

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

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1 this Consent Decree until EPA notifies the Settling Defendant  
2 pursuant to Paragraph 48.b of Section XV (Certification of  
3 Completion). EPA may direct Settling Defendant to reduce the  
4 frequency of these reports. If requested by EPA or the Natural  
5 Resource Trustees, Settling Defendant shall also provide  
6 briefings for EPA and the Natural Resource Trustees to discuss  
7 the progress of the Work.

8 32. The Settling Defendant shall notify EPA of any change in  
9 the schedule described in the monthly progress report for the  
10 performance of any activity, including, but not limited to, data  
11 collection and implementation of work plans, no later than seven  
12 days (7) prior to the performance of the activity.

13 33. Upon the occurrence of any event during performance of  
14 the Work that Settling Defendant is required to report pursuant  
15 to Section 103 of CERCLA or Section 304 of the Emergency Planning  
16 and Community Right-to-know Act (EPCRA), Settling Defendant shall  
17 within 24 hours of the onset of such event orally notify the EPA  
18 Project Coordinator or the Alternate EPA Project Coordinator (in  
19 the event of the unavailability of the EPA Project Coordinator),  
20 or, in the event that neither the EPA Project Coordinator or  
21 Alternate EPA Project Coordinator is available, the Emergency  
22 Response Section, Region 10, United States Environmental  
23 Protection Agency. These reporting requirements are in addition  
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1 to the reporting required by CERCLA Section 103 or EPCRA Section  
2 304.

3 34. Within twenty (20) days of the onset of such an event,  
4 Settling Defendant shall furnish to Plaintiffs a written report,  
5 signed by the Settling Defendant's Project Coordinator, setting  
6 forth the events which occurred and the measures taken, and to be  
7 taken, in response thereto. Within thirty (30) days of the  
8 conclusion of such an event, Settling Defendant shall submit a  
9 report setting forth all actions taken in response thereto.

10 35. Settling Defendant shall submit four (4) copies of all  
11 plans, reports, and data required by the AOC, the Remedial Design  
12 documents, the OMM Plan, the Consent Decree, or any other  
13 approved plans to EPA in accordance with the schedules set forth  
14 in such plans. Settling Defendant shall simultaneously submit  
15 one (1) copy of all such plans, reports and data to the State.

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

21 XII. SUBMISSIONS REQUIRING AGENCY APPROVAL

22 37. Except for submittals under the AOC, after review of any  
23 plan, report or other item which is required to be submitted for  
24 approval pursuant to this Consent Decree, EPA, after reasonable  
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1 opportunity for review and comment by the State and the Natural  
2 Resource Trustees, shall: (a) approve, in whole or in part, the  
3 submission; (b) approve the submission upon specified conditions;  
4 (c) modify the submission to cure the deficiencies; (d)  
5 disapprove, in whole or in part, the submission, directing that  
6 the Settling Defendant modify the submission; or (e) any  
7 combination of the above.

8 38. In the event of approval, approval upon conditions, or  
9 modification by EPA, pursuant to Paragraph 37(a), (b), or (c),  
10 Settling Defendant shall proceed to take any action required by  
11 the plan, report, or other item, as approved or modified by EPA  
12 subject only to their right to invoke the Dispute Resolution  
13 procedures set forth in Section XX (Dispute Resolution) with  
14 respect to the modifications or conditions made by EPA.

15 39. a. Upon receipt of a notice of disapproval pursuant to  
16 Paragraph 37(d), Settling Defendant shall, within thirty (30)  
17 days or such other time as specified by EPA in such notice,  
18 correct the deficiencies and resubmit the plan, report, or other  
19 item for approval. Any stipulated penalties applicable to the  
20 submission, as provided in Section XXI, shall accrue during the  
21 30-day period or otherwise specified period but shall not be  
22 payable unless the resubmission is disapproved or modified due to  
23 a material defect as provided in Paragraph 41.

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1 b. Notwithstanding the receipt of a notice of disapproval  
2 pursuant to Paragraph 37(d), Settling Defendant shall proceed, at  
3 the direction of EPA, to take any action required by any non-  
4 deficient portion of the submission. Implementation of any non-  
5 deficient portion of a submission shall not relieve Settling  
6 Defendant of any liability for stipulated penalties under section  
7 XXI (Stipulated Penalties).

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

17 41. If upon resubmission, a plan, report, or item is  
18 disapproved or modified by EPA due to a material defect, Settling  
19 Defendant shall be deemed to have failed to submit such plan,  
20 report, or item timely and adequately unless the Settling  
21 Defendant invokes the dispute resolution procedures set forth in  
22 Section XX (Dispute Resolution) and EPA's action is overturned  
23 pursuant to that Section. The provisions of Section XX (Dispute  
24 Resolution) and Section XXI (Stipulated Penalties) shall govern

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1 the implementation of the Work and accrual and payment of any  
2 stipulated penalties during Dispute Resolution. If EPA's  
3 disapproval or modification is upheld, stipulated penalties shall  
4 accrue for such violation from the date on which the initial  
5 submission was originally required, as provided in Section XXI.

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

13 XIII. PROJECT COORDINATORS

14 43. Within twenty (20) days of the effective date of this  
15 Consent Decree, Settling Defendant and EPA will notify the other  
16 Parties, in writing, of the name, address and telephone number of  
17 their respective designated Project Coordinators and Alternate  
18 Project Coordinators. If a Project Coordinator or Alternate  
19 Project Coordinator initially designated is changed, the identity  
20 of the successor will be given to the other parties at least five  
21 (5) working days before the changes occur, unless impracticable,  
22 but in no event later than the actual day the change is made.  
23 The Settling Defendant's Project Coordinator shall be subject to  
24 disapproval by EPA and shall have the technical expertise

1 sufficient to adequately oversee all aspects of the Work. The  
2 Settling Defendant's Project Coordinator shall not be an attorney  
3 for the Settling Defendant. He or she may assign other  
4 representatives, including other contractors, to serve as a Site  
5 representative for oversight of performance of daily operations  
6 during remedial activities.

