

1 maintenance activities necessary to assure meeting Performance Standards during elevated flow
2 conditions);

3 (c) Failure to comply with the requirements for sediment
4 controls. (SOW Sections 8.11.1(2); 8.11.2(2); 8.11.3(2); 8.11.4(2); 8.13(8), and 8.13(9)); or

5 (d) Failure to comply with the Surface Water Control
6 requirements (SOW Sections 8.5.2(1); 8.8(3); 8.11.4(1); 8.14(2); 8.17(2); 9.5.2(1), 9.5.2(2);
7 9.7.2(5), 9.7.2(7); 9.10.5.2; 9.12.2; and 9.13.2).

8 (2) Stipulated Penalty Calculations

9 Period of Non-Compliance	Daily Stipulated Penalty Amount
10 Starting on the occurrence of the non- 11 compliance, 1 st through 5 th day	\$5,000
12 After 5 th day of non-compliance, 5 th day 13 through 20 th day after written notice of 14 non-compliance is sent to the Site Operator	\$7,500
15 After 21 st day and beyond after written 16 notice is sent of non-compliance is sent to 17 the Site Operator	\$10,000

18 (3) To the extent that Stipulated Penalties/Damages in this subsection
19 are triggered by written notice, the Stipulated Penalties/Damages will not be assessed if the
20 Site Operator rectifies the failure within 5 calendar days of the notice of non-compliance.

21 D. Failure to Comply with other Requirements of the SOW or Consent
22 Decree

23 (1) Trigger: Any failure to comply with an approved workplan or
24 any other requirement contained in Section 4 through 14 of the SOW or this Consent Decree,
25 except those referenced in Subparagraphs A through C, above.

1 (2) Stipulated Penalty Calculations: Stipulated Penalties/Damages
2 for these failures commence on the 5th calendar day after written notice is sent to the Site
3 Operator of a failure to comply with requirements, or following such longer period as
4 specified by the Oversight Agency in its sole discretion. Stipulated Penalties/Damages will not
5 be assessed if the failure is rectified within the 5 working day period, or such longer period as
6 determined by the Oversight Agency in its sole discretion. If it is not, Stipulated
7 Penalties/Damages are assessed as follows:

8 Period of Non-Compliance (Days start 9 after expiration of 5 calendar day period.)	Daily Stipulated Penalty Amount
10 1 st through 14 th day	\$2,000
11 15 th through 30 th day	\$5,000
12 31 st day and beyond	\$10,000

13 56. In the event that the Oversight Agency takes over all or a portion of the
14 performance of activities otherwise required to be performed by the Site Operator under this
15 Consent Decree and the SOW, the Site Operator shall be liable for reimbursement of SOW
16 Response Costs to the Oversight Agency as specified in the SOW.

17 57. Unless otherwise specified in the Consent Decree or the SOW, all Stipulated
18 Penalties/Damages shall begin to accrue on the day after the complete performance is due or
19 the day a violation occurs, and shall continue to accrue through the final day of the correction
20 of the noncompliance or completion of the activity. However, Stipulated Penalties/Damages
21 shall not accrue: (1) with respect to a deficient submission under Section XI (Oversight
22 Agency Approval of Plans and Other Submissions), during the period, if any, beginning on the
23 31st day after the Oversight Agency's receipt of such submission until the date that the
24 Oversight Agency notifies the Site Operator of any deficiency; (2) with respect to a decision
25 by the Oversight Agency, under Paragraph 45.A of Section XIX (Dispute Resolution), during
26 the period, if any, beginning on the 21st day after the date that the Site Operator's reply to the
27 Oversight Agency's Statement of Position is received until the date that the Oversight Agency

1 issues a final decision regarding such dispute; (3) with respect to judicial review by this Court
2 of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning
3 on the 31st day after the Court's receipt of the final submission regarding the dispute until the
4 date that the Court issues a final decision regarding such dispute or (4) with respect to work
5 taken over by the Oversight Agency, after the Site Operator receives notice that the Oversight
6 Agency is taking over that portion of work pursuant to the Work Takeover provisions of the
7 SOW. Nothing herein shall prevent the simultaneous accrual of separate damages for separate
8 violations of this Consent Decree or the SOW.

