

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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UNITED STATES OF AMERICA
and STATE OF VERMONT

Plaintiffs,

v.

BURGESS BROTHERS, INC.,
EVEREADY BATTERY COMPANY,
INC., and CLYDE BURGESS, JR.

Defendants.

CIVIL ACTION NO. 2:99-cv-194

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U.S. DISTRICT COURT
BURLINGTON, VT

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NORTHEAST REGION

TABLE OF CONTENTS

	<u>Page</u>
I. <u>BACKGROUND</u>	1
II. <u>JURISDICTION</u>	2
III. <u>PARTIES BOUND</u>	3
IV. <u>DEFINITIONS</u>	3
V. <u>GENERAL PROVISIONS</u>	6
VI. <u>PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS</u>	7
VII. <u>REMEDY REVIEW</u>	11
VIII. <u>QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS</u>	11
IX. <u>ACCESS AND INSTITUTIONAL CONTROLS</u>	12
X. <u>REPORTING REQUIREMENTS</u>	15
XI. <u>EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS</u>	16
XII. <u>PROJECT COORDINATORS</u>	17
XIII. <u>ASSURANCE OF ABILITY TO COMPLETE WORK</u>	18
XIV. <u>CERTIFICATION OF COMPLETION</u>	19
XV. <u>EMERGENCY RESPONSE</u>	20
XVI. <u>REIMBURSEMENT OF RESPONSE COSTS AND PAYMENT FOR NATURAL RESOURCE DAMAGES</u>	21
XVII. <u>INDEMNIFICATION AND INSURANCE</u>	24
XVIII. <u>FORCE MAJEURE</u>	25
XIX. <u>DISPUTE RESOLUTION</u>	26
XX. <u>STIPULATED PENALTIES</u>	28
XXI. <u>COVENANTS NOT TO SUE BY PLAINTIFFS</u>	31
XXII. <u>COVENANTS BY SETTLING DEFENDANTS</u>	34
XXIII. <u>EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION</u>	36
XXIV. <u>ACCESS TO INFORMATION</u>	37
XXV. <u>RETENTION OF RECORDS</u>	37
XXVI. <u>NOTICES AND SUBMISSIONS</u>	38
XXVII. <u>EFFECTIVE DATE</u>	39
XXVIII. <u>RETENTION OF JURISDICTION</u>	39
XXIX. <u>APPENDICES</u>	39
XXX. <u>COMMUNITY RELATIONS</u>	40
XXXI. <u>MODIFICATION</u>	40
XXXII. <u>LODGING AND OPPORTUNITY FOR PUBLIC COMMENT</u>	40
XXXIII. <u>SIGNATORIES/SERVICE</u>	40
XXXIV. <u>FINAL JUDGMENT</u>	41

I. BACKGROUND

A. The United States, on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607, and Section 7003 of the Resource, Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Burgess Brothers Superfund Site in Bennington and Woodford, Vermont, (the "Site" as defined below) together with accrued interest; and (2) performance of Remedial Design/Remedial Action ("RD/RA") by the Settling Defendants (as defined below) at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on March 31, 1989, 54 Fed. Reg. 13296.

D. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, on or about September 4, 1991 the EPA and the Settling Defendants entered into an Administrative Order by Consent for a Remedial Investigation/Feasibility Study ("AOC") which required Settling Defendants to, inter alia, perform or finance a Remedial Investigation/Feasibility Study ("RI/FS") for the Site. On or about June 2, 1992, EPA and the Settling Defendants entered into a separate Administrative Agreement whereby the Settling Defendants agreed to reimburse EPA for certain response costs.

E. On or about August 11, 1994, Settling Defendant Eveready Battery Company, Inc. ("Eveready") filed a complaint, Civil Action No. 2:94-CV-235, in the United States District Court for the District of Vermont against the United States of America, the Department of Defense, the Department of the Army, the Department of the Navy and approximately 30 other parties seeking past costs incurred, and future costs to be incurred, by Eveready in connection with the Site.

F. On or about April 20, 1998, the United States and Eveready settled Eveready's lawsuit and dismissed the complaint pursuant to a Consent Decree ("April 20, 1998 Consent Decree") in which the United States agreed to, inter alia, (i) reimburse Eveready for a portion of the costs it had incurred in performing the RI/FS under the AOC and (ii) pay Eveready a portion of the costs it expected to incur if it performed or financed the RD/RA.

G. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Vermont (the "State") on September 9, 1998 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

H. The State of Vermont ("State") also filed a complaint against the Settling Defendants in this Court alleging that they are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and under 10 V.S.A. § 6615.

I. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Department of the Interior and the National Oceanic and Atmospheric Administration on September 9, 1998, of negotiations with potentially responsible parties

regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustees to participate in the negotiation of this Consent Decree.

J. EPA approved the Remedial Investigation on April 30, 1997; and on April 22, 1998 EPA approved the Feasibility Study.

K. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on June 15, 1998, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the EPA based the selection of the response action.

L. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on September 25, 1998, on which the State has given its concurrence. The ROD includes EPA's explanation for any significant differences between the final plan and the proposed plan as well as a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

M. Based on the information presently available to EPA and the State, EPA and the State believe that the Work (as defined below) will be properly and promptly conducted by the Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

N. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the Remedial Action selected by the ROD and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

O. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiffs arising out of the transactions or occurrences alleged in the complaints, nor do they acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

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

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

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345; 42 U.S.C. §§ 9606, 9607 and 9613(b); and 42 U.S.C. § 6973. This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

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

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

IV. DEFINITIONS

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

"April 20, 1998 Consent Decree" shall mean that document entitled Consent Decree entered into between Eveready and the United States and approved by the United States District Court for the District of Vermont on April 20, 1998 in the cause captioned: "Eveready Battery Company, Inc., plaintiff vs. United States of America, et al., defendants, Case No. 94-CV-235."

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

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

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

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

"EPA Project Coordinator" and "EPA Alternate Project Coordinator" shall mean that person designated as a Project Coordinator pursuant to Paragraph 44.

"Eveready" shall mean Settling Defendant Eveready Battery Company, Inc., a Delaware corporation.

"Future Response Costs" shall mean all costs, including, but not limited to, direct and

indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Section XXI. Future Response Costs shall also include all Interim Response Costs, and all Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from December 31, 1998 to the date of entry of this Consent Decree.

"Institutional Controls" shall mean land and/or water use restrictions including, but not limited to, restrictions in the form of contractual agreements, restrictive easements/covenants that run with the land, and governmental controls.

"Interim Response Costs" shall mean all costs, including direct and indirect costs, (a) paid by the United States in connection with the Site between December 31, 1998 and the effective date of this Consent Decree, or (b) incurred prior to the effective date of this Consent Decree but paid after that date.