7 44. Plaintiffs may designate other representatives,  
8 including, but not limited to, EPA's and Natural Resource  
9 Trustees' employees, and federal and Natural Resource Trustees'  
10 contractors and consultants, to observe and monitor the progress  
11 of any activity undertaken pursuant to this Consent Decree.  
12 EPA's Project Coordinator and Alternate Project Coordinator shall  
13 have the authority lawfully vested in a Remedial Project Manager  
14 (RPM) and an On-Scene Coordinator (OSC) by the National  
15 Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project  
16 Coordinator or Alternate Project Coordinator shall have  
17 authority, consistent with the National Contingency Plan, to halt  
18 any Work required by this Consent Decree that is inconsistent  
19 with Work approved by EPA and to take any necessary response  
20 action when s/he determines that conditions at the Site  
21 constitute an emergency situation or may present an immediate  
22 threat to public health or welfare or the environment due to  
23 release or threatened release of Waste Material.

1                   XIV.   ASSURANCE OF ABILITY TO COMPLETE WORK

2           45.   Within thirty (30) days of entry of this Consent Decree,  
3   Settling Defendant shall establish and maintain financial  
4   security for performance of the Work in the amount of \$22,000,000  
5   by demonstrating that the Settling Defendant has:

6           (a) A current rating for its most recent bond issuance of  
7   no lower than BBB, as issued by Standard and Poor's, or Baa, as  
8   issued by Moody's; and

9           (b) Equity of at least six (6) times the amount of the  
10   performance of the Work that remains to be completed.

11          46.   To demonstrate the financial assurance for performance of  
12   the Work pursuant to Paragraph 45 of this Consent Decree,  
13   Settling Defendant shall submit to EPA a copy of an independent  
14   certified public accountant's report on examination of the  
15   Settling Defendant's most recent completed fiscal year. Settling  
16   Defendant shall resubmit the information required by Paragraph 45  
17   annually, on the anniversary of the effective date of this  
18   Consent Decree. In the event that EPA determines at any time  
19   that the financial assurances provided pursuant to this Section  
20   are inadequate, Settling Defendant shall, within thirty (30) days  
21   of receipt of notice of EPA's determination, obtain and present  
22   to EPA for approval one of the other forms of financial assurance  
23   listed in 40 CFR § 264.143. Settling Defendant's inability to  
24   demonstrate financial ability to complete the Work shall not



1 | excuse performance of any activities required under this Consent  
2 | Decree.

3 |                   XV. CERTIFICATION OF COMPLETION

4 |         47. Completion of the Remedial Action

5 |             a. Within ninety (90) days after Settling Defendant  
6 | concludes that it has fully completed and attained Performance  
7 | Standards for the Remedial Action for: (1) the cleanup and  
8 | dredging of sediments in the Sitcum Waterway Problem Area; (2)  
9 | the dredging of sediments in the Blair Waterway; (3) the disposal  
10 | in the Milwaukee Waterway of sediments from both the Sitcum and  
11 | Blair Waterways; and (4) the habitat mitigation at and beyond the  
12 | mouth of the Milwaukee Waterway, Settling Defendant shall  
13 | schedule and conduct a pre-certification inspection to be  
14 | attended by Settling Defendant, EPA, and, at their option, the  
15 | Natural Resource Trustees. The pre-certification inspection  
16 | shall proceed without regard to any Additional Response Actions  
17 | for the Sitcum Phase 2 Area, pursuant to Paragraph 18.b. If,  
18 | after the pre-certification inspection, the Settling Defendant  
19 | still believes that these elements of the Remedial Action have  
20 | been fully performed and the Performance Standards have been  
21 | attained, it shall submit a written report requesting EPA  
22 | approval, pursuant to Section XII (Submissions Requiring Agency  
23 | Approval) within thirty (30) days of the inspection. In the  
24 | report, a registered professional engineer and the Settling

1 Defendant's Project Coordinator shall state that such elements of  
2 the Remedial Action have been completed in full satisfaction of  
3 the requirements of this Consent Decree. The written report  
4 shall include as-built drawings signed and stamped by a  
5 professional engineer. The written report shall also describe  
6 how the habitat mitigation components have satisfied each  
7 identified Performance Standard. The report shall contain the  
8 following statement, signed by an authorized official of the  
9 Settling Defendant or the Settling Defendant's Project  
10 Coordinator:

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

15 If, after completion of the pre-certification inspection and  
16 receipt and review of the written report, EPA, after reasonable  
17 opportunity to review and comment by the State, determines that  
18 these elements of the Remedial Action or any portion thereof has  
19 not been completed in accordance with this Consent Decree or that  
20 the Performance Standards have not been achieved, EPA will notify  
21 Settling Defendant in writing of the activities that must be  
22 undertaken to complete these elements of the Remedial Action and  
23 achieve the Performance Standards. EPA will set forth in the  
24 notice a schedule for performance of such activities consistent  
25 with the Consent Decree, including Remedial Design documents

1 approved by EPA under the AOC or require the Settling Defendant  
2 to submit a schedule to EPA for approval pursuant to Section XII  
3 (Submissions Requiring Agency Approval). Settling Defendant  
4 shall perform all activities described in the notice in  
5 accordance with the specifications and schedules established  
6 pursuant to this Paragraph, subject to their right to invoke the  
7 dispute resolution procedures set forth in Section XX (Dispute  
8 Resolution).

9           b. Within ninety (90) days after Settling Defendant  
10 concludes that the Remedial Action, including the Additional  
11 Mitigation Project, has been fully performed and the Performance  
12 Standards have been attained, Settling Defendant shall schedule  
13 and conduct a pre-certification inspection to be attended by  
14 Settling Defendant, EPA, and, at their option, the Natural  
15 Resource Trustees. If, after the pre-certification inspection,  
16 the Settling Defendant still believes that the Remedial Action  
17 has been fully performed and the Performance Standards have been  
18 attained, it shall submit a written report requesting  
19 certification to EPA for approval, pursuant to Section XII  
20 (Submissions Requiring Agency Approval) within thirty (30) days  
21 of the inspection. In the report, a registered professional  
22 engineer and the Settling Defendant's Project Coordinator shall  
23 state that the Remedial Action has been completed in full  
24 satisfaction of the requirements of this Consent Decree. The

