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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, PLAINTIFF, V. FMC CORPORATION, DEFENDANT.	Civil No. COMPLAINT OF THE UNITED STATES OF AMERICA

The United States of America, by the authority of the Attorney General and at the request of and on the behalf of the

Administrator of the United States Environmental Protection Agency (EPA), alleges as follows:

I. PRELIMINARY STATEMENT OF CASE

1. This is a civil action instituted pursuant to Section 3008 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. § 6928, for injunctive relief and the imposition of civil penalties for violations by FMC Corporation (FMC), at its facility near Pocatello, Idaho (FMC Facility), of the requirements of Sections 3004, 3005, and 3008 of RCRA, 42 U.S.C. §§ 6924, 6925, and 6928, and the regulations promulgated thereunder, in particular 40 C.F.R. Parts 261, 262, 265, and 270.

II. JURISDICTION AND VENUE

2. This court has jurisdiction over the subject matter of the case pursuant to RCRA Sections 3008(a) and 9006, 42 U.S.C. §§ 6928(a), 6991e, and 28 U.S.C. §§ 1331, 1345, and 1355.

3. Venue is proper in this judicial district pursuant to RCRA Section 3008(a)(1), 42 U.S.C. § 6928(a)(1), and 28 U.S.C. §§ 1391(b) and 1395(a), because this action arises from violations of RCRA and implementing regulations promulgated pursuant to such statute, which occurred at a facility located in such judicial district.

4. Authority to bring this action is vested in the United States Department of Justice under Section 3008 of RCRA, 42 U.S.C. § 6928.

III. DEFENDANT AND ENFORCEMENT HISTORY

5. Defendant FMC, is a "person" within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), which includes corporations. FMC is a corporation, incorporated on August 10, 1928, organized and existing under the laws of the state of Delaware. FMC is doing business on the Shoshone-Bannock Tribes' Fort Hall Indian Reservation in the state of Idaho.

6. Since 1949, Defendant has owned and/or operated, and continues to own and/or operate a "solid waste management facility" within the meaning of Section 1004(29) of RCRA, 42 U.S.C. § 6903(29), at Highway 30 West, approximately three miles northwest of Pocatello, Idaho, in Township 6 South, Range 33 East.

7. Defendant is the world's largest producer of elemental phosphorus, which is used in detergents, beverages, foods, synthetic lubricants, and pesticides. Defendant's process operations include ore handling and preparation, furnace feed preparation, furnace operation, and by-product handling. Defendant processes about 1.4 million tons of shale ore per year, which produces about 250 million pounds of elemental phosphorus per year. Numerous solid wastes, air emissions, and wastewater streams are generated during the processing of ore. Defendant has generated more than 1,000 kilograms of hazardous wastes per month. The hazardous wastes generated include: precipitator slurry/dust, which is also known as furnace off-gas solids; Andersen Filter media; Andersen Filter media wash water;

wastewater from the production of elemental phosphorus, which is also called phossy water; Medusa and Andersen scrubber blowdown water; paint and degreaser solvents; and laboratory wastes.

8. On October 24, 1988, Defendant submitted to EPA a revised "Notice of Hazardous Waste Activity" (EPA form 8700-12). Defendant was a generator of hazardous waste solvents until March 1, 1990. Effective March 1, 1990, with the removal of the "Bevill exclusion," all elemental phosphorous production, with the exception of furnace off-gas solids, became subject to regulation under RCRA. Effective July 23, 1990, furnace off-gas solids at elemental phosphorous production plants also became subject to regulation under RCRA. EPA thereby created a category of newly identified wastes, and Defendant became a treatment, storage, and disposal (TSD) facility, as well as a generator of hazardous wastes.

9. Defendant notified EPA as a TSD, as required by Section 3010 of RCRA, 42 U.S.C § 6930, in a revised "Notice of Hazardous Waste Activity" (EPA form 8700-12), submitted to EPA in a timely fashion on November 30, 1989.

10. As a TSD facility, Defendant submitted the required Part A permit application for seven of its units on February 28, 1990. Defendant submitted a Revised Part A permit application for five additional units, along with its Part B permit application on February 21, 1991. Defendant submitted another Revised Part A permit application for a sixth unit, Waste

Management Unit #13 (WMU #13), the Anderson Filter Media Wash Station, on February 28, 1992.

