidence established that New CNC intended to assume CERCLA liability for the Charleston site on several predicate findings. When considering ambiguity, the court initially found that even if the "as if" clause in the Agreement did not evince the parties' intent to enter into something **[**25]** very akin to a stock sale, at the very least the clause was ambiguous. Thus, the court considered the extrinsic evidence and found it demonstrated that the parties did intend to enter into an agreement "tantamount to a stock sale," *i.e.*, "as if" meant "equivalent to."

In support of this critical finding, the district relied on the abundant extrinsic evidence that New CNC knew of Old CNC's determination to dissolve by December 31, 1986, to preserve the $100 million tax advantage. The court found that New CNC's knowledge of Old CNC's paramount aim to avail itself of this tax advantage supported Ashley's contention that the parties--Old CNC and New CNC--agreed that New CNC would acquire "*all* of Old CNC that was not specifically retained or sold to another entity." Given that no one contends that Old CNC's CERCLA liability for the Charleston site was "specifically retained or sold to another entity," the court found this evidence supported Ashley's position that Old CNC transferred this liability to New CNC.

The district court also pointed to the extrinsic evidence that Old CNC discounted its sale price of $50 million by sixty percent from book value, and discounted an additional $5 million **[**26]** from the sale price in exchange for New CNC's assumption of the business and assets "as is," *i.e.*, including unknown environmental liabilities. The court noted that New CNC's lawyer on the transaction testified that the principals at New CNC were "comfortable enough with [their] due diligence to conclude that any unknown liabilities would not exceed $5 million." (To date, of course, the CERCLA cleanup costs for the site ($194,000) do not approach that number.) The court concluded that the heavily discounted purchase price further reduced by the $5 million discount for acceptance "as is" constituted additional extrinsic evidence that New CNC acquired "all of Old CNC that was not specifically retained or sold to another entity," *i.e.*, New CNC acquired CERCLA liability for the Charleston site.

Finally, the court found that New CNC intended to acquire "substantially all" of Old CNC--including its environmental liabilities--evidenced by two other agreements that New CNC entered into at the same time as the Acquisition Agreement. One of these agreements governed future advances, and the other contained guarantees signed by the chairman of New CNC. In both, New CNC stated that it was purchasing **[**27]** "substantially all" of Old CNC's liabilities. The court noted that these contemporaneous statements by New CNC "contradict[ed]" its after-the-fact litigation position as to the limited nature of the liabilities acquired.

Based on these facts, the court found that the parties intended to and in the Acquisition Agreement did transfer all of Old CNC's assets and liabilities not explicitly retained or sold to another entity, including Old CNC's latent CERCLA liabilities for the site.

PCS maintains that the district court clearly erred in so finding. PCS first contends that, contrary to the district court's conclusions, Old CNC's foremost intent to dissolve for tax benefit purposes and its agreement to discount its price if New CNC assumed the assets "as is" are "irrelevant" as to the actual scope of the liabilities **[*176]** transferred. That characterization seems to us to be an overstatement. While these facts are not dispositive, the district court could certainly find them relevant. PCS also points to evidence that after the sale Old CNC never transferred to New CNC records relating to the site (including those regarding environmental contamination); that New CNC was so cautious about assuming **[**28]** environmental liabilities that it did not acquire the land underlying the Augusta plant; and that some of the parties involved in the transaction testified that New CNC only intended to acquire the Augusta plant and operations. Although these facts are helpful to PCS's position, none *require* a finding in its favor.

Finally, PCS contends that, although Recital B describes the Agreement "as if" it were a stock sale, at the time the Agreement was executed witnesses at trial "agreed" that the sale transferred *only* assets. If the undisputed evidence at trial had established such contemporaneous "agreement" between Old CNC and New CNC, then PCS might well have been entitled to judgment. But the trial evidence did not establish this "agreement." In fact, only PCS's witnesses "agreed" on this point, and the district court was free to weigh their testimony against the contrary, above-outlined evidence offered by Ashley.

This is not to say PCS did not present evidence from which the district court could have resolved the Agreement's ambiguity in its favor. But Ashley presented contrary evidence supporting its view as to the meaning of the ambiguous contract language, and the district court, as **[**29]** fact finder, found in favor of Ashley. We cannot conclude that the court clearly erred in doing so. Here, as in many other cases, "both the intrinsic and extrinsic evidence of intended reach of the agreement might have supported a contrary finding." *See Brown v. Balt. & Ohio R.R. Co.*, 805 F.2d 1133, 1140 (4th Cir. 1986). But we are not "left with the definite and firm conviction that a mistake has been committed." *Easley*, 532 U.S. at 242 (internal quotation marks omitted). Accordingly, we must affirm the judgment of the district court holding that in the Agreement New CNC assumed Old CNC's CERCLA liabilities for the site and that PCS is therefore a PRP as a successor to Old CNC's CERCLA liability for the site.[4]

4. For the reasons well stated by the successor judge in her written opinion, we reject PCS's contention that we should vacate the judgment of her predecessor to remedy that court's asserted violation of 28 U.S.C. § 445(a). We also reject PCS's contention that the district court erred in granting summary judgment to the DSM Parties on PCS's contribution claims for alleged derivative CERCLA liability for the acts of Old CNC. Before the district court, PCS merely argued that veil-piercing **[**30]** and single business enterprise theories rendered the DSM Parties liable. The district court rejected both contentions. On appeal, PCS contends that the "amalgamation" theory renders the DSM Parties liable. *See, e.g., Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869, 874 (S.C. Ct. App. 1986). PCS waived this argument by failing to raise it before the district court. *See Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999).

B.

Next, we turn to the appeals of other parties challenging the district court's determinations that they too constituted PRPs. As the plaintiff in the allocation action under 42 U.S.C. § 9613(f), PCS bore the burden of proving that another party was a PRP under § 9607(a). *See Minyard Enters.*, 184 F.3d at 385. We consider each defendant's challenge to PRP status in turn, reviewing the district court's ultimate determinations of PRP status de **[*177]** novo, and its factual findings underlying those determinations for clear error.

1.

The district court held that Holcombe and Fair are PRPs as owners of the site at the time of disposal. *See* 42 U.S.C. § 9607(a)(2). The court based its holding on its factual finding that Holcombe and Fair's earth-moving and construction **[**31]** activities redistributed already-contaminated soils, causing a disposal of hazardous substances on the site.

Holcombe and Fair do not challenge the legal basis for the district court's conclusion. Indeed, Holcombe and Fair accept that past owners or operators of a facility are liable for "secondary disposals"—that is, the movement or dispersal of already-once-disposed hazardous substances through earthmoving or construction activities—that occur during their ownership or operation of the facility. *See Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988) ("[CERCLA's] definition of disposal does not limit disposal to a one-time occurrence—there may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings."); *see also Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1510 (11th Cir. 1996) (same); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342-43 (9th Cir. 1992) (same); *cf. Westfarm Assocs. Ltd. P'ship v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 680-81 (4th Cir. 1995) (refusing to limit "multiple release" disposals to non-migrating hazardous materials); **[**32]** *Nurad*, 966 F.2d at 844-46 (interpreting "disposal" broadly to include passive acts, such as leaking or spilling).

Instead, Holcombe and Fair challenge the district court's finding that a secondary disposal actually occurred during their ownership of the site. Holcombe and Fair argue that the court clearly erred because PCS offered no "discrete proof" that Holcombe and Fair actually moved or dispersed contaminated soils during their earth-moving activities. At best, Holcombe and Fair contend, the evidence demonstrates only that a disposal "probably" occurred during their ownership of the site.

To be sure, PCS presented no *direct* evidence that Holcombe and Fair moved or dispersed any contaminat-

ed soils. However, "CERCLA does not require a smoking gun." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 136 (2d Cir. 2010). Instead, "CERCLA liability may be inferred from the totality of the circumstances [and] need not be proven by direct evidence." *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000); *see also Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 547 (6th Cir. 2001). Thus, as with any other factual finding, **[**33]** we are bound to affirm any inference of CERCLA liability if "plausible in light of the record viewed in its entirety." *See Davis v. Richmond, Fredericksburg & Potomac R.R. Co.*, 803 F.2d 1322, 1327 (4th Cir. 1986) (internal quotation marks omitted).

> 5 Holcombe and Fair rely on *Redwing Carriers* for their contention that a district court needs "discrete proof" to find that a secondary disposal occurred. But in *Redwing Carriers* the Eleventh Circuit merely held that "the only reasonable inference" from the evidence presented did not include disposal, "[n]o matter how broadly the term is defined." 94 F.3d at 1510-12. The court did not require "direct evidence" of movement or dispersal of contaminated soil, but just evidence that would support such an inference. Such evidence was absent in *Redwing Carriers*, but is present here.

The district court heard evidence showing that Holcombe and Fair engaged **[*178]** in extensive grading and construction that affected at least 27.9% of the site during their ownership, and that even superficial earth-moving activities such as grading can redistribute contaminated soils. Considering the evidence of widespread contamination across the site, the court's inference **[**34]** that Holcombe and Fair's construction activities at some point effected a disposal is certainly plausible.

Accordingly, we affirm both the court's finding that a disposal occurred during Holcombe and Fair's ownership of the site, and its holding that Holcombe and Fair are therefore PRPs for the site under 42 U.S.C. § 9607(a)(2).

2.

The district court held that RHCE is a PRP for the site as a current operator. *See* 42 U.S.C. § 9607(a)(1). On appeal, RHCE concedes that it is a current operator,[6] but challenges its PRP status on several grounds--all unavailing.

> 6 The district court also held that RHCE was a PRP as an operator at the time of disposal under § 9607(a)(2), a holding that RHCE contends constitutes clear error. We need not reach that question because RHCE does not challenge on appeal the court's alternative holding that RHCE is a current operator.

Most fundamentally, RHCE argues that its leasehold is not "part of the property for which Ashley sued PCS to remediate." RHCE Br. at 1, 25. This argument misunderstands CERCLA. Whether RHCE's leasehold is "part of the property for which Ashley sued PCS to remediate" is simply irrelevant. The relevant question is whether RHCE's leasehold is **[**35]** part of a "facility" as defined by CERCLA. *See, e.g.*, 42 U.S.C. § 9607(a)(1) (making liable "the owner and operator of a . . . facility").

CERCLA defines "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." *Id.* § 9601(9). The definition is not predicated, as RHCE seems to believe, on the area targeted for remediation. Instead, the statutory definition indicates "that the bounds of a facility should be defined at least in part by the bounds of the contamination." *United States v. Twp. of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998); *see Nurad*, 966 F.2d at 842-43 (holding a "facility" includes that portion of a larger property "in and around the [leaking] storage tanks"). The district court did not err in finding on the basis of the evidence before it that RHCE's leasehold is contaminated as part of a pattern of widespread contamination across the entire site. That is, RHCE's parcel is part of the contaminated "facility" for CERCLA's purposes.

RHCE's seeming suggestion that its leasehold--even though contaminated--should be considered separately from the rest of the site also fails. "Courts **[**36]** have uniformly refused to divide widely contaminated properties . . . into separate facilities in response to a party's claim to be responsible for contamination in only certain parts of the property." *Axel Johnson*, 191 F.3d at 418; *see also United States v. Capital Tax Corp.*, 545 F.3d 525, 535 (7th Cir. 2008) ("The boundaries of [a] facility do not necessarily reflect property boundaries, and liability can extend beyond what . . . defendants actually own." (internal citation omitted)).

In this case, fertilizer production and construction activities widely contaminated the site, including the area of RHCE's leasehold. That the leasehold is less contaminated than some of the rest of the site and would not require remediation for its current industrial use makes no difference **[*179]** for purposes of determining PRP status under CERCLA. This is so because the hazardous substances located on RHCE's leasehold are not distinct from those on the rest of the site. Otherwise, an operator of a less-contaminated leasehold, like RHCE's, in a mul-

tiple-parcel facility could always avoid liability for CERCLA response costs for the rest of the facility merely by demonstrating less pollution-sensitive land **[**37]** use on its leasehold. This would turn § 9607(a)'s strict liability on its head, and would improperly broaden Congress' specific exemption from liability for "innocent" contiguous landowners. *See* 42 U.S.C. § 9607(q).[7]

> 7 RHCE's argument that its leasehold cannot be a part of the "facility" because EPA has neither defined the bounds of the facility nor approved a final remediation plan for the site is similarly meritless. CERCLA does not require EPA to have defined an area as a "facility" in order for a private party to bring a recovery action. *See* 42 U.S.C. §§ 9601(9), 9607(a). And "governmental approval is not a prerequisite to private recovery for cleanup costs." *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 901 F.2d 1206, 1208-09 (4th Cir. 1990).

Finally, although RHCE does not claim that it meets the rigorous qualifications necessary to be exempt from PRP status as an innocent *contiguous* landowner under § 9607(q), it does assert a defense from liability as an innocent landowner under § 9607(b)(3). This defense requires a party otherwise liable as a PRP to prove "by a preponderance of the evidence: (1) that another party was the 'sole cause' of the release of hazardous substances **[**38]** and the damages caused thereby; (2) that the other, responsible party did not cause the release in connection with a contractual, employment, or agency relationship with the defendant; *and* (3) that the defendant exercised due care and guarded against the foreseeable acts or omissions of the responsible party." *Westfarm Assocs. Ltd. P'ship*, 66 F.3d at 682. The district court rejected RHCE's assertion of this defense, holding that it failed on all three prongs. On appeal, RHCE only challenges the court's holdings under the first and third prongs of the defense. Because a party must establish all three prongs of the defense, and RHCE does not challenge the court's determination that it failed the second prong, we must affirm the court's denial of RHCE's innocent landowner defense.

In short, because RHCE is a current operator of a leasehold that is part of the facility at the site, we affirm the district court's determination that RHCE is a PRP for the site as a current operator under 42 U.S.C. § 9607(a)(1).

3.

The district court also held Ashley to be a PRP for the site as a current owner. *See* 42 U.S.C. § 9607(a)(1). In doing so, the court rejected Ashley's attempt to establish a bona fide **[**39]** prospective purchaser ("BFPP") exemption from liability. *See id.* §§ 9601(40), 9607(r)(1). On appeal, Ashley again invokes the BFPP exemption.

In 2002, Congress enacted the BFPP exemption as one in an array of CERCLA amendments intended "to promote the cleanup and reuse of brownfields" under the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Act"), Pub. L. No. 107-118, 115 Stat. 2356 (2002). BFPP status exempts from CERCLA liability a party otherwise liable simply because it is "considered to be an owner or operator of a facility" under 42 U.S.C. § 9607(a)(1). *See* 42 U.S.C. § 9607(r)(1). To qualify for the exemption, a current owner or operator of a facility must have acquired the facility after **[*180]** January 11, 2002, must "not impede the performance of a response action or natural resource restoration" at the facility, and must establish eight criteria by a preponderance of the evidence. *See id.* §§ 9601(40)(A)-(H), 9607(r)(1).

The district court held that Ashley failed to establish a number of these eight criteria. Among them is the requirement that a current owner "exercises appropriate care with respect to hazardous substances found at the facility by taking **[**40]** reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance." *Id.* § 9601(40)(D). The court specifically found that Ashley failed to clean out and fill in sumps that should have been capped, filled, or removed when related aboveground structures were demolished, and that Ashley did not monitor and adequately address conditions relating to a debris pile and the limestone run of crusher cover on the site. The court concluded that these inactions established that Ashley did not exercise appropriate care at the site.

Ashley argues that the purposes of the Brownfields Act necessitate that courts apply a less-stringent standard of "appropriate care" and "reasonable steps" than that applied by the district court. Otherwise, Ashley maintains, landowners will not undertake voluntary brownfields redevelopment for fear of becoming fully liable for cleanup costs as a result of minor mistakes that may not even contribute to harm at the facility. Even recognizing Congress' clear intent to promote voluntary brownfields redevelopment in passing **[**41]** the Brownfields Act, however, Ashley's argument goes too far.

In particular, Ashley fails to provide a persuasive rationale for requiring a lower level of "care" from a BFPP under § 9607(r)(1), than from an "innocent landowner" under § 9607(b)(3). Both the BFPP exemption and the innocent landowner defense require a demonstration of "reasonable steps." *Compare* 42 U.S.C. § 9601(35)(B)(i)(II), *with id.* § 9601(40)(D). Logic seems

to suggest that the standard of "appropriate care" required of a BFPP, who by definition knew of the presence of hazardous substances at a facility, should be *higher* than the standard of "due care" required of an innocent landowner, who by definition "did not know and had no reason to know" of the presence of hazardous substances when it acquired a facility. *Compare id.* §§ 9601(40)(D), 9607(r)(1) (BFPP exemption and "appropriate care" standard), *with id.* §§ 9601(35), 9607(b)(3) (innocent landowner defense and "due care" standard).

We need not here determine whether the BFPP standard of "appropriate care" actually is higher than the standard of "due care" mandated elsewhere in CERCLA, because in all events "appropriate care" under § 9601(40)(D) is at least as stringent **[**42]** as "due care" under § 9607(b)(3). *Accord* Office of Enforcement & Compliance Assurance, U.S. Envtl. Prot. Agency, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability 9 (March 6, 2003) (stating that reasonable steps required under the "appropriate care" standard establish "an approach that is consonant with traditional common law principles and the existing CERCLA 'due care' requirement").

We therefore borrow standards from CERCLA's "due care" jurisprudence to inform our determination of **[*181]** what "reasonable steps" must be taken to demonstrate "appropriate care." We agree with the Second Circuit that the "due care" inquiry asks whether a party "took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances." *New York v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2d Cir. 1996) (internal quotation marks omitted). Under this standard, Ashley's inactions clearly show that it failed to exercise "appropriate care." For Ashley's delay in filling **[**43]** the sumps–which even Ashley's expert admitted should have been filled a full year before Ashley did so–demonstrates that it did not take the "reasonable steps to . . . prevent any threatened future release," 42 U.S.C. § 9601(40)(D), that "a similarly situated reasonable and prudent person would have taken," *Lashins Arcade Co.*, 91 F.3d at 361 (internal quotation marks omitted).

Accordingly, the district court did not err in finding that Ashley failed to demonstrate that it exercised "appropriate care" at the site. Because a party must establish all eight factors under 42 U.S.C. § 9601(40) to qualify for a BFPP exemption from liability, this failure mandates denial of Ashley's claim to BFPP exemption and affirmance of the district court's holding that Ashley is a PRP for the site as a current owner under § 9607(a)(1).

III.

PCS and RHCE challenge the district court's denial of apportionment of harm at the site.[8] Both argue that the harm at the site is divisible and thus should be apportioned. We review a district court's determination of whether a harm is capable of apportionment de novo, and review the factual findings underlying such a determination for clear error. *See In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 902 (5th Cir. 1993).

8 We **[**44]** note that some courts have held that apportionment is not available to parties, like RHCE, sued under § 9613(f), because apportionment is a defense to joint and several liability, and § 9613 imposes only several liability. *See Redwing Carriers*, 94 F.3d at 1513. Because no party raises this argument and RCHE's apportionment claim fails on the merits, we need not decide the issue and assume, for purposes of this case, that RHCE may argue for apportionment to avoid the court's equitable allocation of harms under § 9613(f).

A.

"While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm." *Monsanto*, 858 F.2d at 171. The Supreme Court has confirmed that "[t]he universal starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts." *Burlington Northern*, 556 U.S. at 614 (internal quotation marks omitted); *see also Monsanto*, 858 F.2d at 172.

"Under the Restatement, when two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of **[**45]** the total harm that he has himself caused. . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm." *Burlington Northern*, 556 U.S. at 614 (internal quotation marks and citations omitted); *see Monsanto*, 858 F.2d at 171-72. Thus, PRPs can avoid joint and several liability by establishing either that on-site harms are distinct, **[*182]** or that there exists "a reasonable basis for apportioning liability" for a single harm "among responsible parties." *Monsanto*, 858 F.2d at 172 (citing *Restatement (Second) of Torts* § 433B (1965)).

By its nature, apportionment necessarily requires a fact-intensive, site-specific analysis. *See United States v. NCR Corp.*, 688 F.3d 833, 841-42 (7th Cir. 2012); *Bell Petroleum Servs.*, 3 F.3d at 895-96; *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992).

"Not all harms are capable of apportionment, . . . and CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists." *Burlington Northern*, 556 U.S. at 614.

For this reason, CERCLA's joint and several liability scheme may be "terribly unfair in certain instances." **[**46]** *Bell Petroleum Servs.*, 3 F.3d at 897. Nonetheless, "[e]quitable considerations play no role in the apportionment analysis," *Burlington Northern*, 556 U.S. at 615 n.9, because the availability of contribution actions under 42 U.S.C. § 9613(f) mitigates any inequity arising from the unavailability of apportionment, *see Axel Johnson*, 191 F.3d at 415.

B.

The district court found that two factors contributed to the harm at the site—the amount of hazardous substances each PRP caused to be contributed to the site, and the amount of soil each PRP caused to be contaminated through secondary disposals. The court thus recognized that the harm at the site was at least "theoretically divisible" if a defendant provided sufficient evidence to establish a reasonable basis for apportionment based on those two factors.

At trial, PCS offered several bases for apportionment, including (1) the amount of fill material each PRP added to the site; (2) the volume of contaminants Planters and Old CNC introduced to the site; (3) the period of time that Planters and Old CNC produced fertilizers on the site; (4) the percentage of soils each PRP first disturbed on the site; and (5) the number of contaminated soil samples **[**47]** attributable to each PRP. According to PCS, these bases produced consistent results demonstrating PCS was responsible for, at most, six percent of the harm at the site.

The district court rejected PCS's proposed bases for apportionment. In doing so, the court identified several flaws systemic to PCS's proposed bases for apportionment. Most notably, the court found PCS's methods did not (1) provide a reasonable estimate of the volume of soil contaminated by secondary disposals; (2) account for the likelihood of contamination prior to 1906, and thus assumed that Planters was responsible for all contamination prior to 1945; or (3) compensate appropriately for changes in the type and intensity of uses and construction on the site over time.

C.

1.

On appeal, PCS first argues that the district court erred in requiring the establishment of more than a "reasonable basis" for apportionment, in contravention of the standard applied by the Supreme Court in *Burlington Northern*. (RHCE adopts PCS's argument on this point.) In *Burlington Northern*, the district court *sua sponte* apportioned the collective harm that two railroad companies caused at a facility by multiplying three factors: (1) the percentage **[**48]** of the total area of the facility the railroads owned; (2) the percentage of time the railroads leased their parcel to the facility operator; and (3) an estimate of the percentage of contamination **[*183]** at the facility attributable to the types of hazardous substances present on the railroads' parcel. The court then adjusted its calculation by adding a fifty-percent margin of error, and apportioned nine percent of the harm at the facility to the railroads. 556 U.S. at 616-18. After the Ninth Circuit reversed, concluding that these factors provided an unreliable measure of harm, the Supreme Court reversed the Ninth Circuit, and upheld the apportionment. The Supreme Court explained that the record before the district court provided a "reasonable basis" for the methodology it had adopted. *See id.* at 617-18.

Contrary to PCS's assertion, the district court's denial of apportionment here is entirely consistent with *Burlington Northern*. To be sure, *Burlington Northern* demonstrates that a "reasonable basis for apportionment" need not be mathematically precise, and may be based on the "simplest of considerations," *e.g.*, time and land area. *See* 556 U.S. at 617-18; *see also NCR Corp.*, 688 F.3d at 842. **[**49]** However, *Burlington Northern* neither mandates these "simplest of considerations," nor establishes their presumptive propriety in every case. *See NCR Corp.*, 688 F.3d at 842. For the factual scenario in *Burlington Northern* was relatively simple: "the primary pollution at the [site] was contained in an unlined sump and an unlined pond in the southeastern portion of the facility most distant from the Railroads' parcel and . . . the spills of hazardous chemicals that occurred on the Railroad parcel contributed to no more than 10% of the total site contamination." *Burlington Northern*, 556 U.S. at 617. Only "[w]ith those background facts in mind" did the Court conclude that the district court's methodology was reasonable. *Id.* at 617-18. Clearly, after *Burlington Northern*, apportionment necessarily remains a fact-intensive, site-specific determination. *See NCR Corp.*, 688 F.3d at 841-42.

Here the district court undertook precisely such a fact-intensive, site-specific determination. Weighing the facts in this case, the court held that any reasonable basis for apportionment must include reliable evidence as to *both* the initial disposals of hazardous substances *and* any secondary disposals that **[**50]** occurred over time. Indeed, the court distinguished *Burlington Northern* on this ground, emphasizing that in *Burlington Northern* most of the hazardous substances were located in unlined

sumps and ponds, and that no evidence indicated that secondary disposals significantly contributed to the harm. The court further found that PCS's apportionment methodologies individually and collectively failed to provide the evidence as to secondary disposals necessary to "establish a reasonable basis for apportioning the harm at the Site." Denying apportionment because a party fails to provide reliable evidence as to one of the factors informing apportionment is in no way at odds with *Burlington Northern*.

Indeed, as *Burlington Northern* confirmed, in the face of uncertain causation of harm, "'courts have refused to make an arbitrary apportionment for its own sake.'" 556 U.S. at 614-15 (quoting *Restatement (Second) of Torts* § 433A cmt. i (1963-64)). An arbitrary apportionment is just what the district court refused to make, as any apportionment without adequate evidence as to the harm caused by secondary disposals necessarily would have been arbitrary. Therefore, the district court's fact-intensive and **[**51]** site-specific analysis underlying its denial of apportionment entirely accords with *Burlington Northern*.

[*184] 2.

PCS and RHCE next argue that, even if the district court's apportionment analysis was consistent with *Burlington Northern*, the court erred in holding that they failed to establish a reasonable basis for apportionment. Although the court found that all of the proposed methods of apportionment improperly assumed Planters' responsibility for all harm at the site prior to 1945, PCS and RHCE each maintain that they established a reasonable basis for apportioning at least *their individual shares* of the harm. Because PCS and RHCE are PRPs under different CERCLA provisions, we consider their arguments on this point separately.

a.

PCS's assertion of individual share apportionment presents the question of whether an owner or operator at the time of disposal under § 9607(a)(2) must provide a reasonable basis to apportion *all* of the harm, or only *its share* of the harm, to avoid joint and several liability.

Neither we nor the Supreme Court has ever before considered the question. Contrary to PCS's suggestion, *Burlington Northern* provides no guidance. The district court there apportioned *all* of **[**52]** the harm, because, in that case, all harm not caused by the railroads was necessarily caused by the longtime operator of the facility. *See Burlington Northern*, 556 U.S. at 606.

Nor do traditional and evolving standards of common law provide clear guidance on the issue. *Compare Restatement (Second) of Torts* § 433A(1)(b) (suggesting apportionment is appropriate only when a defendant can demonstrate that "there is a reasonable basis for determining the contribution of *each cause* to a single harm" (emphasis added)), *with United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993) (holding apportionment required a showing "that there is a way to determine what portion of the 'harm' . . . is fairly attributable to [the defendant], as opposed to other responsible parties."), *overruled on other grounds by United States v. E.I. Dupont De Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005); *Chem-Nuclear Sys., Inc. v. Bush*, 292 F.3d 254, 259-60, 352 U.S. App. D.C. 23 (D.C. Cir. 2002) (holding that a PRP can avoid joint and several liability by proving "the amount of the harm that it caused" (internal quotation marks omitted)).

However, we ultimately need not decide today whether a PRP under § 9607(a)(2) can avoid joint **[**53]** and several liability by apportioning only its own harm. For, even assuming that a PRP could do so, the district court did not err in holding that PCS failed to establish a reasonable basis for apportioning *its own* harm in this case. Both primary disposals (from fertilizer manufacturing) and secondary disposals (from earth-moving and construction) occurred during Old CNC's ownership and operation of the site. Therefore, even to establish its own share of the harm, PCS (Old CNC's successor) needed to provide an apportionment methodology that addressed both types of disposals. Because it did not do so, PCS failed to provide a "reasonable basis for apportionment" of its own harm (let alone all of the harm), and we affirm the district court's denial of apportionment. *See Chem-Nuclear Sys.*, 292 F.3d at 260 (finding defendant failed to prove its own share of the harm); *Rohm & Haas Co.*, 2 F.3d at 1280 (same).

b.

RHCE contends that, as a current operator PRP under § 9607(a)(1), it can avoid joint and several liability by demonstrating that no disposal of hazardous substances has occurred during its operation of the facility, and thus a reasonable basis **[*185]** exists to apportion it a zero-share of **[**54]** the harm. This argument clearly fails.

The structure and purposes of CERCLA simply do not permit current owner or operator PRPs to use individual share apportionment to apportion themselves a zero-share harm.[9] Section 9607(a)(1) renders current owners and operators strictly liable for response costs regardless of their culpability. 42 U.S.C. § 9607(a)(1); *Trinity Am. Corp. v. U.S. Envtl. Prot. Agency*, 150 F.3d 389, 395 (4th Cir. 1998). "Innocent" current owners and operators seeking to avoid CERCLA's strict liability scheme must meet the requirements necessary to claim the narrow defenses and exemptions specifically estab-

lished by Congress. *E.g.*, 42 U.S.C. § 9607(b); *see Trinity Am. Corp*, 150 F.3d at 395-96.

> 9 That the district court held RHCE was also a PRP as an operator at the time of disposal under § 9607(a)(2) does not affect this conclusion. It would defeat the purposes of CERCLA to permit a current operator PRP, who was also an operator at the time of disposal, to claim individual share apportionment, while *denying* this right to a current operator PRP who was *not* a PRP at the time of disposal.

Allowing current owner and operator PRPs to avoid joint and several liability through **[**55]** a zero-share apportionment because no disposal occurred during their ownership or operation of a facility effectively would render current owner or operator liability coterminous with liability based on ownership or operation at the time of disposal. *Compare* 42 U.S.C. § 9607(a)(1) (establishing liability for current owners and operators, regardless of whether disposal occurred during ownership or operation), *with id.* § 9607(a)(2) (requiring disposal during ownership or operation for liability).

Such a rule would frustrate the several narrow statutory defenses and exemptions Congress created to address truly "innocent" landowners. *See, e.g., id.* § 9601(20)(D), 35(A) (involuntary acquisition exemption); *id.* §§ 9601(35), 9607(b)(3) (defense for innocent landowners); *id.* §§ 9601(40), 9607(r) (bona fide prospective purchaser exemption); *id.* § 9607(q) (contiguous property owner exemption). All of these provisions require much more than a mere showing that no disposal occurred during a current owner or operator's tenure at a facility. *See, e.g., id.* §§ 9601(35), 9607(b)(3). Consequently, allowing such PRPs to apportion solely their own zero-share of liability would render the heightened requirements **[**56]** of these narrow defenses and exemptions dead letters. Where possible, we must interpret a statute to avoid rendering any of its provisions superfluous. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991). Our holding today avoids such redundancy, and preserves Congress' calculated balance of broad strict liability and narrow defenses and exemptions under CERCLA.

IV.

Having affirmed the district court's holding that the harm at the site is not subject to apportionment, we finally consider the several appeals of the court's ultimate allocation of liabilities under 42 U.S.C. § 9613(f). The district court equitably allocated liability for the response costs to the PRPs as follows: forty-five percent to Ross; thirty percent to PCS; sixteen percent to Holcombe and Fair; five percent to Ashley; three percent to Allwaste; one percent to RHCE; and zero percent to the City of Charleston. As the party bringing the § 9613(f) action, PCS bears the burden of proving each party's equitable share of response costs. *Minyard Enters.*, 184 F.3d at 385.

[*186] Section 9613(f) allows "[a]ny person [to] seek contribution from any other person who is liable or potentially liable under section 9607(a). **[**57]** . . . during or following any civil action . . . under section 9607(a)." A court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). This plain language grants a court significant discretion to choose which factors to consider in determining equitable allocation of liability. We review a district court's choice of factors for abuse of discretion, and its ultimate allocations of liability for clear error. *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1187 (9th Cir. 2000).

In this case, the parties do not challenge the court's selection of relevant factors in arriving at the appropriate allocation. They only challenge the court's application of those factors. PCS, RHCE, and Holcombe and Fair each contend that the court clearly erred by allocating too much liability to each of them, and not enough to the other parties.[10]

> 10 We reject Holcombe and Fair's alternative argument that we remand for further factual findings because the district court's analysis assertedly lacked the detail and exactness required for adequate appellate review. *See* Fed. R. Civ. P. 52(a). The district court made over two **[**58]** hundred factual findings, and specifically referenced the findings it considered important in its allocation determination for each PRP. This factual analysis adequately satisfies Rule 52(a).

Considering, as we must, the record as a whole, we cannot conclude the district court clearly erred. The court's ultimate allocation of liability reasonably weighs relevant factors, including the degree of involvement each party had in disposals (both primary and secondary) on the site, the degree of care each party exhibited with respect to hazardous substances, the degree to which each party cooperated with government officials with respect to hazardous substances, and the benefit each party reaped from disposals of hazardous substances on the site. Although the record also might have supported a different allocation, the ultimate "allocation [is] among the reasonable conclusions supported by the evidence." *Boeing*, 207 F.3d at 1188. We therefore affirm the district court's allocation of liabilities under § 9613(f).[11]

11 Ross challenges the district court's judgment directing that Ashley recover from PCS $147,617.02 plus interest, and that PCS recover from Ross $87,404.82 plus interest. Ross contends [**59] that the money judgment against it is premature because PCS, as the jointly and severally liable party under 42 U.S.C. § 9607(a), has not yet paid its proportionate share of allocated liability to Ashley. However, the court's order denying modification of the money judgment explicitly recognized that PCS cannot recover from Ross until it has paid more than its proportionate share to Ashley. Considering the court's clarification on the record, we find no error in the form of the money judgment.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.



1 of 16 DOCUMENTS

George Skipper, Veronica Skipper, Michael Perry Bowers, Specialty Logging, LLC, and Harold Moors, Plaintiffs, v. ACE Property and Casualty Insurance Company, Brantley C. Rowlen, and Erin Lawson Coia, Defendants.

Opinion No. 27547

SUPREME COURT OF SOUTH CAROLINA

2015 S.C. LEXIS 250

April 7, 2015, Heard
July 15, 2015, Filed

NOTICE:

THIS DECISION IS NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

PRIOR HISTORY: [*1] ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA. Appellate Case No. 2014-001979. J. Michelle Childs, United States District Judge.

DISPOSITION: CERTIFIED QUESTION ANSWERED.

COUNSEL: Blake A. Hewitt, of Bluestein Nichols Thompson & Delgado, of Columbia; Mark B. Tinsley, of Gooding & Gooding, of Allendale; and Randolph Murdaugh, IV, of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton, for Plaintiffs.

Robert H. Hood, Robert H. Hood, Jr., and Deborah Harrison Sheffield, all of the Hood Law Firm, LLC, of Charleston, for Defendants Brantley C. Rowlen and Erin Lawson Coia.

A. Camden Lewis, of Lewis, Babcock & Griffin, L.L.P., of Columbia; Ronald K. Wray, II and Gray T. Culbreath, both of Gallivan, White & Boyd, P.A., of Greenville; and Robert Rivera, Jr. and Robert S. Safi, both of Susman Godfrey L.L.P., of Houston, Texas, for Defendant Ace Property and Casualty Insurance Company.

David C. Marshall, of Turner Padget Graham & Laney P.A., of Columbia; and Alan G. Jones, of McAngus, Goudelock & Courie, of Myrtle Beach, for Amicus Curiae, South Carolina Defense Trial Attorneys' Association.

David C. Marshall and R. Hawthorne Barrett, of Turner Padget Graham & Laney P.A., of Columbia, for [*2] Amicus Curiae, Property Casualty Insurance Association of America.

JUDGES: JUSTICE KITTREDGE: TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

OPINION BY: KITTREDGE

OPINION

CERTIFIED QUESTION

JUSTICE KITTREDGE: We certified the following question from the United States District Court for the District of South Carolina: "Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?" In answering the question "no," we adopt the majority rule and hold that such assignments are void as against public policy.

I.

George Skipper, a citizen of Georgia, was involved in a motor vehicle accident with a logging truck that was driven by Harold Moors and owned by Specialty Logging, LLC (Specialty). Specialty had a commercial automobile insurance policy with a $1,000,000 per occurrence limit (the Policy), which was issued by ACE Property and Casualty Insurance Company (ACE). Following

the accident, Skipper retained an attorney who wrote a demand letter to ACE offering to settle the case for the limits of the Policy. ACE retained two lawyers from Atlanta, Brantley C. Rowlen and Erin Lawson Coia, to represent Specialty and Moors. Specialty and Moors, through counsel, [*3] offered Skipper $50,000. Not satisfied with the $50,000 offer, Skipper and his wife (the Skippers) filed a lawsuit in the Allendale County Court of Common Pleas against Specialty and Moors. Additional attempts to settle the case proved fruitless.

Unbeknownst to ACE or its attorneys, the Skippers entered into a settlement with the allegedly at-fault defendants, Moors and Specialty. Moors, Specialty, and Specialty's owner Michael Perry Bowers (collectively, Specialty Parties) agreed to execute a Confession of Judgment for $4,500,000, in which they admitted liability for the Skippers' injuries and losses. The Specialty Parties also agreed to pursue a legal malpractice claim against ACE and its attorneys Rowlen and Coia (collectively, Defendants) and assigned the predominant interest in that claim to the Skippers.[1] In exchange for the Specialty Parties' admission of liability, the Skippers agreed not to execute the judgment as long as the Specialty Parties cooperated in the legal malpractice litigation against Defendants.

> 1 The terms of the assignment indicated that the Skippers would receive between eighty-five and ninety-five percent of any proceeds from a settlement or judgment in the legal [*4] malpractice case, even if that amount was less than the $4,500,000 Confession of Judgment.

Armed with the assignment, the Skippers and Specialty Parties (collectively, Plaintiffs) filed a legal malpractice action against Defendants in the Allendale County Court of Common Pleas. The case was removed to the United States District Court for the District of South Carolina. In federal court, Defendants asserted the assignment of the malpractice claim was invalid and that the Skippers had no valid claims to assert. The parties filed competing motions, which (we are informed) turn on whether the assignment to the Skippers was valid.

Because the question of whether a legal malpractice claim can be assigned between adversaries in litigation in which the alleged malpractice arose is a novel question in South Carolina, this Court accepted the certified question of United States District Court Judge J. Michelle Childs.

II.

The majority rule in other jurisdictions is to prohibit the assignment of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose. *See Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 79 (D.D.C. 2009) ("[T]he majority of courts have found that the costs to society outweigh the benefits and that overriding [*5] public policy concerns render these types of assignments invalid."). The most common reason other courts have declined to permit assignments of legal malpractice claims is to avoid the risk of collusion between the parties. Were we to permit such assignments, plaintiffs and defendants would be incentivized to collude against the defendant's attorney. When an original defendant is essentially relieved of liability, there is little incentive for the consent judgment to reflect the actual loss. As courts around the country have recognized, the potential for inflated damages in such consent judgments is manifest. *See id.* ("Because the 'losing' party in the consent judgment will never have to pay, nothing prevents the parties from stipulating to artificially inflated damages that could serve as the basis for unjustly high damages in the 'trial within a trial' phase of the subsequent malpractice action."). This potential for collusion and inflated consent judgments undermines the very nature of the jury system. *See Prince v. Peterson*, 538 P.2d 1325, 1329 (Utah 1975) (noting "[w]e frequently declare our commitment to the jury system, under which it is the prerogative of lay citizens to determine questions of fact, both as to liability and the [*6] fixing of damages"). Simply put, "[a] party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary." *Alcman Servs. Corp. v. Bullock*, 925 F. Supp. 252, 258 (D.N.J. 1996).

In addition to the heightened risk for collusion, permitting the assignment of legal malpractice claims between adversaries threatens the integrity of the attorney-client relationship. The relationship between an attorney and a client is a fiduciary one by nature and "is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004) (citations omitted). Permitting these assignments would allow plaintiffs "to drive a wedge between the defense attorney and his client by creating a conflict of interest." *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994).

Moreover, permitting an assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose would lead to disreputable role reversals in which the plaintiff-assignee would be required to take a position "diametrically opposed" to its position in the underlying litigation. *Id.* The Court of Appeals of Texas detailed this role reversal in *Zuniga*:

In each assigned malpractice [*7] case, there would be a demeaning reversal of roles. The two litigants would have to take positions diametrically opposed to their positions during the underlying litigation because the legal malpractice case requires a "suit within a suit." To prove proximate cause, the client must show that his lawsuit or defense would have been successful "but for" the attorney's negligence. In the malpractice suit, the [plaintiff-assignees] would argue that [the defendant-assignor] suffered judgment not on the strength of the [plaintiff-assignees'] claim but because of attorney negligence.

In the underlying tort case, the [plaintiff-assignees'] position was: we have a valid tort case involving a defective . . . ladder [built by the defendant assignor], and we will win the case on the merits even if [the defendant-assignor's] lawyer represents it capably. But to prove proximate cause in the legal malpractice case, the [plaintiff-assignees] would have to take the contrary position: we would have lost our tort case and [the defendant-assignor] would have prevailed if its lawyers had capably defended our suit. [The defendant-assignor] would have won the defective-ladder case if only its lawyers had used [*8] due care and competence.

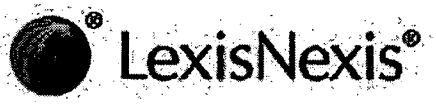
> For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth. It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause have given them a financial interest in switching.

Id. (internal citations omitted).

We have carefully considered the arguments of Plaintiffs' able counsel urging this Court to adopt the minority rule, but we find the majority rule more compelling and persuasive. Accordingly, in South Carolina, the assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose is prohibited.

CERTIFIED QUESTION ANSWERED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.



UNITED STATES OF AMERICA, Plaintiff-Appellant, v. DAVIS MEMORIAL HOSPITAL; ELKINS AREA MEDICAL CENTER, Defendants-Appellees. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVIS MEMORIAL HOSPITAL, CENTER, Defendant-Appellant, and ELKINS AREA MEDICAL CENTER, Defendant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ELKINS AREA MEDICAL CENTER, Defendant-Appellant, and DAVIS MEMORIAL HOSPITAL, Defendant-Appellee.

No. 90-2495, No. 90-2504, No. 90-2507

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1992 U.S. App. LEXIS 4298

October 30, 1991, Argued
March 9, 1992, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported as Table case at *956 F.2d 1163, 1992 U.S. App. LEXIS 10589*

PRIOR HISTORY: Appeals from the United States District Court for the Northern District of West Virginia. Richard L. Williams, District Judge. (CA-89-106-E-K)

DISPOSITION: AFFIRMED

COUNSEL: ARGUED: Charles Derrick Stodghill, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant.

Joseph A. Wallace, WALLACE, ROSS & HARRIS, Elkins, West Virginia, for Appellee Davis Memorial Hospital; Joseph M. Spivey, III, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee Elkins Area Medical Center.

ON BRIEF: Stuart M. Gerson, Assistant Attorney General, J. Christopher Kohn, Director, Robert M. Hollis, Assistant Director, Andrew L. Jiranek, Carlos T. Angulo, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant.

Paul J. Harris, WALLACE, ROSS & HARRIS, Martinsburg, West Virginia, for Appellee Davis Memorial Hospital; John E. Hollerman,

HUNTON & WILLIAMS, Richmond, Virginia, for Appellee Elkins Area Medical Center.

JUDGES: Before HALL and NIEMEYER, Circuit Judges, and HARVEY, Senior United States District Judge for [*2] the District of Maryland, sitting by designation. Senior Judge Harvey wrote the opinion, in which Judge Hall and Judge Niemeyer joined.

OPINION BY: HARVEY

OPINION

OPINION

HARVEY, Senior District Judge:

The United States here appeals from an order of the district court entering judgment in favor of Appellees after a bench trial. Appellees cross-appeal from the district court's denial of their request for an award of costs and attorneys' fees. Finding no error, we affirm.

I

In this civil action, the United States sought to recover damages from Davis Memorial Hospital ("Davis") and Elkins Area Medical Center ("EAMC"), two non-profit hospital corporations located in Elkins, West Virginia, for debts owed the government by Memorial General Hospital Association ("Memorial"). After the failure of an attempted merger between Memorial and Davis, Memorial filed a petition in bankruptcy and defaulted on loans obtained from the government.

In 1963, 1966 and 1980, two agencies of the federal government had made substantial loans to Memorial, a non-profit hospital corporation also located in Elkins. These loans were secured by liens on the assets of Memorial. In the early 1980's, Memorial had suffered financial [*3] distress because of a downturn in the local economy and changes in government third-party reimbursement schemes. In early 1985, officers of Memorial and Davis met and discussed a possible merger of the two institutions. Davis was Memorial's main competitor in the Elkins area, but unlike Memorial, Davis was well managed and had been able to adapt to changes in the hospital industry. Memorial and Davis exchanged financial information, and an investment banking firm was retained to study the proposed merger.

In August of 1985, Memorial and Davis entered into an agreement providing that, pending necessary regulatory approvals, [1] they would be consolidated into EAMC, a new corporation, which would assume the obligations of both hospitals when the consolidation became effective. EAMC then entered into agreements with Memorial and Davis whereby EAMC would provide management services to each hospital pending consummation of the merger. In late 1985 and early 1986, Memorial moved some of its operations and equipment to Davis in anticipation of renovations to its building.

1 Inter alia, approval by the West Virginia Health Care Cost Review Authority was necessary before the merger would become effective.

[*4] In the ensuing months, EAMC discovered that Memorial's financial situation was far worse than previously estimated. In March of 1986, Memorial's auditors reported that Memorial had lost $ 4.7 million in the fiscal year ending September 30, 1985. During this period, EAMC made loans to Memorial to enable Memorial to meet its payroll and pay its tax obligations.

On July 18, 1986, Memorial filed a petition seeking Chapter 11 bankruptcy protection, and Davis' board of directors thereafter terminated its agreements with Memorial and EAMC. On February 1, 1989, EAMC was dissolved by its board. Accordingly, the proposed merger was never consummated.

On July 18, 1989, the government filed a four-count complaint in the United States District Court for the Northern District of West Virginia seeking recoveries from Davis and EAMC for the indebtedness of Memorial and asserting claims of de facto merger, alter ego, tortious interference with contract and tortious impairment of collateral.

On August 13 through 15, 1990, a bench trial limited to issues of liability was held in the district court. On August 31, 1990, the district court entered extensive Findings of Fact and Conclusions of Law, [*5] ruling in favor of defendants on each of the four counts of the complaint. The district court also denied defendants' request for an award of costs and attorneys' fees. The government appeals rulings made by the district court on its claims of de facto merger and tortious interference with contract, and Davis and EAMC appeal the district court's denial of their request for an award of costs and attorneys' fees.

II

The government first contends that the district court erred in determining that none of the indicia of a de facto merger are present in this case. [2] The government challenges, inter alia, the district court's findings: (1) that there was no continuity of enterprise between Davis, Memorial and EAMC; (2) that Memorial did not promptly cease to operate; and (3) that Davis and EAMC did not assume the obligations of Memorial.

2 It was conceded by all parties in the case that a legal consolidation or merger was never achieved.

Extensive findings of fact were made by the district court. Pursuant to *Rule* [*6] *52(a), F.R.Civ.P.*, such findings shall not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. In determining whether the district court's findings in this case are clearly erroneous, we construe the evidence in a light most favorable to Davis and EAMC. *Ente Nazionale Per L'Energia Electtrica v. Baliwag Navigation, Inc., 774 F.2d 648, 654 (4th Cir. 1985).*

The doctrine of de facto merger is a well established exception to the general rule that "where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor." 15 W. Fletcher, Cyclopedia of the Law of Private Corporations § 7122 (1983 ed.). The de facto merger exception '"has been invoked where one corporation takes all of another's assets without providing any consideration that could be made available to meet claims of the other's creditors . . . .'" *Crawford Harbor Assoc. v. Blake Constr. Co., Inc., 661 F. Supp. 880, 884 (E.D. Va. 1987)* (quoting *Ray v. Alad Corp., 560 P.2d 3, 7 (Cal. 1977)).* [*7] In Crawford Harbor, the tests applied under the de facto merger exception were summarized as:

(1) continuity of management, personnel, physical location, assets, and general business operations (i.e., continuity of enterprise); (2) continuity of ownership; (3) prompt cessation of the seller corporation's operations; and (4) assumption by the purchaser of obligations ordinarily necessary for the uninterrupted continuation of normal business operations of the seller.

Id. at 884. Since the theory of de facto merger is equitable in nature, no one of the above factors is necessary or sufficient to establish this exception to limited corporate liability. In *Re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1015 (D. Mass. 1989).*

Applying these principles here, we conclude that the district court's finding that "indicia of a de facto merger are simply not present" was not clearly erroneous. First, the record establishes that there was no continuity of enterprise. Memorial, Davis and EAMC were at all

times governed by separate boards and the personnel of Davis and Memorial were never fully consolidated. Evidence presented at the trial indicated that [*8] the three entities maintained separate accounting records and that the relocation of Memorial equipment to Davis was intended to be a temporary measure pending renovations to Memorial's building. Moreover, the necessary regulatory approvals for the merger were never issued.

Second, the district court did not err in determining that Memorial did not cease doing business "as soon as practically and legally possible." The government's contention that Memorial ceased operating when it moved operations to Davis is contradicted by evidence produced at the trial of the shared beliefs of Memorial, Davis and EAMC management that Memorial's building would be renovated and that Memorial would continue to function as a separate entity until the merger was fully consummated.

Third, neither Davis nor EAMC ever assumed obligations of Memorial which were necessary for the continuance of its normal business operations. While Davis and EAMC extended loans to Memorial in an effort to keep Memorial afloat until the merger was approved by regulators, they neither directly paid any obligation of Memorial nor legally bound themselves to do so. [3]

3 The district court found the "continuity of ownership" factor inapposite to this case because of the non-profit status of Memorial, Davis and EAMC.

[*9] For these reasons, we affirm the district court's entry of judgment in favor of Appellees on the government's claim of de facto merger.

III

The government next contends that the district court erred in determining that Appellees did not tortiously interfere with the loan agreements between the government and Memorial.

Under West Virginia law, the elements of a cause of action for tortious interference with contractual relations are: (1) the existence of a contract; (2) intentional and improper interference by the defendant; (3) actual inducement or other causation of a breach; and (4) resulting damages. See *Cotton v. Otis Elevator Co., 627 F. Supp. 519, 522 (S.D.W. Va. 1986)*, aff'd, *841 F.2d 1122 (4th Cir. 1988)*. "Tortious interference requires a purposeful wrongful act without justification or excuse." *Water Eng'g Consultants Inc. v. Allied Corp., 674 F. Supp. 1221, 1225 (S.D.W. Va. 1987)*. "The proximate cause of injury is the superior or controlling agency from which springs the harm, as contradistinguished from those causes which are merely incidental or subsidiary to such principal and controlling causes." *Lilly v. Taylor, 155 S.E.2d 579, 589 (W. Va. 1967)*.

[*10]

On the record here, we conclude that the district court did not err in finding that the government failed to establish the necessary elements of intentional interference and causation. The determination of the district court that Appellees acted in good faith is supported by the totality of the evidence presented at the trial. Likewise, we conclude that the district court properly found that Appellees' conduct was not the proximate cause of Memorial's breach of its obligations to the government. As disclosed by the evidence produced at the trial, Memorial had been badly mismanaged, and the Elkins area was incapable of any longer sustaining two hospitals.

For these reasons, we also affirm the district court's entry of judgment in favor of Appellees on the government's claim of tortious interference with contractual relations.

IV

In support of their cross-appeal, Appellees contend that the district court erred in denying their request for an award of costs and attorneys' fees. Appellees first argue that they are entitled to such an award because the government brought this suit in bad faith. Our review of the record discloses no bad faith or vexatious conduct on the part of the [*11] government which would support an award of costs and fees to Appellees.

Appellees also contend that they are entitled to an award of costs and attorneys' fees pursuant to the Equal Access to Justice Act (the "EAJA"), *28 U.S.C. § 2412*. Under the EAJA, a party who successfully defends an action brought by the government is entitled to an award of attorneys' fees and costs unless the district court finds that the position of the government was "substantially justified or that special circumstances make an award unjust." *28 U.S.C. § 2412(d)(1)(A)*. *Section 2412(d)(1)(B)* provides, in pertinent part, that:

> [a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement [of such expenses] . . . .

Appellees requested an award of costs and attorneys' fees at the trial in this case, and this request was denied by the district court in its Order of August 31, 1990. However, Appellees did not thereafter file a formal [*12] application within thirty days of final judgment seeking an award of attorneys' fees and costs as required by *§ 2412(d)(1)(B)* of the EAJA.

We conclude that Appellees are now barred from seeking attorneys' fees and expenses under the EAJA. No post-judgment application was filed by them in the district court showing that they were eligible for such an award and specifying the amount sought including an itemized statement of expenses. Whether or not the district court refused the request for such an award which was made at the trial, Appellees were still required to comply with provisions of the EAJA before any award could be made under that statute.

For all these reasons, the judgment of the district court is affirmed.

AFFIRMED

STATE OF SOUTH CAROLINA)
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)
) CIVIL ACTION NUMBER: 11-CP-10-387
PCS Nitrogen, Inc..)
) **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
☐ Plaintiff,)
vs.)
)
Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Home Insurance Company, Certain Underwriters at Lloyd's London, the Avia Companies, the Winterthur Companies, Certain London Market Insurance Company, Providence Washington Insurance Company, as Successor in Interest by Way of Merger to Seaton Insurance Company (f/k/a Unigard Security Insurance Company, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America))
☑ Defendant.)
check box above indicating submitting party)

Name, S.C. Bar №, and address of plaintiff's attorney:	Name, S.C. Bar №, and address of defendant's attorney:
Wm. Howell Morrison, Esquire Haynsworth Sinkler Boyd, PA 134 Meeting Street, Suite 300 Charleston, SC 29401 hmorrison@hsblawfirm.com	R. Scott Wallinger, Jr., Esquire Post Office Box 12487 Columbia, SC 29211 telephone: 803.256.2660 fax: 803.771.4484 e-mail: swallinger@collinsandlacy.com other:

☑ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Notice of Joinder by United States Fire Insurance Company in Continental Casualty Company's Motion for Summary Judgment Based on Corporate Succession

Estimated Time Needed: 30 minutes Court Reporter Needed: ☒YES / ☐NO

SECTION II: Motion Type

☑ Written motion attached
☐ Form Motion –

I hereby move for relief or action by the court as set forth in the attached proposed motion.

R. Scott Wallinger 7/24/15

Signature of Attorney for ☐Plaintiff / ☒Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status
- ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act
- ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication
- ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: Date:
CLERK'S VERIFICATION	DATE FILED
Collected by: _____ (print name) ☐ MOTION FEE COLLECTED: $ ☐ CONTESTED – AMOUNT DUE: $	

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON PCS NITROGEN, INC. Plaintiff, v. CONTINENTAL CASUALTY COMPANY, *et al.* Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT C.A. NO. 11-CP-10-387 **NOTICE OF JOINDER BY UNITED STATES FIRE INSURANCE COMPANY IN CONTINENTAL CASUALTY COMPANY'S MOTION FOR SUMMARY JUDGMENT BASED ON CORPORATE SUCCESSION**

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that United States Fire Insurance Company ("U.S. Fire"), by and through their undersigned attorneys, hereby joins in Defendant Continental Casualty Company's ("Continental") Motion for Summary Judgment Based on Corporate Succession, pursuant to South Carolina Rule of Civil Procedure 56(c). Here, PCS Nitrogen, Inc. ("PCS") is likewise not a named insured under U.S. Fire Policy No. 5401893627. *See* U.S. Fire Policy No. 5401893627 (effective April 1, 1978-April 1, 1979) (attached hereto as **Exhibit A**). Indeed, the named insured, as defined in U.S. Fire Policy No. 5401893627, is "Columbia Nitrogen Corporation and Nipro, Inc." *See id.* at US Fire/CFI 0001. Further, subject to the Policy's terms and conditions, U.S. Fire Policy No. 5401893627 states that the insurers would "pay *on behalf of the insured* all sums which *the insured* shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applies, caused by an occurrence." *See* Ex. A, at US Fire/CFI 0005 (emphasis added). In addition, "no 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." See Ex. A., at US Fire/CFI 0017 (emphasis added). Moreover, "assignment of interest under the policy shall not bind the company *until its consent is endorsed hereon.*" See Ex. A., at US Fire/CFI 0018 (emphasis added). Accordingly, for the reasons set forth in Defendant Continental Casualty Company's Memorandum of Law In Support Of Its Motion For Summary Judgment Based On Corporate Succession, PCS has no basis to claim any rights under policies issued to Columbia Nitrogen Corporation, and all of its claims against U.S. Fire under Policy No. 5401893627 should be dismissed with prejudice.

Defendant United States Fire Insurance Company reserves the right to offer additional submissions, authorities, and memoranda in support of this motion at the hearing thereon.

BE PRESENT IF SO MINDED

(SIGNATURE ON FOLLOWING PAGE)

Dated: July 24, 2015

Respectfully submitted,

COLLINS & LACY, P.C.
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Counsel for United States Fire Insurance Company With Respect To Policy No. 5401893627

And

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Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

The undersigned employee of the law offices of Collins & Lacy, P.C., does hereby certify that on the _____ day of _____, 2015, the following named individual(s) were served with a copy of the within pleading via electronic mail and/or by mailing a copy of same to said person(s) via the United States Postal Service with sufficient postage affixed thereto and return address clearly marked.

PLEADING: NOTICE OF JOINDER BY UNITED STATES FIRE INSURANCE COMPANY IN CONTINENTAL CASUALTY COMPANY'S MOTION FOR SUMMARY JUDGMENT BASED ON CORPORATE SUCCESSION

COUNSEL SERVED:

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John I. Malone, Esquire Goldberg Segalla 800 Green Valley Road, Suite 302 Greensboro, NC 27408 jmalone@goldbergsegalla.com *Counsel for Defendants Certain London Market Insurance Companies*	Morgan S. Templeton, Esquire Wall Templeton & Haldrup, PA 145 King Street, Suite 300 Charleston, SC 29401 Morgan.Templeton@WallTempleton.com Patrick F. Hofer, Esquire Thomas S. Hay, Esquire Troutman Sanders, LLP 401 Ninth Street, Suite 1000 Washington, DC 20004-2134 Patrick.hofer@troutmansanders.com Thomas.hay@troutmansanders.com *Counsel for Defendant Continental Cas. Co.*
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EXHIBIT A

POLICY PART B.
RETURN TO
COMPANY
IF CANCELED.
540 079751 7
Renewal of Number

PART B GENERAL LIABILITY AUTOMOBILE POLICY
DECLARATIONS

COUNTERSIGNATURE DATE	RENEWAL OR REPLACEMENT NO.
5-31-78 bn	540 189362 7

☒ UNITED STATES FIRE INSURANCE COMPANY ☐ WESTCHESTER FIRE INSURANCE COMPANY

☐ THE NORTH RIVER INSURANCE COMPANY ☐ INTERNATIONAL INSURANCE COMPANY

540 189362 7

Item 1. Named Insured and Address. (No., Street, Town or City, County, State)

Columbia Nitrogen Corporation P.O. Box 1483
Nipro, Inc. Augusta, Ga.

Johnson & Higgins of Ga., Inc.
P.O. Box 1111
Atlanta, Georgia 30301
#0-39642-7

Item 2. Policy Period (Mo. Day Yr.)
From 4/1/78 to 4/1/79
12:01 A.M., standard time at the address of the named insured as stated herein.

The named insured is:
☐ Individual ☐ Partnership ☒ Corporation ☐ Joint Venture ☐ Other _____
Business of the named insured is (SEE BELOW) Audit Period: Annual, unless otherwise stated (SEE BELOW)

Item 3. The insurance afforded is only with respect to the following Coverage Part(s) indicated by specific premium charge(s)

Advance Premiums	Coverage Part No(s).	Coverage Part(s)	Advance Premiums	Coverage Part No(s).	Coverage Part(s)
$		Automobile Medical Payments Insurance	$		Hospital Professional Liability Insurance
$		Automobile Physical Damage Insurance (Dealers)	$		Manufacturers' and Contractors' Liability Insurance
$		Automobile Physical Damage Insurance (Fleet Automatic)	$		Owner's and Contractor's Protective Liability Insurance
$		Automobile Physical Damage Insurance (Non-Fleet)	$		Owners', Landlords' and Tenants' Liability Insurance
$		Basic Automobile Liability Insurance	$		Personal Injury Liability Insurance
$		Completed Operations and Products Liability Insurance	$		Physicians', Surgeons' and Dentists' Professional Liability Insurance
$		Comprehensive Automobile Liability Insurance	$		Premises Medical Payments Insurance
$133,952.	I6395	Comprehensive General Liability Insurance	$		Storekeeper's Insurance
$		Comprehensive Personal Insurance	$		Uninsured Motorists Insurance
$		Contractual Liability Insurance	$		
$		Druggists' Liability Insurance	$ Included	L9001	Broadform COL
$		Elevator Collision Insurance			
$		Farm Employers' Liability and Farm Employees' Medical Payments Insurance	$		
$		Farmer's Comprehensive Personal Insurance	$		
$		Garage Insurance			

$ (2) FM.0.0.193 (3) FM 0.0.192 Endt. #3 Form numbers of endorsements, other than those entered on Coverage Part(s), attached at issue

$133,952. Total Advance Premium for this policy.

* If the Policy Period is more than one year and the premium is to be paid in instalments, premium is payable on
Effective Date $ 1st Anniversary $ 2nd Anniversary $

Item 4. During the past three years no insurer has cancelled insurance, issued to the named insured, similar to that afforded hereunder, unless otherwise stated herein

Countersigned
*Not applicable in Texas

By Jewelle C. Turner
Authorized Representative

THIS PART B, WITH "POLICY PROVISIONS—PART A", AND COVERAGE PART(S) AND ENDORSEMENT(S), (IF ANY), ISSUED TO FORM A PART THEREOF, COMPLETES THE ABOVE NUMBERED POLICY

JDL 6300-X-F (Rev. 4/74) Print Date (1/76) Pld 1013 A

RETURN THIS DECLARATION TO COMPANY IF CANCELED—SPOILED—OR NOT USED.

US Fire/CFI 0001

COVERAGE PART

COMPREHENSIVE GENERAL LIABILITY INSURANCE

For attachment to Policy No. 540 189362 7 in complete and policy.

ADDITIONAL DECLARATIONS

Location of all premises owned by, rented to or controlled by the named insured

Interest of named insured in such premises

☐ Owner ☐ Ground Lessee ☐ Tenant ☐ Other

Part occupied by named insured

The following discloses all hazards insured hereunder known to exist at the effective date of this policy, unless otherwise stated herein.

SCHEDULE

The insurance afforded is only with respect to such of the following Coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such Coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

Coverages	Limits of Liability		Advance Premiums
	Each Occurrence	Aggregate	
A—Bodily Injury Liability	$ See Endorsement	90 /1	$133,952.
B—Property Damage Liability	$	$	$
Form numbers of endorsements attached at issue			$
		Total Advance Premium	$133,952.

General Liability Hazards

Description of Hazards	Code No.	Premium Bases	Rates		Advance Premiums	
			P.O.	P.A.	Bodily Injury	Property Damage
Premises - Operations		(Q)				
Fertilizer Manufacturing	28701	1,501,400	1.16465	Incl.	133,952	Incl.
		Area (Sq. Ft.) / Cubic Contents / Receipts / Units / Admissions	Per 100 / Per 1,000 / Per 100 / Per 100 / Per 100	No. of Area / Cubic / Receipts / Units / Admissions		
Escalators Elevators or Hoists		Number Insured	Per Landing			
Independent Contractors		Cost	Per $100 of Cost			
Completed Operations		(Q) Receipts	(Q) Per $1,000 of Receipts			
Included						
Products		(Q) Sales	(Q) Per $1,000 of Sales			
Included						
			Total Advance P.O. and P.A. Premiums		$133,952	Incl.

When used as a premium basis:

1. "Admissions" means the total number of persons, other than employees of the named insured, admitted to the event insured or to events conducted on the premises whether on paid admission tickets, complimentary tickets or passes.
2. "Cost" means the total cost to the named insured with respect to operations performed for the named insured during the policy period by independent contractors of all work let or sub-let in connection with each insured project, including the cost of all labor, materials and equipment furnished, used or delivered for use in the execution of such work, whether furnished by the owner, contractor or subcontractor, including all fees, allowances, bonuses or commissions made, paid or due.
3. "Receipts" means the gross amount of money charged by the named insured for such operations by the named insured or by others during the policy period as are billed on a receipts basis other than receipts from telecasting, broadcasting or motion pictures, and including taxes, other than taxes which the named insured collects as a separate item and remits directly to a governmental division.
4. "Remuneration" means the entire remuneration earned during the policy period by proprietors and by all employees of the named insured, other than chauffeurs (except operations of mobile equipment) and aircraft pilots and co-pilots, subject to any overtime earnings or limitation of remuneration rule applicable in accordance with the manuals in use by the company.
5. "Sales" means the gross amount of money charged by the named insured or by others trading under his name for all goods and products sold or distributed during the policy period and charged during the policy period for installation, servicing or repair, and including taxes, other than taxes which the named insured has such others collect as a separate item and remit directly to a government division.

(over)

US Fire/CFI 0002

P.C

4-1-78 to 4-1-79

GENERAL LIABILITY [redacted] POLICY

JOHNSON & HIGGINS
OF GEORGIA
INSURANCE
17th Floor-Trust Co. of Ga. Bldg.-ATLANTA, GA.
TELEPHONE: 658-1330

UNITED STATES FIRE INSURANCE COMPANY
THE NORTH RIVER INSURANCE COMPANY
WESTCHESTER FIRE INSURANCE COMPANY
INTERNATIONAL INSURANCE COMPANY

CRUM & FORSTER INSURANCE COMPANIES
THE POLICY MAKERS

US Fire/CFI 0003

GENERAL LIABILITY
AUTOMOBILE
POLICY
PROVISIONS
PART A

United States Fire Insurance Company
A New York Corporation
Home Office: New York, N. Y.

Westchester Fire Insurance Company
A New York Corporation
Home Office: New York, N. Y.

International Insurance Company
An Illinois Corporation
Home Office: Chicago, Illinois

The North River Insurance Company
A New Jersey Corporation
Home Office: Township of Morris, N. J.

CRUM & FORSTER INSURANCE COMPANIES

THE COMPANY NAMED ON THE DECLARATIONS PAGE

(A capital stock company, herein called the company)

In consideration of the payment of the premium, in reliance upon the statements in the declarations made a part hereof and subject to all of the terms of this policy, agrees with the named insured as follows:

DEFINITIONS

When used in this policy (including endorsements forming a part hereof):

"automobile" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment;

"bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;

"collapse hazard" includes "structural property damage" as defined herein and "structural property damage" means the collapse of or structural injury to any building or structure due to (1) grading of land, excavating, borrowing, filling, back-filling, tunnelling, pile driving, cofferdam work or caisson work or (2) moving, shoring, underpinning, raising or demolition of any building or structure or removal or rebuilding of any structural support thereof. The collapse hazard does not include property damage (1) arising out of operations performed for the named insured by independent contractors, or (2) included within the completed operations hazard or the underground property damage hazard, or (3) for which liability is assumed by the insured under an incidental contract;

"completed operations hazard" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

(1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,

(2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or

(3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include bodily injury or property damage arising out of

(a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,

(b) the existence of tools, uninstalled equipment or abandoned or unused materials, or

(c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations";

"elevator" means any hoisting or lowering device to connect floors or landings, whether or not in service, and all appliances thereof including any car, platform, shaft, hoistway, stairway, runway, power equipment and machinery but does not include an automobile servicing hoist, or a hoist without a platform outside a building if without mechanical power or if not attached to building walls, or a hod or material hoist used in alteration, construction or demolition operations, or an inclined conveyor used exclusively for carrying property or a dumbwaiter used exclusively for carrying property and having a compartment height not exceeding four feet;

"explosion hazard" includes property damage arising out of blasting or explosion. The explosion hazard does not include property damage (1) arising out of the explosion of air or steam vessels, piping under pressure, prime movers, machinery or power transmitting equipment, or (2) arising out of operations performed for the named insured by independent contractors, or (3) included within the completed operations hazard or the underground property damage hazard, or (4) for which liability is assumed by the insured under an incidental contract;

"incidental contract" means any written (1) lease of premises, (2) easement agreement, except in connection with construction or demolition operations on or adjacent to a railroad, (3) undertaking to indemnify a municipality required by municipal ordinance, except in connection with work for the municipality, (4) sidetrack agreement, or (5) elevator maintenance agreement;

"insured" means any person or organization qualifying as an insured in the "Persons Insured" provision of the applicable insurance coverage. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the company's liability;

"mobile equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the named insured, including the ways immediately adjoining, or (3) designed for use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment;

"named insured" means the person or organization named in Item 1. of the declarations of this policy;

"named insured's products" means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including any container thereof (other than a vehicle), but "named insured's products" shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold.