1 written report shall include as-built drawings signed and stamped  
2 by a professional engineer; the report may refer to, but need not  
3 include, drawings already submitted pursuant to Paragraph 46.a.  
4 The written report shall also describe how the habitat mitigation  
5 components have satisfied each identified Performance Standard.  
6 The report shall contain the following statement, signed by an  
7 authorized official of the Settling Defendant or the Settling  
8 Defendant's Project Coordinator:

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

13 If, after completion of the pre-certification inspection and  
14 receipt and review of the written report, EPA, after reasonable  
15 opportunity to review and comment by the State, determines that  
16 the Remedial Action or any portion thereof has not been completed  
17 in accordance with this Consent Decree or that the Performance  
18 Standards have not been achieved, EPA will notify Settling  
19 Defendant in writing of the activities that must be undertaken to  
20 complete the Remedial Action and achieve the Performance  
21 Standards. EPA will set forth in the notice a schedule for  
22 performance of such activities consistent with the Consent Decree  
23 and Remedial Design documents approved by EPA under the AOC or  
24 require the Settling Defendant to submit a schedule to EPA for  
25 approval pursuant to Section XII (Submissions Requiring Agency

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1 Approval). Settling Defendant shall perform all activities  
2 described in the notice in accordance with the specifications and  
3 schedules established pursuant to this Paragraph, subject to  
4 their right to invoke the dispute resolution procedures set forth  
5 in Section XX (Dispute Resolution).

6 c. Within ninety (90) days after Settling Defendant  
7 concludes that the Remedial Action, including any Additional  
8 Response Actions under Section VII, has been fully performed and  
9 the Performance Standards have been attained, Settling Defendant  
10 shall schedule and conduct a pre-certification inspection to be  
11 attended by Settling Defendant, EPA, and, at their option, the  
12 Natural Resource Trustees. If, after the pre-certification  
13 inspection, the Settling Defendant still believes that the  
14 Remedial Action has been fully performed and the Performance  
15 Standards have been attained, it shall submit a written report  
16 requesting certification to EPA for approval, pursuant to Section  
17 XII (Submissions Requiring Agency Approval) within thirty (30)  
18 days of the inspection. In the report, a registered professional  
19 engineer and the Settling Defendant's Project Coordinator shall  
20 state that the Remedial Action has been completed in full  
21 satisfaction of the requirements of this Consent Decree. The  
22 written report shall include as-built drawings signed and stamped  
23 by a professional engineer; the report may refer to, but need not  
24 include, drawings already submitted pursuant to Paragraph 46.a.

1 The written report shall also describe how the habitat mitigation  
2 components have satisfied each identified Performance Standard.  
3 The report shall contain the following statement, signed by an  
4 authorized official of the Settling Defendant or the Settling  
5 Defendant's Project Coordinator:

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

12 If, after completion of the pre-certification inspection and  
13 receipt and review of the written report, EPA, after reasonable  
14 opportunity to review and comment by the State, determines that  
15 the Remedial Action or any portion thereof has not been completed  
16 in accordance with this Consent Decree or that the Performance  
17 Standards have not been achieved, EPA will notify Settling  
18 Defendant in writing of the activities that must be undertaken to  
19 complete the Remedial Action and achieve the Performance  
20 Standards. EPA will set forth in the notice a schedule for  
21 performance of such activities consistent with the Consent Decree  
22 and Remedial Design documents approved by EPA under the AOC or  
23 require the Settling Defendant to submit a schedule to EPA for  
24 approval pursuant to Section XII (Submissions Requiring Agency  
25 Approval). Settling Defendant shall perform all activities  
26 described in the notice in accordance with the specifications and  
27 schedules established pursuant to this Paragraph, subject to

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

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

15 |         48. Completion of the Work

16 |         a. Within ninety (90) days after Settling Defendant  
17 | concludes that all phases of the Work (including activities under  
18 | the OMM Plan), have been fully performed, Settling Defendant  
19 | shall schedule and conduct a pre-certification inspection to be  
20 | attended by Settling Defendant and EPA. If, after the pre-  
21 | certification inspection, the Settling Defendant still believes  
22 | that the Work has been fully performed, Settling Defendant shall  
23 | submit a written report by a registered professional engineer  
24 | stating that the Work has been completed in full satisfaction of

1 the requirements of this Consent Decree. The report shall  
2 contain the following statement, signed by an authorized official  
3 of the Settling Defendant or the Settling Defendant's Project  
4 Coordinator:

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

11 If, after review of the written report, EPA, after reasonable  
12 opportunity for review and comment by the State, determines that  
13 any portion of the Work has not been completed in accordance with  
14 this Consent Decree, EPA will notify Settling Defendant in  
15 writing of the activities that must be undertaken to complete the  
16 Work. EPA will set forth in the notice a schedule for  
17 performance of such activities consistent with the Consent Decree  
18 and Remedial Design documents approved by EPA under the AOC or  
19 require the Settling Defendant to submit a schedule to EPA for  
20 approval pursuant to Section XII (Submissions Requiring Agency  
21 Approval). Settling Defendant shall perform all activities  
22 described in the notice in accordance with the specifications and  
23 schedules established therein, subject to their right to invoke  
24 the dispute resolution procedures set forth in Section XX  
25 (Dispute Resolution).

26 b. If EPA concludes, based on the initial or any  
27 subsequent request for Certification of Completion by Settling

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1 Defendant, and after reasonable opportunity for review and  
2 comment by the State, that the Work has been fully performed in  
3 accordance with this Consent Decree, EPA will so notify the  
4 Settling Defendant in writing.

5 XVI. EMERGENCY RESPONSE

6 49. In the event of any action or occurrence during the  
7 performance of the Work which causes or threatens a release of  
8 Waste Material from the Sitcum Waterway Remediation Project that  
9 constitutes an emergency situation or may present an immediate  
10 threat to public health or welfare or the environment, Settling  
11 Defendant shall, subject to Paragraph 50, immediately take all  
12 appropriate action to prevent, abate, or minimize such release or  
13 threat of release, and shall immediately notify the EPA's Project  
14 Coordinator, or, if the Project Coordinator is unavailable, EPA's  
15 Alternate Project Coordinator. If neither of these persons is  
16 available, the Settling Defendant shall notify the EPA Superfund  
17 Response/Investigations Branch, Region 10. Settling Defendant  
18 shall take such actions in consultation with EPA's Project  
19 Coordinator or other available authorized EPA officer and in  
20 accordance with all applicable provisions of the Health and  
21 Safety Plans, the Contingency Plans, and any other applicable  
22 plans or documents developed pursuant to the AOC. In the event  
23 that Settling Defendant fails to take appropriate response action  
24 as required by this Section, and EPA takes such action instead,

1 Settling Defendant shall reimburse EPA all costs of the response  
2 action not inconsistent with the NCP pursuant to Section XVII  
3 (Reimbursement of Response Costs).