11. The allegations of violations of RCRA herein arise in large part from a RCRA inspection of Defendant's facility conducted on September 17-18, 1991, by EPA; a multi-media inspection of Defendant conducted by EPA Region 10 and the EPA National Enforcement Investigations Center (NEIC), Denver, Colorado, from July 12-23, 1993 (the NEIC Inspection); sampling conducted by EPA Region 10 and NEIC in April and May of 1997; and a comprehensive monitoring evaluation based on sample collection from June 15-19, 1992.

IV. STATUTORY AND REGULATORY BACKGROUND

12. Federal regulation of hazardous waste is primarily based on RCRA, enacted by Congress in 1976 to amend the Solid Waste Disposal Act, and on the Hazardous and Solid Waste Amendments Act, enacted by Congress in 1984 to further amend the Solid Waste Disposal Act. These acts are jointly referred to as RCRA.

13. Section 3002 of RCRA, 42 U.S.C. § 6922, required EPA to promulgate regulations establishing standards applicable to generators of hazardous waste. Section 3004 of RCRA, 42 U.S.C. § 6924, required EPA to promulgate regulations establishing performance standards applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste, as may be necessary to protect human health and the environment.

14. Pursuant to these statutory authorities, EPA published regulations on May 19, 1980, which became effective November 19, 1980, establishing standards for generators of hazardous waste and for owners and operators of hazardous waste treatment, storage, and disposal (TSD) facilities. These regulations, as amended, are codified at 40 C.F.R. Parts 260, 261, 262, 264, 265, and 268. The standards for generators are located at 40 C.F.R. Part 262.

15. Section 3005 of RCRA, 42 U.S.C. § 6925, required EPA to promulgate regulations requiring each person owning or operating a TSD facility to obtain a permit from the EPA. Pursuant to this authority, on April 1, 1983, EPA published regulations setting forth the administration of the hazardous waste permit program. The regulations, as amended, are presently set forth at 40 C.F.R. Parts 264 and 270.

16. A permit application consists of two parts, Part A and Part B. Under Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), facilities that were in existence at the time the regulations affecting them were promulgated may obtain interim status authorization by timely and adequate submission of notification of hazardous waste activity (pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930) and of the Part A permit application. Interim status means that a facility shall be treated as having been issued a permit until such time as final administrative disposition of such application is made. 40 C.F.R. Part 270

(EPA Administered Permit Programs: The Hazardous Waste Permit Program) sets forth the regulatory requirements for Part A and Part B permit applications, including the content of those applications. The standards for interim status TSD facilities are located at 40 C.F.R. Part 265.

17. 40 C.F.R. § 270.10(e) states that to qualify for interim status, a hazardous waste management facility in existence on the effective date of statutory or regulatory amendments under RCRA that render the facility subject to the requirement to have a permit, must submit Part A of the permit application no later than six (6) months after the date of publication of regulations which first require compliance with the RCRA standards set forth in 40 C.F.R. Part 265.

18. The Bevill Amendment originally exempted from RCRA regulation the process wastes generated from the beneficiation of minerals and ores. The Bevill exclusion for wastes generated during the production of elemental phosphorus, except furnace off-gas solids, was removed as published in the Federal Register on September 1, 1989 (54 Fed. Reg. 36592), and became effective on March 1, 1990. The Bevill exclusion for furnace off-gas solids was removed as published in the Federal Register on January 23, 1990, (55 Fed. Reg. 2322), and became effective July 23, 1990.

19. Section 3005(j)(1) and Section 3005(j)(6) of RCRA, 42 U.S.C. §§ 6925(j)(1) and 6925(j)(6), require that any hazardous waste surface impoundment which newly becomes subject

to regulation under RCRA after November 8, 1984, due to the promulgation of additional listings or characteristics for the identification of hazardous waste, must cease the treatment or storage of hazardous waste in those surface impoundments within four years of promulgation of the new listing, unless the surface impoundment is in compliance with the Minimum Technology Requirements (MTRs) set forth at Section 3004(o)(1)(A) of RCRA, 42 U.S.C. § 6924(o)(1)(A), which would apply if the surface impoundment was new, or unless an exemption was requested under Section 3005(j) of RCRA, 42 U.S.C. § 6925(j), and has been approved by EPA. An exemption may also be requested under Section 3004(o)(2), 42 U.S.C § 6924(o)(2), and 40 C.F.R. § 264.221(d).

