

LOIS J. SCHIFFER  
Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

MICHAEL D. GOODSTEIN  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
(202) 514-1111

JOHN N. MOSCATO  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
999 18th Street, Suite 945  
Denver, Colorado 80202  
(303) 312-7346

SHERRY SCHEEL MATTEUCCI  
United States Attorney  
District of Montana

LORRAINE D. GALLINGER  
Assistant United States Attorney  
District of Montana  
P.O. Box 1478  
Billings, Montana 59103  
(406) 657-6101

Attorneys for the United States

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

UNITED STATES OF AMERICA,	)	
	)	CONSENT DECREE
Plaintiff,	)	
	)	
v.	)	Civil Action No.:
	)	
ASARCO INCORPORATED,	)	
	)	
<u>Defendant.</u>	)	

TABLE OF CONTENTS

I.	<u>BACKGROUND</u>	2
II.	<u>JURISDICTION AND VENUE</u>	4
III.	<u>BINDING EFFECT</u>	4
IV.	<u>OBJECTIVES</u>	5
V.	<u>DEFINITIONS</u>	6
VI.	<u>MATERIALS MANAGEMENT REQUIREMENTS</u>	14
VII.	<u>CORRECTIVE ACTION AT EAST HELENA</u>	19
VIII.	<u>EAST HELENA SUPPLEMENTAL ENVIRONMENTAL PROJECT</u>	60
IX.	<u>COMMUNITY RELATIONS AT EAST HELENA</u>	63
X.	<u>ENVIRONMENTAL MANAGEMENT AND PROTECTION REQUIREMENTS</u>	64
XI.	<u>REPORTING</u>	79
XII.	<u>PENALTY FOR PAST VIOLATIONS</u>	84
XIII.	<u>STIPULATED PENALTIES</u>	84
XIV.	<u>MANNER OF PAYMENT</u>	86
XV.	<u>FORCE MAJEURE</u>	87
XVI.	<u>DISPUTE RESOLUTION</u>	89
XVII.	<u>ACCESS</u>	94
XVIII.	<u>EFFECT OF DECREE</u>	95
XIX.	<u>COSTS OF SUIT</u>	100
XX.	<u>NOTICES AND SUBMISSIONS</u>	101
XXI.	<u>MODIFICATION</u>	104
XXII.	<u>PUBLIC COMMENT</u>	105
XXIII.	<u>CONTINUING JURISDICTION OF THE COURT</u>	105
XXIV.	<u>TERMINATION</u>	105

TABLE OF EXHIBITS

- Exhibit 1:** Memorandum dated April 26, 1989 to Hazardous Waste Management Division Directors
- Exhibit 2:** SEP Plan
- Exhibit 3:** List of ASARCO Facilities for EMS
- Exhibit 4:** AMS Standard
- Exhibit 5:** EMS Policy
- Exhibit 6:** EMS Document and Task Development Plan Model
- Exhibit 7:** Environmental Metrics

I. BACKGROUND

WHEREAS, the United States and ASARCO have been engaged in national negotiations to resolve major environmental compliance issues at ASARCO facilities in a cooperative, innovative manner, without the transaction costs associated with protracted litigation;

WHEREAS, as a result of Phase I of these national negotiations, an agreement has been reached embodied in this consent decree and a related consent decree in the District of Arizona which provides for resolution of alleged claims by the United States against ASARCO under the Federal Resource Conservation and Recovery Act and the Federal Clean Water Act;

WHEREAS, the national agreement includes implementation of compliance measures, corrective action, and a supplemental environmental project at the East Helena Lead Smelter Facility, environmental protection and management measures at ASARCO's facilities nation-wide, and payment of civil penalties for alleged past violations at the East Helena Lead Smelter Facility under this consent decree; and, implementation of an extensive compliance plan at ASARCO's Ray Mine in Arizona and payment of civil penalties for alleged past violations under the decree in the District of Arizona;

WHEREAS, as the national agreement is embodied in two consent decrees the United States reserves the right to withdraw its consent from this Decree based on public comment received on either decree;

WHEREAS, concurrently with the lodging of this Consent Decree, Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), is filing a complaint (the "Complaint") against Defendant, ASARCO Incorporated ("ASARCO");

WHEREAS, ASARCO owns and operates a lead smelting facility in East Helena, Montana ("East Helena Facility" or "the Facility");

WHEREAS, the United States' claims are brought pursuant to the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 et. seq. ("RCRA") and the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1301 et. seq., and seek the imposition of civil penalties and injunctive relief pursuant to the authority of Section 3008(a), (g) and (h) of RCRA, 42 U.S.C. §§ 6928(a), (g) and (h), and Section 309 (b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d);

WHEREAS, ASARCO disputes the allegations of the Complaint, and its assent to this Consent Decree shall not constitute or be construed as an admission of liability; and

WHEREAS, the parties agree and the Court, by entering this Decree, finds that settlement of this matter, without protracted litigation, is fair, reasonable, and in the public interest.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

## II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and Section 309 of the CWA, 33 U.S.C. § 1319, and 28 U.S.C. §§ 1331, 1345, 1355, and 1367.

2. Venue is proper in the District of Montana pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928, Section 309(b) of the CWA, 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1391 and 1395(a). The Complaint states a claim upon which relief may be granted.

## III. BINDING EFFECT

3. This Decree shall apply to, and be binding upon ASARCO and its successors and assigns. ASARCO certifies that its undersigned representatives are fully authorized by ASARCO to enter into the terms and conditions of this Consent Decree, to execute it on behalf of ASARCO, and to legally bind ASARCO to its terms.

4. ASARCO agrees to be bound by this Decree and not to contest its validity in any subsequent proceeding to implement or enforce its terms.

5. No change in ownership or corporate or other legal status including, but not limited to, any transfer of assets or property, shall alter ASARCO's responsibilities under this Decree, except, however, in the event ASARCO no longer has any ownership interest or operational control at a facility, it may notify EPA in writing, providing supporting documentation of the transaction, and, thereafter, will no longer be obligated to

perform the requirements of Parts VI and X of this Decree at that facility. No later than 30 days prior to sale or transfer of ownership or operation of the East Helena Facility, ASARCO shall give written notice of this Decree to each purchaser or successor in interest. Upon such sale or transfer, ASARCO shall provide a copy of this Decree to each such purchaser or successor in interest. Except as provided above, the sale or transfer of ownership or operation of the East Helena Facility will not relieve ASARCO of its obligations regarding the East Helena Facility under this Decree, unless this Decree is modified pursuant to Part XXI (Modification) to reflect such a change. ASARCO shall notify in writing the United States Department of Justice (DOJ) and EPA of such purchaser or successor in interest at least 30 days prior to any sale or transfer.

6. ASARCO shall provide a copy of this Decree to each contractor retained to perform any activity required by this Decree, except for contractors retained solely for purposes of Part X (Environmental Management and Protection Requirements). In any action to enforce this Consent Decree, ASARCO shall not raise as a defense the failure by any of its agents, servants, contractors, employees, successors or assigns to take actions necessary to comply with this Decree except as provided in Part XV (Force Majeure).

#### IV. OBJECTIVES

7. It is the purpose of the parties in entering this Decree to further the objectives of RCRA and the CWA, as

enunciated at Section 1002 of RCRA, 42 U.S.C. § 6902 and Section 101 of the CWA, 33 U.S.C. § 1251. All plans, studies, construction, maintenance, monitoring programs, and other obligations in this Decree or resulting from the activities required by this Decree shall have the objective of causing ASARCO to come into compliance expeditiously, and remain in full compliance, with RCRA, the CWA, and other applicable law.

V. DEFINITIONS

8. Unless otherwise defined herein, terms used in this Decree shall have the meaning given to those terms in RCRA, the regulations promulgated thereunder, or the CWA, and the regulations promulgated thereunder.

Acceptable shall mean that the quality of submittals or completed work is sufficient to warrant EPA review in order to determine whether the submittal or work meets the terms and conditions of this Decree, including attachments, approved work plans and/or EPA's written comments and guidance documents. Acceptability of submittals or work, however, does not necessarily imply that they will be approvable. Approval by EPA of submittals or work, however, establishes that those submittals were prepared, or work was completed, in a manner acceptable to EPA.

Additional Work shall mean any activity or requirement that is determined by EPA to be necessary to fulfill the purposes of Part VII of this Decree, pursuant to the Additional Work

provisions therein.

Administrative Record shall mean the record compiled and maintained by EPA in connection with the implementation of Part VII of this Decree.

AMS Standard shall mean, for purposes of this Decree only, the ASARCO Management System Standard dated November 17, 1997 (and any future revisions thereto - which affect ASARCO's obligations under this Decree as identified and described more fully in Paragraphs 152-174 below - upon mutual agreement of the parties and approval of the Court), which contains corporate-wide management system standards for key business objectives, including environmental, a copy of which is attached as Exhibit 4. This shall not be construed to prevent ASARCO from modifying its AMS Standard for all other purposes.

ANPR or Advance Notice of Proposed Rulemaking shall mean the ANPR published in the Federal Register on May 1, 1996 (61 Fed. Reg. 19432), which describes the evolution and present state of the corrective action program under RCRA, and also requests comment on the future direction of the corrective action program.

Areas to be Investigated as used in Part VII of this Decree shall mean any area of the Facility under the control or ownership of ASARCO where a release to the environment of any hazardous waste or hazardous constituent has occurred, is suspected to have occurred, or may occur, regardless of the time, frequency or duration of the release. The term Areas to be

Investigated includes areas and/or discernible units at which solid wastes have been placed, at any time, irrespective of whether the area or unit was intended for the management of solid or hazardous waste. Examples of Areas to be Investigated include, but are not limited to landfills, surface impoundments, pits, waste piles, land treatment units, incinerators, tank systems (including any storage, treatment, or accumulation tank system), container storage units, elementary neutralization units, waste or wastewater treatment system units, transfer stations, and recycling units, or other areas or systems that received solid or hazardous waste or hazardous constituents, or released hazardous waste or hazardous constituents at any time. Investigations shall be designed so as to not inappropriately intrude into production operations, and to otherwise minimize any interference with production operations. All investigations shall be designed to support a determination of whether hazardous constituents have been, and/or are being released to the environment at, or from the area to be investigated.

ASARCO Facility(ies) shall mean unit(s) and complex(es) listed in Exhibit 3, which is incorporated by reference into this Consent Decree.

CAP or Final CAP or RCRA Corrective Action Plan shall mean the "RCRA Corrective Action Plan (Final)," OSWER Directive 9902.3-2A, dated May 1994.

CERCLA shall mean the Comprehensive Environmental

Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

CERCLA Decree shall mean the Consent Decree entered into by EPA and ASARCO, and entered by the Federal District Court, District of Montana, Missoula Division, on December 27, 1990, as modified as of the date of entry of this Decree.

Comply or Compliance may be used interchangeably and shall mean completion of work required by Part VII of this Decree including submittal of documents of a quality acceptable to EPA, in accordance with work plans approved by EPA and in the manner and time specified in an approved work plan, Part VII of this Decree or any modification thereof. ASARCO must meet both the quality (see definition of acceptable) and timeliness components of a particular requirement to be considered to be in compliance with the terms and conditions of Part VII of this Decree.

Contractor shall include any consultant, laboratory and subcontractor retained to conduct or monitor any portion of the work performed pursuant to this Decree.

Corrective Measures shall mean those measures or actions appropriate to remediate, control, prevent, or mitigate the release, potential release or movement of hazardous waste or hazardous constituents into the environment or within or from one media to another.

Corrective Measures Implementation or CMI shall mean those activities appropriate to initiate, monitor, maintain, and

complete the remedies EPA has selected or may select pursuant to Part VII of this Decree.

Corrective Measures Study or CMS shall mean the investigation and evaluation of potential alternative remedies to protect human health and/or the environment from the release or potential release of hazardous waste or hazardous constituents, into the environment from and/or at the Facility pursuant to Part VII of this Decree.

Day shall mean a calendar day unless expressly stated to be a business day. Business day shall mean a day other than a Saturday, Sunday, or Federal Holiday. In computing any period of time under this Decree, where the last day would fall on a Saturday, Sunday, or Federal Holiday, the period shall run until the end of the next Business day.

Decree shall mean this Consent Decree if, and as, entered by the Court, and any legally made modifications hereto.

DOJ shall mean United States Department of Justice Environmental Enforcement Section.

Effective Date shall be the effective date of this Decree.

EMS Policy shall mean, for purposes of this Decree only, the Environmental Management System Policy dated December 12, 1997 (and any future revisions thereto - which affect ASARCO's obligations under this Decree as identified and described more fully in Paragraphs 152-174 below - upon mutual agreement of the parties and approval of the Court), which contains requirements for the environmental component of the AMS Standard, a copy of

which is attached as Exhibit 5. This shall not be construed to prevent ASARCO from modifying its EMS Policy for all other purposes.

Encycle Materials shall mean materials received at the East Helena Facility from the Encycle/Texas facility in Corpus Christi, Texas through the date of lodging of this Decree.

Environmental Aspects shall mean element of ASARCO's activities, products, or services which can interact with the environment.

Environmental Impacts shall mean any change to the environment, whether adverse or beneficial, wholly or partly resulting from ASARCO's activities, products, or services.

Environmental Requirements shall mean all applicable federal, state, and local environmental statutes and regulations, including permits and enforceable agreements between ASARCO and the respective environmental regulatory agencies.

EPA shall mean the United States Environmental Protection Agency, and any successor departments or agencies of the United States.

Facility as used in the term "the Facility" or in the term "East Helena Facility" shall mean ASARCO's East Helena primary lead smelter and contiguous areas under ASARCO's ownership and control at East Helena.

Ground Water shall mean the water in the saturated zone beneath the land surface.

Hazardous Constituents shall mean those constituents

listed in Appendix VIII to 40 C.F.R. Part 261 or any constituent identified in Appendix IX to 40 C.F.R. Part 264 or any approved subset of Appendix IX to 40 C.F.R. Part 264.

Hazardous Waste shall mean hazardous waste as defined in section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and 40 C.F.R. § 261.3.

Imminent Threat shall mean any release, or threatened release, of hazardous waste or a hazardous constituent, at or from the Facility, which may present an imminent or substantial endangerment to human health and/or the environment.

Interim Measure or IM shall mean those actions which can be, or are, initiated in advance of implementation of the final Corrective Measures for the Facility.