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

11 XVII. REIMBURSEMENT OF RESPONSE COSTS AND  
12 SETTLEMENT OF NATURAL RESOURCE DAMAGE CLAIMS

13 51. a. Response Costs.

14 Within thirty (30) days of the effective date of this  
15 Consent Decree, Settling Defendant shall pay to the United States  
16 \$1,136,638.18 in reimbursement of EPA's Past Response Costs. The  
17 payments shall be made by Electronic Funds Transfer ("EFT" or  
18 wire transfer) to the United States Department of Justice lockbox  
19 bank, referencing DOJ Case No. 90-11-3-711, and U.S.A.O. file  
20 number 9301795, and EPA Region and Site/Spill ID #10G7 in  
21 reimbursement of EPA's Past Response Costs. Payment shall be  
22 made in accordance with instructions provided by the United  
23 States to the Settling Defendant upon execution of this Consent  
24 Decree by the United States. Payments by EFT must be received at

1 the U.S. D.O.J. lockbox bank by 4:00 p.m. (Eastern Time) to be  
2 credited on that day.

3 b. Natural Resource Damages.

4 i. Within thirty (30) days of the effective date of this  
5 Consent Decree, Settling Defendant shall pay to the Natural  
6 Resource Trustees the sum of \$335,000.00 in reimbursement of Past  
7 Trustee Assessment Costs. Payments to each of the Natural  
8 Resource Trustees shall be made in the amounts and with payees  
9 and addressed as follows:

10 Payee: National Oceanic and Atmospheric Administration

11 Amount: \$157,003.53

12 Address: Manager  
13 NOS/Damage Assessment Center  
6001 Executive Blvd., Rm. 425  
Rockville, MD 20852

14 Payee: Puyallup Tribe of Indians

15 Amount: \$84,588.00

16 Address: Mr. Richard Du Bey  
17 Stoel Rives Boley Jones & Grey  
3600 One Union Square  
18 600 University Street  
Seattle, WA 98101

19 Payee: Muckleshoot Indian Tribe

20 Amount: \$28,542.47

21 Address: Mr. Rob Otsea  
22 Reservation Attorney  
Muckleshoot Indian Tribe  
23 39015 172nd Avenue Southeast  
Auburn, WA 98002

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1 Payee: State of Washington/Dept. of Ecology

2 Amount: \$23,000.00

3 Address: State of Washington  
4 Department of Ecology  
5 Attention: Cashiering Section  
6 P.O. Box 5128  
7 Lacey, WA 98503-0210

8 Payee: Secretary of the Interior

9 Amount: \$41,866.00

10 Address: Kate Benkert  
11 U.S. Fish and Wildlife Service  
12 3704 Griffen Lane S.E., Suite 102  
13 Olympia, WA 98501-2192

14 ii. Settling Defendant shall pay to the Natural Resource  
15 Trustees \$12,000,000 (twelve million dollars) in settlement of  
16 Natural Resource Damages caused by releases of hazardous  
17 substances from property owned, managed or operated by Settling  
18 Defendant within the Commencement Bay Environment. Payments  
19 shall be made in accordance with the attached Order directing the  
20 deposit of Natural Resource Damages into the Registry of the  
21 Court and in compliance with the following schedule:

	<u>Date:</u>	<u>Amount:</u>
19	11/15/93	\$ 800,000
20	11/15/94	\$1,000,000
	11/15/95	\$ 800,000
21	5/15/96	\$ 500,000
	11/15/96	\$ 500,000
22	5/15/97	\$1,000,000
	11/15/97	\$1,000,000
23	5/15/98	\$1,400,000
	11/15/98	\$1,400,000
24	5/15/99	\$1,900,000
	11/15/99	\$1,700,000

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1 The Natural Resource Trustees and Settling Defendant intend that  
2 all funds paid for Natural Resource Damages be used to benefit  
3 the natural resources of Commencement Bay in Pierce County  
4 injured as a result of releases of hazardous substances. The  
5 Natural Resource Trustees and Settling Defendant also recognize  
6 that the maximum benefit of habitat restoration in Commencement  
7 Bay can best be achieved with prompt resolution of all claims for  
8 Natural Resource Damages by the Natural Resource Trustees against  
9 responsible parties. Accordingly, the Natural Resource Trustees  
10 and Settling Defendant agree that the Natural Resource Trustees  
11 may apply up to \$1,950,000 (one million nine hundred fifty  
12 thousand dollars) of the funds paid as Natural Resource Damages  
13 to pay Future Trustee Assessment Costs as follows: (a) up to  
14 \$150,000 (one hundred fifty thousand dollars) of that sum for  
15 Future Trustee Assessment Costs incurred in connection with the  
16 Sitcum Waterway Remediation Project; (b) up to \$800,000 (eight  
17 hundred thousand dollars) of that sum for the costs of assessing  
18 Natural Resource Damages in the Commencement Bay Environment; and  
19 (c) up to an additional \$1,000,000 (one million dollars) of that  
20 sum for the costs of assessing Natural Resource Damages in the  
21 Commencement Bay Environment subsequent to January 1, 1995, if  
22 the Natural Resource Trustees are unable, after good faith  
23 efforts, to obtain adequate funds to cover such costs from other  
24 potentially responsible parties. The Natural Resource Trustees

1 agree to credit Settling Defendant the amount of \$35,555.56  
2 (thirty-five thousand five hundred fifty-five dollars and fifty-  
3 six cents) against the payment due November 15, 1999, to reflect  
4 payments made by Settling Defendant toward the costs of the  
5 natural resource damage assessment pursuant to the Funding and  
6 Participation Agreement for Phase 1 of the Commencement Bay  
7 Natural Resource Damage Assessment.