20. A waste is ignitable under 40 C.F.R. § 262.21(a)(1) and (2) if "(1) it is a liquid . . . and has flash point less than 60 degrees C . . . OR (2) it is not a liquid and is capable, under standard temperature and pressure, of causing fire through friction, absorption of moisture or spontaneous chemical changes, and, when ignited, burns so vigorously and persistently that it creates a hazard."

21. A waste is reactive under 40 C.F.R. § 261.23(a)(1), (3),(4) and (7) if it is "(1) normally unstable and readily undergoes violent change without detonating . . . (3) forms potentially explosive mixtures with water (4) when mixed with water generates toxic gases sufficient to present danger to human health or environment; OR . . .(7) readily capable of detonation

or explosive decomposition or reaction at standard temperature and pressure."

22. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), whenever, on the basis of any information, the Administrator of EPA determines that any person has violated or is in violation of this subtitle, the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

23. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), states that any person who violates any requirement of this subchapter is liable to the United States for civil penalties up to $ 25,000.00 per day per violation for violations occurring prior to January 30, 1997, and, pursuant to Section 3008(g) of RCRA, Pub. L. 104-134 and 61 Fed. Reg. 69360, up to $27,500 per day per violation for violations occurring on or after January 30, 1997.

24. Enforcement authority under RCRA is contained in Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), which provides federal enforcement of RCRA violations. States may be authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, to administer and operate a hazardous waste program in lieu of the federal program. However, where the state has not asserted jurisdiction over Indian lands, there is no authorized state program that operates in lieu of the federal program over Indian lands, and the federal program is applicable. Therefore, Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), is applicable and

grants the Administrator of EPA the authority to enforce federal regulations on Indian lands. In Region 10, the state of Idaho has an authorized state program but has not asserted jurisdiction over the Fort Hall Indian reservation; nor has the Shoshone-Bannock Tribe sought authorization. Therefore, federal RCRA rules apply. 40 C.F.R. § 271.1(h).

V. CLAIMS FOR RELIEF

First Claim for Relief
(Failure to make waste determinations)

25. The allegations in Paragraphs 1 through 24 are realleged and incorporated herein by reference.

26. Pursuant to 40 C.F.R. § 262.11, a generator of solid waste is required to determine if such waste is a hazardous waste in accordance with the methods prescribed therein.

27. FMC has maintained to EPA that the effluent from the phosphorus loading dock, precipitator dust slurry treated with lime, and the sediments in Ponds 11S, 12S, 13S, and 14S (collectively referred to as the Phase IV Ponds), and in Pond 8E and 9E are not hazardous wastes.

28. Fires have been documented repeatedly at the Phase IV Ponds and Ponds 9E, 15S and 16S.

29. The sediments in the Phase IV Ponds and in Pond 9E burn vigorously and persistently when exposed to the air, so as to create a hazard. These wastes are ignitable hazardous wastes pursuant to 40 C.F.R. § 262.21(a)(2).

30. On April 30, 1997, during sampling of a Phase IV Pond, phosphine levels were measured at 1.6 ppm. Phosphine is a highly toxic gas.

31. On November 6, 1997, Defendant reported elevated levels of phosphine in the breathing zone of workers at Pond 8E, and further reported elevated airborne levels of phosphine at Pond 8E and at the Phase IV ponds.

32. The effluent from the phosphorus loading dock, treated precipitator dust slurry, and the sediment in the Phase IV Ponds and Ponds 8E and 9E emit phosphine and other toxic gases in concentrations that are dangerous to human health or the environment. These solid wastes are reactive hazardous wastes, pursuant to 40 C.F.R. § 261.23(a).

33. Defendant has failed to satisfy the requirements of 40 C.F.R. § 262.11 to determine if the effluent from the phosphorus loading dock, treated precipitator dust slurry, and the sediments in the Phase IV ponds and Ponds 8E and 9E are hazardous wastes.

34. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), for each violation of the waste analysis requirements of 40 C.F.R. § 262.11. Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Second Claim for Relief
(Late submission of Part A application)

35. The allegations in Paragraphs 1 through 34 are realleged and incorporated herein by reference.

29. Pursuant to 40 C.F.R. § 270.10(e), Part A permit applications covering waste management units receiving wastewater from the production of elemental phosphorus were due March 1, 1990.

36. The Phase IV Ponds and WMU #12 were in existence on September 1, 1989, when the Bevill exclusion was removed, and the wastewater from the production of elemental phosphorous placed in the Phase IV Ponds and WMU #12 became subject to the hazardous waste regulations under Subtitle C of RCRA.

