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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MONTROSE CHEMICAL CORPORATION
OF CALIFORNIA, et al.,

Defendants.

AND RELATED ACTIONS

ORIGINAL
FILED

JUL 19 1996

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NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

NO. 84-6273 CW
(Consolidated)

CONSENT DECREE
[LEVIN GROUP RD/RA]

JUL 19 1996

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CONSENT DECREE - LEVIN GROUP

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13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,)	NO.
)	
)	
17 Plaintiff,)	CONSENT DECREE
)	[LEVIN GROUP RD/RA]
18 v.)	
)	
19 MONTROSE CHEMICAL CORPORATION)	
OF CALIFORNIA, et al.,)	
)	
20 Defendants.)	
)	

21
22 AND RELATED ACTIONS
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CONSENT DECREE

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1 This Consent Decree ("Decree") is made and entered into by and
2 among the United States of America (the "United States"), on
3 behalf of the Environmental Protection Agency, National Oceanic
4 and Atmospheric Administration, the Department of the Interior
5 and Settling Federal Agencies, and Settling Defendants.

6 I. BACKGROUND

7 A. The United States, on behalf of the Administrator of the
8 Environmental Protection Agency ("EPA"), the Secretary of
9 Commerce and the Secretary of the Interior, has filed a civil
10 action for recovery of response costs and natural resource
11 damages, and for injunctive and declaratory relief, pursuant to
12 Sections 106 and 107 of the Comprehensive Environmental Response,
13 Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606,
14 9607, with respect to releases of hazardous substances from a
15 former pesticide formulating and packaging facility now known as
16 the United Heckathorn NPL Site in the City of Richmond, County of
17 Contra Costa, State of California.

18 B. Before the United States filed suit in this matter,
19 several related actions had been pending in this Court arising
20 out of the release or threat of release of hazardous substances
21 from the Site, namely Levin Metals Corporation v. Parr-Richmond
22 Terminal Co. and related actions, Case Nos. C 84 6273; C 84 6324;
23 and C 85 4776 ("Private Party Litigation"). The Honorable
24 Claudia Wilken ordered the parties in the Private Party
25 Litigation, and invited EPA, to engage in mediation to attempt to
26 settle matters. From October 1994 through January 1995, EPA, the
27 Settling Federal Agencies and the private litigants participated

1 in alternative dispute resolution ("ADR") mediated by Judge
2 Coleman Fannin (Ret.) and Lester Levy of J.A.M.S. Endispute, a
3 private firm offering ADR services. This mediation process
4 involved sustained, vigorous and substantial negotiation among
5 the parties. As a result of the mediation and subsequent
6 negotiations, the United States has reached four settlement
7 agreements in principle regarding the Site with potentially
8 responsible parties, including with Settling Defendants ("Four
9 Decrees").

10 C. In accordance with the National Contingency Plan ("NCP")
11 and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F),
12 EPA notified the State of California (the "State") of
13 negotiations with potentially responsible parties regarding the
14 implementation of the remedial design and remedial action for the
15 Site, and EPA has provided the State with an opportunity to
16 participate in such negotiations and be a party to this Consent
17 Decree.

18 D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C.
19 § 9622(j)(1), EPA notified the federal natural resource Trustees,
20 the Department of the Interior and National Oceanic and
21 Atmospheric Administration, of negotiations with potentially
22 responsible parties regarding the release of hazardous substances
23 that may have resulted in injury to the natural resources under
24 federal trusteeship.

25 E. Settling Defendants do not admit any liability to the
26 Plaintiff arising out of the transactions or occurrences alleged
27 in the complaint, nor do they acknowledge that the release or
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1 threatened release of hazardous substances at or from the Site
2 constitutes an imminent or substantial endangerment to the public
3 health or welfare or the environment. The United States on
4 behalf of the Settling Federal Agencies does not admit any
5 liability arising out of the transactions or occurrences alleged
6 in any claim or counterclaim asserted by the parties to the
7 Private Party Litigation, including Settling Defendants.

8 F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA
9 placed the Site on the National Priorities List, set forth at 40
10 C.F.R. Part 300, Appendix B, by publication in the Federal
11 Register on March 14, 1990, 55 Fed. Reg. 9,688.

12 G. In response to a release or a substantial threat of a
13 release of hazardous substances at or from the Site, EPA
14 commenced a Remedial Investigation and Feasibility Study
15 ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430. EPA
16 completed a Remedial Investigation ("RI") Report in February
17 1994, and EPA completed a Feasibility Study ("FS") Report on July
18 5, 1994.

19 H. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA
20 published notice of the completion of the FS and of the proposed
21 plan for remedial action on July 15, 1994, in a major local
22 newspaper of general circulation. EPA provided an opportunity
23 for written and oral comments from the public on the proposed
24 plan for remedial action. A copy of the transcript of the public
25 meeting is available to the public as part of the administrative
26 record upon which the Regional Administrator based the selection
27 of the response action.
28

1 I. The decision by EPA on the remedial action to be
2 implemented at the Site is embodied in a Record of Decision
3 ("ROD"), executed on October 26, 1994, to which the State has
4 given its concurrence. The ROD includes a summary of responses
5 to the public comments. Notice of the final plan was published
6 in accordance with Section 117(b) of CERCLA.

7 J. Based on the information presently available to it, EPA
8 believes that the Work will be properly and promptly conducted by
9 the Settling Defendants if conducted in accordance with the
10 requirements of this Consent Decree and its appendices.

11 K. Solely for the purposes of Section 113(j) of CERCLA, the
12 remedial action selected by the ROD and the Work to be performed
13 by the Settling Defendants shall constitute a response action
14 taken or ordered by the President.

15 L. Settling Defendants currently operate a bulk marine cargo
16 terminal at the Site. Settling Defendants expect to continue to
17 operate the Site as a bulk marine cargo terminal even while the
18 response actions called for in the ROD are being implemented at
19 the Site. The Parties acknowledge that continued cooperation
20 between them is necessary to minimize the impact the response
21 actions may have on the operation of the Site as a cargo
22 terminal.

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

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

4 II. JURISDICTION

5 1. This Court has jurisdiction over the subject matter of
6 this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C.
7 § 9606, 9607, and 9613(b), and personal jurisdiction over the
8 Settling Defendants. The Settling Defendants will not challenge
9 the terms of this Decree, the venue in this District or this
10 Court's jurisdiction to enter and enforce this Decree.

11 III. PARTIES BOUND

12 2. This Consent Decree applies to and is binding upon the
13 United States and upon Settling Defendants and their successors
14 and assigns. Any change in ownership or corporate status of a
15 Settling Defendant including, but not limited to, any transfer of
16 assets or real or personal property, shall in no way alter such
17 Settling Defendant's responsibilities under this Consent Decree.

18 3. Settling Defendants shall provide a copy of this Consent
19 Decree to each contractor hired to perform the Work (as defined
20 below) required by this Consent Decree and to each person
21 representing any Settling Defendant with respect to the Site or
22 the Work and shall condition all contracts entered into hereunder
23 upon performance of the Work in conformity with the terms of this
24 Consent Decree. Settling Defendants or their contractors shall
25 provide written notice of the Consent Decree to all
26 subcontractors hired to perform any portion of the Work required
27 by this Consent Decree. Settling Defendants shall nonetheless be
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1 responsible for ensuring that their contractors and
2 subcontractors perform the Work contemplated herein in accordance
3 with this Consent Decree. With regard to the activities
4 undertaken pursuant to this Consent Decree, each contractor and
5 subcontractor shall be deemed to be in a contractual relationship
6 with the Settling Defendants within the meaning of Section
7 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

8 IV. DEFINITIONS

9 4. Unless otherwise expressly provided herein, terms used in
10 this Consent Decree which are defined in CERCLA or in regulations
11 promulgated under CERCLA shall have the meaning assigned to them
12 in CERCLA or in such regulations. Whenever terms listed below
13 are used in this Consent Decree or in the appendices attached
14 hereto and incorporated hereunder, the following definitions
15 shall apply:

16 "CERCLA" shall mean the Comprehensive Environmental Response,
17 Compensation, and Liability Act of 1980, as amended, 42 U.S.C.
18 §§ 9601 et seq.

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

23 "Damage Assessment Costs" shall mean NOAA's and DOI's costs
24 incurred in connection with activities and studies performed to
25 determine injury to or loss of natural resources, including lost
26 interim uses, resulting from releases of hazardous substances
27 from the United Heckathorn NPL Site.

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

7 "DOI" shall mean the United States Department of the Interior
8 and any successor departments, agencies or instrumentalities of
9 the United States.

10 "EPA" shall mean the United States Environmental Protection
11 Agency and any successor departments, agencies or
12 instrumentalities of the United States.

13 "Interest" shall mean interest at the rate specified for
14 interest on investments of the Hazardous Substance Superfund
15 established under Subchapter A of Chapter 98 of Title 26 of the
16 U.S. Code, compounded on October 1 of each year, in accordance
17 with 42 U.S.C. § 9607(a).

18 "Levin Richmond Terminal" shall mean that real property
19 described in Appendix C.

20 "National Contingency Plan" or "NCP" shall mean the National
21 Oil and Hazardous Substances Pollution Contingency Plan
22 promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605,
23 codified at 40 C.F.R. Part 300, and any amendments thereto.

24 "Natural Resource Damages" shall mean damages, including
25 Damage Assessment Costs and lost use value, recoverable under
26 Section 107 of CERCLA, 42 U.S.C. § 9607, for injury to,
27 destruction of, or loss of any and all Natural Resources at the

1 United Heckathorn Site.

2 "Natural Resources" shall have the meaning provided in Section
3 101(16) of CERCLA, 42 U.S.C. § 9601(16).

4 "NOAA" shall mean the National Oceanic and Atmospheric
5 Administration, an agency of the United States Department of
6 Commerce, and any successor departments, agencies or
7 instrumentalities of the United States.

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

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

14 "Parties" shall mean the United States and the Settling
15 Defendants.

16 "Performance Standards" shall mean placing a cap on the upland
17 area of the Site identified in Figure 6 of the ROD in accordance
18 with this Decree, the Statement of Work and the final remedial
19 design approved by EPA.