8           iii. Settling Defendant shall impose institutional con-  
9 trols on the "Wasser & Winters Property" (identified in Appendix  
10 E) to establish:

11                   (1) a permanent Buffer Area (as defined in Appendix  
12 E) in which the Settling Defendant shall refrain from conducting  
13 any development activities, except remedial activities under  
14 CERCLA, MTCA, or otherwise required under applicable law; and

15                   (2) a permanent Disturbance Barrier, which shall be  
16 an eight-foot cedar fence constructed along the "Disturbance  
17 Barrier Line" (as shown on Appendix E), or such other Disturbance  
18 Barrier agreed upon by the Settling Defendant and the Natural  
19 Resource Trustees that meets the objectives set forth in this  
20 Subparagraph. The purpose of the permanent Buffer Area and the  
21 permanent Disturbance Barrier is to minimize sound, light, visual  
22 and physical disturbances within the Buffer Area and upon the  
23 habitat and wildlife in the Hylebos Creek area.

1           iv. Settling Defendant agrees to provide the Natural  
2 Resource Trustees and their representatives, including their  
3 contractors, access to the Buffer Area on the "Wasser & Winters  
4 Property" to monitor the area and undertake such restoration ac-  
5 tivities as may enhance the habitat value of the Buffer Area.  
6 The Natural Resource Trustees and their representatives shall  
7 give reasonable notice prior to access. Settling Defendant  
8 agrees to provide the Natural Resource Trustees with applicable  
9 health and safety plans. The Natural Resource Trustees agree to  
10 abide by such health and safety requirements. In addition, the  
11 Natural Resource Trustees and the Settling Defendant agree to  
12 conduct their activities in the Buffer Area in a manner designed  
13 to minimize interference with the Settling Defendant's  
14 obligations under this Consent Decree or any other applicable  
15 law. The Natural Resource Trustees agree to notify Settling  
16 Defendant prior to conducting any restoration activities in the  
17 Buffer Area.

18           v. The Natural Resource Trustees agree to require that  
19 any contractor who performs work for them in the Buffer Area  
20 shall agree to indemnify and save the Settling Defendant harmless  
21 against all claims of any nature, including, but not limited to,  
22 claims by third parties for death, personal injury, or property  
23 damage, and claims for environmental liability that arises as the  
24 result of negligent acts or omissions of such contractors, its

1 employees and agents, while they are present on the Buffer Area.  
2 Such indemnity shall be limited to actual damages only, and shall  
3 not extend to consequential damages or any other liability.

4 vi. To minimize the impact upon the natural environment,  
5 drainage on the "Wasser & Winters Property" shall be discharged  
6 at a point no closer to the mouth of Hylebos Creek than the  
7 discharge point shown on Appendix E.

8 vii. Settling Defendant shall continue to remain liable  
9 for the cleanup and/or remediation of any hazardous substances,  
10 including all known or subsequently discovered hazardous  
11 substances, that remain on, in, under or about the "Wasser &  
12 Winters Property" and the Option Area on the "East West Road  
13 Property" (as defined in Appendix F) as of the effective date of  
14 the Consent Decree ("Historic Contamination"). Settling  
15 Defendant shall be liable for all monitoring, testing or other  
16 ongoing or future requirements regarding Historic Contamination  
17 on, in, under or about the "Wasser & Winters Property" and the  
18 Option Area on the "East West Road Property" that either have  
19 been, or may in the future be, imposed by this Consent Decree or  
20 other lawful means. To the extent permitted by law, Settling  
21 Defendant shall hold the Natural Resource Trustees harmless and  
22 shall indemnify and defend the Natural Resource Trustees against  
23 any claim that may be asserted by any person against the Natural  
24 Resource Trustees due to the presence of hazardous substances on,



1 in, under or about the "Wasser & Winters Property" and the Option  
2 Area on the "East West Road Property." If by intent of Settling  
3 Defendant or by operation of law any property interest is trans-  
4 ferred to the Natural Resource Trustees pursuant to this Consent  
5 Decree, such transfer shall not create liability for future  
6 cleanup, remediation and/or natural resource damages due to the  
7 presence of Historic Contamination that remains on, in, under or  
8 about the "Wasser & Winters Property" and the Option Area on the  
9 "East West Road Property" as of the date that such interest is  
10 transferred.

11 viii. Settling Defendant and the Natural Resource  
12 Trustees have entered into an Option Agreement to Buy Real  
13 Property, attached and made a part hereof as Appendix F. The  
14 Settling Defendant and Natural Resource Trustees agree to be  
15 bound by the terms of said Agreement. Settling Defendant agrees  
16 to grant the Natural Resource Trustees a right of first refusal  
17 with regard to the Option Area, defined in Appendix F. Such  
18 right of first refusal shall commence at the end of the first  
19 five-year term of the Option Agreement and continue for five  
20 years thereafter; provided, however, that such right of first  
21 refusal shall terminate upon exercising of the Option. This  
22 right of first refusal shall be exercised within ten (10) days of  
23 the communication of an offer to purchase the Option Area to the  
24 Lead Trustee.

1 ix. The obligations of Settling Defendant with regard to  
2 the implementation of the institutional controls on the "Wasser &  
3 Winters Property," including the right of access described above,  
4 and on the "East West Road Property" (identified in Appendix F)  
5 shall be binding upon the Settling Defendant and any and all  
6 persons who subsequently acquire any interest in such property.  
7 Within fifteen (15) days after entry of this Consent Decree,  
8 Settling Defendant shall record at the Registry of Deeds a notice  
9 of institutional controls on each property, which shall be  
10 reviewed and concurred in by the Lead Trustee prior to recording.