37. Defendant was required to submit a Part A permit application for the Phase IV Ponds and WMU #12 by March 1, 1990.

38. Defendant did not file a Part A permit application for the Phase IV Ponds and WMU #12 until February 21, 1991.

39. At the time of the NEIC Inspection, the Phase IV Ponds and waste management unit #12 (WMU #12), also known as the Scrubber Blowdown Wastewater Treatment Unit, were accepting and managing waste from the production of elemental phosphorous that failed the Toxicity Characteristic Leaching Procedure (TCLP) for cadmium pursuant to 40 C.F.R. § 261.24, and that was ignitable and reactive pursuant to 40 C.F.Rx §§ 261.21 and 261.23.

40. The Phase IV Ponds, along with WMU #12, have been operating illegally without a permit or interim status since March 1, 1990.

41. Pursuant to 40 C.F.R. § 270.10(e), Part A permit applications covering waste management units receiving furnace off-gas solids were due July 23, 1990.

42. At the time of the NEIC Inspection, Ponds 8E and 9E were accepting phosphorous-containing precipitator dust slurry that failed the TCLP for cadmium pursuant to 40 C.F.R. § 261.24, and that was ignitable and reactive pursuant to 40 C.F.R. §§ 261.21 and 261.23. Ponds 8E and 9E were in existence on January 23, 1990, when the Bevill exclusion was removed for precipitator dust slurry, also known as furnace off-gas solids, and the wastewater placed in Ponds 8E and 9E became subject to the hazardous waste regulations under Subtitle C of RCRA.

43. Defendant was required to submit a Part A permit application for Ponds 8E and 9E by July 23, 1990.

44. Defendant did not file a Part A permit application for Ponds 8E and 9E until February 21, 1991.

45. Ponds 8E and 9E have been operating illegally without a permit or interim status since July 23, 1990.

46. Defendant failed to satisfy the requirements of 40 C.F.R. § 270.10(e) to submit timely Part A permit applications for the Phase IV, 8E and 9E surface impoundments and a waste management unit (WMU #12) that received newly identified wastes,

and, therefore, has been operating these units illegally, without a permit or interim status.

47. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Third Claim for Relief
(Failure to cease receipt, storage and treatment of hazardous wastes in surface impoundments that do not meet MTRs)

48. The allegations in Paragraphs 1 through 47 are realleged and incorporated herein by reference.

49. The Phase IV Ponds, the Slag Pit Sump, and Pond 15S received wastewater from the production of elemental phosphorus on September 1, 1989, the date that the Bevill exclusion for wastes generated during the production of elemental phosphorus, with the exception of furnace off-gas solids, was removed.

50. Pursuant to Section 3005(j)(1) and Section 3005(j)(6) of RCRA, 42 U.S.C. §§ 6925(j)(1) and 6925(j)(6), Defendant had until September 1, 1993 (four years from the promulgation of the new listing on September 1, 1989), to ensure that surface impoundments containing wastewater from the production of elemental phosphorus came into compliance with MTRs set forth at Section 3004(o)(1)(A) of RCRA, 42 U.S.C. § 6924(o)(1)(A), or to cease the treatment or storage of hazardous waste.

51. In a letter dated February 9, 1993, EPA denied Defendant's request for an exemption to MTRs pursuant to 40

C.F.R. § 264.221(d) and Section 3004(o)(2) of RCRA, 42 U.S.C § 6924(o)(2), for Ponds 15S, 9E, and 8E.

52. Defendant failed to ensure that the Phase IV Ponds, the Slag Pit Sump, and Pond 15S complied with MTRs, nor did Defendant close the ponds or remove the sludges from the ponds, by September 1, 1993. Instead, Defendant submitted a delay of closure petition on August 31, 1993, for the Phase IV Ponds and closure plans for the Slag Pit Sump and Pond 15S, one day before the date the ponds were required to comply with MTRs or to cease the treatment or storage of hazardous waste.

53. Ponds 8E and 9E were receiving furnace off-gas solids or precipitator slurry as of January 23, 1990, the date that the Bevill exclusion for furnace off-gas solids was removed. Surface impoundments containing furnace off-gas solids had until January 23, 1994, to come into compliance with MTRs set forth at Section 3004(o)(1)(A) of RCRA, 42 U.S.C. § 6924(o)(1)(A), or to cease the treatment or storage of hazardous waste.

