

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	
ORMET PRIMARY ALUMINUM	)	
CORPORATION,	)	
	)	
Defendant.	)	

CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Ormet Corporation Superfund Site in Hannibal, Ohio, together with accrued interest; and (2) performance of studies and response work by the Defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Ohio

(the "State") on February 14, 1995 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Fish and Wildlife Service and the Ohio Environmental Protection Agency on March 24, 1994 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustees to participate in the negotiation of this Consent Decree.

E. The Defendant that has entered into this Consent Decree ("Settling Defendant") does not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 28, 1985, 50 Fed. Reg. 37950, et seq.;

G. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, the Settling Defendant commenced in February 1988, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430;

H. The Settling Defendant completed a Remedial Investigation ("RI") Report in December 1992 and the Settling Defendant completed a Feasibility Study ("FS") Report in December 1993;

I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on April 11, 1994, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

J. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on September 12, 1994, on which the State had a reasonable opportunity to review and comment. The ROD includes EPA's explanation for any significant differences between the final plan and the proposed plan as well as a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

K. Based on the information presently available to EPA, EPA believes that the Work as defined below will be properly and promptly conducted by the Settling Defendant if conducted in accordance with the requirements of this Consent Decree and its appendices.

L. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the ROD and the Work to be performed by the Settling Defendant shall constitute a response action taken or ordered by the President.

M. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon Settling Defendant and its heirs, successors and assigns. Except as otherwise provided herein, any change in

ownership or corporate status of Settling Defendant including, but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing any Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are

used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

"Consent Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXX). In the event of conflict between this Decree and any appendix, this Decree shall control.

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

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

"OEPA" shall mean the Ohio Environmental Protection Agency and any successor departments or agencies of the State.

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to

Sections VII, VIII, X (including, but not limited to, attorneys fees and the amount of just compensation), XVI, and Paragraph 83 of Section XXII. Future Response Costs shall also include all costs, including direct and indirect costs, paid by the United States in connection with the Site between December 31, 1994 and the effective date of this Consent Decree.

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including, but not limited to, any amendments thereto.

"Operation and Maintenance" or "O & M" shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (SOW).

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" shall mean the United States and the Settling Defendant.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs and interest, that the United States incurred and paid with regard to the Site prior to December 31, 1994.

"Performance Standards" shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations set forth in the ROD or Section II of the SOW.

"Plaintiff" shall mean the United States.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on September 12, 1994, by the Regional Administrator, EPA Region V, and all attachments thereto.

"Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendant to implement the final plans and specifications submitted by the Settling Defendant pursuant to the Remedial Design Work Plan and approved by EPA.

"Remedial Design" shall mean those activities to be undertaken by the Settling Defendant to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

"Remedial Design Work Plan" shall mean the document submitted by the Settling Defendant pursuant to Paragraph 11.a of this Consent Decree and described more fully in Paragraph 11.b.

"Section" shall mean a portion of this Consent Decree identified by a roman numeral.

"Settling Defendant" shall mean Ormet Primary Aluminum Corporation.

"Site" shall mean the Superfund site portions of the Ormet Primary Aluminum Corporation property encompassing a stretch of land approximately 2.5 miles long and up to 0.5 miles wide, located along the west bank of the Ohio River, approximately 35 miles south of Wheeling, West Virginia, about 3 miles upriver from Hannibal in Monroe County, Ohio and specifically described and mapped in Appendix C.

"State" shall mean the State of Ohio.

"Statement of Work" or "SOW" shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance at the Site, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

"Supervising Contractor" shall mean the principal contractor retained by the Settling Defendant to supervise and direct the implementation of the Work under this Consent Decree.

"United States" shall mean the United States of America.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous waste" under ORC 3734.01(J).

"Work" shall mean all activities Settling Defendant is required to perform under this Consent Decree, except those required by Section XXVI (Retention of Records).

V. GENERAL PROVISIONS5. Objectives of the Parties

The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Settling Defendant and to reimburse response costs of the Plaintiff.

6. Commitments by Settling Defendant

a. Settling Defendant shall finance and perform the Work in accordance with this Consent Decree and all plans, standards, specifications, and schedules set forth in or developed and approved by EPA pursuant to this Consent Decree. Settling Defendant shall also reimburse the United States for Past Response Costs and Future Response Costs as provided in this Consent Decree.

7. Compliance With Applicable Law

All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

## 8. Permits

a. As provided in Section 121(e) of CERCLA and §300.5 of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site. Where any portion of the Work requires a federal or state permit or approval, Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendant may seek relief under the provisions of Section XIX (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

## 9. Notice of Obligations to Successors-in-Title

a. Within 15 days after the entry of this Consent Decree, the Settling Defendant shall record a certified copy of this Consent Decree with the Recorder's Office or Registry of Deeds or other appropriate office, Monroe County, State of Ohio. Thereafter, each deed, title, or other instrument conveying an interest in the property included in the Site shall contain a notice stating that portions of the property are subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

b. The obligations of Settling Defendant with respect to the provision of access under Section X (Access) and the implementation of institutional controls under Appendix D shall be binding upon Settling Defendant and any and all persons who subsequently acquire any such interest or portion thereof (hereinafter "Successors-in-Title"). Within 15 days after the entry of this Consent Decree, Settling Defendant shall record at the Recorder's Office or Registry of Deeds or other appropriate office where land ownership and transfer records are maintained for the property a notice of obligation to provide access under Section X (Access) and related covenants. Each subsequent instrument conveying an interest to any such property included in the Site shall reference the recorded location of such notice and covenants applicable to the property.