11 52. Settling Defendant shall reimburse the United States for  
12 all Future Response Costs in connection with the Sitcum Waterway  
13 Remediation Project not inconsistent with the National  
14 Contingency Plan incurred by the United States that are not  
15 reimbursed as Future Trustee Assessment Costs pursuant to  
16 Paragraph 51.b.ii. The United States will send the Settling  
17 Defendant a bill requiring payment that includes a prepared cost  
18 summary, which includes direct and indirect costs incurred by EPA  
19 and DOJ, and their contractors, on an annual basis. Settling  
20 Defendant shall make all payments within sixty (60) days of  
21 Settling Defendant's receipt of each bill requiring payment,  
22 except as otherwise provided in Paragraph 53. Settling Defendant  
23 shall make all payments required by this Paragraph in the form of  
24 a certified check(s) made payable to "EPA Hazardous Substances  
25

1 Superfund" and referencing the U.S.A.O. file number 9301795,  
2 the EPA Region and Site/Spill ID #10G7, and DOJ case number 90-  
3 11-3-711. Settling Defendant shall forward the certified  
4 check(s) to the U.S. EPA Superfund, P.O. Box 360903M, Pittsburgh,  
5 Pennsylvania 15251, and shall send copies of the check(s) to the  
6 Director of the Hazardous Waste Division, EPA, Region 10, the EPA  
7 RPM, and the EPA Hearing Clerk, Office of Regional Counsel, EPA,  
8 Region 10, and to the U.S. Department of Justice as specified in  
9 Section XXVII (Notice and Submissions).

10 53. Settling Defendant may contest payment of any Future  
11 Response Costs under Paragraph 52 if they determine that the  
12 United States has made an accounting error or if it alleges that  
13 a cost item that is included represents costs that are  
14 inconsistent with the NCP. Such objection shall be made in  
15 writing within thirty (30) days of receipt of the bill and must  
16 be sent to the United States (if the United States accounting is  
17 being disputed) pursuant to Section XXVII (Notices and  
18 Submissions). Any such objection shall specifically identify the  
19 contested Future Response Costs and the basis for objection. In  
20 the event of an objection, the Settling Defendant shall within  
21 the thirty (30) day period pay all uncontested Future Response  
22 Costs to the United States in the manner described in Paragraph  
23 52. Simultaneously, the Settling Defendant shall establish an  
24 interest bearing escrow account in a federally-insured bank duly

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1 chartered in the State of Washington and remit to that escrow  
2 account funds equivalent to the amount of the contested Future  
3 Response Costs. The Settling Defendant shall send to the United  
4 States, as provided in Section XXVII (Notices and Submissions), a  
5 copy of the transmittal letter and check paying the uncontested  
6 Future Response Costs, and a copy of the correspondence that  
7 establishes and funds the escrow account, including, but not  
8 limited to, information containing the identity of the bank and  
9 bank account under which the escrow account is established as  
10 well as a bank statement showing the initial balance of the  
11 escrow account. Simultaneously with establishment of the escrow  
12 account, the Settling Defendant shall initiate the Dispute  
13 Resolution procedures in Section XX (Dispute Resolution). If the  
14 United States prevails in the dispute, within five (5) days of  
15 the resolution of the dispute, the Settling Defendant shall pay  
16 the sums due (with accrued interest) to the United States, in the  
17 manner described in Paragraph 52. If the Settling Defendant  
18 prevails concerning any aspect of the contested costs, the  
19 Settling Defendant shall pay that portion of the costs (plus  
20 associated accrued interest) for which it did not prevail to the  
21 United States, in the manner described in Paragraph 52; Settling  
22 Defendant shall be disbursed any balance of the escrow account.  
23 The dispute resolution procedures set forth in this Paragraph in  
24 conjunction with the procedures set forth in Section XX (Dispute

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1 Resolution) shall be the exclusive mechanisms for resolving  
2 disputes regarding the Settling Defendant's obligation to  
3 reimburse the United States for its Future Response Costs.

4 54. In the event that the payments required by Paragraphs  
5 51.a. and 51.b.i. are not made within thirty (30) days of the  
6 effective date of this Consent Decree or the payments required by  
7 Paragraph 52 are not made within sixty (60) days of the Settling  
8 Defendant's receipt of the bill, Settling Defendant shall pay  
9 interest on the unpaid balance at the rate established pursuant  
10 to Section 107(a) of CERCLA, 42 U.S.C. § 9607. The interest to  
11 be paid on Past Response Costs shall begin to accrue on the  
12 thirty-first (31st) day after the effective date of this Consent  
13 Decree. The interest on Future Response Costs shall begin to  
14 accrue on the sixty-first (61st) day after the date of the  
15 Settling Defendant's receipt of the bill. Interest shall accrue  
16 at the rate specified through the date of the Settling  
17 Defendant's payment. Payments of interest made under this  
18 Paragraph shall be in addition to such other remedies or  
19 sanctions available to Plaintiffs by virtue of Settling  
20 Defendant's failure to make timely payments under this Section.

21 XVIII. INDEMNIFICATION AND INSURANCE

22 55. The United States and the Natural Resource Trustees do  
23 not assume any liability by entering into this agreement or by  
24 virtue of any designation of Settling Defendant as EPA's

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

1 Consent Decree. Neither the Settling Defendant nor any such  
2 contractor shall be considered an agent of the United States or  
3 the Natural Resource Trustees.

4 56. Settling Defendant waives all claims against the United  
5 States and the Natural Resource Trustees for reimbursement or for  
6 set-off of any payments made or to be made to the United States  
7 or the Natural Resource Trustees for damages or to the United  
8 States or the Natural Resource Trustees arising from or on  
9 account of any contract, agreement, or arrangement between  
10 Settling Defendant and any person for performance of Work on or  
11 relating to the Site, including, but not limited to, claims on  
12 account of construction delays. In addition, Settling Defendant  
13 shall indemnify and hold harmless the United States and the  
14 Natural Resource Trustees with respect to any and all claims for  
15 damages or reimbursement arising from or on account of any  
16 contract, agreement, or arrangement between Settling Defendant  
17 and any person for performance of Work on or relating to the  
18 Sitcum Waterway Remediation Project, including, but not limited  
19 to, claims on account of construction delays.