On-Site Contractor shall mean ASARCO contractors and subcontractors that have fixed-base operations at ASARCO Facilities for more than thirty (30) days in a calendar year, including, but not limited to, raw material blending, residuals processing, vehicle maintenance, and/or waste treatment.

Operating Smelting Facilities shall mean ASARCO's smelter facilities at East Helena, Montana; El Paso, Texas; Hayden, Arizona; Glover, Missouri, and any such additional facilities which commence operations during the pendency of this Decree.

Paragraph(s) shall mean a paragraph or paragraphs of this Decree numbered with arabic numerals, including all subparagraphs contained therein.

Part of this Decree shall mean a portion of this Decree

identified by an upper case roman numeral.

RCRA shall mean the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as further amended by, inter alia, the Hazardous and Solid Waste Amendments of 1984, and the Federal Facility Compliance Act of 1992, 42 U.S.C. § 6901 et seq.

RCRA Facility Investigation or RFI shall mean the investigation and characterization of the source(s) and/or releases of hazardous wastes and/or hazardous constituents and the nature, extent, direction, rate, movement, and concentration of such releases of hazardous wastes and/or hazardous constituents, that have been, or may be released or may reasonably be expected to be released into the environment from or at, and/or to migrate from the Facility.

Receptors shall mean those animals (including humans) or plants, and their habitats which are or may receive or be affected by releases of hazardous waste or hazardous constituents at, or from, the Facility.

Record of Decision or ROD shall mean the Record of Decision issued by EPA Region VIII in November, 1989, regarding the East Helena Facility, and as modified through the date of entry of this Decree.

Release shall mean any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, seeping, leaching, dumping, placing, or disposing into the environment.

Risk Assessment shall mean the process or framework for characterizing risk to human and ecological receptors.

Risk Assessment Guidance or RAGS shall mean the Risk Assessment Guidance for Superfund (December 1989).

Secondary Materials shall mean materials that potentially can be a solid and hazardous waste when recycled. The following are considered secondary materials: spent materials, sludges, by-products, scrap metal, and commercial chemical products recycled in ways that differ from their normal use. Each of these types of secondary materials is defined at 40 C.F.R. § 261.1.

Submittal shall include any work plan, report, progress report, or any other written document ASARCO is required by this Decree to send to EPA.

Violation(s) shall mean actions, omissions, failures, or refusals to act by ASARCO that result in a failure to meet the terms and conditions of this Decree.

Work shall mean any activity ASARCO must perform to comply with the requirements of this Decree.

Work Plans shall mean the detailed plans prepared by ASARCO to satisfy the requirements of each phase of work under Part VII of this Decree. The requirements for each work plan are set forth in the section of Part VII of this Decree entitled Work To Be Performed. All work plans and modifications or amendments thereto, shall be filed with the Court to be incorporated into this Decree and are an enforceable component of this Decree when approved in writing by EPA, unless otherwise required under Part

VII of this Decree.

VI. MATERIALS MANAGEMENT REQUIREMENTS

Secondary Materials Acceptance and Management

9. Within thirty days of entry of this Decree, ASARCO shall submit to EPA for review and comment proposed criteria for the acceptance of Secondary Materials at each of its Operating Smelting Facilities. EPA will use best efforts to coordinate its review with the appropriate States and submit comments on such criteria in a timely manner. ASARCO agrees to consider EPA's comments and shall implement acceptance criteria at each of its Operating Smelting Facilities within thirty days after receipt of EPA's comments, providing a copy of the acceptance criteria to EPA. Each Operating Smelter shall thereupon apply these criteria to all new and renewed contracts for Secondary Materials.

10. The acceptance criteria and any future revisions thereto shall specify the procedures for information acquisition, methods of evaluation, and decision making ASARCO will use to determine whether or not to receive, store, smelt, or otherwise manage Secondary Materials considered for receipt at its Operating Smelting Facilities. ASARCO shall design and implement the acceptance criteria to ensure that ASARCO does not accept any hazardous waste for storage, smelting, or other management, at any of its Operating Smelters without full compliance with RCRA requirements for management of hazardous wastes.

11. The acceptance criteria shall specifically address compliance with the recycling regulations in effect at the time

the Secondary Materials are evaluated. In developing the acceptance criteria and in revising the acceptance criteria ASARCO shall consider the attributes of legitimate recycling provided in EPA guidance at 50 Fed. Reg. 638 (January 4, 1985) and the memorandum dated April 26, 1989 to Hazardous Waste Management Division Directors attached hereto as Exhibit 1. The acceptance criteria and any revisions thereto shall also consider any regulations promulgated, or guidance issued by EPA and authorized States after the execution of this Decree.

12. In accordance with Part XI of this Decree (Reporting), ASARCO shall submit a report to EPA annually on any revisions made to the acceptance criteria in the preceding year with a written explanation of the underlying justification for the revisions. The annual report shall also specify the date on which ASARCO began following the revised procedures. ASARCO, however, may submit revisions to the acceptance criteria to EPA at any time for review and comment. EPA will use best efforts to coordinate its review with the appropriate States and submit comments on such revisions in a timely manner.

13. In the event that ASARCO decides to receive any hazardous waste for storage, smelting, or any other form of management, at any of its Operating Smelting Facilities, ASARCO shall comply with all applicable requirements of RCRA, including permitting and appropriate handling and storage requirements.

14. Nothing herein shall be construed to preclude the United States or authorized States from seeking any appropriate

relief under RCRA or other applicable law for violations by ASARCO of RCRA, including injunctive relief and statutory penalties, for claims relating to the application of its acceptance criteria or for any other activities.

Materials To Be Treated As Hazardous Waste

15.a. ASARCO shall store, treat, manage and/or dispose of the following materials generated or received at all of its smelting facilities as hazardous waste in accordance with the requirements of RCRA. This commitment is notwithstanding ASARCO's contentions that one or more of the materials may presently qualify for an exemption or exclusion under Subtitle C of RCRA or its implementing regulations, unless such exemption is expressly approved by EPA in writing:

(1) used refractory material which exhibits a characteristic of hazardous waste as defined in the applicable authorized state program or under federal law;

(2) spent carbon material which exhibits a characteristic of hazardous waste as defined in the applicable authorized state program or under federal law;

(3) contaminated soil which exhibits a characteristic of hazardous waste as defined in the applicable authorized state program or under federal law.

Contaminated soil excavated as part of construction activity, managed as close to the excavation as

possible, and returned to the area of excavation as fill as quickly as possible, will not be deemed to have been "generated" as a solid or hazardous waste.

b. At its East Helena Facility, ASARCO shall store, treat, manage and/or dispose of plant process water managed outside of the plant process water circuit, or released to the environment without a permit, as hazardous waste in accordance with the requirements of RCRA if such plant process water exhibits a characteristic of hazardous waste as defined in the applicable authorized state program or under federal laws. This commitment is notwithstanding ASARCO's contentions that such plant process water may presently qualify for an exemption or exclusion under Subtitle C of RCRA or its implementing regulations, unless such exemption is expressly approved by EPA in writing. Moreover, nothing herein shall be construed to allow ASARCO to manage or handle listed hazardous waste, in, or through, the plant water circuit, without ASARCO first receiving an appropriate RCRA permit, achieving interim status, or otherwise being authorized to do so under RCRA.

16. In carrying out its undertakings pursuant to Paragraph 15, ASARCO will remain eligible for any applicable federal exemptions that may be enacted after ASARCO's execution of this Decree. In the event ASARCO determines that one of the materials covered by Paragraph 15 is subject to a future exemption, ASARCO shall notify EPA of its intention to avail itself of the exemption at least 30 thirty days in advance of

altering its handling of the material.

17. ASARCO agrees that its management of the above-listed materials in accordance with Paragraph 15 will continue during the pendency of this Decree irrespective of a determination by any State which purports to exempt said materials from the requirements of RCRA for hazardous waste, except in the event ASARCO applies for and receives a commodity-like variance. In the event ASARCO applies for a commodity-like variance from any State, ASARCO shall provide EPA a copy of the application at the same time it provides the application to the State.

#### VII. CORRECTIVE ACTION AT EAST HELENA

##### Purpose

18. The purpose of this Part of the Decree is to provide for the efficient and effective transfer of responsibility for certain remedial activities at ASARCO's East Helena Facility from EPA's CERCLA program to its RCRA program. This transfer of lead responsibility is based upon a determination by EPA that the RCRA corrective action program is better suited for application to this operating industrial facility than is the CERCLA program since it can allow the framing of remedial investigation steps and the adoption of corrective measures in a manner tailored to circumstances at this operating facility.

19. In conducting RCRA corrective action at this facility, EPA intends to take full account of the remedial investigation/feasibility study ("RI/FS") and remedial measures already undertaken at this facility with respect to five

"operable units": the process ponds, groundwater, surface water and soils, the slag pile and the ore storage areas. To the extent that such work fully addresses the requirements of the RCRA corrective action program, no additional work on these matters will be required. Should it be determined, however, that additional work is required on any of these matters, remedial investigations shall take full account of all previously gathered information in a manner which reflects the thoroughness and quality of such information; and any corrective measures required shall take full account of all information gathered, as well as the previously conducted and ongoing work. In particular, EPA recognizes that the facility has already implemented substantial remedial measures with respect to its process ponds pursuant to a record of decision (ROD) of November 22, 1989, and that an RI/FS for the slag pile operable unit was completed. Accordingly, the primary focus of further remedial investigation and potential corrective measures pursuant to this Decree will be on any contamination in groundwater, surface water and soils, and the ore storage areas.

20. A further purpose of this Part of the Decree is to come to a conclusion in an expedited manner on ASARCO's proposed vehicle for disposition of certain contaminated soil and sediment that have been accumulated at the East Helena Facility as a result of implementation of the process ponds ROD and other excavation activities. ASARCO has submitted to EPA an application for approval of a new onsite landfill for disposition

of the approximately 75,000 cubic yards of contaminated soil and sediment presently at the site. EPA plans to expeditiously complete its responsibilities with regard to ASARCO's proposal. EPA has preliminarily determined that should ASARCO's proposal be approved prior to approval of corrective measures pursuant to the corrective measures implementation provisions below, the approved proposal should qualify as an "interim measure" that, by definition, will be consistent with the objectives of any long-term remedy at the Facility.

#### Basis For Corrective Action Jurisdiction

21. This Part of the Decree is based upon Section 3008 (h) of RCRA, 42 U.S.C. § 6928(h). ASARCO admits that it accepted and stored without a RCRA permit or interim status approximately 166 drums of spent caustic waste in the period February-April 1996. Approximately one-half of this spent caustic waste was charged to the blast furnace. For purposes of this Decree, ASARCO concedes that it should have had a permit or interim status to receive this material under hazardous waste manifest and, accordingly, EPA has corrective action authority at the Facility.

#### Statement of Requirements

22. Through this Part of the Decree, ASARCO agrees to:

- a. Identify, and provide to EPA on request, studies performed at, and data and information collected regarding environmental conditions at the Facility prior to the effective date of this Decree;

b. Review the effectiveness of any measures which would meet the definition of interim measures, performed at the Facility prior to the effective date of this Decree and submit this information to EPA in combination with the information required in Subparagraph a. above in a report entitled Current Conditions/Release Assessment;

c. Perform interim measures where possible and appropriate, at the Facility;

d. Perform a RCRA Facility Investigation ("RFI") to determine the full nature and extent of any and all releases of hazardous wastes and/or hazardous constituents at or from the Facility;

e. Perform a Corrective Measure Study ("CMS") to identify and evaluate alternatives which will prevent or mitigate the continuing migration of or future release of hazardous waste or hazardous constituents at and/or from the Facility, and to restore contaminated media to standards acceptable to EPA;

f. Implement all Corrective Measures ("CMI") chosen by EPA after review of the CMS and public input, which will be chosen because they best prevent or mitigate the continuing migration of or future release of hazardous waste or hazardous constituents at and/or from the Facility, and will result in the remediation of contaminated media in a manner protective of human health and the environment; and

g. Conduct such activities in accordance with existing regulations and guidance, including, the preamble to the

regulations EPA proposed in 1990 to promulgate as 40 C.F.R. Part 264, Subpart S, the CAP and the ANPR; then applicable EPA regulations which supersede presently existing EPA regulations or guidance; or Montana regulations which have been incorporated into the federally authorized program which supersede existing EPA regulations or guidance.

Current Conditions/Release Assessment

23. Within one hundred twenty (120) days from the effective date of this Part of the Decree, ASARCO shall submit a current conditions and release assessment report (the "CC/RA Report") for the Facility to EPA. The purpose of the CC/RA Report is to assess the completeness and quality of the existing data to be used to define, in whole or in part, the nature and extent of any hazardous waste and hazardous constituent releases, if any, at, or migrating from, the Facility.

24. The CC/RA Report shall:

a. list any and all sources of existing data which might be used to define, in whole or in part, the nature and extent of any hazardous waste or hazardous constituent releases, if any, at, or migrating from, the Facility, including whether a data quality analysis exists for such data;

b. explain whether ASARCO believes that EPA has a copy of each such source of data; and

c. for each source of data which ASARCO does not believe EPA already has a copy of, identify:

(1) its then present location;

- (2) the intended retention time by ASARCO;
- (3) any privilege or confidentiality claims which may attach, or would be asserted by ASARCO if EPA were to request a copy of such source; and
- (4) any other relevant information.

25. The CC/RA Report shall address existing data quality issues, including:

- a. summary of the quality of the existing data;
- b. identification of data ASARCO proposes not be used in assessing site conditions based on data quality concerns;
- c. identification of the areas of the Facility for which existing data are adequate to define releases and supply information for identification and evaluation of interim and corrective measures;
- d. identification of the areas of the Facility for which existing data are adequate to demonstrate that there are, or have been, no releases of hazardous waste and/or hazardous constituents from any source and that no additional consideration is needed;
- e. identification of the areas of the Facility for which existing data are adequate to demonstrate that remedial work is underway, or has been completed, which, when completed, will remediate that area in a manner, and to the degree, equivalent to the remedial goals of the RCRA corrective action program;
- f. identification of the areas of the Facility for

which existing data are not adequate for such determinations; and

g. identification of additional Facility data needs, including a discussion of whether such data should be gathered as an interim measure, or through the RFI.

26. The CC/RA Report shall detail the nature and extent of each known or legitimately suspected release of hazardous waste and/or hazardous constituent, whether the source is a solid and/or hazardous waste management unit, or other source (such as a one time release), and migration pathways of releases, at or from the Facility. A discussion of any significant impacts quality assurance/quality control issues might have on such releases should also be provided.