20 "Plaintiff" shall mean the United States.

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

24 "Record of Decision" or "ROD" shall mean the EPA Record of
25 Decision relating to the Site signed on October 26, 1994 by the
26 Regional Administrator, EPA Region IX, or her delegate, and all
27 attachments thereto. The ROD is attached as Appendix A.

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1 "Remedial Action" shall mean those activities, except for
2 Operation and Maintenance, to be undertaken by the Settling
3 Defendants to implement that portion of the ROD relating to the
4 upland cap, as set forth in the SOW (see Appendix B) and the
5 final Remedial Design and Remedial Action Work Plans and other
6 plans approved by EPA.

7 "Remedial Action Work Plan" shall mean the document developed
8 pursuant to Paragraph 12 of this Consent Decree and approved by
9 EPA, and any amendments thereto.

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

14 "Remedial Design Work Plan" shall mean the document developed
15 pursuant to Paragraph 11 of this Consent Decree and approved by
16 EPA, and any amendments thereto.

17 "Response Costs" shall mean all costs, including, but not
18 limited to, direct and indirect costs, that the United States,
19 excluding the Settling Federal Agencies, has incurred or will
20 incur in connection with the Site, including, but not limited to,
21 the cost of \$2,693,428.22 reflected in the August 30, 1994 cost
22 summary and costs incurred in performing marine monitoring for at
23 least five (5) years to determine the effectiveness of the remedy
24 selected in the ROD, reviewing or developing plans, reports and
25 other items pursuant to the Four Consent Decrees, verifying or
26 overseeing the Work or other response actions required by the
27 ROD, or otherwise implementing, overseeing, or enforcing the Four
28
CONSENT DECREE

1 Consent Decrees, including, but not limited to, payroll costs,
2 contractor costs, travel costs, laboratory costs, the costs
3 incurred pursuant to Sections VII and IX (including, but not
4 limited to, attorney's fees and any monies paid to secure access
5 and/or to secure institutional controls, including the amount of
6 just compensation).

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

9 "Settling Defendants" shall mean Levin Enterprises, Inc. and
10 Levin Richmond Terminal, Inc..

11 "Settling Federal Agencies" shall mean the General Services
12 Administration and the Agency for International Development, and
13 any successor departments, agencies or instrumentalities of the
14 United States.

15 "Site" or the "United Heckathorn NPL Site" shall mean: the
16 northern half of the Levin Richmond Terminal property bounded by
17 the Lauritzen Channel, Cutting Boulevard, and South Fourth Street
18 in Richmond, California, depicted as a cross-hatched area in the
19 map attached as Appendix F hereto; and the Lauritzen Channel, the
20 Santa Fe Channel, the Parr Canal and the Inner Richmond Harbor
21 Channel, all as depicted in Appendix D hereto.

22 "State" shall mean the State of California.

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

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

4 "United States" shall mean the United States of America,
5 including its agencies, departments and instrumentalities.

6 "Waste Material" shall mean (1) any "hazardous substance"
7 under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any
8 pollutant or contaminant under Section 101(33) of CERCLA, 42
9 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27)
10 of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous waste"
11 under 22 Cal. Code of Regulations Section 66600 et seq.

12 "Work" shall mean all activities Settling Defendants are
13 required to perform under this Consent Decree, except those
14 required by Section XXVI (Retention of Records).

15 V. GENERAL PROVISIONS

16 5. Objectives of the Parties

17 The objectives of the Parties in entering into this Consent
18 Decree are to protect public health or welfare or the environment
19 at the Site by the design and implementation of response actions
20 at the Site by the Settling Defendants; to reimburse response
21 costs of the Plaintiff; to pay Natural Resource Damages to
22 federal Trustees for natural resources; and to resolve cost
23 recovery claims, contribution claims, counterclaims or claims in
24 recoupment among the Parties.

1 6. Commitments by Settling Defendants

2 a. Settling Defendants shall finance and perform the
3 Work in accordance with this Consent Decree, the ROD, the SOW,
4 and all work plans and other plans, standards, specifications,
5 and schedules set forth herein or developed by Settling
6 Defendants and approved by EPA pursuant to this Consent Decree.
7 Settling Defendants shall also reimburse the United States,
8 excluding the Settling Federal Agencies, for response costs as
9 provided in this Consent Decree.

10 b. The obligations of Settling Defendants to finance and
11 perform the Work and to pay amounts owed the United States under
12 this Consent Decree are joint and several. In the event of the
13 insolvency or other failure of any of the Settling Defendants to
14 implement the requirements of this Consent Decree, the remaining
15 Settling Defendants shall complete all such requirements.

16 7. Compliance With Applicable Law

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

26 8. Permits

27 a. As provided in Section 121(e) of CERCLA and Section
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1 300.400(e) of the NCP, no permit shall be required for any
2 portion of the Work conducted entirely on-site (i.e., within the
3 areal extent of contamination or in very close proximity to the
4 contamination and necessary for implementation of the Work).
5 Where any portion of the Work that is not on-site requires a
6 federal or state permit or approval, Settling Defendants shall
7 submit timely and complete applications and take all other
8 actions necessary to obtain all such permits or approvals.

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

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

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

18 a. Within fifteen (15) days after the entry of this
19 Consent Decree, the Settling Defendants shall record a notice of
20 entry of this Consent Decree with the Recorder's Office, Contra
21 Costa County, State of California. Thereafter, each deed, title,
22 or other instrument conveying an interest in the property
23 included in the Site shall contain a notice stating that the
24 property is subject to this Consent Decree and shall reference
25 the recorded location of the Consent Decree and any restrictions
26 applicable to the property under this Consent Decree.

27 b. The obligations of each Settling Defendant with
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1 respect to the provision of access and the implementation of
2 institutional controls under Section IX (Access and Institutional
3 Controls) shall be binding upon any and all such Settling
4 Defendants and any and all persons who subsequently acquire any
5 such interest or portion thereof (hereinafter "Successors-in-
6 Title"). Within fifteen (15) days after the entry of this
7 Consent Decree, each Settling Defendant shall record at the
8 Recorder's Office a notice of obligation to provide access under
9 Section IX (Access) and related covenants, if any. Each
10 subsequent instrument conveying an interest to any such property
11 included in the Site shall reference the recorded location of
12 such notice and covenants applicable to the property.

13 c. Any Settling Defendant and any Successor-in-Title
14 shall, at least thirty (30) days prior to the conveyance of any
15 such interest, give written notice of this Consent Decree to the
16 grantee and written notice to EPA of the proposed conveyance,
17 including the name and address of the grantee, and the date on
18 which notice of the Consent Decree was given to the grantee. In
19 the event of any such conveyance, the Settling Defendants'
20 obligations under this Consent Decree, including their
21 obligations to provide or secure access pursuant to Section IX,
22 shall continue to be met by the Settling Defendants. In
23 addition, if the United States approves, the grantee may perform
24 some or all of the Work under this Consent Decree. In no event
25 shall the conveyance of an interest in property that includes, or
26 is a portion of, the Site release or otherwise affect the
27 liability of the Settling Defendants to comply with the Consent
28

1 Decree.

2 VI. PERFORMANCE OF THE WORK BY SETTling DEFENDANTS

3 10. Selection of Supervising Contractor.

4 a. All aspects of the Work to be performed by Settling
5 Defendants pursuant to Sections VI (Performance of the Work by
6 Settling Defendants), VII (Remedy Review), VIII (Quality
7 Assurance, Sampling and Data Analysis), and XV (Emergency
8 Response) of this Consent Decree shall be under the direction and
9 supervision of the Supervising Contractor, the selection of which
10 shall be subject to disapproval by EPA. Within 10 days after the
11 lodging of this Consent Decree, Settling Defendants shall notify
12 EPA in writing of the name, title, and qualifications of any
13 contractor proposed to be the Supervising Contractor. EPA will
14 issue a notice of disapproval or an authorization to proceed. If
15 at any time thereafter, Settling Defendants propose to change a
16 Supervising Contractor, Settling Defendants shall give such
17 notice to EPA and must obtain an authorization to proceed from
18 EPA before the new Supervising Contractor performs, directs, or
19 supervises any Work under this Consent Decree.

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

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

12 11. Remedial Design.

13 a. Within 60 days after Settling Defendants' execution
14 of this Decree (i.e., the date when both Settling Defendants'
15 signatures are on the Decree) or 10 days after EPA's issuance of
16 an authorization to proceed pursuant to Paragraph 10, whichever
17 is later, Settling Defendants shall submit to EPA a work plan for
18 the design of the Remedial Action at the Site ("Remedial Design
19 Work Plan" or "RD Work Plan"). The Remedial Design Work Plan
20 shall provide for design of the upland capping remedy set forth
21 in the ROD, in accordance with the SOW and for achievement of the
22 Performance Standards and other requirements set forth in the
23 ROD, this Consent Decree and/or the SOW. Upon its approval by
24 EPA, the Remedial Design Work Plan shall be incorporated into and
25 become enforceable under this Consent Decree. At the same time
26 the RD Work Plan is due, the Settling Defendants shall submit to
27 EPA and the State a Health and Safety Plan for field design
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1 activities which conforms to the applicable Occupational Safety
2 and Health Administration and EPA requirements including, but not
3 limited to, 29 C.F.R. § 1910.120.

4 b. The Remedial Design Work Plan shall include plans and
5 schedules for implementation of all remedial design and pre-
6 design tasks identified in the SOW. In addition, the Remedial
7 Design Work Plan shall include a schedule for completion of the
8 Remedial Action Work Plan.

9 c. Upon approval of the Remedial Design Work Plan by EPA
10 and submittal of the Health and Safety Plan for all field
11 activities to EPA and the State, Settling Defendants shall
12 implement the Remedial Design Work Plan. The Settling Defendants
13 shall submit to EPA and the State all plans, submittals and other
14 deliverables required under the approved Remedial Design Work
15 Plan in accordance with the approved schedule for review and
16 approval pursuant to Section XI (EPA Approval of Plans and Other
17 Submissions). Unless otherwise directed by EPA, Settling
18 Defendants shall not commence further Remedial Design activities
19 at the Site prior to approval of the Remedial Design Work Plan.