c. Settling Defendant and any Successor-in-Title shall, at least 30 days prior to the conveyance of any such interest, give written notice of this Consent Decree to the grantee and written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree was given to the grantee. Except as otherwise provided herein, in the event of any such conveyance, the Settling Defendant's obligations under this Consent Decree, including its obligations to provide or secure access pursuant to Section X, shall continue to be met by the Settling Defendant. In addition, if the United States approves, the grantee may perform some or all of the Work under this Consent Decree. The conveyance

of an interest in property that includes, or is a portion of, the Site shall not release or otherwise affect the liability of the Settling Defendant to comply with the Consent Decree unless the Successor in Title: 1) agrees to assume the obligations under this Consent Decree; 2) obtains the approval of the United States for a modification to the Consent Decree substituting the Successor in Title for the Defendant; and 3) submits to the jurisdiction of this Court and the Court approves a modification to the Consent Decree substituting the Successor in Title for the Defendant for purposes of this Consent Decree.

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VI (Performance of the Work by Settling Defendant), VII (Additional Response Actions), VIII (Remedy Review), and IX (Quality Assurance, Sampling and Data Analysis) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA. Within 10 days after the lodging of this Consent Decree, Settling Defendant shall notify EPA in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendant proposes to change a Supervising Contractor, Settling Defendant shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new

Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Settling Defendant in writing. Settling Defendant shall submit to EPA a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendant may select any contractor from that list that is not disapproved and shall notify EPA of the name of the contractor selected within 21 days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendant from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendant may seek relief under the provisions of Section XIX (Force Majeure) hereof.

11. Remedial Design.

a. Within sixty (60) days after EPA's issuance of an authorization to proceed pursuant to Paragraph 10, Settling Defendant shall submit to EPA and the State a work plan for the design of the Remedial Action at the Site ("Remedial Design Work Plan"). The Remedial Design Work Plan shall provide for design of the remedy set forth in the ROD in accordance with the SOW and,

upon its approval by EPA, shall be incorporated into and become enforceable under this Consent Decree. Within sixty (60) days after EPA's issuance of an authorization to proceed, the Settling Defendant shall submit to EPA and the State a Health and Safety Plan for field design activities which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the SOW and in accordance with the schedule contained in Section V of the SOW, including, but not limited to:

- (1) pre-design studies, as set forth in Section II(3) of the SOW;
- (2) a pre-design sampling and analysis plan ("SAP") (including a pre-design Quality Assurance Project Plan (pre-design QAPP));
- (3) plans and schedules for delineation of the extent of PCB contamination in soils located between the Construction Material Scrap Dump (CMSD) and the 004 outfall, and delineation of PCB contamination in the backwater area sediments, as set forth in Section II(3)(A) of the SOW;
- (4) plans for estimation of the contaminant mass-in-place for the groundwater contaminant plume, as set forth in Section II(3)(C) of the SOW;
- (5) plans and schedules for implementing a treatability study for the CMSD seeps and for the Former Spent Potliner Storage Area (FSPSA) soils.

c. Upon approval of the Remedial Design Work Plan by EPA, after a reasonable opportunity for review and comment by the State, and submittal of the Health and Safety Plan for all field

activities to EPA and the State, Settling Defendant shall implement the Remedial Design Work Plan. The Settling Defendant shall submit to EPA and the State all plans, submittals and other deliverables required under the approved Remedial Design Work Plan in accordance with the approved schedule for review and approval pursuant to Section XII (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendant shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.

d. The preliminary design submittal shall include, at a minimum, the following: (1) design assumptions and parameters; (2) results of treatability studies for the CMSD seeps and FSPSA soils; (3) results of additional field sampling and pre-design work, set forth in Section II(3) of the SOW; (4) Proposed cleanup verification methods, including compliance with Performance Standards including Applicable or Relevant and Appropriate Requirements (ARARs); (5) project delivery strategy; (6) preliminary plans, drawings and sketches; (7) required specifications in outline form; (8) Proposed siting locations of processes, and construction activity; (9) expected long term monitoring and operation requirements; (10) real estate easement and permit requirements; and (11) a preliminary construction schedule.

e. The intermediate design submittal shall be a continuation and expansion of the preliminary design. Any value engineering proposals must be identified and evaluated during this

review. The intermediate design submittal shall include, at a minimum: (1) a Draft Performance Standard Verificiation Plan; (2) a Draft Construction Quality Assurance Project Plan (CQAPP); (3) the Draft QAPP, Draft Health and Safety Plan (including Contingency Plan), and Draft Field Sampling Plan (directed at measuring progress towards meeting Performance Standards). The CQAPP, which shall detail the approach to quality assurance during construction activities at the site, shall specify a quality assurance official ("QA Official"), independent of the Remedial Action Contractor, to conduct a quality assurance program during the construction phase of the project.

f. The pre-final/final design submittal shall include, at a minimum, the following: (1) Draft Operation and Maintenance Plan (O&M Plan); (2) Final Construction Quality Assurance Project Plan (CQAPP); (3) Final Field Sampling Plan; (4) Final QAPP; (5) Final Health and Safety Plan (including Contingency Plan); (6) a Capital and Operation and Maintenance Cost Estimate; (7) Final Performance Standard Verification Plan; and (8) the Final Project Schedule for the construction and implementation of the Remedial Action..