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

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

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

"Natural Resource Damages" shall mean any "damages" as that term is defined in Section 101(6) of CERCLA, 42 U.S.C. § 9601(6), including damages recoverable under Section 107(a)(4)(c) of CERCLA, 42 U.S.C. § 9607(a)(4)(c), for injury to, destruction of, or loss of any and all Natural Resources, including the reasonable cost of assessing such injury, destruction or loss, as a result of releases or threats of releases at or from the Site.

"Non-Owner Settling Defendants" shall mean the Settling Defendants listed in Appendix D.

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

"Owner Settling Defendant" shall mean the Settling Defendant listed in Appendix E.

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

"Parties" shall mean the United States, the State of Vermont, and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through December 31, 1998, plus Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a)

through such date.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in Section X of the ROD and Section IV of the SOW.

"Plaintiffs" shall mean the United States and the State of Vermont.

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

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on September 25, 1998, by the Director of the Office of Site Remediation and Restoration, EPA Region I, and all attachments thereto. The ROD is attached as Appendix A.

"Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants to implement the ROD, in accordance with the SOW and the final Remedial Design and Remedial Action Work Plans and other plans approved by EPA.

"Remedial Action Work Plan" shall mean the document developed pursuant to Paragraph 13 of this Consent Decree and approved by EPA, and any amendments thereto.

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

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

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

"Settling Defendants" shall mean those Parties identified in Appendices D (Non-Owner Settling Defendants) and E (Owner Settling Defendant).

"Site" shall mean the Burgess Brothers Superfund Site, encompassing approximately three acres, located at RR #3 between Burgess Road and the Walloomsac Brook on property owned by members of the Burgess family in Woodford and in Bennington, Vermont, and described generally in Appendix C.

"State" shall mean the State of Vermont.

"State Future Response Costs" shall mean all costs, not inconsistent with the National Contingency Plan, direct and indirect costs, other than State Oversight Costs, that the State incurs on and after the effective date of the Consent Decree, including, but not limited to costs that the State may incur: (i) in developing any plans, reports or other items which Settling Defendants fail to submit under this Consent Decree; (ii) in modifying any plans, reports, and other items pursuant to Section XI (EPA Approval of Plans and Other Submissions) except for costs related to the review of any such submissions; (iii) in implementing the Work under Section VI (Performance of the Work by Settling Defendants); (iv) in enforcing the terms of this Consent Decree; (v) in connection with Section VII (Remedy Review); (vi) in connection with Section XV (Emergency Response); and (vii) in connection with Paragraph 86 of Section XXI (State's Post-Certification Reservations).

"State Oversight Costs" shall mean all costs, not inconsistent with the National Contingency Plan, including, but not limited to, direct and indirect costs, that the State incurs on and after the effective date of the Consent Decree in reviewing or developing plans, reports and other items pursuant to the Consent Decree, verifying the Work, or otherwise implementing

overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs contractor costs, travel costs, laboratory costs, and the costs incurred pursuant to Section IX (Access and Institutional Controls) (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls, including, but not limited to, the amount of just compensation).

"State Project Coordinator" and "State Alternate Project Coordinator" shall mean that person designated as a Project Coordinator pursuant to Paragraph 44.

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

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

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

"VTDEC" shall mean the Vermont Department of Environmental Conservation and any successor departments or agencies of the State.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous material" under 10 V.S.A. § 6602(16).

"Work" shall mean all activities Settling Defendants are required to perform under this Consent Decree and the SOW, except those required by Section XXV (Retention of Records).

V. GENERAL PROVISIONS

5. **Objectives of the Parties.** The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Settling Defendants, to reimburse response costs of the Plaintiffs, to satisfy the obligations of the Settling Defendants to Plaintiffs for Natural Resource Damages, and to resolve the claims of Plaintiffs against Settling Defendants as provided in this Consent Decree.

6. Commitments by Settling Defendants

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

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

7. **Compliance With Applicable Law.** All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendants must

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

8. Permits

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

b. The Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work but shall be entitled to such relief only if they have filed timely and complete permit applications.

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

9. Notice to Successors-in-Title

a. At least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Owner Settling Defendant(s) conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "restrictive easements") pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, the Owner Settling Defendant(s) conveying the interest shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

b. In the event of any such conveyance, the Owner Settling Defendant's obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Owner Settling Defendant(s). In no event shall the conveyance release or otherwise affect the liability of the Owner Settling Defendant(s) to comply with all provisions of this Consent Decree, absent the prior written consent of EPA. If the United States approves, after a reasonable opportunity for review and comment by the State, the grantee may perform some or all of the Work under this Consent Decree.

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

10. The Settling Defendants shall perform the Work for the Site as described in and according to all provisions of this Consent Decree; the ROD, attached hereto as Appendix A; the SOW (which the Parties agree is consistent with the ROD), attached hereto as Appendix B; and any modifications thereto or submittals or schedules thereunder. The ROD, the SOW, and all modifications to the SOW, and, upon approval, any attachments and submittals thereunder,

are hereby incorporated by reference and made an enforceable part of this Consent Decree. The Work must meet all applicable or relevant and appropriate federal and state environmental laws and standards, Performance Standards, cleanup goals, and remedial action objectives described in the ROD, SOW, or any amendments thereto. As described with more particularity in the SOW, the major components of the Remedial Action for the Site are as follows:

- a. a multi-barrier, low permeability cap, with drainage controls, over the landfill area;
- b. a single-barrier cap over the marshy area;
- c. a landfill gas management system;
- d. a soil vapor extraction/air sparging system within the former lagoon cells, including treatment of off-gas from the system;
- e. long-term surface water, groundwater and sediment monitoring to ensure the long-term effectiveness of the remedy;
- f. implementation of institutional controls, including access restriction, deed restrictions, land-use restrictions, groundwater use restrictions, or easements and/or other controls;
- g. reviews at least every five years and modeling and evaluation of contaminant degradation rates and pathways to evaluate the effectiveness of the natural attenuation of contamination; and
- h. operation and maintenance of the Remedial Action.

11. Selection of Supervising Contractor

a. All aspects of the Work to be performed by Settling Defendants pursuant to Sections VI (Performance of the Work by Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA, after a reasonable opportunity for review and comment by the State. Within 15 days after EPA signature of this Consent Decree, Settling Defendants shall notify EPA and the State in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendants propose to change a Supervising Contractor, Settling Defendants shall give such notice to EPA and the State and must obtain an authorization to proceed from EPA, after a reasonable opportunity for review and comment by the State, before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

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

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendants from

meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) hereof.

12. Remedial Design.

a. Within 21 days after the date of EPA's issuance of an authorization to proceed pursuant to Paragraph 11, Settling Defendants shall submit to EPA and the State a work plan for the design of the Remedial Action at the Site ("Remedial Design Work Plan" or "RD Work Plan"). The Remedial Design Work Plan shall provide for design of the remedy set forth in the ROD, in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the ROD, this Consent Decree and/or the SOW. Upon its approval by EPA, the Remedial Design Work Plan shall be incorporated into and become enforceable under this Consent Decree.