20 d. The preliminary design submittal shall include, at a
21 minimum, the following: (1) design criteria; (2) results of
22 additional field sampling and pre-design work; (3) project
23 delivery strategy; (4) preliminary plans, drawings and sketches;
24 (5) required specifications in outline form; and (6) preliminary
25 construction schedule.

26 e. The intermediate design submittal, if required by EPA
27 or if independently submitted by the Settling Defendants, shall
28

1 be a continuation and expansion of the preliminary design. Any
2 value engineering proposals must be identified and evaluated
3 during this review.

4 f. The pre-final/final design submittal shall include,
5 at a minimum, the following: (1) final plans and specifications;
6 (2) Operation and Maintenance Plan; (3) Construction Quality
7 Assurance Project Plan ("CQAPP"); (4) Field Sampling Plan
8 (directed at measuring progress towards meeting Performance
9 Standards); and (5) Contingency Plan. The CQAPP, which shall
10 detail the approach to quality assurance during construction
11 activities at the Site, shall specify a quality assurance
12 official ("QA Official"), independent of the Supervising
13 Contractor, to conduct a quality assurance program during the
14 construction phase of the project.

15 12. Remedial Action.

16 a. Within 60 days after Settling Defendants' execution
17 of this Decree (i.e., the date when both Settling Defendants'
18 signatures are on the Decree) or 10 days after EPA's issuance of
19 an authorization to proceed pursuant to Paragraph 10, whichever
20 is later, Settling Defendants shall submit to EPA and the State,
21 a work plan for the performance of the Remedial Action at the
22 Site ("Remedial Action Work Plan"). The Remedial Action Work
23 Plan shall provide for construction and implementation of the
24 remedy set forth in the ROD and achievement of the Performance
25 Standards, in accordance with this Consent Decree, the ROD, the
26 SOW, and the design plans and specifications developed in
27 accordance with the Remedial Design Work Plan and approved by
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1 EPA. Upon its approval by EPA, the Remedial Action Work Plan
2 shall be incorporated into and become enforceable under this
3 Consent Decree. At the same time as they submit the Remedial
4 Action Work Plan, Settling Defendants shall submit to EPA and the
5 State a Health and Safety Plan for field activities required by
6 the Remedial Action Work Plan which conforms to the applicable
7 Occupational Safety and Health Administration and EPA
8 requirements including, but not limited to, 29 C.F.R. § 1910.120.

9 b. The Remedial Action Work Plan shall include the
10 following: (1) the schedule for completion of the Remedial
11 Action; (2) method for selection of the contractor; (3) schedule
12 for developing and submitting other required Remedial Action
13 plans; (4) methodology for implementation of the Construction
14 Quality Assurance Plan; (5) methods for satisfying permitting
15 requirements; (6) methodology for implementation of the Operation
16 and Maintenance Plan; (7) methodology for implementation of the
17 Contingency Plan; (8) tentative formulation of the Remedial
18 Action team; (9) construction quality control plan (by
19 constructor); and (10) procedures and plans for the
20 decontamination of equipment and the disposal of contaminated
21 materials. The Remedial Action Work Plan also shall include a
22 schedule for implementation of all Remedial Action tasks
23 identified in the final design submittal and shall identify the
24 initial formulation of the Settling Defendants' Remedial Action
25 Project Team (including, but not limited to, the Supervising
26 Contractor).

27 c. Upon approval of the Remedial Action Work Plan by
28
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1 EPA, Settling Defendants shall implement the activities required
2 under the Remedial Action Work Plan. The Settling Defendants
3 shall submit to EPA and the State all plans, submittals, or other
4 deliverables required under the approved Remedial Action Work
5 Plan in accordance with the approved schedule for review and
6 approval pursuant to Section XI (EPA Approval of Plans and Other
7 Submissions). Unless otherwise directed by EPA, Settling
8 Defendants shall not commence physical Remedial Action activities
9 at the Site prior to approval of the Remedial Action Work Plan.

10 13. The Settling Defendants shall continue to implement the
11 Remedial Action and O&M until the Performance Standards are
12 achieved and for so long thereafter as is otherwise required
13 under this Consent Decree.

14 14. Modification of the SOW or Related Work Plans.

15 a. If EPA determines that modification to the work
16 specified in the SOW and/or in work plans developed pursuant to
17 the SOW is necessary to carry out and maintain the effectiveness
18 of the remedy set forth in the ROD, EPA may require that such
19 modification be incorporated in the SOW and/or such work plans.
20 A modification may only be required pursuant to this Paragraph to
21 the extent that it is consistent with the scope of the remedy
22 selected in the ROD.

23 b. For the purpose of Paragraphs 14, 46 and 47 of this
24 Decree only, the "scope of the remedy selected in the ROD" is:
25 capping of areas around the former Heckathorn facility, as shown
26 in Figure 6 of the ROD, together with a deed restriction or
27 notice limiting use of the Levin Richmond Terminal to industrial
28

1 or commercial use.

2 c. If Settling Defendants object to any modification
3 determined by EPA to be necessary pursuant to this Paragraph,
4 they may seek dispute resolution pursuant to Section XIX (Dispute
5 Resolution), Paragraph 61 (record review). The SOW and/or
6 related work plans shall be modified in accordance with final
7 resolution of the dispute.

8 d. Settling Defendants shall implement any work
9 required by any modifications incorporated in the SOW and/or in
10 work plans developed pursuant to the SOW in accordance with this
11 Paragraph.

12 e. Nothing in this Paragraph shall be construed to
13 limit EPA's authority to order or require performance of further
14 response actions as otherwise provided in this Consent Decree.

15 15. Settling Defendants acknowledge and agree that nothing in
16 this Consent Decree, the SOW, or the Remedial Design or Remedial
17 Action Work Plans constitutes a warranty or representation of any
18 kind by Plaintiff that compliance with the work requirements set
19 forth in the SOW and the Work Plans will achieve the Performance
20 Standards.

21 16. Settling Defendants shall, prior to any off-Site
22 shipment of Waste Material from the Site to an out-of-state waste
23 management facility, provide written notification to the
24 appropriate state environmental official in the receiving
25 facility's state and to the EPA Project Coordinator of such
26 shipment of Waste Material. However, this notification
27 requirement shall not apply to any off-Site shipments when the
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1 total volume of all such shipments will not exceed 10 cubic
2 yards.

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

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

20 VII. REMEDY REVIEW

21 17. Periodic Review. Settling Defendants shall conduct any
22 studies and investigations as requested by EPA, in order to
23 permit EPA to conduct reviews of whether the Remedial Action is
24 protective of human health and the environment at least every
25 five years as required by Section 121(c) of CERCLA and any
26 applicable regulations.

27 18. EPA Selection of Further Response Actions. If EPA
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1 approved by EPA shall be admissible as evidence, without
2 objection, in any proceeding under this Decree. Settling
3 Defendants shall ensure that EPA personnel and its authorized
4 representatives are allowed access at reasonable times to all
5 laboratories utilized by Settling Defendants in implementing this
6 Consent Decree. In addition, Settling Defendants shall ensure
7 that such laboratories shall analyze all samples submitted by EPA
8 pursuant to the QAPP for quality assurance monitoring. Settling
9 Defendants shall ensure that the laboratories they utilize for
10 the analysis of samples taken pursuant to this Decree perform all
11 analyses according to accepted EPA methods. Accepted EPA methods
12 consist of those methods which are documented in the "Contract
13 Lab Program Statement of Work for Inorganic Analysis" and the
14 "Contract Lab Program Statement of Work for Organic Analysis,"
15 dated February 1988, and any amendments made thereto during the
16 course of the implementation of this Decree. Settling Defendants
17 shall ensure that all laboratories they use for analysis of
18 samples taken pursuant to this Consent Decree participate in an
19 EPA or EPA-equivalent QA/QC program. Settling Defendants shall
20 ensure that all field methodologies utilized in collecting
21 samples for subsequent analysis pursuant to this Decree will be
22 conducted in accordance with the procedures set forth in the QAPP
23 approved by EPA.

24 21. Upon request, the Settling Defendants shall allow split
25 or duplicate samples to be taken by EPA or its authorized
26 representatives. Settling Defendants shall notify EPA not less
27 than 28 days in advance of any sample collection activity unless
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1 shorter notice is agreed to by EPA. In addition, EPA shall have
2 the right to take any additional samples that EPA deem necessary.
3 Upon request, EPA shall allow the Settling Defendants to take
4 split or duplicate samples of any samples it takes as part of the
5 Plaintiff's oversight of the Settling Defendants' implementation
6 of the Work.

7 22. Settling Defendants shall submit to EPA a copy of the
8 results of all sampling and/or tests or other data obtained or
9 generated by or on behalf of Settling Defendants with respect to
10 the Site and/or the implementation of this Consent Decree unless
11 EPA agrees otherwise.

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

17 IX. ACCESS AND INSTITUTIONAL CONTROLS

18 24. Beginning on February 1, 1996, Settling Defendants agree
19 to provide access at all reasonable times to the Site and, to the
20 extent access to the property is controlled by Settling
21 Defendants, any other property to which access is required for
22 the implementation of the response actions called for in the ROD.
23 Such access shall be provided to the United States and its
24 representatives (including EPA and its contractors); the
25 Supervising Contractor and its employees, agents and
26 subcontractors; and technical representatives of any potentially
27 responsible party performing response actions at the Site

1 pursuant to an EPA order or agreement. Access shall be for the
2 purposes of conducting any activity related to the implementation
3 of the response actions called for in the ROD, including, but not
4 limited to:

5 a. Monitoring the Work and other response actions
6 required under the ROD;

7 b. Verifying any data or information submitted to the
8 United States;

9 c. Conducting investigations relating to contamination
10 at or near the Site;

11 d. Obtaining samples;

12 e. Assessing the need for, planning, or implementing
13 additional response actions at or near the Site;

14 f. Inspecting and copying records, operating logs,
15 contracts, or other documents maintained or generated by Settling
16 Defendants or their agents, consistent with Section XXVI; and

17 g. Assessing Settling Defendants' compliance with this
18 Consent Decree or assessing other potentially responsible
19 parties' compliance with an EPA order or agreement.