(2)

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I. COVERAGE A—BODILY INJURY LIABILITY
COVERAGE B—PROPERTY DAMAGE LIABILITY

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

A. bodily injury or

B. property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Exclusions

This insurance does not apply

(a) to liability assumed by the insured under any contract or agreement except an incidental contract, but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;

(b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any automobile or aircraft owned or operated by or rented or loaned to any insured, or

(2) any other automobile or aircraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobile is not owned by or rented or loaned to any insured;

(c) to bodily injury or property damage arising out of (1) the ownership, maintenance, operation, use, loading or unloading of any mobile equipment while being used in any preconstruction, construction, erection, alteration, demolition or repair operations on or in connection with any premises owned by, rented to or controlled by the named insured or (2) the operation or use of any snowmobile or motor vehicle designed for use thereon;

(d) to bodily injury or property damage arising out of and in the course of the transportation of mobile equipment by an automobile owned or operated by or rented or loaned to any insured;

(e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any watercraft owned or operated by or rented or loaned to any insured, or

(2) any other watercraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured;

(f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;

(g) to bodily injury or property damage due to war, whether or not declared, civil war, insurrection, rebellion or revolution or to any act or condition incident to any of the foregoing, with respect to

(1) liability assumed by the insured under an incidental contract, or

(2) expenses for first aid under the Supplementary Payments provisions;

(h) to bodily injury or property damage for which the insured or his indemnitee may be held liable

(1) as a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages, or

(2) if not so engaged, as an owner or lessor of premises used for such purposes

if such liability is imposed

(i) by, or because of the violation of, any statute, ordinance or regulation pertaining to the sale, gift, distribution or use of any alcoholic beverage, or

(ii) by reason of the selling, serving or giving of any alcoholic beverage to a person under the influence of alcohol or which causes or contributes to the intoxication of any person;

(i) to property damage to

(1) property owned or occupied by or rented to the insured,

(2) property used by the insured, or

(3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control;

but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to property damage (other than to elevators) arising out of the use of an elevator at premises owned by, rented to or controlled by the named insured;

(j) to property damage to premises alienated by the named insured arising out of such premises or any part thereof;

(k) to loss of use of tangible property which has not been physically injured or destroyed resulting from

(1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, or

(2) the failure of the named insured's products or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured;

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured;

(l) to property damage to the named insured's products arising out of such products or any part of such products;

(m) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

(n) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein;

(o) to property damage included within

(1) the explosion hazard in connection with operations identified in this policy by a classification code number which includes the symbol "X",

(2) the collapse hazard in connection with operations identified in this policy by a classification code number which includes the symbol "C", or

(3) the underground property damage hazard in connection with operations identified in this policy by a classification code number which includes the symbol "U".

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) if the named insured is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor, and the spouse of the named insured with respect to the conduct of such a business;

(b) if the named insured is designated in the declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to the liability as such;

(c) if the named insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such;

(d) any person (other than an employee of the named insured or organization while acting as real estate manager for the named insured; and

(e) with respect to the operation, for the purpose of locomotion upon a public highway, of mobile equipment registered under any motor vehicle registration law,

(1) an employee of the named insured while operating any such equipment in the course of his employment, and

(2) any other person while operating with the permission of the named insured any such equipment registered in the name of the named insured and any person or organization legally responsible for such operation, but only if there is no other valid and collectible insurance available, either on a primary or excess basis, to such person or organization;

provided that no person or organization shall be an insured under this paragraph (e) with respect to

(i) bodily injury to any fellow employee of such person injured in the course of his employment, or

(ii) property damage to property owned by, rented to, in charge of or occupied by the named insured or the employer of any person described in subparagraph (e).

This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in this policy as a named insured.

III. LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain bodily injury or property damage, or (3) claims made or suits brought on account of bodily injury or property damage, the company's liability is limited as follows:

Coverage A—The total liability of the company for all damages, including damages for care and loss of services, because of bodily injury sustained by one or more persons as the result of any one occurrence shall not exceed the limit of bodily injury liability stated in the schedule as applicable to "each occurrence". Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of (1) all bodily injury included within the completed operations hazard and (2) all bodily injury included within the products hazard shall not exceed the limit of bodily injury liability stated in the schedule as "aggregate".

Coverage B—The total liability of the company for all damages because of all property damage sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the schedule as applicable to "each occurrence". Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of all property damage to which this coverage applies and described in any of the numbered subparagraphs below shall not exceed the limit of property damage liability stated in the schedule as "aggregate".

(1) all property damage arising out of premises or operations rated on a remuneration basis or contractors' equipment rated on a receipts basis, including property damage for which liability is assumed under any incidental contract relating to such premises or operations, but excluding property damage included in subparagraph (2) hereof,

(2) all property damage arising out of and occurring in the course of operations performed for the named insured by independent contractors and general supervision thereof by the named insured, including any such property damage for which liability is assumed under any incidental contract relating to such operations, but this subparagraph (2) does not include property damage arising out of maintenance or repairs at premises owned by or rented to the named insured or structural alterations at such premises which do not involve changing the size of or moving buildings or other structures,

(3) all property damage included within the products hazard and all property damage included within the completed operations hazard.

Such aggregate limit shall apply separately to the property damage described in subparagraphs (1), (2) and (3) above, and under subparagraphs (1) and (2) separately with respect to each project away from premises owned by or rented to the named insured.

Coverages A and B—For the purpose of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

IV. POLICY TERRITORY

This insurance applies only to bodily injury or property damage which occurs within the policy territory.

US Fire/CFI 0005

CRUM & FORSTER
INSURANCE COMPANIES
THE POLICY MAKERS

ENDORSEMENT #

Additional Premium

Return Premium

Effective on and after 4-1- 19 78 , 12:01 A.M. Standard Time

this endorsement forms part of policy No. 540 189362 7 Expiration Date 4-1-79

Issued to Columbia Nitrogen Corporation, Nipro, Inc.

By United States Fire Insurance Company

It is agreed that the limit of liability shall be as follows:

Single Limit Of Liability $500,000. Each Occurrence
$500,000. Aggregate

The single limit of liability stated above as applicable to "each occurrence" is the total limit of the company's liability for all damages because of bodily injury alone, property damage alone, or bodily injury and property damage combined sustained by one or more persons or organizations as the result of any one occurrence.

As respects those coverage parts containing provisions for "aggregate" limits of liability, the limit of liability stated above for "aggregate" is the total limit of the company's liability for all damages to which such "aggregate" provisions shall apply because of Bodily Injury alone, Property Damage alone, or Bodily Injury and Property Damage combined.

All of the provisions relating to "Limits of Liability" contained in the applicable coverage parts shall apply to the insurance under this endorsement except as modified herein.

All other terms and conditions remain unchanged.
Attached to and made part of the policy of the company shown above.

All other terms and conditions of this policy remain unchanged.

AUTHORIZED REPRESENTATIVE

PM 0 0 193 (8-67)

US Fire/CFI 0006

RETENTION ENDORSEMENT #3

It is agreed that:

1. The limit of liability as stated in Endorsement #2 shall apply excess of a retained limit of $25,000.00 per occurrence and the Named Insured agrees to assume this retained limit (herein called the Self-Insured Retention).

2. The limit of the Company's liability (as stated in the Declarations) shall apply in excess of the Self-Insured Retention (as stated in this endorsement) and the Named Insured agrees to assume this retained limit. The Company's obligation under this policy applies only to the amount excess of the Self-Insured Retention.

   The insured shall have the obligation to provide at his own expense adequate defense and investigation of any claim and to accept any reasonable offer of settlement within the Self-Insured Retention and in event of failure of the Insured to comply with this clause, no loss, cost or expense shall be payable by the Company.

   The "retained limit" means the total of the following sums with respect to each occurrence:

   (A) All sums which the insured, or the United States Fire Insurance Company as his insurer, or both, is legally obligated to pay as damages whether by reason of adjudication or settlement, because of injury to which this policy applies, and
   (B) All expenses incurred by the insured in the investigation, negotiation, settlement and defense of any claim or suit to which this policy applies, excluding only the salaries of the insured's regular employees.

3. In the event of a claim or claims arising which appear likely to exceed the Self-Insured Retention, no costs, other than loss adjusting expenses, shall be incurred by the Insured without the written consent of the Company.

4. The Company shall have the right in all cases, at its own expense, to assume charge or the defense and/or settlement of any claim and, upon written request from the Company, the Insured shall tender such portion of the Self-Insured Retention as the Company may deem necessary to complete the settlement of such claim.

5. Policy Condition 4 - "Insured's duties in the event of occurrence, claim or suite" is eliminated from the policy in its entirety and the following wording substituted therefor:

(A) Whenever the Insured has information from which it is reasonable to conclude that an act or omission involves injuries or damages which are likely to involve this policy, written notice containing particulars sufficient to identify the Insured and also reasonable obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses shall be given by or for the Insured to the Company or any of its authorized agents as soon as practicable. Failure to notify the Company of any act or omission which at the time of its happening did not appear to involve this policy, but which at a later date would appear to give rise to claims hereunder, the Named Insured shall promptly take at his own expense all reasonable steps to prevent additional injuries or damages from arising out of the same or similar conditions at the same location, but such expense shall not be recoverable under this policy.

(B) If a claim is made or suit is brought against the Insured involving this policy, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

(C) The Insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Insured is afforded under this policy; and the Insured shall attend hearings and trials and assist in securing and giving evidence and obtaining witnesses.

6. Policy Condition 7 - "Subrogation" is eliminated from the policy in its entirety and the following wording substituted therefor:

Subrogation and Other Recoveries: In the event of any payment under this policy, this 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. The Insured shall do nothing after injury or destruction to prejudice such rights.

It is further agreed that this Company shall act in concert with all other interest concerned, including the Insured, in the enforcement of any subrogation rights or in the recovery of amounts of any other means. The apportioning of any amounts so recovered shall follow the principle that any interest, including the Insured, that shall have paid an amount over and above any payment under this policy shall first be reimbursed up to the amount paid by such interest; this Company shall then be reimbursed out of any balance then remaining up to the amounts paid as the result of loss and ultimate net loss covered under this policy; and, lastly, the interests, including the Insured, of whom this insurance is in excess are entitled to claim any recovery of any such amounts shall be in the ratio of the respective amounts recovered.

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SPECIAL CONDITIONS

It is a condition precedent to the right of the Named Insured to be insured under this policy that:

1. The statements and particulars contained in the proposal are true. 3e

2. During the currency of the insurance the Named Insured shall provide the Company quarterly reports of all claims or incidents occurring within the Self-Insured Retention including a description of each claim and amounts paid and/or reserved. Each report is to be submitted within twenty (20) days following the end of each quarterly period and this shall apply in addition to item 5 of this endorsement.

3. The insured shall at all times

   (A) Give to the Company or their duly appointed representatives such information, assistance and signed statements as the Company may require, and

   (B) Assist in the defense of any claim without charge to the Company.

4. Permission to Insure: The Named Insured may procure insurance for all or any part of the Self-Insured Retention, however, the existance of any such insurance shall not relieve the Named Insured of any of the duties or obligations contained in this endorsement unless speficically agreed by the Company and endorsed hereon.

The following items need be completed only when this endorsement is issued subsequent to preparation of the policy

LIABILITY

$ 222

GROUP FOUR COMPREHENSIVE PERSONAL LIABILITY ENDORSEMENT

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following designated insurance:
COMPREHENSIVE PERSONAL LIABILITY INSURANCE

This endorsement, effective 1-1-78 (12:01 A. M., standard time), forms a part of policy No. 540 189960 7

issued to Columbia Nitrogen Corporation, Blythe, Ens.

by United States Fire Insurance Company

Authorized Representative

SCHEDULE

Personal Injury and Liability Injury Liability

Aggregate limit shall be the per occurrence bodily injury liability limit unless otherwise indicated herein

Limit of Liability $ _____ Aggregate

Limit of Liability--Premises Medical Payments Coverage

$1,000 each Person unless otherwise indicated herein $ _____ each person

Limit of Liability--Fire Legal Liability Coverage

($50,000 per occurrence unless otherwise indicated herein) $ _____ any occurrence

Annual Premium: Premium Basis

$ _____ is the TOTAL COMPREHENSIVE PERSONAL LIABILITY BODILY INJURY AND PROPERTY DAMAGE FEE Limit is otherwise determined

$ _____ Minimum Premium

$ _____ Deposit Premium

I. DEFINITION OF INSURED

(A) The definition of insured contained is amended to include any executive or supervisory official to the extent of the named insured's business

(B) The insurance afforded with respect to bodily injury pursuant under an endorsement referred to subject to the following additional exclusions:

(1) to bodily injury or property damage for which the insured has assumed liability under any incidental contract, or such liability or damage imposed upon or the operation of the insured under contract;

(2) if the insured is an architect, engineer or surveyor, to bodily injury or property damage arising out of the rendering or failure to render professional services by such insured, including

(a) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, and

(b) supervisory, inspection or engineering services;

(3) if the performance of the insured is an architect, engineer or surveyor, by the activity of the submarine, the agents or employees, arising out of

(a) the preparation or approval or the failure to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or

(b) the giving of or the failure to give directions or instructions by the submarine, its agents or employees, provided such giving or failure to give is the primary cause of the bodily injury or property damage;

(4) to any obligation for which the insured may be held liable in an action on a contract by a third party beneficiary for bodily injury or property damage arising out of a project for public authority but this exclusion does not apply to an action by the public authority or any other person or organization engaged in the project;

(5) to bodily injury or property damage arising out of operations, unless by fact, of any railroad property, including any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing but this exclusion does not apply to insured agreements;

(C) The following exclusions applicable to Coverages A (Bodily Injury) and B (Property Damage) do not apply to the Contractual Liability Coverage (see (C) (2) (b) and (d)):

(D) The following additional exclusion applies:

Arbitration

The company shall be entitled to exercise all of the insured's rights in the choice of arbitrators and in the conduct of any arbitration proceeding.

II. PERSONAL INJURY AND ADVERTISING INJURY LIABILITY COVERAGE

(A) The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this indemnity applies, sustained by any person or organization and caused by an offense committed during the policy period. Except as hereinafter provided, the company shall have the right and duty to defend any suit against the insured seeking damages on account of such injury, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

(B) This insurance does not apply

(1) to liability assumed by the insured under any contract or agreement,

(2) to personal injury or advertising injury arising out of an offense committed by or with the knowledge or consent of the insured,

(3) to personal injury or advertising injury arising out of a publication or utterance of a libel or slander, or a publication or utterance in violation of an individual's right of privacy, if this insurance replaces similar insurance or attorney in fact or on behalf of the named insured one year to the effective date of this insurance,

(4) to personal injury or advertising injury arising out of libel or slander or the publication or utterance of defamatory or disparaging material concerned any person, organization or goods, products or services, if the falsity of such matter was known by or with the direction of the insured with knowledge of the falsity thereof,

(5) to personal injury or advertising injury arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in the declarations of the policy as a named insured,

(6) to advertising injury arising out of

(a) failure of performance of contract, but this exclusion does not apply to the unauthorized appropriation of ideas based upon alleged breach of implied contract, or

(b) infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods, products or services sold, offered for sale or advertised, or

(c) incorrect description or mistake in advertised price of goods, products or services sold, offered for sale or advertised

(7) with respect to advertising injury

(a) to any insured in the business of advertising, broadcasting, publishing or telecasting, or

(b) to any injury arising out of any act committed by the insured with actual malice.

(C) Limits of Liability

Regardless of the number of (1) insureds hereunder, (2) persons or organizations who sustain injury or damage, or (3) claims made or suits brought, on account of personal injury or advertising injury, the total limit of the company's liability under the coverage for damages is the limit stated in the schedule as applicable to "each person", except the limit of liability stated in the schedule as applicable to "each occurrence" for all damages because of personal injury sustained by two or more persons or organizations in any one occurrence shall not exceed the limit of liability stated in the schedule as applicable to "each occurrence".

(D) Additional Definitions

"Advertising injury" means injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

"Personal injury" means injury arising out of one or more of the following offenses committed during the policy period:

1 false arrest, detention, imprisonment, or malicious prosecution;

2 wrongful entry or eviction or other invasion of the right of private occupancy;

3 a publication or utterance

(a) of a libel or slander or other defamatory or disparaging material, or

(b) in violation of an individual's right of privacy except publication or utterance in the course of or relevant to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured but not for the named insured's benefit.

III. PREMISES MEDICAL PAYMENTS COVERAGE

The company will pay to or for each person who sustains bodily injury caused by accident all reasonable medical expenses incurred within one year from the date of the accident on account of such bodily injury, provided such bodily injury arises out of (a) a condition in the insured premises or the premises with respect to which the named insured is afforded coverage for bodily injury liability under the policy.

The insurance does not apply

(A) to bodily injury

(1) arising out of the ownership, maintenance, operation, use, loading or unloading of

(a) any automobile or aircraft owned or operated by or rented or loaned to any insured, or

(b) any other automobile or aircraft operated by any person in the course of his employment by any insured,

but the exclusion does not apply to the parking of an automobile on the insured premises, if such automobile is not owned by or rented or loaned to any insured,

(2) arising out of

(a) the ownership, maintenance, operation, use, loading or unloading of any mobile equipment while being towed by or carried on a vehicle owned, operated, rented or loaned to any insured, or

(b) the negligent supervision of any of the foregoing,

(3) arising out of the ownership, maintenance, operation, use, loading or unloading of

(a) any watercraft owned or operated by or rented or loaned to any insured, or

(b) any other watercraft operated by any person in the course of his employment by any insured,

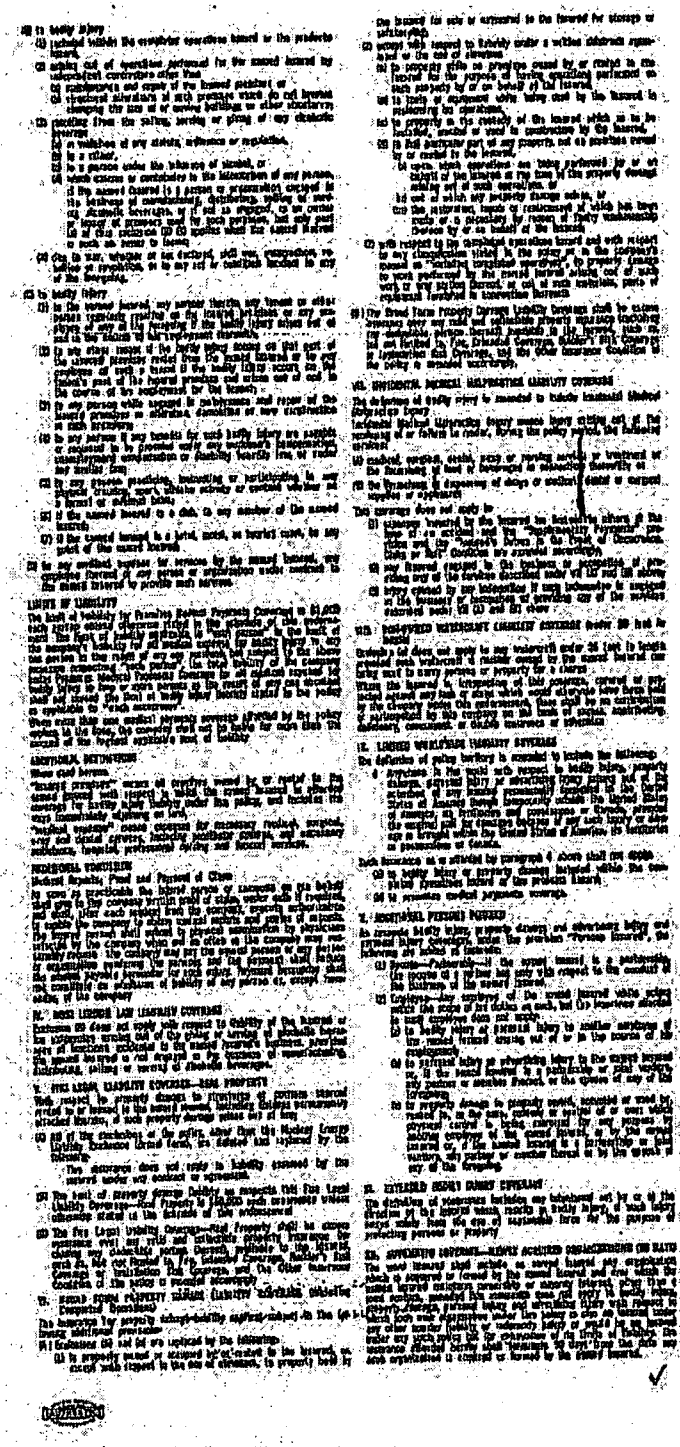
but this exclusion does not apply to watercraft while ashore on the insured premises,

(4) arising out of and in the course of the transportation of mobile equipment by an automobile owned or operated by or rented or loaned to the insured hereunder,

(cont)

V.

US Fire/CFI 0010



ENDORSEMENT No. 5

CRUM&FORSTER INSURANCE COMPANIES
THE POLICY MAKERS

Additional Premium _____

Return Premium _____

Effective on and after 4-1- 1978, 12:01 a.m. Standard Time

this endorsement forms part of policy No. 540 189362 7 Expiration Date 4-1-79

Issued to Columbia Nitrogen Corporation, Nipro, Inc.

By United States Fire Insurance Company

In consideration of the premium charged, it is understood and agreed that in the event of any material change in or cancellation of this policy, the company will give ninty (90) days written notice prior to such change or cancellation to the named insured. Except for non-payment of premium the notice of cancellation will be ten days.

All other terms and conditions remain unchanged.
Attached to and made part of the policy of the company shown above.

All other terms and conditions of this policy remain unchanged.

_____
Authorized Representative

FM. OD. 192 6PT (4/73)

US Fire/CFI 0012

ENDORSEMENT No. 6

CRUM & FORSTER INSURANCE COMPANIES
THE POLICY MAKERS

Additional Premium _____

Return Premium _____

Effective on and after 4-1- 19 78 , 12:01 a.m. Standard Time

This endorsement forms part of policy No. 540 189362 7 Expiration Date 4-1-79

Issued to Columbia Nitrogen Corporation, Nipro, Inc.

By United States Fire Insurance Company

In consideration of the premium charged, it is understood and agreed that Stemicarbon N.V., P.O. Box 1483, Augusta, Georgia, 30903, is added as an additional insured solely as respects their activities on behalf of the named insured as stated in item #1 of the declarations.

All other terms and conditions remain unchanged.
Attached to and made part of the policy of the company shown above.

All other terms and conditions of this policy remain unchanged.

_____ Authorized Representative ✓

FM 00 192 SPT. 14/731

US Fire/CFI 0013

ENDORSEMENT

CRUM&FORSTER
INSURANCE COMPANIES
THE POLICY MAKERS

Additional Premium _____

Return Premium _____

Effective on and after 4-1- 19 78 , 12:01 a.m. Standard Time

this endorsement forms part of policy No. 540 189362 7 Expiration Date 4-1-79

Issued to Columbia Nitrogen Corporation, Nitro, Inc.

By United States Fire Insurance Company Company

ADDITIONAL INSURED

Stamicarbon, N.V. & DSM

All other terms and conditions of this policy remain unchanged.

_____
Authorized Representative

FM 00 192 OFT 11/78

CRUM & FORSTER
INSURANCE COMPANIES
THE POLICY MAKERS

ENDORSEMENT

Additional Premium _____

Return Premium _____

Effective on and after 4-1- 1978, 12:01 a.m. Standard Time

this endorsement forms part of policy No. 540 189362 7 Expiration Date 4-1-79

Issued to Columbia Nitrogen Corporation, Nipro, Inc.

By United States Fire Insurance Company

In consideration of the premium charged it is agreed that the following changes are made in the Broad Form Comprehensive General Liability Endorsement, 19001, (Endorsement #4).

1. Exclusion B (5) of the contractual liability coverage section is deleted.

2. The non-owned watercraft liability coverage section is amended to read fifty (50) feet rather than twenty-six (26) feet.

All other terms and conditions of this policy remain unchanged.

AUTHORIZED REPRESENTATIVE

FM 0 0 193 (8-67)

US Fire/CFI 0015

CRUM & FORSTER
INSURANCE COMPANIES
THE POLICY MAKERS

ENDORSEMENT

Additional Premium _____

Return Premium _____

Effective on and after 4-1-19 78, 12:01 a.m. Standard Time

this endorsement forms part of policy No. 540 189362 7 Expiration Date 4-1-79

Issued to Columbia Nitrogen Corporation, Nipro, Inc.

By United States Fire Insurance Company Company

Broad Named Insured

Columbia Nitrogen Corporation, Nipro, Inc., Columbia Communications Systems, Inc. and any owned, controlled managed, affiliated or subsidiary companies or corporations as their respective interest may appear and/or joint ventures and/or partnerships in which any of the above mentioned are engaged, either as a participant therein or as a manager thereof or both.

All other terms and conditions of this policy remain unchanged.

_____
AUTHORIZED REPRESENTATIVE

FM 0 0 193 (8-67)

US Fire/CFI 0016

Insert Part B here so that edge butts against fold to permit policy number, insured's name and address on Part B to appear through window.

Attach Coverage Part(s) and Endorsement(s) (If Any) Here

"occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

"policy territory" means:

(1) the United States of America, its territories or possessions, or Canada, or

(2) international waters or air space, provided the bodily injury or property damage does not occur in the course of travel or transportation to or from any other country, state or nation, or

(3) anywhere in the world with respect to damages because of bodily injury or property damage arising out of a product which was sold for use or consumption within the territory described in paragraph (1) above, provided the original suit for such damages is brought within such territory.

"products hazard" includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

"property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

"underground property damage hazard" includes underground property damage as defined herein and property damage to any other property at any time resulting therefrom. "Underground property damage" means property damage to wires, conduits, pipes, mains, sewers, tanks, tunnels, any similar property, and any apparatus in connection therewith, beneath the surface of the ground or water, caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, back-filling or pile driving. The underground property damage hazard does not include property damage (1) arising out of operations performed for the named insured by independent contractors, or (2) included within the completed operations hazard, or (3) for which liability is assumed by the insured under an incidental contract.

SUPPLEMENTARY PAYMENTS

The company will pay, in addition to the applicable limit of liability:

(a) all expenses incurred by the company, all costs taxed against the insured in any suit defended by the company and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed $250 per bail bond, but the company shall have no obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for first aid to others at the time of an accident, for bodily injury to which this policy applies;

(d) reasonable expenses incurred by the insured at the company's request in assisting the company in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed $25 per day.

CONDITIONS

1. **Premium.** All premiums for this policy shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

Premium designated in this policy as "advance premium" is a deposit premium only which shall be credited in the amount of the earned premium due at the end of the policy period. At the close of each period (or part thereof terminating with the end of the policy period) designated in the declarations as the audit period the earned premium shall be computed for such period and, upon notice thereof to the named insured, shall become due and payable. If the total earned premium for the policy period is less than the premiums previously paid, the company shall return to the named insured the unearned portion paid by the named insured.

The named insured shall maintain records of such information as is necessary for premium computation, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

2. **Inspection and Audit.** The company shall be permitted but not obligated to inspect the named insured's property and operations at any time. Neither the company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

The company may examine and audit the named insured's books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

3. **Financial Responsibility Laws.** When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

4. **Insured's Duties in the Event of Occurrence, Claim or Suit.**

(a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

(b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

(c) The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy, and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

5. **Action Against Company.** No 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 this 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.

6. **Other Insurance.** The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below.

(a) **Contribution by Equal Shares.** If all of such other valid and collectible insurance provides for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(b) **Contribution by Limits.** If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. **Subrogation.** In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery thereafter 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. The insured shall do nothing after loss to prejudice such rights.

8. Changes: Notice to any agent or knowledge possessed by any agent or by any other person shall not affect a waiver or a change in any part of this policy or estop the company from asserting any right 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.

9. Assignment: Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die, such insurance as is afforded by this policy shall apply (1) to the named insured's legal representative, as the named insured, but only while acting within the scope of his duties as such, and (2) with respect to the property of the named insured, to the person having proper temporary custody thereof, as insured, but only until the appointment and qualification of the legal representative.

10. Three Year Policy: If this policy is issued for a period of three years any limit of the company's liability stated in this policy as "aggregate" shall apply separately to each consecutive annual period thereof.

11. 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 by mailing to the named insured at the address shown in this policy, written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. 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 made 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.

12. Declarations: By acceptance of this policy, the named insured agrees that the statements in the declarations are the 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 himself and the company or any of its agents relating to this insurance.

TEXAS EXCEPTION: Texas Dividend Provision — International Insurance Company — If this policy is written in the International Insurance Company, the named insured shall be entitled to participate in a distribution of the Surplus of this Company, as determined by its Board of Directors from time to time, after approval in accordance with the provisions of the Texas Insurance Code, of 1951, as amended.

IN WITNESS WHEREOF, the company has caused this policy to be signed by its president and secretary but this policy shall not be valid unless completed by the attachment hereto of a declarations page designated as Part B and Coverage Part(s) and countersigned on the aforesaid declarations page by a duly authorized representative of the company.

Secretary

President

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT
(Broad Form)

This endorsement modifies the provisions of this policy relating to ALL AUTOMOBILE LIABILITY, GENERAL LIABILITY AND MEDICAL PAYMENTS INSURANCE OTHER THAN FARM AUTOMOBILE, SPECIAL PACKAGE AUTOMOBILE, COMPREHENSIVE PERSONAL AND FARMER'S COMPREHENSIVE PERSONAL INSURANCE.

It is agreed that:

I. This policy does not apply:

A. Under any Liability Coverage, to bodily injury or property damage

(1) with respect to which an insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(2) resulting from the hazardous properties of nuclear material and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments Coverage, or under any Supplementary Payments provision relating to first aid, to expenses incurred with respect to bodily injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

C. Under any Liability Coverage, to bodily injury or property damage resulting from the hazardous properties of nuclear material, if

(1) the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of, an insured or (b) has been discharged or dispersed therefrom;

(2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or

(3) the bodily injury or property damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such nuclear facility and any property thereon.

II. As used in this endorsement:

"hazardous properties" include radioactive, toxic or explosive properties;

"nuclear material" means source material, special nuclear material or byproduct material;

"source material", "special nuclear material", and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

(a) any nuclear reactor,

(b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,

(c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property.

NEW YORK EXCEPTION: The "Nuclear Energy Liability Exclusion Endorsement (Broad Form)" does not apply to Automobile Liability insurance in New York.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 11-CP-10-387

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

PCS Nitrogen, Inc..

☐ Plaintiff,

vs.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Home Insurance Company, Certain Underwriters at Lloyd's London, the Avia Companies, the Winterthur Companies, Certain London Market Insurance Company, Providence Washington Insurance Company, as Successor in Interest by Way of Merger to Seaton Insurance Company (f/k/a Unigard Security Insurance Company, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America)

☑ Defendant.

check box above indicating submitting party

Name, S.C. Bar №, and address of plaintiff's attorney:	Name, S.C. Bar №, and address of defendant's attorney:
Wm. Howell Morrison, Esquire Haynsworth Sinkler Boyd, PA 134 Meeting Street, Suite 300 Charleston, SC 29401 hmorrison@hsblawfirm.com	R. Scott Wallinger, Jr., Esquire Post Office Box 12487 Columbia, SC 29211 telephone: 803.256.2660 fax: 803.771.4484 e-mail: swallinger@collinsandlacy.com other:

☑ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: United States Fire Insurance Company and Continental Casualty Company's Notice of Motion and Motion for Summary Judgment

Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☑ Written motion attached
☐ Form Motion –

I hereby move for relief or action by the court as set forth in the attached proposed motion.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

7/24/15
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status
- ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act
- ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication
- ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ (print name) ☐ MOTION FEE COLLECTED: $ ☐ CONTESTED – AMOUNT DUE: $	DATE FILED

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	C.A. NO. 11-CP-10-387
	)	
PCS NITROGEN, INC.	)	**UNITED STATES FIRE INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CONTINENTAL CASUALTY COMPANY, *et al.*	)	
	)	
Defendants.	)	

FILED
2015 JUL 24 PM 3:24
JEAN H. ARMSTRONG
CLERK OF COURT

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that ten days hence, or as soon as may be heard by the Court, United States Fire Insurance Company with respect to policy no. 5401893627 ("U.S. Fire") and Continental Casualty Company ("Continental"), by and through their undersigned attorneys, will move and hereby do move for an Order, pursuant to South Carolina Rule of Civil Procedure 56, granting them summary judgment and dismissing this action with prejudice, on the grounds that no coverage is afforded under the Defendants' policies under which Plaintiff PCS Nitrogen, Inc. ("PCS") seeks coverage, because the pollution exclusion in those policies completely excludes coverage. Accordingly, Defendants have no duty to defend or indemnify with respect to the underlying claims. Indeed, PCS has already litigated and lost this very same issue, under the same pollution exclusion, under the same law, as to the same Site. PCS is, therefore, collaterally estopped from re-litigating this issue here. Accordingly, Defendants are entitled to Summary Judgment on all claims asserted by PCS. Defendants offer their supporting memorandum of law, attached herewith and incorporated herein by reference. Defendants reserve the right to

offer additional submissions, authorities, and memoranda in support of this motion at the hearing thereon.

BE PRESENT IF SO MINDED

Respectfully submitted,

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Counsel for Defendant Continental Casualty Company

July 24, 2015

CERTIFICATE OF SERVICE

The undersigned employee of the law offices of Collins & Lacy, P.C., does hereby certify that on the _____ day of _____, 2015, the following named individual(s) were served with a copy of the within pleading via electronic mail and/or by mailing a copy of same to said person(s) via the United States Postal Service with sufficient postage affixed thereto and return address clearly marked.

PLEADING: UNITED STATES FIRE INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

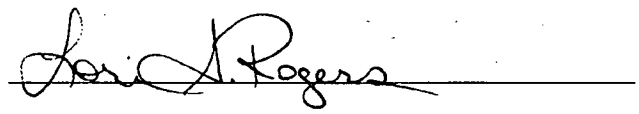
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JULIE J. ARMSTRONG
CLERK OF COURT

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Shareholder

July 24, 2015

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: PCS Nitrogen, Inc. v. Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Home Insurance Company, Certain Underwriters at Lloyd's London, the Avia Companies, the Winterthur Companies, Certain London Market Insurance Company, Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Republic-Vanguard Insurance Company (f/k/a Republic Insurance Company), First State Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America)
Civil Action No. 11-CP-10-387
Claim No.
C&L File No. 001551-00100

Dear Ms. Armstrong:

Please find enclosed the original and one copy of the United States Fire Insurance Company and Continental Casualty Company's Notice of Motion and Motion for Summary Judgment in the above referenced matter. Please clock the Notice and return a copy to us in the self-addressed envelope. By copy of this letter we are serving same on all known counsel of record and providing it to Judge Cooper by email and in hard copy to chambers. Judge Cooper is assigned to this case and will schedule a hearing.

Please let us know should you need anything further. Thank you for your kind attention to this matter.

With warmest regards,

Sincerely,

R. Scott Wallinger, Jr.

Enclosures

Cc (via email):

The Honorable G. Thomas Cooper, Jr. (via email and US Mail)
John S. Favate, Esquire
Robert F. Walsh, Esquire
Adam J. Neil, Esquire
Patrick F. Hofer, Esquire
Wm. Howell Morrison, Esquire
Morgan S. Templeton, Esquire
Robert H. Hood, Jr., Esquire
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Elizabeth J. Palmer, Esquire
Mary Poag, Esquire
Paul Parker, Esquire
Wayne Karbal, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	C.A. NO. 11-CP-10-387
	)	
PCS NITROGEN, INC.	)	**UNITED STATES FIRE INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CONTINENTAL CASUALTY COMPANY, *et al.*	)	
	)	
	)	
Defendants.	)	
	)	

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J. ARMSTRONG
CLERK OF COURT

Defendant Moving Insurers[1] have moved the Court for an order granting Summary Judgment, pursuant to South Carolina Rule of Civil Procedure 56(c). The grounds for their Motion are that no coverage is afforded under the policies issued by Moving Insurers under which Plaintiff PCS Nitrogen, Inc. ("PCS") seeks coverage here because the pollution exclusion in those policies completely excludes coverage. Accordingly, Moving Insurers have no duty to defend or indemnify with respect to the underlying claims. Indeed, PCS *has already litigated and lost* this very same issue, under the *same* pollution exclusion, under the *same* law, as to the *same* Site.[2] PCS is, therefore, collaterally estopped from re-litigating this issue here. Accordingly, Moving Insurers are entitled to Summary Judgment on all claims asserted by PCS. This memorandum is offered in support of their motion.

[1] "Moving Insurers" are Defendants United States Fire Insurance Company with Respect to Policy No. 5401893627 ("U.S. Fire") and Continental Casualty Company ("Continental").
[2] *See, Ross Dev. Corp. v. Fireman's Fund Ins. Co.*, 910 F. Supp. 2d 828 (D.S.C.), *aff'd*, 526 F. App'x 299 (4th Cir. 2013).

I. INTRODUCTION

PCS seeks insurance coverage under certain commercial general liability insurance policies issued by the Moving Insurers to Columbia Nitrogen Corporation ("Old CNC") (the "Policies")[3] for the costs of remediating pollution on a 43-acre site in Charleston, South Carolina (the "Site"). The pollution exclusion in the Policies excludes coverage for the pollution at issue here as a matter of law. As demonstrated below, the pollution exclusion broadly excludes coverage for property damage arising out of the discharge, dispersal release or escape of pollutants at the Site; the exclusion's narrow exception for a discharge, dispersal, release or escape of waste materials or pollutants that is both "sudden and accidental" does not apply as none of the contamination for which PCS is liable resulted from a "sudden and accidental" discharge.

The undisputed facts show that the pollution for which PCS is liable was the result of discharges that took place routinely and repeatedly, as a matter of ordinary business operations, over an extended period of time dating back to 1906. The owner of the Site from 1906 to 1966, Ross Development Corporation ("Ross") (formerly known as Planters Fertilizer and Phosphate Company ("Planters")), used the Site to manufacture phosphate fertilizer and routinely disposed of waste materials on the Site. Old CNC discharged contaminants on the Site as part of its routine day-to-day operations. The undisputed facts which are dispositive for purposes of this motion were exhaustively determined by the U.S. District Court for the District of South Carolina (Seymour, J.), in extensive findings of fact and conclusions of law in an underlying

[3] PCS asserts it is the successor-in-interest to Old CNC's rights under the Policies. In the underlying litigation, PCS vigorously asserted that it is *not* the corporate successor to Old CNC, a proposition with which Moving Insurers agree. Indeed, in a concurrently-filed motion for summary judgment, Moving Insurers seek dismissal of PCS's claims on the ground that PCS has not succeeded to, or otherwise obtained, Old CNC's rights under the Policies. Even if PCS were entitled to the rights of the "Insured" under the Policies, however, coverage is completely excluded by the pollution exclusion.

lawsuit brought under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §§ 9601, *et seq.*[4] Furthermore, District Judge Seymour ruled that the pollution exclusion in the policies issued to Ross precludes coverage for the same underlying claims in an insurance coverage action against Ross's insurers, in which PCS was an active litigant as a judgment creditor of Ross. Judge Seymour held that the discharges at the Site were not "sudden and accidental," under South Carolina law (which applies here), but were part of ordinary and routine business operations. PCS appealed Judge Seymour's decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed. The Fourth Circuit also affirmed Judge Seymour's ruling that Ross's insurers had no duty to defend Ross.[5] That judgment is, therefore, final.

Accordingly, both trial and appellate federal courts applying South Carolina law to the same pollution exclusion at issue here have held that the discharges at the Site were not "sudden and accidental," and therefore insurers had no duty to defend or to indemnify with respect to the alleged property damage at the Site. Not only are these decisions persuasive, they are preclusive because PCS *was an active party* to that litigation, and therefore has already litigated and lost on the merits of the enforceability of the pollution exclusion. Under firmly established South Carolina law, PCS cannot now re-litigate the issue of whether the pollution exclusion bars coverage for the contamination at issue. The undisputed facts show, consistent with the findings of Judge Seymour and the Fourth Circuit, that the pollution exclusion bars coverage because the discharges at the Site were not sudden and accidental.

As a result, under the undisputed facts and established clear South Carolina law, Moving Insurers are entitled to summary judgment on all causes of action asserted by PCS.

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[4] *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431 (D.S.C.), *aff'd*, 714 F.3d 161 (4th Cir. 2013).

[5] *Ross Dev.Corp. v. Fireman's Fund Ins. Co.*, 526 F. App'x at 299.

II. STATEMENT OF UNDISPUTED FACTS

A. Policies Issued by Moving Insurers and Relevant Policy Language

The Policies are the following commercial general liability insurance policies issued by Moving Insurers to Old CNC: (i) Policy No. CCP 9682195 issued by Continental to Old CNC for the policy period January 1, 1973 to January 1, 1974; (ii) Policy No. CCP 9883159 issued by Continental to Old CNC for the policy period January 1, 1974 to February 1, 1975; and (iii) Policy No. 5401893627 issued by U.S. Fire to Old CNC for the policy period April 1, 1978 to April 1, 1979. *See* Third Amended Complaint ("TAC") ¶¶ 17–32 (filed Mar. 24, 2015) (attached hereto as Exhibit A). Subject to all of the Policies' terms, conditions, limits, and exclusions, each Moving Insurer agreed to pay sums that the insured shall be legally obligated to pay as damages because of "property damage" during the policy period caused by an "occurrence". Copies of the Policies as produced in discovery are attached hereto as Exhibit B.

The Policies include the following broad exclusion for property damage arising out of the discharge, dispersal, release or escape of pollutants, subject to a narrow exception which states that the exclusion does not apply if the discharge, dispersal, release or escape of waste materials or pollutants is both sudden and accidental:

> This insurance does not apply:
>
> (f) to **bodily injury** or **property damage** arising out of the discharge, dispersal, release or escape or smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

See Exhibit B (Policies), at Exclusion (f) (Policy No. CCP 9682195, at CCC000208; Policy No. CCP 9883159, at CCC000288; and Policy No. 5401893627, at US Fire/CFI 0005).

B. The Underlying Actions

1. History of Operations at the Site

The Site was subject to extensive litigation by PCS in the underlying CERCLA case, resulting in detailed findings by the district court and a judgment affirmed by the Fourth Circuit. Beginning in 1906, Ross operated a phosphate fertilizer manufacturing facility at the Site. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431 (D.S.C. 2011). Ross manufactured fertilizer by burning pyrite ore and reacting sulfuric acid with phosphate rock. *Id.* at 445. Ross manufactured the sulfuric acid in acid chambers that were housed in an acid manufacturing plant on the northern portion of the Site. *Id.* Once produced, the sulfuric acid was piped to a building on the southern portion of the Site where it was added to crushed phosphate rock. *Id.* The primary fuel utilized by Ross until the early 1930s, pyrite, resulted in the production of pyrite slag. *Id.* The pyrite slag byproduct contained high concentrations of arsenic and lead. *Id.* at 445-46. Over the years, Ross used the pyrite slag on the Site as fill material and to stabilize roads. *Id.* at 445.

In 1963, roughly one decade before the earliest of the Policies was issued and three years before Old CNC acquired the Site, a fire destroyed a large portion of Ross's acid plant. 791 F. Supp. 2d at 446. The 1963 fire was the source of two localized "hot spots" contaminated with carcinogenic polyaromatic hydrocarbon ("cPAH"). *Id.* at 442, 446. After constructing a modernized acid plant and resuming fertilizer production, Ross sold the Site and its equipment in 1966 to Old CNC. *Id.* at 446–47.

Between 1966 and 1985, Old CNC owned the Site. 791 F. Supp. 2d at 448. Old CNC operated the acid plant until June 1970 and operated the fertilizer plant until 1972. *Id.* Arsenic and lead were present in Old CNC's finished product, normal superphosphate fertilizer. *Id.* Dust from the manufacture of this product contained elevated lead and arsenic which was regularly

deposited on the Site. *Id.* Each summer, Old CNC closed the acid plant for maintenance, during which acid chambers were washed out. Lead sludge in the acid chambers was washed from the chambers to the ground. This resulted in a "pyramid of sludge" that was two feet wide and two to three feet in height. Each pyramid of sludge was hosed into an unlined ditch that ran toward the Ashley River. *Id.* at 448–49. The sludge contained lead sulphate. *Id.* Additionally, during periodic repairs to the lead acid chambers, pieces of lead were cut out and discarded onto the ground. *Id.* at 449. These lead sheets, to the extent left on the ground, could have contributed to contamination at the Site. *Id.*

Old CNC generated a liquid process effluent which contained fluorosilicic acid and lead that was discharged into drainage ditches releasing these contaminants across the Site, into the marsh and the Ashley River. 791 F. Supp. 2d at 449. In addition, fumes containing fluorosilicic acid were released into the air and deposited on Site by prevailing winds. *Id.*

During maintenance of the acid chambers, Old CNC treated acidic lead sludge with four to five hundred pounds of soda ash. After the sludge settled, the tanks were drained and another four to five hundred pounds of soda ash were mixed into the lead sludge. *Id.* at 450. Old CNC treated acid pipeline leaks with soda ash as well. *Id.* at 449. Lead and arsenic were mobilized through the soil over time due to routine releases of acid from the washing out of the chambers and/or leaks and spills from pipes and tanks. *Id.* at 450.

On April 23, 1971, two years before the earliest of the Policies was issued, a windstorm damaged the roof of the sulfuric acid plant, the main building, and the chemicals storage building. 791 F. Supp. 2d at 450. Roof dust, finished fertilizer product, and other chemicals were dispersed into the air. *Id.* Shortly thereafter, the acid plant was demolished. *Id.* Demolition involved dismantling and washing out the acid chambers and acid towers, and

excavating the acid tank and associated piping. Heavy equipment was used to demolish and remove the structures, and to remove the pilings on which the structure was built. Demolition of the plant disturbed the subsurface soil to a depth of at least two feet. *Id.* In 1972, Old CNC ceased fertilizer production at the Site. *Id.* Between February and September 1977, Old CNC demolished most of the remaining structures on the Site. *Id.* at 451. By January 1981, demolition of the fertilizer plant was complete. *Id.* Demolition and regrading of the Site by CNC with heavy equipment significantly disturbed the soil at the Site. *Id.*

In 1985, Old CNC conveyed the Site to Holcombe and Fair ("Holcombe"). *Id.* at 444. Holcombe sold two small portions of the Site in 1987 and 1992, and also conveyed a right-of-way to the City of Charleston in 1991. *Id.* In 2002, Holcombe sold its remaining interest in the Site to Ashley II of Charleston, LLC, *Id.* at 444–45, who owns 30.67 acres of the Site (Robin W. Hood, a trucking company, owns 2 acres, and the City of Charleston owns 1.28 acres). *Id.* at 445.

2. The Underlying CERCLA Cost-Recovery Suit Against PCS

On September 26, 2005, Ashley II commenced a cost-recovery action in federal district court in South Carolina under CERCLA, to recover from PCS—as the purported successor to Old CNC's environmental liabilities—costs incurred, and to be incurred, to remediate contamination at the Site. Exhibit C ("*Ashley II* Complaint"); *see also, Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431 (D.S.C. 2011) (the "*Ashley II*"). In *Ashley II*, plaintiff asserted that PCS, as successor to Old CNC, is liable for contamination at the Site due to Old CNC's operation of a phosphate fertilizer granulation plant starting in 1966. (Ex. C, at ¶¶ 15–23). The *Ashley II* Complaint does not allege any "sudden and accidental" discharges and describes the process employed for the production of phosphate fertilizers as:

> ...producing sulfuric acid and mixing this acid with phosphate rock. Sulfuric acid was produced at the Site by burning sulfur in the presence of oxygen to for sulfur trioxide. Water was then passed over packing media to react with the sulfur trioxide gas to form sulfuric acid. Crushed phosphate rock was then mixed with the sulfuric acid, and was further mixed, solidified and cured, ultimately reaching a level of phosphate availability acceptable for fertilizer. The final product was then crushed and bagged for shipment. Ex. C, at ¶ 17.

The Complaint further alleges:

> Waste products generated by the phosphate fertilizer production process at the Site included air emissions of particulates, fluorides, ammonia, and sulfur oxides and wastewaters containing phosphates, flourides, sulfates, and gypsum. Wash down waters containing acid and soluble lead were discharged onto the ground surface or into nearby drainage ditches. Solid wastes included pyrite cinders containing lead and arsenic and spent packing materials, both of which were possibly used as fill material onsite. Ex. C, at ¶ 18.[6]

PCS filed an amended answer, counterclaim and amended third-party claim against Ross and others on January 19, 2007. *See* Exhibit E ("PCS' Third Party Complaint"), at pp. 14–17. As against Ross, PCS alleged that "hazardous substances were disposed of and/or released at the Site at the time Ross owned and operated it" and that "[d]uring the period of Ross' ownership and operation of the Charleston Site, as described above, there was a 'disposal' of 'hazardous substances' as those terms are defined in Section 101(14) and Section 101(29) of CERCLA[.]" *Id.* at 15, ¶¶ 12, 14. PCS maintained that Planters, as Ross's predecessor, owned the Site between 1905 and 1966 and that "Planters is liable for releasing and disposing of hazardous substances on the Site during its ownership period" and "Planters released and disposed of hazardous substances including lead and arsenic on the Site." *See* Relevant Portions of PCS Nitrogen Inc.'s Response to Ross Development Corporation's First Set of Interrogatories, at 6,

[6] On July 16, 2008, following the September 28, 2007 determination by the district court that PCS was liable for the contamination attributable to Old CNC's activities on the Site, the plaintiff filed the First Amended Complaint in *Ashley II*. Exhibit D ("*Ashley II* First Amended Complaint").

filed in *Ashley II* (Exhibit F), PCS explained the factual basis and legal theories of its claims against Ross as follows:

> Planters is the only entity that owned the Site that used pyrite ore – which contains lead and arsenic – in the production of phosphate fertilizer. Planters used pyrite ore from approximately 1905 to 1935. Burned pyrite cinders, commonly referred to as "slag", are a waste product from Planters' phosphate fertilizer production process. Pyrite slag is widely distributed across the Site, is responsible for the vast majority of the lead, arsenic and low pH levels on the Site, and is driving the remediation of the Site. Planters is liable for this contamination.

Exhibit F, at 6.

From October 26, 2009 to November 6, 2009 and continuing from January 19, 2010 to January 27, 2010, the district court in *Ashley II* held a bench trial for the allocation phase of that case. On May 27, 2011, the district court issued its Second Amended Order and Opinion with its Findings of Fact and Conclusions of Law. *Ashley II*, 791 F. Supp. 2d at 431.

The district court found that there are four conditions at the Site: (1) arsenic contamination; (2) lead contamination; (3) high acidity (or "low pH"); and (4) carcinogenic polyaromatic hydrocarbon ("cPAH") contamination. *Id.* at 441.

The district court determined that arsenic and lead contamination are found across the entire Site. 791 F. Supp. 2d at 441. The contamination at the Site is related to the historic operations of the fertilizer plant. *Id.* Cinders of pyrite ore that did not burn completely in the combustion process resulted in the creation of pyrite slag. *Id.* Pyrite slag contains arsenic and lead. *Id.* The use of pyrite ore in fertilizer manufacturing operations is the source of the vast majority of the arsenic contamination at the Site. *Id.* at 442. Another source of lead at the Site is lead sludge that was rinsed from lead acid chambers, which were used to make sulfuric acid during the operation of the fertilizer plant. *Id.*

The district court also found that there are two "hot spots" for cPAHs on the Site. 791 F. Supp. 2d at 442. One location is in the southwest corner and the other is on a parcel owned by

Allwaste Tank Cleaning. *Id.* The source of the cPAH "hot spots" was the 1963 fire in the acid plant in 1963. *Id.*

The low pH of the soil and groundwater at the Site means that there are acidic conditions present. 791 F. Supp. 2d at 442. These conditions are caused by a process referred to as "acid mine drainage" in which sulfides in pyrite ore react with groundwater and oxygen to produce hydrogen ions. *Id.* Arsenic and lead percolate through the soil and into the groundwater on the Site more readily in low pH conditions. *Id.*

One of the causes of the low pH, as found by the district court, is the pyrite slag from Ross's operations. 791 F. Supp. 2d at 445. Low pH is a condition often seen at phosphate fertilizer plant sites with contaminated slag. *Id.* The low pH conditions were also caused by acid discharges from the fertilizer operations, including acid rinsed out of the acid chambers, acid leaks from pipes, and discharges of fluorocyclic acid and hydrofluoric acid. *Id.* at 446. Data shows that during Old CNC's ownership, lead sulfate was released, causing the redistribution of lead and arsenic through chemical migration, leaching, and chemical dissolution followed by re-precipitation. *Id.* at 450. Over time, periodic and regular releases of acid, either from the washing out of the lead chambers or acid spills from line leaks and tank leaks, mobilized both lead and arsenic through the soil. *Id.*

Finally, the district court found that the cost of the remediation is directly related to the volume of contaminated soil on the Site. 791 F. Supp. 2d at 443. The predominant factors contributing to the cost of the clean-up are the amount of hazardous materials and the spread of these hazardous materials throughout the Site. *Id.* The majority of the remediation at the Site is due to arsenic contamination. *Id.* Ross is the only Site owner that burned pyrite ore and

generated pyrite slag. *Id.* at 445. Pyrite slag is the source of the vast majority of the arsenic and much of the lead contamination at the Site. *Id.*

3. PCS's Contribution Claims Against Ross

In its third-party complaint, PCS alleged that Ross was liable under CERCLA for "environmental impacts...associated with [Ross's] phosphate fertilizer manufacturing facilities at the Charleston Site include[ing] elevated levels of metals...in soil, groundwater, and sediment." Ex. E, at 15, ¶ 11. On May 27, 2011, the district court found PCS liable for 30 percent of the environmental response costs at the Site and Ross liable for 45 percent of the costs. 791 F. Supp. 2d at 503. Although it found PCS responsible not only for its share but also for that of Ross and another entity, Robin Hood, for a total of 76 percent of costs, it held that Ross is liable to PCS for its 45 percent share. *Id.* at 507.

C. Ross and PCS's Coverage Action Against Ross's Insurers

On October 15, 2008, Ross brought suit in the Court of Common Pleas for the County of Charleston, South Carolina against two of its insurers seeking a declaration that certain insurance policies issued to Ross between 1972 and 1992 provide defense and indemnity coverage for its potential liability in connection with the claims for environmental response costs asserted by PCS against Ross. *Ross Dev. Corp. v. Fireman's Fund Ins. Co.*, 910 F. Supp. 2d 828, 831 (D.S.C. 2012). Ross named PCS as a nominal defendant. On November 3, 2008, the *Ross* action was removed to the South Carolina Federal District Court. On August 29, 2011, PCS, which by virtue of the May 2011 ruling in *Ashley II* was a judgment creditor of Ross, filed a cross-claim against Ross's insurers seeking coverage under Ross's insurance policies. *Id.*; *see also* Exhibit A, at ¶ 44. Specifically, PCS sought a declaration that "one or more of the ... policies afford coverage for the judgment obtained by PCS against Ross in the *Ashley II* litigation, and that [the insurers] have an obligation to pay PCS the amounts pursuant to such policies." 910 F. Supp. 2d

at 831. PCS also alleged that [the insurers] breached one or more insurance contracts issued to Ross by refusing to defend and indemnify Ross in *Ashley II* and two related cases. *Id.*

Ross's insurers moved for summary judgment on the ground that the policies at issue in that case contained pollution exclusions which barred any duty to defend or indemnify. 910 F. Supp. 2d at 832. All of the policies at issue in *Ross* that were issued prior to 1987 contained the same pollution exclusion as the Policies which are the subject of this Motion. *Id.* In response, Ross and PCS argued that the property damage arising from Ross's placement of pyrite slag in the ground at the Site and from the 1963 fire did not fall within the pollution exclusion, and that Ross's liability in *Ashley II* was based on this property damage. *Id.*

The district court in *Ross* held that the pollution exclusion barred coverage, including any duty to defend, for the liabilities incurred at the Site by Ross.[7] 910 F. Supp. 2d at 836–37. The court held that the "sudden and accidental" exception refers to the discharge of pollutants, not any resulting property damage. *Id.* at 832–33. Further, the court held that Ross's placement of pyrite slag onto and into the ground was intentional. *Id.* at 833.

In addition, the court rejected the argument that the 1963 fire which resulted in cPAH "hot spots" was subject to the "sudden and accidental" exception. 910 F. Supp. 2d at 837. The court noted that the 1963 fire occurred nearly ten years before any of the insurance policies at issue became effective. *Id.* Furthermore, the court observed that the policies apply to property damage that takes place during the policy period. *Id.* Accordingly, the court found that the 1963 fire "could trigger coverage only if it continued to cause new property damage during one or more of the policy periods...." *Id.* The policies "would only cover liability 'because of' this new property damage, not because of the original damage or pollution caused in 1963". *Id.*

[7] The court also held that the post-1987 versions of the absolute pollution exclusion in certain policies barred coverage as well. *See Ross*, 910 F. Supp. 2d at 835–36.

Consequently, the court found "the 1963 fire cannot provide any basis for coverage unless it continued to cause third-party property damage such as groundwater, between 1972 and 1992." *Id.* The court reasoned:

> Ross and PCS have not produced any evidence showing that cPAH contamination or any other contamination caused by the 1963 fire spread or migrated to third-party property between 1972 and 1992. Additionally, nothing in this court's second amended findings of fact in *Ashley II* suggests that such migration occurred. (Internal citations omitted). The fact that the cPAH contamination caused by the fire remained localized in two "hot spots" on the Site decades after the fire suggests that this contamination did not spread throughout the Site. Even more importantly, no analysis of subsurface soil or groundwater revealed the presence of cPAHs.

Id. at 37.

The court went on to conclude:

> [B]ecause of the pollution exclusions, *no policy provides coverage* for liability arising from Ross's dumping of pyrite slag at the Site. Furthermore, although pollution caused by the 1963 fire would not be excluded, Ross's liability in *Ashley II* is not 'because of' property damage caused by this fire during any policy period between 1972 and 1992. Neither Ross *nor PCS* had identified any other potential trigger for coverage in *Ashley II*, and it appears from the record that no other such trigger exists. Accordingly, the court holds as a matter of law that no policy at issue in this case provides coverage for Ross's liability in *Ashley II*.

Id. at 838 (emphasis added).

PCS appealed to the Fourth Circuit, which affirmed the grant of summary judgment to the insurers. *Ross Dev. Corp. v. Fireman's Fund Ins. Co.*, 526 F. App'x 299, 304–05 (4th Cir. 2013). The Fourth Circuit acknowledged that the claims in *Ashley II* might have implicated Ross's policies by imposing liability on Ross for environmental damages to third-party property, namely groundwater and tidal marshlands around the Site. *Id.* at 304. Nevertheless, the court found that "it is equally clear that the qualified or absolute pollution exclusions in each policy exclude this liability from coverage." *Id.* "This is so because Ross's liability for third-party

property damages in the CERCLA action 'arises out of' its 'discharge' – use as fill material – of 'waste' or a 'waste material' – the pyrite slag byproduct – on the Site." *Id.*

The Fourth Circuit also rejected arguments by Ross and PCS that the "sudden and accidental" exception in the pollution exclusion applied. *Id.* at 304–305. First, the court rejected the argument that the pollution discharges were "sudden and accidental." *Id.* at 304. "Appellants first argue that the 1972-87 policies provide coverage notwithstanding the qualified pollution exclusion because the pollution damages to third-party property were both 'sudden' – meaning unexpected – and 'accidental.' This argument rests on a fundamentally flawed reading of the 'sudden and accidental' exception." *Id.*. Next, the court rejected the argument that damage caused by the 1963 acid plant fire was within coverage (even if the fire were "sudden and accidental") because PCS and Ross had failed to show that that fire resulted in any third-party "property damage", much less that it resulted in any property damage years later, during the 1972 to 1987 policy periods. *Id.* at 305 (holding that the appellants "failed to point to any evidence that the 1963 acid plant fire actually caused any third-party property damage, much less damage during the policy periods at issue in this case."). The Fourth Circuit also affirmed the district court's determination that the insurers had no duty to defend Ross, its shareholders or directors. Specifically, the Fourth Circuit held:

> [t]he complaints in the underlying CERCLA action clearly alleged third-party property damages arising out of the discharge of pollutants or waste materials, triggering each policy's respective qualified or absolute pollution exclusion. Further, the complaints raised no possibility that the discharge was "sudden and accidental," or, indeed, anything other than intentional or part of Ross's ordinary course of business. As South Carolina courts have made clear, "an insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded under the policy."

526 F. App'x 299 at 305 (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791, 797 (S.C. 2008). On June 20, 2013, PCS filed a motion for rehearing with the Fourth Circuit on the pollution exclusion decision, which the court denied.

The federal court judgment against PCS is, therefore, final.

D. The Unilateral Administrative Order issued by the United States Environmental Protection Agency

On December 13, 2013, the United States Environmental Protection Agency ("USEPA") issued a Unilateral Administrative Order ("UAO") to PCS, directing PCS to commence "removal response activities" at the Site. *See* Exhibit G ("UAO"). In the UAO, the USEPA asserts that PCS, as an owner/operator of the facility at the time of disposal of hazardous substances at the facility, is liable for response costs. *See* Ex. G, at 9, ¶4 (c). In doing so, the USEPA relied upon and referenced the same facts found by the court in *Ashley II*. *Compare* Ex. G, at pp. 6–8, ¶¶ 1–19, *with Ashley II*, 791 F. Supp. 2d at 442–472.; *see also* 791 F. Supp. 2d at 492. Like the Complaint in *Ashley II*, the UAO does not allege any "sudden and accidental" discharges. *See, generally*, Ex. G. Accordingly, for the same reasons, there is no duty under the Policies to defend or indemnify PCS for the UAO.

III. ARGUMENT

A. Summary Judgment Standard

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003). "In deciding a Rule 56 motion, the Court must view the facts and inferences, therefrom, in the light most favorable to the nonmoving party." *Bravis v. Dunbar*, 316 S.C. 263, 449 S.E.3d 495, 496 (S.C. Ct. App. 1994). "Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions, and affidavits show that there is no genuine issue

of material fact." *Id.* "A party opposing summary judgment, however, may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Id.* "In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (S.C. 2011).

The party seeking summary judgment must initially show the absence of a genuine issue of material fact. *Richardson v. The State Record Co., Inc.*, 330 S.C. 562, 499 S.E.2d 824–25 (S.C. Ct. App. 1998). With respect to an issue for which the non-moving party bears the burden of proof, this initial responsibility "may be discharged by 'showing' – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The moving party need not support its motion with affidavits or other similar materials negating the opponent's claim. *Id.*; *see also Milligan v. Liberty Life Ins. Co.*, 313 S.C. 478, 443 S.E.2d 381, 382 (S.C. 1994) (stating that where the record is devoid of any allegation or evidence tending to show that there is a material fact in issue, the moving party is entitled to summary judgment as a matter of law).

A party will not be permitted to manufacture a genuine issue of material fact to survive a motion for summary judgment. *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970 (4th Cir. 1990). "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." *Thompkins v. Festival Centre Group*, 306 S.C. 193, 410 S.E.2d 593, 594 (S.C. Ct. App. 1991).

B. The Pollution Exclusion Plainly Excludes Coverage for the Alleged Property Damage at the Site

The Policies exclude coverage for property damage arising out of the discharge, dispersal, release or escape of irritants, contaminants or pollutants, unless the "discharge, dispersal, release or escape" was "sudden and accidental." Under South Carolina law *as already applied to the discharges at this very Site*, the pollution exclusion bars any duty to defend or indemnify PCS here.

The "sudden and accidental" exception to the pollution exclusion applies only if the party claiming coverage proves that the "discharge, dispersal, release or escape" of "smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants" was "unexpected and accidental." *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 460 (S.C. 2004); *Greenville County v. Ins. Reserve Fund*, 313 S.C. 546, 443 S.E.2d 553 (S.C. 1994). "[P]roperty damage caused by pollution arising from ordinary business operations is not covered." *Helena Chemical*, 594 S.E.2d at 460.

In *Helena Chemical*, the insured formulated, distributed and sold agricultural chemicals, including pesticides. *Id.* at 460. At issue were three South Carolina sites operated by the insured. The insured was subject to directives regarding the three sites issued by the USEPA, as well as the South Carolina Department of Health and Environmental Control. The evidence showed that the contamination "resulted from the 'incidental release of pesticides during routine operation of grinding pesticide into dust, loading, unloading, bagging and formulating pesticides.' " *Id.* at 460–61. The record established that pollution routinely occurred during the ordinary course of the insured's operations. This included dust from the formulation and grinding process, spills of pesticides from broken bags and containers during loading and

unloading, and spills of liquid pesticides when these were being transferred between rail cars and trucks and storage tanks. *Id.* at 461. The Court found that these discharges were part of the insured's routine business operations and, therefore, were not "unexpected and accidental," and that as a result there is no coverage under the policies. *Id.* In reaching this conclusion, the Court observed that there was "routine contamination that occurred during the ordinary course of operations." *Id.*

Here, PCS, as the party claiming to be the insured, bears the burden of proving that the "sudden and accidental" exception to the qualified pollution exclusion applies. *Helena Chemical*, 594 S.E.2d at 460, n.5. "The exception's plain language requires that the discharge - not the pollution damage - be "sudden and accidental." *Ross Development Corp. v. PCS Nitrogen, Inc.*, 526 F. App'x 299, 304 (4th Cir. 2013). Based on the undisputed facts as established in *Ashley II* and *Ross*, PCS has not and cannot meet that burden.

1. PCS Cannot Show that any Third-Party Property Damage at the Site Resulted from a Sudden and Accidental Discharge

In this case, the indisputable facts established in *Ashley II*, *Ross* and the record of the operations and discharges at the Site show that any "property damage" at issue resulted from ordinary and routine business operations and not from any "sudden and accidental" discharge.