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

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

13. Remedial Action.

a. Within 60 days after the date of the approval of the Final Remedial Action Design Report, Settling Defendants shall submit to EPA and the State, a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan") and a Project Operations Plan ("POP"). The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the ROD and achievement of the Performance Standards, in accordance with this Consent Decree, the ROD, the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan and approved by EPA. Upon their approval by EPA, the Remedial Action Work Plan and POP shall be incorporated into and become enforceable under this Consent Decree.

b. Upon approval of the Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by the State, Settling Defendants shall implement the activities required under the Remedial Action Work Plan. The Settling Defendants shall submit to EPA and the State all plans, submittals, or other deliverables required under the SOW and the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendants shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

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

15. Modification of the SOW or Related Work Plans.

a. If EPA determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, EPA may require that such modification be incorporated in the SOW and/or such work plans. Provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the ROD.

b. For the purposes of this Paragraph 15 and Paragraphs 50 and 51 only, the "scope of the remedy selected in the ROD" is: capping of landfill and marsh soils, treatment of contaminated landfill "hot spots", natural attenuation of the groundwater, implementation of institutional controls, long-term monitoring of surface water, groundwater, sediments and soil gas, operation and maintenance, groundwater modeling, and reviews of the Site at least every five years to ensure the protectiveness of the remedy.

c. If Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 68 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute, but Settling Defendants shall continue any work specified in the SOW and/or in work plans developed pursuant to the SOW not subject to the modification and perform any undisputed portion of the modification.

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

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

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

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

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

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

VII. REMEDY REVIEW

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

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

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

21. Settling Defendants' Obligation To Perform Further Response Actions. If EPA, after reasonable opportunity for review and comment by the State, selects further response actions for the Site, the Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraph 83 or Paragraph 84 (United States' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 83 or Paragraph 84 of Section XXI (Covenants Not To Sue by Plaintiffs) are satisfied, (2) EPA's determination that the Remedial Action is not protective of human health or the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 68 (Record Review).

22. Submissions of Plans. If Settling Defendants are required to perform the further response actions pursuant to Paragraph 21, they shall submit a plan for such work to EPA for approval, after reasonable opportunity for review and comment by the State, in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendants) and shall implement the plan approved by EPA in accordance with the provisions of this Decree.

VIII. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

23. Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with "EPA Requirements for Quality Assurance Project Plans for Environmental Data Operation," (EPA QA/R5; "Preparing Perfect Project Plans," (EPA /600/9-88/087), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendants shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling

Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree. Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

24. Upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA and the State or their authorized representatives. Settling Defendants shall notify EPA and the State not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA and the State shall have the right to take any additional samples that EPA or the State deem necessary. Upon request, EPA and the State shall allow the Settling Defendants to take split or duplicate samples of any samples they take as part of the Plaintiffs' oversight of the Settling Defendants' implementation of the Work.

25. Settling Defendants shall submit five copies to EPA and two copies to the State of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to the Site and/or the implementation of this Consent Decree unless EPA or the State, respectively agrees otherwise.

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

IX. ACCESS AND INSTITUTIONAL CONTROLS

27. If the Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by any of the Settling Defendants, such Settling Defendants shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States, the State, and their representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States or the State;
- (3) Conducting investigations relating to contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Site;
- (6) Implementing the Work pursuant to the conditions set forth in Paragraph 89 (Work Takeover) of this Consent Decree;

(7) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV (Access to Information);

(8) Conducting periodic reviews of the Work including, but not limited to, reviews required by CERCLA and the NCP.

(9) Assessing Settling Defendants' compliance with this Consent Decree; and

(10) Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. commencing on the date of lodging of this Consent Decree, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree. Such restrictions shall include, but are not limited to, the following:

(1) Prohibitions against the extraction, pumping or use of groundwater at the Site or the extraction, pumping or use of off-Site groundwater containing contamination above the Performance Standards;

(2) Prohibitions against activities, including earth removal, excavation, or construction, that would adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree;

(3) A restriction on the use of the Site for other than industrial or commercial uses only; and

(4) Prohibitions against the installation of water supply, drinking water, or other wells that could adversely impact or affect contaminated groundwater at the Site.

c. execute and record in the Town Clerk's Offices for the Towns of Bennington and Woodford, Bennington County, Vermont, an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 27.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 27.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Such Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to one or more of the following persons, as determined by EPA, (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the other Settling Defendants and their representatives, and/or (iv) other appropriate grantees. To implement the requirements of this subparagraph, Settling Defendants shall, within 45 days of entry of this Consent Decree, submit to EPA and the State for review and approval, with respect to such property:

(1) A draft easement, in substantially the form attached hereto as Appendix F, that is enforceable under the laws of the State of Vermont, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and

(2) A current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

Within 15 days of EPA's and the State's approval and acceptance of the easement, such Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, record the easement with the Town Clerk's Offices for the Towns of Bennington and Woodford, Bennington County, Vermont. Within 15 days of receipt of the original recorded easement, such Settling Defendants shall provide EPA and the State with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

28. If the Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendants, Settling Defendants shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Defendants, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 27.a of this Consent Decree;

b. an agreement, enforceable by the Settling Defendants and the United States, to abide by the obligations and restrictions established by Paragraph 27.b of this Consent Decree, or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree; and

c. if EPA so requests, the execution and recordation in the Town Clerk's Offices for the Towns of Bennington and Woodford, Bennington County, Vermont, of an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 27.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 27.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. The access rights and/or rights to enforce land/water use restrictions shall be granted to one or more of the following persons, as determined by EPA, (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the other Settling Defendants and their representatives, and/or (iv) other appropriate grantees. Within 45 days after the date of EPA's request, Settling Defendants, to implement the requirements of this subparagraph, shall submit to EPA and the State for review and approval, with respect to such property:

(1) A draft easement, in substantially the form attached hereto as Appendix F, that is enforceable under the laws of the State of Vermont, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and

(2) A current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

Within 15 days of EPA's and the State's approval and acceptance of the easement, Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, the easement shall be recorded with the Town Clerk's Offices for the Towns of Bennington and Woodford,

Bennington County, Vermont. Within 15 days of receipt of the original recorded easement, Settling Defendants shall provide EPA and the State with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

29. For purposes of Paragraph 28 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access easements, land/water use restrictions, and/or restrictive easements. If any access or land/water use restriction agreements required by Paragraphs 28.a or 28.b of this Consent Decree are not obtained within 45 days of the date of entry of this Consent Decree, or any access easements or restrictive easements required by Paragraph 28.c of this Consent Decree are not submitted to EPA in draft form within 45 days of EPA's request, Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendants have taken to attempt to comply with Paragraph 28 of this Consent Decree. The United States may, as it deems appropriate, assist Settling Defendants in obtaining access or land/water use restrictions, either in the form of contractual agreements or in the form of easements running with the land. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access and/or land/water use restrictions including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.