## 12. Remedial Action.

The Settling Defendant shall implement the Remedial Action as detailed in the approved Final Design. The following activities shall be completed in implementing the Remedial Action: (1) Pre-Construction Inspection and Meeting; (2) Pre-Final Inspection; (3) Final Inspection; (4) Construction Completion

Report; and (5) Remedial Action Completion Report. Activities performed in implementation of the Remedial Action shall be conducted in accordance with the schedule in Section V of the SOW. The Settling Defendant shall prepare the Construction Completion and Completion of Remedial Action Reports in accordance with Section XV (Completion of Work) of this Consent Decree.

13. a. The Work performed by the Settling Defendant pursuant to this Consent Decree shall include the obligation to achieve the Performance Standards.

b. Technical Impracticability Waiver for CMSD Closure Requirements.

i. Settling Defendant may petition EPA to waive compliance with the CMSD closure requirements contained in the ROD solely for that portion of the CMSD that is adjacent to the Ohio River. Settling Defendant must demonstrate, pursuant to Section 121(d)(4) of CERCLA, 42 U.S.C. § 9621(d)(4), that achievement of the closure requirements for that portion of the CMSD is technically impracticable from an engineering perspective and that Settling Defendant's proposed alternative will achieve a standard of performance equivalent to that of the CMSD cover requirements in the ROD. Settling Defendant's petition shall include: (a) an identification of each closure requirement for which a waiver is sought; (b) a detailed justification setting forth the technical basis for the claim that it is technically impracticable from an engineering perspective to achieve each such closure requirement; (c) a proposed alternative performance standard which will achieve

a standard of performance equivalent to that of the CMSD requirements in the ROD; and (d) a demonstration that the Work and/or any alternative cleanup standards at the Site, together with any additional response actions taken or proposed to be taken by Settling Defendant in the petition, will attain a degree of control of further releases which will assure protection of human health and the environment. Settling Defendant shall also submit a copy of their petition and supporting information to Ohio EPA for review and comment.

ii. Determination. Based on its review of the petition and the supporting documentation submitted by Settling Defendant pursuant to Subparagraph 13.b.i. above and other relevant information, and after notice and an opportunity for the State to review and comment on any proposed waiver under this Paragraph, EPA shall determine whether to waive compliance with any of the closure requirements contained in the ROD and shall identify the closure alternative and/or any other response actions that shall be established. The determination shall be made in accordance with all applicable laws and regulations in effect at the time of the petition. Any alternative closure requirement and/or any additional response actions selected by EPA pursuant to this Paragraph shall meet the requirements of CERCLA and the NCP, including protection of human health and the environment. If EPA grants any petition pursuant to this Paragraph, the SOW shall be modified in accordance with Section XXXII of this Consent Decree to include any alternative closure requirement established.

iii. Review. Settling Defendant may challenge EPA's determination under Subparagraph 13.b.ii. above in accordance with the Dispute Resolution provisions in Paragraphs 62 - 67 of this Consent Decree. EPA's determination shall be treated as one regarding the selection and adequacy of a response action within the meaning of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j).

c. Periodic Review. Any technical impracticability waiver granted pursuant to this Paragraph shall be subject to the provisions of Section VIII of this Consent Decree (Remedy Review) and Section 121(c) of CERCLA, 42 U.S.C. § 9621(c).

d. State Involvement. Nothing in this Paragraph shall affect the State's rights under Section 121(f) of CERCLA, 42 U.S.C. § 9621(f).

14. Settling Defendant acknowledges and agrees that nothing in this Consent Decree, the SOW, or the Remedial Design Work Plan constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards. Settling Defendant's compliance with the work requirements shall not foreclose Plaintiff from seeking compliance with all terms and conditions of this Consent Decree, including, but not limited to, the applicable Performance Standards.

15. Settling Defendant shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the

EPA Project Coordinator of such shipment of Waste Material.

However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

a. The Settling Defendant shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Materials are to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendant shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Settling Defendant following the award of the contract for Remedial Action construction. The Settling Defendant shall provide the information required by Paragraph 15.a as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

#### VII. ADDITIONAL RESPONSE ACTIONS

16. In the event that EPA or the Settling Defendant proposes that additional response actions are necessary to meet the Performance Standards or to carry out the remedy selected in the ROD, written notification of such additional response actions shall be provided to the Project Coordinator for the other party. EPA

shall review any proposal by the Settling Defendant to determine whether any additional response action is necessary. After an opportunity for review and comment by the State on any proposal, EPA shall determine what additional response action is necessary and appropriate. If required by Sections 113(k)(2), or 117 of CERCLA, the Settling Defendant and the public will be provided with an opportunity to comment on any additional response actions proposed and an opportunity to submit written comments for the record during the public comment period. Notice of the selection shall be served on the Settling Defendant and the State.

17. Within thirty (30) days of receipt of notice from EPA that additional response actions are necessary, Settling Defendant shall submit to EPA and the State for EPA approval, after reasonable opportunity for review and comment by the State, a work plan for the additional response actions. The plan shall conform to the applicable requirements of Paragraphs 11 and 12. Upon approval of the plan pursuant to Section XII (EPA Approval of Plans and Other Submissions), Settling Defendant shall implement the plan for additional response actions in accordance with the schedule contained therein.

18. Settling Defendant may invoke the procedures set forth in Section XX (Dispute Resolution) to dispute EPA's determination that additional response actions are necessary to meet the Performance Standards or to carry out the remedy selected in the ROD. Such a dispute shall be resolved pursuant to Paragraphs 62-67 of this Consent Decree.