20 57. No later than fifteen (15) days before commencing any on-  
21 site Work, Settling Defendant shall secure, and shall maintain  
22 until the first anniversary of EPA's Certification of Completion  
23 of the Remedial Action pursuant to Paragraph 47.d. of Section XV  
24 (Certification of Completion) comprehensive general liability

1 insurance and automobile insurance with limits of ten million  
2 dollars, combined single limit naming as additional insured the  
3 United States and the Natural Resource Trustees. In addition,  
4 for the duration of this Consent Decree, Settling Defendant shall  
5 satisfy, or shall ensure that its contractors or subcontractors  
6 satisfy, all applicable laws and regulations regarding the  
7 provision of worker's compensation insurance for all persons  
8 performing the Work on behalf of Settling Defendant in  
9 furtherance of this Consent Decree. Prior to commencement of the  
10 Work under this Consent Decree, Settling Defendant shall provide  
11 to EPA and the Natural Resource Trustees certificates of such  
12 insurance and a copy of each insurance policy. Settling  
13 Defendant shall resubmit such certificates and copies of policies  
14 each year on the anniversary of the effective date of this  
15 Consent Decree. If Settling Defendant demonstrates by evidence  
16 satisfactory to EPA and the Natural Resource Trustees that any  
17 contractor or subcontractor maintains insurance equivalent to  
18 that described above, or insurance covering the same risks but in  
19 a lesser amount, then, with respect to that contractor or  
20 subcontractor, the Settling Defendant need provide only that  
21 portion of the insurance described above which is not maintained  
22 by the contractor or subcontractor.







1 is necessary to complete those obligations. An extension of the  
2 time for performance of the obligations affected by the force  
3 majeure event shall not, of itself, extend the time for  
4 performance of any other obligation. If EPA does not agree that  
5 the delay or anticipated delay has been or will be caused by a  
6 force majeure event, EPA will notify the Settling Defendant in  
7 writing of its decision. If EPA agrees that the delay is  
8 attributable to a force majeure event, EPA will notify the  
9 Settling Defendant in writing of the length of the extension, if  
10 any, for performance of the obligations affected by the force  
11 majeure event.

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

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1 violation by the Settling Defendant of the affected obligation of  
2 this Consent Decree identified to EPA and the Court.

3 XX. DISPUTE RESOLUTION

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

11 63. Any dispute which arises under or with respect to this  
12 Consent Decree shall be resolved as follows: If the Settling  
13 Defendant objects to any EPA notice or EPA action made pursuant  
14 to this Consent Decree, Settling Defendant shall send the EPA  
15 Project Coordinator a written Notice of Dispute within fifteen  
16 (15) days after EPA's action or after receiving EPA's notice.  
17 The dispute in the first instance shall be the subject of  
18 informal negotiations between the parties to the dispute. The  
19 period for informal negotiations shall not exceed twenty (20)  
20 days from the time the Notice of Dispute is received by the  
21 Project Coordinator, unless the parties to the dispute agree in  
22 writing to an alternative period.

23 64. a. In the event that the parties cannot resolve a  
24 dispute by informal negotiations under the preceding Paragraph,

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1 | then the position advanced by EPA shall be considered binding  
2 | unless, within ten (10) days after the conclusion of the informal  
3 | negotiation period, Settling Defendant invokes the formal dispute  
4 | resolution procedures of this Section by serving on the United  
5 | States a written Statement of Position on the matter in dispute,  
6 | including, but not limited to, any factual data, analysis or  
7 | opinion supporting that position and any supporting documentation  
8 | relied upon by the Settling Defendant. The Statement of Position  
9 | shall specify the Settling Defendant's position as to whether  
10 | formal dispute resolution should proceed under Paragraph 65 or  
11 | 66.

12 |       b. Within fourteen (14) days after receipt of Settling  
13 | Defendant's Statement of Position, EPA will serve on Settling  
14 | Defendant its Statement of Position, including, but not limited  
15 | to, any factual data, analysis, or opinion supporting that  
16 | position and all supporting documentation relied upon by EPA.  
17 | EPA's Statement of Position shall include a statement as to  
18 | whether formal dispute resolution should proceed under Paragraph  
19 | 65 or 66.

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

1 | appeals to the court to resolve the dispute, the Court shall  
2 | determine which paragraph is applicable in accordance with the  
3 | standards of applicability set forth in Paragraphs 65 or 66.

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

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

23 |       b. The Director of the Hazardous Waste Division, EPA  
24 | Region 10, will issue a final administrative decision resolving

1 the dispute based on the administrative record described in  
2 Paragraph 65.a. This decision shall be binding upon the Settling  
3 Defendant, subject only to the right to seek judicial review  
4 pursuant to Paragraphs 65.c. and d.

5 c. Any administrative decision made by EPA pursuant to  
6 Paragraph 65.b. shall be reviewable by this Court, provided that  
7 a notice of judicial appeal is filed by the Settling Defendant  
8 with the Court and served on all Parties within ten (10) days of  
9 receipt of EPA's decision. The notice of judicial appeal shall  
10 include a description of the matter in dispute, the efforts made  
11 by the parties to resolve it, the relief requested, and the  
12 schedule, if any, within which the dispute must be resolved to  
13 ensure orderly implementation of this Consent Decree. The United  
14 States may file a response to Settling Defendant's notice of  
15 judicial appeal.

16 d. In proceedings on any dispute governed by this  
17 Paragraph, the Settling Defendant shall have the burden of  
18 demonstrating that the decision of the Hazardous Waste Division  
19 Director is arbitrary and capricious or otherwise not in  
20 accordance with law. Judicial review of EPA's decision shall be  
21 on the administrative record compiled pursuant to Paragraph 65.a.

22 66. Formal dispute resolution for disputes that neither  
23 pertain to the selection or adequacy of any response action nor  
24 are otherwise accorded review on the administrative record under

1 applicable principles of administrative law, shall be governed by  
2 this Paragraph.

3 a. Following receipt of Settling Defendant's Statement  
4 of Position submitted pursuant to Paragraph 64, the Director of  
5 the Hazardous Waste Division, EPA Region 10, will issue a final  
6 decision resolving the dispute. The Hazardous Waste Division  
7 Director's decision shall be binding on the Settling Defendant  
8 unless, within ten (10) days of receipt of the decision, the  
9 Settling Defendant files with the Court and serves on the parties  
10 a notice of judicial appeal setting forth the matter in dispute,  
11 the efforts made by the parties to resolve it, the relief  
12 requested, and the schedule, if any, within which the dispute  
13 must be resolved to ensure orderly implementation of the Consent  
14 Decree. The United States may file a response to Settling  
15 Defendant's notice of judicial appeal.