27. In the CC/RA Report, ASARCO shall describe information regarding any existing interim measures as follows:

a. the objectives, design, construction, operation and maintenance requirements of any measures which are, or may be used as, interim measures;

b. whether each is consistent with and may be integrated into any long term corrective measures;

c. any changes/additions which would increase their effectiveness; and

d. all additional or alternative interim measures which might better stabilize the releases of hazardous waste and hazardous constituents, at or migrating from the Facility.

28. In the CC/RA Report, ASARCO shall describe information regarding any final remedial actions as follows:

- a. the objectives, design, construction, operation and maintenance requirements of any final remedial measures;
- b. whether each such measure is consistent with and may be integrated into any long term corrective measures; and
- c. any changes/additions which would increase their effectiveness either as interim measures or corrective measures.

29. The geographic area for study under this Part of the Decree shall include the Facility plus any off-site areas to which hazardous wastes or hazardous constituents may have migrated.

30. EPA shall review the CC/RA Report and shall notify ASARCO in writing which data, if any, not already in EPA's possession, ASARCO must submit. Unless a different time frame for submittal is specified, with justification therefor, ASARCO shall have thirty (30) days to submit such additional information.

31. EPA shall then review the CC/RA Report, and all data in its possession, and shall notify ASARCO in writing which data EPA has determined are sufficient for the purposes of this Part of the Decree.

32. Unless the CC/RA Report is not acceptable, EPA shall provide written justification to support EPA's determination that any portion of the CC/RA Report is incomplete.

33. ASARCO shall modify the CC/RA Report to reflect any EPA comments, and shall resubmit it within forty-five (45) days of receipt of EPA comments, unless a different period is agreed

to by ASARCO and EPA.

Interim Measures and Stabilization

34. Interim measures, in addition to those which may already be in place, shall, for the purposes of this Part of the Decree, be used whenever possible and appropriate to achieve the goal of stabilization, which is defined for purposes of this Part of the Decree to mean the control or abatement of imminent threats to human health and/or the environment, and prevention or minimization of the spread of hazardous waste or hazardous constituents while long-term corrective measure alternatives are being evaluated.

35. EPA will review ASARCO's CC/RA Report and other relevant available information and select all appropriate interim measures for implementation by ASARCO. If deemed appropriate by EPA such selection may be deferred until additional data is collected.

36. Upon written request of EPA, ASARCO shall submit an interim measures work plan ("IM Work Plan") which is no less comprehensive than the IM Work Plan described in the Final CAP, within sixty (60) days of such request.

37. All IM Work Plans shall ensure that the interim measures are designed to mitigate immediate or potential threat(s) to human health and/or the environment, and are consistent with the objectives of and contribute to the performance of any long-term remedies which may be required at the Facility.

38. All IM Work Plans shall discuss all changes and/or additions which may significantly increase the effectiveness of any existing interim measures as well as additional or alternative interim measures which would significantly increase the stabilization or containment of releases of hazardous waste or hazardous constituents, if any, at or migrating from the Facility.

39. Each IM Work Plan shall also include the following sections:

- a. Public Involvement Plan;
- b. Data Collection Quality Assurance;
- c. Data Management; and
- d. Interim Measure Construction Quality Assurance.

40. Concurrent with the submission of an IM Work Plan, ASARCO shall submit to EPA a Health and Safety Plan ("HSP") using the Final CAP as a guideline. The HSP shall conform to applicable health and safety regulations. EPA will not approve the HSP but will review to confirm that all necessary elements are included and that the plan provides for protection of human health.

RCRA Facility Investigation (RFI)

41. If, after reviewing the Final CC/RA Report EPA determines that an RFI is necessary, within one hundred and twenty (120) days of receipt of EPA's determination, ASARCO shall submit to EPA for review and approval a Work Plan for RCRA Facility Investigation ("RFI Work Plan"); provided, however, that

if at least one IM Work Plan has been required pursuant to this Part of the Decree, the period for submission shall be within two hundred ten (210) days following ASARCO's receipt of EPA's determination. Any RFI Workplan shall use the CAP as a guideline and incorporate any elements noted in the CAP as appropriate for facility-specific conditions unless superseding regulations or guidance significantly modify or eliminate any such elements.

42. Relevant EPA guidance may include, but is not limited to the "RCRA Facility Investigation (RFI) Guidance" (Interim Final, May 1989, EPA 530/SW-89-031 (OSWER Directive 9502.00-6D)); "RCRA Ground-Water Monitoring Technical Enforcement Guidance Document" (OSWER Directive 9950.1, September 1986); and the Final CAP.

43. The RFI Work Plan shall document the procedures ASARCO will use in conducting investigations necessary to:

a. characterize the source(s) of hazardous waste or hazardous constituent releases or potential releases of any hazardous waste or hazardous constituent;

b. identify and determine the nature, extent, and the rate of migration of releases of hazardous wastes or hazardous constituents at or from the Facility;

c. determine the likely routes of migration of releases of hazardous waste or hazardous constituents, if any, at or from the Facility including characterization of the geology and hydrology of the Facility;

d. determine the degree and extent of, or threat of,

migration of releases of hazardous waste and hazardous constituents at or from the Facility;

e. identify actual and potential receptors;

f. support the development of corrective measure alternatives; and

g. be definitive enough to support the selection of corrective measures.

44. In addition to the work required under paragraph 43.e. immediately above, the RFI Work Plan may describe the methods to be used to gather information to support a risk assessment of the conditions at the Facility, and to conduct an assessment of risk to identified receptors and their environment.

45. The RFI Work Plan shall address all areas of the Facility, and any contamination which has, or can be expected to have, migrated from the Facility.

46. The RFI Work Plan shall list all Areas to be Investigated.

47. The RFI Work Plan shall describe the investigation to be done at each Area to be Investigated, including an investigation of the complete lateral and vertical extent of any releases of hazardous waste or hazardous constituents from such areas.

48. The RFI Work Plan shall define the methods of analysis to evaluate the presence, magnitude, extent, direction, and rate of migration of any releases of any hazardous waste or hazardous constituents.

49. The RFI Work Plan shall be developed so that, if followed, ASARCO can elicit data of adequate technical quality to support the development and evaluation of corrective measure alternatives during any Corrective Measures Study; and to support a risk assessment.

50. If additional Areas to be Investigated are found on the Facility, or significant new information relating to hazardous waste or hazardous constituent releases not included in the CC/RA Report is discovered at the Facility, ASARCO shall include such information in its next progress report.

51. The RFI Work Plan shall be modified within sixty (60) days of notification from EPA, to address newly identified releases, threatened releases, or Areas to be Investigated.

52. The RFI Work Plan shall include:

- a. a Project Management Plan;
- b. a Data Collection Quality Assurance Plan;
- c. a Data Management Plan for each unit/area or groups of units/areas as appropriate;
- d. a Health and Safety Plan;
- e. a Community Relations Plan;
- f. a Borehole Abandonment Plan; and
- g. a schedule for implementation of all activities described in the RFI Work Plan, including preparation and submission of preliminary and final reports to EPA.

53. The RFI Work Plan and activities conducted pursuant to the RFI Work Plan are subject to acceptance and approval by

EPA. Such shall not be unreasonably withheld by EPA.

#### RFI Reports

54. In compliance with the schedule developed in the RFI Workplan, ASARCO shall prepare an analysis and summary of the RFI and its results. The objective is to ensure that the investigative data collected pursuant to the RFI Work Plan are sufficient in quality and quantity to describe the nature, extent and rate of releases of hazardous waste or hazardous constituents, threat(s) to human health and/or the environment (including risk assessment analysis), and to support any Corrective Measures Study.

#### Data Analysis

55. ASARCO shall analyze all data collected pursuant to this Part of the Decree and prepare reports on whether the gathering and analysis of such data met quality assurance and quality control and other applicable data gathering and analysis procedures.

a. The reports shall describe the extent of all releases of hazardous wastes or hazardous constituents in relation to site or background levels at (i) the source; (ii) the boundaries of the Area to be Investigated; and (iii) off-site locations, if any, to which the releases have migrated. Background groundwater values for all applicable hazardous constituents described in the RFI Work Plan shall be obtained from analyses of water extracted from appropriate upgradient wells.

b. All sampling and analyses shall be conducted in accordance with the Data Collection Quality Assurance Plan included as part of the approved RFI Work Plan.

c. All sampling locations, methods and equipment used shall be documented in a field log and all locations shall be identified on detailed site maps.

56. Laboratory, Bench-Scale, and Field Pilot-Scale Studies.

a. With prior EPA approval, ASARCO may conduct laboratory and/or bench-scale studies and field and pilot-scale testing to determine the applicability of a corrective measure technology or technologies to site conditions.

b. ASARCO shall provide EPA with a work plan defining proposed laboratory and bench scale studies and field and pilot-scale testing.

c. ASARCO shall analyze the technologies based on literature review, vendor contacts, and past experience, to determine the testing requirements.

Corrective Measures Study (CMS)

57. Unless as part of the RFI Final Report (as defined in the approved RFI Work Plan) ASARCO thoroughly supports and documents in writing that the risk assessment investigations and analyses conducted during the RFI demonstrate that no Corrective Measures Study is warranted and EPA accepts such demonstration, within ninety (90) days following receipt of notification in writing by EPA of EPA approval of the RFI Final Report (as

defined in the approved RFI Work Plan), ASARCO shall prepare and submit to EPA a Corrective Measure Study ("CMS") Work Plan using as a guideline: then applicable EPA regulations; the CAP or other applicable guidance then in effect; or Montana regulations which have been incorporated into the federally authorized program.

58. EPA will review and comment on an acceptable CMS Work Plan pursuant to Paragraphs 77-82 (Agency Review, Acceptance and Approvals) below.

59. ASARCO shall revise and resubmit the CMS Work Plan within thirty (30) days of receipt of EPA's written comments.

60. The CMS shall address the entire Facility, including areas to which hazardous waste or hazardous constituents have, or may reasonably be expected to migrate beyond the Facility boundaries.

61. The CMS shall consist of four tasks: (1) Identification and Development of Corrective Measures Alternative(s); (2) Evaluation of the Corrective Measure Alternative(s); (3) Recommendation on Corrective Measure(s), and justification therefor; and (4) Corrective Measure Study Reports.

62. CMS TASK 1 - Identification and Development of Corrective Action Alternatives. Based on the results of the CC/RA, including the RI/FS previously conducted for the CERCLA program to the degree the information gathered and analyzed therein is of sufficient quality, and based on the RFI, including risk assessment work conducted pursuant to an approved RFI Work Plan, ASARCO shall identify, screen and develop alternatives for

removal, containment, treatment, and/or other remediation of releases of hazardous waste or hazardous constituents, at or migrating from the Facility.

63. CMS TASK 2 - Evaluation of the Corrective Measure Alternatives. ASARCO shall describe each corrective measure alternative that passes through the initial screening in CMS TASK 1 and assess each remaining corrective measure alternative and its components. The assessment shall consider technical, environmental, and human health concerns.

64. CMS TASK 3 - Recommendation of Corrective Measure(s) and justification therefor. ASARCO shall justify and recommend corrective measure alternative(s) using technical, human health, environmental, and other appropriate criteria.

- a. This recommendation shall include summary tables,
- b. as appropriate, designed to allow the alternative or alternatives to be understood and compared.

65. ASARCO will propose the corrective measure alternative or alternatives to be implemented based on the results of the evaluation discussed immediately below. At a minimum, the following criteria will be used to justify the proposal of the final corrective measure or measures:

- a. Target Remedial Objectives - Generally. The corrective measures must comply with applicable Federal and/or state statutes and regulations for the protection of human health.

- (1) Target remedial objectives shall be developed

using, and ASARCO shall explicitly identify, all applicable and/or relevant State and Federal standards for the protection of human health and the environment (e.g., Safe Drinking Water Act ("SDWA"), the Clean Water Act ("CWA"), National Ambient Air Quality Standards, federally approved state water quality standards).

(2) If ASARCO chooses to conduct a risk assessment, the results of that risk assessment shall be included.

(3) Corrective Measures required by regulation shall be implemented. Corrective Measures otherwise described as preferred (e.g., in preambles or guidance) by EPA or the State of Montana, shall be noted.

b. Human Health. Corrective measures which provide the minimum level of exposure to contaminants and the maximum reduction in exposure over the shortest period of time are preferred.

c. Groundwater. ASARCO shall provide information to support the selection/development of ground-water protection standards for all of the hazardous constituents described in the RFI Work Plan or Final RFI Report as either found in the ground water during the RFI, or reasonably expected to migrate to groundwater over time. ASARCO shall specifically list applicable SDWA standards for such constituents and describe where and, if

they cannot be practicably met, why they may not be met after implementation of this Part of the Decree is complete.

(1) The applicable ground-water protection standards list shall consist of all of the following (others may also be listed):

(a) for any hazardous constituents described in the RFI Work Plans, the respective value given in Table 1 at 40 C.F.R. § 264.94, if the background level of the hazardous constituent is below the level given in Table 1;

(b) the background level of that constituent in the ground water;

(c) an EPA approved risk based level developed by ASARCO in accordance with the "Risk Assessment Guidance for Superfund: Volume 1 - Human Health Evaluation Manual (Part B, Development of Risk-Based Preliminary Remediation Goals) (OSWER Directive 9285.7-01B)"; and

(d) applicable State standards.

d. Environmental. The Corrective Measure or Measures posing the least adverse impact (or greatest improvement) over the shortest period of time on the environment will be favored.

e. Technical. (NOTE: The HSWA permit appendices may be useful in developing this portion of the CMS.)

(1) Performance - Corrective Measures which are most effective at performing their intended

functions and maintaining performance over extended periods of time will be given preference;

(2) Reliability - Corrective Measures which do not require frequent or complex operation and maintenance activities and that have proven effective under conditions similar to those anticipated at the Facility will be given preference;

(3) Implementability - Corrective Measures which can be constructed and operated to reduce levels of hazardous waste or hazardous constituents to applicable standards, or less, in the shortest period of time will be preferred;

(4) Safety - Corrective Measures which pose the least threats to the safety of area residents and the environment, as well as workers during implementation, will be preferred; and

(5) Other Factors - such other relevant factors as are appropriate, including projected costs and other site-specific factors.

66. CMS TASK 4 - reports, including one designated as the "Draft-Final CMS Report", shall be submitted per the approved CMS Work Plan, shall follow the guidelines in the CAP as appropriate, and shall be subject to EPA acceptance and approval. Such shall not be unreasonably withheld by EPA. The Final CMS Report shall

not become final until after the completion of the public comment and modification procedures described in this Part of the Decree.