VIII. REMEDY REVIEW

19. a. Periodic Review. Settling Defendant shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the Remedial Action is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations. Copies of the studies and any reports, proposals, documents or items required by EPA shall be submitted by the Settling Defendant to EPA for approval under Section XII and to the State for review and comment.

b. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

20. Opportunity to Comment. The Settling Defendant and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

21. Settling Defendant agrees to admit liability in the event that the United States institutes an action for further relief based on the reservations set forth in Paragraphs 79, 80 or 82 of the Covenant Not To Sue.

IX. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

22. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with EPA's "Interim Guidelines and Specifications For Preparing Quality Assurance Project Plans," December 1980, (QAMS-005/80); "Data Quality Objective Guidance," (EPA/540/G87/003 and 004); "EPA NEIC Policies and Procedures Manual," May 1978, revised November 1984, (EPA 330/9-78-001-R); and subsequent amendments to such guidelines upon notification by EPA to Settling Defendant of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendant shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") to EPA and the State that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendant shall ensure that EPA personnel and its authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendant in implementing this Consent Decree. In addition, Settling Defendant shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendant shall ensure that the laboratories

they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree. Settling Defendant shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program.

23. Upon request, the Settling Defendant shall allow split or duplicate samples to be taken by EPA or its authorized representatives. Settling Defendant shall notify EPA not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow the Settling Defendant to take split or duplicate samples of any samples it takes as part of the Plaintiff's oversight of the Settling Defendant's implementation of the Work.

24. Settling Defendant shall submit to EPA and the State two (2) copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendant with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

25. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

X. ACCESS

26. Commencing upon the date of lodging of this Consent Decree, the Settling Defendant agrees to provide the United States and its representatives, including EPA and its contractors, access at all reasonable times to the Site and any other property to which access is required for the implementation of this Consent Decree, to the extent access to the property is controlled by Settling Defendant, for the purposes of conducting any activity related to this Consent Decree including, but not limited to:

- a. Monitoring the Work;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing additional response actions at or near the Site;
- f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XXV; and

g. Assessing Settling Defendant's compliance with this Consent Decree.

27. To the extent that the Site or any other property to which access is required for the implementation of this Consent Decree is owned or controlled by persons other than Settling Defendant, Settling Defendant shall use best efforts to secure from such persons access for Settling Defendant, as well as for the United States and its representatives, including, but not limited to, its contractors, as necessary to effectuate this Consent Decree. For purposes of this Paragraph "best efforts" includes the payment of reasonable sums of money in consideration of access. If any access required to complete the Work is not obtained within 45 days of the date of lodging of this Consent Decree, or within 45 days of the date EPA notifies the Settling Defendant in writing that additional access beyond that previously secured is necessary, Settling Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps Settling Defendant has taken to attempt to obtain access. In such event, the United States may, as it deems appropriate, assist Settling Defendant in obtaining access. Settling Defendant shall reimburse the United States, in accordance with the procedures in Section XVII (Reimbursement of Response Costs), for all costs incurred by the United States in obtaining access.

28. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights,

including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

#### XI. REPORTING REQUIREMENTS

29. In addition to any other requirement of this Consent Decree, Settling Defendant shall submit to EPA and the State two (2) copies of written monthly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendant or its contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Settling Defendant has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Settling

Defendant shall submit these progress reports to EPA and the State by the fifteenth day of every month following the lodging of this Consent Decree until EPA notifies the Settling Defendant pursuant to Paragraph 48.b of Section XV (Certification of Completion). If requested by EPA, Settling Defendant shall also provide briefings for EPA to discuss the progress of the Work.

30. The Settling Defendant shall notify EPA of any change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

31. Upon the occurrence of any event during performance of the Work that Settling Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendant shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region V, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

32. Within 20 days of the onset of such an event, Settling Defendant shall furnish to Plaintiff a written report, signed by the Settling Defendant's Project Coordinator, setting forth the

events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendant shall submit a report setting forth all actions taken in response thereto. Settling Defendants shall simultaneously submit a copy of the reports to the State.

33. Settling Defendant shall submit two (2) copies of all plans, reports, and data required by the SOW, the Remedial Design Work Plan, the Remedial Action Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendant shall simultaneously submit two (2) copies of all such plans, reports and data to the State.

34. All reports and other documents submitted by Settling Defendant to EPA (other than the monthly progress reports referred to above) which purport to document Settling Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendant.

#### XII. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

35. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendant modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing

Settling Defendant at least one notice of deficiency and an opportunity to cure within 14 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

36. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 35(a), (b), or (c), Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 35(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XXI (Stipulated Penalties).

37. a. Upon receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendant shall, within 30 days or such other time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXI, shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 38 and 39.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendant shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendant of any liability for stipulated penalties under Section XXI (Stipulated Penalties).

38. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to amend or develop the plan, report or other item. Settling Defendant shall implement any such plan, report, or item as amended or developed by EPA, subject only to their right to invoke the procedures set forth in Section XX (Dispute Resolution).

39. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendant shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Settling Defendant invokes the dispute resolution procedures set forth in Section XX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XX (Dispute Resolution) and Section XXI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall

accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXI.

40. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

#### XIII. PROJECT COORDINATORS

41. Within 20 days of lodging this Consent Decree, Settling Defendant and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other party at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Settling Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendant's Project Coordinator shall not be an attorney for the Settling Defendant in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

42. Plaintiff may designate other representatives, including, but not limited to, EPA employees, and federal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

XIV. ASSURANCE OF ABILITY TO COMPLETE WORK

43. Within 30 days of entry of this Consent Decree, Settling Defendant shall establish and maintain financial security in the amount of \$8,238,145.00 in one or more of the following forms:

- (a) A surety bond guaranteeing performance of the Work;
- (b) One or more irrevocable letters of credit equalling the total estimated cost of the Work;
- (c) A trust fund;
- (d) 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 the Settling Defendant;

(e) A demonstration that the Settling Defendant satisfies the requirements of 40 C.F.R. Part 264.143(f); or

(f) In the event that Settling Defendant is unable to meet the requirements of 40 C.F.R. Part 264.143(f)(1), Settling Defendant may, subject to EPA's approval and in lieu of using an alternative mechanism, establish the following accounts for purposes of financial assurance of ability to complete the Work:

i. Place in an interest-bearing account to be specifically reserved for purposes of the obligations undertaken under this Consent Decree (hereinafter referred to as the Construction Account or "CA"), cash equal to 100% of the remaining capital to be expended for Remedial Design and Remedial Action. The CA shall be established and used solely for the purposes of the construction activities associated with the Remedial Design and Remedial Action as set forth in the ROD and SOW. Payment out of the CA shall be made at the direction of the Settling Defendant, subject to approval by EPA. Any funds remaining in the CA at the end of construction shall be refunded to Settling Defendant.

ii. Place in a separate interest-bearing account the amount of \$898,668.00, which is an estimate of two years Operation & Maintenance expense (hereinafter the "O&M Account"). The O&M Account shall be used solely to continue the effective operation and oversight of all systems put into place during the Remedial Action in the event that EPA determines that Settling Defendant is

in default of its obligations to perform the Work under this Consent Decree. In the event of Settling Defendant's default of its obligations to perform the Work under this Consent Decree, EPA shall have complete control over payments out of the O&M Account.

iii. Should Settling Defendant be unable to satisfy the requirements of 40 C.F.R. § 264.143(f)(1)(i) for two consecutive years, then Settling Defendant shall place an amount equal to 100% of the remaining O&M costs, as determined by EPA, in a trust fund ("the O&M Trust Fund") to be used solely to continue the effective operation and oversight of all systems put into place during the Remedial Action in the event that EPA determines that Settling Defendant is in default of its obligations to perform the Work under this Consent Decree. In the event of Settling Defendant's default of its obligations to perform the Work under this Consent Decree, EPA shall have complete control over payments out of the O&M Trust Fund.

iv. The O&M Account under subparagraph ii. and the O&M Trust Fund under subparagraph iii. shall revert to the Settling Defendant upon either the Settling Defendant's election to establish financial assurance using one of the other mechanisms in this Paragraph, or the Certification of Completion of the Work as defined under Section XV (Certification of Completion) of this Consent Decree, once EPA determines that no outstanding response costs are owed to EPA under this Consent Decree.

44. If the Settling Defendant seeks to demonstrate the ability to complete the Work through a guarantee by a third party

pursuant to Paragraph 43(d) of this Consent Decree, Settling Defendant shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendant seeks to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 43(d) or (e), it shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendant shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 43 of this Consent Decree. Settling Defendant's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

45. If Settling Defendant can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 43 above after entry of this Consent Decree, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Settling Defendant shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by

EPA. In the event of a dispute, Settling Defendant may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

46. Settling Defendant may change the form of financial assurance 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. In the event of a dispute, Settling Defendant may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### XV. CERTIFICATION OF COMPLETION

##### 47. Completion of the Remedial Action

a. Within 60 days after the Final Inspection described in Section III of the SOW occurs, Settling Defendant shall submit a Construction Completion Report for EPA approval, pursuant to Section XII (EPA Approval of Plans and Other Submissions). In the report, a registered professional engineer and the Settling Defendant's Project Coordinator shall state that the Remedial Action construction has been completed in accordance with the design and specifications. The written report shall include as-built drawings signed and stamped by a registered professional engineer. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or the Settling Defendant's Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant

penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

b. Within 90 days after Settling Defendant concludes that the Remedial Action has been fully performed and all Performance Standards have been attained, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant and EPA. If, after the pre-certification inspection, the Settling Defendant still believes that the Remedial Action has been fully performed and the Performance Standards have been attained, it shall submit a written Completion of Remedial Action Report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XII (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, Settling Defendant's Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of this Consent Decree. The report shall contain all sampling and analysis required in the SOW in order to demonstrate that Performance Standards have been achieved. If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendant in writing of the activities that must be undertaken to complete the Remedial Action and achieve the Performance Standards. EPA will set forth in the notice a

schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section XII (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

c. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been fully performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendant. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXII (Covenants Not to Sue by Plaintiffs). Certification of Completion of the Remedial Action shall not affect Settling Defendant's obligations under this Consent Decree.

48. Completion of the Work

a. Within 90 days after Settling Defendant concludes that all phases of the Work (including O & M), have been fully performed, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant and EPA. If, after the pre-certification inspection, the Settling

Defendant still believes that the Work has been fully performed, Settling Defendant shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of a Settling Defendant or the Settling Defendant's Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendant in writing of the activities that must be undertaken to complete the Work. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section XII (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendant and after a reasonable opportunity for review and comment by the State, that the Work has been fully performed in accordance with this Consent Decree, EPA will so notify the Settling Defendant in writing.

#### XVI. EMERGENCY RESPONSE

49. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendant shall, subject to Paragraph 50, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendant shall notify the EPA Emergency Response Unit, Region V. Settling Defendant shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendant fails to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendant shall reimburse EPA

all costs of the response action not inconsistent with the NCP pursuant to Section XVII (Reimbursement of Response Costs).

50. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action or to seek an order from the Court to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

XVII. REIMBURSEMENT OF RESPONSE COSTS

51. Within 30 days of the effective date of this Consent Decree, Settling Defendant shall:

a. Pay to the United States \$128,070.73 in full satisfaction of Past Response Costs as well as all costs incurred by the U.S. Department of Justice through July 31, 1995, by Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice lockbox bank, referencing the U.S.A.O. file number \_\_\_\_\_, the EPA region and Site/Spill ID number 0512, and DOJ case number 90-11-3-1423. Payment shall be made in accordance with instructions provided by the Plaintiff to the Settling Defendant upon execution of the Consent Decree. Payments by EFT must be received at the U.S. D.O.J. lockbox bank by 11:00 A.M. (Eastern Time) to be credited on that day.

52. Settling Defendant shall reimburse the United States for all Future Response Costs not inconsistent with the National Contingency Plan incurred by the United States. The United States will send Settling Defendant a bill requiring payment that includes

an Itemized Cost Summary, which includes direct and indirect costs incurred by EPA, DOJ and their contractors on an annual basis. Additionally, EPA will provide to Settling Defendant contractor invoices and progress reports. Settling Defendant shall make all payments within 30 days of Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 53. The Settling Defendant shall make all payments required by this Paragraph in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA region and Site/Spill ID number 051Z, and DOJ case number 90-11-3-1423. The Settling Defendant shall forward the certified check(s) to U.S. EPA Region V, Attention: Superfund Accounting, P.O. Box 70753, Chicago, Illinois 60673, and shall send copies of the check(s) to the United States as specified in Section XXVII (Notices and Submissions).

53. Settling Defendant may contest payment of any Future Response Costs under Paragraph 52 if they determine that the United States has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States pursuant to Section XXVII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendant shall within the 30 day period pay all uncontested Future Response Costs to the United States in the

manner described in Paragraph 52. Simultaneously, the Settling Defendant shall establish an interest bearing escrow account in a federally-insured bank duly chartered in the State of Ohio and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendant shall send to the United States, as provided in Section XXVII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendant shall initiate the Dispute Resolution procedures in Section XX (Dispute Resolution). If the United States prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendant shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 52. If the Settling Defendant prevails concerning any aspect of the contested costs, the Settling Defendant shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States in the manner described in Paragraph 52; Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XX (Dispute Resolution) shall be

the exclusive mechanisms for resolving disputes regarding the Settling Defendant's obligation to reimburse the United States for its Future Response Costs.

54. In the event that the payments required by Paragraph 51 are not made within 30 days of the effective date of this Consent Decree or the payments required by Paragraph 52 are not made within 30 days of the Settling Defendant's receipt of the bill, Settling Defendant shall pay interest on the unpaid balance at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607. The interest to be paid on Past Response Costs shall begin to accrue on the effective date of the Consent Decree. The interest on Future Response Costs shall begin to accrue on the date of the Settling Defendant's receipt of the bill. Interest shall accrue at the rate specified through the date of the Settling Defendant's payment. Payments of interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendant's failure to make timely payments under this Section. Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 52.

#### XVIII. INDEMNIFICATION AND INSURANCE

55. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless the United States and its officials, agents,

employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendant agrees to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendant nor any such contractor shall be considered an agent of the United States.

56. Settling Defendant waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to

the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

57. No later than 15 days before commencing any on-site Work, Settling Defendant shall secure, and shall maintain [until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 47.c of Section XV (Certification of Completion)] comprehensive general liability insurance with limits of at least \$15 million dollars and automobile insurance with limits of \$1 million dollars for bodily injury and property damage per accident naming as additional insured the United States. In addition, for the duration of this Consent Decree, Settling Defendant shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendant shall provide to EPA certificates of such insurance and, if requested by EPA, copies of said policies. Settling Defendant shall maintain such insurance and shall resubmit

such certificates and policies upon request by EPA. If Settling Defendant demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

#### XIX. FORCE MAJEURE

58. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendant or of any entity controlled by Settling Defendant, including, but not limited to, its contractors and subcontractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the obligation. The requirement that the Settling Defendant exercises "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

59. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or

not caused by a force majeure event, the Settling Defendant shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Hazardous Waste Management Division, EPA Region V, within 48 hours of when Settling Defendant first knew or should have known that the event might cause a delay. Within 5 days thereafter, Settling Defendant shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendant's rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendant shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of force majeure for that event. Settling Defendant shall be deemed to have notice of any circumstance of which their contractors or subcontractors had or should have had notice.

60. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of

the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendants in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

61. If the Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraphs 58 and 59, above. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XX. DISPUTE RESOLUTION

62. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

63. Any dispute which arises under or with respect to this Consent 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 it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

64. a. 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, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendant. The Statement of Position

shall specify the Settling Defendant's position as to whether formal dispute resolution should proceed under paragraph 65 or 66.

b. Within fourteen (14) days after receipt of Settling Defendant's Statement of Position, EPA will serve on Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 65 or 66. Within seven (7) days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendant as to whether dispute resolution should proceed under Paragraph 65 or 66, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendant 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 65 or 66.

65. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action 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. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness

of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Paragraph. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Waste Management Division, EPA Region V, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 65.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 65.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 65.b. shall be reviewable by this Court, provided that a notice of judicial appeal is filed by the Settling Defendant with the Court and served on all Parties within 10 days of 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 Consent Decree. The United States may file a response to Settling Defendant's notice of judicial appeal.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Waste Management Division Director 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 Paragraphs 65.a.

66. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action 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 Settling Defendant's Statement of Position submitted pursuant to Paragraph 64, the Director of the Waste Management Division, EPA Region V, will issue a final decision resolving the dispute. The Waste Management Division Director's decision shall be binding on the Settling Defendant unless, within 10 days of receipt of the decision, the Settling Defendant files with the Court and serves on the parties 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 Consent Decree. The United States may file a response to Settling Defendant's notice of judicial appeal.

b. Notwithstanding Paragraph M of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable provisions of law.

67. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendant under this Consent Decree not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 75. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXI (Stipulated Penalties).

#### XXI. STIPULATED PENALTIES

68. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 69 and 70 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XIX (Force Majeure). "Compliance" by Settling Defendant shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved

by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

69. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1 - 30 Days
\$2,000	31 - 60 Days
\$5,000	Over 60 Days

b.

i. Failure to timely comply with any notice provisions of this Consent Decree.

ii. Failure to timely complete any of the following elements of the Remedial Design:

- Draft RD Work Plan
- 30% (Preliminary) Design
- 60% (Intermediate) Design
- 95% (Prefinal) Design
- 100% (Final) Design.

iii. Failure to timely complete any of the major milestones of the Remedial Action in accordance with the approved Final Project Schedule and Section III Task 2.C. of the SOW.

iv. Failure to timely comply with any other requirements of this Consent Decree, except those addressed in Paragraph 70, below.

70. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Section XI of this Consent Decree and Section V of the SOW.

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$150	Days 1 - 30
\$300	Days 31 - 60
\$500	Over 60 Days

71. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XII (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notified Settling Defendant of the deficiency; (2) with respect to a decision by the Director of the Waste Management Division, EPA Region V, under Paragraph 65.b. or 66.a. of Section XX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendant's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission

regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

72. Following EPA's determination that Settling Defendant has failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendant written notification of the same and describe the noncompliance. EPA may send the Settling Defendant a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendant of a violation.

73. All penalties accruing under this Section shall be due and payable to the United States within 30 days of the Settling Defendant's receipt from EPA of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section XX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. EPA, Superfund Accounting, P.O. Box 70753, Chicago, Illinois 60673, and shall reference the EPA Region and Site/Spill ID Number 051Z, and DOJ Case Number 90-11-3-1423, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVII (Notices and Submissions).

74. The payment of penalties shall not alter in any way Settling Defendant's obligation to complete the performance of the Work required under this Consent Decree.

75. Penalties shall continue to accrue as provided in Paragraph 71 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendant to the extent that it prevails.

76.a. If Settling Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect

the penalties, as well as interest. Settling Defendant shall pay interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 73 at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607.

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(1) of CERCLA. Provided, however, that the United States shall not seek civil penalties pursuant to Section 122(1) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

77. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

#### XXII. COVENANTS NOT TO SUE BY PLAINTIFF

78. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 79, 80, and 82 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA relating to the Site. Except with respect to future

liability, these covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 51 of Section XVII (Reimbursement of Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 47.c of Section XV (Certification of Completion). These covenants not to sue are conditioned upon the complete and satisfactory performance by Settling Defendant of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendant and do not extend to any other person.

79. United States' Pre-certification reservations.

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, prior to certification of completion of the Remedial Action:

- (i) conditions at the Site, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and, these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

80. United States' Post-certification reservations.

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, subsequent to certification of completion of the Remedial Action:

- (i) conditions at the Site, previously unknown to the EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part, after the certification of completion,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

81. For purposes of Paragraph 79, the information and the conditions known to EPA shall include only that information and those conditions set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 80, the information and the conditions known to EPA shall include only that information and those conditions set forth in the Record of Decision, the administrative record supporting the Record of Decision, and any information received by EPA pursuant to the requirements of this Consent Decree

prior to Certification of Completion of the Remedial Action. Should the land use at the Site, or on properties adjoining the Site, ever change from current use, which is commercial, industrial or undeveloped, to residential use, such information will be considered conditions or information previously unknown to EPA for purposes of paragraphs 79 and 80.

82. General reservations of rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraph 78. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to, the following:

- (1) claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- (2) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;
- (3) liability for damages for injury to, destruction of, or loss of natural resources;
- (4) liability for assessment costs that have been or may be incurred by U.S. Department of Interior;
- (5) criminal liability;
- (6) liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and

(7) liability for costs that the United States will incur related to the Site but are not within the definition of Future Response Costs.

83. In the event EPA determines that Settling Defendant has failed to implement any provisions of the Work in an adequate or timely manner, EPA may perform any and all portions of the Work as EPA determines necessary. Settling Defendant may invoke the procedures set forth in Section XX (Dispute Resolution) to dispute EPA's determination that the Settling Defendant failed to implement a provision of the Work in an adequate or timely manner as arbitrary and capricious or otherwise not in accordance with law. Such dispute shall be resolved on the administrative record. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendant shall pay pursuant to Section XVII (Reimbursement of Response Costs).

84. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

#### XXIII. COVENANTS BY SETTLING DEFENDANT

85. Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Site or this Consent 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 Site, or any claims arising out of response activities at the Site. However, the Settling Defendant reserves, and this Consent Decree is without prejudice to, actions against the United States based on negligent actions taken directly by the United States (not including oversight or approval of the Settling Defendant's plans or activities) that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA. Nothing in this Consent 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).