9 58. Following the Oversight Agency's determination that the Site Operator has
10 failed to comply with a requirement of this Consent Decree, the Oversight Agency may give
11 the Site Operator written notification of the same and describe the noncompliance. The
12 Oversight Agency may send the Site Operator a written demand for the payment of Stipulated
13 Penalties/Damages. However, unless otherwise specified in this Consent Decree or the SOW,
14 Stipulated Penalties/Damages shall accrue as provided in the preceding Paragraph regardless of
15 whether the Oversight Agency has notified the Site Operator of a violation. Except with
16 respect to Stipulated Penalties/Damages that may be assessed under Paragraph 55.B, notwith-
17 standing any other provision of this Consent Decree or the SOW, in all cases where the Site
18 Operator obtains actual knowledge of a violation and does not provide timely notice of such
19 violation to the Oversight Agency, Stipulated Penalties/Damages shall accrue as of the first
20 date of violation and the requirement that the Oversight Agency provide notice and an
21 opportunity to cure shall not apply, but the Site Operator shall nevertheless be entitled to any
22 opportunity to cure provided in Paragraph 55.B of this Consent Decree.

23 59. All Stipulated Penalties/Damages accruing under this Section shall be due and
24 payable to the Oversight Agency within 30 days of the Site Operator's receipt from the
25 Oversight Agency of a demand for payment of the Stipulated Penalties/Damages, unless the
26 Site Operator invokes the Dispute Resolution procedures under Section XIX (Dispute
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1 Resolution). All payments to the Oversight Agency under this Section shall be paid in
2 accordance with the same procedures as set forth in Paragraph 48 for the Settling Parties, if
3 the Oversight Agency is EPA, or into the appropriate State account, upon instructions by the
4 State plaintiffs, if the State plaintiffs are acting as Oversight Agency or if they impose
5 Stipulated Penalties/Damages as provided in Paragraph 68.

6 60. All Stipulated Penalties/Damages provided for in the schedules set out in this
7 Section shall be adjusted annually for inflation, according to the Consumer Price Index for all
8 Urban Consumers (CPI-U) published by the Department of Labor, Bureau of Statistics, to
9 reflect payment in September 2000 dollars. If the CPI-U ceases to exist, an appropriate
10 analogue will be used for this purpose.

11 61. The payment of Stipulated Penalties/Damages shall not alter in any way the Site
12 Operator's obligation to complete the performance of the activities required under this Consent
13 Decree.

14 62. Stipulated Penalties/Damages shall continue to accrue as provided in Paragraph
15 57 during any dispute resolution period, but need not be paid until the following:

16 A. If the dispute is resolved by agreement or by a decision of the Oversight
17 Agency that is not appealed to this Court, accrued Stipulated Penalties/Damages determined to
18 be owing shall be paid to the Oversight Agency within 15 days of the agreement or the receipt
19 of the Oversight Agency's decision or order;

20 B. If the dispute is appealed to this Court and the Oversight Agency
21 prevails in whole or in part, the Site Operator shall pay all accrued Stipulated
22 Penalties/Damages determined by the Court to be owed to the Oversight Agency within 60
23 days of receipt of the Court's decision or order, except as provided in Paragraph C below;

24 C. If the District Court's decision is appealed by either party to the dispute,
25 the Site Operator shall pay all accrued Stipulated Penalties/Damages determined by the District
26 Court to be owing to the Oversight Agency into an interest-bearing escrow account within 60

1 days of receipt of the Court's decision or order. Stipulated Penalties/Damages shall be paid
2 into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt
3 of the final appellate court decision, the escrow agent shall be directed to pay the balance of
4 the account to the Oversight Agency or to the Site Operator to the extent that each has
5 prevailed.

6 63. If the Site Operator fails to pay Stipulated Penalties/Damages when due, the
7 Oversight Agency may institute proceedings to collect the damages, as well as Interest. The
8 Site Operator shall pay Interest on the unpaid balance, which shall begin to accrue on the date
9 of demand made pursuant to Paragraph 59.

10 64. Subject to the covenants and reservations contained in Paragraphs 73, 74, and
11 75 of this Consent Decree, the United States and the State agencies reserve their rights to seek
12 such remedies or sanctions as are available under applicable state or federal laws for the Site
13 Operator's violation of this Consent Decree. Stipulated Penalties/Damages shall be the
14 exclusive monetary remedy for violations by the Site Operator of the requirements of the
15 Work, as set forth in the schedules contained in Paragraph 55 of this Consent Decree, and that
16 arise from conduct that is not negligent, grossly negligent, or does not constitute intentional
17 misconduct. As to any such violation for which the Oversight Agency or the Support Agency
18 in its discretion elects to seek Stipulated Penalties/Damages and Stipulated Penalties/Damages
19 are paid (or determined through Dispute Resolution not to be owing), neither the Oversight
20 Agency nor the Support Agency shall seek other available monetary remedies or sanctions for
21 such violations as to which it has sought Stipulated Penalties/Damages. In the event that the
22 United States or the State agencies elect to pursue other available remedies or sanctions for
23 conduct of the Site Operator that is negligent, grossly negligent, or that constitutes intentional
24 misconduct, neither the Oversight Agency nor the Support Agency will seek Stipulated
25 Penalties/Damages for violations for which it is pursuing such other remedies or sanctions.
26 Subject to Paragraph 80, the Site Operator preserves any claims and defenses as to such

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1 actions by the United States or the State agencies for other available remedies or sanctions.
2 Election by the Oversight Agency or the Support Agency as between Stipulated
3 Penalties/Damages or other available remedies and sanctions for violations arising from
4 conduct by the Site Operator that is negligent, grossly negligent, or that constitutes intentional
5 misconduct shall not be subject to judicial review.