### Corrective Measures Implementation

67. After the procedures described in Paragraphs 23-69 and 85-88 of this Decree (CC/RA, Interim Measures, RFI, CMS, Additional Work) have been completed (except for ongoing requirements thereunder), and the Draft-Final CMS Report is complete, EPA shall select the appropriate corrective measure(s), and notify ASARCO of it's determination on the corrective measures to be implemented ("EPA Decision Document"). The EPA Decision Document shall be in writing and shall state the basis for the measure(s) selected, and shall respond to all significant comments made during the comment period.

68. Within ninety (90) days of receipt of the EPA Decision Document, ASARCO shall submit to EPA a Corrective Measures Implementation ("CMI") Work Plan using as a guideline: then applicable EPA regulations; the CAP and/or other applicable guidance then in effect; or Montana regulations which have been incorporated into the federally authorized program. The CMI Work Plan shall be developed to implement the decisions set forth and supported in the EPA Decision Document, and shall detail all work and related requirements and schedules for the timely implementation and completion of such corrective measures.

69. EPA shall conduct its review of and comment on an acceptable CMI Work Plan pursuant to Paragraphs 77-82 (Agency Review; Acceptance and Approvals) below.

70. ASARCO shall revise and resubmit the CMI Work Plan within thirty (30) days of receipt of EPA's written comments.

71. The CMI Work Plan and activities conducted pursuant to the CMI Work Plan are subject to acceptance and approval by EPA. Such shall not be unreasonably withheld by EPA.

72. Upon ASARCO's conclusion that it has achieved the requirements specified in the EPA Decision Document and elsewhere in and through implementation of this Part of the Decree, ASARCO shall submit to EPA for review and approval, a draft Corrective Measure Completion Report ("CMC Report"). The Draft CMC Report shall provide all information necessary to support ASARCO's conclusions.

73. If the Draft CMC Report is acceptable, EPA shall make the Draft CMC Report available to the public for review and comment pursuant to Paragraphs 108-116 (Public Comment) of the Decree.

74. Following review of the Draft CMC Report and taking into account comments made during the public comment period, and pursuant to Paragraphs 77-82 (Agency Review; Acceptance and Approvals) below, EPA will provide its comments on the Draft CMC Report and/or notify ASARCO of its determination regarding ASARCO's conclusions, and EPA's basis therefor, in writing.

75. ASARCO shall modify and resubmit the Draft CMC Report within thirty (30) days of receipt of EPA's written comments, if necessary.

76. ASARCO's obligations under this Part of the Decree shall terminate upon EPA's written approval of the Final CMC Report.

### Agency Review; Acceptance and Approvals

77. EPA will provide ASARCO with its written approval, conditional approval, approval with modification, rejection as not acceptable, disapproval with comments and/or modifications, or notice of intent to draft and approve, for any work plan, report (except progress reports), specification or schedule submitted pursuant to or required by this Part of the Decree.

78. EPA may reject and not comment on, any submittal which EPA determines is not acceptable. Submittal of a document not acceptable is a violation of this Decree, unless such document is resubmitted prior to the due date for such submittal, and EPA determines that the submittal is acceptable.

79. ASARCO shall revise any work plan, report, specification or schedule in accordance with EPA's written comments, and in accordance with the due date specified herein, or otherwise in writing by EPA. Revised submittals are subject to EPA approval, approval with conditions, rejection as not acceptable, disapproval with comments and/or modifications, or notice of intent to draft and approve.

80. Any report, work plan, specification or schedule approved by EPA, including those drafted by EPA, shall be automatically incorporated in this Decree upon such written approval.

81. Prior to written approval, no report, work plan, specification or schedule shall be construed as approved and final. Oral advice, suggestions, or comments given by EPA will

not constitute an official approval, nor shall any oral approval or oral assurance of approval be considered binding on either party, except as otherwise expressly provided for above.

82. Within thirty (30) days of approval, or approval with modifications of any document, or receipt of a document drafted by EPA after failure by ASARCO to draft an approvable document after receipt of comments from EPA, ASARCO shall commence work to implement the tasks required by such document in accordance with the standards, specifications and schedules set forth in the document approved by EPA.

Submittals

83. ASARCO shall provide draft and final work plans and reports to EPA in accordance with the following schedule:

<u>ACTIVITY</u>	<u>DUE DATE</u>
CC/RA Report	120 days after entry of this Decree
IM Work Plan	60 days after receipt of EPA request
RFI Work Plan	120 days after receipt by ASARCO of EPA findings on CC/RA Report unless IM Work Plan was required, in which case 210 days after receipt of EPA findings
RFI Report	Per schedule contained in EPA-approved RFI Work Plan as amended for Additional Work
CMS Work Plan	90 days after receipt of EPA approval of the RFI Report

CMS Reports	Per schedule contained in approved CMS Work Plan
CMI Work Plan	90 days after receipt of EPA notification of selection of corrective measures to be implemented
CMI Reports	Per schedule contained in approved CMI Work Plan
Progress Reports	Monthly, report to be sent within 20 days after end of each month.

84. Two bound hard copies of all documents required to be submitted pursuant to this Part of the Decree shall be hand delivered, sent by certified mail, return receipt requested, or by overnight express mail or courier to the EPA Project Manager. In addition, with the exception of progress reports, ASARCO shall simultaneously submit a copy of all reports, tables and spreadsheets, on IBM compatible diskettes. Progress reports are to be submitted in original hard copy only. The ASARCO and EPA Project Managers shall determine what computer software is appropriate prior to delivery of the first documents.

Additional Work

85. Based upon new information and/or changed circumstances, EPA may determine or ASARCO may propose that certain tasks, including investigatory work, engineering evaluations, or procedure/methodology modifications, are necessary in addition to or in lieu of the tasks included in any EPA-approved work plan.

86. If EPA determines that it is necessary for ASARCO to perform additional work, EPA shall specify in writing the technical support and other bases for its determination. Within ten (10) days of the receipt of such determination, ASARCO shall have the opportunity to meet or confer with EPA to discuss the additional work prior to beginning such work.

87. If required by EPA, ASARCO shall submit for EPA approval a work plan for the additional work. Such work plan(s) shall be submitted within sixty (60) days of receipt of EPA's determination that additional work is to be performed, or according to an alternative schedule in the work plan established and justified by EPA.

88. Upon approval of a work plan modified to reflect additional work, ASARCO shall implement the work plan in accordance with the revised schedule and provisions contained therein.

#### Proposed Contractor/Consultant

89. All work performed pursuant to this Part of the Decree shall be under the direction and supervision of a professional engineer, hydrogeologist, geologist, or environmental scientist with expertise in hazardous waste site investigation and remediation. This person shall have the technical expertise sufficient to adequately perform and/or direct all aspects of work for which he or she is responsible.

90. Within fourteen (14) days of the effective date of this Decree, ASARCO shall notify EPA in writing of the name, title,

and qualifications of the engineer, hydrologist, geologist, or environmental scientist and of any contractors and/or consultants ASARCO then plans to use in carrying out the terms of this Part of the Decree.

91. EPA shall identify whether any contractor proposed by ASARCO is on the List of Parties Excluded from Federal Procurement or Non-Procurement Programs.

92. EPA reserves the right to disapprove ASARCO's identified contractor/consultant for reasons that shall be specified to ASARCO in EPA's written notice of disapproval. If EPA disapproves of an identified contractor/consultant, then ASARCO must, within thirty (30) days of receipt of written notice of disapproval, notify EPA, in writing, of the name, title, and qualifications of any replacement.

#### Quality Assurance

93. All sampling and analytical activities undertaken pursuant to this Part of the Decree shall follow EPA-approved quality assurance (QA), quality control (QC), and chain-of-custody procedures, which procedures shall be part of the approved Work Plan.

94. In addition, except to the extent alternate arrangements have been made with and approved by EPA, ASARCO shall:

a. Follow the EPA guidance for sampling and analysis contained in the document entitled "Standard Operating Procedures for Field Samplers" (March 1986);

b. Consult with the EPA Project Manager in advance regarding which laboratories will be used by ASARCO and use its best efforts to ensure that EPA personnel and EPA-authorized representatives have reasonable access to the laboratories and personnel used for analyses;

c. Require that laboratories used by ASARCO for analyses perform such analyses according to EPA methods as found in "Test Methods for Evaluating Solid Wastes," Third Edition (SW-846) or other methods deemed satisfactory by EPA, which such other methods will be identified in advance and approved in writing by EPA. If other methods are to be used, ASARCO shall submit all alternative protocols to EPA at least forty five (45) days prior to the commencement of analyses for EPA approval;

d. Require that laboratories used by ASARCO for analyses have a QA/QC program at least equal to that which is followed by EPA. As part of such a program, and upon written request by EPA, such laboratories shall perform analyses of samples provided by EPA to demonstrate the quality of the analytical data; and

e. Use EPA guidance to evaluate all data to be collected during the RFI. This evaluation shall be provided to EPA as part of the sampling plan contained in the Work Plan and shall be updated as necessary or appropriate.

f. Existing data shall be evaluated by EPA for its adequacy as a basis (partial or whole) for CC/RA and RFI Report analyses and conclusions, and development and evaluation of the

corrective measures alternatives. Guidance documents on data quality analysis and data collection methods shall be used as guidelines to assess the quality of existing data, with EPA's best scientific and engineering judgments used as the determining factor on data quality.

#### Financial Assurance

95. During the period that this Part of the Decree is being implemented, ASARCO shall establish and maintain financial security as necessary and appropriate to assure completion of its corrective action obligations as they are identified through the interim measures, RFI, CMS, additional work, and CMI processes.

96. Initially and through December 31, 1999, except as allowed or required pursuant to Paragraphs 97 through 107 below, ASARCO shall establish and maintain financial security in an amount equal to the amount it is currently required to demonstrate under Section XII of the December 1990 CERCLA Consent Decree.

97. By December 31, 1999, and annually thereafter, ASARCO shall develop and maintain a single cost estimate for the remaining work to be performed pursuant to this Part of the Decree. Annual cost estimates after 1999, shall include an adjustment for inflation in accordance with 40 C.F.R.

§ 264.142(b). Annual cost estimates shall be transmitted with the following January monthly report.

98. Beginning on January 1, 2000, and annually thereafter (except as otherwise allowed or required pursuant to Paragraph 99

immediately below), at ASARCO's election, the company shall use one or more of the following forms to establish and maintain the required financial security:

a. A surety bond or fund guaranteeing performance of the work;

b. One or more irrevocable letters of credit equaling the total estimated cost of the necessary assurance;

c. A trust fund;

d. A demonstration that ASARCO satisfies the requirements of 40 C.F.R. § 264.143(f);

e. A guarantee to perform the work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with ASARCO, provided that such guarantor establishes its ability to provide such security through or more of the mechanisms provided in subsections a., b., c., or d., of this paragraph, on the same schedule as otherwise required herein of ASARCO; or

f. A demonstration by ASARCO that:

(1) It has assets located in the United States amounting to at least ninety percent (90%) of total assets or at least six (6) times the sum of the current cost estimate for work to be performed under this Decree and any other environmental obligation and liabilities for which ASARCO is providing assurance by means of a financial test; and

(2) It can satisfy any two of the following three criteria:

(i) A ratio of current assets to current liabilities that equals 1.25 or greater.

(ii) Tangible net worth (as defined in 40 C.F.R. § 264.141) greater than the sum of the cost estimate for work to be performed under this Decree and any other environmental obligations and liabilities for which ASARCO is providing assurance by means of a financial test plus \$10 million.

(iii) Either of the following alternative (A) or (B):

(A) (1) Total assets less total liabilities (as these terms are defined in 40 C.F.R. § 264.141) shall be no less than \$500 million, with "total liabilities" including the sum of the current cost estimate for all work to be performed under this Decree and any other obligations and liabilities for which ASARCO is providing assurance by means of a financial test; or

(2) The ratio of ASARCO's net income, plus depreciation, depletion, and amortization, minus \$10 million to total liabilities (as defined in 40 C.F.R. § 264.141 and subparagraph (A)(1) above) is greater than 0.10.

(B) A current bond rating for the Company's most recent bond issuance of AAA, AA, A or BBB as issued by Standard and Poor's or Aaa, Aa or Baa as issued by Moody's. This bond must be issued by ASARCO and not a corporate parent or other affiliate.

Financial calculations for purposes of this subparagraph f. shall be in accordance with generally accepted accounting principles on a consolidated basis, except that LIFO inventories shall be included in "current assets" at their replacement cost.

99. In any calendar year, if ASARCO can show that the estimated cost to complete the remaining work has diminished below the amount calculated at the end of the prior calendar year (or as previously recalculated during that calendar year), ASARCO may submit a proposal for reduction to EPA, and may reduce the

amount of the security upon approval by EPA.

100. In any calendar year, if ASARCO becomes aware, or should become aware, that the estimated cost to complete the remaining Work has increased by ten percent (10%) or more above the amount calculated by the end of the prior calendar year, such increase shall be reported in the next monthly report and documentation of financial security for that increase shall be provided sixty (60) days following the increase in the cost estimate with the next due monthly report.

101. Should any change(s) in circumstances occur which causes, or ASARCO anticipates might reasonably cause in the short term, the financial security mechanism then in place to fail to meet the requirements herein, ASARCO shall immediately either begin use of a different means for financial assurance, or upgrade its existing affected mechanism(s) to bring it into compliance. ASARCO shall not have more than sixty (60) days from the date on which ASARCO became aware, or should have become aware of such change(s), to come into compliance with this subsection.

102. ASARCO may change the form of financial security provided under this section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this section.

103. ASARCO's inability to maintain financial security hereunder at any time during the pendency of this Decree shall

not excuse or be a defense to allegations of failure to perform any requirements of this Decree.

104. Unused

105. Unused

106. In the event of a dispute regarding financial security, ASARCO may only lower the amount of and/or alter the form of the financial security after, and in accordance with an effective informal resolution, or final administrative or judicial decision resolving the dispute.

107. ASARCO shall be released from financial assurance requirements under this Part at the time the Final CMC Report is approved by EPA.

#### Public Comment

108. Upon receipt by EPA of interim measures workplans, the Draft CMS Report or Draft CMC Report from ASARCO, if EPA determines that such Report is acceptable, EPA shall review that Report and EPA shall provide any comments regarding its content and conclusions to ASARCO, in writing.