30. If EPA determines, after reasonable opportunity for review and comment by the State, that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's and the State's efforts to secure such governmental controls.

31. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

X. REPORTING REQUIREMENTS

32. In addition to any other requirement of this Consent Decree, Settling Defendants shall submit to EPA and the State two copies of written monthly progress reports that:

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

Settling Defendants shall

submit these progress reports to EPA and the State by the 15th day of every month, or more frequently as appropriate, following the entry of this Consent Decree until EPA approval of the Settling Defendants' Final Remedial Construction Report (as defined in the SOW), unless the time for submitting such reports is modified by the EPA Project Coordinator, with a reasonable opportunity for review and comment by the State. If requested by EPA or the State, Settling Defendants shall also provide briefings for EPA and the State to discuss the progress of the Work. Annually, Settling Defendants shall submit a written summary of all costs incurred to date by the Settling Defendants in performing the Work.

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

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

35. Within 20 days of the onset of such an event, Settling Defendants shall furnish to Plaintiffs a written report, signed by the Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

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

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

XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

38. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within 30 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit

an acceptable deliverable.

39. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 38(a), (b), or (c), Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 38(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

40. a. Upon receipt of a notice of disapproval pursuant to Paragraph 38(d), Settling Defendants shall, within 30 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 41 and 42.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 38(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties under Section XX (Stipulated Penalties).

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

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

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

XII. PROJECT COORDINATORS

44. Within 20 days of lodging this Consent Decree, Settling Defendants, the State and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur,

unless impracticable, but in no event later than the actual day the change is made. The Settling Defendants' Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendants' Project Coordinator shall not be an attorney for any of the Settling Defendants in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

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

XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

46. Within 30 days of entry of this Consent Decree, Settling Defendants shall establish and maintain financial security in the amount of \$3.6 million in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equalling the total estimated cost of the Work;
- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of the Settling Defendants; or
- e. A demonstration that one or more of the Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f).

47. If the Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 46.d of this Consent Decree, Settling Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendants seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 46.d or 46.e, they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. In the event that EPA, after a reasonable opportunity for review and comment by the State, determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendants shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 46 of this Consent Decree. Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

48. If Settling Defendants can show that the estimated cost to complete the

remaining Work has diminished below the amount set forth in Paragraph 46 above after entry of this Consent Decree, Settling Defendants may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Settling Defendants shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Settling Defendants may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

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

XIV. CERTIFICATION OF COMPLETION

50. Completion of the Remedial Action

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

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

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards. Provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 15.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to

invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

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

51. Completion of the Work

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

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

If, after completion of the pre-certification inspection and the review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work. Provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 15.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

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

XV. EMERGENCY RESPONSE

52. 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 53, 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 I. The Settling Defendants shall also notify the State Project Coordinator. 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 or, as appropriate, the State takes such action, Settling Defendants shall reimburse EPA and the State all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Reimbursement of Response Costs).

53. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, or the State, 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, at, or from the Site, or b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants Not to Sue by Plaintiffs).

XVI. REIMBURSEMENT OF RESPONSE COSTS AND PAYMENT FOR NATURAL RESOURCE DAMAGES

54. Within 30 days of the Effective Date of this Consent Decree, Settling Defendants shall:

a. pay to the EPA Hazardous Substance Superfund Three Hundred Seventy Four Thousand One Hundred Forty Three and 51/100 dollars (\$374,143.51), plus Interest, in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing the U.S.A.O. file number, the EPA Region Site/Spill ID # 01-B5, and DOJ case number 90-11-3-1454. Interest on all amounts to be paid under Paragraph 54(a) and 54(b) shall begin to accrue from the date this Consent Decree is lodged with the Court. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Vermont following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXVI (Notices and Submissions) and to Michael Manlogon, Financial Management Officer, EPA Region I, One Congress Street, Suite 1100, Boston, MA 02114.

b. pay to the United States Department of the Interior ("DOI"), in its capacity as natural resource trustee, One Hundred Thousand (\$100,000.00) dollars, plus Interest. Payment shall be made using the U.S. Treasury's Remittance Express program, or, in the event said program is not available to Settling Defendants, then via Federal Wire Transfer. Payment shall be made in accordance with the instructions provided by the DOI. Any payments received after 4:00 p.m. Eastern Time shall be credited on the next business day. Settling Defendants' notice to DOI that such payment has been made shall be sent to:

Bruce Nesslage
DOI Restoration Fund
NBC/Division of Financial Management Services

Branch of Accounting Operations
Mail Stop 1313
1849 C. Street N.W.
Washington, D.C. 20240

and shall reference Account Number 14X5198 (NRDAR), shall state that the payment is for Natural Resource Damages with respect to the Burgess Brothers Superfund Site, situated in Bennington and Woodford, Vermont, and is being paid by Settling Defendants, and shall reference that the payment is for natural resource damages under the trusteeship of the Department of the Interior. An additional copy of the notice letter and check shall be sent by Settling Defendants to the United States as follows:

Michael Bartlett, Supervisor
New England Field Office
U.S. Fish and Wildlife Service
22 Bridge Street, Unit 1
Concord, NH 03301

Mark Barash
U.S. Department of the Interior
Office of the Northeast Regional Solicitor
One Gateway Center, Suite 612
Newton Corner, MA 02158

and

Andrew L. Raddant
Regional Environmental Officer
Office of Environmental Policy and Compliance
U.S. Department of the Interior
408 Atlantic Avenue, Room 142
Boston, MA 02110

55. a. Settling Defendants shall reimburse the EPA Hazardous Substance Superfund for all Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis, the United States will send Settling Defendants a bill requiring payment that includes 1) a line-item summary of costs incurred during the preceding year; the summary will include a breakdown of costs by category, including without limitation payroll, travel, indirect costs, and contracts, and a brief narrative of work related to such costs (generally one to two paragraphs in length); and 2) technical portions of the periodic progress reports submitted to EPA by EPA's oversight contractor that will include for field activities a daily summary of tasks and personnel. The technical portions of the periodic progress reports will have been redacted to remove confidential business information as defined by 40 C.F.R. Part 2, Subpart B, enforcement confidential information as defined pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and any other privileged or confidential information. Settling Defendants agree to reimburse the Hazardous Substances Superfund for all costs related to the preparation of this supporting material. Settling Defendants shall make all payments within 30 days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 56. The Settling Defendants shall make all payments required by this Paragraph in

the form of a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA Region Site/Spill ID # 01-B5, the DOJ case number 90-11-3-4154, and the name and address of the Party making payment. The Settling Defendants shall send the check(s) to EPA Region I, Attn: Superfund Accounting, P.O. Box 360197M, Pittsburgh, PA 15251 and shall send copies of the check(s) to the United States as specified in Section XXVI (Notices and Submissions) and to Michael Manlogon, Financial Management Officer, EPA Region I, One Congress Street, Suite 1100, Boston, MA 02114.