54. EPA denied Defendant's request for an exemption to MTRs pursuant to 40 C.F.R. § 264.221(d) and Section 3004(o)(2) of RCRA, 42 U.S.C § 6924(o)(2), for Ponds 8E and 9E.

55. Defendant failed to ensure that Ponds 8E and 9E complied with MTRs, nor did Defendant close the ponds or remove the sludges from the ponds, by January 23, 1994. Instead, Defendant submitted a delay of closure petition for Ponds 8E and 9E on January 20, 1994, three days before the date the ponds were

required to comply with MTRs or to cease the treatment or storage of hazardous waste.

56. Defendant failed to ensure that hazardous waste surface impoundments, which newly become subject to regulation under RCRA after November 8, 1984, due to the promulgation of additional listings or characteristics for the identification of hazardous waste, meet MTRs pursuant to Section 3005(j)(1) and Section 3005(j)(6) of RCRA, 42 U.S.C. §§ 6925(j)(1) and 6925(j)(6), or cease the treatment or storage of hazardous waste.

57. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Fourth Claim for Relief
(Failure to submit closure plans)

58. The allegations in Paragraphs 1 through 57 are realleged and incorporated herein by reference.

59. Although the Phase IV Ponds and Ponds 8E and 9E failed to obtain interim status because Defendant failed to submit timely Part A permit applications, these units still were subject to interim status standards. Pursuant to 40 C.F.R. § 265.1, interim status requirements apply "to those owners and operators of facilities in existence on November 19, 1980 who have failed to . . . file Part A of the permit application as required by 40 C.F.R. § 270.10(e) and (g)."

60. 40 C.F.R. § 265.112(d) requires the owner or operator of a facility which does not have an approved closure plan to submit a closure plan for closing units at least one hundred and eighty (180) days prior to the date on which the owner or operator expects to begin closure of the first surface impoundment.

61. Although Defendant submitted a closure plan in the Part B permit application on March 1, 1991, Defendant has never had an approved facility-wide closure plan.

62. The Phase IV Ponds, Pond 15S and the Slag Pit Sump became newly subject to the hazardous waste regulations under Subtitle C of RCRA with the removal of the Bevill exclusion for such wastes on September 1, 1989.

63. The Phase IV Ponds, Pond 15S and the Slag Pit Sump had until September 1, 1993, which is four years from the date when these units first became subject to RCRA, to come into compliance with MTRs set forth at Section 3004(o)(1)(A) of RCRA, 42 U.S.C. § 6924(o)(1)(A), or to cease the treatment or storage of hazardous waste.

64. The Phase IV Ponds, Pond 15S and the Slag Pit Sump received wastes from the production of elemental phosphorus and did not meet MTRs.

65. Defendant should have submitted a closure plan for the Phase IV Ponds, Pond 15S and the Slag Pit Sump one hundred and eighty (180) days prior to September 1, 1993, which is the date

Pond 15S and the Slag Pit Sump should have either met MTRs or ceased the treatment and storage of hazardous waste.

66. Defendant submitted the closure plan for Pond 15S and the Slag Pit Sump on August 31, 1993, one day before the September 1, 1993, deadline, and, therefore, failed to comply with 40 C.F.R. § 265.112(d).

67. Facilities may request a delay of closure to allow units that once received hazardous waste to continue to receive non-hazardous waste. Defendant submitted documents for delay of closure for the Phase IV Ponds, which did not meet MTRs, on August 31, 1993, one day before the units containing hazardous waste, including the wastewater from the production of elemental phosphorous, were required to cease the treatment and storage of hazardous waste or to be in compliance with MTRs.

68. Pursuant to 40 C.F.R. § 265.113(d)(4), the owner or operator of a facility that requests the delay of closure of a unit that once received hazardous waste that will continue to be used to receive non-hazardous waste must submit to the Regional Administrator a Part B permit application or amended Part B permit application no later than one hundred and eighty (180) days prior to the date on which the unit receives the last known volume of hazardous waste.

69. Defendant failed to submit the documents for delay of closure for the Phase IV Ponds to the Regional Administrator one hundred and eighty (180) days prior to the date the units received the last known volume of hazardous waste, which, based

on information provided by the Defendant, was September 1, 1993.

70. Defendant continued to discharge wastes that it contended were non-hazardous, but that in fact were ignitable and reactive hazardous wastes, into the Phase IV Ponds after the statutory deadline without EPA approval of Defendant's delay of closure requests. Accordingly, Defendant failed to comply with 40 C.F.R. § 265.113(d)(4).