109. Following ASARCO's receipt of EPA's comments, ASARCO shall respond to EPA's comments and suggestions.

110. If and when approved, EPA shall make that approved Draft Report available to the public (the RFI Final Report will be made available together with the CMS Final Report) for review and comment for a period of at least thirty (30) days, but not to exceed sixty (60) days.

111. The public may, and should be encouraged to, comment on all aspects of the work to be performed pursuant to this Part of the Decree at any time during the implementation hereof. EPA and ASARCO will endeavor to make all documents available for review by interested members of the public in a timely manner, and to be responsive to public interest in this matter. (The administrative record will be located at the address noted below.)

112. EPA will endeavor to consider all timely comments from the public during each phase of activity under this Part of the Decree. EPA reserves the right, however, to not respond to comments which are made after the closure of the comment periods specified herein, or to comments on matters outside the scope of this Part of the Decree.

113. Following the public review and comment periods, EPA shall notify ASARCO in writing of any additional work to be performed, and/or of any modifications to the draft documents which are found to be necessary or appropriate.

114. If the corrective measures recommended in the Draft CMS Final Report are not the corrective measures selected by EPA, EPA shall inform ASARCO in writing of the reasons for such decision, and ASARCO shall modify the CMS for EPA approval and implement such changes.

115. If, after review of public comments, EPA disagrees with ASARCO's conclusions in the Draft CMC Report, EPA shall inform ASARCO in writing of the reasons for such decision, and ASARCO

shall either modify the CMC Report for EPA approval or conduct such work as is necessary to complete the corrective measures (including the development and implementation of work plans, if appropriate), as appropriate.

116. The Administrative Record supporting the selection of the Corrective Measures shall be available for public review at EPA Region VIII, Montana Office, 301 South Park, Helena, Montana 59626-0096, from 8 a.m. to 5 p.m., every Business Day.

#### Off-Site Access

117. To the extent that work required by this Part of the Decree, or by any approved Work Plan prepared pursuant hereto, must be done on property not owned or controlled by ASARCO, ASARCO shall use its best efforts to obtain site access agreements from the present owner(s) of such property within thirty (30) days following transmittal of the Work Plan to EPA.

118. "Best efforts" as used in this Section shall include, at a minimum, a certified letter (showing actual receipt) from ASARCO to the present owner(s) of such property requesting the execution of reasonable access agreements to permit ASARCO, and EPA and their authorized representatives to obtain access to such property.

119. Any such access agreement shall be incorporated by reference into this Decree upon execution by ASARCO and copies of fully executed access agreements shall be submitted to EPA with the next following monthly report.

120. In the event that agreements for access are not obtained within thirty (30) days of the date of receipt of ASARCO's certified letter to the property owner, ASARCO shall notify EPA in writing within seven (7) days thereafter regarding both the efforts undertaken to obtain access and its failure to obtain such agreements. EPA may, at its discretion, assist ASARCO in obtaining access.

121. Nothing in this section limits or otherwise affects EPA's right to access and entry pursuant to applicable law, including RCRA and CERCLA.

122. Nothing in this section shall be construed to limit or otherwise affect ASARCO's liability and obligation to perform corrective measures including corrective measures beyond the facility boundary, notwithstanding the lack of access.

#### Sampling and Data/Document Availability

123. Unless notified by EPA in writing, ASARCO shall submit to EPA the results of sampling and/or tests or other data generated by, or on behalf of ASARCO, in the Monthly Reports. In addition, ASARCO shall submit to EPA the results of all validated and confirmed sampling and/or tests or other data generated by, or on behalf of ASARCO performed pursuant to this Part of the Decree, with the RFI Report, if not before.

124. ASARCO shall notify EPA in writing at least three (3) Business Days before conducting any well drilling, equipment installation, or sampling, except, in the event ASARCO is unable to reach the EPA Project Manager, or EPA requests a postponement

of the work a longer notice period shall be provided. ASARCO shall provide a reasonable amount of, or allow EPA or its authorized representatives to take, split samples of all samples collected by ASARCO pursuant to this Part of the Decree.

125. Except as noted below, ASARCO may assert a business confidentiality claim covering all or part of any information provided to EPA or its representatives pursuant to this Part of the Decree. Except under exigent circumstances, any assertion of confidentiality shall be substantiated by ASARCO when the assertion is made, or the right to assert the claim shall be waived. Information determined to be confidential shall be disclosed only to the extent permitted by 40 C.F.R. Part 2. If no confidentiality claim (including substantiation) accompanies the information when it is provided, it may be made available to the public without further notice to ASARCO. Physical or analytical data either generated and/or submitted pursuant to this Part of the Decree cannot be claimed confidential and/or privileged.

#### Record Preservation

126. During the pendency of this Decree and for a minimum of three (3) years from EPA approval of the Final CMC Report, ASARCO shall preserve all submittals and data generated and/or submitted in its possession or in the possession of its divisions, officers, directors, employees, agents, contractors, attorneys, successors and assigns which relate to performance under this Part of the Decree or to hazardous waste management and/or

disposal at the Facility. For a period of three (3) years from EPA approval of the Final CMC Report, ASARCO shall make such records available to EPA for inspection or copying or shall provide copies of any such records to EPA. ASARCO shall notify EPA twenty (20) days prior to the destruction of any such records, and shall provide EPA with the opportunity to take possession of any such records.

Project Managers

127. On or before the effective date of this Decree, EPA, and ASARCO shall designate Project Managers. Each Project Manager shall be responsible for overseeing the implementation of this Part of the Decree. The EPA Project Manager shall be EPA's designated representative at the Facility. To the maximum extent possible, all communications between ASARCO and EPA, and all documents, reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Part of the Decree, shall be directed to the Project Managers.

128. The EPA project manager is:

Susan Zazzali, RCRA Project Manager  
Montana Office  
U.S. EPA Region VIII  
301 South Park, Drawer 10096  
Helena, Montana 59626

129. The ASARCO project manager is:

Jon Nickel  
ASARCO Incorporated  
100 Smelter Road, Highway 12  
East Helena, MT 59635

130. The parties agree to provide at least seven (7) days notice prior to changing Project Managers.

131. The absence of the EPA Project Manager from the site shall not be cause for the stoppage of work.

#### Notification and Document Certification

132. Unless otherwise specified, reports, notices, approvals, disapprovals, or other submittals relating to or required under this Part of the Decree shall be in writing, shall be certified in accordance with Paragraph 228 and shall be sent to the EPA Project Manager.

#### Reservation of Rights

133. EPA expressly reserves all rights and defenses that it may have, including the right both to disapprove of work performed by ASARCO that is not in compliance with this Decree and to require that ASARCO perform tasks in addition to those stated in the Work Plans required by this Part of the Decree.

134. In the event ASARCO fails to adequately perform work pursuant to this Part of the Decree, including the submittal of acceptable documents, EPA reserves the right to perform any portion of the work required hereunder or any additional site characterization, or other corrective actions as EPA deems necessary or appropriate to protect human health and the environment, including drafting final work plans and other documents, which become binding on ASARCO upon execution by EPA.

135. EPA may exercise its authority under CERCLA to undertake removal actions or remedial actions at any time.

136. EPA reserves its right to seek reimbursement from ASARCO under all applicable statutes for such additional costs incurred by the United States.

137. Notwithstanding compliance with the terms of this Decree, ASARCO is not released from liability, if any, for the costs of any response actions taken or authorized by EPA under any applicable statute, including CERCLA.

138. EPA reserves the right to initiate any appropriate action pursuant to section 7003 of RCRA, 42 U.S.C. § 6973, at the East Helena Facility at any time during the pendency of this Decree.

139. If EPA determines that activities in compliance or noncompliance with this Part of the Decree have caused or may cause a release of hazardous waste or hazardous constituents both within and outside of the Facility; or have caused or may cause a threat to human health or the environment; or if EPA determines that ASARCO is not capable of undertaking any studies or corrective measures required hereunder, EPA may order ASARCO to stop further implementation of this Part of the Decree for such period of time as EPA determines may be needed to abate any such release or threat and/or to undertake any action which EPA determines is necessary to abate such release or threat.

140. No informal advice, guidance, suggestions, or comments by EPA regarding reports, plans, specifications, schedules, and any other writings submitted by ASARCO will be construed as relieving ASARCO of its obligations to obtain written approval,

if and when required by this Part of the Decree.

Termination and Satisfaction

141. Except for the record preservation provisions, the requirements of this Part of the Decree shall be deemed satisfied upon ASARCO's receipt of written notice from EPA that the EPA has approved the Final CMC Report.

Survivability/Permit Integration

142. Subsequent to the entry of this Decree, a RCRA permit may be issued to the East Helena Facility incorporating any or all of the requirements of this Part of the Decree into the permit.

143. No requirements of this Part of the Decree shall terminate upon the issuance of a RCRA permit unless the requirements are expressly replaced by equivalent or more stringent requirements in the permit.

VIII. EAST HELENA SUPPLEMENTAL ENVIRONMENTAL PROJECT ("SEP")

SEP Description

144. ASARCO shall perform the following Supplemental Environmental Project ("Upper/Lower Lake SEP") designed to restore native riparian and upland vegetation communities in selected areas of the Upper/Lower Lake system ("site") at the East Helena Facility. These areas consist of the portion of the Upper Lake shoreline not presently vegetated, the shoreline of Lower Lake, and the area between the two lakes. As appropriate, any contaminated soils in these areas will be removed as part of the RCRA Corrective Action. Vegetation communities to be

established will be similar to those which have developed in the Upper Lake Area, effectively expanding the size of the native riparian and upland communities and expanding and enhancing wildlife habitat. Phases 1 and 2 of the SEP shall be implemented in a manner consistent with the completion of the RCRA Corrective Action in the areas of Upper and Lower Lake.

PHASE 1 - Re-Vegetate Upper and Lower Lake Shorelines

145. Phase 1 shall supplement established native and naturalized vegetative communities that are developed along the ten (10) to fifteen (15) - foot wide perimeter of Lower Lake and portions of Upper Lake north and west shorelines. This supplementation first involves the identification and improvement of site conditions that have precluded the establishment of vegetation on barren shoreline locations. In addition, portions of the Lower Lake perimeter shall be filled to create an irregular shoreline to naturalize the site, introduce other vegetative communities (wetland), expand and enhance wildlife habitat, and potentially improve water quality. Perimeter areas predominantly to the west and north of the lakes shall be screened with upland tree and shrub plantings to enhance wildlife habitat and reduce local noise pollution. Re-vegetation of the Upper and Lower Lake Shoreline areas shall result in the establishment of sustainable vegetative communities that are comparable to undisturbed communities in the Upper Lake area.

Phase 2 - Re-vegetate area between the Lakes Consistent With Soils Remediation

146. Phase 2 shall involve re-grading to naturalized topographical contours to enhance upland habitat of the area between Upper and Lower Lake and re-vegetation. Perimeter activity associated with the operation of the East Helena plant to the west of the area between the lakes shall be screened with upland tree and shrub plantings to enhance wildlife habitat and reduce local noise and air pollution. Re-vegetation of the area between the lakes shall create a foothills grassland community comparable to established/undisturbed communities in the local area.

Monitoring and Reporting

147. Baseline vegetation and wildlife measurements will be conducted in conjunction with the implementation of SEP Phases 1 and 2. ASARCO shall provide the reporting for the SEP in accordance with Part XI herein (Reporting).

Statement of SEP Work

148. The Upper/Lower Lake SEP is further described in the Proposed Supplemental Project (SEP) For the ASARCO East Helena Plant, Hydrometrics, Inc., February 1997. This proposal has been accepted by EPA. A copy of ASARCO's proposal for conducting this SEP is appended as Exhibit 2. ASARCO, within sixty (60) Days after the effective date of this Consent Decree, shall submit to EPA for approval a Statement of Work which incorporates Hydrometrics, Inc.'s proposal, any applicable requirements of this Decree, a schedule for completion of Phases 1 and 2 of the

SEP, and any other customary terms. Disputes between EPA and ASARCO concerning the Statement of Work shall be resolved in accordance with Part XVI of this Consent Decree. ASARCO shall implement the SEP in accordance with the RCRA Corrective Action Work Plan.

149. Following receipt of the SEP Completion Report described in Paragraph 177, within sixty (60) days EPA will: (a) accept the SEP Completion Report; or (b) reject the SEP Completion Report and notify ASARCO in writing of the deficiencies in the SEP and/or the SEP Completion Report and grant ASARCO an additional thirty (30) Days to correct deficiencies.

Stipulated Penalty For SEP

150. If, after having satisfactorily completed the SEP, ASARCO's net total expenditure was at least \$180,000, no stipulated penalty will be assessed. If, after having satisfactorily completed the SEP, ASARCO's net total expenditure was less than \$180,000, ASARCO shall pay a stipulated penalty of \$100,000, in accordance with the payment provisions of Part XIII of this Decree.

IX. COMMUNITY RELATIONS AT EAST HELENA

151. ASARCO shall provide public meetings regarding the progress of implementation of this Decree at least once per calendar year in East Helena. ASARCO shall provide appropriate public notice of the meetings, including notice in the Helena Independent Record, and agrees to notify EPA of each such meeting

at least thirty days prior to the planned meeting date. ASARCO agrees to allow EPA to participate jointly in all public meetings regarding the progress of implementation of this Decree.

X. ENVIRONMENTAL MANAGEMENT AND PROTECTION REQUIREMENTS

152. The purpose of this Part of the Decree is to enhance ASARCO's development of a comprehensive corporate-level environmental management system to promote compliance with all environmental requirements, achieve pollution prevention, and accomplish pollution reduction. To this end, ASARCO has developed corporate-wide management system standards, which are documented in the AMS Standard and an EMS Policy which put forth requirements for the Environmental Management System.

153. For purposes of this Decree, ASARCO shall develop and implement those portions of the AMS Standard and EMS Policy identified and more fully described in Paragraphs 154 through 174 below. The AMS Standard and EMS Policy are appended to and incorporated by reference into this Decree as Exhibits 4 and 5. All numeric references included in Paragraphs 154 through 174 refer to specific provisions of the AMS Standard or EMS Policy. The provisions of Paragraphs 154 through 174 and any related exhibits apply to ASARCO Facilities listed in Exhibit 3.