20 25. To the extent that access to offsite property is required
21 for the implementation of the Work, Settling Defendants shall use
22 best efforts to secure from persons who own or control the
23 property access for Settling Defendants, as well as for the
24 United States and its representatives, including, but not limited
25 to, their contractors, as necessary to effectuate this Consent
26 Decree. For purposes of this Paragraph "best efforts" includes
27 the payment of reasonable sums of money in consideration of
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1 access. If any access required to complete the Work is not
2 obtained by February 1, 1996, Settling Defendants shall promptly
3 notify the United States in writing, and shall include in that
4 notification a summary of the steps Settling Defendants have
5 taken to attempt to obtain access. The United States may, as it
6 deems appropriate, assist Settling Defendants in obtaining
7 access. Any costs the United States incurs in obtaining access,
8 including attorney's fees, shall be considered Response Costs.

9 26. Notwithstanding any provision of this Consent Decree, the
10 United States retains all of its access authorities and rights,
11 including enforcement authorities related thereto, under CERCLA,
12 RCRA and any other applicable statute or regulations.

13 27. Settling Defendants shall record a deed restriction
14 limiting use of the Levin Richmond Terminal to the current
15 industrial classification, i.e., industrial or commercial use.
16 The restriction shall be recorded in substantially the same form
17 as Appendix G attached hereto.

18 X. REPORTING REQUIREMENTS

19 28. In addition to any other requirement of this Consent
20 Decree, Settling Defendants shall submit to EPA two (2) copies of
21 written monthly progress reports that: (a) describe the actions
22 which have been taken toward achieving compliance with this
23 Consent Decree during the previous month; (b) include a summary
24 of all results of sampling and tests and all other data received
25 or generated by Settling Defendants or their contractors or
26 agents in the previous month; (c) identify all work plans, plans
27 and other deliverables required by this Consent Decree completed
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1 and submitted during the previous month; (d) describe all
2 actions, including, but not limited to, data collection and
3 implementation of work plans, which are scheduled for the next
4 six weeks and provide other information relating to the progress
5 of construction, including, but not limited to, critical path
6 diagrams, Gantt charts and Pert charts; (e) include information
7 regarding percentage of completion, unresolved delays encountered
8 or anticipated that may affect the future schedule for
9 implementation of the Work, and a description of efforts made to
10 mitigate those delays or anticipated delays; (f) include any
11 modifications to the work plans or other schedules that Settling
12 Defendants have proposed to EPA or that have been approved by
13 EPA; and (g) describe all activities undertaken in support of the
14 Community Relations Plan during the previous month and those to
15 be undertaken in the next six weeks. Settling Defendants shall
16 submit these progress reports to EPA by the tenth day of every
17 month following the lodging of this Consent Decree until EPA
18 notifies the Settling Defendants pursuant to Paragraph 47.b of
19 Section XIV (Certification of Completion). If requested by EPA,
20 Settling Defendants shall also provide briefings for EPA
21 discussing the progress of the Work.

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

27 30. Upon the occurrence of any event during performance of
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1 referred to above) which purport to document Settling Defendants'
2 compliance with the terms of this Consent Decree shall be signed
3 by an authorized representative of the Settling Defendants.

4 XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

5 34. After review of any plan, report or other item which is
6 required to be submitted for approval pursuant to this Consent
7 Decree, EPA shall: (a) approve, in whole or in part, the
8 submission; (b) approve the submission upon specified conditions;
9 (c) modify the submission to cure the deficiencies; (d)
10 disapprove, in whole or in part, the submission, directing that
11 the Settling Defendants modify the submission; or (e) any
12 combination of the above. However, EPA shall not modify a
13 submission without first providing Settling Defendants at least
14 one notice of deficiency and an opportunity to cure within seven
15 (7) days, except where to do so would cause serious disruption to
16 the Work or where previous submissions have been disapproved due
17 to material defects and the deficiencies in the submission under
18 consideration indicate a bad faith lack of effort to submit an
19 acceptable deliverable.

20 35. In the event of approval, approval upon conditions, or
21 modification by EPA, pursuant to Paragraph 34(a), (b), or (c),
22 Settling Defendants shall proceed to take any action required by
23 the plan, report, or other item, as approved or modified by EPA
24 subject only to their right to invoke the Dispute Resolution
25 procedures set forth in Section XIX (Dispute Resolution) with
26 respect to the modifications or conditions made by EPA. In the
27 event that EPA modifies the submission to cure the deficiencies
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1 pursuant to Paragraph 34(c) and the submission has a material
2 defect, EPA retains its right to seek stipulated penalties, as
3 provided in Section XX (Stipulated Penalties).

4 36. a. Upon receipt of a notice of disapproval pursuant to
5 Paragraph 34(d), Settling Defendants shall, within 14 days or
6 such longer time as specified by EPA in such notice, correct the
7 deficiencies and resubmit the plan, report, or other item for
8 approval. Any stipulated penalties applicable to the submission,
9 as provided in Section XX, shall accrue during the 7-day period
10 or otherwise specified period but shall not be payable unless the
11 resubmission is disapproved or modified due to a material defect
12 as provided in Paragraphs 37 and 38.

13 b. Notwithstanding the receipt of a notice of disapproval
14 pursuant to Paragraph 34(d), Settling Defendants shall proceed,
15 at the direction of EPA, to take any action required by any non-
16 deficient portion of the submission. Implementation of any non-
17 deficient portion of a submission shall not relieve Settling
18 Defendants of any liability for stipulated penalties under
19 Section XX (Stipulated Penalties).

20 37. In the event that a resubmitted plan, report or other
21 item, or portion thereof, is disapproved by EPA, EPA may again
22 require the Settling Defendants to correct the deficiencies, in
23 accordance with the preceding Paragraphs. EPA also retains the
24 right to modify or develop the plan, report or other item.
25 Settling Defendants shall implement any such plan, report, or
26 item as modified or developed by EPA, subject only to their right
27 to invoke the procedures set forth in Section XIX (Dispute
28

1 Resolution).

2 38. If upon resubmission, a plan, report, or item is
3 disapproved or modified by EPA due to a material defect, Settling
4 Defendants shall be deemed to have failed to submit such plan,
5 report, or item timely and adequately unless the Settling
6 Defendants invoke the dispute resolution procedures set forth in
7 Section XIX (Dispute Resolution) and EPA's action is overturned
8 pursuant to that Section. The provisions of Section XIX (Dispute
9 Resolution) and Section XX (Stipulated Penalties) shall govern
10 the implementation of the Work and accrual and payment of any
11 stipulated penalties during Dispute Resolution. If EPA's
12 disapproval or modification is upheld, stipulated penalties shall
13 accrue for such violation from the date on which the initial
14 submission was originally required, as provided in Section XX.

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

22 XII. PROJECT COORDINATORS

23 40. The designated Project Coordinators and Alternate Project
24 Coordinators are as follows:

25 For EPA:

26 Andrew Lincoff
27 EPA Region 9
28 75 Hawthorne Street

1 with the National Contingency Plan, to halt any Work required by
2 this Consent Decree and to take any necessary response action
3 when s/he determines that conditions at the Site constitute an
4 emergency situation or may present an immediate threat to public
5 health or welfare or the environment due to release or threatened
6 release of waste material.

7 XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

8 42. Prior to beginning the Work, Settling Defendants shall
9 establish and maintain financial security in the amount of \$1
10 million in one or more of the following forms:

11 (a) A surety bond guaranteeing performance of the Work;

12 (b) One or more irrevocable letters of credit equalling
13 the total estimated cost of the Work;

14 (c) A trust fund;

15 (d) A guarantee to perform the Work by one or more parent
16 corporations or subsidiaries, or by one or more unrelated
17 corporations that have a substantial business relationship with
18 at least one of the Settling Defendants;

19 (e) A demonstration that one or more of the Settling
20 Defendants satisfy the requirements of 40 C.F.R. § 264.143(f); or

21 (f) A demonstration through providing internal and/or
22 public financial information sufficient to satisfy EPA that
23 Settling Defendants have sufficient assets to make other
24 assurances unnecessary. Updates of such financial information
25 shall be submitted to EPA on a semi-annual basis.

26 43. If the Settling Defendants seek to demonstrate the
27 ability to complete the Work through a guarantee by a third party
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1 approval by EPA. In the event of a dispute, Settling Defendants
2 may reduce the amount of the security in accordance with the
3 final administrative or judicial decision resolving the dispute.

4 45. Settling Defendants may change the form of financial
5 assurance provided under this Section at any time, upon notice to
6 and approval by EPA, provided that the new form of assurance
7 meets the requirements of this Section. In the event of a
8 dispute, Settling Defendants may change the form of the financial
9 assurance only in accordance with the final administrative or
10 judicial decision resolving the dispute.

11 XIV. CERTIFICATION OF COMPLETION

12 46. Completion of the Remedial Action

13 a. Within 90 days after Settling Defendants conclude
14 that the Remedial Action has been fully performed and the
15 Performance Standards have been attained, Settling Defendants
16 shall schedule and conduct a pre-certification inspection to be
17 attended by Settling Defendants and EPA. If, after the pre-
18 certification inspection, the Settling Defendants still believe
19 that the Remedial Action has been fully performed and the
20 Performance Standards have been attained, they shall submit a
21 written report requesting certification to EPA for approval, with
22 a copy to the State, pursuant to Section XI (EPA Approval of
23 Plans and Other Submissions) within 30 days of the inspection.
24 In the report, a registered professional engineer and the
25 Settling Defendants' Project Coordinator shall state that the
26 Remedial Action has been completed in full satisfaction of the
27 requirements of this Consent Decree. The written report shall
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1 include as-built drawings signed and stamped by a professional
2 engineer. The report shall contain the following statement,
3 signed by a responsible corporate official of a Settling
4 Defendant or the Settling Defendants' Project Coordinator:

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

11 If, after completion of the pre-certification inspection and
12 receipt and review of the written report, EPA determines that the
13 Remedial Action or any portion thereof has not been completed in
14 accordance with this Consent Decree or that the Performance
15 Standards have not been achieved, EPA will notify Settling
16 Defendants in writing of the activities that must be undertaken
17 by Settling Defendants pursuant to this Consent Decree to
18 complete the Remedial Action and achieve the Performance
19 Standards. EPA may only require Settling Defendants to perform
20 such activities pursuant to this Paragraph to the extent that
21 such activities are consistent with the "scope of the remedy
22 selected in the ROD," as that term is defined in Paragraph 14.b.
23 EPA will set forth in the notice a schedule for performance of
24 such activities consistent with the Consent Decree and the SOW or
25 require the Settling Defendants to submit a schedule to EPA for
26 approval pursuant to Section XI (EPA Approval of Plans and Other
27 Submissions). Settling Defendants shall perform all activities
28 described in the notice in accordance with the specifications and
schedules established pursuant to this Paragraph, subject to

1 their right to invoke the dispute resolution procedures set forth
2 in Section XIX (Dispute Resolution).