Judge Seymour's exhaustive findings of fact in *Ashley II* demonstrate that the contamination for which PCS was held liable was due to routine discharges in the course of ordinary business operations over decades, not by "unexpected and accidental" discharges under *Helena Chemical*. *See also* Ex. G, at p. 6, ¶ 5. Indeed, as in *Helena Chemical*, much of the contamination was due to the ordinary process of manufacturing an agricultural chemical (there, pesticides; here, fertilizer), including grinding product into dust. *Helena Chemical*, 594 S.E.2d

at 460–61; *Ashley II*, 791 F. Supp. 2d at 448. The routine dumping and discharges for which PCS was held liable include:

- Dumping pyrite slag (containing arsenic and lead) onto the ground and dispersing it as fill (791 F. Supp. 2d at 445)
- Rinsing lead sludge from acid chambers onto the ground and an unlined ditch that led to the Ashley River (*Id.* at 448)
- Cutting pieces of lead sheets from acid chambers and discarding them on the ground (*Id.* at 449)
- Discharging a process effluent containing fluorosilicic acid and lead into drainage ditches (*Id.* at 449)
- Acid pipes that regularly leaked (*Id.*)
- Spreading hazardous materials throughout the Site through demolition activity (*Id.* at 451; "the other main factor contributing to the cost of the remediation is the spread of contamination across the Site;" (*Id.* at 489)

Likewise, the UAO issued by the USEPA does not allege any "sudden and accidental" discharges. Specifically, the UAO asserts:

> the historical operations conducted at this facility involved the acidification of phosphate rock. Sulfuric acid was produced and stored onsite in lead-lined acid chambers before it was reacted with phosphate ore to produce "superphosphate." The resultant "superphosphate" vas mixed with other components to produce agricultural grade fertilizer. The lead acid chambers were periodically cleaned and the wash down waters containing acid and soluble lead were discharged on to the Bound surface and into nearby drainage ditches. Solid wastes included pyrite cinders containing lead and arsenic and spent packing material, both of which were possibly used as till material on Site.

Ex. G., at 6, ¶2.

The UAO further alleges that, "[b]etween 1966 and 1972, the Columbia Nitrogen Corporation *operated a phosphate fertilizer granulation plant* at the Site, thereby creating environmental contamination. Production of fertilizer on the Site ceased in 1972. CNC demolished several structures on the property from 1971 to 1982; however demolition debris remained on Site." See Ex. G, at 6, ¶ 5 (emphasis added). All of the aforementioned pollution alleged in *Ashley II*, and in the UAO, was part of "ordinary business operations" at the Site and none of it was due to any "sudden and accidental" discharge. Under *Helena Chemical*, therefore, any property damage resulting from these discharges is not covered. 594 S.E.2d at 460.

Indeed, the court in *Ross* reached precisely this conclusion. It stated that "there is no dispute that Ross intentionally deposited pyrite slag in the ground at the Site over the course of many years." *Ross*, 910 F. Supp. 2d at 833. The court also rejected Ross's and PCS's argument that the exclusion would apply "only if the policyholder intended or expected that *property damage* from pollution would result from its actions." *Id.* at 832–33 (emphasis original). As the court found,"[t]his court finds, based on the plain language of the contracts, that 'sudden and accidental' clearly and unambiguously refers to the release of pollutants and not to any resulting property damage." *Id.* at 833. Further, because the court found that the placement of pyrite slag into the ground was *intentional*, it did not need to consider whether that placement was part of "routine business operations" under *Helena Chemical*, because that discharge clearly was not accidental. *Id.* at 834.

In *Ross*, PCS offered a series of arguments attempting to avoid application of the exclusion, all of which were rejected by the court. First, PCS argued that the pyrite slag was not a pollutant when it was initially produced and placed on the ground as fill or roadbed material, and the lead and arsenic components in the slag were not released and did not cause pollution.

See Ross, 910 F. Supp. 2d at 834. The court explained that "[a]lthough there is no dispute that Ross placed materials containing lead and arsenic, both 'pollutants' or 'contaminants,' into the ground, PCS argues that this did not constitute a discharge of pollutants 'into the environment' because the pollutants were contained within the slag and had not yet been 'mobilized.' " *Id.* The court, however, found "no justification for such a distinction." *Id.* As the court said, "The pyrite slag that Ross put into the ground contained toxic metals and compounds that would, in the normal and natural course of events without any further human action, leach into the soil and ultimately into water sources. The fact that these pollutants may have escaped from their 'container' slowly rather than immediately has no bearing on whether Ross discharged pollutants into the environment." *Id.*

Next, the court rejected PCS's argument that pyrite slag was a byproduct of Ross's manufacturing process, but was "'not considered waste during the time period in question' because it had value for use in road construction and stabilization and was 'marketable.'" 910 F. Supp. 2d at 834. The court found that the term "waste material" "unambiguously includes pyrite slag, a byproduct of Ross's fertilizer production suitable only for low-value uses such as filling in low-lying land and road beds." *Id.*

Finally, the court also dismissed the argument that the pollution exclusion did not apply to a discharge, dispersal, release or escape of pollutants into groundwater because groundwater is not a "watercourse" or "body of water." 910 F. Supp. 2d at 835. The court explained that even if groundwater is not a watercourse or body of water, the exclusion would apply because it was clear that Ross initially dumped the pyrite slag on land. *Id.* "The exclusion bars coverage for anything 'arising out of' this initial pollution, which would bar coverage for any future groundwater contamination resulting from Ross's action." *Id.* Accordingly, it is clear that the

discharges at issue were not "unexpected and accidental" and took place as part of normal, routine business operations.

Here, the facts indisputably show that the pollution for which PCS has been found liable resulted from routine day-to-day business operations, including dust generated by the manufacture of fertilizer, maintenance operations, washing out of acid chambers, removal from chambers and disposal on the ground of pieces of lead, discharge of liquid process effluent into drainage ditches, fumes containing fluorosilicic acid released into the air and deposited across the Site by prevailing winds, washing soda ash-treated lead sludge into drainage ditches, pipe leaks, and demolition activities. 791 F. Supp. 2d at 447–51; *see also* Ex. G, at 6, ¶¶ 2, 5. As a result, there is no basis for applying the "sudden and accidental" exception, and the pollution exclusion in the Policies precludes any duty to defend and/or indemnify PCS.

2. PCS Cannot Show that any "Sudden and Accidental" Discharge Caused Property Damage Covered by Moving Insurers' Policies

In *Ross*, Ross and PCS argued that a 1963 fire that caused cPAH contamination at the Site was "sudden and accidental". In *Ashley II*, however, Judge Seymour did not attribute any party's liability to the 1963 fire. 791 F. Supp. 2d at 490 ("The court concludes that the record does not provide the court with a reasonable basis for apportioning the harm at the Site, and that therefore, the harm at the Site is indivisible."). Then, in *Ross*, Judge Seymour specifically determined that, for purposes of insurance coverage, "Ross's liability in *Ashley II* is in no sense 'because of' the spreading of cPAH's." 910 F. Supp. 2d at 837. Indeed, "the majority of the remediation at the Site is necessary because of arsenic contamination in the soil, most of which was caused by pyrite slag." *Id.* "Additionally," Judge Seymour said in *Ross*, "the cPAH contamination at the Site played no role in this Court's analysis of the divisibility of harm or equitable allocation for remediation costs at the Site" in Ashley *II*. *Id.* at 838. Accordingly,

Judge Seymour concluded that "*there is no basis to conclude that Ross's liability is 'because of' any cPAH contamination at the Site[.]*" *Id.* (emphasis added). The same must be true as to Old CNC, since the fire occurred before Old CNC purchased the Site in 1966, and any liability Old CNC had with respect to the 1963 fire can be no different than Ross's liability.

Moreover, the Policies were effective in 1973, 1974 and 1978. *See* Ex. A. The Policies cover "sums that the insured becomes legally obligated to pay as damages *because of...property damage to which this insurance applies.*" *Id.* (emphasis added). The Policies "apply" only to property damage that takes place during the policy period. *See id; see also Ross*, 910 F. Supp. 2d at 838; and *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589, 603 (S.C. 2011). Thus, the 1963 fire could "trigger" coverage only if it continued to cause new property damage during the 1973, 1974 and 1978 policy periods. *Ross*, 910 F. Supp. 2d at 837. As to this point, the *Ross* court found that "Ross and PCS have not produced any evidence showing that cPAH contamination or any other contamination caused by the 1963 fire spread or migrated to third-party property *between 1972 and 1992*. *Id.* (emphasis added). Additionally, nothing in the second amended findings of fact in *Ashley II* suggest that such migration occurred." *Id.* (emphasis added). Thus, "the fact that the cPAH contamination caused by the fire remained localized in two 'hot spots' on the Site decades after the fire suggests that this contamination did not spread throughout the Site." *Id.*

Accordingly, as the court in *Ross* found, even if the 1963 fire constituted a "sudden and accidental" discharge, it did not cause property damage for which the Site owners were liable, and it certainly did not cause property damage during the policies which were in effect for the 1973–1974, 1974–1975 and 1978–1979 periods.

PCS may argue that dust that was spread in the course of an April 1971 windstorm should be treated as resulting from a "sudden and accidental" discharge, but, as with the 1963 fire, no "property damage" resulted from that event.[8] As the court in *Ashley II* said, "[o]n April 23, 1971, a severe windstorm caused extensive damage to the roof of the sulfuric acid plant, the main building, and the plant protection chemicals storage building. . . . This damage resulted in *air dispersion* of contaminated roof dust, the finished fertilizer product, and chemicals." 791 F. Supp. 2d at 456 (emphasis added). There was no finding that this storm resulted in contamination to *the ground* or any body of water.

Moreover, the court's findings show that the windstorm played *no* role in the determination of PCS's liability. Significantly, the court did not consider the windstorm or the "air dispersion" of dust to be a factor at all in calculating PCS's liability for an equitable share of remediation costs, further supporting the conclusion that the windstorm did not result in damage to third-party property. *Id.* at 492 (noting the factors deemed important to determining PCS's allocated share and not including the windstorm among them). Thus, the windstorm did not result in "property damage," and certainly no damage for which PCS was held liable.

In addition, the windstorm took place in April 1971. There is no evidence that the windstorm deposited any dust on the ground at the time of the storm or, more importantly, that it caused any property damage. Even if the windstorm deposited dust on the ground at the time of the storm (for which there is no evidence), there was no finding that it continued to cause any property damage in subsequent time periods. Thus, like the 1963 fire, the 1971 windstorm did not result in any damage to third-party property while any of the Policies were in effect. *Ross*, 910 F. Supp. 2d at 837. Indeed, *Ross* held that the cPAH contamination resulting from the 1963

[8] As discussed below, PCS had the opportunity and incentive to argue that the April 1971 windstorm gave rise to a "sudden and accidental" discharge in the *Ross* Coverage Action, since it sought coverage from Ross policies covering 1972 to 1992, but it did not make that argument. It is therefore estopped from making that argument now.

fire did not cause additional "property damage" during the 1972 to 1992 policies at issue there, even though that contamination continued to exist in "hot spots" at the Site as late as 2011. *Ashley II*, 702 F. Supp. 2d at 442. If contamination from a 1963 event that was still present in 2011 could not have been "property damage" during the 1972-1992 policy years, then *a fortiori* air dispersion of dust that was never found to contaminate *anything* could not have been "property damage" while any of the Policies were in effect. In other words, the logic of the *Ross* determination as to the 1963 fire applies even more strongly to the 1971 windstorm, since the storm was not found to have resulted in any contamination.

Therefore, the Court should conclude, consistent with *Ross*, that the pollution exclusion bars coverage for any property damage at issue at the Site.[9]

C. Moving Insurers Have No Duty to Defend or Indemnify PCS

Moving Insurers have no coverage obligation with respect to PCS's liability for the Site, based on the facts as found in *Ashley II*, as well as the facts asserted in the UAO.

A liability insurer's duty to defend is determined by comparing the allegations of the underlying complaint and other facts available to the insurer to the terms of the policy. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (S.C. 2008) ("an insurer's duty to defend is not strictly controlled by the allegations of the Complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer"; holding no duty to defend because driver was not a covered person); *City of Hartsville v. South Carolina Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (S.C. 2009) (following *Clegg*). "If the facts alleged in the complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend." *Clegg*, 661 S.E.2d at 797.

[9] Notably, the UAO makes no reference whatsoever to the fire or windstorm.

"'[A]n insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded by the policy.'" *Id.*

Here, Moving Insurers have no duty to defend PCS based on the allegations made against it. The allegations against PCS in *Ashley II* are based exclusively on "[w]aste products generated by the phosphate fertilizer production process at the Site" as part of routine business operations. *See* Ex. C, at ¶ 18. The waste products "included air emissions of particulates, fluorides, ammonia, and sulfur oxides;" "wastewaters containing phosphates, fluorides, sulfates, and gypsum" and "[w]ash down waters containing acid and soluble lead;" and "[s]olid wastes include[ing] pyrite cinders containing lead and arsenic and spent packing materials." *Id.* All of these waste products are alleged to have been discharged routinely. The Complaint alleges no sudden and accidental discharge. Likewise, the allegations contained in the UAO are based upon PCS's operation of a phosphate fertilizer granulation plant at the Site, and PCS' failure to remove demolition debris from structures demolished by PCS' alleged predecessor, Old CNC. *See* Ex. G, at p. 6 ¶ 5. Accordingly, neither the *Ashley II* Complaint, nor the UAO, alleges any discharges falling within the "sudden and accidental" exception to the pollution exclusion.

In addition, as shown above, to the extent that PCS claims that additional facts not alleged in the Complaint or UAO show there were "sudden and accidental" discharges – that is, the 1963 fire and the 1971 windstorm – those additional facts also show that those events did not lead to any "property damage," any property damage during the policy period, or any property damage for which PCS is liable.

Thus, for the same reasons that Ross's insurers had no duty to defend or indemnify Ross, Moving Insurers have no duty to defend or indemnify PCS for *Ashley II*, the UAO, or any other so-called related action which derives from costs incurred by PCS as a result of pollution at or

from the Site. The Complaint in *Ashley II* clearly alleged pollution arising out of the discharge of pollutants or waste materials excluded from coverage by the pollution exclusions. *Ross*, 526 F. App' x at 305. The Fourth Circuit then found that "the complaints raised no possibility that the discharge was 'sudden and accidental,' or, indeed, anything other than intentional or part of Ross's ordinary course of business." *Id.* "As South Carolina courts have made clear, 'an insurer has no duty to defend an insured where the damage caused was for a reason unambiguously excluded under the policy.'" *Id.* (quoting *Clegg*, 661 S.E.2d at 797).

The Fourth Circuit's reasoning is equally applicable here, as there is nothing in the Complaint against PCS in *Ashley II* (or in the district court's extensive factual findings) or the UAO that raises the possibility that any discharges for which PCS was liable were "sudden and accidental" or were anything other than part of the ordinary course of business.

Therefore, the Court should find, consistent with the district court and the Fourth Circuit, that Moving Insurers have no duty to defend or indemnify PCS.

D. PCS Is Collaterally Estopped from Re-Litigating the Application of the Pollution Exclusion Because of Collateral Estoppel

The facts, the contract terms, and the law all point to one conclusion, the pollution exclusion bars coverage for any alleged property damage at the Site. PCS has already litigated and lost this precise issue, and therefore cannot re-litigate it again now. The Fourth Circuit, affirming the district court, has already held in a case in which PCS was an active litigant that the pollution exclusion, with identical language as the one in the Policies, bars coverage for contamination at the Site. For this reason, PCS is barred under the doctrine of non-mutual collateral estoppel from seeking to obtain a different result, including by arguing different facts or law, since it had a full and fair opportunity to do so already.

1. PCS is Collaterally Estopped From Re-Litigating Whether the Qualified Pollution Exclusion Applies

A party such as PCS who had a full and fair opportunity to litigate an issue to final judgment is precluded from re-litigating that issue in another action, even as against litigants who were not parties to the first action. *South Carolina Prop. and Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Ins.*, 304 S.C. 210, 403 S.E.2d 625 (S.C. 1991). This doctrine, sometimes referred to as "non-mutual collateral estoppel," applies "when a party in a second action seeks to preclude a party from re-litigating an issue which was decided in a previous action." *Wal-Mart,* 403 S.E.2d at 627. *Wal-Mart Stores* formally recognized the doctrine of non-mutual collateral estoppel and permitted its use by the plaintiff in that case. *Id.* Consistent with Sections 27-29 of the Restatement (Second) of Judgments ("Restatement"), "[n]onmutual collateral estoppel may be asserted unless the precluded party lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him the opportunity to relitigate the issue." *Id.*; *see also Doe v. Doe*, 346 S.C. 145, 551 S.E.2d 257, 259 n.4 (S.C. 2001) (discussing the collateral estoppel effect of a criminal conviction and explaining that "mutuality is no longer a requirement of collateral estoppel" and that "[t]he offensive use of collateral estoppel is permissible."); and *Middleborough v. Montedison*, 320 S.C. 470, 465 S.E.2d 765, 769 (S.C. Ct. App. 1995) ("The doctrine of non-mutual offensive collateral estoppel was adopted in this State by this Court...and was confirmed as the law of this State by our Supreme Court.").

In *Carolina Renewal, Inc. v. South Carolina Dept. of Trans.*, 385 S.C. 550, 684 S.E.2d 779 (S.C. Ct. App. 2009), two separate suits arose out of the same road construction project. 684 S.E.2d at 781. In the first suit, David Smith (Carolina Renewal's sole officer and shareholder) brought suit against SCDOT for slanderous statements made by an SCDOT employee regarding Smith's inability to pay Carolina Renewal employees. *Id.* As a result of these statements,

Carolina Renewal employees ceased working on the project, which, in turn, led to Carolina Renewal's dismissal from same. *Id.* At trial, "Smith . . . testified regarding the contract damages he and his corporation sustained as a result of the slanderous statements." *Id.* Four years after Smith's successful slander suit, Carolina Renewal brought a breach of contract suit against SCDOT arising out of the same project. *Id.* SCDOT moved to dismiss the breach of contract action, arguing that Carolina Renewal was collaterally estopped because " 'the issue of contract damages . . . lost profits, loss of future opportunities, loss of income, [and] loss of the bargain were all litigated in the (slander action).'" *Id.*

The Court of Appeals held that Carolina Renewal was collaterally estopped from bringing the breach of contract action against the SCDOT. *Carolina Renewal*, 684 S.E.2d at 783. Specifically, Carolina Renewal and Smith's mutuality of interests regarding recovery of contract damages afforded Carolina Renewal a "full and fair opportunity" to litigate the same issue in the slander action. *Id.* at 782 (citing Restatement (Second) of Judgments § 59, cmt. e (1982)). Moreover, Smith's presentment of the contract damages during the slander action "provided further evidence that Carolina Renewal had a full and fair opportunity to litigate the [contract damages] issue." *Id.* n.1.

Here, PCS had a "full and fair opportunity" to litigate applicability of the pollution exclusion to the contamination at the Site. In pursuing coverage under Ross's insurance policies, PCS had the *identical* interest it has here in seeking coverage under Old CNC's policies. Specifically, both PCS and Ross argued against the application of the pollution exclusion, or, alternatively, that the "sudden and accidental" exception applied. *Ross*, 910 F. Supp. 2d. at 833–34. Both the district court and the Fourth Circuit rejected these arguments, holding that the pollution exclusion precluded coverage and that none of the discharges was "sudden and

accidental". PCS had a full and fair opportunity before two federal courts to litigate the applicability of the pollution exclusion. Moving Insurers' absence from *Ross* is of no moment because courts are not concerned with identity of parties, nor their relationships to one another, when deciding to apply the doctrine of collateral estoppel. *See Carolina Renewal*, 684 S.E.2d at 782. "The doctrine of collateral estoppel prevents the relitigation of *issues*, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same." *Id.* at 783 (emphasis added). Accordingly, PCS is collaterally estopped from relitigating the issue of whether any discharges at the Site were "sudden and accidental" because it has already litigated and lost that issue on the merits in *Ross*.

Moreover, PCS cannot argue that any exception to collateral estoppel applies here. Section 28 of the Restatement identifies five exceptions to the general collateral estoppel rule.[10]

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[10] (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws;

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them;

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Restatement §28.

None of these exceptions apply here. First, PCS had full opportunity for review of *Ross* and it actually appealed the judgment to the Fourth Circuit. Second, the claims at issue here are substantially related, indeed identical, to those presented in *Ross*, namely the applicability of the pollution exclusion to contamination at the Site and whether there were any sudden and accidental discharges. Further, there has been no intervening change in law that would warrant further review. Third, both the district court and the Fourth Circuit are courts of competent jurisdiction. PCS was afforded the same procedural rights in *Ross* as are afforded here. Fourth, PCS has the same burden of persuasion to demonstrate coverage in this matter as it did in *Ross*.

Finally, PCS cannot demonstrate any clear and convincing need for a new determination due to any adverse impact on the other parties to the *Ross* litigation, or the public. PCS had filed this suit and it was pending while *Ross* was being litigated; PCS was fully aware that the Policies contained a pollution exclusion identical to that at issue in *Ross*. Accordingly, PCS knew that whether the pollution exclusion precluded coverage for alleged property damage at the Site was at issue in this case, as it was in *Ross*. It cannot claim surprise. PCS cannot point to any special circumstances in *Ross* that prevented it from fully and fairly adjudicating the matter then.

Moreover, PCS cannot argue that any special circumstances justify relieving it of issue preclusion. Section 29 of the Second Restatement identifies eight circumstances that may permit a party to re-litigate an issue that was already determined in the first action.[11]

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[11] (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

None of these eight considerations even remotely weigh in favor of disallowing collateral estoppel:

(1) Treating the application of the pollution exclusion as conclusively determined in this action does not raise issues regarding incompatible administrative remedies;

(2) There are no additional procedural opportunities available in this forum that were unavailable to PCS in federal court;

(3) Moving Insurers could not have been joined into *Ross*;

(4) The district court and the Fourth Circuit holdings regarding application of the qualified pollution exclusion in *Ross* are consistent with the established South Carolina law and are the only judicial decisions on this issue;

(5) The decision in *Ross* was not based upon a compromise verdict or finding. The decision in *Ross* was also not affected by relationships among the parties that are not present in this action. Specifically, *Ross* was an insurance coverage action between insureds and/or purported insureds and insurers seeking judicial interpretation of how the pollution exclusion applied to the damages claimed in *Ashley II*. This action, brought against Moving Insurers by a party purporting to be their insured, presents the exact same circumstances and policy language;

(6) Treating the pollution exclusion issue as having been conclusively determined by the Fourth Circuit in *Ross* will not complicate determination of any other issues in this litigation, nor is there any other party whose interests would be prejudiced if PCS is precluded from re-litigating that issue;

(7) PCS has exhausted its appellate remedies in *Ross*; and

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(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based; and

(8) Other compelling circumstances make it appropriate that the party be permitted to re-litigate the issue.

Restatement §29.

(8) There are no other compelling circumstances that would make it appropriate for PCS to re-litigate whether the qualified pollution exclusion precludes coverage for the alleged property damage at issue.

Thus, the district court and Fourth Circuit – indisputably courts of competent jurisdiction – both conclusively determined that the same pollution exclusion at issue in this matter precluded coverage for the same pollution at the Site. That determination is conclusive in this subsequent lawsuit on those same issues. As a result, summary judgment should be granted to Moving Insurers on application of the Policies' pollution exclusion.

2. PCS is Collaterally Estopped from Arguing that the 1963 Fire and 1971 WindStorm Were "Sudden and Accidental" Events Under the Policies

PCS is also collaterally estopped from asserting that the 1963 fire and/or the 1971 windstorm gave rise to "sudden and accidental" discharges. PCS fully litigated the issue of whether the 1963 fire was a "sudden and accidental" event in *Ross*, 910 F. Supp. 2d at 833, 837–38. The district court determined that the discrete cPAH hot spots caused by the 1963 fire were not covered because there was no evidence that they caused damage to third-party property during one or more of the policy periods between 1972 and 1992. *Id.* at 837. Thus, the effect of the 1963 fire was actually litigated, and PCS lost its claim that the fire gave rise to covered "property damage."

Similarly, PCS is collaterally estopped from asserting that the 1971 windstorm was a "sudden and accidental" event under the Policies. Even if PCS appears not to have expressly alleged that the 1971 windstorm was a "sudden and accidental" event, it had a "full and fair opportunity" to make that argument in *Ross*, and so it may not make that argument now. Collateral estoppel bars a litigant from attempting to interject new arguments or new

"evidentiary facts" to obtain a different result, even if it did not actually raise those arguments or evidentiary facts in the prior proceeding.

> An issue on which relitigation is foreclosed may be one of evidentiary fact, of "ultimate fact" (i.e., the application of law to fact), or of law. . . . Thus, for example, if the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact. . . . And similarly if the issue was one of law, new arguments may not be presented to obtain a different determination of the issue.

Restatement (Second) of Judgments § 27 cmt. c. *See also Barna Conshipping, Inc. v. 2,000 Metric Tons of Abandoned Steel*, 410 F. App'x 716, 721 (4th Cir. 2011) (applying issue preclusion to bar litigant from arguing new evidence regarding existence of admiralty jurisdiction when that evidence could have been brought forward in prior proceeding; "The ultimate issue in both proceedings was whether there was admiralty contract jurisdiction. . . . Barna's failure in the Houston proceeding to present some of the evidence it believed supported its claim does not change the nature of the issue resolved by the Houston courts, nor does it make it improper to give collateral estoppel effect to the decision in the Houston proceedings.").

Here, the "ultimate issue" decided in *Ross* was whether the pollution exclusion excluded coverage for alleged property damage at the Site. PCS had every incentive and opportunity to argue that the 1971 fire caused a "sudden and accidental" property damage, as the 1971 windstorm had been specifically mentioned in *Ashley II*, 791 F. Supp. 2d at 450, and the policies at issue in *Ross*—like the Policies at issue here—were in effect during the years after the windstorm took place. Yet PCS raised no argument about the windstorm and nothing of substance has changed since *Ross*. Having been afforded this full and fair opportunity, and having failed to take advantage of it, PCS cannot seek to raise here this new "evidentiary fact" or new argument in order to relitigate the ultimate issue—the applicability of the pollution exclusion—on which it has already lost.

IV. CONCLUSION

For the reasons stated herein, Moving Insurers respectfully request that this Court grant summary judgment in their favor by declaring that the pollution exclusion in the Policies bars all coverage for any alleged third-party property damage at issue in *Ashley II*, that Moving Insurers therefore have no duty to defend or indemnify PCS under the Policies, and that all of PCS's claims are dismissed with prejudice.

Respectfully submitted,

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July 24, 2015

CERTIFICATE OF SERVICE

The undersigned employee of the law offices of Collins & Lacy, P.C., does hereby certify that on the _____ day of _____, 2015, the following named individual(s) were served with a copy of the within pleading via electronic mail and/or by mailing a copy of same to said person(s) via the United States Postal Service with sufficient postage affixed thereto and return address clearly marked.

PLEADING: UNITED STATES FIRE INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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2015 JUL 24 PM 3:26
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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ASHLEY II OF CHARLESTON, L.L.C., Plaintiff, v.	Civil Action No. 2:05-2782-CWH
PCS NITROGEN, INC., successor through purchase, name change and merger to Columbia Nitrogen Corporation, Defendant/Third-Party Plaintiff, v. ROSS DEVELOPMENT CORPORATION, KONINKLIJKE DSM N.V., DSM CHEMICALS OF NORTH AMERICA, INC., JAMES H. HOLCOMBE, J. HOLCOMBE ENTERPRISES, L.P., J. HENRY FAIR, JR., ALLWASTE TANK CLEANING n/k/a PSC CONTAINER SERVICES, LLC, ROBIN HOOD CONTAINER EXPRESS, INC., and CITY OF CHARLESTON, SOUTH CAROLINA, Third-Party Defendants.	**FIRST AMENDED COMPLAINT**

Ashley II of Charleston, L.L.C. ("Ashley") petitions this Court for a declaratory judgment with respect to the liability of PCS Nitrogen, Inc. ("PCS") for environmental response costs at the "Columbia Nitrogen Site" in Charleston, South Carolina, and for a money judgment for response costs that have been incurred. For its amended complaint Ashley alleges and says as follows:

NATURE OF ACTION

1. Ashley is the owner of real property located at 1801 Milford Street in Charleston, South Carolina and more particularly described at paragraphs 6-8, below, constituting the majority of the acreage of the "Columbia Nitrogen Site." Ashley has agreed in principle to perform an Environmental Protection Agency-approved "non-time-critical removal action" to remediate environmental contamination at the Columbia Nitrogen Site. Ashley seeks a declaratory judgment that PCS is liable for past and future environmental response costs at the Columbia Nitrogen Site, and seeks reimbursement of past response costs incurred by Ashley with respect to the Site.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action because the case arises under federal law: the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§9601, et seq. Jurisdiction is proper under CERCLA Section 113(b), 42 U.S.C. §9613(b), and under 28 U.S.C. §1331.

3. This Court has authority to issue a declaratory judgment regarding the rights and liabilities of the parties herein pursuant to CERCLA Section 113(g)(2), 42 U.S.C. §9613(g)(2), and 28 U.S.C. §§2201 and 2202.

4. Venue is proper in this district pursuant to CERCLA Section 113(b), 42 U.S.C. §9613(b), and 28 U.S.C. §1391(b). The real property which is the subject matter of this action is located within this district, and the release of hazardous substances that gives rise to this action occurred in this district.

PLAINTIFF

5. Ashley is a limited liability company organized and existing under the laws of South Carolina. Ashley is, and at all times relevant to this action was, duly authorized to conduct business in the State of South Carolina. Ashley is a "person" as defined in CERCLA Section 101(21), 42 U.S.C. §9601(21).

6. Ashley is the owner of 30.67 acres of the property constituting the Columbia Nitrogen Site.

7. Ashley purchased 27.68 acres of the property constituting the Columbia Nitrogen Site (19.95 acres of highland and 7.73 acres of marsh) from J. Henry Fair, Jr. and Holcombe Enterprises, L.P. on November 24, 2003. This property is described in a Quit-Claim Deed recorded at Book U476, Page 416, and is designated as Parcel Number 466-00-00-018 on the Charleston County Tax Map.

8. Ashley purchased an additional 2.99 acres of the property constituting a part of the Columbia Nitrogen Site from PSC Container Services, LLC, a Delaware limited liability company (successor by conversion to Allwaste Tank Cleaning, Inc., a Georgia corporation). This property is described in a deed dated as of May 15, 2008 and recorded May 28, 2008 at Book N-660, Page 270, RMC Office for Charleston County, South Carolina, and is designated as Parcel Number 466-00-00-051 on the Charleston County Tax Map.

9. Ashley is a "bona fide prospective purchaser" ("BFPP") of the property described in paragraphs 7 and 8 above, within the meaning of that term as defined by CERCLA Section 101(40), 42 U.S.C. §9601(40). Ashley is a BFPP because:

a. All disposal of hazardous substances at the property described above occurred before Ashley acquired such property.

b. Ashley made all appropriate inquiries into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.

c. Ashley provided all legally required notices with respect to the discovery or release of hazardous substances at the property.

d. Ashley has exercised appropriate care with respect to hazardous substances found at the property by taking reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance. Ashley has provided full cooperation, assistance and access to persons authorized to conduct response actions at the property, is in compliance with all land use restrictions established or relied on in connection with the response action, and has complied with all requests for information issued by the EPA or its duly authorized agents.

e. Ashley is not potentially liable for any release or threatened release of hazardous substances at the property, and is not affiliated with any person that is potentially liable. Ashley was not created as the result of a reorganization of a business entity that was potentially liable.

10. Ashley has agreed in principle, subject to execution of an appropriate formal agreement with the Environmental Protection Agency ("EPA"), to perform an EPA-approved "non-time-critical removal action" with respect to the Columbia Nitrogen Site.

DEFENDANT

11. Defendant PCS is a corporation organized under the laws of the State of Delaware and does business in the State of South Carolina as a foreign corporation.

12. PCS is the successor by merger to Arcadian Corporation, a corporation organized under the laws of Delaware. Arcadian Corporation was merged with PCS on or about March 6, 1997. Arcadian Corporation was formerly named Fertilizer Industries, Inc., which changed its name to Arcadian Corporation on or about November 30, 1989.

13. Fertilizer Industries, Inc., was the successor by merger to Columbia Nitrogen Corporation, a corporation organized under the laws of Delaware and formerly known as CNC Corp. CNC Corp. changed its corporate name to Columbia Nitrogen Corporation on or about November 3, 1986, and is sometimes referred to herein as "(New) Columbia Nitrogen Corporation."

14. CNC Corp. was a corporation organized under the laws of Delaware and chartered on or about September 26, 1986.

15. As more specifically alleged at paragraphs 27 to 29 below, on or about October 31, 1986, CNC Corp. received a transfer of certain assets and agreed to assume certain liabilities of Columbia Nitrogen Corporation. The Columbia Nitrogen Corporation described in the preceding sentence was organized under the laws of Delaware and was chartered on or about October 1, 1962, and is sometimes referred to herein as "(Old) Columbia Nitrogen Corporation." On or about October 31, 1986, (Old) Columbia Nitrogen Corporation changed its name to Augusta Liquidating Corporation, and was thereafter dissolved.

16. The history of the companies as alleged in paragraphs 12-15 above, is summarized as follows:

(OLD) COLUMBIA NITROGEN

Columbia Nitrogen Corporation
was incorporated
on October 1, 1962

Columbia Nitrogen Corporation
transferred assets, liabilities to CNC Corp.
on October 31, 1986

Columbia Nitrogen Corporation
changed its name to Augusta Liquidating Corp.
on October 31, 1986

Augusta Liquidating Corp.
filed Articles of Dissolution
on November 13, 1986

(NEW) COLUMBIA NITROGEN

CNC Corp. was incorporated
on September 26, 1986

CNC Corp. received assets, liabilities and obligations
from (Old) Columbia Nitrogen Corporation
on October 31, 1986

CNC Corp. changed its name
to Columbia Nitrogen Corporation
on November 3, 1986

Columbia Nitrogen Corporation
merged with Fertilizer Industries, Inc.
on November 29, 1989

Fertilizer Industries, Inc.
changed its name to Arcadian Corporation
on November 30, 1989

Arcadian Corporation
merged with PCS Nitrogen, Inc.
on March 6, 1997

17. From 1966 to 1985, (Old) Columbia Nitrogen Corporation was the owner and operator of the property constituting the Columbia Nitrogen Site. (Old) Columbia Nitrogen Corporation actively participated in, managed, supervised and was otherwise involved in

operations at the Columbia Nitrogen Site at the time of disposal of hazardous substances at the Site.

18. On September 28, 2007, the United States District Court for the District of South Carolina entered an order in the instant case holding that PCS is the successor to (Old) Columbia Nitrogen Corporation with respect to environmental liabilities associated with the Columbia Nitrogen Site.

THE COLUMBIA NITROGEN SITE

19 The Columbia Nitrogen Site borders the Ashley River, has a street address of 1801 Milford Street in Charleston, Charleston County, South Carolina, and has geographic coordinates of 32° 49' 19" North latitude and 79° 57' 36" West longitude (USGS, 1983).

20. The Columbia Nitrogen Site includes real property owned by Ashley (30.67 acres) as described in paragraphs 6-8, above.

21. The remaining property that constitutes the Columbia Nitrogen Site includes a parcel of 2 acres owned by Robin W. Hood, II, and designated as Parcel Number 466-00-00-055 on the Charleston County Tax Map, and 1.28 acres deeded to the City of Charleston for the right of way of Milford Street Extension.

22. (Old) Columbia Nitrogen Corporation purchased the Columbia Nitrogen Site in June 1966 and operated a phosphate fertilizer plant on the Site from 1966 to 1972.

23. At all times during (Old) Columbia Nitrogen Corporation's ownership of the Columbia Nitrogen Site, the Site was a "facility" as defined by CERCLA Section 101(9), 42 U.S.C. §9601(9). At the Site, at various times during the period 1966 through 1985, there were "releases" of hazardous substances as defined in CERCLA Section 101(22), 42 U.S.C. §9601(22).

24. During the course of operating the phosphate fertilizer plant from 1966 to 1972, (Old) Columbia Nitrogen Corporation and its employees disposed of hazardous substances at the Columbia Nitrogen Site through discharge of liquid and solid wastes onto the ground, through leakage of chemicals (including acid and lead), through washing out the sludge in lead acid chambers onto the ground, through discarding of lead panels onto the ground, and otherwise.

25. During its ownership of the Columbia Nitrogen Site, (Old) Columbia Nitrogen Corporation disposed of hazardous substances at the Site by causing contaminated fill material to be brought onto the Site and used for grading, filling and site improvement purposes.

26. During its ownership of the Columbia Nitrogen Site, (Old) Columbia Nitrogen Corporation disposed of hazardous substances at the Site by causing the buildings and other structures on the Site to be demolished and hazardous materials contained in those buildings and structures to be released onto the ground of the Site.

27. During its ownership of the Columbia Nitrogen Site, (Old) Columbia Nitrogen Corporation disposed of hazardous substances at the Site by causing soil, fill material and demolition debris, all containing hazardous substances, to be relocated and dispersed throughout Site.

(NEW) COLUMBIA NITROGEN'S LIABILITY

28. By a written "Acquisition Agreement" dated October 31, 1986, (Old) Columbia Nitrogen Corporation agreed to sell and transfer, and CNC Corp. (subsequently renamed to become (New) Columbia Nitrogen Corporation) agreed to purchase and assume, certain assets, liabilities and obligations.

29. The Acquisition Agreement provided that (New) Columbia Nitrogen Corporation (then known as CNC Corp.) agreed to assume, among other liabilities and obligations, responsibility for paying:

> All claims, causes of action and litigations relating to Seller and arising out of or in connection with the Acquired Business or the Purchased Assets whether arising before or after the Effective Date and whether relating to events or occurrences before or after the Effective Date . . . . including without limitation as set forth in Schedule 3.6 hereto.

Exhibit 1, ¶ 3.6. The Acquisition Agreement further provided that the liabilities assumed by (New) Columbia Nitrogen included liabilities "whether absolute, accrued, contingent or otherwise, whether known or unknown . . . ." Exhibit 1, Section III (p. 4).

30. The Acquisition Agreement commenced with two recitals, one of which defined the term "Acquired Business" and the other of which described the intended effect of the Acquisition Agreement:

> RECITALS:
>
> A. Seller, as of the date hereof, operates *a business that produces and sells ammonia and nitrogen-based products (the "Acquired Business"*). The Acquired Business does not include any of the business, operations, assets or liabilities of Nipro, Inc., a Delaware Corporation ("Nipro").
>
> B. Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, the Acquired Business, and Buyer is willing to acquire all of the property and assets relating to the Acquired Business, except as set forth herein, and to assume all obligations and liabilities relating to the Acquired Business, except as set forth herein, as if *Seller were to sell and Buyer were to purchase the stock of Seller on the open market*, for the consideration and upon and subject to the terms and conditions set forth herein.

(Emphasis added.)

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

31. The allegations of paragraphs 1 to 29 are incorporated herein by reference.

32. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides, in relevant part, that:

> In a case of actual controversy within its jurisdiction, . . . any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

33. An actual controversy exists between the parties stemming from Ashley's demand that PCS pay for the cost of remediating the Site and PCS's refusal to do so.

34. Ashley is entitled to, and requests, a declaratory judgment that (Old) Columbia Nitrogen Corporation's environmental liabilities and obligations with respect to the Columbia Nitrogen Site were assumed by PCS when it became the successor through purchase, acquisition, name change and merger to CNC Corporation's liabilities and obligations, and that PCS is jointly and severally liable under CERCLA § 107(a), 42 U.S.C. § 9607(a), for all response costs incurred with respect to the Columbia Nitrogen Site.

SECOND CLAIM FOR RELIEF
(Money Judgment For Past Response Costs)

35. The allegations of Paragraphs 1 through 29 above are incorporated by reference herein.

36. Ashley has incurred response costs consistent with the National Contingency Plan in connection with the Columbia Nitrogen Site. Response costs incurred by Ashley include costs of investigation, environmental sampling and analysis, and coordinating with EPA and state environmental authorities.

37. PCS is jointly and severally liable to Ashley for all such costs pursuant to CERCLA Section 107(a), 42 U.S.C. §9607(a).

WHEREFORE, plaintiff Ashley II respectfully requests:

(a) a declaratory judgment that PCS is jointly and severally liable for all response costs with respect to the Columbia Nitrogen Site;

(b) a money judgment against PCS for Ashley's past response costs with respect to the Columbia Nitrogen Site;

(c) an award of plaintiff's costs incurred in the prosecution of this action; and

(d) such other and further relief as the Court may deem just and proper.

This the 16th day of July, 2008.

YOUNG, CLEMENT, RIVERS, LLP

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ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ASHLEY II OF CHARLESTON, L.L.C., Plaintiff, v. PCS NITROGEN, INC., successor through purchase, name change and merger to Columbia Nitrogen Corporation, Defendant/Third-Party Plaintiff, v. ROSS DEVELOPMENT CORPORATION, KONINKLIJKE DSM N.V., DSM CHEMICALS OF NORTH AMERICA, INC., JAMES H. HOLCOMBE, J. HOLCOMBE ENTERPRISES, L.P., J. HENRY FAIR, JR., ALLWASTE TANK CLEANING n/k/a PSC CONTAINER SERVICES, LLC, ROBIN HOOD CONTAINER EXPRESS, INC., and CITY OF CHARLESTON, SOUTH CAROLINA, Third-Party Defendants.	Civil Action No. 2:05-2782-CWH **CONSENT TO AMENDMENT**

PCS Nitrogen, Inc., hereby consents to the amendment of Ashley II of Charleston, LLC's complaint in the manner set out in the First Amended Complaint attached to Ashley's Motion To Amend filed June 27, 2008.

This the 15th day of July, 2008.

Counsel for PCS Nitrogen, Inc.

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EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ASHLEY II OF CHARLESTON, L.L.C., Plaintiff, v. PCS NITROGEN, INC., Defendant/Third-Party Plaintiff, v. ROSS DEVELOPMENT CORPORATION, KONINKLIJKE DSM N.V., DSM CHEMICALS OF NORTH AMERICA, INC., JAMES H. HOLCOMBE, AND J. HOLCOMBE ENTERPRISES, L.P. AND J. HENRY FAIR, JR., Third-Party Defendants.	Case No. 2:05-2782-CWH **AMENDED ANSWER, COUNTER-CLAIM AND AMENDED THIRD-PARTY CLAIMS OF DEFENDANT PCS NITROGEN, INC.**

Defendant PCS Nitrogen, Inc. ("PCS"), answers the Complaint of Plaintiff Ashley II of Charleston, L.L.C. ("Plaintiff" or "Ashley") as follows:

NATURE OF ACTION

1. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint and, therefore, denies the same. PCS denies the legal conclusions contained in paragraph 1 of the Complaint.

JURISDICTION AND VENUE

2. In response to Paragraph 2 of the Complaint, PCS admits that this Court has subject matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b) and that venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

3. In response to Paragraph 3 of the Complaint, PCS admits that Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), and 28 U.S.C. §§ 2201 and 2202 empower the Court to issue a declaratory judgment. If Paragraph 3 alleges that a declaratory judgment should be entered finding PCS liable to Ashley for any response costs, PCS denies that allegation.

4. In response to Paragraph 4 of the Complaint, PCS admits that that venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b).

PLAINTIFF

5. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint and, therefore, denies the same.

6. PCS denies that Plaintiff is a bona fide prospective purchaser ("BFPP"), as that term is defined under Section 101(40) of CERCLA, 42 U.S.C. § 9601 (40), and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 6 of the Complaint and, therefore, denies the same.

DEFENDANT

7. PCS admits that it is a corporation duly organized under the laws of the State of Delaware. The remaining allegations of paragraph 7 are denied.

8. PCS admits the allegations in paragraph 8 of the Complaint.

9. PCS admits the allegations in paragraph 9 of the Complaint.

10. PCS admits the allegations in paragraph 10 of the Complaint.

11. PCS responds to the attempted incorporation of the allegations contained in paragraphs 24 to 27 of the complaint in the correspondingly numbered answers below. PCS admits the allegations contained in paragraph 11 of the Complaint to the extent that it alleges that on or about October 31, 1986, CNC Corp., also known as New Columbia Nitrogen, received a transfer of certain assets and assumed certain liabilities of Columbia Nitrogen Corporation ("Old Columbia Nitrogen"). PCS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 11 of the Complaint and, therefore, denies the same.

12. PCS denies the allegations contained in paragraph 12 of the Complaint to the extent that it implies that the transfer of certain assets, liabilities and obligations from Old Columbia Nitrogen to New Columbia Nitrogen was a transfer of all assets, liabilities and obligations of Old Columbia Nitrogen. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph 12 concerning the date of incorporation of Old Columbia Nitrogen and, therefore, denies the same. PCS admits the remaining allegations in paragraph 12 of the Complaint.

13. PCS is without knowledge of the allegations contained in paragraph 13 of the Complaint and, therefore, denies the same.

THE COLUMBIA NITROGEN SITE

14. PCS admits the allegation in paragraph 14 of the Complaint that a site referred to as the Columbia Nitrogen Site is located in Charleston, Charleston County, South Carolina ("Charleston Site") and that the site was used in the past for phosphate fertilizer production. PCS further admits that the site in question borders the Ashley River. PCS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 14 and, therefore, denies the same.

15. PCS admits the allegation in paragraph 15 of the Complaint that Old Columbia Nitrogen purchased the site at some time in the past and operated the site to produce phosphate fertilizers there for some period of time. PCS further admits that Old Columbia Nitrogen no longer owned the site as of October 31, 1986. PCS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 15 of the Complaint and, therefore, denies the same.

16. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint and, therefore, denies the same.

17. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Complaint and, therefore, denies the same.

18. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint and, therefore, denies the same.

19. PCS admits that EPA has engaged in activities it has termed a remedial investigation/feasibility study ("RI/FS"). PCS further admits that EPA's regulations describe a RI/FS at 40 C.F.R. § 300.430(a)(2). PCS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 19 and, therefore, denies the same.

NATURE AND EXTENT OF CONTAMINATION

20. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint and, therefore, denies the same.

21. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint and, therefore, denies the same.

22. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Complaint and, therefore, denies the same.

23. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint and, therefore, denies the same.

(NEW) COLUMBIA NITROGEN'S LIABILITY

24. PCS admits the allegations contained in the first sentence of paragraph 24 of the Complaint. It further admits that Exhibit 1 to the Complaint is a copy of certain portions of the Acquisition Agreement. PCS denies that Exhibit 1 is a copy of the Acquisition Agreement in its entirety. The terms of the Acquisition Agreement speak for themselves. PCS denies any allegation in paragraph 24 contrary to those terms.

25. PCS admits the allegations contained in paragraph 25 of the Complaint to the extent that it quotes from the Acquisition Agreement. PCS further admits that the Acquisition Agreement is governed by New York law according to its express terms. The terms of the Acquisition Agreement speak for themselves.

26. PCS admits the allegations contained in paragraph 26 of the Complaint to the extent that it accurately quotes parts of the Acquisition Agreement. The terms of the Acquisition Agreement speak for themselves. PCS denies any allegation in paragraph 26 to the effect that the Acquisition Agreement contemplated or transferred any liability for the Site in dispute.

27. PCS admits that the recitals to the Acquisition Agreement include the quoted language. PCS denies the portions of the allegations in paragraph 27 of the Complaint that seeks to paraphrase the Acquisition Agreement. The terms of the Acquisition Agreement speak for themselves.

FIRST CLAIM FOR RELIEF

28. In response to the allegations contained in paragraph 28 of the Complaint, PCS repeats and incorporates by reference, as if fully set forth herein, its responses to Paragraphs 1 through 28 of the Complaint.

29. In response to the allegations contained in paragraph 29 of the Complaint, PCS states that the statutory language speaks for itself and that no response is required.

30. PCS denies the allegations contained in paragraph 30 of the Complaint.

31. PCS denies the allegations contained in paragraph 31 of the Complaint and denies that Plaintiff is entitled to the relief sought in paragraph 31 of the Complaint.

SECOND CLAIM FOR RELIEF

32. In response to the allegations contained in paragraph 32 of the Complaint, PCS repeats and incorporates by reference, as if fully set forth herein, its responses to Paragraphs 1 through 31 of the Complaint.

33. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the Complaint and, therefore, denies the same.

34. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 of the Complaint and, therefore, denies the same.

35. PCS denies the factual allegations and legal conclusions contained in paragraph 35 of the Complaint.

36. PCS denies the factual allegations and legal conclusions contained in paragraph 36 of the Complaint.

37. PCS denies each allegation and conclusion asserted in the Complaint not otherwise admitted, controverted or denied in paragraphs 1 through 36 above.

ADDITIONAL AND AFFIRMATIVE DEFENSES

FIRST DEFENSE

38. Plaintiff's Complaint is barred because Plaintiff lacks standing to bring this lawsuit.

SECOND DEFENSE

39. Plaintiff's Complaint fails to state a claim against PCS upon which relief can be granted.

THIRD DEFENSE

40. Plaintiff's Complaint is barred because Plaintiff is a covered person under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

FOURTH DEFENSE

41. Plaintiff's Complaint is barred because Plaintiff is not an innocent purchaser under Section 107(b) of CERCLA, 42 U.S.C. § 9607(b).

FIFTH DEFENSE

42. Plaintiff's Complaint is barred because Plaintiff is not a bona fide prospective purchaser as defined under Section 101(40) of CERCLA, 42 U.S.C. § 9601(40).

SIXTH DEFENSE

43. Plaintiff's Complaint against PCS is barred because Plaintiff has assumed the liabilities of the former owners and operators of the Charleston Site.

SEVENTH DEFENSE

44. Plaintiff's Complaint against PCS is barred because PCS is not a liable or responsible party within the meaning of CERCLA.

EIGHTH DEFENSE

45. If the predecessor of PCS assumed liability for the site from Old Columbia Nitrogen, which PCS denies, Plaintiff is not entitled to the relief against PCS because any disposal of hazardous substances within the meaning of CERCLA, as alleged in the Complaint, occurred during a period of ownership or operation of the Charleston Site when Old Columbia Nitrogen, whose liabilities PCS's predecessor allegedly assumed, did not own or operate the site.

NINTH DEFENSE

46. Since Plaintiff or its predecessor corporation(s), to whose liabilities Plaintiff has succeeded, bear substantial responsibility for any environmental contamination that might exist, any costs associated therewith must be allocated accordingly, and Plaintiff should recover nothing from PCS.

TENTH DEFENSE

47. Plaintiff is not entitled to the relief sought in the Complaint insofar as Plaintiff has failed to mitigate its damages.

ELEVENTH DEFENSE

48. Plaintiff is not entitled to the relief sought in the Complaint insofar as any damages sustained or response costs incurred by Plaintiff or its predecessor corporation(s) are the result of their own actions or omissions.

TWELFTH DEFENSE

49. Plaintiff's Complaint against PCS is barred insofar as it seeks to recover any costs, expenses or other damages other than response costs as defined by CERCLA.

THIRTEENTH DEFENSE

50. The conditions complained of in Plaintiff's Complaint were caused and/or contributed to by a person or persons other than PCS and for whose actions PCS is not legally responsible.

FOURTEENTH DEFENSE

51. Plaintiff's Complaint against PCS is barred because any damages or costs were caused by the intervening or superseding acts or omissions of third parties other than an employee or agent of PCS or any predecessor to whose liabilities it has succeeded and because the circumstances and requirements of Section 107(b)(3) of CERCLA, 42 U.S.C. §9607(b)(3), are met.

FIFTEENTH DEFENSE

52. Plaintiff is not entitled to the relief it seeks since it failed to exercise due care with respect to, or take reasonable steps to respond to, the alleged release or threat of release of hazardous substances at the Charleston Site.

SIXTEENTH DEFENSE

53. Plaintiff's Complaint against PCS for contribution is barred to the extent its alleged response costs were (i) incurred in a manner inconsistent with the National Contingency Plan (ii) were not necessary and/or (iii) are not recoverable under CERCLA or the National Contingency Plan.

SEVENTEENTH DEFENSE

54. Plaintiff's Complaint against PCS is barred because any harm alleged to be caused by PCS or any of its predecessors is divisible from any harm or any release or threat of release of hazardous substances which caused or allegedly caused Plaintiff to incur response costs.

EIGHTEENTH DEFENSE

55. Plaintiff's claims are barred because Plaintiff or its predecessor corporation(s), to whose liabilities Plaintiff has succeeded, has, in whole or in part, caused, contributed to or exacerbated the conditions complained of in Plaintiff's Complaint.

NINETEENTH DEFENSE

56. Plaintiff is liable for some or all of the amounts alleged in Plaintiff's Complaint under Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613.

TWENTIETH DEFENSE

57. To the extent that PCS is liable for costs or damages, if any, associated with alleged environmental contamination at the Charleston Site, which PCS denies, such liability is limited to PCS's allocable fair share of such costs pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613.

TWENTY-FIRST DEFENSE

58. PCS intends to rely upon all other applicable affirmative defenses as may become apparent during the course of this action and reserves the right to amend its Answer accordingly.

COUNTERCLAIM

1. Ashley is the owner of the property which comprises the Charleston Site and is the subject of Ashley's Complaint.

2. Ashley alleges in its Complaint that the Charleston Site is a "facility" under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), at which "hazardous substances" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), have been released into the environment. If so, as the owner of the Charleston Site, Ashley is liable for, among other things, all costs of removal or remedial action incurred by the United States Government not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

3. If the site is a facility, and if releases of hazardous substances have occurred there, then, as the owner and operator of the Charleston Site property, Ashley is jointly and severally liable for costs of response pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

4. Pursuant to Section 113(f) CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section

107(a) of CERCLA, 42 U.S.C. § 9607(a). If PCS is liable for response costs at the site under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), which PCS denies, pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from Ashley for any costs of response incurred by PCS at the Charleston Site or for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

5. To the extent PCS is found to have any liability for response costs at the Charleston Site, Ashley is liable to PCS for contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f).

WHEREFORE, PCS requests that this Court deny all relief sought by Ashley against PCS, enter judgment in favor of PCS and against Ashley, dismiss Ashley's Complaint with prejudice, award PCS its costs, attorney's fees and expenses, and grant such other and further relief as this Court deems just and proper. In the event that PCS is determined to have any liability with respect to the Charleston Site, PCS requests that this Court enter an order determining Ashley's liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f) determining that Ashley is liable to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of Ashley's share of any amounts for which PCS is found to be liable; and enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g) determining that Ashley is liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

THIRD-PARTY COMPLAINT AGAINST ROSS DEVELOPMENT CORPORATION (CERCLA 107(a)(2) Past Owner and Operator)

6. Planters' Fertilizer and Phosphate Company ("Planters") was incorporated in South Carolina in 1906. From approximately that time until 1966, Planters owned and operated the Charleston Site. Planters produced phosphate fertilizer at the site. In 1966, Planters changed its name to Ross Industrial Products, Inc. Thereafter, in 1970, Ross Industrial Products, Inc. changed its name to Ross Development Corporation ("Ross").

7. In December, 1983, Ross filed a declaration of its intent to dissolve with the Secretary of State of South Carolina. However, the company was not dissolved.

8. On September 11, 2006, on information and belief with the intent to evade the liabilities associated with the operations described above, Ross filed its Articles of Dissolution with the Secretary of State.

9. This Court has jurisdiction of the subject matter of the claims against Ross because the claims arise under federal law pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b).

10. Venue is proper in this district pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

11. Planters' production of phosphate fertilizers at the Charleston Site involved reacting phosphate ores with sulfuric acid to produce phosphoric acid, the building block of nitrogen-phosphate potassium (N-P-K) agricultural fertilizers. The production process included two components: the production of sulfuric acid using the lead acid chambers process, and the granulation, bagging and storage of the fertilizer. During the early years of

the phosphate fertilizer industry, pyrite ore was used as the source of sulfur. The pyrite ore was crushed and roasted, creating sulfur dioxide gas. The sulfur dioxide gas was reacted with oxygen to create sulfur trioxide gas. Sulfuric acid was produced as water flowing downward through a Glover Tower came into contact with rising sulfur trioxide gas. The sulfuric acid was stored on-site in large chambers insulated with sheet lead. Environmental impacts EPA found associated with the phosphate fertilizer manufacturing facilities at the Charleston Site included elevated levels of metals, particularly lead and arsenic in soil, groundwater, and sediment, as well as acidic pH conditions.

12. CERCLA authorizes contribution claims for cost recovery to be filed against any person, such as Ross, who owned or operated a site at the time that hazardous substances were disposed of and/or released into the environment. 42 U.S.C. 9607(a)(2). PCS's claims against Ross are brought pursuant to that section since, as described below, hazardous substances were disposed of and/or released at the site at the time Ross owned and operated it.

13. From on or around 1906 until 1966, Ross was the "owner" and "operator" of the Charleston Site as defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

14. During the period of Ross' ownership and operation of the Charleston Site, as described above there was a "disposal" of "hazardous substances" as those terms are defined under Section 101(14) and Section 101(29) of CERCLA, 42 U.S.C. §§ 9601(14) and (29).

15. Ross is a "person" as defined in Section 101(21), CERCLA, 42 U.S.C. § 9601(21).

16. Pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of is liable for, among other things, all costs of removal or remedial action incurred by the United States not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.

17. As the owners and operators of the Charleston Site property at a time of a disposal of hazardous substances, Ross is liable pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

18. Pursuant to Section 113(f) CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

19. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from Ross for any necessary costs of response incurred by PCS at the Charleston Site.

20. PCS is entitled to contribution from Ross for any costs of response at the Charleston Site for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

WHEREFORE, PCS requests that this Court enter an order determining Ross' liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section

113(f) of CERCLA, 42 U.S.C. § 9613(f), determining that Ross is liable to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of Ross' share of any amounts for which PCS is found to be liable and enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g) determining that Ross is liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

THIRD-PARTY COMPLAINT AGAINST KONINKLIJKE DSM N.V.

21. Koninklijke DSM N.V. ("DSM N.V.") is a corporation existing under the laws of the Kingdom of the Netherlands. Prior to 2002, DSM N.V. was known as Naamloze Vennootschapp DSM. In 2002, its name was changed to Koninklijke DSM N.V.

22. DSM N.V. is the sole shareholder of DSM Chemicals North America, Inc. ("DCNA").

23. This Court has jurisdiction over the subject matter of the claims against DSM N.V. pursuant to 42 U.S.C. § 9613(b). To the extent the derivative CERCLA claims are either grounded on or arise under state as opposed to federal law, jurisdiction is proper under 27 U.S.C. § 1367.

24. This Court has personal jurisdiction over DSM N.V. As described below, DSM N.V. has purposely availed itself of the benefits of transacting business in the State of South Carolina, regularly and systematically transacted business in the State of South Carolina, and has tortiously committed acts that have caused injury in South Carolina.

25. Venue is proper in this district pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

FIRST CLAIM FOR RELIEF AGAINST KONINKLIJKE DSM N.V.
(Derivative CERCLA Liability: Alter Ego Doctrine)

26. Under CERCLA, all owners or operators who contribute to environmental hazards are liable for remediation costs, even if they no longer own or operate the property, if at the time they owned or operated it hazardous substances were disposed of and/or released into the environment. Under the alter ego doctrine, parent corporations can be derivatively liable if they controlled the actions of their subsidiary. Recent discovery in this case indicates that DSM N.V. and DCNA have exercised dominion and control over Old Columbia Nitrogen and related assets and privileges for decades and, as a result, are responsible for the contamination Old Columbia Nitrogen caused at the Charleston Site. According to documents recently produced and depositions newly taken, DSM N.V. and DCNA controlled the operation of Old Columbia Nitrogen; dissolved Old Columbia Nitrogen for the purpose of achieving favorable tax treatment for DSM N.V.; transferred to DSM N.V. and DCNA, for little to no consideration, all assets of Old Columbia Nitrogen not sold to New Columbia Nitrogen; and, to the present day, assert control over documents, assets, and privileges belonging to Old Columbia Nitrogen. In light of this conduct, DSM N.V. and DCNA should be held liable for any and all costs associated with the release of hazardous substances caused by Old Columbia Nitrogen and PCS should be permitted to seek contribution from them.

27. PCS re-alleges and incorporates by reference the allegations contained in paragraphs 21 through 25 of the Third-Party Complaint Against Koninklijke DSM N.V. as if restated herein.

28. From 1962 through 1972, DSM N.V. owned Old Columbia Nitrogen as a joint venture. In February 1972, DSM N.V. purchased all stock in Old Columbia Nitrogen. Later the same month DSM N.V. transferred all stock in Old Columbia Nitrogen to DCNA. In September 1986, DCNA transferred all stock in Old Columbia Nitrogen to DSM North America, Inc. ("DSMNA"), a wholly owned subsidiary of DSM N.V.

29. For decades, DSM N.V. and DCNA acted to control the operations of Old Columbia Nitrogen, including without limitation as follows:

a. During much of the existence of Old Columbia Nitrogen most or all of the directors and officers of Old Columbia Nitrogen were the same as the directors and officers of DCNA. Those directors and officers made decisions related to Old Columbia Nitrogen generally, and the Charleston Site in particular, while considering the best interests of DSM N.A. and DCNA. Among other things, those directors and officers directed the ongoing operation of the Charleston Site and determined when such operations should be discontinued.

b. In the mid 1980s, DSM N.V. and DCNA decided that Old Columbia Nitrogen and its parent DSMNA should be dissolved to obtain favorable tax treatment for DSM N.V.

c. As noted below in paragraph 41 of the Third-Party Complaint Against DSM N.V. and by reference incorporated herein, in 1986, DSM N.V. and DCNA transferred to themselves all assets not sold to New Columbia Nitrogen.

d. DSM N.V. and DCNA have exercised dominion and control over insurance policies covering the Charleston Site despite repeated requests for access.

30. Further evidence of the control DSM N.V. and DCNA exerted over Old Columbia Nitrogen, and continues to assert over its assets, is apparent from the fact that all assets in the possession of Old Columbia Nitrogen at the time of its 1986 dissolution came under the control of DSM N.V. and DCNA, including those related to Charleston Site. Recent discovery has shown that books and records related to the Charleston Site were kept by DCNA rather than sent to New Columbia Nitrogen and that, *to this day*, DCNA asserts attorney client privilege over Old Columbia Nitrogen documents related to the Charleston Site, and will not provide them because, according to the former general counsel for Old Columbia Nitrogen and DCNA, they could impact the company's position.

31. As a result, DSM N.V. and DCNA are derivatively liable, pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), for, among other things, all costs of removal or remedial action incurred by the United States Government not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.

32. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

33. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from DSM N.V. and DCNA for any necessary costs of response incurred by PCS at the Charleston Site.

34. PCS is entitled to contribution from DSM N.V. and DCNA for any costs of response at the Charleston Site for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

SECOND CLAIM FOR RELIEF AGAINST KONINKLIJKE DSM N.V.
(Derivative CERCLA Liability: Trust Fund Doctrine)

35. Under CERCLA, all owners or operators who contribute to environmental hazards are liable for remediation costs, even if they no longer own or operate the property, if at the time they owned or operated it hazardous substances were disposed of and/or released into the environment. Under the trust fund doctrine an entity who knows or should know of the potential liability of a subsidiary can not take the assets and benefits of that subsidiary, and leave it with no assets to cover the liability. Discovery recently taken in this case reveals that Old Columbia Nitrogen knew of contamination at the Charleston Site. According to witness statements recently filed with this Court, by the time the Charleston Site was dismantled there was a significant concern regarding environmental liabilities. In light of the control DSM N.V. and DCNA exercised, and still exercise, over Old Columbia Nitrogen they knew or should have known of these environmental liabilities at the Charleston Site. Notwithstanding, DSM N.V. and DCNA failed to provide for these liabilities at the time of Old Columbia Nitrogen's dissolution. Instead, DSM N.V. and DCNA had all Old Columbia Nitrogen assets transferred to their benefit. As such, this Court is permitted to -- and should -- impose a constructive trust upon the assets improperly transferred to DSM N.V. and DCNA.

36. PCS re-alleges and incorporates by reference the allegations contained in paragraphs 21 through 25 and 28 through 30 of the Third-Party Complaint Against Koninklijke DSM N.V. as if restated herein.

37. Discovery recently taken in this case has revealed that Old Columbia Nitrogen's activities at the Charleston Site substantially contributed to the contamination of the Charleston Site property and thus rendered Old Columbia Nitrogen a "covered person" within the meaning of Section 107(a)(2) of CERCLA.

38. That discovery includes, but is not limited to, the following:

a. The witness statement of John Hardwick was filed with the Court on November 2, 2006. That statement asserts that Mr. Hardwick will testify that by the time Old Columbia Nitrogen dismantled the facility at the Charleston Site, there were significant concerns about environmental liabilities at the Charleston Site.

b. The deposition of Wallace Benson was taken on November 15, 2006. Mr. Benson testified that during the time he worked at the Charleston Site from the late 1960s to the early 1970s, there was lead strewn about as a result of hapless disposal, leaking lead lined acid chambers, and lead soldering. Mr. Benson further testified that the Old Columbia Nitrogen plant supervisor and Old Columbia Nitrogen employees from Augusta visited the site, including the areas where the lead was located.

c. As indicated above, DSM N.V. and DNCA exercised control over Old Columbia Nitrogen and therefore would have had the same access to the information about environmental liabilities at the Charleston Site as did Old Columbia Nitrogen.

39. Old Columbia Nitrogen, DSM N.V., and DCNA also knew they must account for any unknown environmental liabilities. This understanding is clear from recently taken depositions and documents drafted at the time of the acquisition:

a. William Bivins, in-house counsel for Old Columbia Nitrogen from 1980 to 1986 and in-house counsel for DCNA from 1980 to 2002, testified on November 13, 2006, that he was familiar with CERCLA at the time of the Acquisition Agreement, knew that unknown environmental liabilities must be accounted for, and remembered that they had contemplated if DSM N.V. or DCNA should be responsible. Mr. Bivins further testified that DSM decided to transfer all Old Columbia Nitrogen assets and dissolve it and DSMNA to obtain a $100,000,000.00 tax credit for DSM N.V. Finally, to retain that tax credit DSM had to assure that no assets or liabilities could come back to Old Columbia Nitrogen.

b. A checklist drafted by Shearman & Sterling, counsel for Old Columbia Nitrogen notes that as part of the sale of specified assets to New Columbia Nitrogen any unknown environmental obligations would go to DSM N.V.

c. Another memorandum drafted during the period of the acquisition by an officer of Old Columbia Nitrogen and DCNA noted that unknown liabilities would not be assumed by the buyer and contemplated whether DSM N.V. could avoid jeopardizing the favorable tax treatment for DSM N.V. that instigated the decision to sell Old Columbia Nitrogen.

40. Old Columbia Nitrogen, DSM N.V., and DCNA did not disclose those concerns to New Columbia Nitrogen when it purchased specified assets and assumed certain liabilities of Old Columbia Nitrogen by means of the Acquisition Agreement – an agreement with an effective date of October 31, 1986. Stephen Magida, a member of the team that negotiated the Acquisition Agreement on behalf of New Columbia Nitrogen testified that CERCLA liability with respect to the assets they were acquiring was a concern for New Columbia Nitrogen. Mr. Magida further testified that because New Columbia Nitrogen did not acquire assets or assume liabilities related to the Charleston Site, those assets and liabilities remained with Old Columbia Nitrogen.

41. DSM N.V. and DCNA had all assets not purchased by New Columbia Nitrogen transferred to themselves for little or no consideration through the following transactions:

a. On October 31, 1986, Old Columbia Nitrogen transferred real property located in Augusta, Georgia to DCNA for $10.00.

b. On November 3, 1986, Old Columbia Nitrogen transferred all "Retained Assets" to DCNA, including equipment, 50% ownership of Augusta Service Company, and other specified property.

c. On November 3, 1986, Old Columbia Nitrogen also assigned specified contracts and leases to DCNA and Augusta Service Company, then 50% owned by DCNA.

d. On November 19, 1986, Old Columbia Nitrogen assigned DSMNA promissory notes totaling $27,500,000.00.

e. On November 21 and 24, 1986, Old Columbia Nitrogen distributed to DSMNA a total of $14,450,759.58 in cash representing final distribution of all Old Columbia Nitrogen assets.

f. On November 26, 1986, DSMNA transferred the $27,500,000.00 promissory notes received from Old Columbia Nitrogen to DSM N.V.

g. On November 26, 2986 DSMNA also turned over to DSM N.V. all remaining assets, including a term loan to New Columbia Nitrogen worth $15,122,876.71 and cash transfers totaling $17,483,234.85.