b. Settling Defendants shall reimburse the State for all (i) State Oversight Costs not otherwise reimbursed by the United States and not inconsistent with the National Contingency Plan, up to a total reimbursement of \$90,000 (Ninety Thousand Dollars), and (ii) State Future Response Costs not otherwise reimbursed by the United States and not inconsistent with the National Contingency Plan. On a periodic basis, the State will send the Settling Defendants a bill requiring payment that includes 1) a line-item summary of costs incurred during the preceding year; the summary will include a breakdown of costs by category, including without limitation payroll, travel, indirect costs, and contracts, and a brief narrative of work related to such costs (generally one to two paragraphs in length); and 2) technical portions of the periodic progress reports submitted to the State by the State's oversight contractor that will include for field activities a daily summary of tasks and personnel. The technical portions of the periodic progress reports will have been redacted to remove confidential business information as defined by 40 C.F.R. Part 2, Subpart B, enforcement confidential information as defined pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and any other privileged or confidential information. Settling Defendants agree to reimburse the State for all costs related to the preparation of this supporting material. Settling Defendants shall make all payments within 30 days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 56. All payments to the State under this Section shall be made payable to State Treasurer and shall be mailed to Secretary, Vermont Agency of Natural Resources, 103 South Main Street, Waterbury, VT 05671. Copies of the check and transmittal letter shall be sent to John Schmeltzer, State Project Coordinator, and Mary McCabe, Assistant Attorney General, at the addresses listed in Paragraph 108.

56. Settling Defendants may contest payment of any Future Response Costs, State Oversight Costs, or State Future Response Costs under Paragraph 55 if they determine that the United States or the State has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States (if the United States' accounting is being disputed) or the State (if the State's accounting is being disputed) pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs, State Oversight Costs, or State Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendants shall within the 30 day period pay all uncontested Future Response Costs, State Oversight Costs, or State Future Response Costs to the United States or the State in the manner described in Paragraph 55. Simultaneously, the Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Vermont and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs, State Oversight Costs, or State Future Response Costs. The Settling Defendants shall send to the United States, as provided in Section XXVI (Notices and Submissions), and the State a copy of the transmittal letter and check paying the uncontested Future Response Costs, State Oversight Costs, or State Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow

account. Simultaneously with establishment of the escrow account, the Settling Defendants shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States or the State prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued interest) to the United States or the State, if State costs are disputed, in the manner described in Paragraph 55. If the Settling Defendants prevail concerning any aspect of the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States or the State, if State costs are disputed, in the manner described in Paragraph 55; Settling Defendants shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse the United States for Future Response Costs and the State for State Oversight Costs or State Future Response Costs.

57. In the event that the payments required by Paragraph 54 are not made within 30 days of the effective date of this Consent Decree or the payments required by Paragraph 55 are not made within 30 days of the Settling Defendants' receipt of the bill, Settling Defendants shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue 30 days after the date of lodging this Consent Decree with the Court. The Interest on Future Response Costs, State Oversight Costs, and State Future Response Costs shall begin to accrue upon Settling Defendants' receipt of the bill. The Interest shall accrue through the date of the Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendants' failure to make timely payments under this Section. The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraphs 54 and 55.

XVII. INDEMNIFICATION AND INSURANCE

58. a. The United States and the State do not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendants shall indemnify, save and hold harmless the United States, the State, and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendants agree to pay the United States and the State all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendants nor any such contractor shall be considered an agent of the United States or the State in carrying out activities pursuant to this Consent Decree.

b. The United States and the State shall give Settling Defendants notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph 58, and shall consult with Settling Defendants prior to settling such claim.

59. Settling Defendants waive all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendants shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

60. No later than 15 days before commencing any on-site Work, Settling Defendants shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 50.b of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of one and one-half million dollars, combined single limit, and automobile liability insurance with limits of one and one-half million dollars, combined single limit, naming the United States and the State as additional insureds. In addition, for the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendants shall provide to EPA and the State certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the effective date of this Consent Decree. If Settling Defendants demonstrate by evidence satisfactory to EPA and the State that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XVIII. FORCE MAJEURE

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

62. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Office of Site Remediation and Restoration, EPA Region I, and the State's Project Coordinator within 48 hours of when Settling Defendants first knew that the event might cause a delay. Within 5 working days thereafter, Settling Defendants shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or

minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or Settling Defendants' contractors knew or should have known.

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

64. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 61 and 62, above. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

XIX. DISPUTE RESOLUTION

65. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. The procedures for resolution of disputes which involve EPA are governed by Paragraphs 66 to 70. The State may participate in such dispute resolution proceedings to the extent specified in Paragraphs 66 to 70. Disputes exclusively between the State and the Settling Defendants are governed by Paragraph 71. However, the procedures set forth in this Section shall not apply to actions by the United States or the State to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

66. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the Parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the Parties to the dispute. The dispute shall be

considered to have arisen when one Party sends the other Parties a written notice of dispute.

67. a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA, after reasonable opportunity for review and comment by the State, shall be considered binding unless, within 14 days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 68 or Paragraph 69.

b. Within 14 days after receipt of Settling Defendants' Statement of Position, EPA, after reasonable opportunity for review and comment by the State, will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. The State, after reasonable opportunity for review and comment by EPA, may also serve a Statement of Position within the fourteen-day time limit set forth above in this Paragraph. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 68 or 69. Within 10 days after receipt of EPA's and/or the State's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 68 or 69, the Parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 68 and 69.

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

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

b. The Director of the Office of Site Remediation and Restoration, EPA Region I, will issue, after reasonable opportunity for review and comment by the State, a final administrative decision resolving the dispute based on the administrative record described in Paragraph 68.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 68.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 68.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendants with the Court and served on all Parties within 10 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the

efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion within 30 days.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Site Remediation and Restoration Office Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 68.a.

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

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 67 and any State Statement of Position, if any, the Director of the Office of Site Remediation and Restoration, EPA Region I, will issue, after reasonable opportunity for review and comment by the State, a final decision resolving the dispute. The Director's decision shall be binding on the Settling Defendants unless, within 10 days of receipt of the decision, the Settling Defendants file with the Court and serve on the Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendants' motion within 30 days.

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

70. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree, not directly in dispute, unless EPA, after reasonable opportunity for review and comment by the State, or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 79. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

71. Disputes Solely between the State and Settling Defendants. Disputes arising under the Consent Decree between the State and the Settling Defendants that relate to State Oversight Costs or State Future Response Costs owed to the State, the Settling Defendants' failure to submit deliverables to the State, or assessment of stipulated penalties by the State shall be governed in the following manner. The procedures for resolving the disputes mentioned in this Paragraph shall be the same as provided for in Paragraphs 66 to 70, except that each reference to EPA shall be read as a reference to VTDEC, each reference to the Director of the Office of Site Remediation and Restoration, EPA Region I, shall be read as a reference to the Commissioner of VTDEC, each reference to the United States shall be read as a reference to the State, and each reference to the State shall be read as a reference to the United States.