71. Ponds 8E and 9E became newly subject to the hazardous waste regulations under Subtitle C of RCRA with the removal of the Bevill exclusion for such wastes on January 23, 1990, and had until January 23, 1994, to come into compliance with MTRs set forth at Section 3004(o)(1)(A) of RCRA, 42 U.S.C. § 6924(o)(1)(A), or to cease the treatment or storage of hazardous waste.

72. Pond 8E and 9E received furnace off-gas solids and did not meet MTRs.

73. Defendant should have submitted a closure plan for the 8E and 9E Ponds one hundred and eighty (180) days prior to January 23, 1994, which is the date these ponds should have either met MTRs or ceased the treatment and storage of hazardous waste.

74. Defendant submitted documents for delay of closure for Ponds 8E and 9E, which did not meet MTRs, on January 20, 1994, a few days before these ponds were required to be in compliance with MTRs or to cease the receipt, treatment and storage of hazardous waste.

75. Defendant failed to submit the documents for delay of closure for Ponds 8E and 9E to the Regional Administrator one hundred and eighty (180) days prior to the date the units received the last known volume of hazardous waste, which, based on information provided by the Defendant was January 22, 1994.

76. Defendant failed to satisfy the requirements to submit timely closure plans for surface impoundments pursuant to 40 C.F.R. §§ 265.112(d) and 40 C.F.R. § 265.113(d)(4), and continued to discharge what it contended were non-hazardous wastes, but that in fact were ignitable and reactive hazardous wastes, into the Phase IV Ponds and Ponds 8E and 9E after the statutory deadline without EPA approval of Defendant's delay of closure requests.

77. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Fifth Claim for Relief
(Illegal placement of ignitable and reactive wastes in ponds)

78. The allegations in Paragraphs 1 through 77 are realleged and incorporated herein by reference.

79. 40 C.F.R. § 265.229 prohibits the placement of ignitable or reactive hazardous wastes in surface impoundment unless the waste and the impoundment satisfy all applicable requirements of 40 C.F.R. Part 268 (land disposal restriction

requirements), and the waste is "deactivated" either before or immediately after placement so that it no longer meets the definition of ignitable or reactive hazardous waste, or alternatively is certified by an engineer or chemist to be managed in such as way as to protect it from any material or conditions that may cause it to ignite or react.

80. Defendant has placed reactive effluent from the phos dock and ignitable and reactive sediments into the Phase IV Ponds at the Pocatello Facility without deactivation since the Bevill exemption was removed in September 1989.

81. Defendant has placed sediments dredged from the Phase IV ponds, untreated precipitator slurry, and other reactive and ignitable phossy wastes in Pond 15S without deactivation from September 1989 until September 1, 1993.

82. Defendant has placed reactive and ignitable precipitator slurry in Pond 8E without deactivation from January 1990, when the Bevill exemption for off-gas solids was removed, until September 22, 1994. Partially deactivated wastes were placed in this pond from January 21, 1995 until sometime in 1997.

83. Defendant placed reactive and ignitable precipitator slurry in Pond 9E without deactivation from January 1990 until November 23, 1996.

84. Defendant placed reactive and ignitable sediments dredged from Ponds 8E and 9E, untreated precipitator slurry and other phossy wastes in Pond 16S without deactivation since it became operational in 1993.

85. Defendant has not had any of its surface impoundments certified by an engineer or chemist as being managed in such as way as to protect the waste from any material or conditions that may cause it to ignite or react.

86. Defendant has placed ignitable and reactive hazardous waste in surface impoundments in violation of 40 C.F.R. § 265.229.

87. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Sixth Claim for Relief
(Illegal treatment of hazardous wastes in slurry pots)

88. The allegations in Paragraphs 1 through 87 are realleged and incorporated herein by reference.

89. Interim status or a RCRA permit is required for the treatment, storage or disposal of hazardous wastes. 40 C.F.R. § 270.1(c). "Use of any method . . . designed to change the physical . . . character . . . of any hazardous waste so as to . . . render such waste nonhazardous, safer for transport, . . . amenable for storage . . ." is defined as a treatment by Section 1004(34) of RCRA.

90. Since 1995, Defendant has mixed precipitator dust generated during the production of elemental phosphorus with water and sometimes with lime in slurry pots to render the waste

safer to transport and manage and to render the waste non-hazardous for metals.