3 b. If EPA concludes, based on the initial or any
4 subsequent report requesting Certification of Completion, that
5 the Remedial Action has been performed in accordance with this
6 Consent Decree and that the Performance Standards have been
7 achieved, EPA will so certify in writing to Settling Defendants.
8 This certification shall constitute the Certification of
9 Completion of the Remedial Action for purposes of this Consent
10 Decree, including, but not limited to, Section XXII (Covenants
11 Not to Sue by Plaintiff). Certification of Completion of the
12 Remedial Action shall not affect Settling Defendants' obligations
13 under this Consent Decree.

14 47. Completion of the Work

15 a. Within 90 days after Settling Defendants conclude
16 that all phases of the Work (including O&M), have been fully
17 performed, Settling Defendants shall schedule and conduct a pre-
18 certification inspection to be attended by Settling Defendants
19 and EPA. If, after the pre-certification inspection, the
20 Settling Defendants still believe that the Work has been fully
21 performed, Settling Defendants shall submit a written report by a
22 registered professional engineer stating that the Work has been
23 completed in full satisfaction of the requirements of this
24 Consent Decree. The report shall contain the following
25 statement, signed by a responsible corporate official of a
26 Settling Defendant or the Settling Defendants' Project

27 Coordinator:

28 CONSENT DECREE

XV. EMERGENCY RESPONSE

48. 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 Defendants shall, subject to Paragraph 49, 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 Defendants shall notify the EPA Emergency Response Unit, Region IX. Settling Defendants 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 Defendants fail to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendants shall reimburse EPA all costs of the response action not inconsistent with the NCP.

49. Nothing in the preceding Paragraph, Paragraph 14 or in this Consent Decree shall be deemed to limit any authority of the United States (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on,

1 save and hold harmless the United States and its officials,
2 agents, employees, contractors, subcontractors, or
3 representatives for or from any and all claims or causes of
4 action arising from, or on account of, negligent or other
5 wrongful acts or omissions of Settling Defendants, their
6 officers, directors, employees, agents, contractors,
7 subcontractors, and any persons acting on their behalf or under
8 their control, in carrying out activities pursuant to this
9 Consent Decree, including, but not limited to, any claims arising
10 from any designation of Settling Defendants as EPA's authorized
11 representatives under Section 104(e) of CERCLA. Further, the
12 Settling Defendants agree to pay the United States all costs it
13 incurs including, but not limited to, attorney's fees and other
14 expenses of litigation and settlement arising from, or on account
15 of, claims made against the United States based on negligent or
16 other wrongful acts or omissions of Settling Defendants, their
17 officers, directors, employees, agents, contractors,
18 subcontractors, and any persons acting on their behalf or under
19 their control, in carrying out activities pursuant to this
20 Consent Decree. The United States shall not be held out as a
21 party to any contract entered into by or on behalf of Settling
22 Defendants in carrying out activities pursuant to this Consent
23 Decree. Neither the Settling Defendants nor any such contractor
24 shall be considered an agent of the United States.

25 b. The United States shall give Settling Defendants
26 notice of any claim for which the United States plans to seek
27 indemnification pursuant to Paragraph 51.a., and shall consult
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1 with Settling Defendants prior to settling such claim.

2 52. Settling Defendants waive all claims against the United
3 States for damages or reimbursement or for set-off of any
4 payments made or to be made to the United States arising from or
5 on account of any contract, agreement, or arrangement between any
6 one or more of Settling Defendants and any person for performance
7 of Work on or relating to the Site, including, but not limited
8 to, claims on account of construction delays. In addition,
9 Settling Defendants shall indemnify and hold harmless the United
10 States with respect to any and all claims for damages or
11 reimbursement arising from or on account of any contract,
12 agreement, or arrangement between any one or more of Settling
13 Defendants and any person for performance of Work on or relating
14 to the Site, including, but not limited to, claims on account of
15 construction delays.

16 53. No later than 15 days before commencing any on-site Work,
17 Settling Defendants shall secure, and shall maintain until the
18 first anniversary of EPA's Certification of Completion of the
19 Remedial Action pursuant to Paragraph 46.b. of Section XIV
20 (Certification of Completion) comprehensive general liability
21 insurance with limits of \$5 million dollars, combined single
22 limit, and automobile liability insurance with limits of \$1
23 million dollars, combined single limit, naming the United States
24 as an additional insured. In addition, for the duration of this
25 Consent Decree, Settling Defendants shall satisfy, or shall
26 ensure that their contractors or subcontractors satisfy, all
27 applicable laws and regulations regarding the provision of
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1 worker's compensation insurance for all persons performing the
2 Work on behalf of Settling Defendants in furtherance of this
3 Consent Decree. Prior to commencement of the Work under this
4 Consent Decree, Settling Defendants shall provide to EPA
5 certificates of such insurance and a copy of each insurance
6 policy. Settling Defendants shall resubmit such certificates and
7 copies of policies each year on the anniversary of the effective
8 date of this Consent Decree. If Settling Defendants demonstrate
9 by evidence satisfactory to EPA that any contractor or
10 subcontractor maintains insurance equivalent to that described
11 above, or insurance covering the same risks but in a lesser
12 amount, then, with respect to that contractor or subcontractor,
13 Settling Defendants need provide only that portion of the
14 insurance described above which is not maintained by the
15 contractor or subcontractor.

16 XVIII. FORCE MAJEURE .. =

17 54. "Force majeure," for purposes of this Consent Decree, is
18 defined as any event arising from causes beyond the control of
19 the Settling Defendants, of any entity controlled by Settling
20 Defendants, or of Settling Defendants' contractors, that delays
21 or prevents the performance of any obligation under this Consent
22 Decree despite Settling Defendants' best efforts to fulfill the
23 obligation. The requirement that the Settling Defendants
24 exercise "best efforts to fulfill the obligation" includes using
25 best efforts to anticipate any potential force majeure event and
26 best efforts to address the effects of any potential force
27 majeure event (1) as it is occurring and (2) following the
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1 potential force majeure event, such that the delay is minimized
2 to the greatest extent possible. "Force Majeure" does not
3 include financial inability to complete the Work or a failure to
4 attain the Performance Standards.

5 55. If any event occurs or has occurred that may delay the
6 performance of any obligation under this Consent Decree, whether
7 or not caused by a force majeure event, the Settling Defendants
8 shall notify orally EPA's Project Coordinator or, in his or her
9 absence, EPA's Alternate Project Coordinator or, in the event
10 both of EPA's designated representatives are unavailable, the
11 Director of the Hazardous Waste Management Division, EPA Region
12 IX, within three (3) days of when Settling Defendants first knew
13 that the event might cause a delay. Within ten (10) days
14 thereafter, Settling Defendants shall provide in writing to EPA
15 an explanation and description of the reasons for the delay; the
16 anticipated duration of the delay; all actions taken or to be
17 taken to prevent or minimize the delay; a schedule for
18 implementation of any measures to be taken to prevent or mitigate
19 the delay or the effect of the delay; the Settling Defendants'
20 rationale for attributing such delay to a force majeure event if
21 they intend to assert such a claim; and a statement as to
22 whether, in the opinion of the Settling Defendants, such event
23 may cause or contribute to an endangerment to public health,
24 welfare or the environment. The Settling Defendants shall
25 include with any notice all available documentation supporting
26 their claim that the delay was attributable to a force majeure.
27 Failure to comply with the above requirements shall preclude
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1 Settling Defendants from asserting any claim of force majeure for
2 that event for the period of time of such failure to comply, and
3 for any additional delay caused by such failure. Settling
4 Defendants shall be deemed to know of any circumstance of which
5 Settling Defendants, any entity controlled by Settling
6 Defendants, or Settling Defendants' contractors knew or should
7 have known.

8 56. If EPA agrees that the delay or anticipated delay is
9 attributable to a force majeure event, the time for performance
10 of the obligations under this Consent Decree that are affected by
11 the force majeure event will be extended by EPA for such time as
12 is necessary to complete those obligations. An extension of the
13 time for performance of the obligations affected by the force
14 majeure event shall not, of itself, extend the time for
15 performance of any other obligation. If EPA does not agree that
16 the delay or anticipated delay has been or will be caused by a
17 force majeure event, EPA will notify the Settling Defendants in
18 writing of its decision. If EPA agrees that the delay is
19 attributable to a force majeure event, EPA will notify the
20 Settling Defendants in writing of the length of the extension, if
21 any, for performance of the obligations affected by the force
22 majeure event.

23 57. If the Settling Defendants elect to invoke the dispute
24 resolution procedures set forth in Section XIX (Dispute
25 Resolution), they shall do so no later than 15 days after receipt
26 of EPA's notice. In any such proceeding, Settling Defendants
27 shall have the burden of demonstrating by a preponderance of the
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1 evidence that the delay or anticipated delay has been or will be
2 caused by a force majeure event, that the duration of the delay
3 or the extension sought was or will be warranted under the
4 circumstances, that best efforts were exercised to avoid and
5 mitigate the effects of the delay, and that Settling Defendants
6 complied with the requirements of Paragraphs 54 and 55, above.
7 If Settling Defendants carry this burden, the delay at issue
8 shall be deemed not to be a violation by Settling Defendants of
9 the affected obligation of this Consent Decree identified to EPA
10 and the Court.