6 65. Coordination between the Oversight Agency and the Support Agency. The
7 Oversight Agency and the Support Agency shall coordinate concerning enforcement of this
8 Consent Decree as provided in the MOU. In accordance with the MOU, the following
9 provisions apply:

10 A. As to violations arising from conduct that is not negligent, grossly
11 negligent, or that does not constitute intentional misconduct: the Support Agency will not
12 bring an enforcement action for Stipulated Penalties/Damages if the Oversight Agency pursues
13 an enforcement action for Stipulated Penalties/Damages for the violation. If the Oversight
14 Agency elects not to pursue an enforcement action, the Support Agency may bring an action
15 for Stipulated Penalties/Damages only after complying with the procedures set forth in the
16 MOU.

17 B. Violations based on negligence that do not result in a release to waters of
18 the State or United States: the Support Agency and the State agencies that are serving as
19 neither the Oversight Agency nor the Support Agency may not bring an enforcement action for
20 Stipulated Penalties/Damages or other monetary sanctions if the Oversight Agency takes an
21 enforcement action for Stipulated Penalties/Damages or other monetary sanctions. If the
22 Oversight Agency elects not to pursue an enforcement action, the Support Agency and the
23 State agencies that are serving as neither the Oversight Agency nor the Support Agency may
24 bring an action for Stipulated Penalties/Damages or other monetary sanctions only after
25 complying with the procedures set forth in the MOU. The Support Agency and the State
26 agencies that are serving as neither the Oversight Agency nor the Support Agency may bring

1 an action for injunctive relief in a manner consistent with CERCLA and the SOW, whether or
2 not the Oversight Agency has brought an enforcement action for the violation.

3 C. For all other violations: EPA and the State agencies reserve their rights
4 to bring enforcement actions, as provided in this Consent Decree.

5 66. If the Oversight Agency determines that the Site Operator:

6 A. used best efforts to anticipate and prevent the trigger of the event giving
7 rise to Stipulated Penalties/Damages, and

8 B. used best efforts to respond to the noncompliance and minimize the
9 duration of the noncompliance,

10 then the Oversight Agency will not, absent unusual circumstances, impose Stipulated
11 Penalties/Damages to the extent that either:

12 C. the noncompliance results from a design failure of equipment or facilities
13 designed, constructed, or installed by the Site Operator or its agents and the design was
14 reasonably calculated to achieve the Performance Standards or other requirements of the SOW
15 in a highly reliable manner, or

16 D. the noncompliance results from a design or construction failure of
17 equipment or facilities designed, constructed, or installed by an entity other than the Site
18 Operator or its agents and the design, construction, or installation defect was latent and not
19 discoverable by the Site Operator or its agents through reasonable means.

20 Factors to consider in whether the design was reasonably calculated to achieve the
21 Performance Standards and other requirements of the SOW in a highly reliable manner include
22 whether the design was approved by the Oversight Agency without reservation, whether the
23 Site Operator diligently implemented the design as approved, whether the design utilized best
24 engineering practices, and other relevant factors.

25 67. The Oversight Agency may not impose Stipulated Penalties/Damages for a
26 particular noncompliance with the Consent Decree or SOW if the Oversight Agency has not

1 provided notice of the noncompliance within 365 calendar days of actual notice or actual
2 knowledge of the noncompliance, unless such period is extended by mutual consent. Where
3 notice of noncompliance is provided within 365 days (or such other period as is agreed upon)
4 of any instance of noncompliance of a continuing nature, Stipulated Penalties/Damages may be
5 imposed for the entire period of noncompliance, including any period of noncompliance
6 outside the applicable notice period, subject to the specific provisions of Paragraphs 55.B,
7 55.C, and 55.D of this Consent Decree.