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

20 67. The invocation of formal dispute resolution procedures  
21 under this Section shall not extend, postpone or affect in any  
22 way any obligation of the Settling Defendant under this Consent  
23 Decree not directly in dispute, unless EPA or the Court agrees  
24 otherwise. Stipulated penalties with respect to the disputed  
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1 matter shall continue to accrue but payment shall be stayed  
2 pending resolution of the dispute as provided in Paragraph 76.  
3 Notwithstanding the stay of payment, stipulated penalties shall  
4 accrue from the first day of noncompliance with any applicable  
5 provision of this Consent Decree. In the event that the Settling  
6 Defendant does not prevail on the disputed issue, stipulated  
7 penalties shall be assessed and paid as provided in Section XXI  
8 (Stipulated Penalties).

9 XXI. STIPULATED PENALTIES

10 68. The Settling Defendant shall be liable for stipulated  
11 penalties in the amounts set forth in Paragraphs 69 and 70 to the  
12 United States for failure to comply with the requirements of this  
13 Consent Decree, unless excused under Section XIX (Force Majeure).  
14 "Compliance" by Settling Defendant shall include completion of  
15 the activities under this Consent Decree or any work plan or  
16 other plan approved under this Consent Decree identified below in  
17 accordance with all applicable requirements of law, this Consent  
18 Decree, remedial design documents approved by EPA pursuant to the  
19 AOC, and any plans or other documents approved by EPA pursuant to  
20 this Consent Decree and within the specified time schedules  
21 established by and approved under this Consent Decree.

22 69. The following stipulated penalties shall be payable per  
23 violation per day to the United States for any noncompliance that  
24 is not governed by Paragraph 70:

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1	<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
2	<u>Per Day</u>	
3	\$1,500	1st through 30th day
4	\$6,000	31st through 60th day
5	\$15,000	61st day and beyond

6 70. The following stipulated penalties shall be payable per  
7 violation per day to the United States for failure to submit  
8 timely or adequate reports or other written documents:

9	<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
10	<u>Per Day</u>	
11	\$500	1st through 30th day
12	\$1,000	31st through 60th day
13	\$2,500	61st day and beyond

14 71. In the event that EPA assumes performance of a portion or  
15 all of the Work pursuant to Paragraph 83 of Section XXII  
16 (Covenants Not to Sue by Plaintiffs), Settling Defendant shall be  
17 liable for a stipulated penalty in the amount of \$250,000.

18 72. All penalties shall begin to accrue on the day after the  
19 complete performance is due or other failure or refusal to comply  
20 occurs, and shall continue to accrue through the final day of the  
21 noncompliance, except that, for any violation pursuant to  
22 Paragraph 37 arising out of EPA's disapproval of timely  
23 submittals of deliverables pursuant to the AOC or the Consent  
24 Decree, penalties shall begin to accrue on the due date of such  
25 submittals and shall continue to accrue for thirty (30) days, at  
26 which point penalties shall stop accruing until EPA notifies  
27 Settling Defendant of the violation, whereupon accrual of

28	SITCUM WATERWAY CONSENT DECREE - PAGE 84	Thomas W. Swegle WA Bar Number 15667 U.S. Department of Justice Envt. Enforcement, P.O. Box 7611 Washington, D.C. 20044 (202) 514-3143
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1 penalties shall resume. With respect to all other violations,  
2 penalties shall accrue from the date of violation regardless of  
3 whether the United States has notified Settling Defendant of a  
4 violation. All penalties shall continue to accrue through the  
5 final day of the correction of the noncompliance or completion of  
6 the activity. Nothing herein shall prevent the simultaneous  
7 accrual of separate penalties for separate violations of this  
8 Consent Decree.

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

17 74. All penalties owed to the United States under this  
18 section shall be due and payable within sixty (60) days of the  
19 Settling Defendant's receipt from EPA of a demand for payment of  
20 the penalties, unless Settling Defendant invokes the Dispute  
21 Resolution procedures under Section XX (Dispute Resolution). The  
22 payments shall be made by Electronic Funds Transfer ("EFT" or  
23 wire transfer) to the United States Department of Justice lockbox

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1 bank, referencing DOJ Case No. 90-11-3-711, and U.S.A.O. file  
2 number 9301795, and EPA Region and Site/Spill ID #10G7.  
3 Payment shall be made in accordance with instructions provided by  
4 the United States to the Settling Defendant upon execution of the  
5 consent decree. Any EFTs received at the U.S. D.O.J. lockbox  
6 bank after 4:00 p.m. (Eastern Time) will be credited on the next  
7 business day.

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

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

14 a. If the dispute is resolved by agreement or by a  
15 decision of EPA that is not appealed to this Court, accrued  
16 penalties determined to be owing shall be paid to EPA within  
17 sixty (60) days of the agreement or the receipt of EPA's decision  
18 or order;

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

1           c. If the District Court's decision is appealed by any  
2 Party, Settling Defendant shall pay all accrued penalties  
3 determined by the District Court to be owing to the United States  
4 into an interest-bearing escrow account within sixty (60) days of  
5 receipt of the Court's decision or order. Penalties shall be  
6 paid into this account as they continue to accrue, at least every  
7 sixty (60) days. Within fifteen (15) days of receipt of the  
8 final appellate court decision, the escrow agent shall pay the  
9 balance of the account to EPA or to Settling Defendant to the  
10 extent that they prevail.

11         77. a. If Settling Defendant fails to pay stipulated  
12 penalties when due, the United States may institute proceedings  
13 to collect the penalties, as well as interest. Settling  
14 Defendant shall pay interest on the unpaid balance, which shall  
15 begin to accrue on the date of demand made pursuant to Paragraph  
16 74 at the rate established pursuant to Section 107(a) of CERCLA,  
17 42 U.S.C. § 9607.

18         b. Nothing in this Consent Decree shall be construed as  
19 prohibiting, altering, or in any way limiting the ability of the  
20 United States to seek any other remedies or sanctions available  
21 by virtue of Settling Defendant's violation of this Decree or of  
22 the statutes and regulations upon which it is based, including,  
23 but not limited to, penalties pursuant to Section 122(1) of  
24 CERCLA.

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