91. Defendant has never filed a Part A permit application for the treatment of hazardous waste in the slurry pots, and accordingly does not have interim status or a permit for the slurry pots.

92. Defendant has treated hazardous waste in its furnace slurry pots without a permit or interim status, in violation of Section 3005 of RCRA, 42 U.S.C. § 6925, and 40 C.F.R. § 270.10.

93. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Seventh Claim for Relief
(Failure to provide secondary containment)

94. The allegations in Paragraphs 1 through 93 are realleged and incorporated herein by reference.

95. 40 C.F.R. § 265.193 requires the owner or operator of a facility to provide adequate secondary containment, with release detection, for all tanks and ancillary equipment used to manage hazardous waste.

96. Tanks and ancillary equipment at the FMC facility that are used to manage hazardous waste and that do not exhibit secondary containment include, but are not limited to: the north solids tank, the NE collection tank, the furnace building sumps,

the slurry pots, and the medusa scrubber blowdown tanks, together with pipelines from each of these locations to the surface impoundments.

97. Defendant has failed to satisfy secondary containment requirements for tanks and ancillary equipment in the furnace buildings and phos dock at the FMC Pocatello Facility in violation of 40 C.F.R. § 265.193.

98. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Eighth Claim for Relief
(Failure to obtain a permit to store hazardous waste)

99. The allegations in Paragraphs 1 through 98 are realleged and incorporated herein by reference

100. Section 3005 of RCRA, 42 U.S.C. § 6925, prohibits the storage of hazardous waste except in accordance with a permit or interim status.

101. Generators of hazardous waste that treat or store hazardous waste on-site in accordance with 40 C.F.R. §§ 262.34(a)(1)-(4), are exempt from the requirements of Section 3005 of RCRA, 42 U.S.C. § 6925, to obtain a permit or interim status, provided that they comply with the requirements for owners or operators in Subpart I of 40 C.F.R. Part 265 (§§ 265.170-177).

102. 40 C.F.R. § 262.34(c)(1) expands this exemption further, by providing that a generator who does not comply with 40 C.F.R. § 262.34(a) still may accumulate up to 55 gallons of hazardous waste in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, without a permit or interim status.

103. At the time of the NEIC Inspection, the 55-gallon satellite accumulation drum used to collect spent solvents that qualify as hazardous waste at the Old Kiln building at the FMC Facility was located outside the building and was, therefore, not under the control of the operator of the process generating the waste.

104. Defendant, therefore, failed to store hazardous waste in accordance with 40 C.F.R. § 262.34(c)(1), and thereby failed to qualify for the exemption from the requirements of Section 3005 of RCRA, 42 U.S.C. § 6925, to obtain a permit or interim status. Defendant accordingly stored hazardous waste without a permit or interim status in violation of Section 3005 of RCRA, 42 U.S.C. § 6925.

105. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Ninth Claim for Relief
(Failure to obtain a permit to store hazardous waste)

106. The allegations in Paragraphs 1 through 105 are realleged and incorporated herein by reference.

107. Section 3005 of RCRA, 42 U.S.C. § 6925, prohibits the storage of hazardous waste except in accordance with a permit or interim status.

108. Generators of hazardous waste that treat or store hazardous waste on-site in accordance with 40 C.F.R. §§ 262.34(a)(1)-(4), are exempt from the requirement of Section 3005 of RCRA, 42 U.S.C. § 6925, to obtain a permit or interim status, provided that they comply with the requirements for owners or operators in Subpart I of 40 C.F.R. Part 265 (§§ 265.170-177).

109. 40 C.F.R. § 265.173 requires that containers holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.

110. At the time of the NEIC Inspection, rolls of washed Andersen filter media were being accumulated outside the furnace building at the wash station in a roll-off bin that was not covered. No waste was being added or removed, nor were FMC personnel operating the wash station while the inspectors were present.

111. Defendant failed to store the hazardous waste in accordance with 40 C.F.R. §§ 262.34(a) and 265.173, and thereby failed to qualify for the exemption from the requirements of

Section 3005 of RCRA, 42 U.S.C. § 6925, to obtain a permit or interim status. Defendant, therefore, stored hazardous waste without a permit or interim status in violation of Section 3005 of RCRA, 42 U.S.C. § 6925.

65. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Tenth Claim for Relief
(Failure to obtain research development and demonstration permit)

112. The allegations in Paragraphs 1 through 111 are realleged and incorporated herein by reference.

113. 40 C.F.R. § 270.1 requires anyone who plans to treat hazardous waste to obtain a RCRA permit prior to treating such hazardous waste. 40 C.F.R. § 270.65 provides for the issuance of a research, development, and demonstration permit for any hazardous waste treatment facility which proposes to utilize an innovative and experimental hazardous waste treatment technology or process for which permit standards for such experimental activity have not been promulgated under Parts 264 or 266.

114. Defendant conducted a pilot study for a unit identified in the September 11, 1992, Waste Minimization Plan as the Phossy Waste Reclaim Unit Pilot Plant. This unit treated wastewater from the production of elemental phosphorous that contained levels of cadmium that exceed the TCLP criteria for

classification as characteristic waste, D006. (40 C.F.R. § 261.24).

115. Defendant failed to satisfy the requirements of 40 C.F.R. §§ 270.1 and 270.65 to obtain a research, development, and demonstration permit prior to treating hazardous waste in the Phossy Waste Reclaim Unit Pilot Plant.

116. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Eleventh Claim for Relief
(Failure to implement adequate groundwater monitoring program)

117. The allegations in Paragraphs 1 through 116 are realleged and incorporated herein by reference.

118. 40 C.F.R. §§ 265.90(a) and 265.91(a) require that within one year after becoming subject to these regulations, the owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste must implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility.

119. The Bevill exclusion was eliminated for wastes generated during the production of elemental phosphorous, with the exception of furnace off-gas solids, on September 1, 1989.

(54 Fed. Reg. 36592). Part A permit applications covering the newly identified wastes, elemental phosphorous, were due March 1, 1990. The exemption for furnace off-gas solids was removed on January 23, 1990, (55 Fed. Reg. 2322) with the corresponding Part A permit application due July 23, 1990.

120. At the time of the NEIC Inspection, Defendant did not have in place a technically functional groundwater monitoring system that could effectively detect a release of hazardous waste or constituents into the uppermost aquifer beneath the FMC Facility.

121. Defendant accordingly failed to satisfy 40 C.F.R. §§ 265.90(a) and 265.91(a).

122. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

Twelfth Claim for Relief
(Unauthorized changes during interim status)

123. The allegations in Paragraphs 1 through 122 are realleged and incorporated herein by reference.

124. 40 C.F.R. § 270.72(a)(3) allows a facility with interim status to make changes in the processes for the treatment, storage, or disposal of hazardous waste or addition of processes if the owner or operator submits a revised Part A permit

application prior to such change with the required justification explaining the need for the change and EPA approves the change.

125. In 1991, Defendant began treating Andersen Filter Media at the Andersen Filter Media Wash Station (WMU # 13). A revised Part A permit application covering this treatment unit was submitted on February 28, 1992, after construction of WMU #13.

126. Defendant failed to submit a Part A permit application prior to a change in the process for treatment of the Andersen Filter Media and failed to include the required justification explaining the need for the change.

127. Defendant accordingly failed to satisfy the requirements of 40 C.F.R. § 270.72(a)(3) resulting in unauthorized changes during interim status.

128. Defendant is liable for injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Each day of such violation constitutes a separate violation pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g).

VI. PRAYER FOR RELIEF

Wherefore, Plaintiff, the United States, requests that this court enter judgment against the Defendant:

129. For such injunctive relief as necessary to compel Defendant to ensure that the Phase IV ponds and Ponds 8E and 9E are closed according to RCRA regulations.

130. For such injunctive relief as necessary to compel Defendant to comply with the requirements of 40 C.F.R.

§§ 265.90(a) and 265.91(a) to maintain a groundwater monitoring program capable of determining the FMC facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility.

131. For such additional injunctive relief as necessary to compel Defendant to comply with RCRA and its implementing regulations.

132. Assessing civil penalties not to exceed $25,000.00 for each violation occurring prior to January 30, 1997, and, pursuant to Section 3008(g) of RCRA, Pub. L. 104-134 and 61 Fed. Reg. 69360, not to exceed $27,500 per day per violation for violations occurring on or after January 30, 1997, up to the date of judgment herein, pursuant to Sections 3008(a) and 3008(g) of RCRA, 42 U.S.C. §§ 6928(a) and 6928(g).

133. Awarding the Plaintiff its costs of suit herein and such other additional relief as the Court may deem appropriate.

Respectfully submitted,

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