ENVIRONMENTAL COMPLIANCE PROMOTION

Employee Environmental Awareness Training

154. ASARCO shall develop and implement an Employee Environmental Awareness Training Program as internally mandated by the AMS Standard and EMS Policy. This program is intended, in

part, to increase employee awareness and involvement in meeting an ASARCO Facility's Environmental Requirements. Specifically, ASARCO shall initiate implementation of the applicable requirements of AMS Standard 900 and the EMS Policy Section 4.3.2, including the activities described in this subsection, at all ASARCO Facilities, within twelve (12) months after this Decree is entered by the Court.

a. ASARCO shall develop and conduct environmental awareness training for all employees at all ASARCO Facilities. The training shall include at least four (4) hours of initial classroom instruction, which may include interactive computer-based instruction, and an annual refresher of at least two (2) hours of classroom instruction. Initial classroom instruction for all existing employees shall be conducted within twenty-four (24) months after this Consent Decree is entered by the Court.

b. ASARCO shall also develop a program to ensure that all new employees are provided training equivalent to the four-hour initial classroom instruction within three (3) months after they begin work at any of the ASARCO Facilities. An employee transferred from another ASARCO Facility or a rehired employee who has already received the initial training or equivalent shall not be considered a new employee for the purpose of this requirement.

c. ASARCO shall submit a generic training plan in accordance with subparagraph a. above, to EPA for review and comment within six (6) months after this Decree is entered by the

Court. EPA may submit any comments to be considered by ASARCO within sixty (60) days of submission of the generic training plan by ASARCO. The training plan shall, as a minimum, include:

- (1) Prototype training modules for the topics identified in the following subparagraph.
- (2) List of trainers (by position title), and their individual qualifications and experience.
- (3) Schedule for completing the initial training at each ASARCO Facility.
- (4) A description of the environmental awareness component of the new employee training program.
- (5) A description of how the training will be reinforced in the workplace in order to maintain increased employee awareness and involvement in meeting the facility's environmental requirements.
- (6) A periodic (minimum of at least one annually) evaluation of the training program and how ASARCO plans to incorporate the results into program improvements.

d. Subject material for the initial classroom component of each training program shall be documented in a training manual and address, at a minimum, the following elements and all elements contained in the EMS Policy, Section 4.3.2.:

- (1) Training Objectives
- (2) ASARCO Environmental, Safety and Health Policy
- (3) Overview of Pollution and Potential

Environmental Impacts of ASARCO Facility Operations

(4) Environmental Regulatory Requirements (Statute Overview)

(5) Hazards and the Environment

(6) Facility-Specific Operations, Waste Generation and Management, and Environmental Requirements

(7) Emergency Preparedness and Response

(8) Role of Environmental Department

(9) Role of Individual Employees at the ASARCO Facility (including potential consequences of departure from specified operating procedures, such as non-compliance and/or pollutant releases to the environment)

(10) Pollution Prevention/Recycling/Waste Minimization Programs

(11) Community Outreach Activities

e. Subject material for the refresher classroom component of each training program shall be documented in a training manual and address, as a minimum, the following elements:

(1) Training Objectives

(2) ASARCO Environmental, Safety and Health Policy

(3) New or Revised Environmental Requirements

(4) Review of Employee Environmental Responsibilities (including potential consequences of departure from specified operating procedures)

Protocol For Identifying and Communicating Environmental Requirements

155. ASARCO shall develop and implement a corporate-level program, as more particularly described below, to identify and document environmental requirements applicable to ASARCO Facilities and to establish additional training requirements for company environmental professionals. Specifically, ASARCO shall develop and initiate implementation of the applicable elements of AMS Standard 200 for Customer Requirements, Standard 910 for Qualification and Training, and EMS Policy, Section 4.2.2 for Legal and Other Requirements, and EMS Policy, Section 4.3.2 for Training, Awareness, and Competence, and complete the requirements described in this Paragraph within twelve (12) months after this Decree is entered by the Court.

156. ASARCO shall document this corporate-level program for identifying, understanding, and communicating environmental requirements to affected ASARCO Facilities and other ASARCO personnel, service providers, and On-Site Contractors, and monitor facility activities for conformance to those requirements. The protocol shall also address identifying, obtaining, and evaluating information about changes and proposed changes in Environmental Requirements that could potentially apply to and/or impact company operations. The program plan shall be submitted to EPA for review and comment within six (6) months after this Decree is entered by the Court. EPA may submit any comments to be considered by ASARCO within sixty (60) days of

submission of the plan by ASARCO. The plan shall describe, at a minimum, the following elements:

a. The process for identifying applicable and potentially applicable environmental requirements.

b. The communication protocol for disseminating information on applicable and/or potentially applicable Environmental Requirements to, as a minimum, the individuals included in the network described in subparagraph c. below.

c. The process for interpretation and assessment of applicability through an identified network of designated knowledgeable individuals, defined as those environmental professionals at the corporate level and at each affected ASARCO Facility, who are familiar with the company's production and ancillary processes, Environmental Requirements, and other aspects of operations that could affect the environment and/or compliance.

d. The implementation process at each ASARCO Facility, including methods to communicate the applicable requirements to service providers and On-Site Contractors in a timely manner.

157. The protocol described above shall also establish minimum qualifications and training requirements, including both core and refresher training, for members of the network of designated knowledgeable individuals (described in Paragraph 156 subparagraph c. above). The program plan shall describe measures to be implemented by ASARCO to ensure that network members

satisfy the established qualification and training requirements on a continuing basis.

158. Finally, the protocol described above shall provide for a periodic (minimum of one annually) evaluation of the protocol and describe how ASARCO will incorporate the results into program improvements.

#### Technology Transfer

159. After the protocol described in Paragraph 155 above has been developed and implementation initiated, ASARCO shall share the protocol and lessons learned with other businesses and organizations through a series of seminars as more specifically discussed below in Paragraphs 160 and 161. These seminars shall focus on, at a minimum: (1) how potentially applicable current and proposed environmental requirements are systematically identified; (2) how these requirements are communicated, discussed, interpreted, and assessed for applicability to company operations and facilities; (3) how applicable requirements are integrated into ASARCO Facility activities and processes; (4) practical strategies for implementing this protocol at the plant level; and (5) discussion of implementation/operation successes and problems.

160. ASARCO shall provide or make arrangements for providing the facilities for such seminars, and shall provide all necessary publicity and invitations for them. ASARCO shall plan the curricula for these sessions. However, representatives from EPA and State and local environmental regulatory agencies may be

invited to actively participate in the planning of these sessions, and may attend them. The seminar sessions may be led by, or include participation by, outside experts provided by ASARCO. These seminars shall be offered to the participants free of charge.

161. In each of the fourth and fifth years after this Decree is entered by the Court, ASARCO will conduct three seminars, as described in Paragraphs 159 and 160 above, in forums (e.g., meetings of national or regional professional organizations) that will be attended by members of the regulated community from Regions where ASARCO Facilities are located. Information about seminars conducted in fulfillment of these requirements shall be provided to EPA in the Progress Reports described in Paragraph 178 below.

#### POLLUTION PREVENTION AND POLLUTION REDUCTION

##### Environmental Management System Implementation

162. ASARCO shall fully implement the Environmental Objective of the ASARCO Management System in accordance with the AMS Standard and EMS Policy, at all ASARCO Facilities in accordance with the following provisions.

163. ASARCO shall develop an EMS Implementation Plan and submit the plan to EPA for review and comment within three (3) months after this Decree is entered by the Court. EPA may submit any comments to be considered by ASARCO within sixty (60) days of the submission of the implementation plan by ASARCO. The plan shall contain an implementation schedule with milestones for each

ASARCO Facility. Further, each plan shall identify individuals (by position) who are responsible for EMS implementation at corporate and facility levels and their respective responsibilities and authorities. At a minimum, the milestones shall include:

a. Completion of an initial review and evaluation of the current EMS, as described in Paragraph 164 below.

b. Completion of initial plans for development of implementing documents and tasks (hereafter, Development Plan), as described in Paragraph 165 below.

c. Completion of the Final Implementation Report, as described in Paragraph 167 below.

164. In accordance with the schedule contained in the EMS Implementation Plan, ASARCO shall conduct an initial review and evaluation of the current EMS at each ASARCO Facility to identify and assess the potential impacts of program gaps relative to the AMS Standard and the EMS Policy for the purpose of prioritizing development of implementing documents and other tasks.

165. In accordance with the schedule contained in the EMS Implementation Plan, ASARCO shall complete the initial Development Plan for each ASARCO Facility. The Development Plans shall be based on the initial review and evaluation results and other information, and shall contain a document development schedule, and listing and scheduling of other implementing tasks. Each specific document and task identified in the Development Plan shall be cross-referenced to the respective AMS Standard and

EMS Policy section, where appropriate. The format for each Development Plan shall be the same and shall be based on the format presented in Exhibit 6. Within thirty (30) days following completion of each plan, but not later than twelve (12) months after this Decree is entered by the Court, ASARCO shall submit each Development Plan to EPA for review and comment. EPA may submit any comments to be considered by ASARCO within sixty (60) days of the submission of the development plan by ASARCO. The submittal shall be in both paper hard copy and a mutually agreeable electronic format.

166. Within fifteen (15) months after entry of this Decree, ASARCO shall initiate implementation of the Development Plans in accordance with the schedule of implementing tasks required by Paragraph 165 above.

167. In accordance with the schedule contained in the EMS Implementation Plan, ASARCO shall submit a Final Implementation Report to EPA for each ASARCO Facility that shows completed Development Plan elements, and both scheduled and actual completion dates. The submittal shall be in both paper hard copy and a mutually agreeable electronic format. ASARCO shall complete implementation of the Development Plans at all ASARCO Facilities not later than forty-eight (48) months after this Decree is entered by the Court. Included in the Final Implementation Report will be a compilation of the data collected pursuant to Paragraph 174 below.

## Environmental Aspects/Environmental Impacts Review

168. ASARCO shall conduct an expedited Environmental Aspects/ Environmental Impacts review at all ASARCO Facilities. Based on that review and other pertinent information, ASARCO shall develop and implement an assessment, prevention, and control (APC) program, as more particularly described below. Program implementation shall include development of detailed process flow diagrams for each operation in each ASARCO Facility, as described below. ASARCO's APC Program shall include, at a minimum, processes for:

a. Ongoing assessments of operations, for the purposes of preventing and controlling releases, environmental protection, and maintaining compliance with statutory and regulatory requirements. These assessments shall include the following activities:

(1) monitoring and measurements, as appropriate, to maintain compliance (Refer to EMS Policy, Section 4.4.1);

(2) identifying operations and waste streams where equipment malfunctions and deterioration, operator errors, and discharges or emissions may be causing, or may lead to, releases of hazardous waste or hazardous constituents to the environment, or a threat to human health or the environment (Refer to EMS Policy, Section 4.3.6); and

(3) performing root cause analysis of identified problems to prevent recurring issues.

b. Identifying activities that could cause adverse environmental impacts and/or regulatory non-compliance and, where documented, standard operating practices need to be developed (Refer to EMS Policy, Section 4.3.6).

c. Conducting and documenting routine, objective, self-inspections by department supervision and trained staff, especially at locations identified by the process described in subparagraph a.(2) above (Refer to EMS Policy, Section 4.4.1).

d. Ensuring input of environmental concerns and requirements in planning, design, and operation of ongoing, new, and/or changing buildings, processes, maintenance activities, and products (Refer to EMS Policy, Sections 4.2.1 and 4.2.4).

e. Developing and implementing corrective action procedures which address the following internal/external indicators of actual and/or potential non-compliance, if they occur:

- (1) notice from a government agency of alleged non-compliance;
- (2) observed or documented instance of non-compliance with regulatory or permit requirements;
- (3) observed or documented instance of non-compliance with EMS policies or procedures;
- (4) citizens' complaints; or
- (5) significant environmental impact resulting

from activities enumerated in subparagraphs  
(1) - (4) above.

f. For the purposes of this section, corrective action procedures will include, at a minimum, the following activities: identification and evaluation of any instance of actual and/or potential non-compliance; communication of non-compliance to appropriate operations management with responsibility for authorizing corrective action; determination of and approval for necessary corrective action; schedule for implementation, tracking and reporting of corrective action taken, as needed; and actual implementation and follow-up of corrective action (Refer to EMS Policy, Section 4.4.2).

169. ASARCO shall develop a plan and schedule that describes how, when, and by whom (by position title and qualifications) the environmental aspects/impacts review will be conducted at each ASARCO Facility. The plan shall be submitted to EPA for review and comment within three (3) months after this Decree is entered by the Court. EPA may submit any comments to be considered by ASARCO within sixty (60) days of the submission of the plan by ASARCO. ASARCO shall ensure that reviews at the facilities listed in Exhibit 3, Group 1 are conducted as a first priority. All environmental aspects/impacts reviews shall be completed within eight (8) months after this Decree is entered by the Court.

170. An APC Program is internally mandated by the EMS Policy and the Environmental Objective of the AMS Standard. ASARCO

shall develop and complete implementation of the applicable APC requirements of AMS Section 4 Standards for Process Management and EMS Policy Sections referenced in Paragraph 168 a - f above, and incorporate the APC processes identified in Paragraph 168 above, at all ASARCO Facilities, within thirty (30) months after this Decree is entered by the Court.

171. ASARCO shall develop detailed process flow diagrams and associated descriptive information for each ASARCO and On-Site Contractor operation in each ASARCO Facility, as follows:

a. Identify each process and/or process group and prepare a narrative describing each such operation, including process steps, production capacity and the most recent annual production in a hard copy or electronic "fact sheet."

b. Develop a schematic process flow diagram for each current process and/or process group. All process flow diagrams developed pursuant to this requirement shall use consistently defined terms and labels. A glossary of commonly used terms shall be prepared and updated, as necessary. Each process flow diagram shall, as a minimum, depict each unit operation and identify (by name) raw materials, products, by-products, recyclable materials and waste streams.

c. On each process flow diagram, for each waste stream, by-product, and recyclable material exiting the process, identify its final disposition. Identify any state-assigned emission point source identification number for air emission sources and indicate the respective National Pollutant Discharge Elimination

System ("NPDES") permitted outfall for wastewater streams.

d. For each process or process group, indicate the presence of side sumps, pump stations, and hazardous waste accumulation areas containing 55 gallons or more.

e. If a hazardous waste determination was made for a waste stream or group of waste streams identified on the process flow diagram, indicate the results of that determination either on the schematic or on the "fact sheet" and quantity generated during the last calendar year.

f. For each ASARCO On-Site Contractor, the Environmental Department shall maintain pertinent information including complete company names, mailing addresses, principal contacts for environmental matters and their telephone numbers, RCRA I.D. numbers, if applicable, and brief description of the services rendered and include this information on the fact sheet.