42. At the same time, DSM N.V. and DCNA dissolved Old Columbia Nitrogen and its sole shareholder, DSMNA:

a. On September 25, 1986, the board of directors of Old Columbia Nitrogen adopted a plan of liquidation providing, among other things, for the dissolution of Old Columbia Nitrogen.

b. On September 25, 1986, the board of directors of DSMNA, a wholly-owned subsidiary of DSM N.V., also adopted a plan of liquidation providing, among other things, for the dissolution of DSMN A.

43. On November 19, 1986, Certificates of Dissolution for Old Columbia Nitrogen (then operating as Augusta Liquidating Company) and DSMNA were filed with the office of the Delaware Secretary of State, hereby affecting the dissolution of both those corporations pursuant to Delaware law.

44. Under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" is a "covered person" who has liability for response costs and other damages attributable to environmental contamination stemming from the disposal and/or release of hazardous substances.

45. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

46. Accordingly, if New Columbia Nitrogen is determined to be the successor to Old Columbia Nitrogen, then PCS, as the successor to the rights and liabilities of New Columbia Nitrogen, would have the right to seek contribution, under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), from Old Columbia Nitrogen, had Old Columbia Nitrogen not been dissolved.

47. Under the trust fund doctrine, when a dissolving corporation knows or has reason to know it has creditors, and dissolves without sufficient reserves, those creditors have an equitable right to follow the assets of the dissolved corporation and to impress a constructive trust upon them.

48. DSM N.V. was effectively the sole shareholder of Old Columbia Nitrogen at the time that Old Columbia Nitrogen dissolved on November 19, 1986, because on that date, DSM N.V. was the sole shareholder of DSMNA, and DSMNA, the sole shareholder of Old Columbia Nitrogen, itself dissolved on November 19, 1986.

49. Consequently, PCS, pursuant to its right to seek contribution from Old Columbia Nitrogen under Section 113(f) of CERCLA, 42 U.S.C. § 9613, had Old Columbia Nitrogen not been dissolved, has the right to seek satisfaction of that claim from the assets of Old Columbia Nitrogen that were transferred to DSM N.V. and DCNA in October and November 1986. Pursuant to the trust fund doctrine, this Court should, in order to satisfy PCS's CERCLA contribution claim with respect to the Charleston Site, impress a constructive trust upon the assets of Old Columbia Nitrogen that were transferred to DSM N.V. and DCNA in October and November 1986.

WHEREFORE, PCS requests the following:

First, that this Court enter an order determining that DSM N.V. is liable for any Charleston Site liability that Old Columbia Nitrogen, if still in existence, would have under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), determining that DSM N.V. is liable for any Charleston Site liability that Old Columbia Nitrogen, if still in existence, would have to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of what would be DSM N.V.'s share of any amounts for which PCS is found to be liable; enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g), determining

that DSM N.V. is liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

Second, that this Court impress a constructive trust, in favor of PCS, upon the assets distributed by Old Columbia Nitrogen to DSM N.V. (via DSMNA), for the purpose of satisfying any rights to contribution, under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), that PCS would have had against Old Columbia Nitrogen, were Old Columbia Nitrogen still in existence, in connection with PCS's liabilities, under Section 107 of CERCLA, 42 U.S.C. § 9607, relating to the Charleston Site.

THIRD-PARTY COMPLAINT AGAINST DSM CHEMICALS NORTH AMERICA, INC.

50. DCNA is a Delaware corporation. DCNA was originally incorporated in Delaware on November 5, 1963 as Columbia Nipro Corporation, which changed its name to Nipro, Inc. effective March 22, 1971. Nipro, Inc. changed its name to DSM Chemicals Augusta, Inc., effective August 3, 1987. DSM Chemicals Augusta, Inc., changed its name to DSM Chemicals North America, Inc., effective October 19, 1989.

51. This Court has jurisdiction over the subject matter of the claims against DSM N.V. pursuant to 42 U.S.C. § 9613(b). To the extent the derivative CERCLA claims are either grounded on or arise under state as opposed to federal law, jurisdiction is proper under 27 U.S.C. § 1367.

52. This Court has personal jurisdiction over DCNA. As described below, DCNA has purposely availed itself of the benefits of transacting business in the State of South

Carolina, regularly and systematically transacted business in the State of South Carolina, and has tortiously committed acts that have caused injury in South Carolina.

53. Venue is proper in this district pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

FIRST CLAIM FOR RELIEF AGAINST DSM CHEMICALS NORTH AMERICA, INC. (Derivative CERCLA Liability: Alter Ego Doctrine)

54. PCS re-alleges and incorporates by reference the allegations contained in paragraphs 22, 26, and 28 through 42 of the Third-Party Complaint Against Koninklijke DSM N.V. and paragraphs 50 through 53 of the Third-Party Complaint Against DSM Chemicals North America, Inc. as if restated herein.

55. For the reasons stated therein, DCNA should be held responsible for any and all contamination caused by their alter ego Old Columbia Nitrogen.

SECOND CLAIM FOR RELIEF AGAINST DSM CHEMICALS NORTH AMERICA, INC. (Derivative CERCLA Liability: Trust Fund Doctrine)

56. PCS re-alleges and incorporates by incorporates by reference the allegations contained in paragraphs 22, 28 through 30, and 35 through 49 of the Third-Party Complaint Against Koninklijke DSM N.V. and paragraphs 50 through 53 of the Third-Party Complaint Against DSM Chemicals North America, Inc as if restated herein.

57. For the reasons stated therein, this Court is permitted to – and should – impose a constructive trust upon the funds improperly transferred to DCNA.

THIRD CLAIM FOR RELIEF AGAINST
DSM CHEMICALS NORTH AMERICA, INC.
(Derivative CERCLA Liability: Mere Continuation)

58. Under CERCLA, all owners or operators who contribute to environmental hazards are liable for remediation costs, even if they no longer own or operate the property, if at the time they owned or operated it hazardous substances were disposed of and/or released into the environment. Recent discovery in this case indicates that DCNA purchased specified assets from Old Columbia Nitrogen for little to no consideration and operated as a mere continuation of the Old Columbia Nitrogen business entity. DCNA is, therefore, liable for the contamination Old Columbia Nitrogen caused to the Charleston Site and should be required to contribute to its remediation.

59. PCS re-alleges and incorporates by incorporates by reference the allegations contained in paragraphs 22, 28 through 30, and 35 through 42 of the Third-Party Complaint Against Koninklijke DSM N.V. and paragraphs 50 through 53 of the Third-Party Complaint Against DSM Chemicals North America, Inc. as if restated herein.

60. DCNA and Old Columbia Nitrogen had the same ultimate shareholder, DSM N.V.

61. DCNA and Old Columbia Nitrogen had nearly identical officers and directors.

62. DCNA purchased assets from Old Columbia Nitrogen, including real and personal property, for less than fair market value.

63. The assets were purchased at the time Old Columbia Nitrogen, DSM N.V., and DCNA knew about the potential environmental liabilities of Old Columbia Nitrogen.

Old Columbia Nitrogen, DSM N.V., and DCNA intended that DCNA not assume those environmental liabilities and, thus, Old Columbia Nitrogen and DSM N.V. intentionally, if not fraudulently, transferred the assets to DCNA so that they would not be available as assets from which Old Columbia Nitrogen could make provision for environmental liabilities as part of its dissolution.

64. Consequently, DCNA is liable in contribution and responsible for the remediation costs associated with the Charleston Site.

WHEREFORE, PCS requests the following:

First, that this Court enter an order determining that DCNA is liable for any Charleston Site liability that Old Columbia Nitrogen, if still in existence, would have under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), determining that DCNA is liable for any Charleston Site liability that Old Columbia Nitrogen, if still in existence, would have to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of what would be DCNA's share of any amounts for which PCS is found to be liable; enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g), determining that DCNA is liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

Second, that this Court impress a constructive trust, in favor of PCS, upon the assets distributed by Old Columbia Nitrogen to DCNA, for the purpose of satisfying any rights to contribution, under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), that PCS would have had against Old Columbia Nitrogen, were Old Columbia Nitrogen still in existence, in

connection with PCS's liabilities, under Section 107 of CERCLA, 42 U.S.C. § 9607, relating to the Charleston Site.

Third, that this Court enter an order that DCNA acted as a mere continuation of Old Columbia Nitrogen and, as a result, is liable in contribution and responsible for the remediation costs associated with the Charleston Site.

THIRD-PARTY COMPLAINT AGAINST JAMES HOLCOMBE, HENRY FAIR AND HOLCOMBE ENTERPRISES, L.P.

65. James H. Holcombe is an individual residing in Charleston County, South Carolina.

66. J. Henry Fair, Jr. is an individual residing in Charleston County, South Carolina.

67. Holcombe Enterprises, L.P. is a limited liability partnership formed by Mr. Holcombe on December 31, 1997.

68. This Court has jurisdiction over the subject matter of the claims because the claims arise under federal law pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b).

69. Venue is proper in this district pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

FIRST CLAIM FOR RELIEF AGAINST JAMES HOLCOMBE, HENRY FAIR AND HOLCOMBE ENTERPRISES, L.P.
(CERCLA § 107(a)(2) – Past Owner and Operator)

70. CERCLA authorizes contribution claims against persons that were past owners and operators of sites from which hazardous substances were disposed of and/or released into the environment at the time such hazardous substances were disposed of and/or

released into the environment. 42 U.S.C. 9607(a)(2). As discussed below, Mr. Holcombe, Mr. Fair, and Holcombe Enterprises owned and operated the Charleston Site at the time of the release of hazardous substances and, as such, are liable in contribution for the costs of any remediation.

71. PCS re-alleges and incorporates by incorporates by reference the allegations contained in paragraphs 65 through 69 as if stated herein.

72. On or about May 3, 1985, Mr. Holcombe and Mr. Fair purchased the Charleston Site from Old Columbia Nitrogen. When the property was sold to Mr. Holcombe and Mr. Fair, who then were long-time realtors in the area, they agreed to accept the property in its then current condition. Mr. Holcombe and Mr. Fair knew the property had been previously used to process fertilizer products. On or about December 31, 1997, Mr. Holcombe conveyed his interest in the property to his partnership, Holcombe Enterprises.

73. Holcombe Enterprises and Mr. Fair sold the Charleston Site property to Ashley in or about August, 2003. Pursuant to a Fourth Amendment to contract of sale, Holcombe Enterprises and Mr. Fair acknowledged their potential liability at the site, having sought and received from Ashley an indemnification for past response cost claims in an amount not to exceed $2,700,000 with, among other things, Holcombe Enterprises and Mr. Fair retaining liability for 50% of the first $400,000 past cost claims.

74. Mr. Holcombe, Holcombe Enterprises and Mr. Fair are each "persons" as defined in Section 101(21) CERCLA, 42 U.S.C. § 9601(21).

75. From on or around May 3, 1985 until August, 2003, Mr. Fair was an "owner" and "operator" of the Charleston Site as defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

76. From on or around May 3, 1985 until August, 2003, Mr. Holcombe was an "owner" and "operator" of the Charleston Site as defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

77. From on or around December 31, 1997 to August 2003, Holcombe Enterprises, L.P. was an "owner" and "operator" of the Charleston Site as defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

78. During this time period, Mr. Holcombe, Holcombe Enterprises, and Mr. Fair exacerbated rather than abated the conditions of the Charleston Site by affirmatively causing various hazardous substances to be disposed of and/or released into the environment. For example, at their direction, a number of pits were dug into the earth to a depth of approximately seven to ten feet below the surface and the water table was encountered. As a result of the construction of these pits, corresponding road cuts and other associated activities, the groundwater and surface were materially disturbed thereby causing hazardous substances to be disposed of and/or released into the environment. None of these on-site activities was done with the consent much less the approval of EPA or the State of South Carolina. Subsequent analysis of representative samples taken of subsurface soils and the waste materials described in the preceding sentence indicated that some of the materials would be considered to be "characteristically hazardous wastes," as those terms are defined

under 42 U.S.C. §6903(5) and interpreted by EPA and the South Carolina Department of Health and Environmental Control.

79. Mr. Holcombe and Mr. Fair were informed that the presence of the leaching and/or leaking materials described in the preceding paragraph could constitute an ongoing release of hazardous substances under CERCLA. But neither Mr. Holcombe nor Mr. Fair took any affirmative steps to mitigate the harm, including releases of hazardous substances caused by these actions. Nor did Mr. Holcombe or Mr. Fair report the results of the findings to EPA or the State of South Carolina pursuant to any applicable release reporting requirement set forth in CERCLA 42 U.S.C. § 9603 or other applicable federal or state law, so that any state or federal agency could investigate to determine what remedial action should then be undertaken to address the releases at the site.

80. The environmental actions described in the preceding paragraph by Mr. Holcombe and Mr. Fair were not isolated instances of conduct, that each knew or was reasonably likely to cause releases, leaching, leaking, and/or the disposal of site-related contaminants into the environment. By a letter dated November 5, 1998, EPA informed Mr. Holcombe and Mr. Fair that, due to site conditions, including the ongoing releases of contaminants into the environment, EPA believed future remedial action at the site would be necessary to more adequately protect human health and the environment from exposure to site-related constituents that were regularly being released at the site. EPA specifically noted its "greatest concern" was the "quality of surface water which is transported to the tidal marsh adjacent to the Ashley River during rainfall events." According to sampling data

obtained by EPA at the time, the surface water had, among other things, a pH level of 2.8, lead level of 3.6 mg/l, and arsenic level of 2.2 mg/1.

81. On November 12, 1998, EPA informed Mr. Holcombe and Mr. Fair that due to the quality of uncontrolled storm water runoff at and from the site, EPA was considering commencing an emergency removal action at the site unless Mr. Holcombe and Mr. Fair, among other things, implemented a comprehensive surface water management plan that would be subject to the review and approval of EPA and the State of South Carolina. Neither Mr. Holcombe nor Mr. Fair, however, ever adopted such a plan, thereby allowing and/or causing releases, leaching and/or the disposal of site-related contaminants to continue largely unabated at the Charleston Site.

82. In fact, the actions taken by Mr. Holcombe and Mr. Fair were not only plainly inadequate but actually served to materially exacerbate site conditions. For example, in December, 1998, in response to Mr. Holcombe and Mr. Fair's submission of information to EPA regarding the proposed locations for a storm water drainage basis, EPA expressed its concern that the purported protocol for land disturbance activities near "coastal/critical areas was not followed." Subsequently, it was learned by EPA and the State of South Carolina that Mr. Holcombe and Mr. Fair had actually constructed one or more ponds at the site and filled another pond in with fill material – all without approval by EPA and the State of South Carolina and in a manner that caused environmental harm. Based on these actions, which caused contaminated material at the site to be exposed to environmental conditions (i.e., the air, wind, and water) and disposed of and/or released into the environment, Mr. Holcombe and Mr. Fair were assessed fines by the State of South Carolina.

83. In the Spring of 1999, in light of Mr. Holcombe's and Mr. Fair's chronic indifference to the increasingly worsening of environmental conditions caused by their own actions, EPA informed Mr. Holcombe and Mr. Fair that EPA was proceeding with proposing that the site be added to the NPL.

84. EPA further informed Mr. Holcombe and Mr. Fair that EPA considered them to be responsible parties under CERCLA.

85. Aerial photographs taken of the site show that large portions of the Charleston Site were cleared and filled during the period of time that Mr. Holcombe, Holcombe Enterprises, and Mr. Fair owned and operated it. These observations confirm the suspicions expressed by EPA personnel that Mr. Holcombe and Mr. Fair engaged in a wide-range of actions at the site that they not only concealed from the agency and the public, but also that contributed to the worsening conditions at the site.

86. During the period of Mr. Holcombe's, Holcombe Enterprises, and Mr. Fair's ownership and operation of the Charleston Site, there was a "disposal" of "hazardous substances" as those terms are defined under Section 101(14) and Section 101(29) of CERCLA, 42 U.S.C. §§ 9601(14) and (29).

87. During the period of Mr. Holcombe's, Holcombe Enterprises, and Mr. Fair's ownership and operation of Charleston Site, EPA incurred costs of "removal or remedial" action in connection with the site, as these terms are defined in Sections 101(23), (24) and (25) of CERCLA, 42 U.S.C. § 9601(23), (24) and (25) and 42 U.S.C. § 9607(a).

88. Pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of is liable for, among other things, all costs of removal or remedial action incurred by the United States Government not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.

89. As the owners and operators of the Charleston Site property at a time of a disposal of hazardous substances, Mr. Holcombe, Holcombe Enterprises, and Mr. Fair are each jointly and severally liable pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

90. Pursuant to Section 113(f) CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

91. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from Mr. Holcombe, Holcombe Enterprises, and Mr. Fair for any necessary costs of response incurred by PCS at the Charleston Site.

92. PCS is entitled to contribution from Mr. Holcombe, Holcombe Enterprises, and Mr. Fair for any costs of response at the Charleston Site for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

SECOND CLAIM FOR RELIEF AGAINST JAMES HOLCOMBE, HENRY FAIR AND HOLCOMBE ENTERPRISES, L.P.
(CERCLA 107(a)(1) – Owners and Operator At Time Costs Incurred)

93. CERCLA authorizes contribution claims against persons that own or operate a site at which hazardous substances have been disposed of and/or released into the environment if such a release or threatened release results in response costs being incurred by the United States. 42 U.S.C. 9607(a)(1). Mr. Holcombe, Mr. Fair, and Holcombe Enterprises were owners and operators of the Charleston Site, including when EPA incurred response costs related to the site. As a result, PCS's second contribution claim against Mr. Holcombe, Holcombe Enterprises, and Mr. Fair arises under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

94. PCS re-alleges and incorporates by incorporates by reference the allegations contained in paragraphs 65 through 92 as if stated herein.

95. Because the EPA incurred response costs at the Charleston Site when Mr. Holcombe, Holcombe Enterprises, and Mr. Fair were "owners" and "operators," each is jointly and severally liable pursuant to Section 107(a)(1) of CERCLA, 42 U.S.C. 9607(a)(1).

96. Pursuant to Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), any person who, at the time response costs were incurred by the United States, owned or operated any facility at which such hazardous substances were disposed of and/or or released is liable for, among other things, all costs of removal or remedial action incurred by the United States Government not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.

97. Pursuant to Section 113(f) CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

98. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from Mr. Holcombe, Holcombe Enterprises, and Mr. Fair for any necessary costs of response incurred by PCS at the Charleston Site.

99. PCS is entitled to contribution from Mr. Holcombe, Holcombe Enterprises, and Mr. Fair for any costs of response at the Charleston Site for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

WHEREFORE, PCS requests that this Court enter an order determining Mr. Holcombe's, Holcombe Enterprises, and Mr. Fair's liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), determining that Mr. Holcombe, Holcombe Enterprises, and Mr. Fair are each liable to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of Mr. Holcombe's, Holcombe Enterprises, and Mr. Fair's share of any amounts for which PCS is found to be liable; and enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g) determining that Mr. Holcombe, Holcombe Enterprises, and Mr. Fair are liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CHARLESTON, SC

January 19, 2007

EXHIBIT F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ASHLEY II OF CHARLESTON, L.L.C., Plaintiff,	Case No. 2:05-2782-CWH
v.	PCS NITROGEN, INC.'S RESPONSE TO ROSS DEVELOPMENT CORPORATION'S FIRST SET OF INTERROGATORIES
PCS NITROGEN, INC., Defendant/Third-Party Plaintiff,	
v.	
ROSS DEVELOPMENT CORPORATION, KONINKLIJKE DSM N.V., DSM CHEMICALS OF NORTH AMERICA, INC., JAMES H. HOLCOMBE, J. HOLCOMBE ENTERPRISES, L.P., J. HENRY FAIR, JR., ALLWASTE TANK CLEANING, INC. n/k/a PSC CONTAINER SERVICES, L.L.C., ROBIN HOOD CONTAINER EXPRESS, INC., AND THE CITY OF CHARLESTON, SOUTH CAROLINA, Third-Party Defendants.	

PCS Nitrogen, Inc. ("PCS") responds to the First Set of Interrogatories of Ross Development Corporation ("Ross") as set forth below.

OBJECTIONS

PCS objects to the term "claim" as defined by Ross as overly broad. As defined by Ross—as referring to "the subject matter of the current lawsuit and the factual assertions therein"—"claim" appears to refer to all of the allegations of all of the parties, including PCS, Plaintiff, and nine Third-Party Defendants. For purposes of responding to these interrogatories,



EXHIBIT 7

6. Please provide a brief summary of the factual basis and the legal theories of your claims against this Defendant.

RESPONSE

As set forth in PCS's claims against Ross in Paragraphs 11 to 24 of its Amended Answer, Amended Counterclaims, and Amended Third-Party Claims, filed on August 4, 2008, PCS alleges that Ross's predecessor, Planters Fertilizer and Phosphate Company ("Planters"), is liable under section 113 of CERCLA. Planters owned the Columbia Nitrogen Site between 1905 and 1966. Planters is liable for releasing and disposing of hazardous substances on the Site during its ownership period. Planters released and disposed of hazardous substances including lead and arsenic on the Site in a number of ways:

- First, Planters is the only entity that owned the Site that used pyrite ore—which contains lead and arsenic—in the production of phosphate fertilizer. Planters used pyrite ore from approximately 1905 to 1935. Burned pyrite cinders, commonly referred to as "slag", are a waste product from Planters' phosphate fertilizer production process. Pyrite slag is widely distributed across the Site, is responsible for the vast majority of the lead, arsenic and low pH levels on the Site, and is driving the remediation of the Site. Planters is liable for this contamination.

- Second, Planters operated sulfuric acid and granulation plants on the Site between 1905 and 1966. To the extent that the Court finds air emissions or other emissions from these plants contributed to lead, arsenic, or low pH levels on the Site, Planters is liable for the contamination generated during the sixty years in which it produced fertilizer.

- Third, Planters operated a truck fleet and a machine repair shop on the Site, and there was a fire on-Site during Planters' ownership period. To the extent that these activities\events are found to have contributed to CPAH contamination at the Site, Planters is liable.

PCS also alleges that Planters indemnified Old Columbia Nitrogen Corporation ("Old CNC") for all suits "resulting from any acts or omissions of Planters occurring prior to the closing date[,]" June 30, 1966. Pursuant to this indemnification provision, Planters is liable for all hazardous substances released and disposed of on the Site through June 30, 1966. Ross, as Planters' successor, bears this liability.

7. For each factual basis identified in the above, please identify the person(s), if any, and the document(s) or other evidence, if any, which you contend support your factual assertion.

12. Please identify by caption, civil action number, jurisdiction, and outcome any and all lawsuit(s) in which you have been a party in which allegations related to the following have been made:

a. Violations of any environmental laws;

b. Fraud or dishonesty;

c. Tax evasion.

RESPONSE

PCS objects to this request as unduly burdensome. As defined by Ross "you" refers to the party to whom the interrogatory is directed—PCS Nitrogen, Inc.—as well as "investigators, representatives, employees, attorneys, and all other persons and entities acting in his, her or its interest or behalf, as well as any parent, subsidiary, predecessor, or successor company." PCS also objects to the request as irrelevant. The information sought by the request would not lead to the discovery of relevant information. Without waiving these objections, PCS states that it has not been a party to any other lawsuits involving liability for the Columbia Nitrogen Superfund Site. Arcadian, a predecessor to PCS, was involved in litigation that involved property that borders the Site to the South—the Koppers Superfund Site. The claims against Arcadian in that litigation were settled.

13. Please explain the resolution of the Beazer East litigation, case #2:93-1677-8 filed in the U.S. District of South Carolina, Charleston Division.

RESPONSE

The claims brought against Arcadian were settled in 1998. The terms of that settlement agreement are confidential.

Respectfully submitted,

/s/ John B. Williams

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ATTORNEYS FOR DEFENDANT
PCS NITROGEN, INC.

December 16, 2008

EXHIBIT G

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

DEC 12 2013

URGENT LEGAL MATTER
UPS OVERNIGHT DELIVERY

Ms. Mary Beth Deemer
Jones Day
500 Grant Street
Pittsburg, Pennsylvania 15219-2514

Dear Ms. Deemer:

The purpose of this letter is to transmit to you the enclosed Unilateral Administrative Order ("Order") for the performance of the non time critical removal action (NTCRA) at the Columbia Nitrogen Site, in Charleston, Charleston County, South Carolina (the Site). This Order is issued by the U.S. Environmental Protection Agency, pursuant to Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9606, as amended (CERCLA). Pursuant to the Order, PCS Nitrogen, Incorporated, (Respondent) is required to provide access and perform the NTCRA for the response action at the Site, as described in the Revised Enforcement Action Memorandum dated August 8, 2011, and executed on September 8, 2011.

As you know, the EPA's efforts in the past ten (10) years to enter into an Administrative Agreement on Consent (AOC) with potentially responsible parties to conduct a non time critical removal were unsuccessful. Due to the extended delay in the initiation and performance of the non time critical removal action, there have been continued releases and threats of additional releases of hazardous substances at the Site. This Order provides the mechanism for Respondent to perform the NTCRA without further delay.

PCS Nitrogen, Incorporated may, within five (5) business days after the date this Order was signed by the EPA Region 4 Superfund Division Director, make an oral or written request for a conference with the EPA Region 4 to discuss the Order. Any request for such a conference shall include a statement regarding the extent to which Respondent is willing to comply with the terms of the Order. All telephone communications regarding a conference should be directed to Kim A. Jones, Assistant Regional Counsel, at (404) 562-9553. A verbal notice must be confirmed in writing within two days of the giving of such verbal notice. A written request for a conference may be delivered to Kim A. Jones by personal delivery other than certified mail. Any requested conference will occur at the offices of EPA Region 4 in the Atlanta Federal Center, located at 61 Forsyth Street SW, Atlanta, Georgia. All electronic communications regarding a conference should be directed to Ms. Jones at jones.kima@epa.gov.

The purpose and scope of the conference shall be limited to issues involving the implementation of the response actions required by this Order and the extent to which the Respondent intends to comply with the Order. It is not an evidentiary hearing and will not be a conference to challenge the Order or seek resolution of potential liability.

If Respondent fails to provide notice within the five-day period or provides notice which does not state its intent to comply with the Order, the Respondent will be deemed to have violated the Order.

If you have any questions regarding this letter or the Order, please contact Kim A. Jones at the telephone number or email address indicated above. Thank you for your immediate attention to this matter.

Sincerely,

Franklin E. Hill, Director
Superfund Division

Enclosures

cc: SCDHEC

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF: The Columbia Nitrogen Site Charleston, Charleston County, South Carolina U.S. EPA Region 4 CERCLA Docket No. _____ Ashley II of Charleston, LLC, J. Holcombe Enterprises, L.P., James H. Holcombe, J. Henry Fair, Jr., PCS Nitrogen, Inc., The Respondents	Proceeding under Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act, of 1980, as amended, 42 U.S.C. § 9606(a)

UNILATERAL ADMINISTRATIVE ORDER FOR REMOVAL RESPONSE ACTIVITIES

I. JURISDICTION AND GENERAL PROVISIONS

This Order is issued to the Respondents by the United States Environmental Protection Agency (EPA) pursuant to the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(a), as amended ("CERCLA"), and delegated to the Administrator of the United States Environmental Protection Agency by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, and further delegated to the Regional Administrators by EPA Delegation Nos. 14-14-B and re-delegated to the Region 4 Superfund Division Director by Regional Delegation 14-14-B.

This Order pertains to property located at1801 Milford Street at the western end of Milford Street on the east bank of the Ashley River in Charleston, Charleston County, South Carolina, the "Columbia Nitrogen Site" or "the Site."

This Unilateral Administrative Order for Non Time Critical Removal Action directs the Respondents to conduct response activities described in a Revised Enforcement Action Memorandum, executed on September 9, 2011, to abate an imminent and substantial endangerment to the public health, welfare or the environment that may be presented by the actual or threatened release of hazardous substances at or from the Site.

EPA has notified the State of South Carolina of this action pursuant to section 106(a) of CERCLA, 42 U.S.C. §9606(a).

II. PARTIES BOUND

This Order applies to and shall be binding upon the Respondents, their directors, officers, employees, agents, successors, and assigns. The Respondents are jointly and severally responsible for carrying out all activities required by this Order. Compliance or noncompliance by one or more the Respondents with any provision of this Order shall not excuse or justify noncompliance by any other Respondent. Any change in ownership or corporate status of the Respondents including, but not limited to, any transfer of assets or real or personal property shall in no way alter the Respondent's responsibilities under this Order.

The Respondents shall provide a copy of this Order to any prospective owners or successors before a controlling interest in the Respondents' property rights, stocks, or assets are transferred. The Respondents shall provide a copy of this Order to all contractors, sub-contractors, laboratories, and consultants retained to perform any Work under this Order, within five (5) days after the effective date of this Order, or on the date such services are retained, whichever date occurs later. The Respondents shall also provide a copy of this Order to each person representing any Respondent with respect to the Site or the Work and shall condition all contracts and subcontracts entered into hereunder upon performance of the Work in conformity with the terms of this Order. Notwithstanding the terms of any contract, the Respondents are responsible for ensuring that their contractors and subcontractors and agents perform the Work contemplated herein in accordance with this Order. The Respondents shall be responsible for any noncompliance with this Order,

With regard to the activities undertaken pursuant to this Order, each contractor and subcontractor and agent shall be deemed to be related by contract to the Respondents within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

Each Respondent that now or hereafter owns the Site shall, within 15 days after the effective date of this Order or within 15 days after acquiring title to such property, record a copy or copies of this Order in the appropriate office where land ownership and transfer records are filed or recorded, and shall ensure that the recording of this Order is indexed to the titles of each and every parcel at the Site owned by any Respondent so as to provide notice to third parties of the issuance and terms of this Order with respect to those parcels. The Respondent shall, within 10 days after recording the Order, send notice of such recording and indexing to EPA.

Not later than 60 days prior to any transfer of any real property interest in any property and/or parcel at the Site, the Respondent shall submit a true and correct copy of the transfer documents to EPA, and shall identify the transferee by name, principal business address and effective date of the transfer.

The Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. The Respondents shall be responsible for any noncompliance with this Order.

III. DEFINITIONS

Unless otherwise expressly provided in this Order, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the Appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Administrative Record" (AR) shall mean the body of documents EPA uses to form the basis for the selection of a response action. EPA has established an information repository which contains the AR for the Columbia Nitrogen Site at the Charleston County Main Library at 68 Calhoun Street in Charleston, South Carolina and at the EPA Region 4 Library in Atlanta, Georgia.

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

c. "Day" or "day" shall mean a calendar day unless expressly stated to be a working day. The term "working day" shall mean a day other than a Saturday, Sunday, or federal or state holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal or State holiday, the period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this Order as provided in Section XIX.

e. "The EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

f. "Enforcement Action Memorandum" shall mean the memorandum entitled, "Request for Non-Time Critical Removal Action Approval Columbia Nitrogen Site, Charleston, Charleston County, South Carolina" attached as Appendix A, dated October 5, 2005 and executed on October 11, 2005 providing for the initial Non Time Critical Removal Action at the Site.

g. "The EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

h. "Facility" shall have the meaning defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

i. "South Carolina Department of Health and Environment Control" ("SCDHEC") shall mean the State of South Carolina pollution control agency or environmental protection agency and any successor departments or agencies of the State.

j. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

k. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

l. "Non Time Critical Removal Action" or "Removal Action" shall mean response actions required by the Revised Enforcement Action Memorandum, the Scope of Work, and Removal Action Work Plan developed by the Respondents and approved by EPA pursuant to this Order, including any additional activities required by Sections XVII (Additional Removal Actions).

m. "Order" shall mean this Unilateral Administrative Order for Removal Response Activities and all appendices attached hereto. In the event of conflict between this Order and any appendix, this Order shall control.

n. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral or an upper or lower case letter.

o. "Parties" shall mean the United States of America and the Respondents.

p. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

q. "Revised Enforcement Action Memorandum" shall mean the memorandum entitled, "Revised Enforcement Action Memorandum Involving a Change in Scope Columbia Nitrogen Site, Charleston, Charleston County, South Carolina" attached as Appendix B, dated August 8, 2011 and executed on September 8, 2011 providing for a change in scope to the Time Critical Removal Action at the Site.

r. "The Respondents" shall mean those Parties identified in Appendix E.

s. "Scope of Work" or "SOW" shall mean the implementation document for the Non-Time Critical Removal Action, as set forth in Appendix C to this Order, and any modifications made thereto in accordance with this Order.

t. "Section" shall mean a portion of this Order identified by a Roman numeral.

u. "Site" shall mean the Columbia Nitrogen Site, encompassing approximately 36.67 acres, located at the western end of Milford Street on the east bank of the Ashley River in Charleston, Charleston County, South Carolina and depicted generally on the map attached as Appendix D. The Site shall include all areas to which hazardous substances and/or pollutants or contaminants have been deposited, stored, disposed of, placed, or otherwise come to be located.

v. "State" shall mean the State of South Carolina.

w. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA,

42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

x. "Work" shall mean all activities and obligations the Respondents are required to perform under this Order including, but not limited to, the SOW any schedules or plans required to be submitted pursuant thereto.

IV. FINDINGS OF FACT

1. The Columbia Nitrogen Site consists of approximately 36.67 acres, located at 1801 Milford Street, on the east bank of the Ashley River in Charleston, Charleston County, South Carolina and consists of a former fertilizer manufacturing facility which was operational from 1905 to 1972.

2. In general, the historical operations conducted at this facility involved the acidification of phosphate rock. Sulfuric acid was produced and stored onsite in lead-lined acid chambers before it was reacted with phosphate ore to produce "superphosphate." The resultant "superphosphate" was mixed with other components to produce agricultural grade fertilizer. The lead acid chambers were periodically cleaned and the wash down waters containing acid and soluble lead were discharged on to the ground surface and into nearby drainage ditches. Solid wastes included pyrite cinders containing lead and arsenic and spent packing material, both of which were possibly used as fill material on Site. Environmental impacts typically associated with former phosphate fertilizer manufacturing facilities included elevated levels of metals, particularly lead and arsenic in soil, groundwater and sediments, as well as, acidic pH conditions.

3. Planters Fertilizer & Phosphate ("Planters"), now known as Ross Development Corporation ("Ross") owned and operated the Site from 1906 to 1966. Therefore, Ross Development was the "owner" and/or "operator" of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. §9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

4. On June 30, 1966, Planters sold the property and the phosphate fertilizer manufacturing operations to Columbia Nitrogen Corporation ("CNC").

5. CNC was the "owner" and/or "operator" of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). Between 1966 and 1972, the Columbia Nitrogen Corporation operated a phosphate fertilizer granulation plant at the Site, thereby creating environmental contamination. Production of fertilizer on the Site ceased in 1972. CNC demolished several structures on the property from 1971 to 1982; however demolition debris remained on Site.

6. In 1985, CNC sold the Site to James H. Holcombe and J. Henry Fair ("Holcombe and Fair"). From 1985 to 2003 J. Holcombe Enterprises, L.P., James H. Holcombe, and J. Henry Fair, Jr. were the "owners" of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). Holcombe and Fair conducted

development and construction activities during their ownership that exacerbated contamination at the Site.

7. In October 1986, Columbia Nitrogen Corporation entered into an Acquisition Agreement with a newly created corporation that immediately thereafter assumed the Columbia Nitrogen Corporation name. Through the Agreement, the Columbia Nitrogen assets, as well as liabilities were transferred to the New Columbia Nitrogen Corporation. Andlinger and Company, a company that specialized in the acquisition of other businesses, created the New Columbia Nitrogen Corporation to purchase the acquired business and assets from Old Columbia Nitrogen Corporation. In September 1986, the new Columbia Nitrogen Corporation filed its Certificate of Incorporation in Delaware. In November 1986, the New Columbia Nitrogen Corporation was owned by Andlinger. In 1989, the New CNC merged with Fertilizer Finance, Inc. who changed its name to Arcadian Corporation and later that same year, Arcadian merged with PCS Nitrogen, Inc. (PCS).

8. In 1987, Holcombe and Fair sold three (3) acres of the Site to Max and Marlene Masts ("the Masts"). In 1988, the Masts conveyed their three parcels to Allwaste Tank Cleaning, Incorporated ("Allwaste"). In addition, Allwaste leased additional acreage from Holcombe and Fair beginning in 1991.

9. In 1991, Holcombe and Fair deeded a right of way of 1.28 acres to the City of Charleston.

10. In 1992 Robin W. Hood, II ("Hood") purchased two acres from Holcombe and Fair. Hood subsequently leased these parcels to Robin Hood Container Express, Incorporated (RHCE).

11. In 1997, James H. Holcombe transferred his property interest in the Site to J. Holcombe Enterprises, L.P.

12. In 2003, Holcombe and Fair sold approximately 28 acres consisting of approximately 19.71 acres of highland and 7.91 acres of tidal marsh to Ashley II of Charleston, LLC. ("Ashley").

13. In 2008, Ashley purchased Allwaste's three- acre parcel.

14. Ashley II of Charleston, LLC is the "owner" of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1). Ashley failed to exercise due care with respect to hazardous substances at the Site and exacerbated contamination at the Site. Ashley failed to prevent debris piles from accumulating on Site, failed to investigate the debris and remove the debris for over a year.

15. In 1990, a Site Assessment was performed at the Site indicating the presence of hazardous substances. In 1995, the EPA conducted a Preliminary Assessment/Site Inspection (PA/SI) which indicated elevated concentrations of lead and arsenic across the Site.

16. In 1998, SCDHEC conducted an Expanded Site Investigation ("ESI") and concluded that levels of lead, arsenic and mercury were contained in the surface soil, groundwater and sediment samples above screening levels.

17. From 1999 to 2002, the EPA conducted a Remedial Investigation/Feasibility Study ("RI/FS") to fully characterize the Site- related contamination. The RI/FS identified elevated concentrations of lead, and arsenic, and low pH in surface and subsurface soil at numerous locations across the Site, as well as in sediment samples located in surface water pathways. An ecological risk assessment was conducted with the RI/FS data which indicated potential adverse impacts to ecological receptors in nearby wetlands and the Ashley River.

18. The exposure scenarios include current adolescent trespassers, future workers, future construction workers, and future residents (child and adult). The findings from the Baseline Risk Assessment (BRA) conducted as a part of the RI/FS indicated that the shallow aquifer groundwater does not meet primary and secondary drinking water standards promulgated under the *Safe Drinking Water Act.* The chemicals of concern identified in the soil, subsurface soil, surface water, sediment, and groundwater that may cause harmful effects are arsenic and lead. Chemicals of concern identified in the groundwater that may produce harmful effects include aluminum, antimony, arsenic, beryllium, cadmium, chromium, copper, iron, lead, manganese, thallium, zinc and reduced pH. Based upon the results of the RI/FS, EPA made a determination that there is a release or threat of release into the environment of a hazardous substance, or release or threat of a release into the environment of a pollutant or contaminant which may present an imminent and substantial danger to public health or welfare, pursuant to CERCLA, 42 U.S.C. 9604(a)(1). Further, EPA has documented in the Revised Enforcement Action Memorandum, that there is a threat to public health or welfare or the environment as required by 40 C.F.R. Section 300.451(b) (1).

19. Pursuant to an Order and Opinion in the matter of Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., Civil Action No. 2:05-cv-2782 MBS, 2010 WL 4025885, issued on September 30, 2010, the Federal District Court found Ashley II of Charleston, LLC., PCS Nitrogen, Inc., Ross Development Corporation, J. Holcombe Enterprises, L.P., James H. Holcombe, J. Henry Fair, Jr. Robin Hood Container Express, Inc. and Robin H. Hood, to be liable Parties pursuant to CERCLA for contamination at the Columbia Nitrogen Site.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

Based on the Findings of Fact set forth above, and the Administrative Record supporting the Non Time Critical Removal Action, EPA has determined that:

1. The Columbia Nitrogen Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

2. The contamination found at the Site, as identified in the Findings of Fact above, includes "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

3. Each Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

4. Each Respondent is a liable party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of the Non Time Critical Removal Action and for response costs incurred and to be incurred at the Site.

a. The Respondent Ashley II of Charleston, LLC. is the "owner" and/or "operator" of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) and (a)(2) of CERCLA, 42 U.S.C. § 9607(a)(1) and (a)(2).

b. The Respondents J. Holcombe Enterprises, L.P., James H. Holcombe, J. Henry Fair, Jr. were the "owners" of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

c. The Respondent PCS Nitrogen Inc, successor to Columbia Nitrogen Corporation was the "owner" and/or "operator" of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

5. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C.§ 9601(22).

6. The conditions present at the Site constitute an imminent and substantial endangerment to the public health, welfare, or the environment because the risks calculated from site-related contamination in soils and groundwater were above applicable thresholds for each exposure scenario evaluated in the BRA. The exposure scenarios include current adolescent trespassers, future workers, future construction workers, and future residents (child and adult).

7. The actual or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health, welfare, or the environment within the meaning of section 106(a) of CERCLA, 42.U.S.C. §9606(a).

8. The Non Time Critical Removal Action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

9. This Site meets the criteria listed in Section 300.415 of the NCP for initiating a Non Time Critical Removal Action.

VI. ORDER

Effective Date: January 12, 2014

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, EPA hereby orders that the Respondents, jointly and severally, comply with the following provisions, including, but not limited to, all attachments to this Order, all documents incorporated by reference into this Order, and all schedules and deadlines in this Order, attached to this Order, arising out of this Order, or incorporated by reference into this Order, and perform the following

actions:

1. Notice of Intent to Comply

Each Respondent shall notify the EPA in writing within five (5) business days after the effective date of this Order of the Respondent's intent to comply with this Order. Failure of any Respondent to provide such notification within this time period shall be a violation of this Order by such Respondent.

2. Designation of Contractor, Project Coordinator, and Remedial Project Manager

The Respondents shall perform the Non Time Critical Removal Action themselves or retain one or more contractors to perform the Removal Action. The Respondents shall notify the EPA of the Respondents' qualifications or the name(s) and qualification(s) of such contractor(s) within 15 days of the effective date of this Order. The Respondents shall also notify the EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Non Time Critical Removal Action under this Order at least 15 days prior to commencement of such Removal Action. The proposed contractor(s) must demonstrate compliance with ANSI/ASOC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "the EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01-002, March 2001, Reissued May 2006) or equivalent documentation as determined by the EPA. The EPA retains the right to disapprove of any, or all, of the contractors and/or subcontractors retained by the Respondents, or of the Respondents' choice of themselves to do the Removal Action. If the EPA disapproves of a selected contractor or Respondent, the Respondents shall retain a different contractor or notify that it will perform the Removal Action itself within 15 calendar days following the EPA's disapproval and shall notify the EPA of that contractor's name or the Respondents' name(s) and qualifications within 10 business days of the EPA's disapproval.

Within 10 days after the effective date of this Order, the Respondents shall designate a Project Coordinator who shall be responsible for administration of all the Respondents' actions required by the Order. The Respondents shall submit the designated coordinator's name, address, telephone number, and qualifications to the EPA. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. The EPA retains the right to disapprove of any Project Coordinator named by the Respondents. If the EPA disapproves of a selected Project Coordinator, the Respondents shall retain a different Project Coordinator and shall notify the EPA of that person's name, address, telephone number, and qualifications within 10 business days following the EPA's disapproval. Receipt by the Respondents' Project Coordinator of any notice or communication from the EPA relating to this Order shall constitute receipt by all the Respondents.

The EPA has designated McKenzie Mallary of the Superfund Remedial and Site Evaluation Branch ("SRSEB"), as its On Scene Coordinator ("OSC"). Except as otherwise provided in this Order, the Respondents shall direct all submissions required by this Order to the OSC at the

offices of EPA Region 4 located in the Atlanta Federal Center, 61 Forsyth Street, Atlanta, Georgia 30303.

3. Components of the Removal Action

The Respondents shall perform the Removal Action as set forth in the Revised Enforcement Action Memorandum and the SOW. The general components of the Removal Action include:

A. Complete any remaining investigation activities necessary to fully characterize the nature and extent of Site-related soil, sediment, and groundwater contamination, including potential exposure pathways of concern.

B. Control the source of existing releases or threatened releases of hazardous substances into the environment from the Site in such a manner, and to the extent necessary, to achieve compliance with Federal and/or State cleanup standards;

C. Excavate and solidify contaminated soil and ship it off-site for disposal at an approved landfill and cap the area with a vegetative cover, or asphalt or concrete appropriate.

D. Use a chemical additive in the backfill for the excavated upland areas below the water table to address groundwater contamination. Use a chemical additive in all backfill used below the watertable as a means of buffering the groundwater pH and lowering levels of lead and arsenic;

E. Repair or replace hard features in the landscape if removed or damaged in the process of conducting the Removal Action. Hard features include, but are not limited to, fences, walls, retaining walls, monitoring wells, underground pipes/tanks, etc; and

G. Prepare a post-removal Site Control Plan during the removal process consistent with Section 300.415(k) of the NCP and OSWER Directive 9360.2-02. Once approved by the EPA, the Respondents shall implement such controls and provide the EPA with documentation of all activities related to the post removal site controls.

3.1 Work Plan and Implementation

Within 30 days after the Effective Date of this Order, the Respondents shall submit to the EPA for approval a draft Removal Action Work Plan based upon the requirements of the SOW and this UAO. The draft Removal Action Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Order. The EPA shall require preparation of a Quality Assurance Project Plan ("QAPP") as part of the Removal Action Work Plan except in circumstances involving emergency or non-complex removal work. The QAPP should be prepared in accordance with "the EPA Requirements for Quality Management Plans (QA/R-5)" (EPA/240/B-01/002, March 2001, Reissued May 2006), and "the EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/240/R-02/009, December 2002).

The EPA may approve, disapprove, require revisions to, or modify the draft Removal Action Work Plan. If the EPA requires revisions, the Respondents shall submit a revised draft Removal Action Work Plan within 15 days of receipt of the EPA's notification of the required revisions. The Respondents shall implement the revised Removal Action Work Plan as approved in writing by the EPA in accordance with the schedule approved by the EPA. Once approved, or approved with modifications, the revised Removal Action Work Plan, the schedule, and any subsequent modifications shall be fully enforceable under this Order. The Respondents shall notify the EPA at least 48 hours prior to performing any on-Site work pursuant to the EPA-approved Removal Action Work Plan. The Respondents shall not commence or undertake any Removal Action at the Site without the EPA approval.

3.3 Reporting

As set forth in Section 4 of the SOW, the Respondents shall submit a written progress report to the EPA concerning actions undertaken pursuant to this Order every 7th day after the date of receipt of the EPA's approval of the Removal Action Work Plan until termination of this Order, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

The Respondents who own or control property at the Site shall, at least 60 days prior to the conveyance of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Order and written notice to the EPA and the State of the proposed conveyance, including the name and address of the transferee. The party conveying such an interest shall require that the transferee comply this Order's Access to Property and Information Section.

3.4 Final Report.

As set forth in Section 4 of the SOW, within 30 days after completion of all Removal Action requirements under this Order, the Respondents shall submit for the EPA review and approval a final report summarizing the actions taken to comply with this Order. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports" and with "Superfund Removal Procedures: Removal Response Reporting – POLREPS and OSC Reports" (OSWER Directive No. 9360.3-03, June 1, 1994). The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Order, a listing of quantities and types of materials removed, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destinations of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the Removal Action (*e.g.*, manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

4. Access to Property and Information

Access to Property, Information and Institutional Controls: The Respondents shall provide and/or obtain access to the Site and off-site areas to which access is necessary to implement this Order and provide access to all records and documentation related to the conditions at the Site and the actions conducted pursuant to this Order. Such access shall be provided to the EPA employees, contractors, agents, consultants, designees, representatives, and State of South Carolina representatives. These individuals shall be permitted to move freely at the Site and appropriate off-Site areas in order to conduct actions which the EPA determines to be necessary. The Respondents shall submit to the EPA, upon receipt, the results of all sampling or tests and all other data generated by the Respondents or their contractor(s), or on the Respondents' behalf during implementation of this Order.

Where action under this Order is to be performed in areas owned by or in possession of someone other than the Respondents, the Respondents shall use their best efforts to obtain all necessary access agreements within 30 days after the effective date of this Order, or as otherwise specified in writing by the RPM. The Respondents shall immediately notify the EPA if after using their best efforts they are unable to obtain such agreements. The Respondents shall describe in writing their efforts to obtain access. The EPA may then assist the Respondents in gaining access, to the extent necessary to effectuate the Removal Actions described herein, using such means as the EPA deems appropriate. The EPA reserves the right to seek reimbursement from the Respondents for all costs and attorney's fees incurred by the United States in obtaining access for the Respondents.

5. Record Retention, Documentation, Availability of Information

The Respondents shall preserve all documents and information relating to Work performed under this Order, or relating to the hazardous substances found on or released from the Site, for 10 years following completion of the Removal Actions required by this Order. At the end of this 10-year period and 30 days before any document or information is destroyed, the Respondents shall notify the EPA that such documents and information are available to the EPA for inspection, and upon request, shall provide the originals or copies of such documents and information to the EPA. In addition, the Respondents shall provide documents and information retained under this Section at any time before expiration of the ten-year period at the written request of the EPA.

The Respondents may assert a business confidentiality claim pursuant to 40 C.F.R. § 2.203(b) with respect to part or all of any information submitted to the EPA pursuant to this Order, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). If no

such claim accompanies the information when it is received by the EPA, the EPA may make it available to the public without further notice to the Respondents.

6. Off-Site Shipments

The Respondents shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the On Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all shipments will not exceed 10 cubic yards.

The Respondents shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

The identity of the receiving facility and state will be determined by the Respondents following the award of the contract for the Removal Action. The Respondents shall provide information required by this Order as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, the Respondents shall obtain the EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. §300.440. The Respondents shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

7. Compliance with Other Laws

The Respondents shall perform all actions required pursuant to this Order in accordance with all applicable state and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order shall, to the extent practicable, as determined by the EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws. The Respondents shall identify ARARs in the Work Plan subject to the EPA approval. Except as provided in Section 121(e) of CERCLA, 42 U.S.C. 9621(e), and the NCP, no permit shall be required for any portion of the Work conducted entirely on the Site. Where any portion of the Work requires a federal or state permit or approval under CERCLA and the NCP, the Respondents shall submit, on a timely basis, applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

The Respondents shall include provisions in all contracts or subcontracts entered into for the performance of their obligations under this Order stating that such contractors or subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with all applicable laws and regulations. The Respondents shall provide a certification to the United States that such provision has been included in their contracts and subcontracts, within 15 days of final execution of each contract.

8. Emergency Response and Notification of Releases

If any incident, or change in Site conditions, during the actions pursuant to this Order causes or threatens to cause an additional release of hazardous substances from the Site or an endangerment to the public health, welfare, or the environment, the Respondents shall immediately take all appropriate action. The Respondents shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. The Respondents shall also immediately notify the RPM at (404) 562-8802 or, in the event of his unavailability, the Regional Duty Officer for EPA Region 4-- Emergency Response and Removal Branch, at (800) 562-8700, and the EPA Regional Emergency 24-hour telephone number at (800) 424-8802 to report the incident or Site condition(s). If the Respondents fail to take action, then the EPA may respond to the release or endangerment and reserve the right to pursue cost recovery.

In addition, in the event of any release of a hazardous substance from the Site, the Respondents shall immediately notify the OSC at (404) 562-8802 and the National Response Center at (800) 424-8802. The Respondents shall submit a written report to the EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

VII. AUTHORITY OF THE EPA ON SCENE COORDINATOR

The OSC shall be responsible for overseeing the proper and complete implementation of this Order. The OSC shall have the authority vested in an OSC by the NCP, 40 C.F.R. § 300.120, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC. The EPA and the Respondents shall have the right to change their designated OSC or Project Coordinator. The EPA shall notify the Respondents, and the Respondents shall notify the EPA 5 days before such a change is made. Notification may initially be made orally but shall be followed promptly by written notice.

VIII. ENFORCEMENT: PENALTIES FOR NONCOMPLIANCE

Violation of any provision of this Order may subject the Respondents to civil penalties of up to thirty-seven thousand five hundred dollars ($37,500) per violation per day, as provided in Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1). The Respondents may also be subject to punitive damages in an amount up to three times the amount of any cost incurred by the United States as a result of such violation, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Should the Respondents violate this Order or any portion hereof, the EPA may elect to carry out the required actions unilaterally, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604 and/or may seek judicial enforcement of this Order pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606.

IX. REIMBURSEMENT OF OVERSIGHT COSTS

The Respondents shall reimburse the EPA, upon written demand, for all response costs incurred by the United States, in overseeing the Respondents' implementation of the requirements of this Order or in performing any response action which the Respondents fail to perform pursuant to this Order. The EPA may submit to the Respondents on a periodic basis a demand for all response costs incurred by the United States with respect to this Order. Response costs may include, but are not limited to, costs incurred by the United States in overseeing the Respondents' implementation of the requirements of this Order and in performing activities as a part of the removal including any costs incurred while obtaining access for the Respondents. Costs shall include all direct and indirect costs, including but not limited to time and travel costs of EPA personnel and associate indirect costs, contractor costs, Site visits and inspections, discussions regarding disputes that may arise as a result of this Order and costs of performing any Work which the Respondents failed to perform pursuant to this Order. EPA's certified Agency Financial Management System summary data (SCOPRIOS Reports) or such other data summary as certified by EPA shall serve as the basis for payment.

EPA's demand for payment shall request that the Respondents, within 30 days of receipt of each EPA accounting, remit a certified or cashier's check for the amount of those costs. Checks shall be made payable to the "EPA Hazardous Substances Superfund" and shall include the name of the Site, the Site identification number, the account number and the title of this Order. Checks shall be forwarded to:

U.S. Environmental Protection Agency
Superfund Payments – Region 4
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

The Respondents shall send copies of each transmittal letter and check to Paula V. Painter, Environmental Protection Specialist, 61 Forsyth Street, SW, Atlanta, Georgia, 30303, and shall reference the Site/Spill ID Number and the EPA docket number for this action.

Interest at the rate established under Section 107(a) of CERCLA shall begin to accrue on the unpaid balance from the day of the original demand notwithstanding any dispute or objection to any portion of the costs.

X. RESERVATION OF RIGHTS

Except as specifically provided in this Order, nothing herein shall limit the power and authority of the EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent the EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring the Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law. The EPA also reserves the right to carry out any of the actions required by this Order itself irrespective of whether the Respondents have violated the Order. The EPA reserves the right to bring an action against the Respondents under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any response costs incurred by the United States related to this Order or the Site and not reimbursed by the Respondents.

XI. OTHER CLAIMS

By issuance of this Order, the United States and the EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of the Respondents. The United States or the EPA shall not be deemed a party to any contract entered into by the Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

This Order does not constitute a pre-authorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

Nothing in this Order shall constitute a satisfaction of or release from any claim or cause of action against the Respondents or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or the common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) and 9607(a).

XII. MODIFICATIONS

Modifications to any plan or schedule may be made in writing by the OSC or at the OSC's oral direction. If the OSC makes an oral modification, it promptly will be memorialized in writing; provided, however, that the effective date of the modification shall be the date of the OSC's oral direction. The rest of the Order or any other portion of the Order may only be modified in writing by signature of the Regional Administrator of the EPA Region 4 or her designee.

If the Respondents seek permission to deviate from any approved work plan or schedule, the Respondents' Project Coordinator shall submit a written request to the EPA for approval outlining the proposed modification and its basis.

No informal advice, guidance, suggestion, or comment by the EPA regarding reports, plans, specifications, schedules, or any other submissions required from by the Respondents shall relieve the

Respondents of their obligation to obtain such formal approval as may be required by this Order, and to comply with all requirements of this Order unless it is in accordance with this Section.

XIII. NOTICE OF COMPLETION OF WORK

When the EPA determines, after the EPA's review of the Final Removal Action Report, that all removal actions have been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including, post-removal site controls, or record retention, the EPA will provide written notice to the Respondents. If the EPA determines that any removal actions have not been completed in accordance with this Order, the EPA will notify the Respondents, provide a list of the deficiencies, and require that the Respondents modify the Work Plan to correct such deficiencies. The Respondents shall implement the modified and approved Work Plan and shall submit a modified Final Removal Action Report in accordance with the EPA notice. Failure by the Respondents to implement the approved modified Work Plan shall be a violation of this Order.

XIV. ACCESS TO ADMINISTRATIVE RECORD

The Administrative Record supporting this Removal Action is available for review at the Charleston County Main Library, 68 Calhoun Street, Charleston, South Carolina and the offices of EPA Region 4 in the EPA Library located at 61 Forsyth Street, Atlanta, Georgia. Upon request by EPA, the Respondents must submit to EPA all documents related to the selection of the response action for possible inclusion in the administrative record file.

XV. OPPORTUNITY TO CONFER

Within five (5) business days after issuance of this Order, the Respondents may request a conference with EPA. Any such conference shall be held within 10 days prior to the Effective Date unless extended by agreement of the parties. At any conference held pursuant to the request, the Respondents may appear in person or be represented by an attorney or other representative. This conference shall take place at the offices of EPA Region 4, located in the Atlanta Federal Center at 61 Forsyth Street, SW, Atlanta, Georgia 30303.

The purpose and scope of the conference shall be limited to issues involving the implementation of the response actions required by this Order and the extent to which the Respondents intend to comply with this Order. This conference is not an evidentiary hearing, does not constitute a proceeding to challenge this Order, and does not give the Respondents a right to seek review of this Order. Requests for a conference, or any written submittal under this paragraph, shall be directed to Kim A. Jones, Assistant Regional Counsel, at (404) 562-9553, 61 Forsyth Street, S.W., Atlanta, Georgia, 30303.

XVI. INSURANCE

At least ten (10) days prior to commencing any on-Site work under this Order, the Respondents shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of seven million two hundred thousand ($7,200,000) dollars, combined single limit. Within the same time period, the Respondents shall provide the EPA with certificates of such insurance and a copy of each insurance policy. If the Respondents demonstrate by evidence satisfactory to the EPA that any contractor or subcontractor maintains insurance equivalent to that

described above, or insurance covering the same risks but in a lesser amount, then the Respondents need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XVII. ADDITIONAL REMOVAL ACTIONS

If the EPA determines that additional removal actions not included in an approved work plan are necessary to protect public health, welfare, or the environment, the EPA will notify the Respondents of that determination. Unless otherwise stated by the EPA, within 30 days of receipt of notice from the EPA that additional removal actions are necessary to protect public health, welfare, or the environment, the Respondents shall submit for approval by the EPA a Work Plan for the additional removal actions. The plan shall conform to the applicable requirements of Section VI, Paragraph 3.1 (Work Plan and Implementation) of this Order. Upon the EPA's approval of the plan pursuant to Section VI, Paragraph 3.1 of this Order, the Respondents shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the OSC's authority to make oral modifications to any plan or schedule pursuant to Section XII (Modifications).

XVIII. SEVERABILITY

If a court issues an order that invalidates any provision of this Order or finds that the Respondents have sufficient cause not to comply with one or more provisions of this Order, the Respondents shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

XIX. EFFECTIVE DATE

This Order shall be effective thirty (30) days after this Order is signed by the Region 4 Superfund Division Director. All times for performance of ordered activities shall be calculated from this effective date. If a conference is requested, this order shall be effective on the tenth (10^{th}) day following the day of the conference or the thirtieth day after signature whichever is later. When computing any period of time under this Order, if the last day would fall on a Saturday, Sunday, or legal holiday, the period shall run until the next working day.

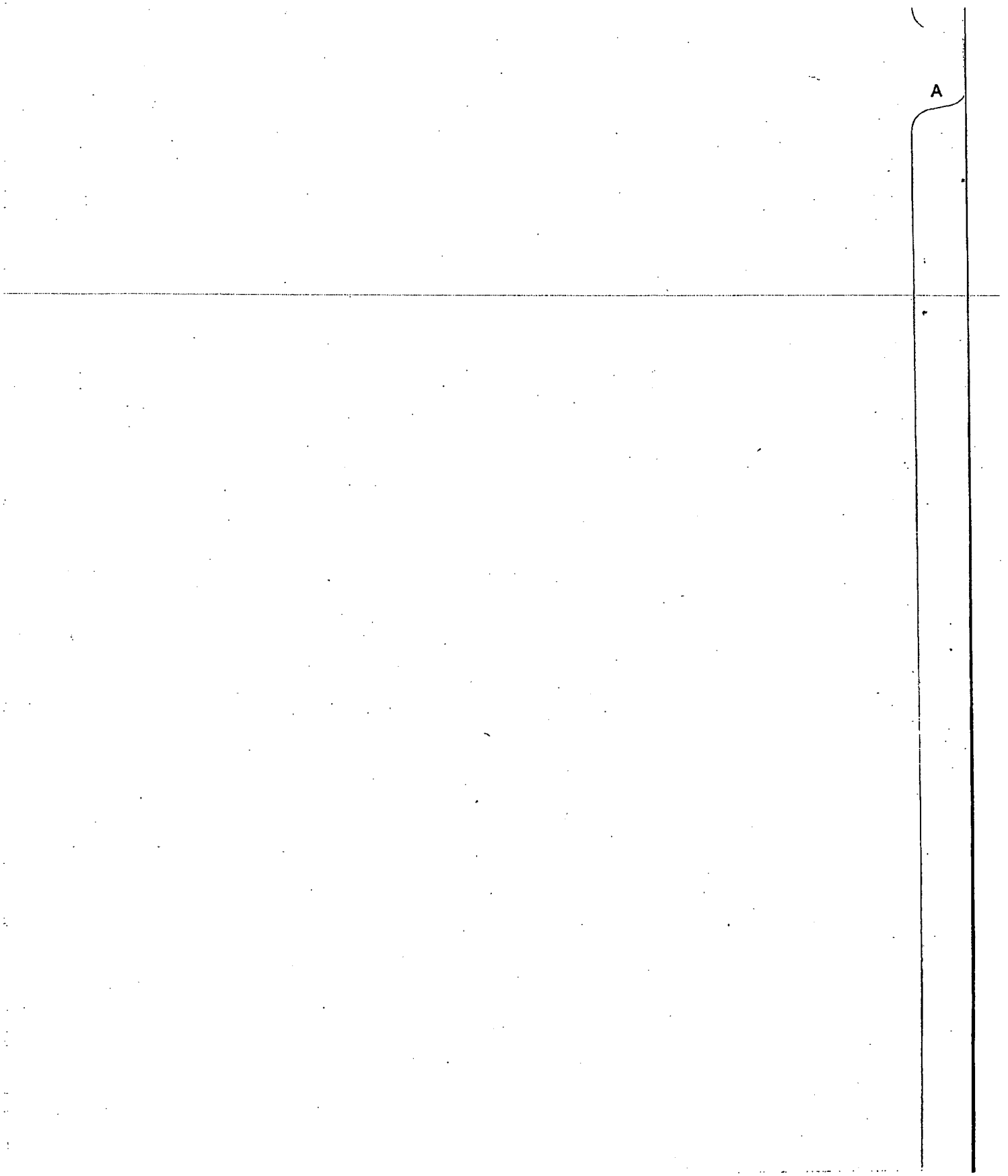
IT IS SO ORDERED

BY: _____
Franklin E. Hill, Director
Superfund Division

DATE: 12/11/2013

EFFECTIVE DATE: _____

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
SAM NUNN ATLANTA FEDERAL CENTER
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-3104

August 8, 2011

4SD-SRSEB

REVISED ENFORCEMENT ACTION MEMORANDUM

SUBJECT: Revised Enforcement Action Memorandum Involving a Change in Scope
Columbia Nitrogen Site, Charleston, Charleston County, South Carolina

FROM: McKenzie Mallary, Remedial Project Manager
Superfund Remedial and Site Evaluation Branch

TO: Franklin E. Hill, Director
Superfund Division

I. PURPOSE

The purpose of this Revised Action Memorandum, pursuant to Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), is to request a change in the scope regarding the response actions to address the soil, groundwater, and sediment contamination during the upcoming PRP-lead, Non-Time-Critical Removal Action (NTCRA), described herein for the Columbia Nitrogen Site (the "Site"), located in Charleston, South Carolina.

The 2005 Action Memorandum included a soil response action that would have involved excavating an estimated 31,390 cubic yards (yd^3) of soil, slag, and debris associated with the former fertilizer manufacturing with levels of lead and arsenic contamination exceeding 895 parts-per-million (ppm) and 373 ppm, respectively, followed by on-site treatment, if required, and off-site disposal. In addition, an estimated 9,500 yd^3 of soil contamination with levels of lead between 400 and 895 ppm, and levels of arsenic between 22.5 and 373, respectively, would have been excavated, consolidated on-site in the soil excavation zones, and capped, in order to accommodate the future redevelopment of the Site.

The 2005 Action Memorandum included a groundwater response action that would have involved installing groundwater extraction trenches, and using pump-and-treat technology to extract the contaminated groundwater. Once the groundwater was extracted and treated, it would have been discharged into the City of Charleston's publicly-owned treatment works (POTW).

The 2005 Action Memorandum included a sediment response action that would have involved excavating an estimated 800 yd^3 of contaminated sediments identified as Category 3 and 4 Mean ERM Quotients, and either consolidating them into the soil excavation zones on-site beneath a cap, or transporting them off-site for disposal. In addition, sediments with Category 2 Mean ERM Quotients with lead and/or arsenic concentrations exceeding their respective ERM values would have been evaluated for removal.

In lieu of using the soil, groundwater, and sediment response actions in the 2005 Action Memorandum, as described in the previous paragraphs, EPA proposes using the preferred response actions described in Section V. of this document. The change in scope is based on the experience that EPA and the South Carolina Department of Health and Environmental Control (SCDHEC) have gained addressing similar contamination at other former phosphate fertilizer sites in Charleston, SC, since the 2005 Action Memorandum was signed.

Future land use restrictions were required in the October 2005 Action Memorandum. In addition to the future land use restrictions, a Post-Removal Site Control Plan (PRSCP) will be developed during the NTCRA to document the requirements for post-removal groundwater monitoring, erosion control measures, and periodic site inspections.

II. SITE CONDITIONS AND BACKGROUND

The EPA Site ID# is 045N; the CERCLIS ID# for the Site is SC0001040393. Several sampling investigations have been conducted at the Site, including a Preliminary Assessment/Site Inspection (PA/SI), and Expanded Site Inspection (ESI), and a Remedial Investigation/Feasibility Study (RI/FS). The following paragraphs provide more detail on the history of the Site.

A. SITE DESCRIPTION

1. Removal Site Evaluation

From 1905 to 1966, Planters Warehouse and Fertilizer Company (also known as Ross Industrial Products) manufactured phosphate fertilizer at the Site. The Planters Warehouse and Fertilizer Company and the property were sold to Columbia Nitrogen Corporation (CNC) in 1966. CNC operated a fertilizer plant at the Site from 1966 to 1972. All on-site structures were demolished in 1980. In 1985, James H. Holcombe and J. Henry Fair (Holcombe and Fair) purchased the property from CNC. In 1986, CNC was sold to Arcadian Corporation, which later became the PCS Corporation. During their ownership until 2003, Holcombe and Fair leased the property to container-storage companies. Large portions of the Site were covered in crush-and-run limestone in 1998. On November 24, 2003, Holcombe and Fair sold the property to Ashley II of Charleston, SC.