XXIV. EFFECT OF SETTLEMENT: CONTRIBUTION PROTECTION

86. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

87. With regard to claims for contribution against Settling Defendant for matters addressed in this Consent Decree, the Parties hereto agree that the Settling Defendant is entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

88. The Settling Defendant agrees that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

89. The Settling Defendant also agrees that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within 10 days of service of the complaint on them. In addition, Settling Defendant shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

90. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant 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 the covenants not to sue set forth in Section XXII (Covenants Not to Sue by Plaintiffs).

XXV. ACCESS TO INFORMATION

91. Settling Defendant shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendant shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

92.a. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendant that the documents or information are not confidential

under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendant.

b. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

93. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

#### XXVI. RETENTION OF RECORDS

94. Until 10 years after the Settling Defendant's receipt of EPA's notification pursuant to Paragraph 48.b of Section XV (Certification of Completion of the Work), Settling Defendant shall

preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary. Until 10 years after the Settling Defendant's receipt of EPA's notification pursuant to Paragraph 48.b of Section XV (Certification of Completion), Settling Defendant shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

95. At the conclusion of this document retention period, Settling Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendant shall deliver any such records or documents to EPA. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no

documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

96. Settling Defendant hereby certifies that to the best of its knowledge it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA and Section 3007 of RCRA.

#### XXVII. NOTICES AND SUBMISSIONS

97. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and the Settling Defendant, respectively.

As to the United States:

Chief, Environmental Enforcement Section  
 Environment and Natural Resources Division  
 U.S. Department of Justice  
 DJ# 90-11-3-1423  
 P.O. Box 7611  
 Washington, D.C. 20044-7611

and

Director, Waste Management Division  
 United States Environmental Protection Agency  
 Region V  
 77 West Jackson Blvd.  
 Chicago, IL 60604-3590

Jennifer L. Wendel  
 EPA Project Coordinator  
 United States Environmental Protection Agency  
 Region V  
 77 West Jackson Blvd., HSRM-6J

As to the Settling Defendant:

John Reggi  
 Ormet Primary Aluminum Corporation's Project Coordinator  
 Ormet Primary Aluminum Corporation  
 P.O. Box 176  
 Hannibal, Ohio 43931

As to the State:

Kay Gossett  
 OEPA Project Coordinator  
 Ohio Environmental Protection Agency  
 Southeast District Office  
 2195 Front Street  
 Logan, Ohio 43138-9031

XXVIII. EFFECTIVE DATE

98. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXIX. RETENTION OF JURISDICTION

99. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XX (Dispute Resolution) hereof.

XXX. APPENDICES

100. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is the ROD.

"Appendix B" is the SOW.

"Appendix C" is the description and/or map of the Site.

"Appendix D" is the land use restrictions that will bind present and future owners of the Site.

XXXI. COMMUNITY RELATIONS

101. Settling Defendant shall propose to EPA its participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Settling Defendant under the Plan. Settling Defendant shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendant shall participate in the preparation of such information for dissemination to the public and

in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

XXXII. MODIFICATION

102. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendant after an opportunity for review and comment by the State. All such modifications shall be made in writing.

103. No material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendant, and the Court. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendant.

104. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

105. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding

the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

106. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

#### XXXIV. SIGNATORIES/SERVICE

107. The undersigned representative of Settling Defendant and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice certify that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

108. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

109. Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept

service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Ormet Primary Aluminum Corporation, relating to the Ormet Corporation Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: Sept 27, 1995

*L. J. Schiffer*  
LOIS J. SCHIFFER  
Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date: 9/27/95

*Leslie E. Lehnert*  
LESLIE LEHNERT  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date: \_\_\_\_\_

\_\_\_\_\_  
Assistant United States Attorney  
Southern District of Ohio  
U.S. Department of Justice

Date: \_\_\_\_\_

\_\_\_\_\_  
VALDAS V. ADAMKUS  
Regional Administrator, Region V  
U.S. Environmental Protection  
Agency  
77 West Jackson Blvd.  
Chicago, IL 60604-3590

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Ormet Primary Aluminum Corporation, relating to the Ormet Corporation Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: \_\_\_\_\_

~~LOIS J. SCHIFFER  
Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530~~

Date: \_\_\_\_\_

~~LESLIE LEHNERT  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530~~

Date: \_\_\_\_\_

~~Assistant United States Attorney  
Southern District of Ohio  
U.S. Department of Justice~~

Date: 9/12/95

*David A. Adamkus*  
\_\_\_\_\_  
VALDAS V. ADAMKUS  
Regional Administrator, Region V  
U.S. Environmental Protection  
Agency  
77 West Jackson Blvd.  
Chicago, IL 60604-3590

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Ormet Primary Aluminum Corporation, No. \_\_\_\_\_ (S.D. Ohio) relating to the Ormet Superfund Site.

FOR THE DEFENDANT

Date: August 29, 1995

Ormet Primary Aluminum Corporation  
P.O. Box 176  
State Route 7  
Hannibal, Ohio 43931  
(614) 483-1381

BY:

  
R.E. BOYLE  
Chairman, President and  
Chief Executive Officer

If different from above, the following is the name and address of Settling Defendant's agent for service and, if Settling Defendant has counsel, the name and address of Settling Defendant's counsel. Counsel may act as agent for service.

Agent for Service

Attorney

Richard S. Wiedman  
Eckert Seamans Cherin & Mellott  
600 Grant Street  
Pittsburgh, PA 15219

Richard S. Wiedman  
Eckert Seamans Cherin & Mellott  
600 Grant Street  
Pittsburgh, PA 15219

Settling Defendant shall notify the United States Department of Justice and U.S. EPA of any change in the identity or address of Settling Defendant, its agent for service, or its counsel.