8 68. Notwithstanding any other provision of this Section, the Oversight Agency may,
9 in its unreviewable discretion, waive any portion of Stipulated Penalties/Damages that have
10 accrued pursuant to this Consent Decree. In deciding whether to waive Stipulated
11 Penalties/Damages, the Oversight Agency may consider, among other factors, the overall
12 efforts taken by the Site Operator to prevent and minimize the duration and impact of the
13 trigger for the Stipulated Penalties/Damages, the history of the Site Operator's compliance
14 with the Decree, the degree of culpability, and the savings (if any) resulting from the non-
15 compliance. In the event that the Oversight Agency elects not to pursue Stipulated
16 Penalties/Damages under this Section, the Support Agency may impose Stipulated
17 Penalties/Damages hereunder, after following the procedures set forth in the MOU and in
18 accordance with Paragraphs 64 and 65 of this Consent Decree. In such cases, references to
19 "Oversight Agency" in Sections XVIII, XIX, and XX shall be read as including the "Support
20 Agency," and references to "Support Agency" shall be read as including "Oversight Agency,"
21 consistent with this Paragraph.

22 69. The United States, the State agencies, and the Site Operator acknowledge and
23 agree that any Stipulated Penalties/Damages that may be assessed under Section XX of this
24 Consent Decree shall be deemed to be penalties for performance deficiencies and not civil or
25 administrative penalties for violations of law.

1 unknown. These covenants not to sue shall take effect upon the payments that will be made by
2 the Settling Parties under this Consent Decree, pursuant to Paragraph 6. The covenants not to
3 sue provided in this Paragraph extend only to the Released Parties and do not extend to any
4 other person.

5 71. United States' General Reservations of Rights as to the Released Parties. The
6 covenants not to sue set forth above do not pertain to any matters other than those specified in
7 Paragraph 70. The United States reserves, and this Consent Decree is without prejudice to, all
8 rights against the Released Parties with respect to all other matters, including but not limited
9 to, the following:

10 A. Non-compliance with Consent Decree: claims based on a failure by the
11 Settling Parties to meet a requirement of this Consent Decree for which they are obligated;

12 B. Release or Disposal of Other Waste Material Inside the Site: claims
13 arising from the past, present, or future disposal, release, or threat of release of Waste
14 Materials at locations not within the Iron Mountain Mine Property, but geographically within
15 the Site, but only for Waste Materials that did not spread or migrate directly or indirectly from
16 the Iron Mountain Mine Property; to the extent that such other Waste Material mixes or
17 commingles with Waste Material that has migrated directly or indirectly from the Iron
18 Mountain Mine Property, each Party reserves its claims and defenses as to any potential
19 liability associated with Waste Material that has not migrated directly or indirectly from the
20 Iron Mountain Mine Property, including but not limited to claims and defenses as to joint and
21 several liability and divisibility of harm.

22 C. Conduct Causing Future Release or Disposal at the Site: claims arising
23 from future conduct by a Released Party after the Effective Date of this Consent Decree that
24 causes a new disposal, release, or threat of release of Waste Material at the Site;

25 D. Release or Disposal Outside the Site: claims arising from the past,
26 present, or future disposal, release, or threat of release of Waste Materials at locations outside

1 the Site, including the past, present, or future disposal, release, or threat of release of Waste
2 Materials shipped from the Site to a location outside the Site by rail, ship, car, truck, or
3 similar mechanical conveyance; and

4 E. Criminal liability: claims for criminal liability.

5 72. State Agencies' Covenant Not to Sue the Released Parties.

6 A. Covenant Not to Sue. In consideration of the payments that will be
7 made by the Settling Parties under the terms of this Consent Decree, and except as specifically
8 provided in Paragraph 72.B, the State agencies (including, without limitation, any State
9 department or agency that is included in the definition of the term Natural Resource Trustees)
10 covenant not to sue or to take administrative action against the Released Parties for any civil
11 claims or causes of actions, known or unknown, suspected or unsuspected, which the State
12 agencies have now or may have in the future against the Released Parties, under any federal,
13 state or common law, arising from or relating to any conditions at the Site, including without
14 limitation any claims for response costs, for response actions, for Natural Resource Damages,
15 for contribution, or for other relief based upon the disposal, release or threat of release of the
16 hazardous substances alleged in the State plaintiffs' complaint at or from the Site. The State
17 agencies relinquish, to the fullest extent permitted by law, the provisions, rights, and benefits
18 of Section 1542 of the California Civil Code, which provides:

19 A general release does not extend to claims which the creditor does not know or
20 suspect to exist in his favor at the time of executing the release, which if known
21 by him must have materially affected his settlement with the debtor.

22 These covenants not to sue shall take effect upon the payments that will be made by the
23 Settling Parties under this Consent Decree, pursuant to Paragraph 6. The covenants not to sue
24 provided in this Paragraph extend only to the Released Parties and do not extend to any other
25 person.