XX. STIPULATED PENALTIES

72. a. Settling Defendants shall be liable for stipulated penalties in the amounts

set forth in Paragraph 73 for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). When the United States enforces stipulated penalties, the United States shall receive 90% of the stipulated penalties received and the State shall receive 10% of the stipulated penalties received. When the State enforces stipulated penalties, the State shall receive 90% of the stipulated penalties received and the United States shall receive 10% of the stipulated penalties received. The fact that the United States or the State, under the circumstances set out below, may pursue stipulated penalties shall not increase the total liability of the Settling Defendants for stipulated penalties. "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.

b. The United States shall have the first opportunity to pursue stipulated penalties for all violations of this Consent Decree. If the United States does not pursue stipulated penalties within 45 days of the date on which the United States becomes aware that there was a failure to comply, then, subject to Paragraph 72.c., the State may pursue stipulated penalties in the same manner as the United States is authorized to pursue stipulated penalties under this Consent Decree.

c. The State may pursue stipulated penalties, after expiration of the 45 days only if:

(i) the State has provided written notice to the United States which identifies the failure to comply which would be the basis for stipulated penalties and the Party or Parties from whom penalties would be sought;

(ii) the State has, after providing the written notice, consulted with the United States regarding any reasons EPA may have for not pursuing the stipulated penalties, and the State has, after completion of the consultation, provided further written notice to the United States of a date, not less than 30 days from the date of such notice, when the State intends to seek stipulated penalties; and

(iii) EPA has not issued the Settling Defendants a written demand for payment of the penalties.

d. Nothing herein shall preclude the United States from pursuing stipulated penalties except where the State has already pursued stipulated penalties in accordance with subparagraphs b and c.

73. The following stipulated penalties shall be payable per violation per day to the United States or the State for any noncompliance with the requirements of the Consent Decree, including but not limited to, failure to provide access or institutional controls, failure to reimburse response costs, failure to comply with the schedule set forth in the SOW and in any deliverables or submittals thereunder, and failure to submit timely or adequate deliverables.

<u>Penalties Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 2,000	1st through 14th day
\$ 3,000	15th through 30th day
\$ 5,000	31st day and beyond

74. In the event that EPA or the State assumes performance of a portion or all of the Work pursuant to Paragraph 89 of Section XXI (Covenants Not to Sue by Plaintiffs), Settling

Defendants shall be liable for the following stipulated penalties:

- | | |
|-----------|---|
| \$900,000 | If work performance is assumed any time before the date EPA approves the final Remedial Action Work Plan or the Project Operations Plan (as defined in the SOW), whichever is later. |
| \$700,000 | If work performance is assumed on or after the date EPA approves the final Remedial Action Work Plan or the Project Operations Plan, whichever is later, but before the date EPA issues a Certification of Completion of the Remedial Action, pursuant to Paragraph 50.b of Section XIV(Certification of Completion). |
| \$500,000 | If work performance is assumed on or after the date EPA issues a Certification of Completion of the Remedial Action, pursuant to Paragraph 50.b of Section XIV(Certification of Completion). |

Notwithstanding the foregoing provisions of this Paragraph, if EPA determines that additional work is required pursuant to Paragraph 15 (Modification of the SOW or Related Work Plans) or Paragraph 21 (Settling Defendants' Obligation To Perform Further Response Actions) and EPA or the State assumes performance of a portion or all of such Work pursuant to Paragraph 89 of Section XXI (Covenants Not to Sue by Plaintiffs), Settling Defendants shall be liable for a stipulated penalty in the amount of \$750,000.

75. 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 Office of Site Remediation and Restoration, EPA Region I, under Paragraph 68.b or 69.a of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

76. Following EPA's determination, after reasonable opportunity for review and comment by the State, that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA or the State as provided in Paragraph 72.b may give Settling Defendants written notification of the same and describe the noncompliance. EPA and/or the State may send the Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA or the State has notified the Settling Defendants of a violation.

77. All penalties accruing under this Section shall be due and payable to the United States and the State within 30 days of the Settling Defendants' receipt from EPA or the State of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to EPA Region I, Attn: Superfund Accounting, P.O. Box 360197M, Pittsburgh, PA 15251, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # 01-B5, the DOJ

Case Number 90-11-3-1454, and the name and address of the Party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the Parties as provided in Section XXVI (Notices and Submissions). All payments to the State under this Section shall be made payable to State Treasurer and shall be mailed to Secretary, Vermont Agency of Natural Resources, 103 South Main Street, Waterbury, VT 05671.

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

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

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

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

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

80. a. If Settling Defendants fail to pay stipulated penalties when due, the United States or the State may institute proceedings to collect the penalties, as well as Interest. Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 76.

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

81. Notwithstanding any other provision of this Section, the United States or the State may, in its unreviewable discretion, decide not to seek stipulated penalties or waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree. Waiver by the United States or the State shall not affect the other's right to pursue stipulated penalties.

XXI. COVENANTS NOT TO SUE BY PLAINTIFFS

82. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 83, 84, 88, and 91 of this Section, the United States on behalf of EPA, the DOI, and the National Oceanic and Atmospheric Administration ("NOAA") covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA relating to the Site. In

consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of this Consent Decree, and except as specifically provided in Paragraphs 85, 86 and 88 of this Section, the State covenants not to sue or take administrative action relating to the Site against the Settling Defendants regarding Natural Resource Damages or pursuant to 107(a) of CERCLA and 10 V.S.A. § 6615. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 54 of Section XVI (Reimbursement of Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 50.b of Section XIV (Certification of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

83. United States' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants

a. to perform further response actions relating to the Site or
b. to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Remedial Action:

(1) conditions at the Site, previously unknown to EPA, are discovered,
or

(2) information, previously unknown to EPA, is received, in whole or in part,

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

84. United States' Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants

a. to perform further response actions relating to the Site or
b. to reimburse the United States for additional costs of response if, subsequent to Certification of Completion of the Remedial Action:

(1) conditions at the Site, previously unknown to EPA, are discovered, or

(2) information, previously unknown to EPA, is received, in whole or in part,

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

85. State's Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, any right, jointly with or separately from, the United States to institute proceedings in this action or in a new action under Section 107 of CERCLA, 42 U.S.C. § 9607, or under 10 V.S.A. § 6615,

seeking to compel any or all of the Settling Defendants (1) to perform other response actions at the Site, or (2) to reimburse the State for response costs for other response actions at the Site, to the extent that EPA has determined that such response actions required under (1) and (2) above in this Paragraph will not significantly delay or be inconsistent with the Remedial Action, if, prior to Certification of Completion of the Remedial Action:

(i) conditions at the Site, previously unknown to the State, are discovered or become known to the State, or

(ii) information previously unknown to the State is received by the State, in whole or in part,

and the VTDEC Commissioner, or his or her delegate, determines, pursuant to V.S.A. Ch. 159, 201 and 211, based on these previously unknown conditions or this information together with any other relevant information that the response actions taken are not protective of public health, safety, welfare or the environment. The United States reserves all rights it may have under applicable law, to oppose any determinations made or any actions taken, ordered or proposed by the State pursuant to this Paragraph.