11 XIX. DISPUTE RESOLUTION

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

19 59. Any dispute which arises under or with respect to this
20 Consent Decree shall in the first instance be the subject of
21 informal negotiations between the parties to the dispute. The
22 period for informal negotiations shall not exceed 20 days from
23 the time the dispute arises, unless it is modified by written
24 agreement of the parties to the dispute. The dispute shall be
25 considered to have arisen when one party sends the other parties
26 a written Notice of Dispute.

27 60. a. In the event that the parties cannot resolve a
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1 | dispute by informal negotiations, including mediation, under
2 | Paragraph 59, then the position advanced by EPA shall be
3 | considered binding unless, within seven (7) days after the
4 | conclusion of the informal negotiation period, Settling
5 | Defendants invoke the formal dispute resolution procedures of
6 | this Section by serving on the United States a written Statement
7 | of Position on the matter in dispute, including, but not limited
8 | to, any factual data, analysis or opinion supporting that
9 | position and any supporting documentation relied upon by the
10 | Settling Defendants. The Statement of Position shall specify the
11 | Settling Defendants' position as to whether formal dispute
12 | resolution should proceed under Paragraph 61 or Paragraph 62.

13 | b. Within seven (7) days after receipt of Settling
14 | Defendants' Statement of Position, EPA will serve on Settling
15 | Defendants its Statement of Position, including, but not limited
16 | to, any factual data, analysis, or opinion supporting that
17 | position and all supporting documentation relied upon by EPA.
18 | EPA's Statement of Position shall include a statement as to
19 | whether formal dispute resolution should proceed under Paragraph
20 | 61 or 62. Within five (5) days after receipt of EPA's Statement
21 | of Position, Settling Defendants may submit a Reply.

22 | c. If there is disagreement between EPA and the Settling
23 | Defendants as to whether dispute resolution should proceed under
24 | Paragraph 61 or 62, the parties to the dispute shall follow the
25 | procedures set forth in the paragraph determined by EPA to be
26 | applicable. However, if the Settling Defendants ultimately
27 | appeal to the Court to resolve the dispute, the Court shall
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1 determine which paragraph is applicable in accordance with the
2 standards of applicability set forth in Paragraphs 61 and 62.

3 61. Formal dispute resolution for disputes pertaining to the
4 selection or adequacy of any response action and all other
5 disputes that are accorded review on the administrative record
6 under applicable principles of administrative law shall be
7 conducted pursuant to the procedures set forth in this Paragraph.
8 For purposes of this Paragraph, the adequacy of any response
9 action includes, without limitation: (1) the adequacy or
10 appropriateness of plans, procedures to implement plans, or any
11 other items requiring approval by EPA under this Consent Decree;
12 and (2) the adequacy of the performance of response actions taken
13 pursuant to this Consent Decree. Nothing in this Consent Decree
14 shall be construed to allow any dispute by Settling Defendants
15 regarding the validity of the ROD's provisions.

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

22 b. The Director of the Waste Management Division, EPA
23 Region IX, will issue a final administrative decision resolving
24 the dispute based on the administrative record described in
25 Paragraph 61.a. This decision shall be binding upon the Settling
26 Defendants, subject only to the right to seek judicial review
27 pursuant to Paragraph 61.c. and d.

1 c. Any administrative decision made by EPA pursuant to
2 Paragraph 61.b. shall be reviewable by this Court, provided that
3 a motion for judicial review of the decision is filed by the
4 Settling Defendants with the Court and served on all Parties
5 within 10 days of receipt of EPA's decision. The motion shall
6 include a description of the matter in dispute, the efforts made
7 by the parties to resolve it, the relief requested, and the
8 schedule, if any, within which the dispute must be resolved to
9 ensure orderly implementation of this Consent Decree. The United
10 States may file a response to Settling Defendants' motion.

11 d. In proceedings on any dispute governed by this
12 Paragraph, Settling Defendants shall have the burden of
13 demonstrating that the decision of the Waste Management Division
14 Director is arbitrary and capricious or otherwise not in
15 accordance with law. Judicial review of EPA's decision shall be
16 on the administrative record compiled pursuant to Paragraph 61.a.

17 62. Formal dispute resolution for disputes that neither
18 pertain to the selection or adequacy of any response action nor
19 are otherwise accorded review on the administrative record under
20 applicable principles of administrative law, shall be governed by
21 this Paragraph.

22 a. Following receipt of Settling Defendants' Statement
23 of Position submitted pursuant to Paragraph 65, the Director of
24 the Waste Management Division, EPA Region IX, will issue a final
25 decision resolving the dispute. The Waste Management Division
26 Director's decision shall be binding on the Settling Defendants
27 unless, within 10 days of receipt of the decision, the Settling
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1 Defendants file with the Court and serve on the parties a motion
2 for judicial review of the decision setting forth the matter in
3 dispute, the efforts made by the parties to resolve it, the
4 relief requested, and the schedule, if any, within which the
5 dispute must be resolved to ensure orderly implementation of the
6 Consent Decree. The United States may file a response to
7 Settling Defendants' motion.

8 b. Notwithstanding Paragraph K of Section I
9 (Background) of this Consent Decree, judicial review of any
10 dispute governed by this Paragraph shall be governed by
11 applicable principles of law.

12 63. The invocation of formal dispute resolution procedures
13 under this Section shall not extend, postpone or affect in any
14 way any obligation of the Settling Defendants under this Consent
15 Decree, not directly in dispute, unless EPA or the Court agrees
16 otherwise. Stipulated penalties with respect to the disputed
17 matter shall continue to accrue but payment shall be stayed
18 pending resolution of the dispute as provided in Paragraph 72.
19 Notwithstanding the stay of payment, stipulated penalties shall
20 accrue from the first day of noncompliance with any applicable
21 provision of this Consent Decree. In the event that the Settling
22 Defendants do not prevail on the disputed issue, stipulated
23 penalties shall be assessed and paid as provided in Section XX
24 (Stipulated Penalties).

XX. STIPULATED PENALTIES

64. Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 65 and 66 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). "Compliance" by Settling Defendants 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.

65. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in

Subparagraph b:

<u>Penalty Per Violation</u> <u>Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1-7 days
\$ 5,000	8-14 days
\$ 7,500	15-21 days
\$10,000	22-28 days
\$20,000	29-35 days
\$25,000	36 days and beyond

b. Settling Defendants' failure to:

(1) make the payment required in Paragraph 50;

(2) complete the Work as set out in this Decree and the

SOW;

(3) correct deficiencies and resubmit plans as specified

in Paragraph 36;

CONSENT DECREE

(4) obtain insurance as specified in Paragraph 53; or
(5) maintain the upland cap in accordance with the
Operations and Maintenance Manual.

66. The following stipulated penalties shall accrue per
violation per day for failure to submit timely or adequate
reports or other written documents pursuant to Paragraphs
28, 30, 31:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 100	1-7 days
\$ 500	8-14 days
\$ 750	15-21 days
\$1,000	22 days and beyond

67. In the event that EPA assumes performance of a portion or
all of the Work pursuant to Paragraph 84 of Section XXII
(Covenants Not to Sue by Plaintiff), Settling Defendants shall be
liable for a stipulated penalty in the amount of \$50,000.00.

68. 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 XI (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 notifies Settling Defendants of any deficiency; (2) with
respect to a decision by the Director of the Waste Management
Division, EPA Region IX, under Paragraph 61.b. or 62.a. of
Section XIX (Dispute Resolution), during the period, if any,

1 beginning on the 21st day after the date that Settling
2 Defendants' reply to EPA's Statement of Position is received
3 until the date that the Director issues a final decision
4 regarding such dispute; or (3) with respect to judicial review by
5 this Court of any dispute under Section XIX (Dispute Resolution),
6 during the period, if any, beginning on the 31st day after the
7 Court's receipt of the final submission regarding the dispute
8 until the date that the Court issues a final decision regarding
9 such dispute. Nothing herein shall prevent the simultaneous
10 accrual of separate penalties for separate violations of this
11 Consent Decree.

12 69. Following EPA's determination that Settling Defendants
13 have failed to comply with a requirement of this Consent Decree,
14 EPA may give Settling Defendants written notification of the same
15 and describe the noncompliance. EPA may send the Settling
16 Defendants a written demand for the payment of the penalties.
17 However, penalties shall accrue as provided in the preceding
18 Paragraph regardless of whether EPA has notified the Settling
19 Defendants of a violation.

20 70. All penalties accruing under this Section shall be due
21 and payable to the United States within 30 days of the Settling
22 Defendants' receipt from EPA of a demand for payment of the
23 penalties, unless Settling Defendants invoke the Dispute
24 Resolution procedures under Section XIX (Dispute Resolution).
25 All payments to the United States under this Section shall be
26 paid by certified or cashier's check(s) made payable to "EPA
27 Hazardous Substance Superfund;" shall be mailed to U.S. EPA,
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1 Region IX, Attention: Superfund Accounting, P.O. Box 360863M,
2 Pittsburgh, PA 15251; shall indicate that the payment is for
3 stipulated penalties; and shall reference the EPA Region and
4 Site/Spill ID #09R3, the DOJ Case Number 90-11-3-598, and the
5 name and address of the party making payment. Copies of check(s)
6 paid pursuant to this Section, and any accompanying transmittal
7 letter(s), shall be sent to the United States as provided in
8 Section XXVII (Notices and Submissions).

9 71. The payment of penalties shall not alter in any way
10 Settling Defendants' obligation to complete the performance of
11 the Work required under this Consent Decree.