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In September 1990, Holcombe and Fair conducted a subsurface soil investigation as part of a Property Transaction Site Assessment for the Site. In March 1995, EPA collected sediment samples to prepare a Preliminary Assessment/Site Inspection (PA/SI) Report. In August 1998, an Expanded Site Inspection (ESI) sampling investigation was conducted by the South Carolina Department of Health and Environmental Control (SCDHEC). The ESI indicated contamination exists at the Site which poses a potential threat to human health and the environment. From 1999 to 2001, EPA conducted a Phase I and II RI to fully characterize the contamination associated with former phosphate fertilizer manufacturing at the Site. A human health risk assessment and ecological assessment were conducted as part of the RI/FS process.

2. Brief Background on the Phosphate Fertilizer Manufacturing Using the Acid Chamber Process

The production of phosphate fertilizers generally involved reacting phosphate ores with sulfuric acid to produce phosphoric acid, the building block of nitrogen-phosphorus-potassium (also known as N-P-K) agricultural fertilizers.

The production process included two components: 1) the production of sulfuric acid using the lead acid chamber process, and 2) the granulation, bagging, and storage of the fertilizer. During the early years of the phosphate fertilizer industry, pyrite ore was used as the source of sulfur. The pyrite ore was crushed and roasted, creating sulfur trioxide gas. The sulfur trioxide gas (SO) was reacted with oxygen (O_2) to create sulfur trioxide gas (SO_3).

Sulfuric acid was produced as water (H_20) flowing downward through a Glover Tower came into contact with the rising sulfur trioxide gas ($S0_3$). The sulfuric acid (H_2SO_4) was stored on-site in large acid chambers insulated with sheet lead. Ground phosphate rock and sulfuric acid were then mixed in a reaction vessel to create phosphoric acid. The phosphoric acid mixture was transferred to a storage area for curing. Once cured, the phosphoric acid was mechanically granulated and mixed with other components such as ammonia for nitrogen and potash for potassium to produce the fertilizer.

Environmental impacts typically associated with former phosphate fertilizer manufacturing facilities include elevated levels of metals, particularly lead and arsenic in soil, groundwater, and sediment, as well as acidic pH conditions. During periodic cleaning of the lead chambers, it is believed that wash-down water containing acid and soluble lead was flushed onto the ground surface. Cinders from the pyrite-roasting process were frequently used as on-site fill material. The cinders have a distinctive reddish or magenta color, and have been found to contain elevated levels of inorganic constituents, including arsenic.

3. Physical Location

The former Columbia Nitrogen facility (the "Site") is located at 1801 Milford Street at the end of Milford Street in Charleston, South Carolina.

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The geographic coordinates of the Site are 32°49'36" North Latitude and 79°57'36" West Longitude (USGS, 1983). The 43-acre Site is bordered to the north by the South Carolina Electric and Gas (SCE&G) Hagood Station, to the south by the Koppers Site, to the east by an area used for industrial purposes, and to the west by the Ashley River. The western margins of the Site property between the upland soils and the Ashley River are a saltwater marsh wetland. All surface water run-off from the Site drains directly into the wetland and the Ashley River.

4. Site Characteristics

As of December 2010, the Site property was being used by Robin Hood Container Express, Inc.; Philip Services Corporation (PSC), a tanker-cleaning company; Horizon Tank Lines, on a sub-lease to PSC; and the City of Charleston Commissioner of Public Works. Several container companies were also using western portions of the property.

5. Release or Threatened Release of a Hazardous Substance or Contaminant into the Environment

The following bullets provide a summary of the analytical results from the Phase I and Phase II RI, and document the release or threatened release of a hazardous substance or contaminant into the environment:

A. A total of 58 surface and subsurface soil samples were collected and analyzed during the Phase I RI; a total of 18 surface soil and 23 subsurface soil samples were collected and analyzed during the Phase II RI; soil contamination was identified from the land surface to six feet below land surface;

B. lead concentrations in soil were identified during the RI up to 28,000 ppm; arsenic concentrations in the soil were identified up to 1,800 ppm;

C. pH values in surface soil were identified during the RI as low as 3 standard units; pH values in subsurface soil were identified as low as 1.1 standard units;

D. groundwater samples were collected from 18 monitoring wells during the RI; groundwater samples were also collected from 58 temporary wells; groundwater contamination was identified from the top of the shallow aquifer down to 30 feet below land surface;

E. arsenic concentrations in groundwater were identified during the RI up to 2,600 parts-per-billion (ppb), while lead concentrations were identified up to 690 ppb; pH values in groundwater ranged from 2.4 to 4 standard units;

F. a total of 16 surface water and 22 sediment samples were collected during the Phase I RI; a total of 19 surface water and 28 sediment samples were collected during the Phase II RI;

G. Arsenic concentrations in surface water and sediment were identified up to 2,200 ppb and 4,700 ppb, respectively, during the Phase I and Phase II RI; lead concentrations were identified in surface water and sediment up to 3,600 ppb and 7,900 ppb, respectively, during the Phase I and Phase II RI;

6) **National Priorities List Status**

The Site is not currently on the National Priorities List (NPL). EPA considers this Site to be NPL-equivalent.

7) **Maps, Pictures, and Other Graphic Materials**

Maps, pictures, and other graphic materials have been produced during previous investigations at the Site, including the RI/FS, and are included in the Site file.

8) **Other Actions to Date**

A pilot study was conducted at the Site to determine if a Permeable Reactive Barrier (PRB) would be a viable response action to address groundwater contamination at the Site. Analytical results collected during the pilot study were inconclusive as to the effectiveness of the PRB in addressing the groundwater contamination at the Site.

In 2004, General Engineering & Environmental LLC, on behalf of the property owner Ashley II, completed pre-design data collection activities at the Site. The objectives of the pre-design data collection effort was to increase the amount of data, thereby better defining the nature and extent of arsenic and lead contamination at the Site. The work was conducted from August 30, 2004 through September 10, 2004, and the analytical results were compiled in a report titled "Pre-Design Site Characterization Report, Columbia Nitrogen Site, Milford Street, Charleston, South Carolina, November 1, 2004".

There are no other response actions currently being conducted at the Site.

9) **State and Local Authorities' Roles**

The SCDHEC, Charleston County, and City of Charleston officials were provided an opportunity to participate in the RI/FS process, including the selection of the cleanup alternatives for the NTCRA. The SCDHEC provided oversight during the RI/FS sampling activities, and participated in technical meetings with EPA.

EPA will continue to coordinate with State, local, and county officials throughout the removal action process. Relevant information regarding Site activities will be made available to local authorities and members of the general public.

II. THREATS TO HUMAN HEALTH OR WELFARE OR THE ENVIRONMENT AND STATUTORY AND REGULATORY AUTHORITIES

According to the criteria listed in Section 300.415 of the National Contingency Plan (NCP), the Site meets the requirements for initiating a NTCRA. Specifically, these criteria include the following determinations:

A. Threats to Public Health and Welfare

Using the soil data collected during the RI/FS, a human health risk assessment was performed to assess the potential risks, or potential threats, to human health. Arsenic was identified in surface and subsurface soil at concentrations up to 1,800 ppm, while lead was identified in soil at concentrations up to 28,000 ppm. These levels of arsenic and lead contamination exceed the industrial-based cleanup criteria of 27 ppm and 895 ppm, based on the potential for direct contact exposure. In addition, these elevated levels of arsenic and lead in soil continue to be a source of groundwater contamination at the Site.

The Site property has been used for industrial purposes in the past. However, based on previous discussions with the current property owner, the expected future land use of the Site may involve mixed residential and commercial use. If no action is taken to address the soil contamination at the Site, the potential risks to future workers and/or residents from direct contact exposure to elevated levels of arsenic and lead in soil would remain. These Site-related conditions meet the requirements for initiating a NTCRA, based on the criteria in the NCP, Section 300.415(b)(2)(i), (i.e., "Actual or potential exposure to nearby populations, animals, or the food chain from hazardous substances or pollutants or contaminants.")

B. Threats to the Environment

There are several migration pathways for site-related contamination in the upland source areas to be released into the wetlands and into the Ashley River. One of the migration pathways involves direct surface water run-off from the upland source areas into the wetlands and Ashley River. Although it has not been confirmed, a second migration pathway may involve the discharge of shallow groundwater contamination into the wetlands and Ashley River.

An ecological risk assessment was performed during the RI/FS to assess the potential risks, or potential threats, to the ecological receptors in the wetlands and Ashley River. As part of the ecological assessment, Mean Effects-Range Median (ERM) Quotients were calculated for the sediment samples in order to assess the potential toxicological significance of the complex mixture of chemicals found in the sediment. The Mean ERM Quotients were calculated by dividing the individual concentrations of 25 chemical constituents in the sediment by their respective ERM values. As the numerical value of the Mean ERM Quotient increases from 1 to 4, the toxicity of the sediment increases, as follows: Category 1, not toxic; Category 2, possibly toxic; Category 3, marginally toxic; and Category 4, highly toxic.

Category 2, 3 and 4 Mean ERM Quotients were calculated for sediment samples collected in the wetland areas located between the upland source areas at the Site and the Ashley River. The sediment with Category 4 Mean ERM Quotients is considered to be highly toxic, and has a strong likelihood of causing adverse impacts to ecological receptors in the wetlands. Sediment with Category 3 Mean ERM Quotients is considered to be marginally toxic, with the possibility of causing adverse impacts to ecological receptors in the wetlands. The presence of sediment with elevated Mean ERM Quotients meets the requirements for initiating a NTCRA, based on the criteria in the NCP, Section 300.415(b)(2)(iv), (i.e., "High levels of hazardous substances or pollutants or contaminants largely at or near the surface, that may migrate."). Sediment with Category 2 Mean ERM Quotients is considered possibly toxic.

In addition to developing the Mean ERM Quotients, site-specific toxicity testing was conducted in and around the tidal pool area during the ecological assessment which indicated adverse effects to grass shrimp, an important part of the food chain. These Site-related conditions meet the requirements for initiating a NTCRA, based on the NCP, Section 300.415(b)(2)(i), (i.e., "Actual or potential exposure to hazardous substances or pollutants by nearby populations or the food chain".) One of the conclusions in the ecological assessment is that low pH or acidic conditions in sediment at the Site may have a toxic effect on the grass shrimp.

IV. ENDANGERMENT DETERMINATION

Actual or threatened releases of hazardous substances from the Site, if not addressed with the NTCRA selected in this revised Action Memorandum, may present an imminent and substantial endangerment to public health, welfare, and the environment.

V. PROPOSED RESPONSE ACTIONS

A. Brief Description of Response Actions

The proposed response actions include a combination of technologies to address the soil, groundwater, and sediment contamination at the Site.

The proposed response actions have been modified from the response actions in the 2005 Action Memorandum, based on the knowledge and experience EPA and SCDHEC have gained in addressing contamination at other former phosphate fertilizer sites in Charleston, SC.

1. Soil Response Action

An estimated 35,337 cubic yards (yd^3) of soil, pyrite slag, and debris associated with the former fertilizer manufacturing with concentrations of arsenic exceeding 27 ppm and/or concentrations of lead exceeding 895 ppm, will be treated on-site, if required, using a chemical mixture to

encapsulate, solidify, and/or chemically modify the arsenic and lead, and reduce its leachability, prior to being transported off-site for disposal at an approved landfill.

These removal action levels have been approved by EPA and SCDHEC to address similar contamination at other former phosphate sites in Charleston, SC, and are based on future industrial land use. Based on the successful treatment of lead- and arsenic-contaminated soil at these other former phosphate fertilizer sites, it is assumed that all treated soil will be disposed off-site as non-hazardous.

Consistent with RCRA ARARs and U.S.EPA's Guidance for Demonstrating Compliance with the Land Disposal Restrictions (LDR) Alternative Soil Treatment Standards, the soil will be treated to reduce lead and arsenic below the Toxicity Characteristic Leaching Procedure (TCLP) regulatory level of 5 mg/L (ppm), and to meet the "ten-times-the-universal-treatment-standard" concentration as an alternative LDR treatment standard for soil (specifically, 10 x 5.0 mg/kg arsenic = 50 mg/kg arsenic, and 10 x .75 mg/kg lead = 7.5 mg/kg lead).

Soil excavation limits will be determined based on both visual examination, and with confirmation sampling prior to backfilling. The amount of confirmation sampling will be determined during the Removal Design process, and will be based on the size of the excavation.

Once the excavations of the soil, slag, and debris are completed, all excavated areas will be backfilled with clean material, graded to original grade, and re-vegetated.

A treatability study will be conducted, if deemed necessary, to determine the most effective mixture of chemicals needed to reduce the arsenic and lead TCLP concentrations in the soil to non-hazardous levels. After stabilization/solidification, treated soil will be segregated into 500-ton stockpiles for confirmation sampling. The confirmation sampling will be conducted as follows:

- One composite sample from five discrete locations within each stockpile will be collected and analyzed for TCLP arsenic and lead.
- The volumes of soil estimated for off-site disposal will be verified based on sampling and analysis of stockpiled soil, followed by profiling as necessary, to meet the requirements of the disposal facility.
- Soil with post-treatment TCLP arsenic and lead concentrations less than 5mg/L and that meets the alternative LDR treatment standards for contaminated soil, will be transported off-site for disposal as non-hazardous waste.

- Soil with post-treatment TCLP concentrations greater than or equal to 5 mg/L and that does not meet the alternative LDR treatment standard, will be re-treated and re-sampled.

- If the soil that is treated a second time and continues to exceed the 5 mg/L regulatory limit, and does not meet the alternative treatment standard, the treated soil will be transported off-site for disposal at a hazardous waste landfill.

- Clean backfill will be used to fill the excavated area. In addition, several on-site areas determined to have elevated levels of poly-nuclear aromatic hydrocarbons (PAHs) will also be excavated and transported off-site for disposal.

- Following excavation, all excavated areas (upland areas and wetlands), will be backfilled with clean material, graded to original contours, and re-vegetated, with the goal of restoring all areas affected by the Removal Action to their pre-removal grades to the maximum extent possible.

Consistent with the specified ARARs, including the South Carolina Storm Water and Sediment Reduction Act, a storm-water runoff and marsh sediment control plan will be required to ensure that the NTCRA is designed to minimize storm-water runoff during the NTCRA. Likewise, a dust emissions control plan will be required to ensure that appropriate measures are taken during the NTCRA to minimize fugitive dust emissions.

2. Groundwater Response Action

The preferred groundwater response action involves adding a chemical amendment to the backfill in the excavated upland areas below the water table. The objective of adding the chemical amendment to the backfill is to buffer the pH of the groundwater, and reduce the levels of lead and arsenic.

This is the preferred response action because it is considered to be a more efficient and cost-effective method of addressing groundwater than using groundwater extraction trenches and pump-and-treat technology.

One of the objectives of the groundwater response action is to reduce the potential for site-related groundwater contamination discharging into nearby wetlands and the Ashley River, and potentially impacting the ecological receptors in the food chain.

Although it is unlikely that the groundwater at the Site would be used for drinking water, another objective of the groundwater response action is to reduce levels of lead and arsenic in groundwater to the State and Federal drinking water standards, i.e., the chemical specific ARARs.

The groundwater response action is the preferred action to address groundwater contamination for the following reasons:

- The groundwater response action would reduce the potential for human exposure to contaminated groundwater and restore groundwater as a potential drinking water source;

- The groundwater response action would reduce the potential for discharge of shallow groundwater contamination into the wetlands and Ashley River;

- The use of a chemical additive in the backfill in the excavated areas below the water table offers a balance between effectiveness and cost; the cost would be significantly lower than the cost estimate for the installing extraction trenches and using pump-and-treat technology;

- The preferred response action is compatible with the preferred soil and sediment response actions, and is consistent with the expected future land use at the Site; and

- Using a chemical additive in the backfill, in combination with future land use controls, and groundwater monitoring are considered technically feasible because these technologies have been used at other former phosphate fertilizer sites, and the chemicals and qualified contractors are readily available.

3. Sediment Response Action

The preferred sediment response action involves excavating and removing an estimated 2,300 cubic yards of contaminated sediments in the wetland area referred to as the "tidal pool" and surrounding areas with Category 3 and 4 ERM Quotients. In addition, sediments with Category 2 Mean ERM Quotients with lead and/or arsenic levels exceeding their respective ERM values will be evaluated for excavation and removal.

Once excavated, the contaminated sediments will be treated on-site, if required, and the treated sediments will be stockpiled on-site for verification sampling.

The purpose of the verification sampling is to ensure all excavated sediments meet the RCRA LDR Treatment Standards prior to being transported off-site for disposal at an approved landfill. Restoration of the wetlands will involve backfilling and re-vegetation of the areas affected by the NTCRA. Excavating and removing contaminated sediments with Category 3 and 4 Mean ERM Quotients, evaluating sediments with Category 2 Mean ERM Quotients, and restoring the wetlands, is the preferred sediment response action, for the following reasons:

- excavating and removing the contaminated sediments would reduce the potential for human exposure to elevated levels of lead and arsenic in sediment;

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- excavating and removing the contaminated sediments would reduce the potential for adverse impacts to ecological receptors in the wetlands and nearby marine ecosystem;

- the sediment alternative offers a balance between effectiveness and cost: the combination of excavation, on-site treatment (if required), and off-site disposal, should provide both short- and long-term protection of human health and the environment, and the cost of the preferred sediment alternative should be reasonable for the level of protection provided;

- the combination of sediment excavation, on-site treatment, and off-site disposal is consistent with the preferred soil and groundwater response actions for the Site;

- the preferred sediment response action is considered technically feasible because these same technologies are being used to address similar contamination at other former phosphate fertilizer sites located in Charleston, SC; and

- the materials, equipment, and qualified commercial contractors are readily available to conduct the work.

Following treatment and verification sampling, the treated sediments will be transported off-site for disposal at an approved landfill.

4. Post Removal Site Control Plan

An EPA-approved, Post-Removal Site Control Plan (PRSCP) will be required before the completion of the NTCRA. The PRSCP will include a detailed groundwater monitoring plan to monitor groundwater quality at the Site following the completion of the soil and sediment excavation and backfilling. The purpose of the groundwater monitoring is to demonstrate the effectiveness of the NTCRA in reducing levels of lead and arsenic in groundwater.

The PRSCP will also include a detailed erosion control plan that will be required to ensure adequate erosion control measures are in place.

Groundwater monitoring will continue for a minimum period of 5 years, or for the length of time required to demonstrate to EPA and SCDHEC that the groundwater removal action levels have been met. The SCDHEC must approve the installation of new monitoring wells or the abandonment of existing wells during the NTCRA.

Future land use controls will be required on the property deed to prohibit the use of contaminated groundwater at the Site, and to prohibit any activities at the Site which may have a negative impact on the integrity of the NTCRA.

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Details on the future land use controls will be included in the PRSCP.

5. ARARs

In accordance with 40 *Code of Federal Regulations* (C.F.R.) § 300.415(j) of the National Oil and Hazardous Substances Pollution Contingency Plan on-site removal actions conducted under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, are required to attain 'applicable' or 'relevant and appropriate' requirements (ARARs) to the extent practicable, considering the exigencies of the situation. In determining whether compliance with ARARs is practicable, the lead agency may consider appropriate factors, including: 1) the urgency of the situation; and 2) the scope of the removal action. ARARs include only federal and state environmental or facility siting laws/regulations; they do not include occupational safety or worker protection requirements. Compliance with OSHA standards is required by 40 C.F.R. § 300.150. For purposes of ease of identification, the EPA has created three categories of ARARs: Chemical-, Location- and Action-Specific. Refer to Appendix A. Additionally, per 40 C.F.R. § 300.405(g)(3), other advisories, criteria, or guidance may be considered in determining remedies [to-be-considered (TBC) category].

6. Project Schedule

EPA anticipates that the NTCRA will be initiated at the Site in 2012, and completed in 2013.

7. Estimated Total Cost

The NTCRA will be performed and funded by the potentially responsible parties (PRPs) and current property owners, and overseen by EPA and SCDHEC.

VII. OUSTANDING POLICY ISSUES

In summary, the preferred response actions to address soil, groundwater, and sediment contamination at the Site will involve excavating contaminated soil and sediment, treating the soil and sediment, if required, to meet the RCRA LDR Treatment Standards, and either transporting the treated soil and sediment off-site for disposal, or consolidating it in the soil excavation zones on-site, and capping with imported clean backfill. A chemical additive will be added to the backfill used in the excavated areas below the water table to reduce lead and arsenic levels in groundwater. The NTCRA will attain, to the maximum extent practicable, all of the applicable and relevant and appropriate requirements (ARARs) identified for this Site. The ARARs tables are included at the end of this document as Attachment A.

Institutional Controls (ICs) in the form of future land use restrictions will be required on the property deed to prohibit use of contaminated groundwater, and other measures deemed appropriate as outlined in the Post-Removal Site Control Plan (NRSCP).

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A Post Removal Site Control Plan will be required which describes the activities that are necessary once the NTCRA construction activities have been completed. Those activities will include, but not be limited to, a groundwater monitoring plan and storm water management and erosion control plan.

Groundwater monitoring will be required on an annual basis for a minimum of five years, or for the length of time required to demonstrate to EPA and SCDHEC that the groundwater removal action levels have been met, in order to monitor the lead and arsenic levels and pH, and determine the effectiveness of the NTCRA.

IX. RECOMMENDATION

This decision document sets forth the preferred response actions proposed for the NTCRA at the Columbia Nitrogen Site located in North Charleston, Charleston County, South Carolina. It has been developed in accordance with CERCLA, as amended, and is consistent with the NCP. The NTCRA will attain, to the maximum extent practicable, all of the applicable and relevant and appropriate requirements (ARARs) identified for this Site. The ARARs tables are included at the end of this document as Attachment A.

The selection of the preferred response actions is based on the Administrative Record for the Site, as well as the knowledge and experience that EPA and SCDHEC have gained addressing similar contamination at other former phosphate fertilizer sites located in Charleston, SC. The preferred response actions have been thoroughly reviewed by EPA and SCDHEC, and SCDHEC concurs with the use of these response actions to address the contamination at the Site.

As required, prior to the initiation of the NTCRA, EPA will publish a public notice for the upcoming NTCRA, and hold a 30-day comment period to solicit public input on the selection of the response actions to address the soil, groundwater, and sediment contamination at the Site. EPA will address all public comments received during the 30-day comment period.

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Conditions at the Site meet the NCP section 300.415 (b)(2) criteria for a NTCRA. I recommend that you approve the preferred response actions, as described in this revised Action Memorandum. In addition, ICs in the form of future land use restrictions will be required on the property deed to prohibit use of contaminated groundwater, and other measures deemed appropriate as outlined in the Post-Removal Site Control Plan (NRSCP).

A Post-Removal Site Control Plan (PRSCP) will be required during the NTCRA which describes the groundwater monitoring, as well as requirements for the storm water management, marsh sediment controls, and erosion control measures to be taken once the NTCRA has been completed.

(Approval) _____ Date: 9/8/14

(Disapproval) _____ Date: _____

Franklin E. Hill, Director
Superfund Division

Attachment A

List of Chemical-specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action/Media	Requirements	Prerequisite	Citation
Classification of groundwater	All South Carolina ground water is classified **Class GB** under SCDHEC R. 61-68H.9. which meets the definition of underground sources of drinking water.	Ground waters, except within mixing zones, located within the State of South Carolina — **applicable**	SCDHEC R. 61-68H.2.
Restoration of groundwater to its designated use(s)	May not exceed Maximum Contaminant Levels (MCLs) for Inorganics as set forth in R.61-58.5(B)(2), *Primary Drinking Water Regulations.* - arsenic 0.010 mg/L	Ground water classified as **Class GB** under SCDHEC R. 61-68H.9. requiring restoration — **relevant and appropriate**	SCDHEC R. 61-68H.9.b
	May not exceed Action Levels for Lead as set forth in R.61-58.11(B)(1) *Primary Drinking Water Regulations.* - lead 0.015 mg/L		
	Shall not exceed concentrations or amounts such as to interfere with use, actual or intended, as determined by SCDHEC.	Presence of waste, pesticides, other synthetic organic compounds, deleterious substances, or constituents thereof not specified in SCDHEC R. 61-68H.9.a or b. in Class GB groundwater — **relevant and appropriate**	SCDHEC R. 61-68H.9.c

ARAR = applicable or relevant and appropriate requirement
SCDHEC = South Carolina Department of Health and Environmental Control
TBC = to be considered

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List of Location-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Location Characteristics	Requirements	Prerequisite	Citation
		Wetlands	
Presence of wetlands	Requires Federal agencies to evaluate action to minimize the destruction, loss or degradation of wetlands and to preserve and enhance beneficial values of wetlands.	Actions that involve potential impacts to, or take place within, wetlands – **TBC**	Executive Order 11990 – *Protection of Wetlands* Section 1.(a)
		Floodplains	
Presence of floodplain designated as such on a map	Shall consider alternatives to avoid, to the extent possible adverse effects and incompatible development in the floodplain.	Federal actions that involve potential impacts to, or take place within, floodplains – **TBC**	Executive Order 11988 – *Floodplain Management* Section 2(a)(2)
		Aquatic Resources	
Location encompassing navigable waters under South Carolina laws	Activities shall not block or obstruct navigation or the flow of any waters unless specifically authorized herein. No spoil, dredged material, or any other fill material be placed below the mean high water or ordinary high water elevation, unless specifically authorized herein.	Actions that involve any dredging, filling, or construction or alteration activity in, on, or over a navigable water, as defined in R. 19-450.2.C, or in, or on the bed under navigable waters, or in, or on lands or waters subject to a public navigational servitude under Article 14 Section 4 of the South Carolina Constitution and 49-1-10 of the 1976 S.C. Code of Laws including submerged lands under the navigable waters of the state, or for any activity significantly affecting the flow of any navigable water – **relevant and appropriate**	SCDHEC R. 19-450.4(7)
	Shall make every reasonable effort to perform the authorized work in a manner to minimize adverse impact on fish, wildlife, or water quality.		SCDHEC R. 19-450.4(8)

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List of Location-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Location Characteristics	Requirement	Prerequisite	Citation
Location encompassing *coastal waters* and *tidelands* (including coastal wetlands, mudflats, marshes and shallows) as defined in SCDHEC R. 30-10	(b) Dredging and filling in wetland areas should be undertaken only if that activity is water-dependent and there are no feasible alternatives. (c) To the maximum extent feasible, dredging and filling activities should be restricted in nursery areas and shellfish grounds and during periods of migration, spawning, and early development of important sport and commercial species. (d) Dredging and excavation shall not create stagnant water conditions, lethal fish entrapments, or deposit sumps or otherwise contribute to water quality degradation. (e) Designs for dredging and excavation projects shall, where feasible, include protective measures such as silt curtains, diapers, and weirs to protect water quality in adjacent areas during construction by preventing the dispersal of silt materials. (f) Dredged materials shall be deposited and contained in such a manner so as to prevent dispersal into adjacent wetland areas and, in all cases, new facilities must have permanent upland disposal sites. Existing facilities must have either permanent upland disposal sites or EPA approved ocean disposal sites.	Actions that involve dredging, filling, or construction activity in, on, over *critical areas* as defined in SCDHEC R. 30-10 (A) – relevant and appropriate	SCDHEC R. 30-10(G)(2)(b)-(f) Dredging and Filling Material
Location encompassing *coastal waters* and *tidelands* (including coastal wetlands, mudflats, marshes and shallows) as defined in SCDHEC R. 30-10	The following standards are to be utilized: (a)Upland disposal of dredged material shall always be sought in preference to disposal in wetlands. Vegetated wetlands and mudflats shall not be utilized for disposal of dredged materials unless there are no feasible alternatives. Any other wetlands should not be utilized for disposal of dredged materials when other alternatives exist;	Actions that involve dredging, filling, or construction activity in, on, over *critical areas* as defined in SCDHEC R. 30-10 (A) – relevant and appropriate	SCDHEC R. 30-10(I)(2)(a) and (c) Deposition of Dredged Material

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List of Location-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Location Characteristics	Requirements	Prerequisite	Citation
	(c) Dredged materials containing hazardous levels of toxic material must be disposed of with extraordinary caution. These materials shall never be disposed of in wetland areas and only in highland areas which are lined and diked with impervious materials.		
Location encompassing aquatic ecosystem as defined in 40 CFR 230.3(c)	No discharge of dredged or fill material into an aquatic ecosystem is permitted if there is a practicable alternative that would have less adverse impact.	Action that involves the discharge of dredged or fill material into waters of the United States, including jurisdictional wetlands – **relevant and appropriate**	40 CFR 230.10(a)
	No discharge of dredged or fill material shall be permitted unless appropriate and practicable steps in accordance with 40 CFR 230.70 *et seq.* have been taken that will minimize potential adverse impacts of the discharge on the aquatic ecosystem.		40 CFR 230.10(d)
	Must comply with the substantive requirements of the NWP 38 General Conditions, as appropriate, any regional or case-specific conditions recommended by the Corps District Engineer, after consultation. *Note:* Despite that consultation may be considered an administrative requirement, it should be performed to ensure activities are in compliance with substantive provisions of the permit.	On-site CERCLA action conducted by Federal agency that involves the discharge of dredged or fill material into waters of the United States, including jurisdictional wetlands – **relevant and appropriate**	Nation Wide Permit (38) Cleanup of Hazardous and Toxic Waste 33 CFR 323.3(b)

ARAR = applicable or relevant and appropriate requirement
CFR = *Code of Federal Regulations*
EPA = U.S. Environmental Protection Agency
NWP = Nation Wide Permit
SCDHEC = South Carolina Department of Health and Environmental Control
TBC = to be considered

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List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirements	Prerequisite	Citation
General Construction Standards – All Land-disturbing Activities (i.e. excavation, clearing, grading, etc)			
Managing storm water runoff from land-disturbing activities	Must comply with the substantive requirements for stormwater management and sediment control of *NPDES General Permit No. SCR100000*.	Large and small construction activities (as defined in R. 61-9) of more than 1 acre of land C applicable	SCDHEC R. 61-9.122.41 NPDES General Permit No. SCR100000
	The stormwater management and sediment control plan shall contain at a minimum the information provided in the following subsections:	Activities involving more than two (2) acres and less than five (5) acres of actual land disturbance which are not part of a larger common plan of development or sale C applicable	SCDHEC R. 72-307 I. *South Carolina Storm Water Management and Sediment Reduction Regulations*
	A plan for temporary and permanent vegetative and structural erosion and sediment control measures which specify the erosion and sediment control measures to be used during all phases of the land disturbing activity and a description of their proposed operation;		SCDHEC R. 72-307 I.(3)(d)
	Provisions for stormwater runoff control during the land disturbing activity and during the life of the facility meeting the following requirements of subsections (e)1 and 2.		SCDHEC R. 72-307 I.(3)(e)
Managing fugitive dust emissions from land disturbing activities	Emissions of fugitive particulate matter shall be controlled in such a manner and to the degree that it does not create an undesirable level of air pollution. Volatile organic compounds shall not be used for dust control purposes. Oil treatment is also prohibited.	Activities that will generate fugitive particulate matter (Statewide) C applicable	SCDHEC R. 61-62.6 Section III(a)- *Control of Fugitive Particulate Matter Statewide* SCDHEC R. 61-62.6 Section III(d)
Monitoring Well Installation, Operation, and Abandonment			
Installation or Abandonment of Permanent and Temporary Monitoring Wells.	All monitoring wells shall be drilled, constructed, maintained, operated, and/or abandoned to ensure that underground sources of drinking water are not contaminated.	Construction of permanent and temporary monitoring wells (including non-standard installation, as defined in R. 61-71B(2)) C applicable	SCDHEC R. 61-71H.1(b)

List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirements	Prerequisite	Citation
	Abandonment of permanent conventionally installed monitoring wells shall be by forced injection of grout or pouring through a tremie pipe starting at the bottom of the well and proceeding to the surface in one continuous operation. The well shall be filled with either with neat cement, bentonite-cement, or 20% high solids sodium bentonite grout, from the bottom of the well to the land surface.		SCDHEC R. 61-71H.2(e)
Waste Characterization and Storage — Primary Wastes (e.g., excavated contaminated soils/sediments, debris) and Secondary Wastes (e.g., treatment residuals, PPE)			
Characterization of solid waste (all primary and secondary wastes)	Must determine if solid waste is a hazardous waste using the following method: Should first determine if waste is excluded from regulation under 40 CFR 261.4; and	Generation of solid waste as defined in 40 CFR 261.2 C applicable	40 CFR 262.11(a)
	Must determine if waste is listed as hazardous waste under 40 CFR Part 261.	Generation of solid waste which is not excluded under 40 CFR 261.4(a) C applicable	40 CFR 262.11(b)
	Must determine whether the waste is (characteristic waste) identified in subpart C of 40 CFR Part 261by either: (1) Testing the waste according to the methods set forth in subpart C of 40 CFR part 261, or according to an equivalent method approved by the Administrator under 40 CFR 260.21; or (2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.	Generation of solid waste which is not excluded under 40 CFR 261.4(a) C applicable	40 CFR 262.11(c)
	Must refer to Parts 261, 262, 264, 265, 266, 268, and 273 of Chapter 40 for possible exclusions or restrictions pertaining to management of the specific waste.	Generation of solid waste which is determined to be hazardous waste C applicable	40 CFR 262.11(d)

List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirements	Prerequisite	Citation
Determinations for management of hazardous waste	Must determine each EPA Hazardous Waste Number (waste code) applicable to the waste in order to determine the applicable treatment standards under 40 CFR 268 *et seq.*. *Note:* This determination may be made concurrently with the hazardous waste determination required in Sec. 262.11 of this chapter.	Generation of hazardous waste for storage, treatment or disposal C applicable	40 CFR 268.9(a)
	Must determine the underlying hazardous constituents [as defined in 40 CFR 268.2(i)] in the characteristic waste.	Generation of RCRA characteristic hazardous waste (and is not D001 non-wastewaters treated by CMBST, RORGS, or POLYM of Section 268.42 Table 1) for storage, treatment or disposal C applicable	40 CFR 268.9(a)
	Must determine if the hazardous waste meets the treatment standards in 40 CFR 268.40, 268.45, or 268.49 by testing in accordance with prescribed methods or use of generator knowledge of waste: *Note:* This determination can be made concurrently with the hazardous waste determination required in 40 CFR 262.11.	Generation of hazardous waste for storage, treatment or disposal C applicable	40 CFR 268.7(a)
Temporary storage of hazardous waste in containers	A generator may accumulate hazardous waste at the facility provided that: • waste is placed in containers that comply with 40 CFR 265.171-173; and • the date upon which accumulation begins is clearly marked and visible for inspection on each container • container is marked with the words "hazardous waste"; or	Accumulation of RCRA hazardous waste on site as defined in 40 CFR 260.10 C applicable	40 CFR 262.34(a) 40 CFR 262.34(a)(1)(i) 40 CFR 262.34(a)(2) 40 CFR 264.34(a)(3)
	• container may be marked with other words that identify the contents.	Accumulation of 55 gal. or less of RCRA hazardous waste at or near any point of generation C applicable	40 CFR 262.34(c)(1)

List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirements	Prerequisite	Citation
Use and management of hazardous waste in containers	If container is not in good condition (e.g. severe rusting, structural defects) or if it begins to leak, must transfer waste into container in good condition.	Storage of RCRA hazardous waste in containers **C applicable**	40 CFR 265.171
	Use container made or lined with materials compatible with waste to be stored so that the ability of the container is not impaired.		40 CFR 265.172
	Keep containers closed during storage, except to add/remove waste. Open, handle and store containers in a manner that will not cause containers to rupture or leak.		40 CFR 265.173(a) 40 CFR 265.173(b)
Storage of hazardous waste in container area	Area must have a containment system designed and operated in accordance with 40 CFR 264.175(b).	Storage of RCRA hazardous waste in containers ***with free liquids*** **C applicable**	40 CFR 264.175(a)
	Area must be sloped or otherwise designed and operated to drain liquid from precipitation, or Containers must be elevated or otherwise protected from contact with accumulated liquid.	Storage of RCRA-hazardous waste in containers that ***do not contain free liquids*** (other than F020, F021, F022, F023,F026 and F027) **C applicable**	40 CFR 264.175(c)
Temporary storage of solid waste	Shall be conducted in a manner to: a. Inhibit the harborage of flies, rodents, and other vectors; b. Prevent conditions for transmission of diseases to man or animals; c. Prevent blowing debris and particulates so as not to be injurious to human health and the environment;	Generation of solid waste for temporary storage prior to processing, disposal of that waste **C relevant and appropriate**	SCDHEC R. 61-107.5(C)(1)
	d. Prevent water pollution and prevent the escape of solid waste or leachate to waters of the State; and e. Minimize objectionable odors, dust, unsightliness, and aesthetically objectionable conditions, and prevent the accumulation of materials in an untidy and unsafe manner so as to become a fire and safety hazard.		

List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirement	Prerequisite	Citation
Closure of RCRA container storage unit	At closure, all hazardous waste and hazardous waste residues must be removed from the containment system. Remaining containers, liners, bases, and soils containing or contaminated with hazardous waste and hazardous waste residues must be decontaminated or removed. [Comment: At closure, as throughout the operating period, unless the owner or operator can demonstrate in accordance with40 CFR 261.3(d) of this chapter that the solid waste removed from the containment system is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of parts 262 through 266 of this chapter].	Storage of RCRA hazardous waste in containers in a unit with a containment system C applicable	40 CFR 264.178
Temporary on-site storage of remediation waste in staging piles (e.g., excavated soils)	Must be located within the contiguous property under the control of the owner/operator where the wastes are to be managed in the staging pile originated. For purposes of this section, storage includes mixing, sizing, blending or other similar physical operations so long as intended to prepare the wastes for subsequent management or treatment.	Accumulation of ***non-flowing hazardous remediation waste*** (or remediation waste otherwise subject to land disposal restrictions) as defined in 40 CFR 260.10 C applicable	40 CFR 264.554(a)(1)
Performance criteria for staging pile	Staging pile must: • facilitate a reliable, effective and protective remedy; • must be designed to prevent or minimize releases of hazardous wastes and constituents into the environment, and • minimize or adequately control cross-media transfer as necessary to protect human health and the environment (e.g. use of liners, covers, run-off/run-on controls).	Storage of remediation waste in a staging pile C applicable	40 CFR 264.554(d)(1)(i) and (ii)
Operation of a staging pile	Must not operate for more than 2 years, except when an operating term extension under 40 CFR.264.554(i) is granted.	Storage of remediation waste in a staging pile C applicable	40 CFR 264.554(d)(1)(iii)

List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirements	Prerequisite	Citation
	Note: Must measure the 2-year limit (or other operating term specified) from first time remediation waste placed in staging pile.		
	Must not use staging pile longer than the length of time designated by EPA in appropriate decision document.		40 CFR 264.554(h)
Design criteria for staging pile	In setting standards and design criteria must consider the following factors: • Length of time pile will be in operation; • Volumes of waste you intend to store in the pile; • Physical and chemical characteristics of the wastes to be stored in the unit; • Potential for releases from the unit; • Hydrogeological and other relevant environmental conditions at the facility that may influence the migration of any potential releases; and • Potential for human and environmental exposure to potential releases from the unit.		40 CFR 264.554(d)(2)(i) – (vi)
Operation of a staging pile	Must not place in the same staging pile unless you have complied with 40 CFR 264.17(b).	Storage of "incompatible" remediation waste (as defined in 40 CFR 260.10) in staging pile **C applicable**	40 CFR 264.554(f)(1)
	Must separate the incompatible waste or materials, or protect them from on another by using a dike, berm, wall or other device.	Staging pile of remediation waste stored nearby to incompatible wastes or materials in containers, other piles, open tanks or land disposal units—**applicable.**	40 CFR 264.554(f)(2)
	Must not pile remediation waste on same base where incompatible wastes or materials were previously piled unless you have sufficiently decontaminated the base to comply with 40 CFR 264.17(b)		40 CFR 264.554(f)(3)

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List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirement	Prerequisite	Citation
Closure of staging piles of remediation waste	Must be closed within 180 days after the operating term by removing or decontaminating all remediation waste, contaminated containment system components, and structures and equipment contaminated with waste and leachate. Must decontaminate contaminated sub-soils in a manner that EPA determines will protect human and the environment.	Storage of remediation waste in staging pile in *previously contaminated area*C applicable	40 CFR 264.554(j)(1) 40 CFR 264.554(j)(2)
Waste Treatment and Disposal – Primary Wastes (e.g., excavated contaminated soil, demolition debris, [illegible])			
Disposal of solid waste	Shall ultimately dispose of solid waste at facilities and/or sites permitted or registered by the Department for processing or disposal of that waste stream.	Generation of solid waste intended for off-site disposal C relevant and appropriate	SCDHEC R. 61-107.5(D)(3)
Disposal of RCRA-hazardous waste in an off-site land-based unit	May be land disposed if it meets the requirements in the table "Treatment Standards for Hazardous Waste" at 40 CFR 268.40 before land disposal.	Land disposal, as defined in 40 CFR 268.2, of restricted RCRA waste C applicable	40 CFR 268.40(a)
	All underlying hazardous constituents [as defined in 40 CFR 268.2(i)] must meet the Universal Treatment Standards, found in 40 CFR 268.48 Table UTS prior to land disposal	Land disposal of restricted RCRA characteristic wastes (D001-D043) that are not managed in a wastewater treatment system that is regulated under the CWA, that is CWA equivalent, or that is injected into a Class I nonhazardous injection well C applicable	40 CFR 268.40(e)
	Must be treated according to the alternative treatment standards of 40 CFR 268.49(c) or Must be treated according to the UTSs [specified in 40 CFR 268.48 Table UTS] applicable to the listed and/or characteristic waste contaminating the soil prior to land disposal.	Land disposal, as defined in 40 CFR 268.2, of restricted hazardous soils — applicable	40 CFR 268.49(b)

List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirement	Prerequisite	Citation
	To determine whether a hazardous waste indentified in this section exceeds the applicable treatment standards of 40 CFR 268.40, the initial generator must test a sample of the waste extract or the entire waste, depending on whether the treatment standards are expressed as concentration in the waste extract or waste, or the generator may use knowledge of the waste. If the waste contains constituents (including UHCs in the characteristic wastes) in excess of the applicable UTS levels in 40 CFR 268.48, the waste is prohibited from land disposal, and all requirements of part 268 are applicable, except as otherwise specified.	Land disposal of RCRA toxicity characteristic wastes (D004-D011) that are newly identified (i.e., wastes, soil, or debris identified by the TCLP but not the Extraction Procedure) C applicable	40 CFR 268.34(f)
Disposal of RCRA-*hazardous waste debris* in a land-based unit (i.e., landfill)	Must be treated prior to land disposal as provided in 40 CFR 268.45(a)(1)-(5) unless EPA determines under 40 CFR 261.3(f)(2) that the debris no longer contaminated with hazardous waste or the debris is treated to the waste-specific treatment standard provided in 40 CFR 268.40 for the waste contaminating the debris.	Land disposal, as defined in 40 CFR 268.2, of restricted RCRA-hazardous debris C applicable	40 CFR 268.45(a)
Disposal of *treated hazardous debris*	Debris treated by one of the specified extraction or destruction technologies on Table 1 of 40 CFR 268.45 and which no longer exhibits a characteristic is not a hazardous waste and need not be managed in RCRA Subtitle C facility. Hazardous debris contaminated with listed waste that is treated by immobilization technology must be managed in a RCRA Subtitle C facility.	Treated debris contaminated with RCRA-listed or characteristic waste C applicable	40 CFR 268.45(c)
Disposal of *hazardous debris treatment residues*	Except as provided in 40 CFR 268.45(d)(2) and (d)(4), must be separated from debris by simple physical or mechanical means, and such residues are subject to the waste-specific treatment standards for the waste contaminating the debris.	Residue from treatment of hazardous debris C applicable	40 CFR 268.45(d)(1)

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List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirement	Prerequisite	Citation
Treatment of RCRA *hazardous waste soil* on-site	Prior to land disposal, all "constituents subject to treatment" as defined in 40 CFR 268.49(d) must be treated as follows:	Treatment of restricted hazardous waste soils **C applicable**	40 CFR 268.49(c)(1)
	For non-metals (except carbon disulfide, cyclohexanone, and methanol), treatment must achieve a 90 percent reduction in total constituent concentrations, except as provided in 40 CFR 268.49(c)(1)(C).		40 CFR 268.49(c)(1)(A)
	For metals and carbon disulfide, cyclohexanone, and methanol,), treatment must achieve a 90 percent reduction in total constituent concentrations as measured in leachate from the treated media (tested according to TCLP) or 90 percent reduction in total constituent concentrations (when a metal removal technology is used), except as provided in 40 CFR 268.49(c)(1)(C).		40 CFR 268.49(c)(1)(B)
	When treatment of any constituent subject to treatment to a 90 percent reduction standard would result in a concentration less than 10 times the Universal Treatment Standard for that constituent, treatment to achieve constituent concentrations less than 10 times the universal treatment standard is not required. [Universal Treatment Standards are identified in 40 CFR 268.48 Table UTS].	Treatment of restricted hazardous waste soils **C applicable**	40 CFR 268.49(c)(1)(C)
	In addition to the treatment requirement required by paragraph (c)(1) of this section, soils must be treated to eliminate these characteristics.	Soils that exhibit the characteristic of ignitability, corrosivity or reactivity intended for land disposal **C applicable**	40 CFR 268.49(c)(2)
	Provides methods on how to demonstrate compliance with the alternative treatment standards for contaminated soils that will be land disposed.	On-site treatment of restricted hazardous waste soils following alternative soil treatment of 40 CFR 268.49(c) **C To Be Considered**	*Guidance on Demonstrating Compliance with the LDR Alternative Soil Treatment Standards* [EPA 530-R-02-003, July 2002]

List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirements	Prerequisite	Citation
Treatment of hazardous waste (soils considered D004 and D008) in Misc. Treatment Unit	Unit must be located, designed, constructed, operated and maintained, and closed in a manner that will ensure protection of human health and the environment.	Treatment of RCRA hazardous waste in miscellaneous units, except as provided in 40 CFR 264.1C relevant and appropriate	40 CFR 264.601
	Protection of human health and the environment includes, but is not limited to: prevention of any release that may have adverse effects on human health or the environment due to migration of waste constituents in the surface water, or wetlands or soil surface considering the factors listed in 40 CFR 264.601(b)(1) thru (11).		40 CFR 264.601(b)
On-site Consolidation of Waste in Place Alternative - Alternative 3			
Location restrictions for landfill	A landfill located in a 100-year floodplain shall demonstrate that engineering measures have been incorporated into the landfill design to ensure the landfill will not restrict the flow of the 100-year flood, reduce temporary water storage capacity of the flood plain, minimize potential floodwaters coming into contact with waste, or result in washout of solid waste so as to pose a hazard to human health or the environment.	Landfill used for disposal of Class II solid waste C relevant and appropriate	SCDHEC R. 61-107.19 Part IV. B.1.b.
	The landfill shall be in compliance with applicable requirements concerning wetlands imposed by the U.S. Army Corps of Engineers, the U.S. EPA, and SCDHEC.		SCDHEC R. 61-107.19 Part IV. B.1.c.
Landfill cover design and construction	A two foot thick final earth cover is required with a least 3% but not greater than 5% surface slope, graded to promote positive drainage. The side slope cover shall not exceed three horizontal feet to one vertical foot, i.e., 3:1 slope. Alternative cover designs may be submitted for approval. The integrity of the final cover shall be maintained	Landfill used for disposal of Class II solid waste C relevant and appropriate	SCDHEC R. 61-107.19 Part IV. F.1.a.

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List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

Action	Requirements	Prerequisite	Citation
	The storm water conveyance system for the landfill shall be designed to ensure the system is capable of handling a 24-hr, 25-year storm event during post-closure period. The finished surface of the disposal area shall be seeded with native grasses or other suitable ground cover within 15 days of the completion of the landfill.		SCDHEC R. 61-107.19 Part IV. F.1.c. SCDHEC R. 61-107.19 Part IV. F.1.d.
Post-closure care requirements	Maintain the integrity and effectiveness of nay final cover, including making repairs to cover as necessary to correct effects of settlement, subsidence, erosion, or other events, and preventing run-on and run-off from eroding or otherwise damaging the final cover. A 75% or greater vegetative ground cover with no substantial bare spots shall be established and maintained throughout the post-closure period.	Landfill used for disposal of Class II solid waste C relevant and appropriate	SCDHEC R. 61-107.19 Part IV. F.2.a.(1)
	Post-closure use of the property shall not disturb the integrity of the final cover, or any other components of the containment system unless necessary to comply with requirements of this regulation.		SCDHEC R. 61-107.19 Part IV. F.2.c.(3)
		Transportation of Waste	
Transportation of hazardous waste *on-site*	The generator manifesting requirements of 40 CFR 262.20–262.32(b) do not apply. Generator or transporter must comply with the requirements set forth in 40 CFR 263.30 and 263.31 in the event of a discharge of hazardous waste on a private or public right-of-way.	Transportation of hazardous wastes on a public or private right-of-way within or along the border of contiguous property under the control of the same person, even if such contiguous property is divided by a public or private right-of-way C applicable	40 CFR 262.20(f)
Transportation of hazardous waste *off-site*	Must comply with the generator requirements of 40 CFR 262.20–23 for manifesting, Sect. 262.30 for packaging, Sect. 262.31 for labeling, Sect. 262.32 for marking, Sect. 262.33 for placarding, Sect. 262.40, 262.41(a) for record keeping requirements, and Sect. 262.12 to obtain EPA ID number.	Off-site transportation of RCRA-hazardous waste C applicable	40 CFR 262.10(h);

List of Action-Specific ARARs/TBC For Revised Action Memorandum
Columbia Nitrogen Site, Charleston, South Carolina

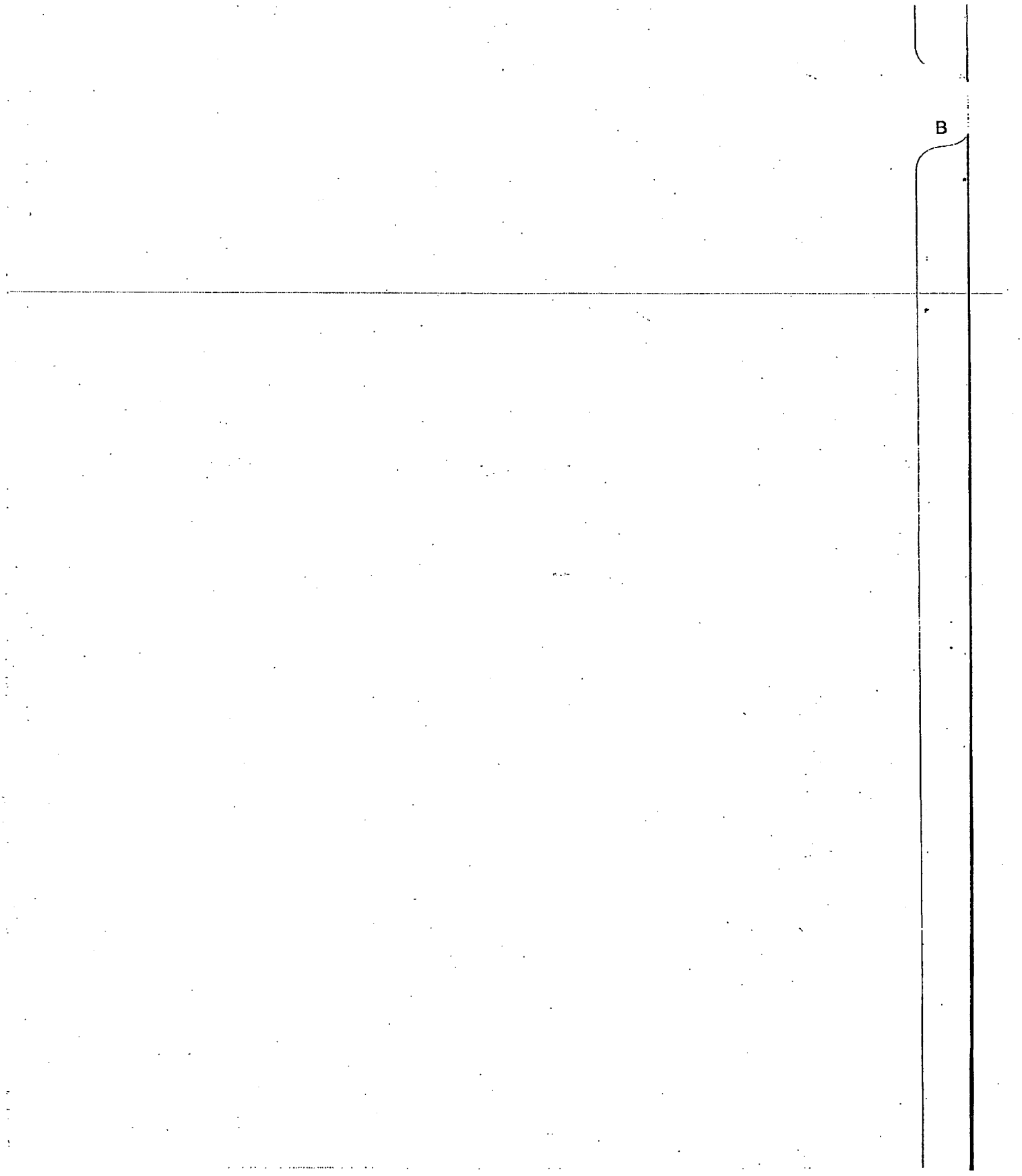
Action	Requirements	Prerequisite	Citation
Transportation of hazardous materials	Shall be subject to and must comply with all applicable provisions of the HMTA and DOT HMR at 49 CFR 171-180.	Any person who, under contract with a department or agency of the federal government, transports "in commerce," or causes to be transported or shipped, a hazardous material **C applicable**	49 CFR 171.1(c)
Transportation of samples (i.e. contaminated soils and sediments)	Are not subject to any requirements of 40 CFR Parts 261 through 268 or 270 when: • the sample is being transported to a laboratory for the purpose of testing; or • the sample is being transported back to the sample collector after testing. • the sample is being stored by sample collector before transport to a lab for testing.	Samples of solid waste or a sample of water, soil for purpose of conducting testing to determine its characteristics or composition **C applicable**	40 CFR 261.4(d)(1)(i)-(iii)
	In order to qualify for the exemption in paragraphs (d)(1)(i) and (ii), a sample collector shipping samples to a laboratory must: • Comply with U.S. DOT, U.S. Postal Service, or any other applicable shipping requirements. • Assure that the information provided in (1) thru (5) of this section accompanies the sample. • Package the sample so that it does not leak, spill, or vaporize from its packaging.		40 CFR 261.4(d)(2)(i) 40 CFR 261.4(d)(2)(i)(A) 40 CFR 261.4(d)(2)(i)(B)

ARAR = applicable or relevant and appropriate requirement
CFR = *Code of Federal Regulations*
CWA = Clean Water Act of 1972
DEACT = deactivation
DOT = U.S. Department of Transportation
EPA = U.S. Environmental Protection Agency
HMR = Hazardous Materials Regulations
HMTA = Hazardous Materials Transportation Act
LDR = Land Disposal Restrictions
NPDES = National Pollutant Discharge Elimination System
PPE = personal protection equipment
RCRA = Resource Conservation and Recovery Act of 1976
SCDHEC = South Carolina Department of Health and Environmental Control
TBC = to be considered

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TCLP = Toxicity Characteristic Leaching Procedure
UHC = underlying hazardous constituents
UTS = Universal Treatment Standard
WWTU = Waste Water Treatment Unit


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WD-SRSEB

ENFORCEMENT ACTION MEMORANDUM

DATE: October 05, 2005

SUBJECT: Request for Non-Time Critical Removal Action Approval
Columbia Nitrogen Site, Charleston, Charleston County, South Carolina

FROM: McKenzie Mallary, RPM
Superfund Remedial and Site Evaluation Branch

TO: Beverly H. Banister, Acting Director
Waste Management Division

SITE ID #: 045N

I. PURPOSE

The purpose of this Action Memorandum is to request and document approval of the proposed Non-Time-Critical Removal Action described herein for the Columbia Nitrogen Site (Site), in Charleston, Charleston County, South Carolina.

II. SITE CONDITIONS AND BACKGROUND

The EPA Site ID # is 045N; the CERCLIS ID # for the Site is SC0001040393. Several sampling investigations have been conducted at the Site, including a Preliminary Assessment/Site Inspection (PA/SI), an Expanded Site Inspection (ESI), and an Remedial Investigation/Feasibility Study (RI/FS).

A. Site Description

1. Removal Site Evaluation

From 1905 until 1966 Planters Warehouse and Fertilizer Company (also known as Ross Industrial Products) manufactured phosphate fertilizer at the Site. The Planters Warehouse and Fertilizer Company and the property was sold to Columbia Nitrogen Corporation (CNC) in 1966. CNC operated a fertilizer plant at the Site from 1966 to 1972. All on-site structures were demolished in 1980. In 1985 James H. Holcombe and J. Henry Fair (Holcombe and Fair) purchased the property from CNC. In 1986, CNC was sold to Arcadian Corporation which later

became the PCS Corporation. During their ownership until 2003, Holcombe and Fair leased the property to container-storage companies. Large portions of the Site were covered in crush-and-run limestone in 1998. On November 24, 2003, Holcombe and Fair sold the property to Ashley II of Charleston, LLC.

In September 1990, Holcombe and Fair conducted a subsurface soil investigation as part of a Property Transaction Site Assessment for the Site. In March 1995, EPA collected sediment samples to prepare the PA/SI report. In August 1998, the ESI sampling investigation was performed for EPA by the South Carolina Department of Health and Environmental Control (SCDHEC). The ESI indicated contamination exists at the Site which poses a potential threat to human health and the environment. From 1999 to 2001, EPA conducted a Phase I and Phase II RI to fully characterize the contamination associated with the Site. A human health risk assessment and ecological risk assessment were conducted as part of the RI/FS process.

The production of phosphate fertilizers generally involved reacting phosphate ores with sulfuric acid to produce phosphoric acid, the building block of nitrogen-phosphorus-potassium (N-P-K) agricultural fertilizers. The production process included two components: 1) the production of sulfuric acid using the lead acid chamber process, and 2) the granulation, bagging, and storage of the fertilizer. During the early years of the phosphate fertilizer industry, pyrite ore was used as the source of sulfur. The pyrite ore was crushed and roasted, creating sulfur dioxide (SO_2). Sulfur dioxide gas (SO_2) was reacted with oxygen (O_2) to create sulfur trioxide gas (SO_3). Sulfuric acid was produced as water (H_2O) flowing downward through a Glover Tower came in contact with rising sulfur trioxide gas. The sulfuric acid (H_2SO_4) was stored on-site in chambers constructed with sheet lead.

Ground phosphate rock and sulfuric acid were then mixed in a reaction vessel to create phosphoric acid. The phosphoric acid mixture was transferred to a storage area for curing. The phosphoric acid was mechanically granulated, and mixed with other components (for potash (for potassium) to produce the N-P-K fertilizer.

Environmental impact typically associated with former phosphate fertilizer manufacturing facilities include elevated levels of metals, particularly lead and arsenic in soil, groundwater, and sediment, as well as acidic pH conditions. During periodic cleaning of the lead chambers, it is believed that washdown water containing acid and soluble lead was flushed onto the ground surface. Cinders from the pyrite-roasting process were frequently used as on-site fill material. The cinders have a distinctive reddish or "magenta" color, and have been found to contain elevated levels of inorganic constituents, including arsenic.

2) Physical Location

The former Columbia Nitrogen plant (the "Site") is located at 1801 Milford Street at the end of Milford Street in Charleston, South Carolina, on the Ashley River. The geographic coordinates of the Site are 32° 9'19" North Latitude and 79°57'36" West Longitude (USGS, 1983). The 43-acre Site is bordered to the north by the South Carolina Electric & Gas (SCE&G)

Hagood Station, to the south by the Koppers Site, to the east by an area used for industrial purposes, and to the west by the Ashley River.

3) Site Characteristics

As of December 2001, the Site being was used by Robin Hood Container Express, Inc.; Philip Services Corporation (PSC), a tanker clean-out company; Horizon Tank Lines, on a sub-lease to PSC; the City of Charleston Commissioner of Public Works; and several container companies on the western portion of the property.

4) Release of Threatened Release into the Environment of a Hazardous Substance or Contaminant

The following is a brief summary of the analytical results from the Phase I and Phase II RI conducted at the Site from 1998 to 2001:

A. A total of 58 surface soil and 48 subsurface soil samples were collected and analyzed during the Phase I RI; a total of 18 surface soil and 23 subsurface soil samples were collected and analyzed during the Phase II RI; soil contamination was identified from land surface to six feet below land surface;

B. lead concentrations in soil were identified up to 28,000 parts-per-million (ppm); arsenic concentrations in the soil were identified up to 1,800 ppm;

C. pH values in surface soil were identified as low as 3 standards units; pH values in subsurface soil were identified as low as 1.1 standard units;

D. groundwater samples were collected from 18 monitoring wells during the Phase I RI; groundwater samples were also collected from 58 temporary wells; groundwater contamination was identified from the top of the surficial aquifer down to 30 feet below land surface;

E. arsenic concentrations in groundwater were identified up to 2,600 parts-per-billion (ppb), while lead concentrations were identified up to 690 ppb; pH values in groundwater range from 2.4 to 4 standard units;

F. a total of 16 surface water and 22 sediment samples were collected during the Phase I RI; a total of 19 surface water and 28 sediment samples were collected during the Phase II RI;

G arsenic concentrations in surface water and sediment were identified up to 2,200 ppb and 4,700 ppb, respectively, during the Phase I RI; lead concentrations were identified in surface water and sediment up to 3,600 ppb and 7,900 ppb, respectively, during the Phase I RI

5) National Priorities Li t (NPL) Status

The Site is not currentl on the National Priorities List.(NPL) list. but EPA considers this Site to be NPL-equivalent.

6) Maps, Pictures, and (ther Graphic Materials

Maps, pictures, and oth er graphic materials are part of the RI/FS report, and are available in the Site file.

7) Other Actions to Dat

A pilot study has been conducted at the Site to determine if a Permeable Reactive Barrier (PRB) is a viable response act on to address groundwater contamination at the Site.

In 2004, General Engi neering & Environmental LLC completed pre-design data collection activities at the Site to characterize and delineate the areas of elevated arsenic and lead in soil. The work was conduc ed on behalf of the current property owner, Ashley II of Charleston. The work was co ducted from August 30, 2004 through September 10, 2004 and the results were compiled in a rep rt titled "Pre-Design Site Characterization Report, Columbia Nitrogen Site. Milford Street. Charleston, South Carolina, November 1, 2004".

There are no other response ac ions currently being conducted at the Site.

8) State and Local Auth orities' Roles

The SCDHEC, Charle ton County, and City of Charleston officials have been provided an opportunity to participate i the RI/FS process, including the selection of the cleanup alternatives for the Non-Time Critical Removal Action. The SCDHEC provided oversight during the RI/FS sampling act vities, and participated in technical meetings with EPA.

EPA will continue to c ordinate with State, local, and county officials throughout the Non-Time-Critical Removal A ction process. Relevant information regarding Site activities will be made available to local aut orities and members of the general public.

III. THREATS TO PUBL IC HEALTH OR WELFARE OR THE ENVIRONMENT AND STATUTORY AND REGULATORY AUTHORITIES

According to the criter a listed in Section 300.415 of the National Contingency Plan (NCP), the Site meets the req irements for initiating a Non-Time-Critical Removal Action. Specifically, these include the following determinations:

A. Threats to Public Health and Welfare

Using the soil data collected during the RI/FS, a human health risk assessment was performed to assess the potential risks, or potential threats, to human health. Arsenic was identified in surface and subsurface soil in the soil during the RI at concentrations up 1,800 ppm, while lead was identified in surface and subsurface soil during the RI at concentrations up to 28,000 ppm. These levels of arsenic and lead contamination exceed both USEPA- and SCDHEC-approved action levels, or cleanup criteria, for protection of human health through direct contact exposure.

In addition, future redevelopment of the Site appears likely. Redevelopment plans would involve a combination of commercial and residential land use. If no action is taken to address the contamination at the Site, the potential would exist for future workers or residents to be exposed to high levels of arsenic and lead in soil. These Site conditions meet the requirements for initiating a Non-Time-Critical Removal Action, based on the criteria in the NCP, Section 300.415(b)(2)(i), (i.e., "*Actual or potential exposure to nearby populations, animals, or the food chain from hazardous substances or pollutants or contaminants.*")

B. Threats to the Environment

Using the surface water and sediment data collected during the RI/FS, an ecological risk assessment was performed to assess the potential risks, or potential threats, to the environment. As part of the ecological assessment, mean effect-range median (ERM) quotients were calculated to assess the potential toxicological significance of the complex mixture of chemicals in marsh sediments. Mean ERM quotients were calculated for 25 constituents by dividing the individual chemical concentrations by their respective ERM values. As the value of the mean ERM quotient increases from 1 to 4, the toxicity of the sediment increases as follows: Category 1, not toxic; Category 2, possibly toxic; Category 3, marginally toxic; and Category 4, highly toxic.

Category 3 and 4 Mean ERM Quotients were calculated for sediment samples collected in the tidal pool area, indicating the sediment in this area has a strong likelihood of causing adverse impacts to ecological receptors. Possible migration pathways for this contamination include surface water run-off from the Site, and possibly discharge of contaminated groundwater from the shallow aquifer. These Site conditions meet the requirements for initiating a Non-Time-Critical Removal Action, based on the criteria in the NCP, Section 300.415(b)(2)(iv), (i.e., "*High levels of hazardous substances or pollutants or contaminants largely at or near the surface, that may migrate.*")

In addition, site-specific toxicity testing was conducted in and around the tidal pool which indicated adverse effects to grass shrimp, an important part of the food chain. These Site conditions meet the requirements for initiating a Non-Time-Critical Removal Action, based on the criteria in the NCP, Section 300.415(b)(2)(i), (i.e., "*Actual or potential exposure to hazardous substances or pollutants or contaminants by nearby populations or the food chain.*")

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IV. ENDANGERMENT DETERMINATION

Actual or threatened releases of hazardous substances from this Site, if not addressed with the Non-Time-Critical Removal Action selected in this Action Memorandum, may present an imminent and substantial endangerment to public health, welfare, and/or the environment.

V. PROPOSED ACTIONS

A. Proposed Action Description

The following description of the proposed actions assume redevelopment will occur at the Site in the future, involving commercial and/or residential land use. Due to inherent uncertainties associated with the proposed actions described below, the RPM/OSC, in a manner consistent with the NCP, remains obligated to modify the removal procedures as conditions warrant. In an email dated September 29, 2005, SCDHEC concurred that the proposed actions summarized below are the preferred alternatives to address contamination at the Site.

1. The Preferred Soil Alternative

The preferred soil alternative consists of several components, including: soil excavation, off-site transportation and disposal, and capping. Removing contaminated soil from the Site would involve excavating an estimated 31,390 cubic yards of surface soil and subsurface soil (from 0 to 6 feet below land surface) with lead and arsenic concentrations greater than 895 ppm and 373 ppm, respectively, and transporting the soil off-site for disposal. Removing contaminated surface and subsurface soil from the Site is a component of the preferred soil alternative for the following reasons:

- removing the contaminated soil from the Site would reduce the potential for human exposure to elevated levels of lead and arsenic in surface and subsurface soil;
- removing the contaminated surface soil from the Site would reduce the potential migration of elevated lead and arsenic into the Ashley River and nearby wetlands via surface water run-off; and
- removing the contaminated soil from the Site would also reduce the potential leaching of lead and arsenic from soil to groundwater, thereby reducing the potential discharge of contaminated groundwater into the Ashley River and nearby wetlands.