86. State's Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right, jointly, with or separately from, the United States to institute proceedings in this action or in a new action under Section 107 of CERCLA, 42 U.S.C. § 9607, or under 10 V.S.A. § 6615, seeking to compel any or all of the Settling Defendants (1) to perform other response actions at the Site, or (2) to reimburse the State for response costs for other response actions at the Site, to the extent that EPA has determined that such response actions required under (1) and (2) above in this Paragraph will not significantly delay or be inconsistent with the Remedial Action, if, subsequent to Certification of Completion of Remedial Action:

(i) conditions at the Site, previously unknown to the State, are discovered or become known to the State after the Certification of Completion, or

(ii) information previously unknown to the State is received by the State, in whole or in part, after the Certification of Completion,

and the VTDEC Commissioner, or his or her delegate, determines, pursuant to V.S.A. Ch. 159, 201 and 211, based on these previously unknown conditions or this information together with any other relevant information, that the response actions taken are not protective of public health, safety, welfare or the environment. The United States reserves all rights it may have under applicable law, to oppose any determinations made or any actions taken, ordered or proposed by the State pursuant to this Paragraph.

87. For purposes of Paragraphs 83 and 85, the information and the conditions known to EPA, under Paragraph 83, and information and the conditions known to the State, under Paragraph 85, shall include only that information and those conditions known to EPA or the State, as applicable, as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 84 and 86, the information and the conditions known to EPA, under Paragraph 84, and the conditions known to the State, under Paragraph 86, shall include only that information and those conditions known to EPA or the State, as applicable, as of the date of Certification of Completion of the Remedial Action and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in any information received by EPA and the State pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

88. General reservations of rights. The covenants not to sue set forth above do not

pertain to any matters other than those expressly specified in Paragraph 82. Subject to the April 20, 1998 Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;
- c. liability for future disposal of Waste Material at the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA;
- d. criminal liability;
- e. liability for violations of federal or state law ;
- f. liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 15 (Modification of the SOW or Related Work Plans); and
- g. claims seeking, or liability for, the securing and implementation of supplemental institutional controls, and liability for any response costs incurred relating to the implementation or securing of supplemental institutional controls.

89. Work Takeover. In the event EPA determines, after a reasonable opportunity for review and comment by the State, that Settling Defendants have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 68, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Reimbursement of Response Costs).

90. Notwithstanding any other provision of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

91. Reservations Concerning Natural Resource Injury. Notwithstanding any other provision of this Consent Decree, the United States, on behalf of DOI and NOAA, its natural resource trustees, reserves the right to institute proceedings against Settling Defendants in this action or in a new action seeking recovery of Natural Resource Damages based upon (1) conditions with respect to the Site, unknown to the United States at the date of lodging of this Consent Decree, that result in releases or threatened releases of hazardous substances that contribute to injury to, destruction of, or loss of natural resources, or (2) information received after the date of lodging of the Consent Decree which indicates that there is injury to, destruction of, or loss of natural resources of a type that was unknown, or of a magnitude greater than was known, to the United States at the date of lodging of this Consent Decree.

XXII. COVENANTS BY SETTLING DEFENDANTS

92. Covenant Not to Sue. Subject to Paragraph 96 and the reservations in

Paragraph 93, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States, including any department, agency, or instrumentality of the United States, or the State, including any department, agency, or instrumentality of the State, with respect to the Site or this Consent Decree, including but not limited to,

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;
- b. any claims under CERCLA Sections 107 or 113 related to the Site including, but not limited to, those that were expressly released pursuant to the April 20, 1998 Consent Decree;
- c. any claims arising out of response activities at the Site, including claims based on EPA's and the State's selection of response actions, oversight of response activities or approval of plans for such activities;
- d. any claims for costs, fees or expenses incurred in this action, including claims under 28 U.S.C. § 2412 (including claims under the Equal Access to Justice Act, as amended, 28 U.S.C. § 2412(d));
- e. any claims under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, or at common law, arising out of or relating to, past or future access to, imposition of deed restrictions, or other restrictions on the use or enjoyment of property owned or controlled by the Settling Defendants; and
- f. any claims, disputes, or dispute resolution regarding Settling Defendants' payments for response and oversight costs already billed and paid by Settling Defendants under the RI/FS AOC. Settling Defendants waive any rights to pursue dispute resolution either under this Consent Decree or under the RI/FS AOC for such payments.

93. The Settling Defendants reserve, and this Consent Decree is without prejudice to claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

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

95. Waiver of Claims against De Micromis Parties. Settling Defendants agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if

the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site.

XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

96. Nothing in this Consent Decree shall limit or expand any rights, duties, or defenses that Eveready has pursuant to the April 20, 1998 Consent Decree.

97. Except as provided in Paragraph 95 (Waiver of Claims Against De Micromis Parties), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Subject to the April 20, 1998 Consent Decree and except as provided in Paragraph 95 (Waiver of Claims Against De Micromis Parties), each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

98. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs, Future Response Costs, Interim Response Costs, State Future Costs, State Oversight Costs, the Work, and Natural Resource Damages.

99. The Settling Defendants agree that with respect to any further suit or claim for contribution brought by them against parties other than the Settling Federal Agencies (as defined in the April 20, 1998 Consent Decree) that entered into the April 20, 1998 Consent Decree for matters related to this Consent Decree they will notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim.

100. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States and the State within 30 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States and the State within 30 days of service or receipt of any Motion for Summary Judgment and within 30 days of receipt of any order from a court setting a case for trial.

101. Subject to the April 20, 1998 Consent Decree, in any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by Plaintiffs).

XXIV. ACCESS TO INFORMATION

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

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

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

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

XXV. RETENTION OF RECORDS

105. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 51.b of Section XIV (Certification of Completion of the Work), each Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 51.b of Section XIV (Certification of Completion), Settling Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

106. At the conclusion of this document retention period, Settling Defendants shall notify the United States and the State at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States or the State, Settling Defendants shall deliver any such records or documents to EPA or the State. The Settling Defendants may

assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged. Settling Defendants shall preserve and retain any privileged documents or records until the resolution of any dispute regarding their privileged status.