12 72. Penalties shall continue to accrue as provided in
13 Paragraph 68 during any dispute resolution period, but need not
14 be paid until the following:

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

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

24 c. If the District Court's decision is appealed by any
25 Party, Settling Defendants shall pay all accrued penalties
26 determined by the District Court to be owing to the United States
27 into an interest-bearing escrow account within 60 days of receipt
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XXI. PAYMENT OF NATURAL RESOURCE DAMAGES

75. Within 10 days after entry of this Decree, Settling Defendants shall pay \$19,464.72 to the United States. The allocation to Settling Defendants of \$19,464.72, out of the United States' total Natural Resource Damages recovery of \$400,000 from defendants which are parties to the Four Decrees, was determined solely by potentially responsible parties, including Settling Defendants. Payment shall be made by check, made payable to the Secretary of the Interior and delivered to Chief, Division of Finance Division, United States Fish and Wildlife Service, 4401 North Fairfax Drive, Room 380, Arlington, VA, 22203 (phone (703) 358-1742). The check shall reflect that it is a payment to the "Natural Resource Damage Assessment and Restoration Fund, Account No. 14X5198" and reference the "Levin Richmond/United Heckathorn Site." DOI will assign these funds a special project number to allow the funds to be maintained as a segregated account within the DOI Natural Resource Damage Assessment and Restoration Fund, Account No. 14X5198 ("Trustees Account"). DOI shall, in accordance with law, manage and invest funds in the Trustees Account and segregate in the Account any return on investments or interest accrued for use by the natural resource Trustees. DOI shall not make any charge against the Account for any investment or management services provided. DOI shall hold all funds in the Account, including return on investments or accrued interest, subject to the provisions of this Decree and any agreement DOI and NOAA may reach regarding the use of the funds.

1 76. If Settling Defendants do not timely pay the amount
2 specified in Paragraph 75, this Consent Decree shall be
3 considered an enforceable judgment, under Federal Rules of Civil
4 Procedure 69 and other applicable statutory authority, for
5 purposes of post-judgment collection of the amount due the
6 Trustees, without further order of this Court. Interest shall be
7 assessed at the annual rate established pursuant to 31 U.S.C.
8 § 3717 on the overdue amount from the due date set forth in
9 Paragraph 75 through the date of payment. In addition, in the
10 event the United States takes action to enforce the judgment,
11 Settling Defendants shall reimburse the United States for costs
12 and reasonable attorney's fees incurred in enforcing Settling
13 Defendants' obligation.

1 United States reserves, and this Consent Decree is without
2 prejudice to, the right to institute proceedings in this action
3 or in a new action, or to issue an administrative order seeking
4 to compel Settling Defendants (1) to perform further response
5 actions relating to the Site, or (2) to reimburse the United
6 States for additional costs of response if, prior to
7 Certification of Completion of the Remedial Action:

8 (i) conditions at the Site, previously unknown to EPA,
9 are discovered, or

10 (ii) information, previously unknown to EPA, is received,
11 in whole or in part,

12 and these previously unknown conditions or information together
13 with any other relevant information indicates that the remedial
14 action(s) selected in the ROD are not protective of human health
15 or the environment.

16 79. United States' Post-certification reservations.

17 Notwithstanding any other provision of this Consent Decree, the
18 United States reserves, and this Consent Decree is without
19 prejudice to, the right to institute proceedings in this action
20 or in a new action, or to issue an administrative order seeking
21 to compel Settling Defendants (1) to perform further response
22 actions relating to the Site, or (2) to reimburse the United
23 States for additional costs of response if, subsequent to
24 Certification of Completion of the Remedial Action:

25 (i) conditions at the Site, previously unknown to EPA,
26 are discovered, or

27 (ii) information, previously unknown to EPA, is received,
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1 in whole or in part,
2 and these previously unknown conditions or this information
3 together with other relevant information indicate that the
4 remedial action(s) selected in the ROD are not protective of
5 human health or the environment.

6 80. For purposes of Paragraph 78, the information and the
7 conditions known to EPA shall include only that information and
8 those conditions known to EPA as of the date the ROD was signed
9 and set forth in the ROD for the Site and the administrative
10 record supporting the ROD. For purposes of Paragraph 79, the
11 information and the conditions known to EPA shall include only
12 that information and those conditions known to EPA as of the date
13 of Certification of Completion of the Remedial Action and set
14 forth in the Record of Decision, the administrative record
15 supporting the Record of Decision, the post-ROD administrative
16 record, or in any information received by EPA pursuant to the
17 requirements of this Consent Decree prior to Certification of
18 Completion of the Remedial Action.

19 81. Reservation by the Natural Resource Trustees for Unknown
20 Conditions and New Information. Notwithstanding any other
21 provision of this Decree, the United States, on behalf of its
22 natural resource Trustees, reserves, and this Decree is without
23 prejudice to, the right to bring an action against any Settling
24 Defendant in this action or in a new action to seek recovery of
25 Natural Resource Damages, based on (i) conditions with respect to
26 the Site unknown to the Trustees as of the date this Decree is
27 lodged with the court, that result in or contribute to injury to,
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1 destruction of or loss of natural resources; or (ii) information
2 received by the Trustees after the date the Decree is lodged with
3 the court which indicates that there is injury to, destruction
4 of, or loss of natural resources of a type unknown, or a
5 magnitude greater than was known, to the Trustees.

6 82. Notwithstanding any other provision of this Decree, the
7 United States reserves, and this Decree is without prejudice to,
8 the right to institute proceedings in this action or in a new
9 action, or to issue an administrative order, seeking to compel
10 Settling Defendants to perform further response actions relating
11 to the Site or to reimburse the United States for response costs
12 incurred after the effective date of this Decree, if EPA
13 determines, through an amendment to the ROD, that the remedial
14 actions selected in the ROD are not protective of human health
15 and the environment and EPA selects further response actions at
16 the Site.

17
18 83. General Reservation of Rights. The covenants not to sue
19 set forth above do not pertain to any matters other than those
20 expressly specified in Paragraph 77. The United States reserves,
21 and this Consent Decree is without prejudice to, all rights
22 against Settling Defendants with respect to all other matters,
23 including but not limited to, the following:

- 24 (1) claims based on a failure by Settling Defendants to
25 meet a requirement of this Consent Decree;
26 (2) liability arising from the past, present, or future
27 disposal, release, or threat of release of Waste
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1 Materials outside of the Site, including liability for
2 damages for injury to, destruction of, or loss of natural
3 resources, and for the costs of any natural resource
4 damage assessments;

5 (3) liability for future disposal of Waste Material at
6 the Site, other than as provided in the ROD, the Work, or
7 otherwise ordered by EPA;

8 (4) criminal liability; and

9 (5) liability for violations of federal or state law
10 which occur during or after implementation of the
11 Remedial Action.

12 84. Work Takeover In the event EPA determines that Settling
13 Defendants have ceased implementation of any portion of the Work,
14 are seriously or repeatedly deficient or late in their
15 performance of the Work, or are implementing the Work in a manner
16 which may cause an endangerment to human health or the
17 environment, EPA may assume the performance of all or any
18 portions of the Work as EPA determines necessary. Settling
19 Defendants may invoke the procedures set forth in Section XIX
20 (Dispute Resolution), Paragraph 61, to dispute EPA's
21 determination that takeover of the Work is warranted under this
22 Paragraph. Costs incurred by the United States in performing the
23 Work pursuant to this Paragraph shall be considered response
24 costs, and Settling Defendants shall reimburse EPA all costs of
25 the response action not inconsistent with the NCP.

26 85. Notwithstanding any other provision of this Consent
27 Decree, the United States retains all authority and reserves all
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1 wrongful act or omission of any employee of the United States
2 while acting within the scope of his office or employment under
3 circumstances where the United States, if a private person, would
4 be liable to the claimant in accordance with the law of the place
5 where the act or omission occurred. However, any such claim
6 shall not include a claim for any damages caused, in whole or in
7 part, by the act or omission of any person, including any
8 contractor, who is not a federal employee as that term is defined
9 in 28 U.S.C. § 2671; nor shall any such claim include a claim
10 based on EPA's selection of response actions, or the oversight or
11 approval of the Settling Defendants' plans or activities. The
12 foregoing applies only to claims which are brought pursuant to
13 any statute other than CERCLA and for which the waiver of
14 sovereign immunity is found in a statute other than CERCLA.

15 88. Nothing in this Consent Decree shall be deemed to
16 constitute preauthorization of a claim within the meaning of
17 Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.
18 § 300.700(d).

19 89. The Settling Defendants agree that in this action or in
20 an new action or proceeding seeking to recover the United States'
21 response costs, or to compel Settling Defendants to undertake a
22 response action, or to recover Natural Resource Damages incurred
23 for releases of hazardous substances at the Site, the United
24 States may, at its option, use any depositions taken in the
25 Private Party Litigation for any purpose as though the court had
26 found that the conditions set forth in Fed. R. Civ. P. 32(a)(3)
27 are satisfied and as though the deponent were then present and
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1 testifying.

2 XXIV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

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

14 91. The Parties agree, and by entering this Consent Decree
15 this Court finds, that the Settling Defendants and Settling
16 Federal Agencies are entitled, as of the effective date of this
17 Consent Decree, to protection from contribution actions or claims
18 as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2)
19 for matters addressed in this Consent Decree. "Matters addressed
20 in this Decree" shall mean Natural Resource Damages and all
21 response costs incurred or to be incurred by the United States or
22 any other person or entity at the Site, but do not include
23 natural resource damages and response costs incurred or to be
24 incurred in connection with the presence, release or threatened
25 release of a hazardous substance outside the Site.

26 92. The Settling Defendants agree that with respect to any
27 suit or claim for contribution brought by them for matters
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1 related to this Consent Decree they will notify the United States
2 in writing no later than 60 days prior to the initiation of such
3 suit or claim.

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

12 94. In any subsequent administrative or judicial proceeding
13 initiated by the United States for injunctive relief, recovery of
14 response costs, or other appropriate relief relating to the Site,
15 Settling Defendants shall not assert, and may not maintain, any
16 defense or claim based upon the principles of waiver, res
17 judicata, collateral estoppel, issue preclusion, claim-splitting,
18 or other defenses based upon any contention that the claims
19 raised by the United States in the subsequent proceeding were or
20 should have been brought in the instant case; provided, however,
21 that nothing in this Paragraph affects the enforceability of the
22 covenants not to sue set forth in Section XXII (Covenants Not to
23 Sue by Plaintiff).