The second component of the soil alternative would involve capping surface soil with lead concentrations greater than 400 ppm and arsenic concentrations greater than 22.5 ppm. Capping the soil is a component of the preferred soil alternative for the following reasons:

- capping the soil would reduce the potential for human exposure with elevated lead and arsenic in soil;

- capping the soil would reduce the potential migration of elevated lead and arsenic into the Ashley River and nearby wetlands via surface water run-off; and

- capping the soil would reduce the potential leaching of elevated lead and arsenic into groundwater, thereby reducing the potential discharge of contaminated groundwater into the Ashley River and nearby wetlands.

Several additional reasons why the soil alternative described above is the preferred alternative to address soil contamination at the Site include the following:

- the soil alternative offers a balance between effectiveness and cost (i.e., the combination of excavation, off-site disposal, and capping should provide both short-term and long-term protection of human health and the environment, and the cost estimate of the preferred soil alternative, $4,576,763, is considerably less than other soil alternatives evaluated in the Feasibility Study, including the off-site disposal alternative ($10,044,300));

- the combination of soil excavation, off-site disposal, and capping is compatible with the preferred sediment and groundwater alternatives selected for the Site; and

- the preferred soil alternative is considered technically feasible because excavation, off-site transportation and disposal, and capping have been successfully implemented at many sites, and the materials and qualified commercial contractors are readily available to conduct the work.

Surface water run-off will be managed to mitigate the discharge of pollutants into the marsh, the tidal pool, and the Ashley River. The response actions selected in this Action Memo, including the preferred soil alternative, would include a comprehensive, site-wide storm water management plan, and marsh sediment control plan to meet the requirements of the South Carolina Storm Water and Sediment Reduction Act.

2. The Preferred Sediment Alternative

An ecological assessment was conducted during the RI/FS to evaluate the potential effects of site-related contamination to ecological receptors. As part of the ecological assessment, Mean ERM Quotients were calculated to assess the potential toxicological significance of the complex mixture of chemicals in marsh sediments. Category 3 and 4 Mean ERM Quotients were calculated for sediment samples collected in the tidal pool, indicating sediment in this area has the highest potential for adverse impacts to ecological receptors in the

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benthic macro-invertebrate community and food chain in nearby wetlands, fisheries, and threatened species habitat. Category 1 and 2 Mean ERM Quotients were calculated for sediment samples in the on-site salt marsh and one upland drainage ditch, indicating a lower potential for adverse impacts to ecological receptors.

Based on the ecological assessment, a preferred sediment alternative was selected to excavate and remove an estimated 2,300 cubic yards of contaminated sediments in the tidal pool with Category 3 and 4 Mean ERM Quotients. Once excavated, the contaminated sediments would either be placed beneath the soil cap on-site, or transported off-site for disposal. Restoration of the marsh in the tidal pool area would involve backfilling and re-vegetating the area affected by the sediment removal. Excavating and removing contaminated sediment with Category 3 and 4 Mean ERM Quotients, and restoring the marsh effected by the sediment removal, is a component of the preferred sediment alternative for the following reasons:

- excavating and removing the contaminated sediment would reduce the potential for human exposure to elevated levels of lead and arsenic in sediment;
- excavating and removing the contaminated sediment would reduce the potential for adverse impacts to ecological receptors in the marsh and nearby marine ecosystem;
- the sediment alternative offers a balance between effectiveness and cost (i.e., the combination of excavation, and on-site placement beneath the cap or off-site disposal, should provide both short-term and long-term protection of human health and the environment, and the cost estimate of the preferred sediment alternative, $601,995, is considered reasonable for the level of protection provided;
- the combination of sediment excavation, and either on-site placement beneath the cap or off-site disposal, is compatible with the preferred soil and groundwater alternatives selected for the Site; and
- the preferred sediment alternative is considered technically feasible because sediment excavation, and either capping or off-site transportation and disposal, have been successfully implemented at many sites, and the materials and qualified commercial contractors are readily available to conduct the work.

In addition, the preferred sediment alternative would evaluate the feasibility of removing sediment with Category 2 Mean ERM Quotients and lead and/or arsenic concentrations exceeding their individual ERM values. Eight sediment sample locations with Category 2 Mean ERM Quotients were identified during the RI. With the exception of sediment sample CN-SD-20 (which is an isolated occurrence of lead at 250 ppm), samples CN-SD-33, CN-SD-36, CN-SD-38, and CN-SD-39 contained lead and arsenic concentrations below their individual ERM values. The three remaining samples with Category 2 Mean ERM Quotients, CN-SD-17, CN-

SD-27, CN-SD-28, are located in an upland drainage ditch area which would be addressed with the soil alternative.

The technical approach of removing sediments with Category 3 and 4 Mean ERM Quotients, restoring the marsh effected by the sediment removal, and evaluating the feasibility of removing sediment with Category 2 Mean ERM Quotients and lead or arsenic concentrations exceeding their individual ERM values, is consistent with the technical approach being used by EPA Region 4 and SCDHEC to address sediment contamination at other former phosphate fertilizer sites in the Charleston area.

Surface water run-off will be managed to mitigate the discharge of pollutants into the marsh, the tidal pool, and the Ashley River. The response actions selected in this Action Memo, including the preferred sediment alternative, would include a comprehensive, site-wide storm water management plan and marsh sediment control plan to meet the requirements of the South Carolina Storm Water and Sediment Reduction Act.

3. The Preferred Groundwater Alternative

The preferred groundwater alternative would involve the construction of an interceptor trench to prevent the contaminated groundwater from discharging into the Ashley River and nearby wetlands. As the interceptor trench collects contaminated groundwater, the water would be pumped from the trench, treated if necessary, and discharged into the city of Charleston's treatment system. The length of time required for implementation of the groundwater alternative would depend on a number of factors, including the effectiveness of the source control, as well as the permeability and flow rate in the shallow aquifer. The preferred groundwater alternative would also involve future land use controls to prohibit the use of groundwater at the Site, and Monitored Natural Attenuation to monitor groundwater quality.

In addition, as part of the preferred groundwater action, a source control action will be taken to remove those contaminated subsurface soils and debris located beneath the water table.

This alternative is the preferred option to address groundwater contamination at the Site for the following reasons:

- it would reduce the potential for human exposure to contaminated groundwater;
- it would reduce the potential for discharge of contaminated groundwater into the Ashley River and/or nearby wetlands;
- the preferred groundwater alternative offers a balance between effectiveness and cost (i.e., the combination of groundwater extraction from the interceptor trench, treatment if needed, future land use controls, and MNA should provide both short-term and long-term protection of human health and the environment. The cost estimate of the preferred groundwater remedy, $2,210,199, is significantly lower

than the cost estimate for the Permeable Reactive Barrier alternative in the Feasibility Study ($3,493,400);

- the preferred groundwater alternative is compatible with the preferred soil and sediment alternatives; and
- groundwater extraction, future land use controls, and MNA are considered technically feasible because these technologies have been used at many sites, and the materials and qualified contractors are readily available.

Surface water run-off will be managed to mitigate the discharge of pollutants into the marsh, the tidal pool, and the Ashley River. The response actions selected in this Action Memo, including the preferred groundwater alternative, would include a comprehensive site-wide storm water management plan and marsh sediment control plan to meet the requirements of the South Carolina Storm Water and Sediment Reduction Act.

B. Contribution to Remedial Performance

The Non-Time-Critical Removal Action described herein is intended to mitigate the known threats to public health and the environment posed by the Site, as well as provide adequate long-term protection of human health and the environment. Five-year reviews will be conducted to determine if the actions taken during the Non-Time-Critical Removal Action remain protective. The need for additional remedial measures will be assessed during the five-year reviews.

C. Remedial Investigation/Feasibility Study (RI/FS)

Prior to the completion of the Remedial Investigation/Feasibility Study (RI/FS), EPA evaluated the Site in order to determine its eligibility for a non-time-critical removal action. Applying a non-time-critical removal action to the Site instead of a remedial action has the potential to reduce the time and administrative costs of the response action, while still insuring that the Site contamination is reduced to levels that are protective of human health and the environment. EPA has determined that the Site is eligible for a non-time-critical removal action.

D. Applicable or Relevant and Appropriate Requirements (ARARs)

Section 300.415(i) of the NCP requires that removal actions under CERCLA Section 104 and CERCLA Section 106 attain applicable or relevant and appropriate requirements (ARARs) under Federal or State environmental laws or facility siting laws to the extent practicable considering the urgency of the situation and the scope of the removal. In addition to ARARs, other Federal or State advisories, criteria, or guidance "to be considered" (TBC) for a particular action may be identified. TBCs are not required by the NCP, but are meant to complement the use of ARARs.

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The Non-Time-Critica Removal Action will be conducted in compliance with all Federal and State applicable or relevant and appropriate chemical-, action-, and location-, specific requirements (ARARS) described in Tables 2-2, 2-8, and 2-9 in the FS report for the Site.

The potential Federal and State chemical-specific ARARs include the following:

Federal ARARs
- Safe Drinking Water Act: National Primary Drinking Water Standards (40 CFR 141, Subparts B and G);
- Clean Water Act: Ambient Water Quality Criteria (40 CFR Part 131);
- Clean Water Act: National Pretreatment Standards (40 CFR Parts 122, 125);
- Resource Conservation and Recovery Act (RCRA): Groundwater Protection (40 CFR Parts 257.3-4 and 264);
- Clean Air Act: National Ambient Air Quality Criteria (40 CFR Part 50);

State ARARs
- South Carolina Drinking Water Standards (R.61-58);
- South Carolina Hazardous Waste Regulations (R.61-79);
- South Carolina Water Quality Standards (R.61-68) and (R.61-69); and
- South Carolina Air Pollution Control (R.61-62.70)

The potential Federal and State action-specific ARARs include the following:

Federal ARARs
- Solid Waste Disposal Act (40 CFR Parts 261, 262, 263, 264);
- Occupational Safety and Health Act (29 CFR Parts 1903, 1904, 1910, 1926)
- Clean Water Act: Ambient Water Quality Standards (40 CFR Part 131);
- Clean Water Act: National Pretreatment Standards (40 CFR Part 403);
- Clean Air Act (40 CFR Parts 50, 53, 61);
- Hazardous Materials Transportation Act (49 CFR Parts 107, 171-177);

State ARARs
- South Carolina Hazardous Waste Management Regulations (R.61-79); and
- South Carolina Well Standards and Regulations (R.61-71)

The potential Federal and State location-specific ARARs include the following:

Federal ARARs
- Fish and Wildlife Coordination Act (16 USC Section 661-666);
- Endangered Species Act (16 USC 1531), (50 CFR parts 200 and 402);
- Rivers and Harbors Act of 1899 (33 USC Section 403, Executive Order # 11);
- Scenic River Act (16 USC 1271);
- Coastal Zone Management Act (16 USC 1451);

State ARARs
- South Carolina Stormwater Management and Sediment Reduction Regulations (r.72-through 316);

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- South Carolina Water Classifications and Standards and Classified Waters (R.61-68 and R.61-69); and
- South Carolina Solid and Hazardous Waste Programs (R.61-79 and R.61-107)

E. Project Schedule

Within approximately the next 9 months, design documents will be prepared for the Non-Time-Critical Removal Action. The exact time table for implementing the Non-Time-Critical Removal Action at the Site will be developed during the design process.

VI. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

If this Non-Time-Critical Removal Action is delayed or not implemented, the threats described herein will continue to exist, and may worsen with time as contaminants continue to migrate from upland areas into the ecologically-sensitive wetlands.

VII. OUTSTANDING POLICY ISSUES

EPA Region 4 has chosen to address this Site using Removal, rather than Remedial authority. Based on EPA Guidance, this Site meets the criteria for a Non-Time Critical Removal.

The conditions at this Site are relatively straightforward. Contamination at the Site consists of lead and arsenic in the surface and subsurface soils, as well as marsh sediments. In addition, groundwater is contaminated with lead and arsenic. Low pH conditions exist in soil, groundwater, and marsh sediments. A combination of excavation, transportation and off-site disposal, and capping techniques will be utilized to address soil contamination. Contaminated marsh sediments will be excavated and either consolidated beneath the soil cap or transported off-site for disposal. Areas of the tidal pool area affected by the sediment removal will be backfilled and re-vegetated.

The preferred groundwater action would involve the construction of an interceptor trench to prevent the contaminated groundwater from discharging into the Ashley River and nearby wetlands. Once the interceptor trench collects the contaminated groundwater, the water would be pumped from the trench, treated if necessary, and discharged into the city of Charleston's treatment system. The length of time required for groundwater extraction will depend on a number of factors, including the effectiveness of the source control, as well as the permeability and flow rates in the shallow aquifer. In addition, as part of the preferred groundwater action, a source control action will be taken to remove those contaminated subsurface soils and debris located beneath the water table.

VIII. ENFORCEMENT

As discussed previously, this decision document is an Enforcement Action Memorandum. The removal action will be conducted by potentially responsible parties under a consensual agreement. See the attached Enforcement Addendum for detailed information regarding the enforcement status.

IX. RECOMMENDATION

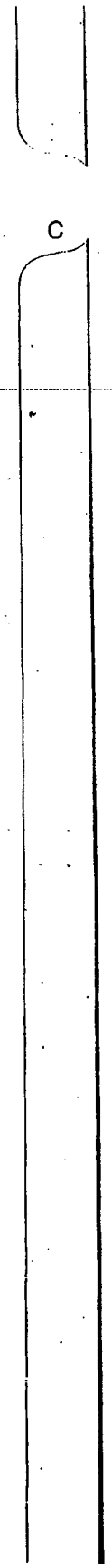
This decision document sets forth the selected Non-Time-Critical Removal Action for the Columbia Nitrogen Site, Charleston County, Charleston South Carolina, developed in accordance with CERCLA, as amended, and is consistent with the NCP. This decision is based on the Administrative Record for the Site.

Conditions at the Site meet the NCP Section 300.415(b)(2) for a Non-Time-Critical Removal Action. I recommend your approval of the proposed Non-Time-Critical Removal Action.

Approval: _____ Date: 10/11/05
Beverly H. Banister, Acting Director
Waste Management Division

Disapproval: _____ Date: _____
Beverly H. Banister, Acting Director
Waste Management Division

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REMOVAL ACTION SCOPE OF WORK
COLUMBIA NITROGEN SITE
CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA
December 2013

INTRODUCTION

This Scope of Work (SOW) defines the response activities and deliverables required to implement the work under the Unilateral Administrative Order for Removal Response Activities at the Columbia Nitrogen Site (the "Site"). EPA executed a Revised Enforcement Action Memorandum on September 8, 2011 in which it chose a Non Time Critical Removal Action (NTCRA) to address actual or threatened releases of hazardous substances from the Site which may present an imminent and substantial endangerment to public health, welfare, and/or the environment. The requirements for this SOW will be further detailed in work plans and other documents to be submitted by the UAO recipients for approval as set forth in this SOW. EPA review or approval of a task or deliverable shall not be construed as a guarantee as to the adequacy of such task or deliverable.

BACKGROUND

The Site consists of approximately 36.67 acres, located at 1801 Milford Street, on the east bank of the Ashley River in Charleston, Charleston County, South Carolina. The Site consists of a former phosphate fertilizer manufacturing facility which was operational from 1905 to 1972. In general, the historical operations conducted at this facility involved a number of processes including the production of sulfuric acid and the acidification of phosphate rock. The sulfuric acid was stored onsite in lead-lined acid chambers before it was reacted with phosphate ore to produce phosphoric acid, the building block of phosphate fertilizers. The phosphoric acid was mixed with other components on-site such as ammonia (for nitrogen) and potash (for potassium) to produce a three-component fertilizer. The finished product was bagged on-site and prepared for distribution.

The lead acid chambers were periodically cleaned, and the wash-down water containing acid and soluble lead was discharged onto the ground surface and into nearby drainage ditches. Pyrite cinders that did not burn completely in the combustion chambers may have been used as on-site fill material. The pyrite cinders are characterized as a red to magenta colored slag material known to contain elevated levels of lead, arsenic, and other inorganic constituents. Environmental impacts typically associated with former phosphate fertilizer manufacturing facilities included elevated levels of metals, particularly lead and arsenic in soil, groundwater and sediments, as well as acidic pH conditions.

In 1990, a Site Assessment was performed at the Site indicating the presence of materials which could be considered hazardous wastes. In 1995 EPA conducted a Preliminary Assessment/Site Inspection (PA/SI) which indicated elevated concentrations of lead and arsenic across the Site. In 1998, South Carolina Department of Health, Environmental Control (SCDHEC) conducted an Expanded Site Investigation (ESI) that identified lead, arsenic, and mercury in the surface soil, groundwater and sediment samples above screening levels. From 1999 to 2002, EPA conducted an RI/FS to fully characterize the Site-related contamination. The RI/FS indicated elevated concentrations of lead, arsenic, and low pH in surface and subsurface soil at numerous locations across the Site, in sediment samples located in wetlands between the Site and the Ashley River, as well as in groundwater. An ecological risk assessment was conducted with

the RI/FS data which indicated potential adverse impacts to ecological receptors in the nearby wetlands and the Ashley River.

1. **Non -Time Critical Removal Action Implementation**

A. The Respondents shall gather and analyze the existing background information regarding the Site to assist in planning the scope of the removal action. From 1999 to 2002, EPA conducted a Remedial Investigation/Feasibility Study (RI/FS) to fully characterize the Site related contamination. However, there may be data gaps which will require additional data collection to complete a full characterization of the nature and extent of contamination at the Site. The intent of additional data collection will not be to replicate prior studies, but to complete data gaps and incorporate and build upon prior work.

Respondents shall conduct any remaining investigation activities necessary to further characterize the nature and extent of Site-related soil, sediment, and groundwater contamination, including potential exposure pathways of concern. Respondents shall collect and analyze additional samples as necessary from other locations at the Site. These investigations shall cover, as set out in the Site Delineation Work Plan, all areas of the Site presently known to be contaminated by the past release of Site-related hazardous substances into the environment, including drainage areas, areas impacted by the discharge of contaminated groundwater, plus any other areas on-site where a data gap might exist.

B. In general, the Respondents shall conduct the NTCRA to control the source of existing releases or threatened releases of hazardous substances into the environment from the Site in such a manner, and to the extent necessary, to achieve compliance with Federal and/or State cleanup standards. The NTCRA shall include a response action to address soil contamination (also including building debris, pyrite slag, etc., located in the soil), sediment contamination (including any building debris, slag, etc., that may located in the wetland areas), groundwater contamination, as well as post-removal site controls (as needed).

The removal action contractor shall take all necessary precautions to protect the environment during the removal action. This includes protecting all water courses, surface waters, soils, and air from degradation or damage in accordance with all federal, state, and local laws and regulations. This also includes repairing or replacing hard features in the landscape if removed or damaged in the process of conducting the removal action, as needed. Hard features include, but are not limited to, fences, walls, retaining walls, monitoring wells, underground pipes/tanks, etc.

C. The Respondents shall conduct the soil response action to include the excavation of an estimated 35,557 cubic yards of soil, pyrite slag and building debris associated with the former fertilizer manufacturing processes which are contaminated with concentrations of arsenic exceeding 27 ppm and/or concentrations of lead exceeding 895 ppm. Soil excavation limits will be determined based on both visual examination and confirmation sampling prior to backfilling. XRF field screening will be used to determine when the soil at the base and in the sidewalls of each excavation contains arsenic and/or lead concentrations less than 895 mg/kg lead and 27 mg/kg arsenic. All excavated areas will be surveyed before and after backfilling for horizontal and vertical control, and to support the implementation of institutional controls (if needed). All survey data will be referenced to the North American Horizontal Datum of 1983 and the North American Vertical Datum of 1988. All soil excavation activities will comply with OSHA regulations. If needed, trucks with water-spraying equipment will be used to minimize the potential for dust during the soil excavation activities.

Soil will be treated on-site, if required, using a chemical mixture to encapsulate, solidify, and/or chemically modify the arsenic and lead, and reduce its leachability, prior to being transported off-site for disposal at an approved landfill. Once the soil is excavated and stockpiled, the Respondents shall collect and analyze composite samples in order to characterize the impacted soil for off-site disposal. All soils with RCRA TCLP concentrations above the 5.0 mg/l standard will be stabilized in order to meet the requirements of an EPA-approved subtitle D landfill. Once excavated and approved by the landfill for disposal (with leachable arsenic and lead concentrations below the RCRA standard), the soil will be loaded into trucks and transported to the RCRA Subtitle D landfill. Any soils that do not meet the RCRA standards (or the alternative treatment standards of 7.5 mg/l TCLP for lead and 50 mg/l TCLP for arsenic) following treatment will require off-site disposal at an EPA-approved subtitle C landfill. Smaller debris such as bricks will be excavated and handled with the excavated soil. All building debris equal or larger than 1 cubic yard in size will be left in place and cleaned by manual brushing and/or pressure washing, or excavated, cleaned, and left on-site at a location that is agreeable to the property owner.

Stabilization will be achieved (as needed) by mixing a phosphate-based stabilization agent (or equivalent) with the soil using an excavator bucket or similar means. Soil will be mixed with a stabilizing agent in batches of approximately 300 cubic yards to ensure efficient and uniform blending. Verification samples will be collected from the stockpiles at a minimum frequency of one sample per 500 tons to ensure compliance with the landfill disposal requirements.

Soil to be used for backfill in the excavated areas will be sampled to screen for hazardous substances. The analytical results for the backfill shall be reviewed by EPA and each sampled batch of backfill shall be approved for use by EPA prior to the commencement of any backfilling activities. Erosion and sediment control measures (e.g., silt fence, hay bales) shall be installed during the NTCRA to prevent the migration of soil-bound contamination to adjacent wetlands and surface water bodies.

A vegetative cover and/or other material used for capping purposes such as asphalt or concrete will be installed to prevent the erosion of areas impacted by the Removal Action. If needed, in areas where a vegetative cover is used, Respondents will irrigate the vegetative cover to insure its establishment. The type(s) of soil/vegetation cover and/or caps to be used will be determined during the design process, and will be based on the expected future land use(s) of the Site property. If needed, the vegetation cover (if used) will be irrigated to insure its establishment.

The Respondents shall develop a Traffic Control Plan to establish traffic patterns designed to minimize or prevent trucks that are hauling soil off-site to the landfill from traversing areas with impacted surface soil. All trucks used for off-site transport will be covered with tarps and decontaminated (as needed) before leaving the Site to ensure each load is secure and no contamination will be tracked off-site. The decontamination procedures will be established in a Site Control Plan by the Removal Action contractor. The Removal Action contractor will also be responsible for verifying that all trucks are covered with tarps, manifested, and placarded in accordance with appropriate RCRA and DOT regulations before each truck exits the Site. See Revised Enforcement Action Memorandum at pages 7-9.

D. The Respondents' sediments response action shall include the excavation of approximately 2,300 cubic yards of contaminated sediments in the wetlands area referred to as the "tidal pool". Once excavated, the contaminated sediments will be treated on-site, if required, and the treated sediments will be stockpiled on-site for verification sampling. Following treatment and verification, the treated sediments will be transported off-site for disposal at an approved landfill. Respondents will backfill excavated areas with clean sediment, and re-vegetate affected areas, i.e. restore all wetlands to their pre-Removal Action conditions to the maximum extent possible. The Respondents shall characterize the

tidal pool contaminated sediments as Category 3 and 4 ERM quotients, and the evaluate locations with Category 2 ERM Quotients to determine the feasibility of excavating those sediments.

Once the excavation of sediments is completed in an area, a non-woven geo-textile will be placed at the bottom of the excavation and the area will be backfilled with clean sand. Once the area has been backfilled to grade, the affected areas will be re-vegetated with native vegetation. Each area will be monitored once the re-vegetation activities are completed (details to be included by the removal action contractor in the re-vegetation monitoring plan). Each area impacted by the sediment excavation will be restored to its pre-Removal Action conditions to the maximum extent possible. See Revised Enforcement Action Memorandum at pages 10-11.

E. Respondents shall implement a groundwater response action which involves a chemical additive to the backfill being used in the excavated upland areas below the water table. The purpose of the chemical additive is to buffer the pH in the groundwater, and reduce levels of lead and arsenic in groundwater. Chemical additives recently used at other former fertilizer sites in the area utilized a combination of the following chemicals and loading rates: ferric sulfate (1.7 to 2.04 wt %); magnesium oxide (0.2 to .24 wt %); and Portland cement (0.6 to 0.72 wt %). These chemicals are mixed thoroughly with the backfill using an excavator, and then loaded into trucks, and placed into the excavation at one-foot lifts using an excavator and-or bulldozer. See Revised Enforcement Action Memorandum at pages 9-10.

F. The Respondents shall repair or replace hard features in the landscape if removed or damaged in the process of conducting the Removal Action. Hard features include, but are not limited to, fences, walls, retaining walls, monitoring wells, underground pipes/tanks, etc.

G. The Respondents shall prepare a post-removal Site Control Plan during the removal process consistent with Section 300.415(k) of the NCP and OSWER Directive 9360.2-02. Once approved by the EPA, Respondents shall implement such controls and provide the EPA with documentation of all activities related to the post removal site controls. See Revised Enforcement Action Memorandum at pages 11-12.

2. Development of Work Plans

Each of these Work Plans shall be a part of the Removal Action Work Plan:

A. Site Delineation Work Plan - The Removal Action contractor shall prepare a Site Delineation Work Plan which will provide a detailed description of the strategy to perform the Removal Action component set forth in Section I. A. above.

B. Source Control Work Plan - The Removal Action contractor shall prepare a Source Control Work Plan which will provide a detailed description of the strategy to perform the Removal Action component set forth in Section I. B. above.

C. Soil Response Action Work Plan - The Removal Action contractor shall prepare a Soil Response Action Work Plan which will provide a detailed description of the strategy to perform the Removal Action component set forth in Section I. C. above including a Traffic Control Plan and a Site Control Plan.

D. Sediments Response Action Work Plan - The Removal Action contractor shall prepare a Sediments Response Action Work Plan which will provide a detailed description of the strategy to

perform the Removal Action component set forth in Section I. D. above including a Revegetative Monitoring Plan..

E. Groundwater Response Action Work Plan - The Removal Action contractor shall prepare a Groundwater Response Action Work Plan which will provide a detailed description of the strategy to perform the Removal Action component set forth in Section I. E. above.

F. Hard Features Work Plan - The Removal Action contractor shall prepare Hard Features Work Plan which will provide a detailed description of the strategy to perform the Removal Action component set forth in Section I. F. above

G. Post-removal Site Control Plan - The Removal Action contractor shall prepare a Post-removal Site Control Plan which will provide a detailed description of the strategy to perform the Removal Action component set forth in Section I. G. above.

H. Site Operations Plan - The Removal Action contractor shall prepare a Site Operations Plan (SOP) which will provide a detailed description of the strategy and procedures to be used to accomplish the Removal Action work as set forth in the work plans above at Section 2. A. – G . The SOP will outline pre-removal existing conditions (including a detailed summary of existing soil, sediment, and groundwater data), detailed excavation procedures, detailed description of methods and materials to be used for stabilization, detailed list of equipment to be used, detailed description of storage areas, excavation areas, stockpile areas, stabilization and material-loading areas, access roads, health and safety plan, erosion control plan, traffic control plan, dust control plan, noise control plan, storm-water management plan, excavation equipment decontamination plan, site security plan, contingency plan, and project schedule.

I. Health and Safety Plan -Within 30 days after the Effective Date, Respondents shall submit for the EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Order. This plan shall be prepared in accordance with the EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If the EPA determines that it is appropriate, the plan shall also include contingency planning. The Respondents shall incorporate all changes to the plan recommended by the EPA and shall implement the plan during the pendency of the removal action.

3 Quality Assurance and Sampling

All sampling and analyses performed pursuant to this Order shall conform to the EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. The Respondents shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. The Respondents shall follow the below listed documents, as appropriate, for QA/QC and sampling guidance: "EPA Requirements for Quality Management Plans (QA/R-5)" (EPA/240/B-01/002, March 2001, Reissued May 2006), and "Representative Sampling Guidance for Soil, Air, Ecology, Waste, and Water" as this information becomes finalized and available.

Upon request by the EPA, the Respondents shall have such a laboratory analyze samples submitted by the EPA for QA monitoring. Respondents shall provide to the EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis. The Respondents shall only

use laboratories that have a documented quality system which complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995) and "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001; reissued May 2006) or equivalent documentation as determined by the EPA. The EPA may consider laboratories accredited under the National Environmental Laboratory Accreditations Program (NELAP) as meeting the quality system requirements.

Upon request by the EPA, the Respondents shall allow the EPA or its authorized representatives to take split and/or duplicate samples. The Respondents shall notify the EPA not less than 15 days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary.

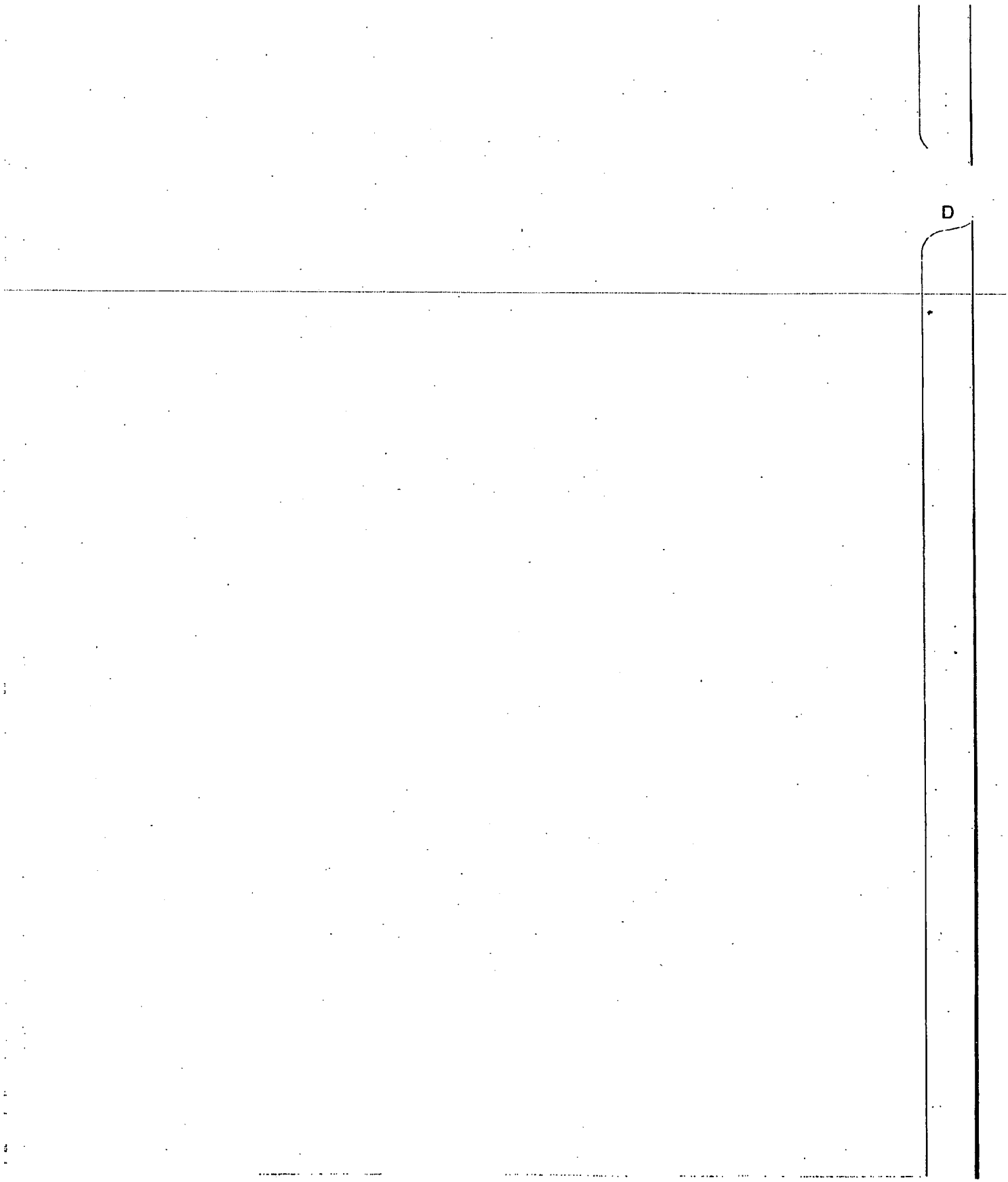
4. Reporting

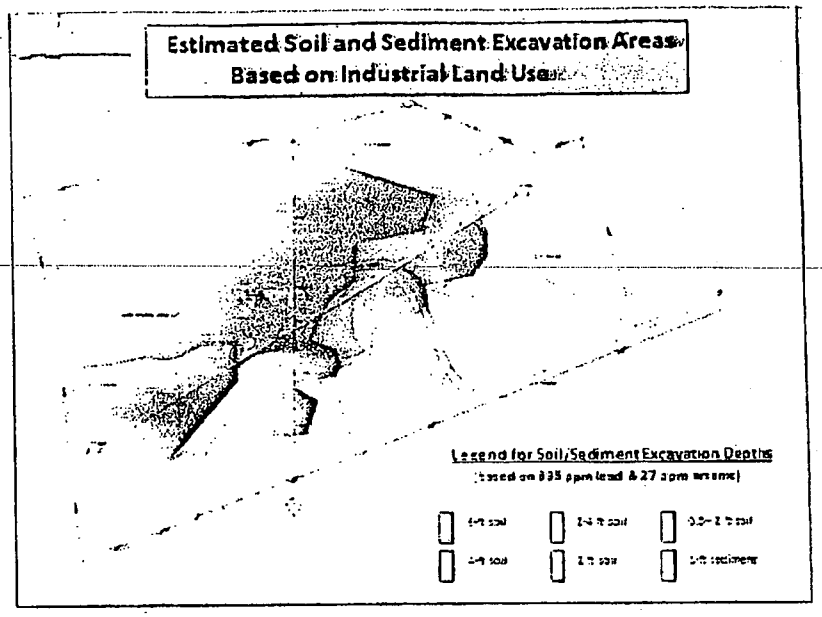
A. Weekly Reports – the Removal Action contractor will prepare and submit to the EPA a brief written progress report each week from the time the contractor mobilizes to the Site to begin the Removal Action, to the time the contractor de-mobilizes at the completion of the Removal Action. Each weekly report shall describe all significant activities during the preceding 7 days, including actions performed and problems encountered. The report will also describe developments anticipated for the next reporting period, including anticipated problems and a schedule of work to be performed.

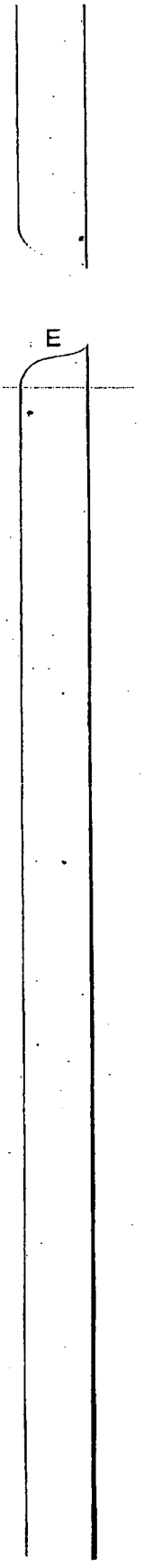
B. Final Removal Action Completion Report – the Removal Action Contractor shall prepare and submit to EPA a final report, consistent with Section 300.165 ("OSC Reports") of the National Contingency Plan (NCP).

C. The final report will include a list of quantities and types of materials removed from the Site, description of the disposal option(s) used, a listing of destination(s) of all removed materials (i.e., landfills), a presentation of all relevant documentation generated during the Removal Action (i.e., manifests, permits, etc.).

D. Post-Removal Site Control Plan – Upon completion of the Removal Action, the Removal Action contractor shall prepare a Post-Removal Site Control Plan, consistent with Section 300.415(k) of the NCP and OSWER Directive 9360.2-02. Upon EPA approval, the Respondents shall implement such controls and provide EPA with documentation of all activities related to the post-removal Site controls. Examples of post-removal Site controls used at other former fertilizer manufacturing sites in the area include establishment of institutional controls (as needed), development of a groundwater monitoring plan, erosion control and monitoring plan, and re-vegetation monitoring plan. Institutional controls (i.e., land use restrictions) will be required on the property deed to prohibit the use of the Site property for residential purposes, restrict the use of impacted groundwater, and to restrict any intrusive activities that will jeopardize the integrity of the removal action.


D


Estimated Soil and Sediment Excavation Areas
Based on Industrial Land Use
Legend for Soil/Sediment Excavation Depths


E

RESPONDENTS RECEIVING THIS UAO

Ashley II of Charleston, LLC

J. Holcombe Enterprises, L.P.

James H. Holcombe

J. Henry Fair, Jr.

PCS Nitrogen, Inc.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF CHARLESTON	)	**CASE NO. 11-CP-10-387**
	)	
PCS Nitrogen, Inc.,	)	**NOTICE OF JOINDER BY DEFENDANT PROVIDENCE WASHINGTON INSURANCE COMPANY IN CONTINENTAL CASUALTY COMPANY'S MOTION FOR SUMMARY JUDGMENT BASED ON CORPORATE SUCCESSION**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Continental Casualty Company, et al.,	)	
	)	
Defendants.	)	
	)	

FILED
2011 DEC 1 PM 4:12
CHARLESTON COUNTY

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Providence Washington Insurance Company, as successor in interest by way of merger to Seaton Insurance Company, f/k/a Unigard Security Insurance Company, f/k/a Unigard Mutual Insurance Company ("Providence Washington"), by and through its undersigned attorneys, hereby joins in Defendant Continental Casualty Company's Motion for Summary Judgment Based on Corporate Succession (hereinafter, the "Motion"), pursuant to South Carolina Rule of Civil Procedure 56(c).

The only Providence Washington insurance policy at issue in this case – Policy No. 1-2027, issued by Unigard Mutual Insurance Company covering the period November 12, 1973 to February 1, 1975 (the "Unigard Policy" or "the Policy") (copy attached hereto as Exhibit A) – states that the insurer "agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify *the Assured* for all sums which *the Assured* shall be obligated to pay by

reason of liability . . . ." *See* Ex. A, at PW00016 (emphasis added). The Policy defines "Assured" to include the Named Assured and:

> (a) any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such, and any organization or proprietor with respect to real estate management for the Named Assured;
>
> (b) any person, organization, trustee or estate to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Assured or of facilities of the Named Assured or used by them;
>
> (c) any additional assured (not being the Named Assured under this policy) included in the Underlying Insurances, subject to the provisions in Condition B; but not for broader coverage than is available to such additional Assured under any underlying insurances as set out in attached Schedule;
>
> (d) with respect to any automobile owned by the Named Assured or hired for use in behalf of the Named Assured, to any aircraft owned by or hired for use in behalf of the Named Assured, any person while using such automobile or aircraft and any person or organization legally responsible for the use thereof, provided the actual use of the automobile or aircraft is with the permission of the Named Assured. The insurance extended by this sub-division (d), with respect to any person or organization other than the Named Assured, shall not apply -
>
> 1. to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any occurrence arising out of the operation thereof;
>
> 2. to any manufacturer of aircraft, engines, or aviation accessories, or any aviation sales or service or repair organization or airport or hangar operator or their respective employees or agents with respect to any occurrence arising out of the operation thereof;
>
> 3. with respect to any hired automobile or aircraft, to the owner thereof or any employee of such owner. This sub-division (d) shall not apply if it restricts the insurance granted under sub-division (c) above.

The only Named Assureds under the Unigard Policy are "COLUMBIA NITROGEN CORPORATION & NIPRO, INC., COLUMBIA COMMUNICATIONS SERVICES, INC." *See id.*, at PW00015. PCS Nitrogen, Inc. ("PCS") is not a Named Assured under the Unigard

Policy. Nor does PCS qualify as an Assured under the definition set forth in the Policy. In addition, for the reasons set forth in Defendant Continental Casualty Company's Memorandum of Law in support of its Motion for Summary Judgment Based on Corporate Succession ("Continental's Memorandum of Law"), PCS cannot establish that it is the successor to Columbia Nitrogen Corporation, the Named Assured under the Policy.

Moreover, any claim by PCS that the Unigard Policy or rights thereunder were assigned to it must fail. Like the policies referenced in Continental's Memorandum of Law, the Unigard Policy expressly conditions the assignment of interests under the Policy on the insurer's consent. Specifically, the Unigard Policy, in Condition O, expressly states that: "Assignment of interest under this policy shall not bind the Company *unless and until their consent is endorsed hereon.*" *Id.*, at PW00018 (emphasis added).

The documents produced in this litigation provide no indication whatsoever that any Named Assured under the Unigard Policy sought to assign the Policy or any interests under the Policy to any other entity or that Providence Washington consented to any assignment of the Policy or any interests thereunder. Moreover, although the Unigard Policy contains numerous endorsements, no endorsement purports to assign interests under the Policy to any other party. Therefore, any purported assignment of Columbia Nitrogen Corporation's rights under the Unigard Policy would be ineffective and void.

Accordingly, for the reasons described above and set forth in Continental's Memorandum of Law, PCS has no basis to claim any rights under Unigard Policy No. 1-2027, and all of its

claims against Providence Washington under the Unigard Policy should be dismissed with prejudice. [1]

Resolution of the pending Motion and this Joinder will promote judicial economy and narrow the issues and/or parties for trial.

Providence Washington reserves the right to offer additional submissions, authorities, and memoranda in support of this Joinder and/or the pending Motion at the hearing thereon.

Respectfully submitted;

Elizabeth J. Palmer, Esquire (73680)
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
Phone: (843) 577-6726
Fax: (843) 324-8036

and

Harry Lee (Admitted Pro Hac Vice)
Mary (Molly) Woodson Poag (Admitted Pro Hac Vice)
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Phone: (202) 429-3000
Fax: (202) 429-3902

Attorneys for Providence Washington Insurance Company, as successor in interest by way of merger to Seaton Insurance Company, f/k/a Unigard Security Insurance Company, f/k/a Unigard Mutual Insurance Company

Charleston, South Carolina
August 11, 2015

[1] As discussed in the separate Joinder submitted by Providence Washington simultaneously herewith, Plaintiff PCS Nitrogen, Inc.'s claims are also barred by the pollution exclusion in the Unigard Policy, which provides a separate and independent basis for the dismissal of all claims against Providence Washington in this matter.

Exhibit A

Endorsement No. 9 Additional Premium $926.68 Return Premium

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

IN CONSIDERATION OF AN ADDITIONAL PREMIUM OF $926.68, IT IS UNDERSTOOD AND AGREED THAT THIS POLICY IS CANCELLED EFFECTIVE FEBRUARY 1, 1975.

THE ADDITIONAL PREMIUM IS CALCULATED AS FOLLOWS:

EARNED PREMIUM

JANUARY 1, 1975 TO FEBRUARY 1, 1975 - $10,851.00 X .085 = $922.33

AUDIT FOR EXCESS EMPLOYERS LIABILITY

JANUARY 1, 1975 TO FEBRUARY 1, 1975 - $6809.35 X .03 =	$204.28
LESS DEPOSIT PREMIUM -	199.83
ADDITIONAL PREMIUM DUE	$ 4.45

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective FEBRUARY 1, 1975

Attached to and forming part of Policy No. 1-2027 of the

UNIGARD MUTUAL INSURANCE COMPANY.

ALLEN, MILLER AND ASSOCIATES, I
Underwriting Managers

By

AMAI-9

Endorsement No. 8 Additional Premium $199.16 Return Premium _____

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

AUDIT ENDORSEMENT FOR EXCESS EMPLOYERS LIABILITY

AUDIT PERIOD	EXPOSURE	RATE	EARNED PREMIUM
JANUARY 1, 1974 TO JANUARY 1, 1975	$8,500,566.00	.03 PER $100.00 OF PAYROLL	$2,550.16
		LESS DEPOSIT PREMIUM	$2,351.00
		ADDITIONAL PREMIUM DUE:	$ 199.16

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective JANUARY 1, 1975

Attached to and forming part of Policy No. 1-2027 of the

UNIGARD MUTUAL INSURANCE COMPANY

ALLEN, MILLER AND ASSOCIATES, INC
Underwriting Managers

By _____

AMAI-9

Endorsement No. 7 Additional Premium Return Premium

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL.

IT IS AGREED THAT THE INSURANCE DOES NOT APPLY TO BODILY INJURY OR PROPERTY DAMAGE ARISING OUT OF THE DISCHARGE, DISPERSAL, RELEASE OR ESCAPE OF SMOKE, VAPOR, SOOT FUMES, ACIDS, ALKALIS, TOXIC CHEMICALS, LIQUIDS OR GASES, WASTE MATERIALS OR OTHER IRRITANTS, CONTAMINANTS, OR POLLUTANTS INTO OR UPON LAND, THE ATMOSPHERE OR ANY WATERCOURSE OR BODY OF WATER; BUT THIS EXCLUSION DOES NOT APPLY IF SUCH DISCHARGE, DISPERSAL, RELEASE OR ESCAPE IS SUDDEN AND ACCIDENTAL.

(THIS ENDORSEMENT REPLACES ENDORSEMENT NUMBER 2 IN ITS ENTIRITY)

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective 1-2007 JANUARY 17, 1974

Attached to and forming part of Policy No. 1-2007 of the

UNIGARD MUTUAL INSURANCE COMPANY

ALLEN, MILLER & ASSOCIATES, INC.
Underwriting Managers

By

AMAI-9

Endorsement No. 6 Additional Premium ____ Return Premium ____

Name of Assured COLUMBIA NITROGEN CORPORATION & NITRO, INC., ET AL

ANNUAL INSTALLMENT PREMIUM

THE PREMIUMS ARE PAYABLE AS FOLLOWS:

DUE DATE	AMOUNT
JANUARY 1, 1974	$10,851.00
JANUARY 1, 1975	$10,851.00
JANUARY 1, 1976	$10,851.00

(THIS ENDORSEMENT REPLACES ENDORSEMENT NUMBERS 1 AND 4)

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective JANUARY 1, 1974

Attached to and forming part of Policy No. 1-2027 of the

UNIGARD MUTUAL INSURANCE COMPANY

ALLEN, MILLER & ASSOCIATES, INC.
Underwriting Managers

By ____

AHAI-9

Endorsement No. 5 (REVISED) Additional Premium $2,351.00 Return Premium

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

IN CONSIDERATION OF THE ADDITIONAL PREMIUM OF $2,351.00 IT IS UNDERSTOOD AND AGREED THAT THE SCHEDULE OF UNDERLYING INSURANCE IS COMPLETED TO READ AS FOLLOWS:

EXCESS WORKMEN'S COMPENSATION AND EMPLOYERS LIABILITY (GEORGIA & SOUTH CAROLINA)	$125,000 EACH AND EVERY OCCURRENCE

IT IS FURTHER AGREED THAT EXCLUSION (A) CONTAINED IN THE POLICY WORDING REFERRING TO WORKMEN'S COMPENSATION COVERAGE IS DELETED IN ITS ENTIRITY AND THE EXCESS EMPLOYERS LIABILITY PROVIDED BY THIS POLICY IS ADJUSTABLE AT A RATE OF .03 PER $100.00 OF PAYROLL.

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective JANUARY 1, 1974

Attached to and forming part of Policy No. 1-2027 of the

UNIGARD MUTUAL INSURANCE COMPANY

ALLEN, MILLER AND ASSOCIATES, INC.
Underwriting Managers

By

Confidential

PW00010

Endorsement No. 5 Additional Premium $2,351.00 Return Premium

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

IN CONSIDERATION OF THE ADDITIONAL PREMIUM OF $2,351.00 IT IS UNDERSTOOD AND AGREED THAT THE SCHEDULE OF UNDERLYING INSURANCE IS COMPLETED TO READ AS FOLLOWS:

EXCESS EMPLOYERS LIABILITY (GEORGIA)	$500,000 EXCESS OF $125,000 EACH AND EVERY OCCURRENCE

IT IS FURTHER AGREED THAT EXCLUSION (A) CONTAINED IN THE POLICY WORDING REFERRING TO WORKMEN'S COMPENSATION COVERAGE IS DELETED IN ITS ENTIRITY AND THE EXCESS EMPLOYERS LIABILITY PROVIDED BY THIS POLICY IS ADJUSTABLE AT A RATE OF .03 PER $100.00 OF PAYROLL.

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective JANUARY 1, 1974

Attached to and forming part of Policy No. 1-2027 of the

INTEGRAND MUTUAL INSURANCE COMPANY

By

AMAI-8

Endorsement No. 4 Additional Premium _____ Return Premium _____

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

IT IS HEREBY UNDERSTOOD AND AGREED THAT ANNUAL INSTALLMENT PREMIUMS ARE DUE AND PAYABLE AS FOLLOWS:

DUE DATE	AMOUNT
JANUARY 1, 1974	$8,500.00
JANUARY 1, 1975	$8,500.00
JANUARY 1, 1976	$8,500.00

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective JANUARY 1, 1974

Attached to and forming part of Policy No. 1-2027 of the

UNIGARD MUTUAL INSURANCE COMPANY

ALLEN, MILLER AND ASSOCIATES, INC.
Underwriting Managers

By _____

AMA1-9

Endorsement No. 3 Additional Premium $1,165.00 Return Premium

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

IN CONSIDERATION OF AN ADDITIONAL PREMIUM OF $1,165.00, IT IS HEREBY UNDERSTOOD AND AGREED THAT THE INCEPTION DATE OF THIS POLICY IS AMENDED TO READ:

NOVEMBER 12, 1973

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective NOVEMBER 12, 1973

Attached to and forming part of Policy No. 1-2027 of the

UNIGARD MUTUAL INSURANCE COMPANY

ALLEN, MILLER AND ASSOCIATES, INC.
Underwriting Managers

By

AMAL-9

UNIGARD MUTUAL INSURANCE COMPANY

DECLARATIONS - PART B

NO. 1-2027

1477

AMOUNT	RATE	PREMIUM
$ 5,000,000.		$ AS PER
$		ENDT. NO. 1
$		$
$		$
TOTAL ▶		$

ASSURED'S NAME: COLUMBIA NITROGEN CORPORATION & NIPRO, INC., COLUMBIA COMMUNICATIONS SERVICES, INC.

ADDRESS: P. O. BOX 1483
AUGUSTA, GEORGIA

POLICY PERIOD

FROM JANUARY 1, 1974 TO JANUARY 1, 1977 (See Endt.)

BOTH DAYS AT 12.01 A.M. STANDARD TIME) AT THE LOCATION(S) OF THE RISK(S) INSURED AND IN ACCORD WITH THE TERMS AND CONDITIONS OF THE FORM(S) ATTACHED.

COVERAGE

UMBRELLA LIABILITY

Loveless & Company, Inc. Atlanta
Commission: 17.5%
New

CONTROL NO. 1-2027

ALLEN, MILLER AND ASSOCIATES, INC.
Underwriting Managers

JWM/cg

FEBRUARY 5, 1974

AUTHORIZED BY _____

THIS DECLARATIONS PAGE, WITH "POLICY PROVISIONS—PART A", AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETES THE ABOVE POLICY.

OFFICE COPY

UMBRELLA POLICY

DECLARATIONS

ITEM 1. Named Assured: COLUMBIA NITROGEN CORPORATION & NIPRO, INC.
COLUMBIA COMMUNICATIONS SERVICES, INC.

ITEM 2. Limit of Liability – as Insuring Agreement II,

(a) Limit in all in respect of each occurrence	$ 5 MILLION
(b) Limit in the aggregate for each annual period where applicable	$ 5 MILLION
(c) Self Insured Retention	$ 10,000.

ITEM 3. Notice of Occurrence (Condition G) to: ALLEN, MILLER AND ASSOCIATES, INC.

ITEM 4. Currency (Condition Q): U. S. Dollars

ITEM 5. Payment of Premium (Condition Q) to: ALLEN, MILLER AND ASSOCIATES, INC.

SCHEDULE OF UNDERLYING INSURANCES

COMPREHENSIVE GENERAL LIABILITY INCLUDING PRODUCTS LIABILITY	B.I. $1,000,000./$1,000,000. P.D. $1,000,000.
AUTOMOBILE LIABILITY	B.I. $ 500,000./$1,500,000. P.D. $ 500,000.
EMPLOYER'S LIABILITY INCLUDING JONES ACT	$100,000.
NON-OWNED AIRCRAFT LIABILITY	$1,000,000.

Named Assured: As stated in Item 1 of the Declarations forming a part hereof

and/or subsidiary, associated, affiliated companies or owned and controlled companies as now or hereafter constituted and of which prompt notice has been given to the Company, (Hereinafter called the "Named Assured").

Attached to and forming part of Policy No. 1-2027

Issued to: COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

ALLEN, MILLER AND ASSOCIATES, INC.
Underwriting Managers

Dated: FEBRUARY 5, 1974

By _____

(Provisions on pages 2, 3 and 4 are hereby referred to and made a part hereof.)

AMAI-6

INSURING AGREEMENTS

I. COVERAGE

The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability.

(a) imposed upon the Assured by law,

or

(b) Assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such,

for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" on account of:-

(i) Personal Injuries, including death at any time resulting therefrom,
(ii) Property Damage,
(iii) Advertising Liability,

caused by or arising out of each occurrence happening anywhere in the world.

II. LIMIT OF LIABILITY

The Company shall only be liable for the ultimate net loss the excess of either

(a) the limits of the underlying insurances as set out in the schedule in respect of each occurrence covered by said underlying insurances,

(b) the amount as set out in the declarations as the self-insured retention in respect of each occurrence not covered by said underlying insurances.

(hereinafter called the "Underlying Limits"):

and then only up to a further sum as stated in Item 2(a) of the Declarations in all in respect of each occurrence - subject to a limit as stated in Item 2(b) of the Declarations in the aggregate for each annual period during the currency of this Policy, separately in respect of Products Liability and in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employee of the Assured.

In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurances by reason of losses paid thereunder, this policy shall

(1) in the event of reduction pay the excess of the reduced underlying limit

(2) in the event of exhaustion continue in force as underlying insurance.

The inclusion or addition hereunder of more than one Assured shall not operate to increase the Company's limit of liability.

THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS:

1. ASSURED -

The unqualified word "Assured", wherever used in this policy, includes not only the Named Assured but also -

(a) any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such, and any organization or proprietor with respect to real estate management for the Named Assured;

(b) any person, organization, trustee or estate to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Assured or of facilities of the Named Assured or used by them;

(c) any additional assured (not being the Named Assured under this policy) included in the Underlying Insurances, subject to the provisions in Condition B; but not for broader coverage than is available to such additional Assured under any underlying insurances as set out in attached Schedule;

(d) with respect to any automobile owned by the Named Assured or hired for use in behalf of the Named Assured, or to any aircraft owned by or hired for use in behalf of the Named Assured, any person while using such automobile or aircraft and any person or organization legally responsible for the use thereof, provided the actual use of the automobile or aircraft is with the permission of the Named Assured. The insurance extended by this sub-division (d), with respect to any person or organization other than the Named Assured, shall not apply -

1. to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any occurrence arising out of the operation thereof;

2. to any manufacturer of aircraft, engines, or aviation accessories, or any aviation sales or service or repair organization or airport or hangar operator or their respective employees or agents with respect to any occurrence arising out of the operation thereof;

3. with respect to any hired automobile or aircraft, to the owner thereof or any employee of such owner. This sub-division (d) shall not apply if it restricts the insurance granted under sub-division (c) above.

2. PERSONAL INJURIES -

The term "Personal Injuries" wherever used herein means bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation, also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any Advertising activities.

3. PROPERTY DAMAGE -

The term "Property Damage" wherever used herein shall mean loss of or direct damage to or destruction of tangible property (other than property owned by the Named Assured).

4. ADVERTISING LIABILITY -

The term "Advertising Liability" wherever used herein shall mean:-

(a) Libel, slander or defamation;

(b) Any infringement of copyright or of title or of slogan;

(c) Piracy or unfair competition or idea misappropriation under an implied contract;

(d) Any invasion of right of privacy;

committed or alleged to have been committed in any advertisement, publicity article broadcast or telecast and arising out of the Named Assured's Advertising activities.

5. OCCURRENCE -

The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

6. ULTIMATE NET LOSS -

The term "Ultimate Net Loss" shall mean the total sum which the Assured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Assured's or of any underlying insurer's permanent employees.

The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

7. AUTOMOBILE -

The term "Automobile", wherever used herein, shall mean a land motor vehicle, trailer or semi-trailer.

8. AIRCRAFT -

The term "Aircraft", wherever used herein, shall mean any heavier than air or lighter than air aircraft designed to transport persons or property.

9. PRODUCTS LIABILITY -

The term "Products Liability" means

(a) Liability arising out of goods or products manufactured, sold, handled or distributed by the Named Assured or by others trading under his name if the occurrence occurs after possession of such goods or products has been relinquished to others by the Named Assured or by others trading under his name and if such occurrence occurs away from

premises owned, rented or controlled by the named Assured; provided such goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine or any property, other than such container, rented to or located for use of others but not sold;

(b) Liability arising out of operations, if the occurrence occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the Named Assured; provided operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to an agreement; provided further the following shall not be deemed to be "operations" within the meaning of this paragraph: (i) pick-up or delivery, except from or onto a railroad car, (ii) the maintenance of vehicles owned or used by or in behalf of the Assured, (iii) the existance of tools, uninstalled equipment and abandoned or unused materials.

10. ANNUAL PERIOD –

The term "each Annual Period" shall mean each consecutive period of one year commencing from the inception date of this Policy.

THIS POLICY IS SUBJECT TO THE FOLLOWING EXCLUSIONS:

This policy shall not apply:-

(a) to any obligation for which the Assured or any company as its insurer may be held liable under any Workmen's Compensation, unemployment compensation or disability benefits law provided, however, that this exclusion does not apply to liability of others assumed by the Named Assured under contract or agreement;

(b) to claims made against the Assured;

(i) for repairing or replacing any defective product or products manufactured, sold or supplied by the Assured or any defective part or parts thereof nor for the cost of such repair or replacement;

(ii) for the loss of use of any such defective product or products or part or parts thereof;

(iii) for improper or inadequate performance, design or specification; but nothing herein contained shall be construed to exclude claims made against the Assured for personal injuries or property damage (other than damage to a product of the Assured) resulting from improper or inadequate performance, design or specification;

(c) with respect to advertising activities, to claims made against the Assured for:

(i) failure of performance of contract, but this shall not relate to claims for unauthorized appropriation of ideas based upon alleged breach of an implied contract;

(ii) infringement of registered trade mark, service mark or trade name by use thereof as the registered trade mark, service mark or trade name of goods or services sold, offered for sale or advertised, but this shall not relate to titles or slogans;

(iii) incorrect description of any article or commodity;

(iv) mistake in advertised price;

(d) except in respect of occurrences taking place in the United States of America, its territories or possession, or Canada, to any liability of the Assured directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities, (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

Except insofar as coverage is available to the Assured in the underlying insurances as set out in the attached Schedule, this policy shall not apply:-

(e) to liability of any Assured hereunder for assault and battery committed by or at the direction of such Assured except liability for Personal Injury or Death resulting from any act alleged to be assault and battery committed for the purpose of preventing or eliminating danger in the operation of aircraft, or for the purpose of preventing personal injury or property damage; it being understood and agreed that this exclusion shall not apply to the liability of the Named Assured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above.

(f) with respect to aircraft owned by the Assured except liability of the Named Assured for aircraft not owned by them; it being understood and agreed that this exclusion shall not apply to the liability of the Named Assured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above;

(g) with respect to any watercraft owned by the Assured, while away from premises owned, rented or controlled by the Assured, except liability of the Named Assured for watercraft not owned by them; it being understood and agreed that this exclusion shall not apply to the liability of the Named Assured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above;

(h) to any employee with respect to injury to or the death of another employee of the same Employer injured in the course of such employment.

THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS –

A. PREMIUM –

Unless otherwise provided for the premium for this Policy is a flat premium and is not subject to adjustment except as provided in Conditions B AND P.

B. In the event of additional assureds being added to the coverage under the Underlying Insurances during currency hereof prompt notice shall be given to the Company hereon and if an additional premium has been charged for such addition on the Underlying Insurances, the Company shall be entitled to charge an appropriate additional premium hereon.

C. PRIOR INSURANCE NON CUMULATION OF LIABILITY –

It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance.

Subject to the foregoing paragraph and to all the other terms and conditions of this policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy the Company will continue to protect the Assured for liability in respect of such personal injury or property damage without payment of additional premium.

D. SPECIAL CONDITIONS APPLICABLE TO OCCUPATIONAL DISEASE –

As regards personal injury (fatal or non-fatal) by occupational disease sustained by any employee of the Assured, this policy is subject to the same warranties, terms and conditions (except as regards the premium, the amount and limits of liability and the renewal agreement, if any) as are contained in or as may be added to the underlying insurances prior to the happening of an occurrence for which claim is made hereunder.

E. INSPECTION AND AUDIT –

The Company shall be permitted at all reasonable times during the policy period to inspect the premises, plants, machinery and equipment used in connection with the Assured's business, trade or work, and to examine the Assured's books and records at any time during the currency hereof and within one year after final settlement of all claims so far as the books and records relate to any payments made on account of occurrences happening during the term of this policy.

F. CROSS LIABILITY –

In the event of claims being made by reason of personal injuries suffered by any employee or employees of one Assured hereunder for which another Assured hereunder is or may be liable, then this policy shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

In the event of claims being made by reason of damage to property belonging to any Assured hereunder for which another Assured is, or may be, liable then this policy shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

Nothing contained herein shall operate to increase the Company's limit of liability as set forth in Insuring Agreement II.

G. NOTICE OF OCCURRENCE –

Whenever the Assured has information from which the Assured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which, in the event that the Assured should be held liable, is likely to involve this Policy, notice shall be sent as stated in Item 3 of the declarations as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims.

H. ASSISTANCE AND CO-OPERATION –

The Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured but the Company shall have the right and shall be given the opportunity to associate with the Assured or the Assured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Assured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding.

I. APPEALS –

In the event the Assured or the Assured's underlying insurers elect not to appeal a judgment in excess of the underlying limits, the Company may elect to make such appeal at their cost and expense, and shall be liable for the taxable costs and disbursements and interest incidental thereto, but in no event shall the liability of the Company for ultimate net loss exceed the amount set forth in Insuring Agreement II for any one occurrence and in addition the cost and expense of such appeal.

J. LOSS PAYABLE –

Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Assured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and the Company. If any subsequent payments shall be made by the Assured on account of the same occurrence additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.

K. BANKRUPTCY AND INSOLVENCY –

In the event of the bankruptcy or insolvency of the Assured or any entity comprising the Assured, the Company shall not be relieved thereby of the payment of any claims hereunder because of such bankruptcy or insolvency.

L. OTHER INSURANCE –

If other valid and collectible insurance with any other insurer is available to the Assured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance.

M. SUBROGATION –

Inasmuch as this policy is "Excess Coverage", the Assured's right of recovery against any person or other entity cannot be exclusively subrogated to the Company. It is, therefore, understood and agreed that in case of any payment hereunder, the Company will act in concert with all other interests (including the Assured) concerned, in the exercise of such rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any interests (including the Assured) that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them; the Company is then to be reimbursed out of any balance then remaining up to the amount paid hereunder; lastly, the interests (including the Assured) of whom this coverage is in excess are entitled to claim the residue, if any. Expenses necessary to the recovery of any such amounts shall be apportioned between the interests (including the Assured) concerned, in the ratio of their respective recoveries as finally settled.

N. CHANGES –

Notice to or knowledge possessed by any person shall not effect a waiver or change in any part of this policy or estop the Company from asserting any right 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 hereof, signed by the Company.

O. ASSIGNMENT –

Assignment of interest under this policy shall not bind the Company unless and until their consent is endorsed hereon.

P. CANCELLATION –

This policy may be cancelled by the Named Assured or by the Company or their representative by sending by registered mail notice to the other party stating when, not less than thirty (30) days thereafter, cancellation shall be effective. The mailing of notice as aforesaid by the Company or their representatives to the Named Assured at the address shown in this policy shall be sufficient proof of notice, and the insurance under this policy shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the Named Assured or by the Company or their representatives shall be equivalent to mailing.

If this policy shall be cancelled by the Named Assured the Company shall retain the customary short rate proportion of the premium for the period this policy has been in force. If this policy shall be cancelled by the Company the Company shall retain the pro rata proportion of the premium for the period this policy has been in force. Notice of cancellation by the Company shall be effective even though the Company makes no payment or tender of return premium with such notice.

Q. CURRENCY –

The premiums and losses under this policy are payable in the currency stated in Item 4 of the Declarations. Payment of Premium shall be made as stated in Item 5 of the Declarations.

R. CONFLICTING STATUTES –

In the event that any provision of this policy is unenforceable by the Assured under the laws of any State or other jurisdiction wherein it is claimed that the Assured is liable for any injury covered hereby, because of non compliance with any statute thereof, then this policy shall be enforceable by the Assured with the same effect as if it complied with such Statute.

S. MAINTENANCE OF UNDERLYING INSURANCES –

It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the currency of this policy except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Assured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Company shall only be liable to the same extent as they would have been had the Assured complied with the said condition.

Endorsement No. 2

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

SEEPAGE, POLLUTION AND CONTAMINATION EXCLUSION CLAUSE

IT IS UNDERSTOOD AND AGREED THAT THIS INSURANCE DOES NOT APPLY TO PERSONAL INJURY OR PROPERTY DAMAGE ARISING OUT OF THE DISCHARGE, DISPERSAL, RELEASE OR ESCAPE OF:

(1) SMOKE, VAPORS, SOOT, FUMES, ACIDS, ALKALIS, TOXIC CHEMICALS, LIQUIDS OR GASES, WASTE MATERIALS OR OTHER IRRITANTS, CONTAMINANTS, OR POLLUTANTS INTO OR UPON LAND, THE ATMOSPHERE OR ANY WATERCOURSE OR BODY OF WATER; BUT THIS EXCLUSION DOES NOT APPLY IF SUCH DISCHARGE, DISPERSAL, RELEASE OR ESCAPE IS SUDDEN AND ACCIDENTAL;

(2) OIL OR OTHER PETROLEUM SUBSTANCE OR DERIVATIVE (INCLUDING ANY OIL REFUSE OR OIL MIXED WITH WASTES) INTO OR UPON ANY WATERCOURSE OR BODY OF WATER, WHETHER OR NOT SUCH DISCHARGE, DISPERSAL, RELEASE OR ESCAPE IS SUDDEN AND ACCIDENTAL.

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective ~~JANUARY 1, 1974~~

Attached to and forming part of Policy No. ~~1-2027~~ of the

UNIGARD MUTUAL INSURANCE COMPANY

ALLEN, MILLER AND ASSOCIATES, INC.
Underwriting Managers

By _____

AMAI-17

Endorsement No. 1 Additional Premium _____ Return Premium _____

Name of Assured COLUMBIA NITROGEN CORPORATION & NIPRO, INC., ET AL

ANNUAL INSTALLMENT PREMIUM

THE PREMIUMS ARE PAYABLE AS FOLLOWS:

DUE DATE	AMOUNT
JANUARY 1, 1974	$8,500.00
JANUARY 1, 1975	$8,500.00
JANUARY 1, 1976	$8,500.00

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the Policy except as hereinabove set forth.