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

XXVI. NOTICES AND SUBMISSIONS

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

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-11-3-1454

As to EPA:

Director, Office of Site Remediation and
Restoration, Region I
United States Environmental Protection Agency
One Congress Street
Suite 1100 – Mail Code HBT
Boston, MA 02114-2023
Re: Burgess Brothers Superfund Site

Ronald Jennings
EPA Project Coordinator
United States Environmental Protection Agency
Region I
One Congress Street
Suite 1100 – Mail Code HBT

Boston, MA 02114-2023
Re: Burgess Brothers Superfund Site

As to the State:

John Schmeltzer
State Project Coordinator
Site Management Section
103 South Main Street, West Building
Waterbury, VT 05671-0404
Re: Burgess Brothers Superfund Site

Mary McCabe
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
Re: Burgess Brothers Superfund Site

As to the Settling Defendants:

Harry Strachen
General Counsel
Eveready Battery Company, Inc.
835 South 8th Street – 1EBC
St. Louis, MO 63164

Tom Hauser
Eveready Battery Company, Inc.
25225 Detroit Road
Westlake, OH 44145

XXVII. EFFECTIVE DATE

109. 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.

XXVIII. RETENTION OF JURISDICTION

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

XXIX. APPENDICES

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

"Appendix A" is the ROD.

"Appendix B" is the SOW.

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

"Appendix D" is the complete list of the Non-Owner Settling Defendants.

"Appendix E" is the complete list of the Owner Settling Defendant.

"Appendix F" is the Draft Deed Restrictions.

XXX. COMMUNITY RELATIONS

112. As requested by EPA, Settling Defendants shall propose to EPA and the State their participation in the community relations plan to be developed by EPA. EPA will determine, after a reasonable opportunity for review and comment by the State, the appropriate role for the Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA and the State in providing information regarding the Work to the public. As requested by EPA or the State Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA or the State to explain activities at or relating to the Site.

XXXI. MODIFICATION

113. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA, after a reasonable opportunity for review and comment by the State, and the Settling Defendants. All such modifications shall be made in writing.

114. Except as provided in Paragraph 15 ("Modification of the SOW or related Work Plans"), no modifications shall be made to the Consent Decree or SOW without written notification to and written approval of the United States and Settling Defendants. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification.

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

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

116. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice. The State may withdraw or withhold its consent to the entry of this Consent Decree if comments received disclose facts or considerations which show that the Consent Decree violates State law. The United States reserves the right to challenge in court the State withdrawal from the Consent Decree, including the right to argue that the requirements of state law have been waived, pre-empted or otherwise rendered inapplicable by federal law. The State reserves the right to oppose the United States' position taken in opposition to the proposed withdrawal. In addition, in the event of the United States' withdrawal from this Consent Decree, the State reserves its right to withdraw from this Consent Decree.

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

XXXIII. SIGNATORIES/SERVICE

118. Each undersigned representative of a Settling Defendant to this Consent Decree, the Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice, and the Assistant Attorney General for the State of Vermont certifies that he or she is fully authorized to enter into the terms and

conditions of this Consent Decree and to execute and legally bind such Party to this document.

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

120. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XXXIV. FINAL JUDGMENT

121. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS __ DAY OF _____, 1999.

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Burgess Brothers, Inc., and the State of Vermont v. Burgess Brothers, Inc. relating to the Burgess Brothers Superfund Site.

FOR THE UNITED STATES OF AMERICA

7/2/99
Date

Joel M. Gross
Joel M. Gross
Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20044

7/2/99
Date

Alex A. Beehler
Alex A. Beehler
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Charles R. Tetzlaff
United States Attorney for the District of Vermont

7/6/99
Date

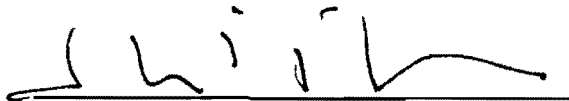
By: Joseph R. Perella
Joseph R. Perella
Assistant United States Attorney
United States Attorney for the District
of Vermont
P.O. Box 570
Burlington, VT 05402

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Burgess Brothers, Inc., and the State of Vermont v. Burgess Brothers, Inc. relating to the Burgess Brothers Superfund Site.

**FOR THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

6/15/99

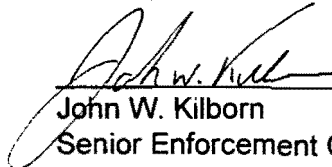
Date



John P. DeVillars
Regional Administrator, Region I
U.S. Environmental Protection Agency
One Congress Street
Suite 1100
Boston, MA 02114-2023

6/1/99

Date



John W. Kilborn
Senior Enforcement Counsel
U.S. Environmental Protection Agency
Region I
One Congress Street
Suite 1100 - Mail Code SES
Boston, MA 02114-2023

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Burgess Brothers, Inc., and the State of Vermont v. Burgess Brothers, Inc. relating to the Burgess Brothers Superfund Site.

5/14/99

Date

5-17-99

Date

FOR THE STATE OF VERMONT



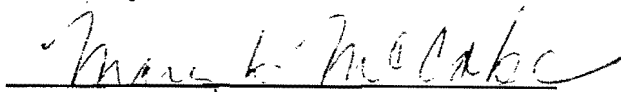
Conute Dalmasse

Commissioner

Vermont Department of Environmental
Conservation

103 South Main Street

Waterbury, VT 05671-0404



Mary K. McCabe

Assistant Attorney General

State of Vermont

Office of the Attorney General

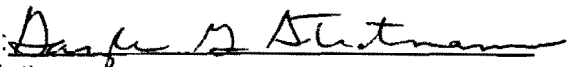
109 State Street

Montpelier, VT 05609-1001

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Burgess Brothers, Inc., and the State of Vermont v. Burgess Brothers, Inc. relating to the Burgess Brothers Superfund Site.

FOR EVEREADY BATTERY COMPANY, INC.

5/13/99
Date

Signature: 
Name (print): Gayle G. Stratmann
Title: Assistant General Counsel
Address: Eveready Battery Company, Inc.
Checkerboard Square - 1EBC
St. Louis, MO 63164

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Harry Strachen
Title: General Counsel
Address: Eveready Battery Company, Inc.
835 South 8th Street - 1EBC
St. Louis, MO 63164
Ph. Number: (314) 982-2990

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Burgess Brothers, Inc., and the State of Vermont v. Burgess Brothers, Inc. relating to the Burgess Brothers Superfund Site.

FOR BURGESS BROTHERS, INC.

5/12/99
Date

Signature: 

Name: Clyde Burgess, Jr.

Title: President, Burgess Brothers, Inc.

Address: RR # 3, Box 1130
Bennington, VT 05201

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Clyde Burgess, Jr.

Title: President, Burgess Brothers, Inc.

Address: RR # 3, Box 1130
Bennington, VT 05201

Ph. Number: (802) 442-3345

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Burgess Brothers, Inc., and the State of Vermont v. Burgess Brothers, Inc. relating to the Burgess Brothers Superfund Site.

CLYDE BURGESS, JR.

5/12/99
Date

Signature: Clyde V. Burgess, Jr.
Name: Clyde Burgess, Jr.
Title: N/A
Address: c/o Burgess Brothers, Inc.
RR #, Box 1130
Bennington, VT 05210-9217