24 25 XXV. ACCESS TO INFORMATION

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

11 96. a. Settling Defendants may assert business
12 confidentiality claims covering part or all of the documents or
13 information submitted to Plaintiff under this Consent Decree to
14 the extent permitted by and in accordance with Section 104(e)(7)
15 of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b).
16 Documents or information determined to be confidential by EPA
17 will be afforded the protection specified in 40 C.F.R. Part 2,
18 Subpart B. If no claim of confidentiality accompanies documents
19 or information when they are submitted to EPA, or if EPA has
20 notified Settling Defendants that the documents or information
21 are not confidential under the standards of Section 104(e)(7) of
22 CERCLA, the public may be given access to such documents or
23 information without further notice to Settling Defendants.

24 b. The Settling Defendants may assert that certain documents,
25 records and other information are privileged under the attorney-
26 client privilege or any other privilege recognized by federal
27 law. If the Settling Defendants assert such a privilege in lieu
28

1 of providing documents, they shall provide the Plaintiff with the
2 following: (1) the title of the document, record, or
3 information; (2) the date of the document, record, or
4 information; (3) the name and title of the author of the
5 document, record, or information; (4) the name and title of each
6 addressee and recipient; (5) a description of the contents of the
7 document, record, or information; and (6) the privilege asserted
8 by Settling Defendants. However, no documents, reports or other
9 information created or generated pursuant to the requirements of
10 the Consent Decree shall be withheld on the grounds that they are
11 privileged.

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

17 XXVI. RETENTION OF RECORDS

18 98. Except as specifically provided in Paragraph 101, until
19 10 years after the Settling Defendants' receipt of EPA's
20 notification pursuant to Paragraph 47.b of Section XIV
21 (Certification of Completion of the Work), each Settling
22 Defendant shall preserve and retain all records and documents now
23 in its possession or control or which come into its possession or
24 control that relate in any manner to the performance of the Work
25 or liability of any person for response actions conducted and to
26 be conducted at the Site, regardless of any corporate retention
27 policy to the contrary. Until 10 years after the Settling
28

1 Defendants' receipt of EPA's notification pursuant to Paragraph
2 47.b of Section XIV (Certification of Completion), Settling
3 Defendants shall also instruct their contractors and agents to
4 preserve all documents, records, and information of whatever
5 kind, nature or description relating to the performance of the
6 Work.

7 99. At the conclusion of this document retention period, or
8 at any earlier date, Settling Defendants shall notify the United
9 States at least 90 days prior to the destruction of any such
10 records or documents, and, upon request by the United States
11 Settling Defendants shall deliver any such records or documents
12 to EPA. Settling Defendants shall be relieved of the
13 preservation and retention obligation 180 days after giving such
14 notice as to the specific records or documents described in the
15 notice. The Settling Defendants may assert that certain
16 documents, records and other information are privileged under the
17 attorney-client privilege or any other privilege recognized by
18 federal law. If the Settling Defendants assert such a privilege,
19 they shall provide the Plaintiffs with the following: (1) the
20 title of the document, record, or information; (2) the date of
21 the document, record, or information; (3) the name and title of
22 the author of the document, record, or information; (4) the name
23 and title of each addressee and recipient; (5) a description of
24 the subject of the document, record, or information; and (6) the
25 privilege asserted by Settling Defendants. However, no
26 documents, reports or other information created or generated
27 pursuant to the requirements of the Consent Decree shall be
28

1 withheld on the grounds that they are privileged.

2 100. Each Settling Defendant hereby certifies individually
3 that, to the best of its knowledge and belief, after thorough
4 inquiry, it has not altered, mutilated, discarded, destroyed or
5 otherwise disposed of any records, documents or other information
6 relating to its potential liability regarding the Site since
7 notification of potential liability by the United States or the
8 State or the filing of suit against it regarding the Site and
9 that it has fully complied with any and all EPA requests for
10 information pursuant to Sections 104(e) and 122(e) of CERCLA, 42
11 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42
12 U.S.C. § 6927.

13 XXVII. NOTICES AND SUBMISSIONS

14 101. Whenever, under the terms of this Consent Decree,
15 written notice is required to be given or a report or other
16 document is required to be sent by one Party to another, it shall
17 be directed to the individuals at the addresses specified below,
18 unless those individuals or their successors give notice of a
19 change to the other Parties in writing. All notices and
20 submissions shall be considered effective upon receipt, unless
21 otherwise provided. Written notice as specified herein shall
22 constitute complete satisfaction of any written notice
23 requirement of the Consent Decree with respect to the United
24 States, EPA and the Settling Defendants, respectively.

1 As to the United States:

2 Chief, Environmental Enforcement Section
3 Environment and Natural Resources Division
4 U.S. Department of Justice
5 P.O. Box 7611
6 Ben Franklin Station
7 Washington, D.C. 20044
8 Re: DJ # 90-11-3-598

9 and

10 Director, Waste Management Division
11 United States Environmental Protection Agency
12 Region IX
13 75 Hawthorne Street
14 San Francisco, CA 94105

15 As to EPA:

16 Andrew Lincoff
17 EPA Project Coordinator
18 United States Environmental Protection Agency
19 Region IX
20 75 Hawthorne Street
21 San Francisco, CA 94105

22 As to the Settling Defendants:

23 Mike McCoy
24 Settling Defendants' Project Coordinator
25 Levin Richmond Terminal
26 402 Wright Ave.
27 Richmond, CA 94804

28 XXVIII. EFFECTIVE DATE

102. 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

103. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants 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

1 apply to the Court at any time for such further order, direction,
2 and relief as may be necessary or appropriate for the
3 construction or modification of this Consent Decree, or to
4 effectuate or enforce compliance with its terms, or to resolve
5 disputes in accordance with Section XIX (Dispute Resolution)
6 hereof.

7 XXX. APPENDICES

8 104. The following appendices are attached to and
9 incorporated into this Consent Decree:

10 "Appendix A" is the ROD.

11 "Appendix B" is the SOW.

12 "Appendix C" is the description of the Levin Richmond
13 Terminal.

14 "Appendix D" is the description and/or map of the marine
15 portion of the Site.

16 "Appendix E" is a form of the deed restriction.

17 "Appendix F" is a map of the land portion of the Site.

18 XXXI. COMMUNITY RELATIONS

19 105. Settling Defendants shall propose to EPA their
20 participation in the community relations plan to be developed by
21 EPA. EPA will determine the appropriate role for the Settling
22 Defendants under the Plan. Settling Defendants shall also
23 cooperate with EPA in providing information regarding the Work to
24 the public. As requested by EPA, Settling Defendants shall
25 participate in the preparation of such information for
26 dissemination to the public and in public meetings which may be
27 held or sponsored by EPA to explain activities at or relating to

1 regarding the Consent Decree disclose facts or considerations
2 which indicate that the Consent Decree is inappropriate,
3 improper, or inadequate. Settling Defendants consent to the
4 entry of this Consent Decree without further notice. If for any
5 reason the Court should decline to approve this Consent Decree in
6 the form presented, this agreement is voidable at the sole
7 discretion of any Party and the terms of the agreement may not be
8 used as evidence in any litigation between the Parties.

9 XXXIV. SIGNATORIES/SERVICE

10 110. Each undersigned representative of a Settling Defendant
11 to this Consent Decree and the Assistant Attorney General for
12 Environment and Natural Resources of the Department of Justice
13 certifies that he or she is fully authorized to enter into the
14 terms and conditions of this Consent Decree and to execute and
15 legally bind such Party to this document.

16 111. Each Settling Defendant hereby agrees not to oppose
17 entry of this Consent Decree by this Court or to challenge any
18 provision of this Consent Decree unless the United States has
19 notified the Settling Defendants in writing that it no longer
20 supports entry of the Consent Decree.

21 112. Each Settling Defendant shall identify, on the attached
22 signature page, the name, address and telephone number of an
23 agent who is authorized to accept service of process by mail on
24 behalf of that Party with respect to all matters arising under or
25 relating to this Consent Decree. Settling Defendants hereby
26 agree to accept service in that manner and to waive the formal
27 service requirements set forth in Rule 4 of the Federal Rules of
28

1 Civil Procedure and any applicable local rules of this Court,
2 including, but not limited to, service of a summons.

3 SO ORDERED THIS _____ DAY OF _____, 19__.

4
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6 United States District Judge
7 CLAUDIA WILKEN
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1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. Montrose Chemical Corporation of
California, relating to the United Heckathorn Superfund Site.

3 FOR THE UNITED STATES OF AMERICA

4
5 Date: June 9, 1996

Lois J. Schiffer
6 LOIS J. SCHIFFER
7 Assistant Attorney General
8 Environment and Natural Resources
Division
U.S. Department of Justice

9
10 Date: _____

11 HELEN H. KANG
12 Environmental Enforcement Section
13 Environment and Natural Resources
Division

14 Date: _____

15 S. RANDALL HUMM
16 Environment & Natural Resources
Division
17 P.O. Box 23986
Washington, D.C. 20026-3986
18 (202) 514-3097

19
20 Date: _____

21 MICHAEL J. YAMAGUCHI
22 United States Attorney
Northern District of California
23 PATRICK BUPARA
Assistant United States Attorney

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. Montrose Chemical Corporation of
California, related to the United Heckathorn Superfund Site.

3 FOR THE UNITED STATES OF AMERICA

4
5 Date: _____

6 KEITH TAKATA
7 Deputy Director for Superfund
Region 9
8 U.S. Environmental Protection
Agency

9
10 Date: _____

11 JOHN J. LYONS
12 Assistant Regional Counsel
13 U.S. Environmental Protection Agency
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1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. Montrose Chemical Corporation of
California, related to the United Heckathorn Superfund Site.

3 FOR SETTLING DEFENDANTS

4 LEVIN ENTERPRISES, INC.

5
6 Date: _____

7 [NAME, TITLE]

8 LEVIN RICHMOND TERMINAL, INC.

9
10 Date: _____

11 [NAME, TITLE]