This endorsement is effective JANUARY 1, 1974

Attached to and forming part of Policy No. 1-2027 of the

UNIGARD MUTUAL INSURANCE COMPANY

ALLEN, MILLER AND ASSOCIATES, INC.
Underwriting Managers

By _____

AMAI-8

U.S.A

NUCLEAR INCIDENT EXCLUSION CLAUSE—LIABILITY—DIRECT (BROAD)

(Approved by Lloyd's Underwriters' Fire and Non-Marine Association)

For attachment to insurances of the following classifications in the U.S.A., its Territories and Possessions, Puerto Rico and the Canal Zone:—

Owners, Landlords and Tenants Liability, Contractual Liability, Elevator Liability, Owners or Contractors (including railroad) Protective Liability, Manufacturers and Contractors Liability, Product Liability, Professional and Malpractice Liability, Storekeepers Liability, Garage Liability, Automobile Liability (including Massachusetts Motor Vehicle or Garage Liability),

not being insurances of the classifications to which the Nuclear Incident Exclusion Clause—Liability—Direct (Limited) applies.

This policy*

does not apply:—

I. Under any Liability Coverage, to injury, sickness, disease, death or destruction

(a) with respect to which an insured under the policy is also an insured under a nuclear energy libability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(b) resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (2) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

II. Under any Medical Payments Coverage, or under any Supplementary Payments Provision relating to immediate medical or surgical relief, to expenses incurred with respect to bodily injury, sickness, disease or death resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

III. Under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if

(a) the nuclear material (1) is at any nuclear facility owned by, or operated by or on behalf of, an insured or (2) has been discharged or dispersed therefrom;

(b) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or

(c) the injury, sickness, disease, death or destruction arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (c) applies only to injury to or destruction of property at such nuclear facility.

IV. As used in this endorsement:

"hazardous properties" include radioactive, toxic or explosive properties; "nuclear material" means source material, special nuclear material or byproduct material; "source material", "special nuclear material", and "byproduct material" have the meanings given them in the Atomic Energy Act 1954 or in any law amendatory thereof; "spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor; "waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof; "nuclear facility" means

(a) any nuclear reactor,

(b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,

(c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste, and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations; "nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.

It is understood and agreed that, except as specifically provided in the foregoing to the contrary, this clause is subject to the terms, exclusions, conditions and limitations of the Policy to which it is attached.

*Note:—As respects policies which afford liability coverages and other forms of coverage in addition, the words underlined should be amended to designate the liability coverage to which this clause is to apply.

Attached to and forming part of Policy No. 1-2027

ALLEN, MILLER AND ASSOCIATES, INC.
Underwriting Managers

Issued to: COLUMBIA NITROGEN CORPORATION & NIPRO, INC, ET AL

Dated: FEBRUARY 5, 1974

Printed in U.S.A.
N.M.A. 1256

By.....

Confidential

PW00021

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**CASE NO. 11-CP-10-387**
COUNTY OF CHARLESTON	)	
	)	**CERTIFICATE OF SERVICE**
	)	
PCS Nitrogen, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Continental Casualty Company, et al.,	)	
	)	
Defendants.	)	
	)	

FILED
2015 AUG 11 PM 4:13
CHARLESTON COUNTY
CLERK OF COURT

The undersigned states that on August 11, 2015, she served a copy of Notice of Joinder by Defendant Washington Insurance Company in Continental Casualty Company's Motion for Summary Judgment Based on Corporate Succession by electronic mail one copy to the following address(s):

Wm. Howell Morrison Haynsworth Sinkler Boyd, P.A. 134 Meeting Street, 3rd Floor Charleston, SC 29401 hmorrison@hsblawfirm.com Michael Ginsberg (*Pro Hac Vice*) Amy K. Pohl (*Pro Hac Vice*) Jones Day 500 Grant Street – Suite 4500 Pittsburgh, PA 15219 mginsberg@JonesDay.com akpohl@JonesDay.com *Counsel for Plaintiff PCS Nitrogen, Inc.*	Morgan S. Templeton, Esq. Wall Templeton & Haldrup, PA 145 King Street, Suite 300 Charleston, SC 29401 Morgan.Templeton@WallTempleton.com Patrick F. Hofer, Esq. (*pro hac*) Thomas S. Hay, Esq. (*pro hac*) Toutman Sanders LLP 401 9th Street, Suite 1000 Washington, DC 20004-2134 Patrick.hofer@troutmansanders.com Thomas.hay@troutmansanders.com *Counsel for Defendant Continental Cas. Co.*
R. Scott Wallinger, Jr., Esq. Collins & Lacy, P.C. 1330 Lady Street, 6th Floor Columbia, SC 29201 swallinger@collinsandlacy.com	Robert H. Hood, Jr., Esq. Hood Law Firm, LLC 172 Meeting Street Charleston, SC 29402 bobbyjrhood@hoodlaw.com

John S. Favate, Esq. (*pro hac*) Hardin, Kundla, McKeon & Polletto 673 Morris Ave. Springfield, NJ 07081 JFavata@hkmpp.com *Counsel for Defendant U.S. Fire Ins. Co. (for Policy No. 5401893627)*	Patricia B. Santelle, Esq. (*pro hac*) Robert F. Walsh, Esq. (*pro hac*) Thomas M. Going (*pro hac*) Paul Briganti, Esq. (*pro hac*) White and Williams, LLP 1650 Market Street One Liberty Place, Suite 1800 Philadelphia, PA 19103-7395 santellep@whiteandwilliams.com walshr@whiteandwilliams.com goingt@whiteandwilliams.com brigantip@whiteandwilliams.com *Counsel for Defendants ACE Property & Cas. Co. and US Fire Ins. Co., and Century Indem. Co. (f/k/a California Union and Insurance Co. of North America)*
Edward K. Pritchard, III, Esquire Elizabeth F. Fulton, Esquire Pritchard Law Group, LLC 129 Broad Street Charleston, SC 29401	John I. Malone, Esquire Goldberg Segalla 800 Green Valley Road, Suite 302 Greensboro, NC 27408
Jerald H. Hochman, Esquire Martin Siegal, Esquire Siegal & Park 533 Fellowship Road, Suite 120 Mt. Laurel, NJ 08054	Adam J. Neil, Esquire Murphy & Grantland, P.A. Post Office Box 6648 Columbia, South Carolina 29260

Deborah Wooten, Legal Assistant

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON PCS Nitrogen, Inc. ☐ Plaintiff v. Continental Casualty Company, et al. ☒ Defendant.	))))))))))	IN THE COURT OF COMMON PLEAS CASE NO. 11-CP-10-387 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Wm. Howell Morrison Address: Haynesworth Sinkler Boyd, PA P.O. Box 340 Charleston, SC 29402 phone: (843) 722-3366 fax: (843) 722-2266 e-mail: hmorrison@hsblawfirm.com other:	Elizabeth J. Palmer, Bar No. 73680 Address: Rosen, Rosen & Hagood, LLC 151 Meeting Street, Suite 400 Charleston, SC 29401 phone: (843) 577-6726 fax: (843) 724-8036 e-mail: epalmer@rrhlawfirm.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment /Joinder
Estimated Time Needed:30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐Plaintiff / ☒Defendant — Date submitted: 8/11/15

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

- ☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
)
) CASE NO.: 2011-CP-10-387
PCS Nitrogen, Inc.)
Plaintiff,) **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
vs.)
)
Continental Casualty Company., et al.)
Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Wm. Howell Morrison, Bar No. _____ Address: Haynsworth Sinkler Boyd, PA 134 Meeting Street, 3rd Floor Charleston, SC 29401 Phone: _____Fax _____ E-mail: _____Other: _____	John C. Bonnie, Bar No. 62997 Address: Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC 3344 Peachtree Road, Suite 2400 Atlanta, GA 30326 Phone: (404) 876-2700 Fax(404) 875-9433 E-mail: jbonnie@wwhgd.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Joinder in Motion for Summary Judgment
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☐ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	:	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C.A. NO.: 11-CP-10-387

PCS NITROGEN, INC.,

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY, *et al.*
Defendants.

NOTICE OF JOINDER BY LEXINGTON INSURANCE COMPANY IN CONTINENTAL CASUALTY COMPANY'S MOTION FOR SUMMARY JUDGMENT BASED ON CORPORATE SUCCESSION

PLEASE TAKE NOTICE that Lexington Insurance Company ("Lexington") hereby joins in the Motion for Summary Judgment filed by Defendant Continental Casualty Company Based on Corporate Succession pursuant to South Carolina Rule of Civil Procedure 56(c). The grounds for this Motion are that no coverage is afforded under the policies issued by Lexington under which Plaintiff PCS Nitrogen, Inc. ("PCS") seeks coverage here because PCS is not the insured under the Lexington policies. Accordingly, for the reasons stated herein, and in the Motion for Summary Judgment Based on Corporate Succession filed by Defendant Continental Casualty Company, Lexington has no duty to defend or indemnify PCS with respect to the underlying claims. Lexington is therefore entitled to Summary Judgment on all claims asserted by PCS.

Lexington adopts in full the Factual Background and Argument set forth in the Motion for Summary Judgment Based on Corporate Succession filed by Defendant Continental Casualty Company. In addition to those facts, Lexington sets forth the following facts in support of this Motion.

Lexington issued an Umbrella Liability Insurance Policy to "Columbia Nitrogen Corporation, Nipro Inc., [and] Columbia Communications Services, Inc." policy number 5001284, for policy period February 1, 1976, to February 1, 1977 (the "1976 – 1977 Lexington

Policy"). The 1976-1977 Lexington Policy is attached hereto as Exhibit A, and it defines the "Named Insured" as "the Insured named in Item 1 of the Declaration and (1) any subsidiary company . . . of the Insured so named, and (2) any other entity coming under its control over which it assumes active management." (Ex. A, Definitions).

Lexington also issued an Umbrella Liability Insurance Policy to "Columbia Nitrogen Corporation," policy number 5001787, for policy period April 1, 1977, to April 1, 1978 (the "1977 – 1978 Lexington Policy"). The 1977-1978 Lexington Policy is attached hereto as Exhibit B, and Endorsement 1 to that policy defines the "Named Insured" as "Columbia Nitrogen Corporation," "Nipro Inc.," and "Columbia Communications Services, Inc." The 1977 – 1978 Lexington Policy defines the "Named Insured" as "the Insured named in Item 1 of the Declaration and (1) any subsidiary company . . . of the Insured so named, and (2) any other entity coming under its control over which it assumes active management." (Ex. B, Definitions).

Both of the Lexington Policies provide that Lexington will "pay on behalf of the Insured the ultimate net loss in excess of the retained limit hereinafter defined, which the Insured shall become legally obligated to pay as damages by reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract because of . . . Property Damage . . . as defined herein and caused by or arising out of an occurrence." (Ex. A, Insuring Agreement, §(1); Ex. B, Insuring Agreement, §(I)).

Both of the Lexington Policies also prohibit assignment without Lexington's consent via the following provision: "Assignment of interest under this policy shall not bind the Company until its consent is endorsed heron, if however, the Named Insured shall be adjudged bankrupt or insolvent, this policy shall cover the Named insured's legal representative as Named Insured, provided that notice of cancellation addressed to the Insured named in the Declarations and

mailed to the address shown in this policy shall be sufficient notice to effect cancellation of this policy." (Ex. A, Conditions, ¶14; Ex. B, Conditions, ¶14)

For the reasons stated herein, and in the motion filed by Defendant Continental Casualty Company, Lexington respectfully requests that this Court grant summary judgment in its favor by declaring that PCS is not insured by the Lexington Policies, that Lexington therefore has no duty to defend or indemnify PCS under the Lexington Policies, and that all of PCS's claims against Lexington are dismissed with prejudice.

WEINBERG WHEELER HUDGINS GUNN & DIAL, LLC

By: _____

John C. Bonnie (SC Bar No. 62997)
3344 Peachtree Road, NE
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jbonnie@wwhgd.com

Attorney for Lexington Insurance Company

Atlanta, Georgia
August 12, 2015.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon all counsel of record via Electronic Mail:

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John C. Bonnie (SC Bar No. 62997)

EXHIBIT A

DECLARATIONS
UMBRELLA LIABILITY

POLICY NO. 500 12 84

LEXINGTON
INSURANCE COMPANY
25 NEW CHARDON STREET
BOSTON, MASSACHUSETTS

A CAPITAL STOCK COMPANY

ITEM 1.

Name of Insured: COLUMBIA NITROGEN CORPORATION, NIPRO INC., COLUMBIA COMMUNICATIONS SERVICES, INC.

Address (Street, Town, State): Post Office Box 1483 Augusta, Georgia 30903

This Declaration page, with policy provisions and endorsements, if any, issued to form a part thereof, completes the above numbered Umbrella Liability Policy

ITEM 2. POLICY PERIOD

From: February 1, 1976 To: February 1, 1977

(12:01 A.M. Standard Time at the address of the insured stated above)

ITEM 3. LIMIT OF LIABILITY

The limit of the Company's liability shall be as stated herein subject to all the terms of this policy having reference thereto

(A) $ 4,000,000.00 Single Limit any one occurrence Personal Injury or Property Damage or Advertising Liability or any combination thereof.

In excess of

(1) the amount recoverable under the underlying insurance as set out in the attached Schedule A.

or

(2) $ 10,000.00 ultimate net loss in respect of each occurrence not covered by said underlying insurance.

(B) $ 4,000,000.00 in the aggregate for each annual period in accordance with Insuring Agreement III.

ITEM 4. PREMIUM COMPUTATION

Rating Basis	Estimated Exposure	Rate	Estimated Premium
Per $1,000 Receipts	$30,000,000.00	.2017	$26,225.00

Deposit Premium	Minimum Premium	Audit Period
$ 26,225.00	$ 26,225.00	Annual

Date of Issue April 12, 1976 JAJ/lh

Countersigned by _____
(Licensed Resident Agent)

Form 8405

DSM-017066
LEX00001

PROVISIONS OF
UMBRELLA LIABILITY
POLICY

LEXINGTON
INSURANCE COMPANY
25 NEW CHARDON STREET
BOSTON, MASSACHUSETTS

A CAPITAL STOCK COMPANY

LEXINGTON INSURANCE COMPANY
BOSTON, MASSACHUSETTS

(HEREIN CALLED THE COMPANY)

In consideration of the payment of the premium, in reliance upon the statements in the Declarations made a part hereof and subject to the limits of liability, exclusions, conditions and other terms of this policy, the Company agrees with the Insured named in the Declarations as follows

INSURING AGREEMENTS

I. **Coverage** – To pay on behalf of the Insured the ultimate net loss in excess of the retained limit hereinafter defined, which the Insured shall become legally obligated to pay as damages by reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract because of –
(a) Personal Injury, including death at any time resulting therefrom,
(b) Property Damage,
(c) Advertising Liability,

as defined herein and caused by or arising out of an occurrence

II. **Defense, Settlement, Supplementary Payments** – Solely as respects occurrences covered under this policy except for the amount stated in Item 3A2 of the Declarations, but not covered under the underlying insurance set forth in the Schedule of Underlying Policies, or under any other underlying insurance collectible by the Insured, the Company shall
(a) defend any suit against the Insured alleging liability insured under the provisions of this policy and seeking recovery for damages on account thereof even if such suit is groundless, false or fraudulent, but the Company shall have the right to make such investigation and negotiation and settlement of any claim or suit as may be deemed expedient by the Company,
(b) pay all premiums on bonds to release attachments for an amount not in excess of the limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the Insured in any such suit, all expenses incurred by the Company and all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court that part of such judgment as does not exceed the limit of the Company's liability thereon,
(c) reimburse the Insured for all reasonable expenses incurred at the Company's request, (including actual loss of wages or salary, but not loss of other income, not to exceed $75 per day) because of his attendance at hearings or trials at such request.

The Company agrees to pay the amounts incurred under this Insurance Agreement II, except in settlement of claims and suits, in addition to the limit of liability stated in the Declarations, and such defense and supplementary payments shall not be included as part of the ultimate net loss, as defined in the policy.

The Insured shall promptly reimburse the Company (excepting Defense Costs) for any amount of ultimate net loss paid on behalf of the Insured within the retained limit specified in Item 3A of the Declarations.

III. **Limit of Liability – Retained Limit**
(a) The Company shall be liable only for the ultimate net loss in excess of the Insured's retained limit defined as the greater of
(1) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other underlying insurance collectible by the Insured, or
(2) the amount stated in Item 3A2 of the Declarations as the result of any one occurrence not covered by such underlying policies or insurance,

and then up to an amount not exceeding the amount as stated in Item 3A of the Declarations as the result of any one occurrence.
(b) In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder during this policy period, this policy shall, subject to the Company's limit of liability stated in Item 3A of the Declarations and to the terms and conditions of the underlying insurance,
(1) in the event of reductions, pay the excess of the reduced underlying insurance, or
(2) in the event of exhaustion, continue in force as underlying insurance.
(c) There is no limit to the number of occurrences during the policy period for which claims may be made, except that the Company's total limit of liability arising out of the Products Hazard or the Completed Operations Hazard or both combined shall not exceed the amount stated in Item 3A of the Declarations as respects all occurrences during each annual period commencing with the effective or anniversary date of this policy.

IV. **Territory – Policy Period** – This policy applies only to occurrences happening anywhere during the policy period.

DEFINITIONS

1. **Named Insured and Insured**
(a) The term "Named Insured" wherever used in this policy includes the Insured named in Item 1 of the Declaration and,
(1) any subsidiary company (including subsidiaries thereof) of the Insured so named, and
(2) any other entity coming under its control and over which it assumes active management.
(b) The unqualified word "Insured", wherever used in this policy includes not only the Named Insured but also
(1) if the Named Insured is designated in the Declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to his liability as such, however, if the Named Insured is a partnership, this policy does not apply to an automobile owned by or registered in the name of a partner thereof. This policy does not apply to Personal Injury, Property Damage or Advertising Liability arising out of the conduct of any partnership or joint venture of which the Insured is a partner or member and which is not designated in this policy as a Named Insured if the Named Insured is designated in the Declarations as an individual, the person so designated, but only with respect to the conduct of a business of which he is the sole proprietor,

Form 8404

(2) except with respect to ownership, maintenance or use including loading or unloading of automobiles or of aircraft, any partner, executive officer, director, stockholder or employee of the Named Insured, while acting in his capacity as such and any organization or proprietor with respect to real estate management for the Named Insured,
(3) any person, organization, trustee or estate to whom or to which the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy, but only with respect to operations by or on behalf of the Named Insured or to the facilities of or used by the Named Insured,
(4) subject to the terms and conditions of this policy, any additional insured included in the underlying insurance, but only to the extent that insurance is available to such additional insured under such underlying insurance,
(5) any person while using an automobile or aircraft owned by or loaned to the Named Insured or hired for use in behalf of the Named Insured and any person or organization legally responsible for the use thereof, provided the actual use of the automobile or aircraft is by the Named Insured or with the Named Insured's permission, and any executive officer, director or stockholder of the Named Insured with respect to the use of an automobile or aircraft not owned by the Named Insured in the business of the Named Insured. The insurance with respect to any person or organization other than the Named Insured does not apply under division (5) of this insuring agreement
i. to any person or organization, to any agent or employee thereof, operating an automobile sales agency, repair shop, service station, storage garage or public parking place, with respect to any occurrence arising out of the operation thereof,
ii. with respect to any automobile or aircraft hired by or loaned to the Named Insured, to the owner or lessee thereof other than the Named Insured, or to any agent or employee of such owner or lessee,
iii. to any manufacturer of aircraft, aircraft engines or aviation accessories, or to any aviation sales or service or repair organization or airport or hangar operator or their respective employees or agents, with respect to any occurrence arising out of the operation thereof

The inclusion or addition hereunder of more than one insured shall not operate to increase the company's limit of liability

2. **Personal Injury** – The term "Personal Injury" shall mean:
(a) bodily injury, sickness, disease, disability, shock, fright, mental anguish and mental injury,
(b) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution and humiliation,
(c) libel, slander, defamation of character or invasion of right of privacy unless arising out of Advertising Liability, and
(d) assault and battery not committed by or at the direction of the insured unless committed for the purpose of preventing or eliminating danger to persons or property,

3. **Property Damage** – The term "Property Damage" shall mean direct or consequential damage to or destruction of tangible property, including loss of use thereof,

4. **Advertising Liability** – The term "Advertising Liability" shall mean liability for damages because of,
(a) unintentional Libel, Slander or Defamation,
(b) infringement of copyright or title or of slogan,
(c) piracy or unfair competition or idea misappropriation under an implied contract,
(d) invasion of the rights of privacy,
committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Insured's advertising activities,

5. **Products Hazard** – The term "Products Hazard" includes Personal Injury and Property Damage arising out of the Named Insured's products or reliance upon a representation of warranty with respect thereto, but only if the Personal Injury or Property Damage occurs away from premises owned by or rented to the Named Insured and after physical possession has been relinquished to others

6. **Named Insured's Products** – The term "Named Insured's Products" means goods or products manufactured, sold, handled or distributed by the Named Insured or by others trading under his name, including any container thereof (other than a vehicle), but Named Insured's Products shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold,

7. **Completed Operations Hazards** – The term "Completed Operations Hazard" includes Personal Injury and Property Damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the Personal Injury or Property Damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the Named Insured. "Operations" include materials, parts or equipment furnished in connection therewith. "Operations" shall be deemed completed at the earliest of the following times,
(a) when all operations to be performed by or on behalf of the Named Insured under the contract have been completed,
(b) when all operations to be performed by or on behalf of the Named Insured at the site of the operations have been completed, or
(c) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project,

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed,

The Completed Operations Hazard does not include Personal Injury or Property Damage arising out of
(a) operations in connection with the transportation of property, unless the Personal Injury or Property Damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
(b) the existence of tools, uninstalled equipment or abandoned or unused materials,

8. **Occurrence** – With respect to Personal Injury and Property Damage the term "Occurrence" means an event, including continuous or repeated exposure to conditions, which result in Personal Injury or Property Damage neither expected nor intended from the standpoint of the insured. All such exposure to substantially the same general conditions shall be deemed one occurrence. With respect to Advertising Liability all damages involving the same injurious material or act, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants shall be deemed to arise out of one occurrence,

9 Ultimate Net Loss – Except as provided in the Supplementary Payments Provisions, the term "Ultimate Net Loss" shall mean the total sum which the Insured or

9. **Ultimate Net Loss** – Except as provided in Insuring Agreement II, "Defense", the term "Ultimate Net Loss" shall mean the total sum which the Insured, or any company as its insurer, or both become obligated to pay by reason of Personal Injury, Property Damage, or Advertising Liability claims, either through adjudication or compromise, and shall also include hospital, medical, and funeral charges and all sums paid as salaries, wages, compensation, fees, charges, interest, expenses for doctors, nurses, and investigators and other persons, and for settlement, adjustment, investigation and defense of claims and excluding only the salaries of the Insured or any of the underlying insurer's permanent employees.

The Company shall not be liable for expenses as aforesaid when such are covered by underlying policies of insurance.

10. **Aircraft** – The term "Aircraft" includes any heavier than air or lighter than air craft designed to transport persons or property.

EXCLUSIONS

This policy shall not apply

(a) to any obligation for which the Insured or any company as its insurer may be held liable under any Workmen's Compensation or Disability Benefits law provided, however, that this exclusion shall not apply to liability of others assumed by the Named Insured under contract or agreement

(b) under Coverage 1 (a) and 1 (b), to liability for:
   (1) Personal Injury or Property Damage resulting from the failure of the Named Insured's Products or work completed by or for the Named Insured to perform the function or serve the purpose intended by the Named Insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any Insured, but this exclusion does not apply to Personal Injury or Property Damage resulting from the active malfunctioning of such products or work,
   (2) Property Damage to the Named Insured's Products arising out of such products or any part of such products,
   (3) Property Damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of material, parts or equipment furnished in connection therewith,
   (4) damages claimed for the withdrawal, inspection, repair, replacement or loss of use of the Named Insured's Products or work completed by or for the Named Insured or of any property of which such products or work form a part, if such product, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein,

(c) under Coverage 1 (b) to Property Damage
   (1) to property owned by the Insured,
   (2) to aircraft or watercraft rented to, used by or in the care, custody or control of the Insured, or

(d) under Coverages 1 (a) and 1 (b) to liability for Personal Injury or Property Damage arising out of the ownership, maintenance, operation, use, loading or unloading of aircraft or of watercraft unless insurance therefore is provided by a policy listed in Schedule A,

(e) under Coverage 1 (a) to liability of any employee with respect to Personal Injury to another employee of the same employer injured in the course of such employment unless insurance therefore is provided by a policy listed in Schedule A and then not for broader coverage than is afforded to such employee by that policy;

(f) under Coverage 1 (c) to claims made against the Insured,
   (1) for failure of performance of contract,
   (2) for infringement of trade-mark or trade name,
   (3) for incorrect description of any article or commodity,
   (4) for mistake in advertised prices,

(g) (1) under Coverage 1 (a) and 1 (b) to injury, sickness, disease, death or destruction
      (i) with respect to which an Insured under the policy is also an Insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an Insured under any such policy but for its termination upon exhaustion of its limit of liability, or
      (ii) resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (2) the Insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America or any agency thereof, under any agreement entered into by the United States of America or any agency thereof, with any person or organization.

   (2) under any Medical Payments Coverage, or under any Supplementary Payments provision relating to immediate medical or surgical relief to expenses incurred with respect to bodily injury, sickness, disease, or death resulting from hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization,

   (3) under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if –
      (i) the nuclear material (1) is at any nuclear facility owned by or operated by or on behalf of, an Insured or (2) has been discharged or dispersed therefrom,
      (ii) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an Insured, or
      (iii) the injury, sickness, disease, death, or destruction arises out of the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (iii) applies only to injury to or destruction of property at such nuclear facility,

   (4) As used in this policy:
   "hazardous properties" include radioactive, toxic or explosive properties, "nuclear material" means source material, special nuclear material or by-product material,

   "source material", "special nuclear material" and "by-product material" have meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

   "spent fuel" means any fuel element or fuel component, solid or liquid which has been used or exposed to radiation in a nuclear reactor,

   "waste" means any waste material (1) containing by-product material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (i) or (ii) thereof,

   "Nuclear Facility" means:
      (i) any nuclear reactor,
      (ii) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,
      (iii) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the Insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,
      (iv) any structure, basin, excavation, premises or place prepared or used for storage or disposal of waste, and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations,

   "Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material,

   with respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.

(h) to any liability of the Insured or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

CONDITIONS

1. **Premium.** Unless otherwise provided the premium for this policy is a flat premium and is not subject to adjustment except as provided in Condition 15-Cancellation. If this policy is subject to audit adjustment, the premium may be based upon the rating basis as set forth in the Declarations during the policy period. Upon expiration of this policy or its termination during the policy period, or at the end of each policy year, the earned premium shall be computed as defined herein. If the earned premium is more than the advance premium paid, the Named Insured shall pay the excess to the company, if less, the company shall return to the Named Insured the unearned portion, subject to the annual minimum premium stated in the Declarations for each twelve months of the policy period, and subject further to the policy minimum premium as stated in the Declarations

2. Additional Named Insureds. In the event of additional Named Insureds as defined in Definition 1 (a) being added hereunder, prompt notice shall be given to the company.

3. Prior Insurance and Non-Cumulation of Liability. It is agreed, that if any loss is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof, the company's limit of liability as stated in Item 3 of the Declarations shall be reduced by any amounts due the Insured on account of any such loss under such prior insurance.

4. Severability of Interest. In the event of claims being made by reason of Personal Injuries, Property Damage or Advertising Liability suffered by one Insured herein for which another Insured herein is or may be liable, this policy shall cover such Insured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Insured herein. Nothing contained herein shall operate to increase the Company's limit of liability as set forth in Insuring Agreement III.

5. Notice of Occurrence. Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered hereunder involved injuries or damages which, in the event that the Insured should be held liable, is likely to involve this policy, notice shall be sent to the Company as soon as practicable, provided however, that failure to notify the Company of any occurrence which at the time of its happening did not appear to involve this policy, but which at a later date would appear to give rise to claims hereunder, shall not prejudice such claims.

6. Inspection and Audit. The Company shall be permitted but not obligated to inspect the Named Insured's property and operations at any time. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the Named Insured or others, to determine or warrant that such property or operations are safe.

The Company may examine and audit the Named Insured's books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

7. Maintenance of Underlying Insurance. The policy or policies referred to in the attached "Schedule of Underlying Insurances", and renewal or replacement thereof not more restrictive, shall be maintained by the Named Insured in full effect during the currency of this policy without alteration of terms or conditions except for any reduction of the aggregate limit or limits contained therein solely by payment of claims. Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Company shall only be liable to the same extent as it would have been had the Insured so maintained such policy or policies.

8. Assistance and Co-operation. Except as provided by Insuring Agreement II, Defense, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceedings instituted against the Insured, but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurer, or both, in the defense and control of any claim, suit or proceeding relative to any occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured, the underlying insurers and the Company shall cooperate in all things in the defense of such claim, suit, or proceeding.

9. Appeals. In the event the Insured or the Insured's underlying insurer(s) elects not to appeal a judgment in excess of the underlying limits, the Company may elect to make such appeal at its own cost and expense and shall be liable for the taxable costs and disbursements and interest incidental thereto, but in no event shall the liability of the Company, for ultimate net loss, exceed the amount set forth in Item 3 (a) of the Declarations for any one occurrence plus the cost and expense of such appeal.

10. Loss Payable. Liability of the Company under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of underlying limits on account of such occurrence. The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or the Insured's underlying insurer(s) or after the Insured's Liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company. If any subsequent payments shall be made similarly from time to time, such losses shall be due and payable within thirty (30) days after proof of loss has been furnished to the Company in a satisfactory form.

11. Other Insurance. If other collectible insurance with any other insurer is available to the Insured covering a loss also covered hereunder, this insurance shall be in excess of, and shall not contribute with such other insurance. Excess insurance over the limits of liability expressed in this policy is permitted without prejudice to this insurance and the existence of such insurance shall not reduce any liability under this policy.

12. Application of Salvages — Subrogation. All salvages, recoveries or payments recovered or received subsequent to a loss settlement under this insurance shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Insured and the Company, provided always that nothing in this clause shall be construed or mean that losses under this insurance are not recoverable until the Insured's ultimate net loss has been finally ascertained. Inasmuch as this policy is "Excess Coverage", the Insured's right of recovery against any person or other entity cannot always be exclusively subrogated to the company. It is, therefore, understood and agreed that in case of any payment hereunder, the Company shall act in concert with all other interests (including the Insured) concerned, in the exercise of such rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any interests (including the Insured) that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them, the Company shall then be reimbursed out of any balance then remaining up to the amount paid hereunder, lastly, the interests (including the Insured) of whom this coverage is in excess are entitled to claim the residue, if any. Expense necessary to the recovery of any such amounts shall be apportioned between the interests (including the Insured) concerned, in the ratio of their respective recoveries as finally settled.

13. Changes. Notice to or knowledge possessed by any person shall not effect a waiver or change in any part of this policy or stop 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 hereof, signed by an authorized representative of the Company.

14. Assignment. Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon, if, however, the Named Insured shall be adjudged bankrupt or insolvent, this policy shall cover the Named Insured's legal representative as Named Insured, provided that notice of cancellation addressed to the Insured named in the Declarations and mailed to the address shown in this policy shall be sufficient notice to effect cancellation of this policy.

15. 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 or any of its authorized agents, written notice stating when thereafter such cancellation shall be effective. The policy may be cancelled by the Company by mailing to the Named Insured at the address shown in this policy written notice stating when, not less than thirty (30) days thereafter, such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. 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 procedure. If the Company cancels, earned premium shall be computed pro rata. In the event of cancellation, the earned premium shall in no case be less than the annual minimum premium stated in the Declarations, subject to the policy maximum premium also stated in the Declarations.

Premium adjustment may be made at the time cancellation is effected or as soon as practicable thereafter. The check of the Company or its representative mailed or delivered, shall be sufficient tender of any refund due the Named Insured.

If this policy insures more than one Named Insured, cancellation may be effected by first of such Named Insureds for the account of all Insureds. The notice of cancellation by the Company to such first Named Insured shall be notice to all Insureds. Payment of any unearned premium to such first Named Insured shall be for the account of all interests in such payment.

16. Bankruptcy and Insolvency. In the event of the Bankruptcy or insolvency of the Insured or any entity comprising the Insured, the Company shall not be relieved thereby of the payment of any claims hereunder because of such bankruptcy or insolvency.

In Witness Whereof, the Company has caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by a duly authorized representative of the Company.

P. E. Heath
Secretary

F. A. Clarkson
President

SCHEDULE OF UNDERLYING INSURANCE

TYPE OF POLICY OR COVERAGE	INSURER	LIMITS
Comprehensive General Liability Including Products/ Completed Operations, Personal Injury, Blanket Contractual, Explosion, Collapse and Underground "XCU" Property Damage.	U.S. Fire	Bodily Injury or Property Damage or Both Combined $250,000.00 Each occurrence $250,000.00 Aggregate
Automobile Liability	Firemans' Fund	Bodily Injury Liability $500,000.00 Each person $1,000,000.00 Each Occurrence Property Damage Liability $500,000.00 Each Occurrence
Employers Liability (for Georgia Only)	Employers' Reinsurance	$5,000,000.00 excess of $45,000.00 Each Claim
Employers Liability (other than Georgia)	Firemans' Fund	$100,000.00 Each Accident
Excess General Liability	Canadian Universal	$250,000.00 Combined Single Limit & Aggregate EXCESS OF $250,000.00 Combined Single Limit and Aggregate.

LEXINGTON INSURANCE COMPANY
POLICY NUMBER 500 12 84

ENDORSEMENT 1

This endorsement, effective 12:01 AM February 1, 1976
policy No 500 12 84 issued to Columbia Nitrogen Corp.

by Lexington Insurance Company

SEEPAGE, POLLUTION AND CONTAMINATION EXCLUSION CLAUSE

This Insurance does not cover any liability for:

(1) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination.
(2) Cost of removing, nullifying or cleaning up seeping, polluting or contaminating substances.
(3) Loss of, damage to, or loss of use of property directly or indirectly resulting from subsidence caused by sub-surface operations of the Assured.
(4) Removal or, loss of or damage to sub-surface oil, gas or any other substance, property of others.
(5) Fines, penalties, punitive or exemplary damages.

John S. Gibson
Authorized Representative

Form 1803

DSM-0170067
LEX000007

ENDORSEMENT NO. 2

Name of Insured:
Effective Date of this Endorsement:
Policy 500 12 84 (number) of Lexington Insurance Company (insurance company)

SERVICE OF SUIT CLAUSE

The following Service of Suit Clause is not to become effective unless or until the Insured has notified this Company in each specific claim of its intention to sue.

It is agreed that in the event of the failure of this Company to pay any amount claimed to be due hereunder, this Company, at the request of the Insured, will submit to the jurisdiction of any Court of Competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon the highest one in authority bearing the title "Commissioner," "Director," or "Superintendent" of Insurance of the state or commonwealth wherein the property covered by this Policy is located, and that in any suit instituted against it upon this contract this Company will abide by the final decision of such Court or any Appellate Court in the event of an appeal. The one in authority bearing the title "Commissioner," "Director," or "Superintendent" of Insurance of the state or commonwealth wherein the property covered by this Policy is located is hereby authorized and directed to accept service of process on behalf of this Company in any such suit and/or upon the Insured's request to give a written undertaking to the Insured that they will enter a general appearance upon this Company's behalf in the event such a suit shall be instituted.

All other terms and conditions remain unchanged.
Attached to and made part of the policy of the Company shown above.

Date of Issue _____ 19___

Authorized Representative

ENDORSEMENT NO.3

Name of Insured:
Effective Date of this Endorsement:
Policy 500 12 84 (number) of Lexington Insurance Company (insurance company)

AMENDMENT OF CANCELLATION CLAUSE FOR NONPAYMENT OF PREMIUM

In consideration of the premium charged, it is agreed that the Policy is amended to include the following under Condition 13. Cancellation:

This Policy may be cancelled by ten (10) days' written notice by registered mail, return receipt requested, by the Company due to nonpayment of premium by the Insured, which default is not cured by the Insured within ten (10) days from receipt of that notice.

All other terms and conditions remain unchanged.
Attached to and made part of the policy of the Company shown above.

Date of Issue _____ 19___

Authorized Representative

ENDORSEMENT NO. 4

Name of Insured:
Effective Date of this Endorsement:
Policy 500 12 84 (number) of LEXINGTON INSURANCE COMPANY (Insurance company)

It is hereby understood and agreed that notwithstanding anything contained in the policy to the contrary, this policy shall follow the terms, conditions and settlements of the coverage listed below in every respect insofar as coverage is afforded by the said Scheduled Primary Coverage; and then only for such hazards for which coverage is afforded under said underlying insurance.

Explosion, Collapse and Underground (XCU) Property Damage Liability

All other terms and conditions remain unchanged.
Attached to and made part of the policy of the Company shown above.

Date of Issue _____ 19___

John S. Gibson
Authorized Representative

ENDORSEMENT NO. 5

Name of Insured:
Effective Date of this Endorsement:
Policy 500 12 84 (number) of Lexington Insurance Company (insurance company)

It is agreed that the Insurance afforded by this policy shall apply with respect to liability arising out of the ownership, maintenance, operation, use, loading or unloading of any aircraft, but only if such liability is covered by valid and collectible underlying insurance by an underlying policy listed in the schedule of underlying insurance and then only for such hazards for which coverage is afforded by said underlying insurance.

All other terms and conditions remain unchanged.
Attached to and made part of the policy of the Company shown above.

Date of Issue_____ 19___

Authorized Representative

[missing]

E-dons #6

will be no #6

per J. Jolley

ENDORSEMENT #7.

This endorsement, effective 12:01 A.M. February 1, 1976, forms a part of policy No. 500 12 84 issued to Columbia Nitrogen Corporation by LEXINGTON INSURANCE COMPANY.

It is understood and agreed that the rating basis of this policy is revised to Georgia Worker's Compensation Payroll.

RATING BASIS	ESTIMATED ESPOSURE	RATE	ESTIMATED PREMIUM
Per $1000 Ga. W.C. Payroll	$10,000,000.00	2.6225	$26,225.00

Deposit premium remains the same.

All other terms and conditions remain unchanged,

5-18-76 sc

John S. Gibson
Authorized Representative

ENDORSEMENT #8.

This endorsement, effective 12:01 A.M. February 1, 1976 forms a part of policy No 500 12 84 issued to Columbia Nitrogen Corporation

by LEXINGTON INSURANCE COMPANY.

It is understood and agreed that the Schedule of Underlying Insurance is hereby amended per the attached.

All other terms and conditions remain the same.

5-18-76 sc

Form 1803

John S. Gibson
Authorized Representative

DSM-017074
LEX000614

SCHEDULE OF UNDERLYING INSURANCE

Issued To Columbia Nitrogen 500 12 84

Type of Policy or Coverage	Insurer	Limits
Comprehensive General Liability including Products / Completed operations, personal injury, blanket contractual, explosion, collapse and underground "XCU" property damage.	U.S. FIRE	Bodily Injury Liability $ N/A each person $ N/A each occurrence $ N/A aggregate Property Damage Liability $ N/A each occurrence $ N/A aggregate Combined Single Limit $ 250,000.
Automobile Liability	FIREMANS' FUND	Bodily Injury Liability $ 500,000. each person $1,000,000. each occurrence Property Damage Liability $ 500,000. each occurrence Combined Single Limit $ N/A
Standard Workmen's Compensation and Employers Liability	(See Below)	Coverage B Employers Liability $ N/A each accident.
Miscellaneous Liability		
Employers' Liability (For Georgia Only)	Employers' Reinsurance	$5,000,000. excess of $45,000. Each Claim
Employers' Liability (Other Than Georgia)	Fireman's Fund	$100,000. Each Accident
Excess General Liability	Canadian Universeal	$250,000. Combined Single Limit & Aggregate EXCESS OF $250,000. Combined Single LImit and Aggregate.
Non-Owned Aircraft	2/ Associated Airation Underwriters	$1,000,000. Combined Single Limit
Owned Aircraft	2/ Associated Airation Underwriters	$10,000,000. Combined Single Limit

5-18-76 sc

Authorized Representative John S. Gibson

ENDORSEMENT #9.

This endorsement, effective 12:01 A.M. February 1, 1976, forms a part of policy No. 500 12 84 issued to Columbia Nitrogen Corporation by LEXINGTON INSURANCE COMPANY.

This endorsement supercedes and replaces Endt. No. 1:

SEEPAGE, POLLUTION AND CONTAMINATION CLAUSE

This insurance does not cover any liability for:

1. Personal injury or bodily injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination resulting from the discharge, dispersal, release or escape of any substance into or upon an watercourse or body or water.

2. Personal injury or bodily injury or loss of,, damage to, or loss of use of property directly or indirectly caused by seepage, pollution, or contamination other than described in paragraph (1) above, provided always that this paragraph (2) shall not apply to liability for personal injury or bodily injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.

3. The cost of removing, nullifying or cleaning up seeping, polluting or contaminating substances unless the seepage, pollution or contamination is caused by a sudden unintended or unexpected happening during the period of this insurance.

4. Fines, penalties, punitive or exemplary damages.

This clause shall not extend this insurance to cover any liability which would not have been covered under this insurance had this clause not been attached.

All other terms and conditions remain the same.

5-18-76 sc

John S. Gibson
Authorized Representative

ENDORSEMENT #10

This endorsement, effective 12:01 A.M February 1, 1976 forms a part of policy No 500-12 84 issued to Columbia Nitrogen Corporation

by Lexington Insurance Company

It is hereby understood and agreed that Endorsement #8 and all previously issued Schedules of underlying Insurance are voided and replaced by the Schedule of Underlying Insurance -A-.

It is further agreed that effective June 10, 1976, The Schedule of Underlying Insurance -A- is amended to show as follows:

Non-owned Aircraft	U.S.A.I.G.	$10,000,000. Combined Single Limit

All other terms and conditions remain unchanged.

Endorsement # 10

8/4/76 jej

John S. Gibson
Authorized Representative

Form 1803

SCHEDULE OF UNDERLYING INSURANCE -A-

Issued To ~~Columbia Nitrogen 500 12 84~~ ~~Effective 2/1/76~~

Type of Policy or Coverage	Insurer	Limits
Comprehensive General Liability including Products / Completed Operations, Personal Injury, Blanket Contractual, Explosion, Collapse and Underground "XCU" Property Damage.	U.S. Fire	Bodily Injury Liability $ N/A each person $ N/A each occurrence $ N/A aggregate Property Damage Liability $ N/A each occurrence $ N/A aggregate Combined Single Limit $ 250,000
Automobile Liability	Firemans' Fund	Bodily Injury Liability $ 500,000. each person $ 1,000,000 each occurrence Property Damage Liability $ 500,000. each occurrence Combined Single Limit $ N/A
Standard Workmen's Compensation and Employers Liability	N/A	Coverage B Employers Liability $ N/A each accident.
Miscellaneous Liability		
Employers' Liability (For Georgia Only)	Employers' Reinsurance	$5,000,000. Excess of $45,000. Each Occurrence
Employers' Liability (Other Than Georgia)	Fireman's Fund	$100,000. Each Accident
Excess General Liablitty	Cancdian Universal	$250,000. Combined Single Limit & Aggregate EXCESS OF $250,000. Combined Single Limit and Aggregate.
Non-Owned Aircraft	U.S.A.I.G.	$1,000,000. Combined Single Limit
Owned Aircraft	U.S.A.I.G.	$10,000,000. Combined Single Limit

8-4-76 ac

Authorized Representative John S. Gibson

ENDORSEMENT #13.

This endorsement, effective 12:01 A.M February 1, 1976 forms a part of policy No 500 12 84 issued to Columbia Nitrogen Corp.

by LEXINGTON INSURANCE COMPANY.

It is understood and agreed that the Named Insured warrants that there are no known or reported losses for the period from February 1, 1976 to February 23, 1976 which might involve the policy.

This endorsement supercedes and voids Endorsement #11.

All other terms and conditions remain the same.

ENDORSEMENT #13.

1-20-77 sc

John S. Gibson
Authorized Representative

Form 1803

DSM-017079
LEX000019

ENDORSEMENT #14.

This endorsement, effective 12:01 A.M 2-1-76 forms a part of policy No 500 12 84 issued to Columbia Nitrogen Corp.

by LEXINGTON INSURANCE COMPANY.

It is understood and agreed that the expiration date is changed to April 1, 1977. It is also understood and agreed that a new aggregate applies for this period of time.

Revised Minimum and Deposit Premium: $33,306.00

Additional Premium: $7,081.00

All other terms and conditions remain the same.

ENDORSEMENT #14.

2-7-77 sc

John S. Gibson
Authorized Representative

Form 1803

Alexander & Alexander Inc.
Two Piedmont Center, N. E.
Atlanta, Georgia 30305
Telephone 404 261-3400
TWX 810-751-8433

Alexander & Alexander

February 17, 1977

Mr. Clay Perry
Corporate Risk Manager
Columbia Nitrogen Corporation
Post Office Box 1483
Augusta, Georgia 30903

UMBRELLA LIABILITY COVERAGE
LEXINGTON INSURANCE COMPANY
POLICY NO. 5001284

Dear Clay:

This will confirm the three (3) items discussed during our phone conversation on 2/15/77:

1) A copy of Endorsement No. 9 is enclosed which replaces ~~Endorsement No. 1.~~

2) Endorsement No. 12 does not exist; therefore, your contract is correct as written.

3) Invoice No. 055400 is correct in that the Lexington agreed to this extension of liability on a short rate basis. The factor is .27.

NO —

Sincerely,

A. Byron Young

ABY/sd
Enclosure

cc: Mr. Joseph Collins
Mr. Dixie D. Wiggins

ENDORSEMENT NO. 15

Name of Insured: COLUMBIA NITROGEN CORPORATION, ETAL
Effective Date of this Endorsement: February 1, 1976
Policy 500 12 84 (number) of Lexington Insurance Company (insurance company)

The W. C. PAYROLL for the audit period of 2/1/76

to 4/1/77 being $12,680,309., the $33,306.00

Minimum and Deposit Premium applies,

No additional or return premium due.

All other terms and conditions remain unchanged.
Attached to and made part of the policy of the Company shown above.

Date of Issue July 11, 19 77

JAJ/cah

John S. Gibson
Authorized Representative

EXHIBIT B

DECLARATIONS
UMBRELLA LIABILITY

85

POLICY NO.
500 17 87
Renewal of 500 12 84

LEXINGTON
INSURANCE COMPANY
25 NEW CHARDON STREET
BOSTON, MASSACHUSETTS

A CAPITAL STOCK COMPANY

ITEM 1.

Name of Insured: Columbia Nitrogen Corporation
(See Endorsement #1)

Address (Street, Town, State): P.O.Box 1483
Augusta, Ga. 30903

This Declaration page, with policy provisions and endorsements, if any, issued to form a part thereof, completes the above numbered Umbrella Liability Policy

ITEM 2. POLICY PERIOD

From. 4-1-77 To. 4-1-78

(12 01 A M Standard Time at the address of the Insured stated above)

ITEM 3. LIMIT OF LIABILITY

The limit of the Company's liability shall be as stated herein subject to all the terms of this policy having reference thereto

(A) $ 4,000,000 Single Limit any one occurrence Personal Injury or Property Damage or Advertising Liability or any combination thereof

In excess of

(1) the amount recoverable under the underlying insurance as set out in the attached Schedule A.

or

(2) $ 10,000 ultimate net loss in respect of each occurrence not covered by said underlying insurance

(B) $ 4,000,000 in the aggregate for each annual period in accordance with Insuring Agreement III.

ITEM 4. PREMIUM COMPUTATION

Rating Basis	Estimated Exposure	Rate	Estimated Premium
Per $1,000 Gross Receipts	$116,000,000	.8319	$96,500 Plus Tax

Deposit Premium	Earned Minimum Premium	Audit Period
$ 96,500 plus tax	$ 48,250 plus tax	4-1-77 to 4-1-78

Date of Issue 4-15-77 sc

Countersigned by John S. Gibson
Authorized Representative

DSM-017779
LEX00023

PROVISIONS OF
UMBRELLA LIABILITY
POLICY

LEXINGTON
INSURANCE COMPANY
25 NEW CHARDON STREET
BOSTON, MASSACHUSETTS

5.1.77 to 4.1.78

A CAPITAL STOCK COMPANY

Alexander & Alexander Inc.
Two Piedmont Center
3566 Piedmont Road, N. E.
Atlanta, Georgia 30305
Telephone 404 261-9400

Alexander & Alexander

LEXINGTON INSURANCE COMPANY
BOSTON, MASSACHUSETTS

(HEREIN CALLED THE COMPANY)

In consideration of the payment of the premium, in reliance upon the statements in the Declarations made a part hereof and subject to the limits of liability, exclusions, conditions and other terms of this policy, the Company agrees with the Insured named in the Declarations as follows

INSURING AGREEMENTS

I. **Coverage** — To pay on behalf of the Insured the ultimate net loss in excess of the retained limit hereinafter defined, which the Insured shall become legally obligated to pay as damages by reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract because of —

(a) Personal Injury, including death at any time resulting therefrom,
(b) Property Damage,
(c) Advertising Liability,

as defined herein and caused by or arising out of an occurrence

II. **Defense, Settlement, Supplementary Payments** — Solely as respects occurrences covered under this policy except for the amount stated in Item 3A2 of the Declarations, but not covered under the underlying insurance set forth in the Schedule of Underlying Policies, or under any other underlying insurance collectible by the Insured, the Company shall

(a) defend any suit against the Insured alleging liability insured under the provisions of this policy and seeking recovery for damages on account thereof even if such suit is groundless, false or fraudulent, but the Company shall have the right to make such investigation and negotiation and settlement of any claim or suit as may be deemed expedient by the Company,
(b) pay all premiums on bonds to release attachments for an amount not in excess of the limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the Insured in any such suit, all expenses incurred by the Company and all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court that part of such judgment as does not exceed the limit of the Company's liability thereon,
(c) reimburse the Insured for all reasonable expenses incurred at the Company's request, (including actual loss of wages or salary, but not loss of other income, not to exceed $75 per day) because of his attendance at hearings or trials at such request.

The Company agrees to pay the amounts incurred under this Insurance Agreement II, except in settlement of claims and suits, in addition to the limit of liability stated in the Declarations, and such defense and supplementary payments shall not be included as part of the ultimate net loss, as defined in the policy

The Insured shall promptly reimburse the Company (excepting Defense Costs) for any amount of ultimate net loss paid on behalf of the Insured within the retained limit specified in Item 3A of the Declarations

III. **Limit of Liability — Retained Limit**

(a) The Company shall be liable only for the ultimate net loss in excess of the Insured's retained limit defined as the greater of:
  (1) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other underlying insurance collectible by the Insured, or
  (2) the amount stated in Item 3A2 of the Declarations as the result of any one occurrence not covered by such underlying policies or insurance;

and then up to an amount not exceeding the amount as stated in Item 3A of the Declarations as the result of any one occurrence.

(b) In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder during this policy period, this policy shall, subject to the Company's limit of liability stated in Item 3A of the Declarations and to the terms and conditions of the underlying insurance,
  (1) in the event of reductions, pay the excess of the reduced underlying insurance; or
  (2) in the event of exhaustion, continue in force as underlying insurance.
(c) There is no limit to the number of occurrences during the policy period for which claims may be made, except that the Company's total limit of liability arising out of the Products Hazard or the Completed Operations Hazard or both combined shall not exceed the amount stated in Item 3A of the Declarations as respects all occurrences during each annual period commencing with the effective or anniversary date of this policy.

IV. **Territory — Policy Period** — This policy applies only to occurrences happening anywhere during the policy period.

DEFINITIONS

1. **Named Insured and Insured**

(a) The term "Named Insured" wherever used in this policy includes the Insured named in Item 1 of the Declaration and,
  (1) any subsidiary company (including subsidiaries thereof) of the Insured so named, and
  (2) any other entity coming under its control and over which it assumes active management,
(b) The unqualified word "Insured", wherever used in this policy includes not only the Named Insured but also
  (1) if the Named Insured is designated in the Declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to his liability as such, however, if the Named Insured is a partnership, this policy does not apply to automobile owned by or registered in the name of a partner thereof. This policy does not apply to Personal Injury, Property Damage or Advertising Liability arising out of the conduct of any partnership or joint venture of which the Insured is a partner or member and which is not designated in this policy as a Named Insured if the Named Insured is designated in the Declarations as an individual, the person so designated, but only with respect to the conduct of a business of which he is the sole proprietor,

Form 8404

(2) except with respect to ownership, maintenance or use including loading or unloading of automobiles or of aircraft, any partner, executive officer, director, stockholder or employee of the Named Insured, while acting in his capacity as such and any organization or proprietor with respect to real estate management for the Named Insured,
(3) any person, organization, trustee or estate to whom or to which the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy, but only with respect to operations by or on behalf of the Named Insured or to the facilities of or used by the Named Insured,
(4) subject to the terms and conditions of this policy, any additional insured included in the underlying insurance, but only to the extent that insurance is available to such additional insured under such underlying insurance,
(5) any person while using an automobile or aircraft owned by or loaned to the Named Insured or hired for use in behalf of the Named Insured and any person or organization legally responsible for the use thereof, provided the actual use of the automobile or aircraft is by the Named Insured or with the Named Insured's permission, and any executive officer, director or stockholder of the Named Insured with respect to the use of an automobile or aircraft not owned by the Named Insured in the business of the Named Insured. The insurance with respect to any person or organization other than the Named Insured does not apply under division (5) of this insuring agreement
i. to any person or organization, to any agent or employee thereof, operating an automobile sales agency, repair shop, service station, storage garage or public parking place, with respect to any occurrence arising out of the operation thereof,
ii. with respect to any automobile or aircraft hired by or loaned to the Named Insured, to the owner or lessee thereof other than the Named Insured, or to any agent or employee of such owner or lessee,
iii. to any manufacturer of aircraft, aircraft engines or aviation accessories, or to any aviation sales or service or repair organization or airport or hangar operator or their respective employees or agents, with respect to any occurrence arising out of the operation thereof.

The inclusion or addition hereunder of more than one insured shall not operate to increase the company's limit of liability.

2. **Personal Injury** — The term "Personal Injury" shall mean
(a) bodily injury, sickness, disease, disability, shock, fright, mental anguish and mental injury,
(b) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution and humiliation,
(c) libel, slander, defamation of character or invasion of right of privacy unless arising out of Advertising Liability, and
(d) assault and battery not committed by or at the direction of the Insured unless commited for the purpose of preventing or eliminating danger to persons or property.

3. **Property Damage** — The term "Property Damage" shall mean direct or consequential damage to or destruction of tangible property, including loss of use thereof.

4. **Advertising Liability** — The term "Advertising Liability" shall mean liability for damages because of
(a) unintentional Libel, Slander or Defamation,
(b) infringement of copyright or title or of slogan,
(c) piracy or unfair competition or idea misappropriation under an implied contract,
(d) invasion of the rights of privacy,
committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Insured's advertising activities.

5. **Products Hazard** — The term "Products Hazard" includes Personal Injury and Property Damage arising out of the Named Insured's products or reliance upon a representation of warranty with respect thereto, but only if the Personal Injury or Property Damage occurs away from premises owned by or rented to the Named Insured and after physical possession has been relinquished to others

6. **Named Insured's Products** — The term "Named Insured's Products" means goods or products manufactured, sold, handled or distributed by the Named Insured or by others trading under his name, including any container thereof (other than a vehicle), but Named Insured's Products shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold

7. **Completed Operations Hazards** — The term "Completed Operations Hazard" includes Personal Injury and Property Damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the Personal Injury or Property Damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the Named Insured. "Operations" include materials, parts or equipment furnished in connection therewith. "Operations" shall be deemed completed at the earliest of the following times
(a) when all operations to be performed by or on behalf of the Named Insured under the contract have been completed,
(b) when all operations to be performed by or on behalf of the Named Insured at the site of the operations have been completed, or
(c) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The Completed Operations Hazard does not include Personal Injury or Property Damage arising out of
(a) operations in connection with the transportation of property, unless the Personal Injury or Property Damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
(b) the existence of tools, uninstalled equipment or abandoned or unused materials.

8. **Occurrence** — With respect to Personal Injury and Property Damage the term "Occurrence" means an event, including continuous or repeated exposure to conditions, which result in Personal Injury or Property Damage neither expected nor intended from the standpoint of the Insured. All such exposure to substantially the same general conditions shall be deemed one occurrence. With respect to Advertising Liability all damages involving the same injurious material or act, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants shall be deemed to arise out of one occurrence.

SCHEDULE OF UNDERLYING INSURANCE

Issued To Columbia Nitrogen Corporation 500 17 87

Type of Policy or Coverage	Insurer	Limits
Comprehensive General Liability Including Products Completed Operations, Personal Injury, Blanket Contractual, Explosion, Collapse and Underground Property Damage.	U.S. Fire	Bodily Injury Liability $ N/A each person $ N/A each occurrence $ N/A aggregate Property Damage Liability $ N/A each occurrence $ N/A aggregate Combined Single Limit $ 500,000.
Automobile Liability	Travelers	Bodily Injury Liability $ 500,000. each person $1,000,000. each occurrence Property Damage Liability $500,000. each occurrence Combined Single Limit $ N/A
Standard Workmen's Compensation and Employers Liability	N/A	Coverage B Employers Liability $ N/A each accident.
Miscellaneous Liability		
Employer's Liability (For Georgia Only)	Employer's Reinsurance Liberty Mutual	$5,000,000. Each Occurrence excess of $60,000. retained limit
Employer's Liability (other than Georgia)	Fireman's Fund	$100,000. Each Accident
Excess General Liability	Canadian Universal	$500,000. Combined Single Limit and aggregate EXCESS OF $500,000. Combined Single Limit and aggregate
Owned and Non-Owned Aircraft	I.N.A.	$20,000,000. Combined Single Limit
Foreign Coverage on Comprehensive General - Automobile Liability including Products, Personal Injury, Blanket Contractual	Granite State	Bodily Injury and Property Damage liability $500,000. combined Single Limit
	Revision #1 Effective 6/1/77	

Authorized Representative John S Gibson

SCHEDULE OF UNDERLYING INSURANCE

Issued To Columbia Nitrogen Corp. 500 17 87

Type of Policy or Coverage	Insurer	Limits
Comprehensive General Liability including Products/ Completed Operations, Personal Injury, Blanket contractual, Explosion, Collapse and Underground Property Damage.	U.S. Fire	Bodily Injury Liability $ N/A each person $ N/A each occurrence $ N/A aggregate
		Property Damage Liability $ N/A each occurrence $ N/A aggregate
		Combined Single Limit $ 500,000
Automobile Liability	Travelers	Bodily Injury Liability $ 500,000 each person $ 1,000,000 each occurrence
		Property Damage Liability $ 500,000 each occurrence
		Combined Single Limit $ N/A
Standard Workmen's Compensation and Employers Liability	N/A	Coverage B Employers Liability $ N/A each accident.
Miscellaneous Liability		
Employer's Liability (For Georgia Only)	Employer's Reinsurance	$5,000,000 Each Occurrence excess of $60,000 retained limit
Employer's Liability (Other Than Georgia)	Fireman's Fund	$100,000 Each Accident
Excess General Liability	Canadian Universal	$500,000 Combined Single Limit and aggregate EXCESS OF $500,000 Combined Single Limit and aggregate
Owned and Non-Owned Aircraft	I.N.A.	$20,000,000 Combined Single Limit

4-15-77 sc

Authorized Representative John S. Gibson

ENDORSEMENT #1.

This endorsement, effective 12:01 A.M. 4-1-77 forms a part of policy No 500 17 87 issued to Columbia Nitrogen Corp.

by LEXINGTON INSURANCE COMPANY.

It is agreed that the Name of Insured is:

1. Columbia Nitrogen Corporation
2. Nipro, Inc.
3. Columbia Communication Services, Inc.

All other terms and conditions remain the same.

ENDORSEMENT #1.

4-15-77 sc

John S. Gibson
Authorized Representative

Form 1803

ENDORSEMENT #2.

This endorsement, effective 12:01 A.M. 4-1-77 forms a part of
policy No 500 17 87 issued to Columbia Nitrogen Corp.

by LEXINGTON INSURANCE COMPANY.

It is agreed that with respect to the Insured's advertising activities, this policy shall not apply to any liability arising out of infringement of copyright or of title or of slogan, piracy or unfair competition or idea misappropriation under an implied contract, malicious prosecution, humiliation, libel, slander, defamation of character or invasion of rights of privacy, unless such liability is covered by valid and collectible underlying insurance as described in the Schedule of Underlying Insurance, and then only for such hazards for which coverage is afforded under said underlying insurance.

All other terms and conditions remain the same.

ENDORSEMENT #2.

4-15-77 sc

John S. Gibson
Authorized Representative

Form 1803

AIRCRAFT LIMITATION

It is agreed that this policy shall not apply to any liability for personal injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any aircraft, unless such liability is covered by valid and collectible underlying insurance as described in the Schedule of Underlying Insurance, and then only for such hazards for which coverage is afforded under said underlying insurance.

All other terms and conditions remain the same.

Attached to and forming part of policy No. 500 17 87

Issued to Columbia Nitrogen Corp.

Effective 4-1-77 12:01 A.M.

John S. Gibson
Authorized Representative

ENDORSEMENT #3.

X C U LIMITATION

It is agreed that the insurance afforded by this policy shall not apply:

To any liability for property damage arising out of:

(a) Blasting or explosion other than the explosion of air or steam vessels, piping under pressure, prime movers, machinery or power transmitting equipment; or

(b) The collapse of or structural injury to any building or structure due to (i) grading of land, excavation, borrowing, filling or back-filling, tunneling, pile driving, coffer-dam work or caisson work, or (ii) moving, shoring, underpinning, raising or demolition of any building or structure, or removal or rebuilding of any structural support thereof; or

(c) Injury to or destruction of wires, conduits, pipes, mains, sewers, tanks, tunnels, any similar property, and any apparatus in connection therewith, beneath the surface of the ground or water, caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, back-filling or pile driving.

unless such liability is covered by valid and collectible underlying insurance at the full limits of liability as described in the Schedule of Underlying Insurance, and then only for such hazards for which coverage is afforded under said underlying insurance.

Attached to and forming part of policy No. 500 17 87

Issued to Columbia Nitrogen Corp.

Effective 4-1-77 12:01 A.M.

John S. Gibson
Authorized Representative

ENDORSEMENT #4.

EXCLUSION - LIABILITY IMPOSED BY THE
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974
(ERISA)

It is agreed that such insurance as is afforded by this policy shall not apply to liability imposed upon any insured by the Employee Retirement Income Security Act of 1974 or any amendments or additions thereto.

All other terms and conditions remain unchanged.

Attached to and forming part of policy No.500 17 87

Issued to Columbia Nitrogen Corp.

by Lexington Insurance Company.

Effective 4-1-77 12:01 A.M.

John S. Gibson
Authorized Representative

ENDORSEMENT # 5.

PROPERTY OF OTHERS EXCLUSION
(CARE, CUSTODY AND CONTROL EXCLUSION)

It is agreed that this policy does not apply to property damage to:

1) Property occupied by or rented to the insured,

2) Property used by the insured, or

3) Property in the care, custody and control of the insured or as to which the insured is for any purpose exercising physical control, or

4) Property being transported by the insured; but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement.

Attached to and forming part of policy No. 500 17 87

Issued to Columbia Nitrogen Corp.

Effective 4-1-77 12:01 A.M.

John S. Gibson
Authorized Representative

ENDORSEMENT #6.

AMENDATORY ENDORSEMENT

This endorsement, effective 12:01 A.M. 4-1-77 forms a part of policy No. 500 17 87 issued to Columbia Nitrogen Corp. by LEXINGTON INSURANCE COMPANY.

It is agreed that the policy is amended as follows:

A. SEEPAGE, POLLUTION AND CONTAMINATION. This insurance does not cover any liability for:
   1. Personal injury or bodily injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination.
   2. The cost of removing, nullifying or cleaning up seeping, polluting or contamination substances.
   3. Fines, penalties, punitive or exemplary damages.

B. SERVICE OF SUIT. The following Service of Suit Clause is not to become effective unless or until the Insured has notified this Company in each specific claim of its intention to sue.

   It is agreed that in the event of the failure of this Company to pay any amount claimed to be due hereunder, this Company, at the request of the Insured, will submit to the jurisdiction of any Court of Competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

   It is further agreed that service of process in such suit may be made upon the highest one in authority bearing the title "Commissioner", "Director" or "Superintendent" of Insurance of the state or commonwealth wherein the property covered by this policy is located, and that in any suit instituted against it upon this contract this Company will abide by the final decision of such Court or any Appellate Court in the event of an appeal. The one in authority bearing the title "Commissioner", "Director" or "Superintendent" of Insurance of the state or commonwealth wherein the property covered by this policy is located is hereby authorized and directed to accept service of process on behalf of this Company in any such suit and/or upon the Insured's request to give a written undertaking to the Insured that they will enter a general appearance upon this Company's behalf in the event such a suit shall be instituted.

C. AMENDMENT OF CANCELLATION CONDITION FOR NON-PAYMENT OF PREMIUM. This policy may be cancelled by ten (10) days written notice by registered mail, return receipt requested, by the Company due to non-payment of premium by the Insured; which default is not cured by the Insured within ten (10) days from receipt of that notice.

John S. Gibson
Authorized Representative

ENDORSEMENT #7.

DSME0000064

ENDORSEMENT

This endorsement, effective 12:01 a.m. 4/1/77 forms a part of
policy No 500 17 87 issued to Columbia Nitrogen

by LEXINGTON INSURANCE COMPANY

It is agreed that Endorsement # 6, Property of Others Exclusion, is hereby cancelled.

ENDORSEMENT # 8

5/5/77 dh

John S. Gibson
Authorized Representative

Form 1803

DSM-EX000035

CARE, CUSTODY AND CONTROL

It is agreed that the insurance afforded by this policy shall apply with respect to liability arising out of injury to or destruction of any property leased by, rented to, used by, or in the care, custody or control of the insured, his agents or subcontractors, or to any property as to which the insured, his agents or subcontractors are, for any purpose, exercising physical control, but only if such liability is covered by valid and collectible underlying insurance by an underlying policy listed in the Schedule of Underlying Insurance and then only for such hazards for which coverage is afforded by said underlying insurance.

It is further agreed that this endorsement supercedes and voids Endorsement #6 and #8.

All other terms and conditions remain the same.

Attached to and forming part of policy No. 500 17 87

Issued to Columbia Nitrogen Corp.

Effective 4-1-77 12:01 A.M.

LEXINGTON INSURANCE COMPANY

John L Gibson
Authorized Representative

ENDORSEMENT #9.

SEEPAGE, POLLUTION AND CONTAMINATION CLAUSE

This insurance does not cover any liability for:

1. Personal injury or bodily injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination resulting from the discharge, dispersal, release or escape of any substance into or upon any watercourse or body of water.

2. Personal injury or bodily injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination other than described in paragraph (1) above, provided always that this paragraph (2) shall not apply to liability for personal injury or bodily injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.

3. Fines, penalties, punitive or exemplary damages.

This clause shall not extend this insurance to cover any liability which would not have been covered under this insurance had this clause not been attached.

It is further agreed that this endorsement supercedes and voids Paragraph A (Seepage, Pollution and Contamination) of Amendatory Endorsement #7.

All other terms and conditions remain the same.

Attached and forming part of policy No. 500 17 87

Issued to Columbia Nitrogen Corp.

Effective 5-25-77 12:01 A.M.

LEXINGTON INSURANCE COMPANY

John S. Gibson
Authorized Representative

ENDORSEMENT #10.

9. **Ultimate Net Loss** — Except as provided in Insuring Agreement II, "Defense", the term "Ultimate Net Loss" shall mean the total sum which the Insured, or any company as its insurer, or both become obligated to pay by reason of Personal Injury, Property Damage, or Advertising Liability claims, either through adjudication or compromise, and shall also include hospital, medical, and funeral charges and all sums paid as salaries, wages, compensation, fees, charges, interest, expenses for doctors, nurses, and investigators and other persons, and for settlement, adjustment, investigation and defense of claims and excluding only the salaries of the Insured or any of the underlying insurer's permanent employees

The Company shall not be liable for expenses as aforesaid when such are covered by underlying policies of insurance.

10. **Aircraft** — The term "Aircraft" includes any heavier than air or lighter than air craft designed to transport persons or property.

EXCLUSIONS

This policy shall not apply

(a) to any obligation for which the Insured or any company as its insurer may be held liable under any Workmen's Compensation or Disability Benefits law provided, however, that this exclusion shall not apply to liability of others assumed by the Named Insured under contract or agreement

(b) under Coverage 1 (a) and 1 (b), to liability for

(1) Personal Injury or Property Damage resulting from the failure of the Named Insured's Products or work completed by or for the Named Insured to perform the function or serve the purpose intended by the Named Insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any insured, but this exclusion does not apply to Personal Injury or Property Damage resulting from the active malfunctioning of such products or work,

(2) Property Damage to the Named Insured's Products arising out of such products or any part of such products,

(3) Property Damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of material, parts or equipment furnished in connection therewith,

(4) damages claimed for the withdrawal, inspection, repair, replacement or loss of use of the Named Insured's Products or work completed by or for the Named Insured or of any property of which such products or work form a part, if such product, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein,

(c) under Coverage 1 (b) to Property Damage

(1) to property owned by the Insured,

(2) to aircraft or watercraft rented to, used by or in the care, custody or control of the Insured, or

(d) under Coverages 1 (a) and 1 (b) to liability for Personal Injury or Property Damage arising out of the ownership, maintenance, operation, use, loading or unloading of aircraft or of watercraft unless insurance therefore is provided by a policy listed in Schedule A,

(e) under Coverage 1 (a) to liability of any employee with respect to Personal Injury to another employee of the same employer injured in the course of such employment unless insurance therefore is provided by a policy listed in Schedule A and then not for broader coverage than is afforded to such employee by that policy,

(f) under Coverage 1 (c) to claims made against the Insured,

(1) for failure of performance of contract,

(2) for infringement of trade-mark or trade name,

(3) for incorrect description of any article or commodity,

(4) for mistake in advertised prices,

(g) (1) under Coverage 1 (a) and 1 (b) to injury, sickness, disease, death or destruction

(i) with respect to which an Insured under the policy is also an Insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an Insured under any such policy but for its termination upon exhaustion of its limit of liability, or

(ii) resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (2) the Insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America or any agency thereof, under any agreement entered into by the United States of America or any agency thereof, with any person or organization,

(2) under any Medical Payments Coverage, or under any Supplementary Payments provision relating to immediate medical or surgical relief to expenses incurred with respect to bodily injury, sickness, disease, or death resulting from hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization,

(3) under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if —

(i) the nuclear material (1) is at any nuclear facility owned by or operated by or on behalf of, an Insured or (2) has been discharged or dispersed therefrom,

(ii) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an Insured; or

(iii) the injury, sickness, disease, death, or destruction arises out of the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions of Canada, this exclusion (iii) applies only to injury to or destruction of property at such nuclear facility,

(4) As used in this policy

"hazardous properties" include radioactive, toxic or explosive properties; "nuclear material" means source material, special nuclear material or by-product material,

"source material", "special nuclear material" and "by-product material" have meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof,

"spent fuel" means any fuel element or fuel component, solid or liquid which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing by-product material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (i) or (ii) thereof,

"Nuclear Facility" means:

(i) any nuclear reactor,

(ii) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,

(iii) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the Insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,

(iv) any structure, basin, excavation, premises or place prepared or used for storage or disposal of waste, and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations,

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material,

with respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property

(h) to any liability of the Insured or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

CONDITIONS

1. **Premium** — Unless otherwise provided the premium for this policy is a flat premium and is not subject to adjustment except as provided in Condition 15 Cancellation. If this policy is subject to audit adjustment, the premium may be based upon the rating basis as set forth in the Declarations during the policy period. Upon expiration of this policy or its termination during the policy period, or at the end of each policy year, the earned premium shall be computed as defined herein. If the earned premium is more than the advance premium paid, the Named Insured shall pay the excess to the company, if less, the company shall return to the Named Insured the unearned portion, subject to the annual minimum premium stated in the Declarations for each twelve months of the policy period, and subject further to the policy minimum premium as stated in the Declarations.

2. **Additional Named Insureds.** In the event of additional Named Insureds as defined in Definition 1 (a) being added hereunder, prompt notice shall be given to the company.

3. **Prior Insurance and Non-Cumulation of Liability.** It is agreed, that if any loss is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof, the company's limit of liability as stated in Item 3 of the Declarations shall be reduced by any amounts due the Insured on account of any such loss under such prior insurance.

4. **Severability of Interest.** In the event of claims being made by reason of Personal Injuries, Property Damage or Advertising Liability suffered by one Insured herein for which another Insured herein is or may be liable, this policy shall cover such Insured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Insured herein. Nothing contained herein shall operate to increase the Company's limit of liability as set forth in Insuring Agreement III.

5. **Notice of Occurrence.** Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered hereunder involved injuries or damages which, in the event that the Insured should be held liable, is likely to involve this policy, notice shall be sent to the Company as soon as practicable, provided however, that failure to notify the Company of any occurrence which at the time of its happening did not appear to involve this policy, but which at a later date would appear to give rise to claims hereunder, shall not prejudice such claims

6. **Inspection and Audit.** The Company shall be permitted but not obligated to inspect the Named Insured's property and operations at any time. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the Named Insured or others, to determine or warrant that such property or operations are safe

The Company may examine and audit the Named Insured's books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

7. **Maintenance of Underlying Insurance.** The policy or policies referred to in the attached "Schedule of Underlying Insurances", and renewal or replacement thereof not more restrictive, shall be maintained by the Named Insured in full effect during the currency of this policy without alteration of terms or conditions except for any reduction of the aggregate limit or limits contained therein solely by payment of claims. Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Company shall only be liable to the same extent as it would have been had the Insured so maintained such policy or policies.

8. **Assistance and Co-operation.** Except as provided by Insuring Agreement II, Defense, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceedings instituted against the Insured, but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurer, or both, in the defense and control of any claim, suit or proceeding relative to any occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured, the underlying insurers and the Company shall cooperate in all things in the defense of such claim, suit, or proceeding.

9. **Appeals.** In the event the Insured or the Insured's underlying insurer(s) elects not to appeal a judgment in excess of the underlying limits, the Company may elect to make such appeal at its own cost and expense and shall be liable for the taxable costs and disbursements and interest incidental thereto, but in no event shall the liability of the Company, for ultimate net loss, exceed the amount set forth in Item 3 (a) of the Declarations for any one occurrence plus the cost and expense of such appeal.

10. **Loss Payable.** Liability of the Company under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of underlying limits on account of such occurrence. The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid on account of ultimate net loss in excess of the amount borne by the Insured or the Insured's underlying insurer(s) or after the Insured's Liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company. If any subsequent payments shall be made similarly from time to time, such losses shall be due and payable within thirty (30) days after proof of loss has been furnished to the Company in a satisfactory form.

11. **Other Insurance.** If other collectible insurance with any other insurer is available to the Insured covering a loss also covered hereunder, this insurance shall be in excess of, and shall not contribute with such other insurance. Excess insurance over the limits of liability expressed in this policy is permitted without prejudice to this insurance and the existence of such insurance shall not reduce any liability under this policy.

12. **Application of Salvages – Subrogation.** All salvages, recoveries of payments recovered or received subsequent to a loss settlement under this insurance shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Insured and the Company, provided always that nothing in this clause shall be construed or mean that losses under this insurance are not recoverable until the Insured's ultimate net loss has been finally ascertained. Inasmuch as this policy is "Excess Coverage", the Insured's right of recovery against any person or other entity cannot always be exclusively subrogated to the company. It is, therefore, understood and agreed that in case of any payment hereunder, the Company shall act in concert with all other interests (including the Insured) concerned, in the exercise of such rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any interests (including the Insured) that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them; the Company shall then be reimbursed out of any balance then remaining up to the amount paid hereunder, lastly, the interests (including the Insured) of whom this coverage is in excess are entitled to claim the residue, if any. Expense necessary to the recovery of any such amounts shall be apportioned between the interests (including the Insured) concerned, in the ratio of their respective recoveries as finally settled.

13. **Changes.** Notice to or knowledge possessed by any person shall not effect a waiver or change in any part of this policy or stop 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 hereof, signed by an authorized representative of the Company.

14. **Assignment.** Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon, if, however, the Named Insured shall be adjudged bankrupt or insolvent, this policy shall cover the Named Insured's legal representative as Named Insured, provided that notice of cancellation addressed to the Insured named in the Declarations and mailed to the address shown in this policy shall be sufficient notice to effect cancellation of this policy.

15. **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 or any of its authorized agents, written notice stating when thereafter such cancellation shall be effective. The policy may be cancelled by the Company by mailing to the Named Insured at the address shown in this policy written notice stating when, not less than thirty (30) days thereafter, such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. 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 procedure. If the Company cancels, earned premium shall be computed pro rata. In the event of cancellation, the earned premium shall in no case be less than the annual minimum premium stated in the Declarations, subject to the policy minimum premium also stated in the Declarations.

Premium adjustment may be made at the time cancellation is effected or as soon as practicable thereafter. The check of the Company or its representative mailed or delivered, shall be sufficient tender of any refund due the Named Insured.

If this policy insures more than one Named Insured, cancellation may be effected by first of such Named Insureds for the account of all Insureds; the notice of cancellation by the Company to such first Named Insured shall be notice to all Insureds. Payment of any unearned premium to such first Named Insured shall be for the account of all interests in such payment.

16. **Bankruptcy and Insolvency.** In the event of the Bankruptcy or Insolvency of the Insured or any entity comprising the Insured, the Company shall not be relieved thereby of the payment of any claims hereunder because of such bankruptcy or insolvency.

In Witness Whereof, the Company has caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by a duly authorized representative of the Company.

P. E. Heath
Secretary

F. M. Clarkson
President

PROVISIONS OF
UMBRELLA LIABILITY
POLICY

LEXINGTON
INSURANCE COMPANY
25 NEW CHARDON STREET
BOSTON, MASSACHUSETTS

4.1.77 to 4.1.78

A CAPITAL STOCK COMPANY

Alexander & Alexander Inc.
Two Piedmont Center
3565 Piedmont Road, N. E.
Atlanta, Georgia 30305
Telephone 404 261-3400

Alexander & Alexander

LEXINGTON INSURANCE COMPANY
BOSTON, MASSACHUSETTS

(HEREIN CALLED THE COMPANY)

In consideration of the payment of the premium, in reliance upon the statements in the Declarations made a part hereof and subject to the limits of liability, exclusions, conditions and other terms of this policy, the Company agrees with the Insured named in the Declarations as follows

INSURING AGREEMENTS

I. **Coverage** – To pay on behalf of the Insured the ultimate net loss in excess of the retained limit hereinafter defined, which the Insured shall become legally obligated to pay as damages by reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract because of –
(a) Personal Injury, including death at any time resulting therefrom,
(b) Property Damage,
(c) Advertising Liability,

as defined herein and caused by or arising out of an occurrence

II. **Defense, Settlement, Supplementary Payments** – Solely as respects occurrences covered under this policy except for the amount stated in Item 3A2 of the Declarations, but not covered under the underlying insurance set forth in the Schedule of Underlying Policies, or under any other underlying insurance collectible by the Insured, the Company shall
(a) defend any suit against the Insured alleging liability insured under the provisions of this policy and seeking recovery for damages on account thereof even if such suit is groundless, false or fraudulent, but the Company shall have the right to make such investigation and negotiation and settlement of any claim or suit as may be deemed expedient by the Company,
(b) pay all premiums on bonds to release attachments for an amount not in excess of the limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the Insured in any such suit, all expenses incurred by the Company and all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court that part of such judgment as does not exceed the limit of the Company's liability thereon,
(c) reimburse the Insured for all reasonable expenses incurred at the Company's request, (including actual loss of wages or salary, but not loss of other income, not to exceed $75 per day) because of his attendance at hearings or trials at such request,

The Company agrees to pay the amounts incurred under this Insurance Agreement II, except in settlement of claims and suits, in addition to the limit of liability stated in the Declarations, and such defense and supplementary payments shall not be included as part of the ultimate net loss, as defined in the policy

The Insured shall promptly reimburse the Company (excepting Defense Costs) for any amount of ultimate net loss paid on behalf of the Insured within the retained limit specified in Item 3A of the Declarations

III. **Limit of Liability – Retained Limit**
(a) The Company shall be liable only for the ultimate net loss in excess of the Insured's retained limit defined as the greater of:
(1) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other underlying insurance collectible by the Insured, or
(2) the amount stated in Item 3A2 of the Declarations as the result of any one occurrence not covered by such underlying policies or insurance;
and then up to an amount not exceeding the amount as stated in Item 3A of the Declarations as the result of any one occurrence.
(b) In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder during this policy period, this policy shall, subject to the Company's limit of liability stated in Item 3A of the Declarations and to the terms and conditions of the underlying insurance,
(1) in the event of reductions, pay the excess of the reduced underlying insurance; or
(2) in the event of exhaustion, continue in force as underlying insurance.
(c) There is no limit to the number of occurrences during the policy period for which claims may be made, except that the Company's total limit of liability arising out of the Products Hazard or the Completed Operations Hazard or both combined shall not exceed the amount stated in Item 3A of the Declarations as respects all occurrences during each annual period commencing with the effective or anniversary date of this policy.

IV. **Territory – Policy Period** – This policy applies only to occurrences happening anywhere during the policy period.

DEFINITIONS

1. **Named Insured and Insured**
(a) The term "Named Insured" wherever used in this policy includes the Insured named in Item 1 of the Declaration and,
(1) any subsidiary company (including subsidiaries thereof) of the Insured so named, and
(2) any other entity coming under its control and over which it assumes active management.
(b) The unqualified word "Insured", wherever used in this policy includes not only the Named Insured but also:
(1) if the Named Insured is designated in the Declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to his liability as such; however, if the Named Insured is a partnership, this policy does not apply to an automobile owned by or registered in the name of a partner thereof. This policy does not apply to Personal Injury, Property Damage or Advertising Liability arising out of the conduct of any partnership or joint venture of which the Insured is a partner or member and which is not designated in this policy as a Named Insured if the Named Insured is designated in the Declarations as an individual, the person so designated, but only with respect to the conduct of a business of which he is the sole proprietor,

Form 8404

(2) except with respect to ownership, maintenance or use including loading or unloading of automobiles or of aircraft, any partner, executive officer, director, stockholder or employee of the Named Insured, while acting in his capacity as such and any organization or proprietor with respect to real estate management for the Named Insured,
(3) any person, organization, trustee or estate to whom or to which the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy, but only with respect to operations by or on behalf of the Named Insured or to the facilities of or used by the Named Insured,
(4) subject to the terms and conditions of this policy, any additional insured included in the underlying insurance, but only to the extent that insurance is available to such additional insured under such underlying insurance,
(5) any person while using an automobile or aircraft owned by or loaned to the Named Insured or hired for use in behalf of the Named Insured and any person or organization legally responsible for the use thereof, provided the actual use of the automobile or aircraft is by the Named Insured or with the Named Insured's permission, and any executive officer, director or stockholder of the Named Insured with respect to the use of an automobile or aircraft not owned by the Named Insured in the business of the Named Insured. The insurance with respect to any person or organization other than the Named Insured does not apply under division (5) of this insuring agreement
   i. to any person or organization, to any agent or employee thereof, operating an automobile sales agency, repair shop, service station, storage garage or public parking place, with respect to any occurrence arising out of the operation thereof,
   ii. with respect to any automobile or aircraft hired by or loaned to the Named Insured, to the owner or lessee thereof other than the Named Insured, or to any agent or employee of such owner or lessee,
   iii. to any manufacturer of aircraft, aircraft engines or aviation accessories, or to any aviation sales or service or repair organization or airport or hangar operator or their respective employees or agents, with respect to any occurrence arising out of the operation thereof.

The inclusion or addition hereunder of more than one insured shall not operate to increase the company's limit of liability.

2. **Personal Injury** – The term "Personal Injury" shall mean
(a) bodily injury, sickness, disease, disability, shock, fright, mental anguish and mental injury,
(b) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution and humiliation,
(c) libel, slander, defamation of character or invasion of right of privacy unless arising out of Advertising Liability, and
(d) assault and battery not committed by or at the direction of the Insured unless commited for the purpose of preventing or eliminating danger to persons or property.

3. **Property Damage** – The term "Property Damage" shall mean direct or consequential damage to or destruction of tangible property, including loss of use thereof.

4. **Advertising Liability** – The term "Advertising Liability" shall mean liability for damages because of
(a) unintentional Libel, Slander or Defamation,
(b) infringement of copyright or title or of slogan,
(c) piracy or unfair competition or idea misappropriation under an implied contract,
(d) invasion of the rights of privacy,
committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Insured's advertising activities,

5. **Products Hazard** – The term "Products Hazard" includes Personal Injury and Property Damage arising out of the Named Insured's products or reliance upon a representation of warranty with respect thereto, but only if the Personal Injury or Property Damage occurs away from premises owned by or rented to the Named Insured and after physical possession has been relinquished to others

6. **Named Insured's Products** – The term "Named Insured's Products" means goods or products manufactured, sold, handled or distributed by the Named Insured or by others trading under his name, including any container thereof (other than a vehicle), but Named Insured's Products shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold

7. **Completed Operations Hazards** – The term "Completed Operations Hazard" includes Personal Injury and Property Damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the Personal Injury or Property Damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the Named Insured. "Operations" include materials, parts or equipment furnished in connection therewith. "Operations shall be deemed completed at the earliest of the following times
(a) when all operations to be performed by or on behalf of the Named Insured under the contract have been completed,
(b) when all operations to be performed by or on behalf of the Named Insured at the site of the operations have been completed, or
(c) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The Completed Operations Hazard does not include Personal Injury or Property Damage arising out of
(a) operations in connection with the transportation of property, unless the Personal Injury or Property Damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
(b) the existence of tools, uninstalled equipment or abandoned or unused materials.

8. **Occurrence** – With respect to Personal Injury and Property Damage the term "Occurrence" means an event, including continuous or repeated exposure to conditions, which result in Personal Injury or Property Damage neither expected nor intended from the standpoint of the Insured. All such exposure to substantially the same general conditions shall be deemed one occurrence. With respect to Advertising Liability all damages involving the same injurious material or act, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants shall be deemed to arise out of one occurrence.

STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON**	)	**IN THE COURT OF COMMON PLEAS** **FOR THE NINTH JUDICIAL CIRCUIT**
PCS NITROGEN, INC. Plaintiff, v. CONTINENTIAL CASUALTY CO., ET. AL. Defendants.	)	CIVIL ACTION NO.: 2011 387 ~~2014-CP-10-0423~~ **MOTION AND ORDER INFORMATION AND COVER SHEET**

Name, SC Bar No. and address of Defendant.
Edward K. Pritchard, III, Esq.
Elizabeth F. Fulton, Esq.
PRITCHARD LAW GROUP, LLC
129 Broad Street
Charleston, SC 29401
Telephone: (843) 722-3300; Fax: (843) 722-3379
Email: epritchard@pritchardlawgroup.com; liz@pritchardlawgroup.com
Other: None

XX **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and**
FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
PROPOSED CONSENT ORDER (complete Sections II and III)

SECTION I: Hearing Information

Nature of Motion: Motion For Summary Judgment on behalf of Defendants Stonewall Insurance Company and Republic Insurance Company
Estimated Time Needed: None Needed

SECTION II: Motion/Order Type

XX Written motion attached
— Form Order Attached

Elizabeth F. Fulton — July 28, 2015
Attorney for Defendants — Date submitted

SECTION III: Motion Fee

X PAID – AMOUNT: $25.00

_____ EXEMPT: (check reason)
_____ Rule to Show Cause in Child or Spousal Support
_____ Domestic Abuse or Abuse and Neglect
_____ Indigent Status _____ State Agency v. Indigent Party
_____ Sexually Violent Predator Act _____ Post-Conviction Relief
_____ Motion for Stay in Bankruptcy
_____ Motion for Publication _____ Motion for Execution (Rule 69, SCRCP)
_____ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:

JUDGE'S SECTION

_____ Motion Fee to be paid upon filing of the attached order.
_____ Other:

JUDGE CODE: Date:

CLERK'S VERIFICATION

Colleted by: _____ Date Filed: _____
(print name)
_____ MOTION FEE COLLECTED: _____
_____ CONTESTED – AMOUNT DUE:

FILED
2015 JUL 28 PM 4:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 11-CP-10-387
	)	
PCS Nitrogen,	)	
	)	**MOTION FOR SUMMARY JUDGMENT**
Plaintiff,	)	**ON BEHALF OF DEFEDANTS**
	)	**STONEWALL INSURANCE COMPANY**
v.	)	**AND REPUBLIC INSURANCE COMPANY**
	)	
Continental Casualty Company, et al.,	)	
	)	
Defendants.	)	
	)	

Defendants Starr Indemnity & Liability Company (formerly known as Republic Insurance Company and referred to herein as "Republic") and Berkshire Hathaway Specialty Insurance Company (formerly known as Stonewall Insurance Company and referred to herein as "Stonewall"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, hereby move for summary judgment on the same grounds set forth in (1) Defendant Continental Casualty Company's Motion for Summary Judgment Based on Corporate Succession and Memorandum of Law in support thereof, and (2) certain defendants' Motion for Summary Judgment regarding the pollution exclusion and Joint Brief in support thereof. Both of these motions are incorporated herein by reference, and Republic and Stonewall join in the relief sought therein. In further support thereof, Republic and Stonewall state as follows:

I. Factual Background

A. The Republic Policies

1. Republic issued three excess liability policies to Columbia Nitrogen Corporation ("Old CNC"), as follows (the "Republic Policies"):

Policy No.	Period
CDU 1583	4/1/1978-4/1/1979
CDU 2583	4/1/1979-4/1/1980
CDU 6578	6/15/1981-4/1/1982

2. Subject to all of their terms and conditions, the Republic Policies[1] obligate Republic:

> To indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of "ultimate net loss", because of:
> (a) personal injury,
> (b) property damage,
> (c) advertising liability,
> as defined herein and caused by or arising out of an occurrence anywhere in the world.

See Republic policy no. CDU 1583, of which a true and correct copy of the most complete evidence presently available is attached hereto as Exhibit 1, at REP001082; Republic policy no. CDU 2583, of which a true and correct copy of the most complete evidence presently available is attached hereto as Exhibit 2, at REP001099; Republic policy no. CDU 6578, of which a true and correct copy of the most complete evidence presently available is attached hereto as Exhibit 3, at REP001120.

3. The Republic Policies define the term "Insured" as follows:

> The unqualified word "Insured" includes the Named Insured and also includes:
> (a) except with respect to liability arising out of the ownership, operation, maintenance, use, loading and unloading of automobiles, aircraft and watercraft – any director, stockholder, officer, or other employee of the Named Insured, while acting within the scope of his duties as such, and any organization or proprietor with respect to real estate management for the Named Insured. If the Named Insured is a partnership, any partner therein but only with respect to his liability as such;
> (b) any person, organization, trustee or estate to whom the Named Insured is obligated by virtue of a written contract to provide insurance such as

[1] Endorsement no. 1 to Republic policy no. CDU 6578 replaces the word "indemnify" with the phrase "pay on behalf of," a change that is immaterial to the instant Motion. *See* Ex. 3, at REP001148.

is afforded by this Policy, but only with respect to operations by or on behalf of the Named Insured or to facilities of or used by the Named Insured;

(c) any other person or organization who is an additional Insured under any underlying policy of insurance subject to all the limitations upon coverage under such policy other than the limits of the underlying insurer's liability;

(d) with respect to any automobile owned by the Named Insured or hired for use by or on behalf of the Named Insured, or to any aircraft or watercraft hired for use by or on behalf of the Named Insured, any person while using such automobile, aircraft, or watercraft and any person or organization legally responsible for the use thereof, provided the actual use thereof is with the permission of the Named Insured. The insurance afforded by this sub-division (d) with respect to any person or organization other than the Named Insured does not apply –

1. to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any occurrence arising out of the operation thereof;
2. to (i) any manufacturer of aircraft engines or component parts of aircraft or aviation accessories, or (ii) any aircraft sales or service or repair organization, or (iii) any seller of aircraft supplies, accessories, equipment or component parts of aircraft, or (iv) any airport or hangar operator, or (v) the respective employees or agents of any of the aforementioned, with respect to any occurrence arising out of the operation of any of the aforementioned;
3. with respect to any hired automobile, aircraft or watercraft, to the owner or lessee thereof, other than the Named Insured, or any employee of such owner or lessee.

Except with respect to sub-paragraph 2 hereof, this subdivisions (d) shall not apply if it restricts the insurance granted under sub-division (c) above.

See id.

4. Republic policy nos. CDU 1583 and CDU 2583 both define the "Named Insured" under the policies as follows:

> Columbia Nitrogen Corporation, Nipro, Inc., Columbia Communications Systems, Inc., and any owned, controlled, managed, affiliated or subsidiary companies or corporations as their respective interest may appear and/or joint ventures and/or partnerships in which any of the above mentioned are engaged, either as a participant therein or as a manager thereof or both.

See Ex., 1 at REP001094; Ex. 2, at REP001105.

5. Republic policy no. CDU 6578 defines the "Named Insured" under the policy as follows:

> It is understood and agreed Named Insured is completed as follows:
>
> Columbia Nitrogen Corporation; Nipro, Inc.; DSM; Synres Chemical Corporation; Custom Chemical and Daniel Products, and any owned, controlled, managed, affiliated or subsidiary companies or corporations as their respective interest may appear and/or joint ventures engaged, either as a participant therein or as a manager thereof or both.

See Ex. 3, at REP001133.

6. Condition 15 of the Republic Policies, titled "Assignment," states that, "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon." *See* Ex., 1 at REP001098; Ex. 2, at REP001118; Ex. 3, at REP001159. None of the Republic Policies contains an endorsement by which Republic consented to any purported assignment of interest thereunder.

7. Republic Policies CDU 1583 and CDU 2583 each contain an endorsement titled "Exclusion(s) Endorsement," which provides in pertinent part as follows:

> In consideration of the premium charge for this policy, it is agreed the policy shall not apply to loss arising out of:
>
> * * *
>
> The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

See Ex., 1 at REP001089; Ex. 2, at REP001108.

8. Endorsement no. 24 to Republic Policy no. CDU 6578, titled "Pollution Exclusion –II," states as follows:

> It is agreed that this policy does not apply to liability for personal injury or property damage arising out of the discharge, dispersal, release, escape, or seepage of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals,

liquids or gases, waste material or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, unless such discharge, dispersal, release or escape is sudden and accidental.

See Ex. 3, at REP001123.

B. The Stonewall Policy

9. Stonewall issued a single umbrella liability insurance policy to Old CNC, policy no. 35000534, for the period February 1, 1975, to February 1, 1976 (the "Stonewall Policy").

10. Subject to all of its terms and conditions, the Stonewall Policy obligates Stonewall:

> To indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages and expenses, all as included in the definition of "ultimate net loss", because of:
> (a) personal injury, as hereinafter defined;
> (b) property damage, as hereinafter defined;
> (c) advertising liability, as hereinafter defined.

See Stonewall policy no. CDU 1583, of which a true and correct copy of the most complete evidence presently available is attached hereto as Exhibit 4, at STW000318.

11. The Stonewall Policy defines the term "Insured" in substantially the same way as the Republic Policies, as set forth in Paragraph 3, *supra*, with only minor differences immaterial to the resolution of the instant Motion. *See id.*

12. Item 1 of the Schedule for the Stonewall Policy identifies "Columbia Nitrogen Corporation, et al.," as the "Named Insured" under the policy. *See* Ex. 4, at STW000321. Endorsement no. 1 to the Stonewall Policy states as follows:

> In consideration of the premium charged, it is hereby agreed that Item 1, Named Insured, is completed as follows:
>
> Columbia Nitrogen Corporation, and Nipro, Inc.
> Columbia Communications Services, Inc.

See Ex. 4, at STW000322.

13. Condition 15 of the Stonewall Policy, titled "Assignment," states that, "Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon." *See* Ex. 4, at STW000320. The Stonewall Policy does not contain an endorsement by which Stonewall consented to any purported assignment of interest thereunder.

14. Exclusion I of the Stonewall Policy states as follows, in relevant part:

> This policy does not apply,
>
> * * *
>
> (I) as respects all operations,
>
> (1) to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, solids, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water unless such discharge, dispersal, release or escape is sudden and accidental.
> (2) to fines, penalties, punitive or exemplary damages; or the cost of removing or cleaning up substances described in (1) above. This limitation (2) applies only to occurrences described in (1) above.

See Ex. 4, at STW000319.

15. Additional facts relevant to the disposition of the instant Motion are set forth in the Memorandum of Law filed in support of Defendant Continental Casualty Company's Motion for Summary Judgment Based on Corporate Succession ("Corporate Succession Memorandum") and the Joint Brief filed in support of certain defendants' Motion for Summary Judgment regarding the pollution exclusion ("Pollution Exclusion Brief"), which are incorporated herein by reference.

II. Argument

A. PCS Is Not an Insured Under the Republic Policies or the Stonewall Policy and Is Not the Successor to Old CNC's Rights Thereunder

16. The Republic Policies and the Stonewall Policy potentially provide coverage only to an Insured as that term is defined in the policies. PCS is not entitled to coverage under the

Republic Policies or the Stonewall Policy because it does not qualify as an Insured as that term is defined therein.

17. Moreover, for the reasons set forth in further detail in Section IV.B.1 of the Corporate Succession Memorandum, Old CNC was not entitled to assign its rights to coverage under the Republic Policies and the Stonewall Policy to any other entity without the consent of Republic and Stonewall, respectively. Neither Republic nor Stonewall ever consented to such an assignment, nor is there an endorsement to any of the policies evidencing Republic or Stonewall's consent to any such assignment. Any purported assignment of Old CNC's rights under the Republic Policies or the Stonewall Policy would therefore be ineffective and void.

18. In addition, as Sections IV.B.2 and IV.B.3 of the Corporate Succession Memorandum make clear, PCS has not previously been held to be the corporate successor to Old CNC, the Named Insured under the Republic Policies and the Stonewall Policy, and is not in fact the corporate successor to Old CNC under either South Carolina or Federal law. Therefore, PCS is not entitled to coverage under the Republic Policies or the Stonewall Policy under any corporate succession theory.

19. Based on the foregoing, PCS cannot establish that it qualifies as an insured under the Republic Policies or the Stonewall Policy or that it is the successor to Old CNC's rights to coverage thereunder, and Republic and Stonewall are therefore entitled to judgment as a matter of law on each and every claim asserted against them by PCS in this action.

B. PCS's Claims for Coverage Are Barred By the Pollution Exclusion

20. Even if it is assumed that PCS qualifies as an insured under them, PCS's claims for coverage under the Republic Policies and Stonewall Policy must also fail because they are excluded from coverage by the pollution exclusions contained in the policies.

21. As demonstrated in the Pollution Exclusion Brief, the alleged property damage at the site in question falls squarely within the terms of the pollution exclusions contained in the Republic Policies and Stonewall Policy. Moreover, the "sudden and accidental" exception in the pollution exclusions does not apply because PCS cannot show that any third-party property damage at the site resulted from a sudden and accidental discharge.

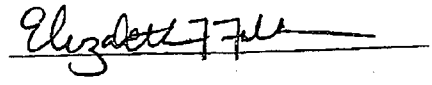
22. Additionally, as set forth in further detail in the Pollution Exclusion Brief, PCS is collaterally estopped from re-litigating whether the pollution exclusions apply to bar coverage for its claims.

23. Accordingly, based on the application of the pollution exclusions, Republic and Stonewall are entitled to judgment as a matter of law on all claims asserted against them by PCS in this action.

WHEREFORE, Defendants Berkshire Hathaway Specialty Insurance Company (formerly known as Stonewall Insurance Company) and Starr Indemnity & Liability Company (formerly known as Republic Insurance Company) pray that the Court enter an order granting summary judgment in their favor and against Plaintiff PCS Nitrogen, Inc., on all counts of PCS's Third Amended Complaint directed against them, and granting such other and further relief as the Court deems just and proper.

Dated: July 28, 2015

Respectfully Submitted,

By: 

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Attorneys for Defendants Certain Underwriters at Lloyd's, London, Certain Aviva Companies, Certain Winterthur Companies, New London Reinsurance Company Limited, The Scottish Lion Insurance Company Limited, Berkshire Hathaway Specialty Insurance Company (formerly known as Stonewall Insurance Company), and Starr Indemnity & Liability Company (formerly known as Republic Insurance Company)

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this date, a true and correct copy of the within and foregoing *Motion for Summary Judgment on behalf of Defendants Stonewall Insurance Company and Republic Insurance Company* was served upon all known counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto, or via e-mail as required, as follows:

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FILED
2015 JUL 28 PM 4:40
JULIE J. ARMSTRONG
CLERK OF COURT
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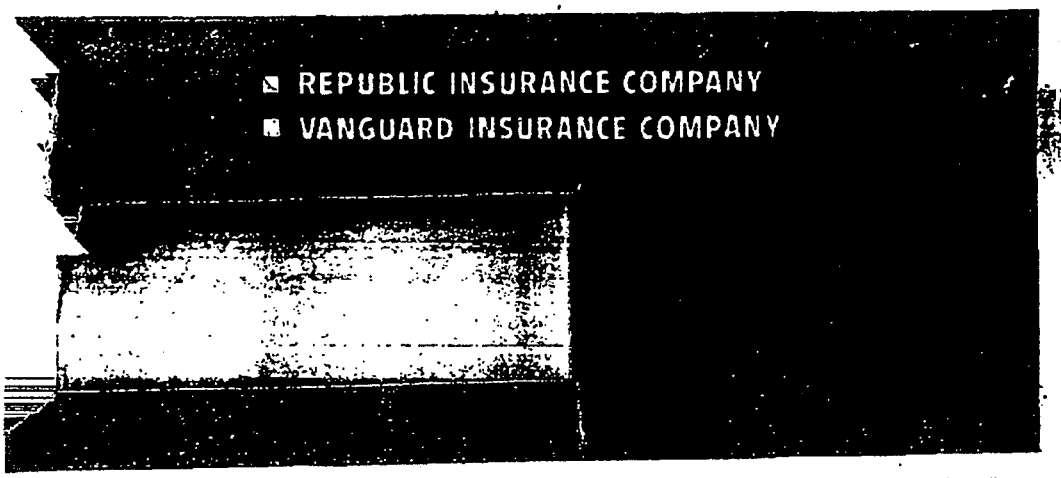
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PRITCHARD LAW GROUP

Elizabeth F. Fulton

July 28, 2015
Charleston, South Carolina

EXHIBIT 1



Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premiums and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I COVERAGES: To indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of "ultimate net loss", because of:
(a) personal injury,
(b) property damage,
(c) advertising liability,
as defined herein and caused by or arising out of an occurrence anywhere in the world.

II. DEFINITIONS:

1 Insured.
The unqualified word "Insured" includes the Named Insured and also includes:
(a) except with respect to liability arising out of the ownership, operation, maintenance, use, loading and unloading of automobiles, aircraft and watercraft — any director, stockholder, officer, or other employee of the Named Insured, while acting within the scope of his duties as such, and any organization or proprietor with respect to real estate management for the Named Insured. If the Named Insured is a partnership, any partner therein but only with respect to his liability as such;
(b) any person, organization, trustee or estate to whom the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this Policy, but only with respect to operations by or on behalf of the Named Insured or to facilities of or used by the Named Insured;
(c) any other person or organization who is an additional Insured under any underlying policy of insurance subject to all the limitations upon coverage under such policy other than the limits of the underlying insurer's liability;
(d) with respect to any automobile owned by the Named Insured or hired for use by or on behalf of the Named Insured, or to any aircraft or watercraft hired for use by or on behalf of the Named Insured, any person while using such automobile, aircraft, or watercraft and any person or organization legally responsible for the use thereof, provided the actual use thereof is with the permission of the Named Insured. The insurance afforded by this sub-division (d) with respect to any person or organization other than the Named Insured does not apply —
1. to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any occurrence arising out of the operation thereof;
2. to (i) any manufacturer of aircraft engines or component parts of aircraft or aviation accessories, or (ii) any aircraft sales or service or repair organization, or (iii) any seller of aircraft supplies, accessories, equipment or component parts of aircraft, or (iv) any airport or hangar operator, or (v) the respective employees or agents of any of the aforementioned, with respect to any occurrence arising out of the operation of any of the aforementioned;
3. with respect to any hired automobile, aircraft or watercraft, to the owner or lessee thereof, other than the Named Insured, or any employee of such owner or lessee.

Except with respect to sub-paragraph 2 hereof, this sub-division (d) shall not apply if it restricts the insurance granted under sub-division (c) above.

2. Personal Injury.
The term "personal injury" shall mean bodily injury, sickness or disease, mental injury, mental anguish, shock, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination (unless insurance therefor is prohibited by law), humiliation, invasion of right of privacy, libel, slander or defamation of character, including death at any time resulting therefrom.

3. Property Damage.
The term "property damage" shall mean physical injury to, or physical destruction of, tangible property, including the loss of use thereof.

4. Advertising Liability.
The term "advertising liability" shall mean (1) libel, slander or defamation, (2) any infringement of copyright or of title or of slogan, piracy or unfair competition or idea misappropriation under an implied contract, or (3) any invasion of right of privacy — all committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Insured's advertising activities.

DSM-016633

5. Ultimate Net Loss.
The term "ultimate net loss" shall mean the total sum which the Insured, or any company as his insurer, or both, becomes legally obligated to pay as damages, because of personal injury, property damage, or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest on judgments, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Named Insured's or of and underlying insurer's permanent employees.

The company shall not be liable for any expenses as aforesaid when payment of such expenses is included in other valid and collectible insurance.

6. Automobile.
The term "automobile" shall mean a land motor vehicle, trailer or semi-trailer designed for travel on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment;

"Mobile equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the Named Insured, including the ways immediately adjoining, or (3) designed for use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes; shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment.

7. Aircraft.
The term "aircraft" shall mean heavier than air or lighter than air aircraft designed to transport persons or property.

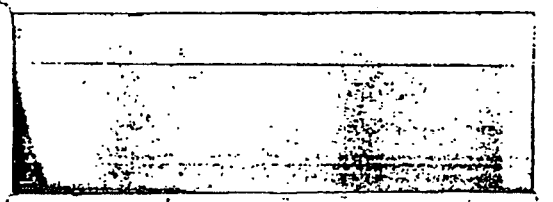
8. Completed Operations Hazard.
The term "completed operations" hazard includes personal injury and property damage arising out of the operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the personal injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the Named Insured:
"Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
(1) when all operations to be performed by or on behalf of the Named Insured under the contract have been completed,
(2) when all operations to be performed by or on behalf of the Named Insured at the site of the operations have been completed, or
(3) when the portion of the work of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or sub-contractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.
The completed operations hazard does not include personal injury or property damage arising out of
(a) operations in connection with the transportation of property, unless the personal injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
(b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
(c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations".

9. Products Hazard.
The term "products hazard" includes personal injury and property damage arising out of the Named Insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the personal injury or property damage occurs away from premises owned by or rented to the Named Insured and after physical possession of such products has been relinquished to others.

10. Occurrence.
The term "occurrence" shall mean (a) an accident, or (b) an event, or continuous or repeated exposure to conditions, which results during the policy period, in personal injury, property damage, or advertising liability (either alone or in combination) neither expected nor intended from the standpoint of the Insured. With respect to Coverages I (a) and I (b), except with respect to the Products-Completed Operations Hazards, all personal injury and property damage (either alone or in combination) arising out of one event or continuous or repeated exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed to be one occurrence. With respect to Coverages I (a) and I (b), all personal injury and property damage (either alone or in combination) arising out of the Products-Completed Operations Hazards shall be deemed to be one occurrence if arising out of one lot of goods or products prepared or acquired by the Named Insured or others trading under his name. With respect to Coverage I (c), all personal injury and property damage (either alone or in combination) involving the same injurious material or set, regardless of the frequency or repetition thereof, the number or kind of media used, and the number of claimants, shall be deemed to arise out of one occurrence.

III. POLICY PERIOD — TERRITORY: This policy applies to personal injury, property damage or advertising liability which occurs anywhere during the policy period.



DSM-016634

DECLARATIONS PAGE OF

NEW
RENEWAL OF NO.

☒ The Republic Insurance Company
☐ The Vanguard Insurance Company

CDU 1583

Declaration Items

ITEM 1. Name and Address of Named Insured

Columbia Nitrogen Corporation, etal.
and as per Endorsement #1
P O Box 1483
Augusta, Georgia 30903

pd recd

JOHNSON & HIGGINS
OF GEORGIA
INSURANCE
17th Floor-Trust Co. of Ga. Bldg. – ATLANTA, GA.
TELEPHONE 658-1330

Business of Insured: Fertilizer and Industrial Chemical Manufacturer

ITEM 2. Policy Period: From April 1, 1978 to April 1, 1979 12:01 A.M. standard time at the address of the Named Insured as stated herein.

ITEM 3. Underlying Insurance

Coverage	Limits of Liability
COMPREHENSIVE GENERAL LIABILITY Including: Products - Completed Operations Blanket Contractual Personal Injury (U. S. Fire)	BODILY INJURY AND PROPERTY DAMAGE Combined Single Limit $ 500,000.00 each occurrence $ 500,000.00 aggregate
AUTOMOBILE LIABILITY (Travelers)	BODILY INJURY $ 500,000.00 each person $ 1,000,000.00 each occurrence PROPERTY DAMAGE $ 500,000.00 each occurrence
EMPLOYERS LIABILITY (Employers Re)	$ 5,000,000.00 each accident
MARITIME LIABILITY (Employers Re)	$ 500,000.00 each person $ 500,000.00 each occurrence
AIRCRAFT LIABILITY (INA)	$20,000,000.00 each occurrence $20,000,000.00 aggregate
FOREIGN COMPREHENSIVE GENERAL LIABILITY (Granite State)	Combined Single Limit $ 500,000.00 each occurrence $ 500,000.00 aggregate

ITEM 4. Underlying Limits: $ 10,000.00 Self Insured Retention

ITEM 5. Limits of Liability – Ultimate Net Loss

$ 10,000,000.00 each occurrence

$ 10,000,000.00 aggregate

CDU 1583

ITEM 6. Premium: $ 102,666.00 Minimum & Deposit

ITEM 7. Rate .8927 per 100 W. C. Payroll

5-1-78sr

Countersigned _____
(Authorized Representative)

ORIGINAL

DSM-016635

CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1660 HOUSTON, TEXAS 77001

Date Effective: April 1 197 8

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 10

It is agreed that this policy shall not apply to any liability for personal injury or property damage arising out of the rendering of or failure to render, during the policy period, medical professional services, unless such liability is covered by valid and collectible underlying contingent malpractice insurance scheduled as follows:

U. S. Fire
Combined Single Limit
$500,000.00 Each Claim
$500,000.00 Aggregate

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

5-1-78sr CAS DIV 236

DSM-016636

CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1660 HOUSTON, TEXAS 77001

Date Effective: April 1 197 8

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 9

ARCHITECTS, ENGINEERS OR SURVEYORS PROFESSIONAL LIABILITY EXCLUSION

IN CONSIDERATION OF THE REDUCED PREMIUM CHARGED, IT IS AGREED THAT THE INSURANCE AFFORDED BY THIS POLICY SHALL NOT APPLY WITH RESPECT TO LIABILITY ARISING OUT OF THE RENDERING OF, OR THE FAILURE TO RENDER, PROFESSIONAL SERVICES BY OR ON BEHALF OF THE INSURED, FOR OTHERS, IN THE INSUREDS CAPACITY AS AN ARCHITECT, ENGINEER OR SURVEYOR, INCLUDING, BUT NOT LIMITED TO, ANY NEGLIGENT ACT, ERROR, OMISSION OR MISTAKE INVOLVING THE PREPARATION OF SURVEYS, MAPS, PLANS, DESIGNS OR SPECIFICATIONS OR SUPERVISORY INSPECTION OR ENGINEERING SERVICES FURNISHED IN CONNECTION THEREWITH.

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

CAS DIV 236
5-1-78st

DSM-016637

CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1660 HOUSTON, TEXAS 77001

Date Effective: April 1 19 78

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 8

FOLLOWING FORM PUNITIVE DAMAGE

It is agreed that except insofar as coverage is available to the insured in the underlying insurance as set forth in the schedule of underlying insurance, this policy shall not apply to punitive damages.

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

CAS DIV 236
5-1-78sr

CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1660 HOUSTON, TEXAS 77001

Date Effective: April 1 197 8

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 7

ERISA EXCLUSION

In consideration of the premium charged, it is agreed that the insurance afforded by this policy shall not apply with respect to any liability resulting out of the intentional or unintentional violation or violations of any provision or provisions of the Employee Retirement Income Security Act of 1974 (ERISA) or any amendment thereof, nor to the administration or handling of or in connection with any employee benefit program subject to regulation by said above mentioned Employee Retirement Income Security Act of 1974 or any amendment thereof.

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

CAS DIV 236
5-1-78sr

DSM-016639

EFFECTIVE April 1, 1978

INSURED Columbia Nitrogen Corporation, etal.

ENDORSEMENT NO. 6

EXCLUSION(S) ENDORSEMENT

In consideration of the premium charge for this policy, it is agreed the policy shall not apply to loss arising out of:

_____ 1. The ownership, maintenance, operation or use of any Watercraft.

_____ 2. The ownership, maintenance, operation or use of any Aircraft.

X_____ 3. Injury to or destruction of property of others in the Insured's care, custody, or control or property over which for any purpose the Insured is exercising physical control.

X_____ 4. Injury to or destruction of property leased to, rented to or occupied by the Insured.

X_____ 5. The discharge, dispersal, release or excape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or excape is sudden and accidental.

_____ 6. Any liability for personal injury to the master or a member of the crew of any vessel.

_____ 7. Any negligence, error or omission, malpractice or mistake of a professional nature committed or alleged to have been committed by or on behalf of the insured in the conduct of any of the insured's business activities.

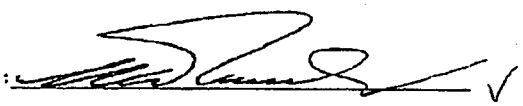
_____ 8. Any substance released or discharged from any Aircraft.

_____ 9. The delivery of any liquid product into a wrong receptacle or to a wrong address or the erroneous delivery of one liquid product for another.

This endorsement applies only to those Items preceded by "X" .

Attached to and forming part of Policy No. CDU 1583 of the Republic Insurance Company.

CDU 64
CAS/DIV

BY: 

DSM-016640

CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1660 HOUSTON, TEXAS 77001

Date Effective: April 1 197 8

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 5

AIRCRAFT LIMITATION

It is agreed that this policy shall not apply to any liability for personal injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any aircraft, unless such liability is covered by valid and collectible underlying insurance as described in the schedule of underlying insurance, and then only for such hazards for which coverage is afforded under said underlying insurance.

CDU 3

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

5-1-78sr CAS DIV 236

DSM-016641

CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1660 HOUSTON, TEXAS 77001

Date Effective: April 1 197 8

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 4

FOREIGN LIABILITY

In consideration of the premium charged, it is agreed that the Insurance afforded by this policy shall not apply with respect to any liability for foreign operations unless such liability is covered by valid and collectible underlying insurance at the limits shown in the schedule of underlying insurance.

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

CAS DIV 236
5-1-78sr

DSM-016642

CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1660 HOUSTON, TEXAS 77001

Date Effective: April 1 197 8

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 3

FOLLOWING FORM BROAD FORM PROPERTY DAMAGE

It is hereby understood and agreed that coverage is provided by this policy for Broad Form Property Damage, but only for such hazards for which coverage is afforded in the underlying insurance.

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

CAS DIV 236
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CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1660 HOUSTON, TEXAS 77001

Date Effective: April 1 197 8

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 2

ADDITIONAL INSURED ENDORSEMENT

It is hereby understood and agreed that Stamicarbon, N.V. & DSM, are added as Additional Insureds as their interests may appear in the Named Operations only.

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

CAS DIV 236
5-1-78sr

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CRAVENS, DARGAN & COMPANY SPECIAL RISKS
P. O. BOX 1550 HOUSTON, TEXAS 77001

Date Effective: April 1 197 8

Insured Columbia Nitrogen Corporation, etal.

Endorsement No. 1

NAMED INSURED

It is hereby understood and agreed that Named Insured is completed to read:

Columbia Nitrogen Corporation, Nipro, Inc., Columbia Communications Systems, Inc., and any owned, controlled, managed, affiliated or subsidiary companies or corporations as their respective interest may appear and/or joint ventures and/or partnerships in which any of the above mentioned are engaged, either as a participant therein or as a manager thereof or both.

All other terms and conditions remaining unchanged.

Attached to and forming part of Certificate No. CDU 1583 Republic Insurance Company

Houston, Texas.

Cravens, Dargan & Company Special Risks

By

CAS DIV 236
5-1-78sr

DSM-016645

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT

(BROAD FORM)

It is agreed that the policy does not apply:

1. Under any Liability Coverage, to injury, sickness, disease, death or destruction
   (a) with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

   (b) resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (2) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

2. Under any Medical Payments Coverage, or under any Supplementary Payments provision relating to immediate medical or surgical relief, to expenses incurred with respect to bodily injury, sickness, disease or death resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

3. Under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if
   (a) the nuclear material (1) is at any nuclear facility owned by or operated by or on behalf of, an insured or (2) has been discharged or dispersed therefrom;

   (b) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or

   (c) the injury, sickness, disease, death or destruction arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (c) applies only to injury to or destruction of property at such nuclear facility.

4. As used in this endorsement

   "hazardous properties" includes radioactive, toxic or explosive properties;

   "nuclear material" means source material, special nuclear material or byproduct material;

   "source material", "special nuclear material", and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

   "spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

✓

"waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof.

"nuclear facility" means

(a) any nuclear reactor,

(b) any equipment or devise designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste.

(c) any equipment or device used for the processing, fabricating or allowing of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises, where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235.

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

With respect to injury to or destruction of property the word "injury" or "destruction" includes all forms of radioactive contamination of property.

This endorsement forms a part of the policy, issued by the Company designated therein, to which it is attached and takes effect as of the effective date of said policy.

Nothing herein contained shall be held to vary, waive, alter, or extend any of the terms, conditions, agreements or declarations of the policy, other than as herein stated.

REPUBLIC INSURANCE COMPANY

CDU 62

CAS DIV 371

EXCLUSIONS

This policy does not apply, except insofar as coverage is available to the Insured under the underlying policies of insurance set forth in the Declarations:

(a) with respect to advertising liability, to claims made against the Insured:
  (i) for failure of performance of contract, but this shall not relate to claims for unauthorized appropriation of ideas based upon alleged breach of implied contract;
  (ii) for infringement of registered trade-mark, service mark or trade-name by use thereof as the registered trade-mark, service mark or trade-name of goods or services sold, offered for sale or advertised, but this shall not relate to titles or slogans;
  (iii) for incorrect description of any article or commodity;
  (iv) for mistake in advertised price;

(b) to any obligation for which the Insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment, compensation or disability benefits law, or under any similar law, provided however, that this exclusion does not apply to liability of others assumed by the Named Insured under any contract or agreement;

(c) to claims made against the Insured:
  (i) for damage to the Named Insured's products arising out of such products or any part of such products;
  (ii) for property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;
  (iii) for damages for the withdrawal, inspection, repair, replacement, or loss of use of the Named Insured's products or work completed by or for the Named Insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein;
  (iv) for improper or inadequate performance, design or specification, but nothing herein contained shall be construed to exclude claims made against the Insured for personal injuries or property damage (other than property damage to a product of the Insured) resulting from improper or inadequate performance, design or specification;

(d) to any employee with respect to personal injury to or death of another employee of the same employer injured in the course of such employment;

(e) to liability arising out of the ownership, maintenance, operation, use, loading or unloading of any aircraft or watercraft owned by any insured or leased by any insured for a period of more than thirty consecutive days; provided however, this exclusion shall not apply to liability of the Named Insured for any other non-owned aircraft or watercraft;

(f) to any liability of the Insured due to war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority;

(g) to injury to or destruction of property owned by any Named Insured;

(h) to liability of any insured hereunder for assault and battery committed by or at the direction of such insured except liability for personal injury or death resulting from any act alleged to be assault and battery committed for the purpose of preventing personal injury or property damage.

CONDITIONS

1. Premium. The premium for this policy shall be as stated in the Declaration Page.

2. Additions. In the event of additional insureds or additional coverages being added to the coverage under the Underlying Insurances while this policy is in force prompt notice shall be given to the Company and the Company shall be entitled to charge appropriate additional premiums thereon.

3. Inspection and Audit. The Company shall be permitted but not obligated to inspect the Named Insured's property and operations at any time. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the Named Insured or others, to determine or warrant that such property or operations are safe.

   The Company may examine and audit the Named Insured's books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

4. Special Conditions Applicable to Occupational Disease. As regards personal injury (fatal or non-fatal) by Occupational Disease sustained by any employee of the Insured, this policy is subject to the same warranties, terms or conditions (except as regards the premium, the amount and limits of liability, any condition respecting "other insurance" and the renewal agreement, if any) as are contained in or as may be added to the policies of Underlying Insurances set forth in the Declarations prior to the happening of an occurrence for which claim is made hereunder.

5. Limits of Liability. The company shall only be liable for ultimate loss in excess of either:
   (a) except as provided in sub-paragraph (b) hereof, the applicable limits of liability of the policies of underlying insurance set forth in Item 3 of the Declarations; or
   (b) as respects each occurrence not covered by such underlying insurance, or where each occurrence is covered by such underlying insurance but in recoverable amounts less than the Underlying Limits set forth in Item 4 of the Declarations, the amount of ultimate net loss set forth in the Declarations as "Underlying Limits",

   but in no event shall the company be liable for an amount in excess of the applicable limit of liability set forth in Item 5 of the Declarations.

   The limit of liability stated in Item 5 of the Declarations as applicable to "each occurrence" is the total limit of the company's liability under this policy for ultimate net loss as a result of any one occurrence.

   Subject to the limit of liability set forth in Item 5 of the Declarations with respect to "each occurrence", the limit of liability so set forth as "aggregate" shall be the total limit of the company's liability under this policy for ultimate net loss:
   (1) because of all personal injury and property damage during each consecutive twelve months of the policy period, arising out of the Products-Completed Operations Hazards, and
   (2) because of all personal injury during each consecutive twelve months of the policy period sustained from Occupational Disease by any employee of the Insured.

   In the event of reduction or exhaustion of the aggregate limits of liability under the policies of underlying insurance by reason of losses paid thereunder, this policy shall:
   (i) in the event of reduction, pay the excess of the reduced underlying insurance, and
   (ii) in the event of exhaustion, continue in force as underlying insurance,

   but nothing in this paragraph shall operate to increase the limits of the company's liability.

6. Severability of Interest. The term "the Insured" is used severally and not collectively, but the inclusion herein of more than one Insured shall not operate to increase the limits of the company's liability. If more than one Insured is named in Item 1 of the Declarations, it is agreed that the limits of the company's liability shall not apply separately to each such Insured.

7. Notice of Occurrence. When an occurrence takes place which, in the opinion of the insured, involves or may involve liability on the part of the company, prompt written notice shall be given by or on behalf of the insured to Cravens, Dargan & Company Special Risks and/or American Adjustment Company, P. O. Box 1860, Houston, Texas 77001. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the occurrence. Failure to so notify the company of any occurrence which at the time of its happening did not appear to involve this policy but which, at a later date, would appear to give rise to a claim hereunder shall not prejudice such claim provided such notice is then given.

8. Assistance and Cooperation of the Insured. The company shall not be called upon to assume charge of the settlement or defense of any claim made, suit brought or proceeding instituted against the Insured but the company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where, in the judgment of the company, the claim or suit involves or appears reasonably likely to result in liability for indemnity by the company under this policy, in which event the Insured, any underlying insurers involved, and the company, shall cooperate in all things in the defense of such claim or suit.

   With respect to any claim made, suit brought or proceeding instituted against the Insured to which the policies or underlying insurance set forth in Item 3 of the Declarations will not apply be-

cause of the exhaustion of the aggregate limits of liability thereunder, if such claim, suit or proceeding is one which could result in liability of the Company to indemnify the Insured hereunder for damages, the Company may assume complete control of the investigation, negotiations, settlement and defense of any such claim, suit or proceeding against the Insured. The Insured shall cooperate with the Company and, upon the Company's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the occurrence.

9. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

10. Appeals. In the event the Insured or the Insured's underlying insurer(s) elect not to appeal a judgment in excess of the underlying limits, the company may elect to make such appeal at its own cost and expense, and shall be liable for the taxable costs, disbursements and interest on judgments incidental thereto, but in no event shall the liability of the company for ultimate net loss exceed the limit of its liability stated in this policy and, in addition, the cost and expense of such appeal.

11. Loss Payable. Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Insured shall make a definite claim for any loss for which the company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty days after they are respectively claimed and proven in conformity with this policy.

12. Other Insurance. If any other valid and collectible insurance exists protecting the Insured against ultimate net loss covered by this policy (other than the policies of underlying insurance specified in Item 3 of the Declarations and other than any policy with respect to which this policy is specified therein as underlying insurance), this policy shall be null and void with respect to such loss whether the Insured is specifically named in such other policy of insurance or not; provided, however, if the amounts recoverable by the Insured under such other insurance are not sufficient to completely protect the Insured against such loss, this policy shall apply but only as excess insurance over such other valid and collectible insurance, in an amount not to exceed the limit of the company's liability stated in this policy, and not as contributing insurance.

13. Subrogation. Inasmuch as this policy is excess coverage, the Insured's right of recovery against any person, firm or corporation cannot be exclusively subrogated to the company; therefore, in case of any payment hereunder, the company will act in concert with all other interests, including the Insured, concerned in the exercise of such rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any interests, including the Insured, that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them; the company is then to be reimbursed out of any balance then remaining up to the amount paid hereunder; lastly, the interests, including the Insured, of which this coverage is in excess are entitled to claim the residue, if any. Expenses necessary to the recovery of any such amounts shall be apportioned between the interests, including the Insured, concerned, in the ratio of their respective recoveries as finally settled.

14. Changes. Notice to or knowledge possessed by any 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.

15. Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon.

16. Cancellation. This policy may be cancelled at any time by the Insured first named in Item 1 of the Declarations by mailing to the company or any of its authorized representatives, written notice stating when thereafter such cancellation shall become effective. This policy may be cancelled by the company by mailing to the Insured first named in Item 1 of the Declarations, at the address shown in the Declarations, written notice stating when, either not less than 30 days thereafter or the maximum cancellation notice period stated in the policies of underlying insurance set forth in the Declarations, whichever is lesser, such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date and hour stated in such notice shall become the end of the policy period. Delivery of such written notice either by such Insured or the company shall be equivalent to mailing. If such 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 made 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.

17. Maintenance of Underlying Insurance. The policy or policies set forth in the Declarations as Underlying Insurance shall be maintained in full effect during the period this policy remains in force except for any reduction of the aggregate limits contained therein solely by payment of claims for occurrences which take place during this policy period. Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the company shall only be liable to the same extent as it would have been if the Insured had complied with this condition.

18. Service of Suit. Pursuant to any statute of any state, territory or district of the United States which makes provision therefor, the company hereby designates the Commissioner, Superintendant or Director of Insurance or other officer specified for that purpose in the statute, and his 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 in any Court of competent jurisdiction by or on behalf of the insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designates Cravens, Dargan & Company Special Risks and/or American Adjustment Company, P. O. Box 1660, Houston, Texas 77001 as the companies to whom said officer is authorized to mail such process or a true copy thereof.

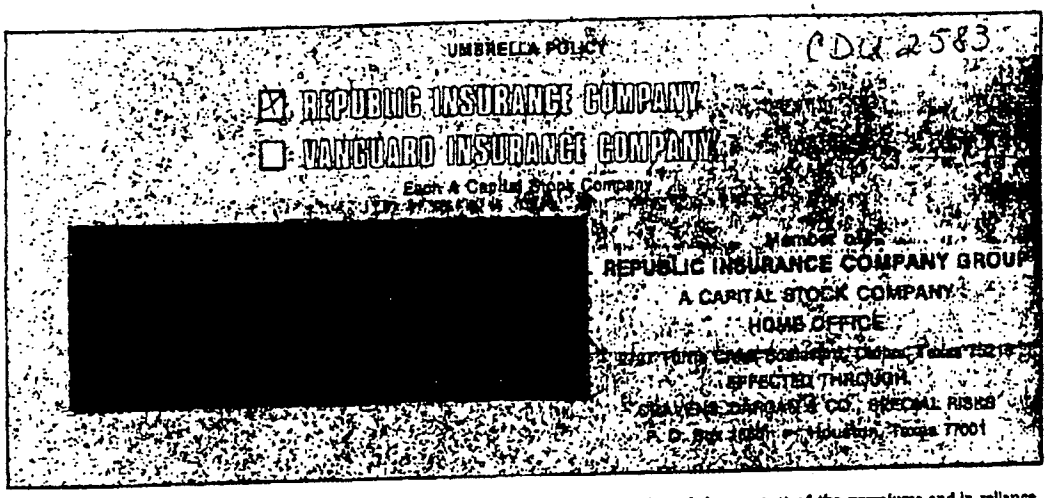
In witness whereof, the Company indicated ☒ on the Declarations page, has caused this policy to be signed by its president and secretary at Dallas, Texas, and countersigned on the declaration page by a duly authorized agent of the company.

SURPLUS LINES BUR.
MAY - 5 1978
RECEIVED

Jack Witherspoon
Secretary

John T. Knight
President

EXHIBIT 2



Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premiums and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I COVERAGES To indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of "ultimate net loss", because of:
(a) personal injury,
(b) property damage,
(c) advertising liability,
as defined herein and caused by or arising out of an occurrence anywhere in the world.

II DEFINITIONS

1 Insured
The unqualified word "Insured" includes the Named Insured and also includes:
(a) except with respect to liability arising out of the ownership, operation, maintenance, use, loading and unloading of automobiles, aircraft and watercraft — any director, stockholder, officer, or other employee of the Named Insured, while acting within the scope of his duties as such, and any organization or proprietor with respect to real estate management for the Named Insured. If the Named Insured is a partnership, any partner therein but only with respect to his liability as such;
(b) any person, organization, trustee or estate to whom the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this Policy, but only with respect to operations by or on behalf of the Named Insured or to facilities of or used by the Named Insured;
(c) any other person or organization who is an additional Insured under any underlying policy of insurance subject to all the limitations upon coverage under such policy other than the limits of the underlying insurer's liability;
(d) with respect to any automobile owned by the Named Insured or hired for use by or on behalf of the Named Insured, or to any aircraft or watercraft hired for use by or on behalf of the Named Insured, any person while using such automobile, aircraft, or watercraft and any person or organization legally responsible for the use thereof, provided the actual use thereof is with the permission of the Named Insured. The insurance afforded by this sub-division (d) with respect to any person or organization other than the Named Insured does not apply —
1. to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any occurrence arising out of the operation thereof;
2. to (i) any manufacturer of aircraft engines or component parts of aircraft or aviation accessories, or (ii) any aircraft sales or service or repair organization, or (iii) any seller of aircraft supplies, accessories, equipment or component parts of aircraft, or (iv) any airport or hangar operator, or (v) the respective employees or agents of any of the aforementioned, with respect to any occurrence arising out of the operation of any of the aforementioned;
3. with respect to any hired automobile, aircraft or watercraft, to the owner or lessee thereof, other than the Named Insured, or any employee of such owner or lessee.

Except with respect to sub-paragraph 2 hereof, this sub-division (d) shall not apply if it restricts the insurance granted under sub-division (c) above.

2 Personal Injury.
The term "personal injury" shall mean bodily injury, sickness or disease, mental injury, mental anguish, shock, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination (unless insurance therefor is prohibited by law), humiliation, invasion of right of privacy, libel, slander or defamation of character, including death at any time resulting therefrom.

3 Property Damage
The term "property damage" shall mean physical injury to, or physical destruction of, tangible property, including the loss of use thereof.

4 Advertising Liability.
The term "advertising liability" shall mean (1) libel, slander or defamation, (2) any infringement of copyright or of title or of slogan, piracy or unfair competition or idea misappropriation under an implied contract, or (3) any invasion of right of privacy — all committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Insured's advertising activities.

5 Ultimate Net Loss

The term "ultimate net loss" shall mean the total sum which the Insured, or any company as his insurer, or both, becomes legally obligated to pay as damages, because of personal injury, property damage, or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest on judgments, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Named Insured's or of and underlying insurer's permanent employees.

The company shall not be liable for any expenses as aforesaid when payment of such expenses is included in other valid and collectible insurance.

6 Automobile

The term "automobile" shall mean a land motor vehicle, trailer or semi-trailer designed for travel on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment;

"Mobile equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the Named Insured, including the ways immediately adjoining, or (3) designed for use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment.

7 Aircraft

The term "aircraft" shall mean heavier than air or lighter than air aircraft designed to transport persons or property.

8 Completed Operations Hazard

The term "completed operations" hazard includes personal injury and property damage arising out of the operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the personal injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the Named Insured:

"Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

(1) when all operations to be performed by or on behalf of the Named Insured under the contract have been completed,

(2) when all operations to be performed by or on behalf of the Named Insured at the site of the operations have been completed, or

(3) when the portion of the work of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or sub-contractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include personal injury or property damage arising out of:

(a) operations in connection with the transportation of property, unless the personal injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,

(b) the existence of tools, uninstalled equipment or abandoned or unused materials, or

(c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations".

9. Products Hazard

The term "products hazard" includes personal injury and property damage arising out of the Named Insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the personal injury or property damage occurs away from premises owned by or rented to the Named Insured and after physical possession of such products has been relinquished to others.

10 Occurence.

The term "occurrence" shall mean (a) an accident, or (b) an event, or continuous or repeated exposure to conditions, which results during the policy period, in personal injury, property damage, or advertising liability (either alone or in combination) neither expected nor intended from the standpoint of the Insured. With respect to Coverages I (a) and I (b), except with respect to the Products-Completed Operations Hazards, all personal injury and property damage (either alone or in combination) arising out of one event or continuous or repeated exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed to be one occurrence. With respect to Coverages I (a) and I (b), all personal injury and property damage (either alone or in combination) arising out of the Products-Completed Operations Hazards shall be deemed to be one occurrence if arising out of one lot of goods or products prepared or acquired by the Named Insured or others trading under his name. With respect to Coverage I (c), all personal injury and property damage (either alone or in combination) involving the same injurious material or act, regardless of the frequency or repetition thereof, the number or kind of media used, and the number of claimants, shall be deemed to arise out of one occurrence.

III POLICY PERIOD — TERRITORY This policy applies to personal injury, property damage or advertising liability which occurs anywhere during the policy period.

[redacted]

EXCLUSIONS