172. ASARCO shall review annually and update as necessary the process flow diagrams and fact sheet information to incorporate new equipment, or processes, or modifications to existing equipment or processes. ASARCO shall include all revision dates on the process flow diagrams and fact sheets.

173. ASARCO shall submit a schedule for completing the process flow diagrams and associated fact sheets at each ASARCO Facility to EPA for review and comment within eight (8) months after this Decree is entered by the Court. EPA may submit any comments to be considered by ASARCO within sixty (60) days of the submission of the schedule by ASARCO. The schedule shall

indicate higher priority for completion of this work at the ASARCO Facilities listed in Exhibit 3, Group 1; this work will be completed for all ASARCO Facilities within twenty-four (24) months after this Decree is entered by the Court. ASARCO shall also provide with the schedule, at least three (3) prototype process flow diagrams and associated fact sheets, each from a different ASARCO Facility.

#### Environmental Metrics

174. ASARCO shall collect and report data on the Environmental Metrics listed in Exhibit 7 hereto for each ASARCO Facility on an annual basis for the purpose of measuring the impacts of implementation of the EMS. ASARCO shall propose detailed monitoring parameters and reporting format in accordance with Exhibit 7 to EPA for review and comment within three (3) months after this Decree is entered by the Court. EPA may submit comments to be considered by ASARCO within sixty (60) days of the submission of the monitoring parameters and reporting format by ASARCO.

#### XI. REPORTING

##### Reporting: Materials Management

175. In accordance with Paragraph 12 of this Decree, ASARCO shall submit a report to EPA annually on any revisions made to the acceptance criteria in the preceding year with a written explanation of the underlying justification for the revisions. The annual report shall also specify the date on which ASARCO began following the revised procedures.

Reporting: Corrective Action

176. The monthly progress reports deliverable pursuant to Part VII of this Decree are to be sent to EPA no later than the twentieth (20th) day of the following month and shall at a minimum:

a. Describe the actions, progress, and status of projects which have been undertaken pursuant to Part VII of this Decree;

b. Identify any requirements under Part VII of this Decree that were not completed in a timely manner, and problem or anticipated problem areas affecting compliance with this Decree;

c. Describe projects completed during the prior month, as well as the activities scheduled for the next month;

d. Describe, and estimate the percentage of, studies completed;

e. Describe and summarize all findings to date;

f. Describe actions being taken to address problems;

g. Identify changes in key personnel during the period;

h. Include copies of the results of sampling and tests conducted and other data generated pursuant to work performed under Part VII of this Decree since the last Progress Report. ASARCO may also submit data that have been validated and confirmed by ASARCO to supplement any prior submitted data. Updated validated and confirmed data shall be included with the RFI Report if not delivered before; and

i. Describe the status of financial assurance mechanisms, including whether any changes have occurred, or are expected to occur which might affect them, and the status of efforts to bring such mechanisms back into compliance with the requirements of this Decree.

Reporting: East Helena SEP

177. In accordance with Part VIII, a report detailing baseline conditions shall be submitted to EPA within thirty (30) days after implementation of Phase 1 of the SEP. Annual reporting requirements prior to SEP completion shall consist of the preparation of yearly reports summarizing the findings of the vegetation, wildlife and soils sampling and monitoring. No later than sixty (60) Days after ASARCO completes the SEP described in Paragraphs 144-146, ASARCO shall provide EPA a SEP Completion Report containing the following information: (i) A description of the SEP as fully implemented; (ii) A description of the environmental benefits resulting from implementation of each SEP; (iii) Itemized and total net costs of the SEP; and (iv) A certification that the SEP has been fully implemented pursuant to the provisions of this Consent Decree and the Statement of SEP Work.

Reporting: Environmental Management And Protection

178. ASARCO shall submit semi-annual progress reports to EPA summarizing progress made in completing the activities required by Paragraphs 154 through 173 above. Progress reports shall be submitted to EPA within thirty (30) days after the last day of

June and December of each calendar year commencing in 1998 until all activities required by Paragraphs 154 through 173 above are completed. The progress reports shall include any and all revisions to the AMS Standard and EMS Policy made during the reporting period.

a. The progress reports, as appropriate, shall contain a summary of the employee environmental awareness training given, as required by Paragraph 154 above, and include the following information:

- (1) A listing of where and when training classes were given.
- (2) Certification that the required training was conducted by ASARCO pursuant to the provisions of this Decree.
- (3) Costs of conducting this training during the reporting period.
- (4) Number of employees trained during reporting period.

b. The progress reports, as appropriate, shall contain a summary of the seminars required by Paragraphs 159 through 161 above, and include the following information:

- (1) A description of where and when the seminar was given and the audience.
- (2) Certification that the required seminars were conducted by ASARCO pursuant to the provisions of this Decree.

(3) Costs of conducting the seminars during the reporting period

(4) List of attendees.

c. The progress reports, as appropriate, shall contain a summary of the EMS implementation required by Paragraphs 162 through 170 above, and include the following information:

(1) Total number of procedures requiring documentation in the EMS as of the last report.

(2) Number of procedures requiring documentation added during reporting period.

(3) Number of procedures no longer requiring documentation identified during reporting period.

(4) Total number of procedures requiring documentation as of the end of this reporting period.

(5) Number of procedures requiring documentation due during this reporting period.

(6) Number of procedures requiring documentation completed during reporting period.

d. The progress reports, as appropriate, shall describe progress made in completing the process flow diagrams and associated fact sheets for each ASARCO Facility, as required by Paragraph 171 above, and include the following information:

(1) Expected completion date for each ASARCO Facility.

(2) Change, if any in expected completion date from previous progress report.

(3) List of ASARCO Facilities for which process flow diagrams and associated fact sheets have been completed.

e. The progress reports due within thirty (30) days after the end of June, as appropriate, shall include the data collected during the previous calendar year for the Environmental Metrics, as required by Paragraph 174 above.

XII. PENALTY FOR PAST VIOLATIONS

179. Within 30 days after the date of entry of this Decree, ASARCO shall pay to the United States a civil penalty in the amount of Three Million three Hundred and Eighty-Six thousand and One Hundred Dollars (\$3,386,100), plus interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, calculated from the date of lodging of this Decree until the date of payment.

XIII. STIPULATED PENALTIES

180. If ASARCO fails to submit any report required by Section XI (Reporting) on or before the specified due date, ASARCO shall pay a stipulated penalty of \$1,000 per day. Provided, however, the time period during which stipulated penalties accrue for failure to submit a report shall not exceed the date the next such periodic report required by that particular part of the Decree is submitted if the later report

contains all information required to be submitted in the first (and any subsequently missed) reports.

181. If ASARCO fails to comply with any other requirement of this decree, unless such noncompliance is excused pursuant to Part XV (Force Majeure), ASARCO shall pay stipulated civil penalties as follows:

<u>Period of Failure to Comply</u>	<u>Penalty</u>
1st to 14th day	\$ 1,000/day per violation
15th to 30th day	\$ 2,000/day per violation
After 30 days	\$ 3,000/day per violation

182. Nothing herein shall preclude the simultaneous accrual of stipulated penalties for separate violations of this Decree.

183. All stipulated penalties begin to accrue on the day of the noncompliance or on the day after ASARCO fails to submit a required report. Stipulated penalties shall continue to accrue through the final day of noncompliance or until the day a late report is submitted, except as provided in Paragraph 180, above. Stipulated penalties shall continue to accrue during any related dispute resolution period, but shall not be imposed unless the United States prevails in the dispute.

184. ASARCO shall pay stipulated penalties in the manner set forth in Part XIV (Manner of Payment) by the fifteenth day of the month following the month in which ASARCO knew, or should reasonably have known that the violation(s) occurred, and each month thereafter, for so long as the violation continues, together with a letter summarizing the violation(s) for which the payment is made. Penalties paid pursuant to this Decree shall

not be tax deductible for purposes of federal, State, or local law.

185. The stipulated penalties herein shall be in addition to other remedies or sanctions available to the United States or to the State by reason of ASARCO's failure to comply with the requirements of this Decree, the NPDES Permit at East Helena, RCRA or the CWA. If, however, the United States collects a stipulated penalty under this Decree and subsequently seeks and is awarded a monetary penalty pursuant to a statutory claim for penalties for the same act(s) or omission(s), ASARCO shall receive a credit against the penalty for the amount of the stipulated penalty already paid by ASARCO for the act or omission. The payment of stipulated penalties shall not relieve ASARCO from specific compliance with this Decree or federal or State law, or limit the authority of the United States or the State to require compliance with such laws.

186. In any dispute over the applicability of stipulated penalties, ASARCO shall bear the burden of proving that it is not subject to stipulated penalties.

XIV. MANNER OF PAYMENT

187. All payments made to the United States under this Decree shall be made by certified or cashier's check made payable to "Treasurer, United States of America" and shall be sent to:

Financial Litigation Unit  
Office of the United States Attorney  
District of Montana  
2929 3rd Avenue North, Suite 400  
Billings, Montana 59103

together with a letter tendering the check. A copy of the letter and the check shall be sent to DOJ and EPA.

188. If the civil and stipulated penalties provided for in this Decree are not timely paid, this Decree shall be considered an enforceable judgment for purposes of post-judgment collection of any unpaid amounts, and interest, in accordance with Rule 69 of the Federal Rules of Civil Procedure and other applicable federal or State authority. Interest shall accrue at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. ASARCO shall be liable for attorneys' fees and costs incurred by the United States or the State to collect any amounts due under this Decree.

XV. FORCE MAJEURE

189. ASARCO's obligation to comply with the requirements of this Decree shall only be deferred to the extent and for the duration that the delay is caused by a "Force Majeure Event." A "Force Majeure Event" is defined as circumstances beyond the control of the defendant or an entity controlled by the defendant that could not have been foreseen and prevented by the exercise of due diligence.

190. If any Force Majeure Event occurs which causes or may cause ASARCO to violate any provision of this Decree, ASARCO shall notify in writing the United States Attorney for the District of Montana, DOJ, and EPA within ten (10) days of the event. The notice shall specifically reference this Part of the Decree and describe in detail the anticipated length of time the

violation may persist, the precise cause or causes of the violation, the measures taken or to be taken by ASARCO to prevent or minimize the violation as well as to prevent future violations, and the schedule by which those measures will be implemented. ASARCO shall adopt all reasonable measures necessary to avoid or minimize any such violation. Failure by ASARCO to comply with the notice requirements of this section shall constitute a waiver of ASARCO's right to obtain an extension of time for its obligations under this Part of the Decree based on such event.

191. If ASARCO asserts in its notice, and EPA agrees, that the violation has been or will be caused by a Force Majeure Event, the time for performance of such requirement may be extended for a period not to exceed the actual delay resulting from such event and stipulated penalties shall not be due for said delay.

192. EPA shall notify ASARCO in writing of their agreement or disagreement with ASARCO's claim of a Force Majeure Event within thirty (30) days of receipt of ASARCO's notice under this Part.

193. If EPA disagrees, ASARCO may submit the matter for resolution pursuant to Section XVI of this Decree (Dispute Resolution). If ASARCO submits the matter to the Court for resolution and the Court determines that the violation was caused by a Force Majeure Event, ASARCO shall be excused as to that

violation, but only for the period of time the violation continues due to such circumstances.

194. Unanticipated or increased costs or expenses associated with the implementation of this Decree, changed financial circumstances, shall not, in any event, serve as a basis for changes in this Decree, except as provided by the Financial Assurance requirements in Part VII of this Decree.

195. Compliance with any requirement of this Decree by itself shall not constitute compliance with any other requirement. An extension of one compliance date based on a particular incident does not result in an automatic extension of other subsequent compliance date or dates. ASARCO must make an individual showing of proof regarding each requirement for which an extension is sought.

196. ASARCO shall bear the burden of raising and proving that any delay or violation of any requirement of this Decree was caused by a Force Majeure Event. ASARCO shall also bear the burden of proving the duration and extent of any delay or violation found attributable to such circumstances.

#### XVI. DISPUTE RESOLUTION

197. The dispute resolution procedures of this Part shall be the exclusive mechanism to resolve disputes arising under or with respect to this Decree. However, the procedures set forth in this Part shall not apply to actions by the United States to enforce obligations agreed to herein by ASARCO that have not been disputed in accordance with this Part.

198. Any dispute which arises under or with respect to this Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless such period is modified by written agreement of the parties. The dispute shall be considered to have commenced when one party sends the other party a written Notice of Dispute. The dispute notice shall set forth the specific points of the dispute, the basis for the objection of the disputing party, and any matters, or other information, which the disputing party considers necessary or appropriate.

199. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 10 days after the conclusion of the informal negotiation period, ASARCO invokes the formal dispute resolution procedures of this Part by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, all non-privileged factual data, analysis and/or opinion relevant to the disputed matter(s). The Statement of Position may highlight any submitted information supporting ASARCO's position and any supporting documentation relied upon by ASARCO.

200. Within fourteen (14) days after receipt of ASARCO's Statement of Position, EPA will serve on ASARCO its Statement of Position, including, EPA's position regarding the disputed matter(s), and all non-privileged factual data, analysis, and/or

opinion relevant to the disputed matter(s) not submitted by ASARCO. The EPA Statement of Position may highlight any submitted information supporting EPA's position and any supporting documentation relied upon by EPA.

201. If there is disagreement between EPA and ASARCO as to whether dispute resolution should proceed under Paragraph 202 or 203, the parties shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if ASARCO ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 202 and 203.

202. Formal dispute resolution for disputes pertaining to the selection or adequacy of any Corrective Measures and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. Nothing in this Decree shall be construed to allow any dispute by ASARCO regarding the validity of provisions of any Records of Decision or Explanation of Significant Differences issued pursuant to CERCLA for the East Helena Facility.

a. An administrative record of each formal dispute under this paragraph shall be maintained by EPA and shall include all statements of position, including supporting documentation, submitted pursuant to this Part. Where appropriate, EPA may allow submission of supplemental statements

of position by the parties to the dispute.

b. The Assistant Regional Administrator, Enforcement, Compliance and Environmental Justice Division, EPA Region VIII ("ARA"), will issue a final administrative decision resolving any disputes related solely to the East Helena Facility. The Director, Multimedia Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, EPA Headquarters ("MMED") will issue a final administrative decision resolving any other disputes arising under this Decree. All such final administrative decisions will be based on the administrative record described in subparagraph a. above. This decision shall be binding upon ASARCO when ASARCO receives the decision, subject only to the right to seek judicial review pursuant to subparagraph c. and d. below.

c. Any administrative decision made by EPA pursuant to subparagraph b. above shall be reviewable by this Court, provided that a notice of judicial appeal is filed by ASARCO with the Court and served on all Parties within 10 days of ASARCO's receipt of EPA's decision. The notice of judicial appeal shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Decree. The United States may file a response to ASARCO's notice of judicial appeal.

d. In any judicial proceedings on any dispute governed by this Paragraph, ASARCO shall have the burden of demonstrating

that the decision of the ARA or MMED is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to subparagraph a. above.

203. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any Corrective Measures nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Statements of Position submitted pursuant to Paragraphs 199 and 200, the ARA will issue a final administrative decision resolving any disputes related solely to the East Helena Facility and the MMED will issue a final decision resolving any other disputes arising under this Decree. The decision of the ARA or MMED shall be binding on ASARCO unless, within 10 days of receipt of the decision, ASARCO files with the Court and serves on the United States a notice of judicial appeal setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Decree. The United States may file a response to ASARCO's notice of judicial appeal.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable provisions of law.

204. The filing of a petition asking the Court to review the resolution of a dispute by the ARA or MMED shall not itself

postpone or affect any deadline for ASARCO to meet its obligation under this Decree. The deadline shall remain as specified in this Decree and accompanying documents containing compliance requirements, unless the parties agree in writing or the Court orders otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Decree. In the event that ASARCO does not prevail on the disputed issue, stipulated penalties shall be paid as provided in Part XIII of this Decree (Stipulated Penalties).

XVII. ACCESS

205. At all reasonable times, EPA, and/or any authorized EPA representative shall be authorized to enter and freely move about all properties affected by this Decree during the time period this Decree is in effect for the purposes of, inter alia: interviewing personnel and contractors; inspecting records, operating logs, and contracts related to this Decree; conducting such tests, sampling or monitoring as EPA deems necessary; using a camera, sound recording, or other similar type equipment; verifying the reports and data submitted to EPA by ASARCO; and any other activities necessary to properly review the progress of ASARCO in carrying out the terms of this Decree. To the extent that such information is business confidential or proprietary,

ASARCO shall so advise such persons in writing, and 40 C.F.R. Part 2 procedures shall be followed.

206. ASARCO shall permit such persons to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, that pertain to activities undertaken pursuant to this Decree. To the extent that such information is business confidential or proprietary, ASARCO shall so advise such persons in writing, and 40 C.F.R. Part 2 procedures shall be followed.

207. EPA shall reciprocate with respect to information collected or generated by EPA pertaining to this Decree and upon request by ASARCO, EPA shall provide ASARCO with split samples of any samples taken by EPA.

208. This provision in no way affects or reduces any rights of entry or inspection that the United States or the State has under any law or regulation.

XVIII. EFFECT OF DECREE

209. ASARCO's payment of all civil penalties due, and ASARCO's commitments to pay all stipulated penalties due and owing under this Decree, and ASARCO's commitment to fully and successfully complete the requirements of this Decree, shall constitute full satisfaction of the claims for civil penalties for civil violations alleged in the complaint of the United States that occurred prior to the date of lodging of this Decree, except as provided in this Paragraph. This release includes any alleged civil violations relating to the management of materials

generated by the smelting of Encycle Materials, but does not include alleged civil violations relating to receipt, storage or smelting of the Encycle Materials themselves. This release also does not include any civil violations relating to discharges from the Facility to the East Helena Publicly Owned Treatment Works. This release is conditioned upon the complete and satisfactory performance by ASARCO of its obligations under this Decree.

210. a. ASARCO agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the East Helena Facility or this Decree, including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 111, 112, 113 or any other provision of law; any claim against the United States, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113 related to the East Helena Facility, or this Decree. Nothing in this Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

b. ASARCO reserves and this Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any

employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damage caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of activities to be performed pursuant to this Decree, or the oversight or approval of ASARCO's plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than the CWA, RCRA, or CERCLA and for which the waiver of sovereign immunity is found in a statute other than the CWA, RCRA, or CERCLA.

211. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, penalties, recovery of response costs, or other appropriate relief relating to any ASARCO facility, ASARCO shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of Paragraph 209. This includes any

claims through which the United States seeks additional relief related to ASARCO's environmental management system.

212. This Decree does not limit the United States' right to obtain penalties or injunctive relief under RCRA, the CWA, or other federal or State statutes or regulations except as expressly specified in Paragraph 209 of this Part.

213. EPA reserves all of its statutory and regulatory powers, authorities, rights, remedies, both legal and equitable, which pertain to ASARCO's failure to comply with any of the requirements of this Decree, including the assessment of penalties under RCRA or the CWA.

214. This Decree shall not be construed as a covenant not to sue, release, waiver or limitation of any rights, remedies, powers and/or authorities, civil or criminal, which EPA has under RCRA, CERCLA, or any other statutory, regulatory, or common law authority, except as provided in Paragraph 209 above, however, EPA agrees that, so long as ASARCO remains in compliance with Part VII of this Decree, EPA shall not initiate a separate action under Sections 3008(h) and 3013 of RCRA, 42 U.S.C. §§ 6928(h) and 6933, for work to be performed at the Facility.

215. Except as expressly provided in this Decree, compliance by ASARCO with the terms of this Decree shall not relieve ASARCO of its obligations to comply with RCRA or any other applicable local, state or federal laws and regulations, including, but not limited to, the CWA and SDWA.

216. By consenting to the entry of this Decree, the United

States does not warrant or aver that ASARCO's compliance with this Decree will constitute or result in compliance with the RCRA, the CWA, ASARCO's NPDES permits, or any other federal, State, or local permit, law, rule or regulation. Notwithstanding EPA's review and approval of any plans formulated pursuant to this Decree, ASARCO shall remain solely responsible for compliance with RCRA and the CWA, this Decree, ASARCO's NPDES permits, and any other applicable federal, State, or local permit, law, rule, or regulation. Compliance with this Decree shall be no defense to any action commenced pursuant to said laws, regulations, or permits, except as specifically provided in Paragraph 209 of this Part.

#### Other Claims and Parties

217. Except as expressly provided herein, nothing in this Decree shall constitute or be construed as a release from any claim, cause of action or demand in law or equity, against any person, firm, partnership, or corporation for any liability it may have arising out of, or relating in any way to, the generation, storage, treatment, handling, transportation, release, management or disposal of any hazardous wastes, hazardous constituents, hazardous substances, hazardous materials, pollutants, or contaminants found at, on, or under, taken to or from, or migrating to, from or through the Facility.

#### Other Applicable Laws

218. This Decree is not intended to be nor shall it be construed as a permit. This Decree does not relieve ASARCO of

any obligation to obtain and comply with any local, state, or Federal permits. ASARCO, therefor, shall obtain or cause its representatives to obtain all permits and approvals necessary under applicable local, state, and Federal laws and regulations and shall otherwise comply with all applicable local, state, and Federal requirements. The pendency or outcome of any proceeding concerning the issuance, reissuance, or modification of any permit shall neither affect nor postpone ASARCO's duties and liabilities as set forth in this Decree.

Indemnification of the United States

219. Neither the United States Government, nor its agencies, departments, agents, and employees (the "Government"), shall be held out or construed to be a party to any contract entered into by ASARCO in carrying out activities pursuant to this Decree.

220. The Government shall not be liable for any injury or damages to persons or property resulting from acts or omissions of ASARCO or its contractor(s) in implementing the requirements of this Decree, or any EPA-approved work plans or planning documents submitted and/or approved pursuant to this Decree.

221. The Government shall not be considered agent, independent contractor, receiver, trustee and assign, in carrying out activities required by this Decree.

XIX. COSTS OF SUIT

222. Each party shall bear its own costs and attorney's fees in this action. Except that, should ASARCO subsequently be determined to have violated this Decree, then ASARCO shall be

liable to the United States for any costs and attorney's fees incurred by the United States in any actions against ASARCO for noncompliance with this Decree.

XX. NOTICES AND SUBMISSIONS

223. Except as specified in the paragraphs herein below, when written notification to or communication with the EPA, DOJ, the United States Attorney, or ASARCO is required by the terms of this Decree, it shall be addressed as follows:

As to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Post Office Box 7611, Ben Franklin Station  
Washington, D.C. 20044-7611  
Reference Case No. 90-7-1-886

As to EPA:

Attorney/ ASARCO East Helena Corrective Action  
Office of Enforcement, Compliance,  
and Environmental Justice  
United States Environmental Protection Agency -  
Region VIII  
999 18<sup>th</sup> Street, Suite 500  
Denver, Colorado 80202-2466

As to the United States Attorney (unless otherwise specified):

Chief, Civil Division  
Office of the United States Attorney  
District of Montana  
2929 3rd Avenue North, Suite 400,  
Billings, Montana 59103

As to ASARCO:

Robert N. Novotny  
Vice President  
ASARCO Incorporated  
180 Maiden Lane  
New York, New York 10038

and

Michael O. Varner  
Vice President  
ASARCO Incorporated  
180 Maiden Lane  
New York, New York 10038

224. For purposes of Part VII of this Decree (Corrective Action At East Helena) and Part VIII (East Helena SEP) documents to be submitted shall be addressed to the attention of the Project Managers:

The RCRA project manager (Part VII) is:

Susan Zazzali, RCRA Project Manager  
Montana Office  
U.S. EPA Region VIII  
301 South Park, Drawer 10096  
Helena, Montana 59626

The CWA project manager (Part VIII) is:

Gwen Jacobs, CWA Project Manager  
Montana Office  
U.S. EPA Region VIII  
301 South Park, Drawer 10096  
Helena, Montana 59626

The ASARCO project manager is:

Jon Nickel  
ASARCO Incorporated  
100 Smelter Road, Highway 12  
East Helena, MT 59635

225. For the purposes of Part VI of this Decree (Materials Management) and Part X of this Decree (Environmental Protection and Management System), documents to be submitted in writing to ASARCO shall be addressed to the attention of:

Robert N. Novotny  
Vice President  
ASARCO Incorporated  
180 Maiden Lane  
New York, New York 10038

and

Michael O. Varner  
Vice President  
ASARCO Incorporated  
180 Maiden Lane  
New York, New York 10038

226. Documents to be submitted to EPA shall be addressed to the attention of:

Melissa P. Marshall, Director  
Multimedia Enforcement Division (Mail Code 2248-A)  
Office of Regulatory Enforcement, U.S. EPA  
401 M Street, S.W.  
Washington D.C. 20460

and

Steven W. Sisk  
National Enforcement Investigations Center  
Building 53  
P.O. Box 25227  
Denver Federal Center  
Denver, Colorado 80225

227. Notifications to or communications with EPA, DOJ, or the United States Attorney shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested.

228. Any notice, report, certification, data presentation or other document submitted by ASARCO under or pursuant to this Decree, which discusses, describes, demonstrates, or supports any finding or makes any representation concerning ASARCO's compliance or non-compliance with any requirement(s) of this Decree shall contain the following certification by a responsible corporate officer or duly authorized representative of ASARCO:

"I certify under penalty of law that this document and

all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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."

Signature \_\_\_\_\_

Name  
Title

A "responsible corporate officer" means a president, secretary, treasurer, or vice-president of ASARCO in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation.

XXI. MODIFICATION

229. Modifications to work plans that do not materially alter the wordplay may be made by agreement of the parties and are effective and become an enforceable part of this Decree upon approval by EPA in writing. Otherwise, there shall be no modification of this Decree without written approval of all of the parties to this Decree and the Court or through dispute resolution under this Decree. Nothing herein shall be deemed to

alter the Court's power to enforce, supervise or approve modifications to this Decree.

XXII. PUBLIC COMMENT

230. The parties agree and acknowledge that final approval by the United States and entry of this Decree and the related Decree lodged in the District Court for the District of Arizona is subject to notice of the lodging of the Decrees in the Federal Register, an opportunity for public comment, and consideration of any comments. The United States reserves the right to withdraw its consent to this Decree based on public comment received on this Decree or the related Decree lodged in the District Court for the District of Arizona.

231. ASARCO shall not withdraw its consent to this Decree during the period of governmental and judicial review between lodging and entry of this Decree, and hereby consents to entry of this Decree without further notice.

XXIII. CONTINUING JURISDICTION OF THE COURT

232. The Court shall retain jurisdiction to enforce this Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Decree.

XXIV. TERMINATION

233. This Decree shall terminate upon motion of any party after each of the following has occurred:

a. ASARCO has completed all actions required by this Decree;

b. ASARCO has paid all monies and penalties due under this Decree;

c. ASARCO has submitted a certification to the United States that conditions a. and b., above, have been met; and

d. Within 60 days of receiving such certification from ASARCO (or longer, if the United States notifies ASARCO that additional time will be required), the United States has not disputed, in writing, ASARCO's contention that conditions a. and b. have been met. If the United States disputes ASARCO's contention, the dispute resolution provision of this Decree (Part XVI) shall be invoked and this Decree shall remain in effect pending resolution of the dispute by the parties or the Court.

Dated and entered this \_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this Decree, subject to the public notice requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES OF AMERICA:

\_\_\_\_\_  
DATE

\_\_\_\_\_  
LOIS J. SCHIFFER  
Assistant Attorney General  
Environment and Natural Resources  
Division  
United States Department of Justice

\_\_\_\_\_  
DATE

\_\_\_\_\_  
MICHAEL D. GOODSTEIN  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
United States Department of Justice

\_\_\_\_\_  
DATE

\_\_\_\_\_  
JOHN N. MOSCATO  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
United States Department of Justice

SHERRI SCHEEL MATTEUCCI  
United States Attorney  
District of Montana

\_\_\_\_\_  
DATE

\_\_\_\_\_  
LORRAINE D. GALLINGER  
Assistant United States Attorney

WE HEREBY CONSENT to the entry of this Decree, subject to the public notice requirements of 28 C.F.R. § 50.7.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
STEVEN A. HERMAN  
Assistant Administrator for  
Enforcement  
U.S. Environmental Protection Agency  
Washington, D.C.

WE HEREBY CONSENT to the entry of this Decree, subject to the public notice requirements of 28 C.F.R. § 50.7.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Regional Administrator  
U.S. Environmental Protection Agency,  
Region VIII

WE HEREBY CONSENT to the entry of this Decree, subject  
to the public notice requirements of 28 C.F.R. § 50.7.

FOR DEFENDANT ASARCO, INC.:

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Name:  
Title: