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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

_____)
UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
GATEWAY FOREST PRODUCTS, INC.,)
KETCHIKAN PULP COMPANY, &)
LOUISIANA-PACIFIC CORPORATION,)
)
Defendants.)
_____)

No. A00-225 CV (HRH)

CERCLA REMEDIAL DESIGN/REMEDIAL ACTION CONSENT DECREE

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12 **I. BACKGROUND**

13 (1) The United States of America (“United States”), on behalf of the
14 Administrator of the United States Environmental Protection Agency (“EPA”), filed
15 a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive
16 Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C.
17 §§ 9606 and 9607.

18 (2) The United States in its complaint seeks, *inter alia*:

19 (a) Reimbursement of costs incurred by EPA, the Agency for Toxic
20 Substances and Disease Registry (“ATSDR”), and the United States Department of
21 Justice (“DOJ”) for response actions at the Ketchikan Pulp Company (“KPC”)
22 Superfund Site (“the Site”) in Ketchikan, Alaska, together with accrued interest; and

23 (b) Performance of studies and response actions by the defendants
24 at the Site consistent with the National Oil and Hazardous Substances Pollution
25 Contingency Plan (“NCP”), 40 C.F.R. Part 300, as amended.
26

1 (3) In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42
2 U.S.C. § 9621(f)(1)(F), EPA notified the State of Alaska ("the State") on March 31,
3 2000, of negotiations with potentially responsible parties regarding the
4 implementation of the remedial design and remedial action for the Site.

5 (4) In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. §
6 9622(j)(1), EPA notified the National Oceanic and Atmospheric Administration and
7 the U.S. Fish and Wildlife Service on April 13, 2000 of negotiations with potentially
8 responsible parties regarding the release of hazardous substances that may have
9 resulted in injury to the natural resources under federal trusteeship and encouraged
10 the trustees to participate in the negotiation of this Consent Decree.

11 (5) The defendants that have entered into this Consent Decree ("Settling
12 Defendants") do not admit the allegations in the Complaint or any liability to the
13 Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor
14 do they acknowledge that the release or threatened release of hazardous substances
15 at or from the Site constitutes an imminent and substantial endangerment to the
16 public health or welfare or the environment.

17 (6) EPA has divided the KPC Site into two operable units ("OUs"): the
18 Uplands OU and the Marine OU. The scope of the remedy selected in the ROD for
19 these OUs is described in Paragraph (28)(b) below.

20 (7) In response to a release or a substantial threat of a release of hazardous
21 substances at or from the Site, KPC commenced a Remedial Investigation/Feasibility
22 Study ("RI/FS") for the Uplands OU pursuant to an Administrative Order on Consent
23 ("AOC") dated July 21, 1997. KPC has also performed early response actions
24 under the AOC. KPC commenced investigatory studies for the Marine OU pursuant
25 to a Consent Decree in U.S. v. Ketchikan Pulp Company, No. A92-587
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1 (JKS)(D.Alaska), entered pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 *et*
2 *seq.*, and the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, dated September 19, 1995
3 (the “CWA/CAA consent decree”).

4 (8) Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA
5 published notice of the proposed plan for remedial action for the Uplands OU on
6 May 14, 1999, and for the Marine OU on June 30, 1999 and July 14, 1999, in major
7 local newspapers of general circulation. EPA provided an opportunity for written
8 and oral comments from the public on the proposed plans for both OUs. A copy of
9 the transcripts of the public meetings are available to the public as part of the
10 administrative records upon which the Regional Administrator based the selection
11 of the response actions.

12 (9) The decisions by EPA on the remedial actions to be implemented for
13 the OUs at the Site are embodied in two final Records of Decision (“RODs”),
14 executed on June 7, 2000 for the Uplands OU (Appendix A) and on March 29, 2000
15 for the Marine OU (Appendix B). The State had reasonable opportunity to review
16 and has given its concurrence on both RODs. The RODs include responsiveness
17 summaries to the public comments. Notices of the final plans were published in
18 accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

19 (10) Based on the information presently available to EPA, EPA believes
20 that the Work will be properly and promptly conducted by the Settling Defendants
21 in accordance with the requirements of this Consent Decree and its appendices.

22 (11) Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. §
23 9613(j), the Remedial Actions selected by the RODs and the Work to be performed
24 by the Settling Defendants shall constitute response actions taken or ordered by the
25 President.

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

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

7 **II. JURISDICTION**

8 (13) This Court has jurisdiction over the subject matter of this action
9 pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and
10 9613(b). This Court also has personal jurisdiction over the Settling Defendants.
11 Solely for the purposes of this Consent Decree and the underlying complaint, Settling
12 Defendants waive all objections and defenses that they may have to jurisdiction of
13 the Court or to venue in this District. Settling Defendants shall not challenge the
14 terms of this Consent Decree or this Court's jurisdiction to enter and enforce this
15 Consent Decree.

16 **III. PARTIES BOUND**

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

22 (15) Settling Defendants are defined in Section IV herein as Gateway Forest
23 Products Company, Inc., Ketchikan Pulp Company, and Louisiana-Pacific
24 Corporation. Where appropriate, this Consent Decree shall designate which Settling
25 Defendant is responsible for a specific requirement or for performance of Work
26

1 under this Consent Decree.

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

16 **IV. DEFINITIONS**

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

22 (a) "ADEC" shall mean the State of Alaska Department of
23 Environmental Conservation and any successor departments or agencies of the State.

24 (b) "CERCLA" shall mean the Comprehensive Environmental
25 Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601
26

1 *et seq.*

2 (c) "Consent Decree" shall mean this Decree and all appendices
3 attached hereto (listed in Section XXIX). In the event of a conflict between this
4 Decree and any Appendix, this Decree shall control.

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

10 (e) "EPA" shall mean the United States Environmental Protection
11 Agency and any successor departments or agencies of the United States.

12 (f) "Future Response Costs" shall mean all costs, including, but not
13 limited to, direct and indirect costs, that the United States incurs in reviewing or
14 developing plans, reports, and other items pursuant to this Consent Decree, verifying
15 the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree,
16 including, but not limited to, payroll costs, contractor costs, travel costs, laboratory
17 costs, the costs incurred pursuant to Sections VII and IX (including, but not limited
18 to, attorneys fees and any monies paid to secure access and/or secure institutional
19 controls, including the amount of just compensation), XV, and Paragraph (101) of
20 Section XXI. Future Response Costs shall also include all Interim Response Costs
21 and all Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C.
22 § 9607(a) during the period from the date of lodging of this Consent Decree to the
23 date of entry of this Consent Decree. "Future Response Costs" shall not include
24 costs reimbursed by KPC under the AOC dated July 21, 1997 or costs incurred by
25 ATSDR.

1
2 (g) “Gateway Forest Products, Inc.” or “Gateway” shall mean the
3 Alaska corporation licensed to do business in Alaska. Gateway is the current owner
4 of the former pulp mill area, nearshore fill area, and Patented Tidelands within Ward
5 Cove.

6 (h) “Institutional Controls Plan” shall mean the document attached
7 as Appendix C to this Consent Decree that was developed pursuant to Paragraph
8 (43) of this Consent Decree and approved by EPA and ADEC, and any amendments
9 thereto.

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

14 (j) “Interim Response Costs” shall mean all costs, including direct
15 and indirect costs (i) paid by the United States in connection with the Site between
16 December 1, 1999 and the effective date of this Consent Decree, or (ii) incurred
17 prior to the effective date of this Consent Decree but paid after that date. “Interim
18 Response Costs” shall not include costs reimbursed by KPC under the AOC dated
19 July 21, 1997 or costs incurred by ATSDR.

20 (k) “Ketchikan Pulp Company” or “KPC” shall mean the
21 Washington corporation licensed to do business in Alaska. KPC is a wholly-owned
22 subsidiary of Louisiana-Pacific Corporation. KPC is the current owner of the wood
23 waste and ash disposal landfill at the Site.

24 (l) “Louisiana-Pacific Corporation” or “L-P” shall mean the
25 Delaware corporation which is the parent company of KPC.

1
2 (m) "Marine Operable Unit" or "Marine OU" shall mean the marine
3 sediments within Ward Cove, which encompasses approximately 250 acres.

4 (n) "Monitoring Plan" shall mean the "Monitoring and Reporting
5 Work Plan" developed pursuant to Paragraph (27) of this Consent Decree and
6 approved by EPA, and any amendments thereto.

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

11 (p) "Paragraph" shall mean a portion of this Consent Decree
12 identified by an Arabic numeral or an upper or lower case letter.

13 (q) "Parties" shall mean the United States and the Settling
14 Defendants.

15 (r) "Past Response Costs" shall mean all costs, including, but not
16 limited to, direct and indirect costs, that the United States paid at or in connection
17 with the Site through November 30, 1999, plus Interest on all such costs which has
18 accrued pursuant to 42 U.S.C. § 9607(a) through the date of lodging of this Consent
19 Decree. "Past Response Costs" shall not include costs reimbursed by KPC under
20 the AOC dated July 21, 1997.

21 (s) "Patented Tidelands" shall mean the area within Ward Cove
22 depicted in Appendix D hereto.

23 (t) "Plaintiff" shall mean the United States.

24 (u) "Project Management Work Plan" shall mean the work plan
25 developed pursuant to Paragraph (25) of this Consent Decree and approved by EPA,
26

1 and any amendments thereto.

2 (v) "RCRA" shall mean the Solid Waste Disposal Act, as amended,
3 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery
4 Act).

5 (w) "Record of Decision" or "ROD" shall mean, as appropriate,
6 either the EPA and ADEC Record of Decision relating to the Uplands Operable Unit
7 (Appendix A) signed on June 7, 2000, by the Acting Regional Administrator, EPA
8 Region 10 and ADEC, or the EPA Record of Decision relating to the Marine
9 Operable Unit (Appendix B), signed on March 29, 2000, by the Regional
10 Administrator, EPA Region 10, and all attachments thereto.

11 (x) "Remedial Action" shall mean those activities, except for
12 activities pursuant to the Monitoring and Reporting Plan, to be undertaken by
13 KPC/L-P to implement the ROD for the Marine OU, in accordance with the SOW
14 and the final Remedial Design and Remedial Action Work Plans and other plans
15 approved by EPA.

16 (y) "Remedial Action Objectives" or "RAOs" are the objectives set
17 forth in the RODs for the Marine OU and Uplands OU, respectively. EPA expects
18 that the RAOs for the Marine OU will be attained within ten (10) years of
19 implementation of the Remedial Action Work Plan for the Marine OU.

20 (z) "Remedial Action Work Plan" shall mean the document
21 developed pursuant to Paragraph (26) of this Consent Decree and approved by EPA,
22 and any amendments thereto.

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

1
2 (bb) “Remedial Design Work Plan” shall mean the document
3 developed pursuant to Paragraph (25) of this Consent Decree and approved by EPA,
4 and any amendments thereto.

5 (cc) “Section” shall mean a portion of this Consent Decree identified
6 by a Roman numeral.

7 (dd) “Sediment Cap” shall mean capping materials, mounding or
8 other materials added to marine sediments as part of the Remedial Action for the
9 Marine OU.

10 (ee) “Settling Defendants” shall mean Gateway Forest Products, Inc.
11 (Gateway), Ketchikan Pulp Company (KPC), and Louisiana-Pacific Corporation (L-
12 P).

13 (ff) “Site” shall mean the Ketchikan Pulp Company Site,
14 encompassing the Uplands Operable Unit and the Marine Operable Unit, as defined
15 herein, and as described in Appendix E. For purposes of Section XXI (Covenants
16 Not To Sue By Plaintiff), Section XXII (Covenants By Settling Defendants), and
17 Section XXIII (Effect Of Settlement; Contribution Protection), the Site also includes
18 residential and other soils where hazardous substances from the pulp mill may have
19 come to be located either as a result of aerial deposition or as a result of the
20 transport of grit and/or dredge spoil material from the property associated with the
21 former pulp mill.

22 (gg) “State” shall mean the State of Alaska.

23 (hh) “Statement of Work” or “SOW” shall mean the statement of
24 work for implementation of the Remedial Design, Remedial Action, and Monitoring
25 Plans at the Site, as set forth in Appendix F to this Consent Decree and any
26

1 modifications made in accordance with this Consent Decree.

2 (ii) "Supervising Contractor" shall mean the principal contractor
3 retained by the Settling Defendants to supervise and direct the implementation of the
4 Remedial Action or other Work, as appropriate, under this Consent Decree.

5 (jj) "United States" shall mean the United States of America,
6 including all of its departments, agencies, and instrumentalities.

7 (kk) "Uplands Operable Unit" or "Uplands OU" shall mean the
8 former pulp mill area (i.e., where pulping, milling and associated activities occurred),
9 the wood waste and ash disposal landfill, the dredge spoil area, and the pipeline
10 access road area.

11 (ll) "Waste Material" shall mean (i) any "hazardous substance"
12 under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (ii) any pollutant or
13 contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (iii) any
14 "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27) or the State
15 of Alaska Solid Waste Management Regulations (18 AAC 60).

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

19 (nn) "Work Plans" shall mean the Work Plans required under Section
20 VI hereunder.

21 **V. GENERAL PROVISIONS**

22 (18) **Objectives of the Parties.** The objectives of the Parties in entering
23 into this Consent Decree are to protect public health or welfare or the environment
24 at the Site by the design and implementation of response actions at the Site by
25 Settling Defendants, to reimburse response costs of the Plaintiff, and to resolve the
26

1 claims of Plaintiff against Settling Defendants as provided in this Consent Decree.

2 (19) **Commitments by Settling Defendants.**

3 (a) Except as stated in paragraph (c) below, KPC and L-P
4 (collectively “KPC/L-P”) shall finance and perform the Work in accordance with this
5 Consent Decree, the ROD, the SOW, and all Work Plans and other plans, standards,
6 specifications, and schedules set forth herein or developed by KPC/L-P and
7 approved by EPA pursuant to this Consent Decree. KPC/L-P shall also reimburse
8 the United States for Past Response Costs, Interim Response Costs and Future
9 Response Costs as provided in this Consent Decree. In addition, with respect to
10 property owned by KPC, KPC shall be responsible for ensuring access to the Site
11 as provided in Paragraph (41) below; not interfering with or restricting performance
12 of the Work; and ensuring compliance with the prescriptions and prohibitions set
13 forth in Paragraph (43) below that are applicable to KPC.

14 (b) The obligations of KPC and L-P to finance and perform the
15 Work and to pay amounts owed the United States under this Consent Decree are
16 joint and several. Between themselves, however, KPC and L-P have agreed that
17 KPC shall have the primary responsibility to perform all requirements imposed under
18 this Consent Decree. If KPC fails to perform any requirement imposed under this
19 Consent Decree, then L-P shall perform or otherwise satisfy the requirement(s)
20 imposed under this Consent Decree. Nothing in this Paragraph is intended to alter
21 the rights of KPC or L-P under this Consent Decree, including those pertaining to
22 Dispute Resolution (Section XIX).

23 (c) With respect to property owned by Gateway, Gateway shall be
24 responsible for ensuring access to the Site as provided in Paragraphs (41) and (42)
25 below; not interfering with or restricting performance of the Work; and ensuring
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1 compliance with the prescriptions and prohibitions set forth in Paragraph (43) below
2 that are applicable to Gateway. In addition, Gateway shall finance and perform
3 requirements set forth in this Consent Decree that are identified as Gateway's
4 responsibilities, e.g., repairing damage to the Sediment Cap. Gateway shall
5 reimburse the United States for Future Response Costs that are related to Work to
6 be performed by Gateway.

7 (20) Compliance with Applicable Law. All activities undertaken by Settling
8 Defendants pursuant to this Consent Decree shall be performed in accordance with
9 the requirements of all applicable federal and state laws and regulations. Settling
10 Defendants must also comply with all applicable or relevant and appropriate
11 requirements of all federal and state environmental laws as set forth in the ROD and
12 the SOW. The activities conducted pursuant to this Consent Decree, if approved by
13 EPA, shall be considered to be consistent with the NCP.

14 (21) **Permits.**

15 (a) As provided in Section 121(e) of CERCLA, 42 U.S.C. §
16 9621(e), and Section 300.400(e) of the NCP, no permit shall be required for any
17 portion of the Work conducted entirely on-Site (i.e., within the areal extent of
18 contamination or in very close proximity to the contamination and necessary for
19 implementation of the Work). Where any portion of the Work that is not on-Site
20 requires a federal or state permit or approval, Settling Defendants shall submit
21 timely and complete applications and take all other actions necessary to obtain all
22 such permits or approvals.

23 (b) The Settling Defendants may seek relief under the provisions
24 of Section XVIII (Force Majeure) of this Consent Decree for any delay in the
25 performance of the Work resulting from a failure to obtain, or a delay in obtaining,
26

1 any permit required for the Work.

2
3 (c) This Consent Decree is not, and shall not be construed to be, a
4 permit, issued pursuant to any federal or state statute or regulation.

5 (d) This Consent Decree does not supersede or obviate the need to
6 obtain permits, or to comply with requirements under existing permits, for activities
7 that are not part of the Work herein.

8 (22) **Prior Agreements.** KPC/L-P have performed response actions at the
9 KPC Site pursuant to the prior agreements described in Paragraph (7) above: an
10 AOC dated July 21, 1997 and a CWA/CAA consent decree dated September 19,
11 1995.

12 (a) The AOC shall remain in effect until all required response
13 actions have been completed and ADEC and EPA have issued a certificate of
14 completion pursuant to Paragraph 35.3 of the AOC.

15 (b) The United States, KPC and L-P will jointly move, on or about
16 the same time that this Consent Decree is lodged with the Court, for termination of
17 the CWA/CAA consent decree. Such motion shall request that termination be
18 effective simultaneously with the entry of this Consent Decree.

19 (23) **Notification of Obligations to Successors-in-Title.**

20 (a) For purposes of this Paragraph (23), the term “Settling
21 Defendant” means the current owner of real property at the Site (i.e., KPC/L-P or
22 Gateway, as appropriate).

23 (b) At least seven (7) days prior to the conveyance of any interest
24 in real property located within the Site including, but not limited to, fee interests,
25 leasehold interests, and mortgage interests, KPC/L-P or Gateway shall give the
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1 grantee written notice of:

- 2 (i) This Consent Decree.
- 3 (ii) The “Environmental Protection Easement and
4 Declaration of Restrictive Covenants”
5 (“Easement/Restrictive Covenants”) recorded on
6 October 28, 1999, in the Ketchikan Recording District.
- 7 (iii) Any instrument by which an interest in, or a covenant
8 running with, real property has been conveyed that
9 confers a right of access to the Site (hereinafter referred
10 to as “access easements”) pursuant to Section IX
11 (Access and Institutional Controls).
- 12 (iv) Any instrument by which an interest in real property has
13 been conveyed that confers a right to enforce restrictions
14 on the use of such property (hereinafter referred to as
15 “restrictive easements”) pursuant to Section IX (Access
16 and Institutional Controls).

17 (c) Within seven (7) days of any such conveyance, KPC/L-P or
18 Gateway shall also give written notice to EPA and the State of the conveyance,
19 including the name and address of the grantee, and the date on which notice of the
20 Consent Decree, Easement/Restrictive Covenants, access easements, and/or
21 restrictive easements was given to the grantee. This requirement shall not apply,
22 however, to any leasehold or other interest that is less than three (3) months in
23 duration.

24 (d) In the event of any such conveyance, KPC/L-P’s or Gateway’s
25 obligations under this Consent Decree, including, but not limited to, their obligation
26

1 to provide or secure access and institutional controls, as well as to abide by such
2 institutional controls, pursuant to Section IX (Access and Institutional Controls) of
3 this Consent Decree, shall continue to be met by KPC/L-P or Gateway. In no event
4 shall the conveyance release or otherwise affect the liability of KPC/L-P or Gateway
5 to comply with all provisions of this Consent Decree, absent the prior written consent
6 of EPA.

7 **VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS**

8 (24) **Selection of Supervising Contractor.**

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

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

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

11 (d) At EPA's direction, the requirements of this Paragraph (24) shall
12 apply to Gateway in the event that Gateway is required to perform Work under this
13 Consent Decree.

14 (25) **Remedial Design.**

15 (a) Within thirty (30) days after EPA's notice of authorization to
16 proceed pursuant to Paragraph (24), KPC/L-P shall submit to EPA a Project
17 Management Work Plan. The Project Management Work Plan shall include:

18 (i) The composition and organization of the KPC/L-P's
19 project team, including quality control and safety
20 officers.

21 (ii) Key project personnel for KPC/L-P and its contractors
22 and subcontractors at the time of submittal of the Project
23 Management Work Plan.

24 (iii) Contact information (addresses, phone numbers, and e-
25 mail addresses) for key project personnel.

1 (iv) General responsibilities of project team personnel and/or
2 contractors and subcontractors.

3 (v) Qualifications of key project personnel and other
4 personnel, as appropriate.

5 (vi) Status of any projected contractor procurements.

6 (vii) Schedule for all Work to be performed under the SOW.

7 (b) Within thirty (30) days after EPA’s issuance of an authorization
8 to proceed pursuant to Paragraph (24), KPC/L-P shall submit to EPA a Work Plan
9 for the design of the Remedial Action for the Marine OU (“Remedial Design Work
10 Plan” or “RD Work Plan”). The Remedial Design Work Plan shall provide for
11 design of the remedy set forth in the ROD for the Marine OU, including the Remedial
12 Action Objectives described therein, and in accordance with the SOW and this
13 Consent Decree. Upon its approval by EPA, the Remedial Design Work Plan shall
14 be incorporated into and become enforceable under this Consent Decree.

15 (c) The Remedial Design Work Plan shall identify all remedial
16 design activities that have already been completed (e.g., EPA’s approval of a
17 Sampling and Analysis Plan, including a Field Sampling Plan, Quality Assurance
18 Project Plan, and Health and Safety Plan, for field design activities). KPC/L-P shall
19 meet regularly with EPA throughout the Preliminary and Intermediate Design,
20 providing to EPA for review those key technical documents that support the remedial
21 design analysis. The Remedial Design Work Plan shall also include plans and
22 schedules for implementation of all remedial design and pre-design tasks identified
23 in the SOW, including, but not limited to, plans and schedules for the completion of:

24 (i) a prefinal design submittal.

25 (ii) a final design submittal.

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1 (iii) a schedule for completion of the Remedial Action Work
2 Plan.

3 (d) The prefinal and final design submittals shall include, at a
4 minimum, the following:

5 (i) results of additional field sampling and pre-design work.

6 (ii) design analysis, including design criteria and basis of
7 design.

8 (iii) plans/drawings/sketches and required specifications.

9 (iv) proposed locations of processes/construction activity.

10 (v) construction schedule.

11 (vi) Performance Standard Verification Plan.

12 (vii) Construction Quality Assurance Plan (CQAP), which
13 shall detail the approach to quality assurance during
14 construction activities at the Site, shall specify a quality
15 assurance official ("QA Official"), independent of the
16 Supervising Contractor, to conduct a quality assurance
17 program during the construction phase of the project.

18 (viii) Water Quality Monitoring Plan.

19 (ix) Final design (100%) shall include final plans and
20 specifications, final cost estimates, and a schedule for
21 the major milestones for construction and
22 implementation of the Remedial Action.

23 (26) **Remedial Action.**

24 (a) Within forty-five (45) days after the approval of the final design
25 submittal for the Marine OU, KPC/L-P shall submit to EPA, the Work Plan for the

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1 performance of the Remedial Action for the Marine OU ("Remedial Action Work
2 Plan" or "RA Work Plan"). The Remedial Action Work Plan shall provide for
3 construction and implementation of the remedies set forth in the ROD for the Marine
4 OU, including the Remedial Action Objectives described therein, and in accordance
5 with the SOW, this Consent Decree, and the design plans and specifications
6 developed in accordance with the Remedial Design Work Plan and approved by
7 EPA. Upon its approval by EPA, the Remedial Action Work Plan shall be
8 incorporated into and become enforceable under this Consent Decree. At the same
9 time as they submit the Remedial Action Work Plans, KPC/L-P shall submit to EPA
10 separate Health and Safety Plans for field activities required by the Remedial Action
11 Work Plan for the Marine OU which conform to the applicable Occupational Safety
12 and Health Administration and EPA requirements including, but not limited to, 29
13 C.F.R. § 1910.120.

14 (b) The Remedial Action Work Plan shall include the following
15 information:

- 16 (i) the schedule of activities and for completion of the
17 Remedial Action.
- 18 (ii) method for selection of the contractor.
- 19 (iii) schedule for developing and submitting other required
20 Remedial Action plans.
- 21 (iv) methodology for implementation of the Construction
22 Quality Assurance Plan.
- 23 (v) methods for satisfying permitting requirements.
- 24 (vi) methodology for implementation of the Monitoring and
25 Reporting Work Plan (see Paragraph (27) below).

- 1 (vii) formulation of the Remedial Action team.
- 2 (viii) accident prevention plan.
- 3 (ix) construction quality control plan and statement of
- 4 qualifications (by constructor).
- 5 (x) stormwater pollution prevention plan.
- 6 (xi) spill prevention and emergency response plan.
- 7 (xii) materials handling plan.
- 8 (xiii) procedures and plans for the decontamination of
- 9 equipment and the disposal of contaminated materials,
- 10 as appropriate.

11 (c) The Remedial Action Work Plan also shall include a schedule
12 for implementation of all Remedial Action tasks identified in the final design
13 submittal and shall identify the initial formulation of KPC/L-P's Remedial Action
14 Project Team (including, but not limited to, the Supervising Contractor) for the
15 Marine OU.

16 (d) After approval of the Remedial Action Work Plan, KPC/L-P
17 shall participate with EPA in a preconstruction inspection and meeting.

18 (e) Upon approval of the Remedial Action Work Plan by EPA,
19 KPC/L-P shall implement the activities required under the Remedial Action Work
20 Plan. KPC/L-P shall submit to EPA all plans, submittals, or other deliverables
21 required under each approved Remedial Action Work Plan in accordance with the
22 approved schedule for review and approval pursuant to Section XI (EPA Approval
23 of Plans and Other Submissions). Unless otherwise directed by EPA, KPC/L-P shall
24 not commence physical Remedial Action activities at the Marine OU prior to
25 approval of the Remedial Action Work Plan for that OU.

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1 (27) **Monitoring and Reporting Work Plan.**

2 (a) Prior to the pre-final construction inspection meeting, KPC/L-P
3 shall submit to EPA the Monitoring and Reporting Work Plan (Monitoring Plan).

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5 (b) The Monitoring Plan shall include the following information:

6 (i) monitoring objectives.

7 (ii) description and schedule for monitoring and laboratory
8 testing requirements.

9 (iii) identification of biological standards that will be used to
10 evaluate monitoring data and to measure progress
11 towards achieving the RAOs.

12 (iv) description of a process to notify EPA of possible
13 additional responses if the Remedial Action does not
14 achieve RAOs within an adequate time period.

15 (v) records and reporting mechanisms.

16 (vi) procedures for petitioning EPA to reduce the frequency
17 of or discontinue monitoring.

18 (vii) description of monitoring tasks and data collection
19 necessary for addressing circumstances that are deemed
20 to violate the institutional controls identified for the
21 Marine OU.

22 (c) KPC/L-P shall continue to implement the Remedial Action and
23 Monitoring Plan at the Marine OU until the Remedial Action Objectives are
24 achieved and for so long thereafter as is otherwise required under this Consent
25 Decree.

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1 (28) **Modification of the SOW or Related Work Plans.**

2 (a) If EPA determines that modification to the Work specified in the
3 SOW and/or in Work Plans developed pursuant to the SOW is necessary to achieve
4 and maintain the Remedial Action Objectives or to carry out and maintain the
5 effectiveness of the remedies set forth in the RODs, EPA may require that such
6 modification be incorporated in the SOW and/or such Work Plans. Provided,
7 however, that a modification may only be required pursuant to this paragraph to the
8 extent that it is consistent with the scope of the remedy selected in a ROD. EPA
9 shall determine which Settling Defendant (KPC/L-P or Gateway) will perform the
10 modification to the Work consistent with the commitments set forth in Paragraph (19)
11 above. The requirements of this Paragraph shall apply to KPC/L-P or Gateway,
12 whichever is designated to perform the modification to the Work.

13 (b) For the purposes of Paragraphs (6), (28), (54), and (66) only, the
14 “scope of the remedy selected in the ROD” means the following:

15 (i) For the Uplands OU, the requirements set forth in
16 Section IX of this Consent Decree on access and
17 institutional controls with respect to hazardous
18 substances that were not removed during KPC’s
19 response actions under the AOC and which remain at the
20 Site at levels that preclude unrestricted use.

21 (ii) For the Marine OU, the achievement of RAOs within
22 approximately 80 acres of marine sediments within the
23 Area of Concern within Ward Cove as identified in the
24 ROD dated March 29, 2000. The scope of the remedy
25 does not include activities associated with a waterbody
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1 recovery plan for Ward Cove or activities necessary to
2 comply with the NPDES permit for the log transfer
3 facility in Ward Cove.

4 (c) If KPC/L-P or Gateway objects to any modification determined
5 by EPA to be necessary pursuant to this paragraph, it may seek dispute resolution
6 pursuant to Section XIX (Dispute Resolution), Paragraph (83)(record review). The
7 SOW and/or related Work Plans shall be modified in accordance with final
8 resolution of the dispute.

9 (d) KPC/L-P or Gateway shall implement any Work required by any
10 modifications incorporated in the SOW and/or in Work Plans developed pursuant to
11 the SOW in accordance with this paragraph.

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

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

20 (30) KPC/L-P or Gateway shall, prior to any off-Site shipment of Waste
21 Material produced as part of the Work, from the Site to an out-of-state waste
22 management facility, provide written notification to the appropriate state
23 environmental official in the receiving facility's state and to the EPA Project
24 Coordinator of such shipment of Waste Material. However, this notification
25 requirement shall not apply to any off-Site shipments when the total volume of all
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1 such shipments will not exceed 10 cubic yards.

2 (a) KPC/L-P or Gateway shall include in the written notification the
3 following information, where available:

4 (i) the name and location of the facility to which the Waste
5 Material is to be shipped.

6 (ii) the type and quantity of the Waste Material to be
7 shipped.

8 (iii) the expected schedule for the shipment of the Waste
9 Material.

10 (iv) the method of transportation.

11 (b) KPC/L-P or Gateway shall notify the state in which the planned
12 receiving facility is located of major changes in the shipment plan, such as a decision
13 to ship the Waste Material to another facility within the same state, or to a facility
14 in another state.

15 (c) The identity of the receiving facility and state will be
16 determined by KPC/L-P or Gateway following the award of the contracts for
17 Remedial Action construction. KPC/L-P or Gateway shall provide the information
18 required by Paragraph (30)(a) as soon as practicable after the award of the contract
19 and before the Waste Material is actually shipped.

20 **VII. REMEDY REVIEW**

21 (31) **Periodic Review.** Consistent with the commitments set forth in
22 Paragraph (19) above, EPA may request that KPC/L-P or Gateway conduct any
23 studies and investigations necessary in order to permit EPA to conduct reviews of
24 whether the Remedial Action and the Institutional Controls Plan are protective of
25 human health and the environment at least every five (5) years as required by Section
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1 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations.

2 (32) **EPA Selection of Further Response Actions.** If EPA determines,
3 at any time, that the Remedial Action or the Institutional Controls Plan is not
4 protective of human health and the environment, EPA may select further response
5 actions for the Site in accordance with the requirements of CERCLA and the NCP.

6 (33) **Opportunity To Comment.** KPC/L-P or Gateway and, if required by
7 Sections 113(k)(2) or 117 of CERCLA, 42 U.S.C. §§ 9613(k)(2) or 9617, the public,
8 will be provided with an opportunity to comment on any further response actions
9 proposed by EPA as a result of the review conducted pursuant to Section 121(c) of
10 CERCLA, 42 U.S.C. § 9621(c), and to submit written comments for the record
11 during the comment period.

12 (34) **Settling Defendants' Obligation To Perform Further Response**
13 **Actions.** If EPA selects further response actions for the Site, EPA shall designate
14 which Settling Defendant (KPC/L-P or Gateway) shall perform the response action
15 consistent with the commitments set forth in Paragraph (19) above. KPC/L-P or
16 Gateway shall undertake such further response actions to the extent that the reopener
17 conditions in Paragraph (97) or Paragraph (98)(United States' reservations of liability
18 based on unknown conditions or new information) are satisfied. KPC/L-P or
19 Gateway may invoke the procedures set forth in Section XIX (Dispute Resolution)
20 to dispute: (a) EPA's determination that the reopener conditions of Paragraph (97)
21 or Paragraph (98) of Section XXI (Covenants Not To Sue by Plaintiff) are satisfied;
22 (b) EPA's determination that the Remedial Action is not protective of human health
23 and the environment; (c) EPA's selection of the further response actions; or (d)
24 EPA's designation of KPC/L-P or Gateway to perform the response action. Disputes
25 pertaining to whether the Remedial Action is protective or to EPA's selection of
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1 further response actions shall be resolved pursuant to Paragraph (83)(record review).

2 (35) **Submissions of Plans.** If KPC/L-P or Gateway is required to perform
3 the further response actions pursuant to Paragraph (34), KPC/L-P or Gateway shall
4 submit a plan for such Work to EPA for approval in accordance with the procedures
5 set forth in Section VI (Performance of the Work by Settling Defendants) and shall
6 implement the plan approved by EPA in accordance with the provisions of this
7 Decree.

8 **VIII. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS**

9 (36) The requirements of this Section apply to the Settling Defendant,
10 KPC/L-P or Gateway, as appropriate, that is required or designated to perform Work.

11
12 (37) KPC/L-P or Gateway shall use quality assurance, quality control, and
13 chain-of-custody procedures for all treatability, design, compliance, and monitoring
14 samples in accordance with "EPA Requirements for Quality Assurance Project Plans
15 for Environmental Data Operation" (EPA QA/R5); "Preparing Perfect Project Plans"
16 (EPA /600/9-88/087), and subsequent amendments to such guidelines upon
17 notification by EPA to KPC/L-P or Gateway of such amendment. Amended
18 guidelines shall apply only to procedures conducted after such notification. Prior
19 to the commencement of any monitoring project under this Consent Decree, KPC/L-P
20 or Gateway shall submit to EPA for approval a Quality Assurance Project Plan
21 ("QAPP") that is consistent with the SOW and the NCP. If relevant to the
22 proceeding, the Parties agree that validated sampling data generated in accordance
23 with the QAPP(s) and reviewed and approved by EPA shall be admissible as
24 evidence, without objection, in any proceeding under this Decree. KPC/L-P or
25 Gateway shall ensure that EPA personnel and their authorized representatives are
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1 allowed access at reasonable times to all laboratories utilized by KPC/L-P or
2 Gateway in implementing this Consent Decree. In addition, KPC/L-P or Gateway
3 shall ensure that such laboratories shall analyze all samples submitted by EPA
4 pursuant to the QAPP for quality assurance monitoring. KPC/L-P or Gateway shall
5 ensure that the laboratories they utilize for the analysis of samples taken pursuant
6 to this Decree perform all analyses according to accepted EPA methods. Accepted
7 EPA methods consist of the following: (a) those methods which are documented in
8 the USEPA Contract Laboratory Program Statement of Work for Organic Analysis,
9 Multi-Media, Multi-Concentration, OLM04.1, or the USEPA Contract Laboratory
10 Program Statement of Work for Inorganic Analysis, Multi-Media, Multi-
11 Concentration, ILM04.0, and any amendments made thereto during the course of the
12 implementation of this Consent Decree; (b) the Institutional Controls Sampling and
13 Analysis Plan; and (c) any other methods that EPA states in writing are acceptable
14 for purposes of performing Work under this Consent Decree. KPC/L-P or Gateway
15 shall ensure that all laboratories they use for analysis of samples taken pursuant to
16 this Consent Decree participate in an EPA or EPA-equivalent QA/QC program.
17 KPC/L-P or Gateway shall ensure that all field methodologies utilized in collecting
18 samples for subsequent analysis pursuant to this Consent Decree will be conducted
19 in accordance with the procedures set forth in the QAPP approved by EPA.

20 (38) Upon request, KPC/L-P or Gateway shall allow split or duplicate
21 samples to be taken by EPA personnel or their authorized representatives. KPC/L-P
22 or Gateway shall notify EPA not less than twenty-eight (28) days in advance of any
23 sample collection activity unless shorter notice is agreed to by EPA. In addition,
24 EPA shall have the right to take any additional samples that EPA deems necessary.
25 Upon request, EPA shall allow KPC/L-P or Gateway to take split or duplicate
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1 samples of any samples they take as part of EPA's oversight of KPC/L-P or
2 Gateway's implementation of the Work.

3 (39) KPC/L-P or Gateway shall submit to EPA five (5) copies of the results
4 of all sampling and/or tests or other data obtained or generated by or on behalf of
5 KPC/L-P or Gateway with respect to the Site and/or the implementation of this
6 Consent Decree unless EPA agrees otherwise.

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

11 **IX. ACCESS AND INSTITUTIONAL CONTROLS**

12 (41) Commencing on the date of lodging of this Consent Decree, KPC/L-P
13 and Gateway shall provide the United States, EPA, the State, and their authorized
14 representatives, including their contractors, with access at all reasonable times to the
15 portion of the Site, or such other property, owned or controlled by KPC/L-P and
16 Gateway, respectively, for the purpose of conducting any activity related to this
17 Consent Decree including, but not limited to, the following activities:

- 18 (a) Monitoring the Work.
- 19 (b) Verifying any data or information submitted to the United States
20 or the State.
- 21 (c) Conducting investigations relating to contamination at or near
22 the Site.
- 23 (d) Obtaining samples.
- 24 (e) Assessing the need for, planning, or implementing additional
25 response actions at or near the Site.

1 (f) Implementing the Work pursuant to the conditions set forth in
2 Paragraph (101) of this Consent Decree.

3 (g) Inspecting and copying records, operating logs, contracts, or
4 other documents maintained or generated by Settling Defendants or their agents,
5 consistent with Section XXIV (Access to Information).

6
7 (h) Assessing Settling Defendants' compliance with this Consent
8 Decree.

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

12 (42) Commencing on the date of lodging of this Consent Decree, Gateway
13 shall also provide access to KPC/L-P to perform the Work required under this
14 Consent Decree.

15 (43) Commencing on the date of lodging of this Consent Decree, KPC/L-P
16 and Gateway shall refrain -- and shall use their best efforts to ensure that other
17 persons refrain -- from using the Site, or such other property owned or controlled by
18 KPC/L-P and Gateway, respectively, in any manner that would interfere with or
19 adversely affect the integrity or protectiveness of the remedial measures to be
20 implemented pursuant to this Consent Decree. KPC/L-P and Gateway shall ensure,
21 with respect to real property owned or controlled by KPC/L-P and Gateway,
22 respectively, that:

23 (a) For the Uplands OU:

24 (i) Uses of the Site are limited to commercial or industrial
25 use, except that the pipeline access road may also be
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available for recreational use.

(ii) The Site shall not, at any time, be used, in whole or in part, for human habitation, schooling of children, hospital care, child care or any purpose necessitating around-the-clock residence by humans.

(iii) Drilling of drinking water wells is prohibited.

(iv) Controls specified in the “Management Plan for Arsenic and Rock and Soil,” prepared by Exponent for KPC, dated July 1998, to limit concentrations of arsenic from crushed rock are complied with.

(v) Soils in the nearshore fill area, soils underneath paved areas or structures at the former pulp mill site, or soils that were not evaluated or characterized during the remedial investigation, that are exposed in the future, e.g., as the result of excavation or demolition activities, shall be properly characterized and managed in accordance with the Institutional Controls Plan (Appendix C) and applicable disposal requirements. Appendix G is a map describing areas of the Site that were characterized during the remedial investigations.

(vi) No activities will be allowed at the landfill property that involve use of ground water, potential exposure of Waste Materials within the landfill or potential interference with the integrity of the landfill cap.

(vii) An Institutional Controls Plan that provides for the

1 implementation of the requirements set forth in
2 Paragraph (43)(a)(i) through (vi) above is attached
3 hereto as Appendix C. The Institutional Controls Plan
4 is incorporated into and enforceable under this Consent
5 Decree.

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7 (b) For the Marine OU:

8 (i) If projects or activities materially damage the Sediment
9 Cap applied to Patented Tidelands, Gateway shall be
10 required, at the direction of EPA, to redress such
11 impacts, e.g., Gateway shall be required to repair or
12 replace the impacted portions of the Sediment Cap if a
13 dredging project exposes substantial areas of non-native
14 organic-rich sediments and thus adversely affects the
15 continued recovery of the benthic community in the
16 sediments.

17 (ii) A Monitoring and Reporting Work Plan is required to be
18 submitted pursuant to Paragraph (27) above. This Work
19 Plan shall include provisions for implementation of
20 subparagraph (i) above.

21 (44) Within forty-five (45) days of entry of this Consent Decree, KPC/L-P
22 shall submit to EPA and ADEC for review and approval a draft easement for the
23 landfill property, in substantially the form attached hereto as Appendix H, that is
24 enforceable under the laws of the State of Alaska, free and clear of all prior liens and
25 encumbrances (except as approved by EPA and ADEC). The draft easement shall
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1 provide that:

2 (a) The easement runs with the land.

3 (b) The easement regulates the former landfill.

4 (c) The easement shall include the following information about the
5 landfill:

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7 (i) The type of waste that was disposed in the landfill.

8 (ii) The geographical boundaries of the waste management
9 area.

10 (iii) Detailed information about the final cover, cap and other
11 structures or devices that were installed when the
12 landfill was closed.

13 (d) The easement grants a right of access to the landfill property for
14 the purpose of conducting any activity related to this Consent Decree including, but
15 not limited to, those activities listed in Paragraph (41) of this Consent Decree.

16 (e) The easement grants the right to enforce the land/water use
17 restrictions listed in Paragraph (43) of this Consent Decree with respect to the
18 landfill property, or other restrictions that EPA and ADEC determine are necessary
19 to implement, ensure non-interference with, or ensure the protectiveness of the
20 remedial measures to be performed pursuant to this Consent Decree.

21 (f) The access rights and the rights to enforce the land/water use
22 restrictions set forth in the easement are granted to the State of Alaska Department
23 of Natural Resources (“ADNR”).

24 (45) Upon review and approval by EPA and ADEC, KPC shall seek review
25 and approval of the easement by ADNR.

1 (a) KPC/L-P shall provide survey information to ADNR that
2 complies with local or state platting requirements and use best efforts to obtain all
3 other information necessary for ADNR to record the easement.

4 (b) KPC/L-P shall pay reasonable fees charged by the State to
5 review and record the easement.

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7 (46) If EPA determines that land/water use restrictions in the form of state
8 or local laws, regulations, ordinances or other governmental controls are needed to
9 implement the remedy selected in the ROD, ensure the integrity and protectiveness
10 thereof, or ensure non-interference therewith, KPC/L-P and Gateway shall cooperate
11 with EPA's and the State's efforts to secure such governmental controls. KPC shall
12 continue to seek ownership of the pipeline access road area. Within forty-five (45)
13 days of acquiring such ownership, KPC shall initiate the process of conveying an
14 easement with respect to the pipeline access road to DNR in accordance with the
15 procedures and requirements set forth in Paragraphs (44) and (45) above.

16 (47) Notwithstanding any provision of this Consent Decree, the United
17 States retains all of its access authorities and rights, as well as all of its rights to
18 require land/water use restrictions, including enforcement authorities related thereto,
19 under CERCLA, RCRA, and any other applicable statute or regulations.

20 **X. REPORTING REQUIREMENTS**

21 (48) In addition to any other requirement of this Consent Decree, each
22 Settling Defendant that performs Work (KPC/L-P or Gateway) shall submit to EPA
23 three (3) copies of written monthly progress reports. With respect to the Remedial
24 Action for the Marine OU, KPC/L-P shall submit monthly progress reports to EPA
25 by the tenth day of every month following the lodging of this Consent Decree until
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1 EPA has approved the Final Construction Report and any addenda thereto or until
2 otherwise required by EPA. Thereafter, KPC/L-P shall submit annual progress
3 reports within ten (10) days of each anniversary of the effective date of this Consent
4 Decree until EPA notifies KPC/L-P pursuant to Paragraph (66) of Section XIV
5 (Certification of Completion). With respect to the Uplands OU, KPC/L-P or
6 Gateway shall comply with reporting requirements set forth in the Institutional
7 Controls Plan. If requested by EPA, KPC/L-P or Gateway shall also provide
8 briefings for EPA to discuss the progress of the Work. Each progress report shall,
9 at a minimum:

10 (a) Describe the actions which have been taken toward achieving
11 compliance with this Consent Decree during the previous month.

12 (b) Include a summary of all nonpreliminary results of sampling and
13 tests and all other data received or generated by KPC/L-P or Gateway or its
14 contractors or agents in the previous month. The summary shall identify all reports
15 generated or received by KPC/L-P or Gateway, including the name of the report, type
16 of sampling, test or other data included in the report, the author, and the date.

17 (c) Identify all Work Plans, plans, and other deliverables required
18 by this Consent Decree that have been completed and submitted during the previous
19 month.

20 (d) Describe all actions, including, but not limited to, data
21 collection and implementation of Work Plans, which are scheduled for the next six
22 weeks and provide other information relating to the progress of construction,
23 including, but not limited to, critical path diagrams, Gantt charts, and Pert charts.

24 (e) Include information regarding percentage of completion,
25 unresolved delays, encountered or anticipated, that may affect the future schedule
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1 for implementation of the Work, and a description of efforts made to mitigate those
2 delays or anticipated delays.

3 (f) Include any modifications to the Work Plans or schedules that
4 KPC/L-P or Gateway has proposed to EPA or that have been approved by EPA.

5 (g) Identify any deviations from approved Work Plans made when
6 performing work and explain the reason for such deviations.

7 (h) Identify any changes in key project personnel.

8 (i) Describe all activities undertaken in support of the Community
9 Relations Plan during the previous month and those to be undertaken in the next
10 six weeks.

11 (49) KPC/L-P or Gateway shall notify EPA of any change in the schedule
12 described in the monthly progress report for the performance of any activity,
13 including, but not limited to, data collection and implementation of Work Plans, no
14 later than seven (7) days prior to the performance of the activity.

15 (50) Upon the occurrence of any event during performance of the Work that
16 KPC/L-P or Gateway is required to report pursuant to Section 103 of CERCLA, 42
17 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-
18 Know Act (EPCRA), KPC/L-P or Gateway shall, within twenty-four (24) hours of
19 learning of the onset of such event, orally notify the EPA Project Coordinator or the
20 Alternate EPA Project Coordinator (in the event of the unavailability of the EPA
21 Project Coordinator), or, in the event that neither the EPA Project Coordinator or
22 Alternate EPA Project Coordinator is available, the Unit Manager, Emergency
23 Response and Site Cleanup Unit, Region 10, United States Environmental Protection
24 Agency. These reporting requirements are in addition to the reporting required by
25 CERCLA Section 103 or EPCRA Section 304.

1 (51) Within twenty (20) days of learning of the onset of such an event,
2 KPC/L-P or Gateway shall furnish to EPA a written report, signed by KPC/L-P or
3 Gateway's Project Coordinator, setting forth the events which occurred and the
4 measures taken, and to be taken, in response thereto. Within thirty (30) days of the
5 conclusion of such an event, KPC/L-P or Gateway shall submit a report setting forth
6 all actions taken in response thereto.

7
8 (52) KPC/L-P or Gateway shall submit five (5) copies of all plans, reports,
9 and data required by the SOW, the Remedial Design Work Plan, the Remedial
10 Action Work Plan, or any other approved plans to EPA in accordance with the
11 schedules set forth in such plans.

12 (53) All reports and other documents submitted by KPC/L-P or Gateway
13 to EPA (other than the monthly progress reports referred to above) which purport to
14 document KPC/L-P or Gateway's compliance with the terms of this Consent Decree
15 shall be signed by an authorized representative of KPC/L-P or Gateway.

16 **XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

17 (54) After review of any plan, report, or other item which is required to be
18 submitted for approval by the Settling Defendant performing Work (KPC/L-P or
19 Gateway) pursuant to this Consent Decree, EPA shall, consistent with Paragraph
20 (28)(b) above: (a) approve, in whole or in part, the submission; (b) approve the
21 submission upon specified conditions; (c) modify the submission to cure the
22 deficiencies; (d) disapprove, in whole or in part, the submission, directing that
23 KPC/L-P or Gateway modify the submission; or (e) any combination of the above;
24 however, EPA shall not modify a submission without first providing KPC/L-P or
25 Gateway at least one notice of deficiency and an opportunity to cure within twenty
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1 (20) days, except where to do so would cause serious disruption to the Work or
2 where previous submission(s) have been disapproved due to material defects and the
3 deficiencies in the submission under consideration indicate a bad faith lack of effort
4 to submit an acceptable deliverable.

5 (55) In the event of approval, approval upon conditions, or modification by
6 EPA, pursuant to Paragraph (54)(a), (b), or (c), KPC/L-P or Gateway shall proceed
7 to take any action required by the plan, report, or other item, as approved or
8 modified by EPA subject only to their right to invoke the Dispute Resolution
9 procedures set forth in Section XIX (Dispute Resolution) with respect to the
10 modifications or conditions made by EPA. In the event that EPA modifies the
11 submission to cure the deficiencies pursuant to Paragraph (54)(c) and the submission
12 has a material defect, EPA retains its right to seek stipulated penalties, as provided
13 in Section XX (Stipulated Penalties).

14 (56) (a) Upon receipt of a notice of disapproval pursuant to Paragraph
15 (54)(d), KPC/L-P or Gateway shall, within twenty (20) days or such longer time as
16 specified by EPA in such notice, correct the deficiencies and resubmit the plan,
17 report, or other item for approval. Any stipulated penalties applicable to the
18 submission, as provided in Section XX, shall accrue during the 20-day period or
19 otherwise specified period but shall not be payable unless the resubmission is
20 disapproved or modified due to a material defect as provided in Paragraphs (57) and
21 (58).

22 (b) Notwithstanding the receipt of a notice of disapproval pursuant to
23 Paragraph (54)(d), KPC/L-P or Gateway shall proceed, at the direction of EPA, to
24 take any action required by any non-deficient portion of the submission.
25 Implementation of any non-deficient portion of a submission shall not relieve KPC/L-

1 P or Gateway of any liability for stipulated penalties under Section XX (Stipulated
2 Penalties).

3 (57) In the event that a resubmitted plan, report, or other item, or portion
4 thereof, is disapproved by EPA, EPA may again require KPC/L-P or Gateway to
5 correct the deficiencies, in accordance with the preceding paragraphs. EPA also
6 retains the right to modify or develop the plan, report, or other item. KPC/L-P or
7 Gateway shall implement any such plan, report, or item as modified or developed by
8 EPA, subject only to their right to invoke the procedures set forth in Section XIX
9 (Dispute Resolution).

10 (58) If upon resubmission, a plan, report, or item is disapproved or modified
11 by EPA due to a material defect, KPC/L-P or Gateway shall be deemed to have
12 failed to submit such plan, report, or item timely and adequately unless KPC/L-P or
13 Gateway invokes the dispute resolution procedures set forth in Section XIX (Dispute
14 Resolution) and EPA's action is overturned pursuant to that Section. The provisions
15 of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall
16 govern the implementation of the Work and accrual and payment of any stipulated
17 penalties during Dispute Resolution. If EPA's disapproval or modification is upheld,
18 stipulated penalties shall accrue for such violation from the date on which the initial
19 submission was originally required, as provided in Section XX.

20 (59) All plans, reports, and other items required to be submitted to EPA
21 under this Consent Decree shall, upon approval or modification by EPA, be
22 enforceable under this Consent Decree. In the event EPA approves or modifies a
23 portion of a plan, report, or other item required to be submitted to EPA under this
24 Consent Decree, the approved or modified portion shall be enforceable under this
25 Consent Decree.

1 **XII. PROJECT COORDINATORS**

2 (60) Within twenty (20) days of lodging this Consent Decree, KPC/L-P,
3 Gateway and EPA will notify each other, in writing, of the name, address, and
4 telephone number of their respective designated Project Coordinators and Alternate
5 Project Coordinators under this Consent Decree. If a Project Coordinator or
6 Alternate Project Coordinator initially designated is changed, the identity of the
7 successor will be given to the other Parties at least five (5) working days before the
8 changes occur, unless impracticable, but in no event later than the actual day the
9 change is made. The Settling Defendants' Project Coordinators shall be subject to
10 disapproval by EPA and shall have the technical expertise sufficient to adequately
11 oversee all aspects of the Work. The Settling Defendants' Project Coordinators shall
12 not be an attorney for any of the Settling Defendants in this matter. He or she may
13 assign other representatives, including other contractors, to serve as a Site
14 representative for oversight of performance of daily operations during remedial
15 activities.

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

2 **XIII. ASSURANCE OF ABILITY TO COMPLETE WORK**

3 (62) Within thirty (30) days of entry of this Consent Decree, KPC/L-P shall
4 establish and maintain financial security in the amount of \$5 million in one or more
5 of the following forms:

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

7 (b) One or more irrevocable letters of credit equaling the total
8 estimated cost of the Work;

9 (c) A trust fund;

10 (d) A guarantee to perform the Work by one or more parent
11 corporations or subsidiaries, or by one or more unrelated corporations that have a
12 substantial business relationship with KPC and/or L-P; or

13 (e) A demonstration that KPC and/or L-P satisfy the requirements
14 of 40 C.F.R. § 264.143(f).

15 (63) If KPC and/or L-P seek to demonstrate the ability to complete the
16 Work through a guarantee by a third party pursuant to Paragraph (62)(d) of this
17 Consent Decree, KPC and/or L-P shall demonstrate that the guarantor satisfies the
18 requirements of 40 C.F.R. Part 264.143(f). If KPC and/or L-P seek to demonstrate
19 their ability to complete the Work by means of the financial test or the corporate
20 guarantee pursuant to Paragraph (62)(d) or (e), they shall resubmit sworn statements
21 conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the
22 anniversary of the effective date of this Consent Decree. In the event that EPA
23 determines at any time that the financial assurances provided pursuant to this section
24 are inadequate, KPC and/or L-P shall, within thirty (30) days of receipt of notice of
25 EPA's determination, obtain and present to EPA for approval one of the other forms

1 of financial assurance listed in Paragraph (62) of this Consent Decree. KPC and/or
2 L-P's inability to demonstrate financial ability to complete the Work shall not excuse
3 performance of any activities required under this Consent Decree.

4 (64) If KPC and/or L-P can show that the estimated cost to complete the
5 remaining Work has diminished below the amount set forth in Paragraph (62) above
6 after entry of this Consent Decree, KPC and/or L-P may, on any anniversary date of
7 entry of this Consent Decree, or at any other time agreed to by the Parties, reduce
8 the amount of the financial security provided under this section to the estimated cost
9 of the remaining Work to be performed. KPC and/or L-P shall submit a proposal for
10 such reduction to EPA, in accordance with the requirements of this section, and may
11 reduce the amount of the security upon approval by EPA. In the event of a dispute,
12 KPC and/or L-P may reduce the amount of the security in accordance with the final
13 administrative or judicial decision resolving the dispute.

14 (65) KPC and/or L-P may change the form of financial assurance provided
15 under this section at any time, upon notice to and approval by EPA, provided that
16 the new form of assurance meets the requirements of this section. In the event of a
17 dispute, KPC and/or L-P may change the form of the financial assurance only in
18 accordance with the final administrative or judicial decision resolving the dispute.

19 **XIV. CERTIFICATION OF COMPLETION**

20 (66) **Completion of the Remedial Action.**

21 (a) Within thirty (30) days of receiving certification from the State
22 that the wood waste and ash disposal landfill has been closed in accordance with the
23 ADEC solid waste permit and all applicable regulations, KPC/L-P shall submit a
24 letter to EPA requesting certification of completion of cleanup activities for the
25 uplands OU. If EPA concludes that all requirements for the uplands OU have been
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1 performed, EPA will so certify, in writing, to KPC/L-P.

2 (b) Within ninety (90) days after KPC/L-P conclude that the
3 Remedial Action for the Marine OU has been fully performed and the Remedial
4 Action Objectives have been attained, KPC/L-P shall schedule and conduct a pre-
5 certification inspection/meeting to be attended by EPA. If, after the pre-certification
6 inspection/meeting, KPC/L-P still believe that the Remedial Action has been fully
7 performed and the Remedial Action Objectives have been attained, within thirty (30)
8 days of the inspection/meeting, they shall submit a written Remedial Action report,
9 in accordance with the SOW, requesting certification to EPA for approval, with a
10 copy to the State, pursuant to Section XI (EPA Approval of Plans and Other
11 Submissions). In the report, KPC/L-P's Project Coordinator shall state that the
12 Remedial Action has been completed and the RAOs have been attained in full
13 satisfaction of the requirements of this Consent Decree. The written report shall
14 reference the Final Construction Report required under Task 5 of the SOW
15 (Appendix F). The Remedial Action report shall also contain the following
16 statement, signed by a responsible corporate official of KPC/L-P or KPC/L-P's
17 Project Coordinator:

18 "To the best of my knowledge, after thorough investigation, I certify
19 that the information contained in or accompanying this submission is
20 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."

21 If, after completion of the pre-certification inspection and receipt and review of the
22 written report, EPA determines that the Remedial Action or any portion thereof has
23 not been completed in accordance with this Consent Decree or that the Remedial
24 Action Objectives have not been achieved, EPA will notify KPC/L-P, in writing, of
25 the activities that must be undertaken by KPC/L-P pursuant to this Consent Decree
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1 to complete the Remedial Action and achieve the Remedial Action Objectives.
2 Provided, however, that EPA may only require KPC/L-P to perform such activities
3 pursuant to this paragraph to the extent that such activities are consistent with the
4 "scope of the remedy selected in the ROD", as that term is defined in Paragraph
5 (28)(b). EPA will set forth in the notice a schedule for performance of such
6 activities consistent with the Consent Decree and the SOW, or require KPC/L-P to
7 submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of
8 Plans and Other Submissions). KPC/L-P shall perform all activities described in the
9 notice in accordance with the specifications and schedules established pursuant to
10 this paragraph, subject to their right to invoke the dispute resolution procedures set
11 forth in Section XIX (Dispute Resolution).

12 (c) If EPA concludes, based on the initial or any subsequent report
13 requesting Certification, that the Remedial Action has been performed in accordance
14 with this Consent Decree and that the Remedial Action Objectives have been
15 achieved, EPA will so certify, in writing, to KPC/L-P. This certification, together
16 with the certification referenced in Paragraph (66)(a) above, shall constitute the
17 Certification of Completion of the Remedial Action for purposes of this Consent
18 Decree, including, but not limited to, Section XXI (Covenants Not to Sue by
19 Plaintiff). Certification of Completion of the Remedial Action shall not affect
20 Settling Defendants' obligations under this Consent Decree.

21 **XV. EMERGENCY RESPONSE**

22 (67) In the event of any action or occurrence during the performance of the
23 Work which causes or threatens a release of Waste Material from the Site that
24 constitutes an emergency situation or may present an immediate threat to public
25 health, welfare, or the environment, the Settling Defendant performing the Work
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1 (KPC/L-P or Gateway) shall, subject to Paragraph (68), immediately take all
2 appropriate action to prevent, abate, or minimize such release or threat of release,
3 and shall immediately notify the EPA's Project Coordinator, or, if the Project
4 Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these
5 persons is available, KPC/L-P or Gateway shall notify the EPA Emergency Response
6 and Site Cleanup Unit, Region 10. KPC/L-P or Gateway shall take such actions in
7 consultation with EPA's Project Coordinator or other available authorized EPA
8 officer and in accordance with all applicable provisions of the Health and Safety
9 Plans, the Contingency Plans, and any other applicable plans or documents
10 developed pursuant to the SOW. In the event that KPC/L-P or Gateway fails to take
11 appropriate response action as required by this section, and EPA takes such action
12 instead, KPC/L-P or Gateway shall reimburse EPA all costs of the response action
13 not inconsistent with the NCP pursuant to Section XVI (Reimbursement of Response
14 Costs).

15 (68) Nothing in the preceding paragraph or in this Consent Decree shall be
16 deemed to limit any authority of the United States (a) to take all appropriate action
17 to protect human health and the environment or to prevent, abate, respond to, or
18 minimize an actual or threatened release of Waste Material on, at, or from the Site,
19 or (b) to direct or order such action, or seek an order from the Court, to protect
20 human health and the environment or to prevent, abate, respond to, or minimize an
21 actual or threatened release of Waste Material on, at, or from the Site, subject to
22 Section XXI (Covenants Not to Sue by Plaintiff).

23 **XVI. REIMBURSEMENT OF RESPONSE COSTS**

24 (69) Within thirty (30) days of the effective date of this Consent Decree,
25 KPC/L-P shall pay to the EPA Hazardous Substance Superfund \$371,057.00 in
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1 reimbursement of Past Response Costs, by FedWire electronic Funds Transfer
2 ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance
3 with current electronic funds transfer procedures, referencing U.S.A.O. file number
4 2000V00097, the EPA Region and Site/Spill ID Numbers 104E (Marine OU) and
5 104F (Uplands OU) and DOJ case number 90-11-3-1726. Payment shall be made
6 in accordance with instructions provided to KPC/L-P by the Financial Litigation Unit
7 of the United States Attorney's Office for the District of Alaska following lodging
8 of the Consent Decree. Any payments received by the Department of Justice after
9 4 p.m. (Eastern Time) will be credited on the next business day. KPC/L-P shall send
10 notice that such payment has been made to the United States as specified in Section
11 XXVI (Notices and Submissions) and the Region 10 Finance Unit (OMP-146), 1200
12 Sixth Avenue, Seattle, WA 98101.

13 (70) KPC/L-P shall reimburse the EPA Hazardous Substance Superfund for
14 all Future Response Costs not inconsistent with the NCP relating to Work to be
15 performed by KPC/L-P. Gateway shall reimburse the United States for Future
16 Response Costs that are related to Work to be performed by Gateway. The United
17 States will send KPC/L-P or Gateway a bill requiring payment that includes an
18 Itemized Cost Summary Report on an annual basis. KPC/L-P or Gateway shall make
19 all payments within thirty (30) days of its receipt of each bill requiring payment,
20 except as otherwise provided in Paragraph (71). KPC/L-P or Gateway shall make
21 all payments required by this paragraph in the form of a certified or cashier's check
22 or checks made payable to "EPA Hazardous Substance Superfund" and referencing
23 the EPA Region and Site/Spill ID Numbers 104E (Marine OU) and 104F (Uplands
24 OU), the DOJ case number 90-11-3-1726, and the name and address of the party
25 making payment. KPC/L-P or Gateway shall send the check(s) to U.S. Environmental
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1 Protection Agency – Region 10, Attn: Superfund Accounting, P.O. Box 360903M,
2 Pittsburgh, PA 15251 and shall send copies of the check(s) to the United States as
3 specified in Section XXVI (Notices and Submissions) and the EPA Region 10
4 Finance Unit (OMP-146), 1200 Sixth Avenue, Seattle, Washington 98101.

5 (71) KPC/L-P or Gateway may contest payment of any Future Response
6 Costs under Paragraph (70) if they determine that the United States has made an
7 accounting error or if they allege that a cost item that is included represents costs
8 that are inconsistent with the NCP. Such objection shall be made, in writing, within
9 thirty (30) days of receipt of the bill and must be sent to the United States pursuant
10 to Section XXVI (Notices and Submissions). Any such objection shall specifically
11 identify the contested costs and the basis for objection. In the event of an objection,
12 KPC/L-P or Gateway shall, within the thirty (30) day period, pay all uncontested
13 Response Costs to the United States in the manner described in Paragraph (70).
14 Simultaneously, KPC/L-P or Gateway shall establish an interest-bearing escrow
15 account in a federally-insured bank duly chartered in the State of Alaska and remit
16 to that escrow account funds equivalent to the amount of the contested Response
17 Costs. KPC/L-P or Gateway shall send to the United States, as provided in Section
18 XXVI (Notices and Submissions) a copy of the transmittal letter and check paying
19 the uncontested Response Costs, and a copy of the correspondence that establishes
20 and funds the escrow account, including, but not limited to, information containing
21 the identity of the bank and bank account under which the escrow account is
22 established as well as a bank statement showing the initial balance of the escrow
23 account. Simultaneously with establishment of the escrow account, KPC/L-P or
24 Gateway shall initiate the Dispute Resolution procedures in Section XIX (Dispute
25 Resolution). If the United States prevails in the dispute, within five (5) days of the
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1 resolution of the dispute, KPC/L-P or Gateway shall pay the sums due (with accrued
2 interest) to the United States in the manner described in Paragraph (70). If KPC/L-P
3 or Gateway prevail concerning any aspect of the contested costs, KPC/L-P or
4 Gateway shall pay that portion of the costs (plus associated accrued interest) for
5 which they did not prevail to the United States in the manner described in Paragraph
6 (70); KPC/L-P or Gateway shall be disbursed any balance of the escrow account.
7 The dispute resolution procedures set forth in this paragraph in conjunction with the
8 procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive
9 mechanisms for resolving disputes regarding KPC/L-P or Gateway's obligation to
10 reimburse the United States for its Future Response Costs.

11 (72) In the event that the payment required by Paragraph (69) is not made
12 within thirty (30) days of the effective date of this Consent Decree, or the payments
13 required by Paragraph (70) are not made within thirty (30) days of KPC/L-P's or
14 Gateway's receipt of the bill, KPC/L-P or Gateway shall pay Interest on the unpaid
15 balance. The Interest to be paid on Past Response Costs under this paragraph shall
16 begin to accrue thirty (30) days after the effective date of this Consent Decree. The
17 Interest on Future Response Costs shall begin to accrue on the date of the bill. The
18 Interest shall accrue through the date of KPC/L-P's or Gateway's payment.
19 Payments of Interest made under this paragraph shall be in addition to such other
20 remedies or sanctions available to Plaintiff by virtue of KPC/L-P's or Gateway's
21 failure to make timely payments under this section. KPC/L-P or Gateway shall make
22 all payments required by this paragraph in the manner described in Paragraph (70).

23 **XVII. INDEMNIFICATION AND INSURANCE**

24 (73) **Indemnification.**

25 (a) The United States does not assume any liability by entering into
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1 this agreement or by virtue of any designation of KPC/L-P or Gateway as EPA's
2 authorized representative(s) under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e).
3 Whenever KPC/L-P or Gateway perform Work, KPC/L-P or Gateway shall
4 indemnify, save and hold harmless the United States and its officials, agents,
5 employees, contractors, subcontractors, or representatives for or from any and all
6 claims or causes of action arising from, or on account of, negligent or other wrongful
7 acts or omissions of KPC/L-P or Gateway, their officers, directors, employees,
8 agents, contractors, subcontractors, and any persons acting on their behalf or under
9 their control, in carrying out activities pursuant to this Consent Decree, including, but
10 not limited to, any claims arising from any designation of KPC/L-P or Gateway as
11 EPA's authorized representative(s) under Section 104(e) of CERCLA, 42 U.S.C.
12 § 9604(e). Further, KPC/L-P and Gateway agree to pay the United States all costs
13 it incurs including, but not limited to, attorneys fees and other expenses of litigation
14 and settlement arising from, or on account of, claims made against the United States
15 based on negligent or other wrongful acts or omissions of KPC/L-P or Gateway, their
16 officers, directors, employees, agents, contractors, subcontractors, and any persons
17 acting on their behalf or under their control, in carrying out activities pursuant to this
18 Consent Decree. The United States shall not be held out as a party to any contract
19 entered into by or on behalf of KPC/L-P or Gateway in carrying out activities
20 pursuant to this Consent Decree. Neither KPC/L-P or Gateway nor any such
21 contractor shall be considered an agent of the United States.

22 (b) The United States shall give KPC/L-P or Gateway notice of any
23 claim for which the United States plans to seek indemnification pursuant to
24 Paragraph (73)(a) and shall consult with KPC/L-P or Gateway prior to settling such
25 claim.

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

12
13 (75) **Insurance.** No later than fifteen (15) days before commencing any on-
14 Site Work, KPC/L-P and Gateway, whichever is performing Work, shall secure, and
15 shall maintain until the first anniversary of EPA's Certification of Completion of the
16 Remedial Action pursuant to Paragraph (66) of Section XIV (Certification of
17 Completion) comprehensive general liability insurance with limits of three million
18 dollars, combined single limit, automobile liability insurance with limits of one
19 million dollars, combined single limit, and, for Work performed in the marine OU,
20 marine liability insurance, collision liability insurance, tower's liability insurance,
21 and marine pollution liability insurance, all naming the United States as an additional
22 insured. If marine liability insurance is written in a standard form protection and
23 indemnity (P&I) policy, separate maritime liability insurance need not be secured.
24 In addition, for the duration of this Consent Decree, KPC/L-P or Gateway shall
25 satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable
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1 laws and regulations regarding the provision of worker's compensation insurance for
2 all persons performing the Work on behalf of KPC/L-P or Gateway in furtherance of
3 this Consent Decree. Prior to commencement of the Work under this Consent
4 Decree, KPC/L-P or Gateway shall provide to EPA certificates of such insurance.
5 KPC/L-P or Gateway shall resubmit such certificates each year on the anniversary
6 of the effective date of this Consent Decree. If KPC/L-P or Gateway demonstrate
7 by evidence satisfactory to EPA that any contractor or subcontractor maintains
8 insurance equivalent to that described above, or insurance covering the same risks
9 but in a lesser amount, then, with respect to that contractor or subcontractor, KPC/L-
10 P or Gateway need provide only that portion of the insurance described above which
11 is not maintained by the contractor or subcontractor.

12 13 **XVIII. FORCE MAJEURE**

14 (76) "Force Majeure," for purposes of this Consent Decree, is defined as
15 any event arising from causes beyond the control of the Settling Defendant that is
16 performing Work (KPC/L-P or Gateway), of any entity controlled by KPC/L-P or
17 Gateway, or of KPC/L-P's or Gateway's contractors, that delays or prevents the
18 performance of any obligation under this Consent Decree despite KPC/L-P's or
19 Gateway's best efforts to fulfill the obligation. The requirement that KPC/L-P or
20 Gateway exercise "best efforts to fulfill the obligation" includes using best efforts
21 to anticipate any potential Force Majeure event and best efforts to address the
22 effects of any potential Force Majeure event (a) as it is occurring, and (b) following
23 the potential Force Majeure event, such that the delay is minimized to the greatest
24 extent possible. "Force Majeure" does not include financial inability to complete the
25 Work or a failure to attain the Remedial Action Objectives.

1 (77) If any event occurs or has occurred that may delay the performance of
2 any obligation under this Consent Decree, whether or not caused by a Force Majeure
3 event, KPC/L-P or Gateway shall notify orally EPA's Project Coordinator or, in his
4 or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's
5 designated representatives are unavailable, the Director of the Office of
6 Environmental Cleanup, EPA Region 10, within forty-eight (48) hours of when one
7 or more of KPC/L-P or Gateway first knew that the event might cause a delay.
8 Within five (5) days thereafter, KPC/L-P or Gateway shall provide, in writing, to
9 EPA an explanation and description of the reasons for the delay; the anticipated
10 duration of the delay; all actions taken or to be taken to prevent or minimize the
11 delay; a schedule for implementation of any measures to be taken to prevent or
12 mitigate the delay or the effect of the delay; KPC/L-P or Gateway's rationale for
13 attributing such delay to a Force Majeure event if they intend to assert such a claim;
14 and a statement as to whether, in the opinion of KPC/L-P or Gateway, such event
15 may cause or contribute to an endangerment to public health, welfare, or the
16 environment. KPC/L-P or Gateway shall include with any notice all available
17 documentation supporting their claim that the delay was attributable to a Force
18 Majeure. Failure to comply with the above requirements shall preclude KPC/L-P or
19 Gateway from asserting any claim of Force Majeure for that event for the period of
20 time of such failure to comply, and for any additional delay caused by such failure.
21 KPC/L-P or Gateway shall be deemed to know of any circumstance of which KPC/L-
22 P or Gateway, any entity controlled by KPC/L-P or Gateway, or KPC/L-P or
23 Gateway's contractors knew or should have known.

24 (78) If EPA agrees that the delay or anticipated delay is attributable to a
25 Force Majeure event, the time for performance of the obligations under this Consent
26

1 Decree that are affected by the Force Majeure event will be extended by EPA for
2 such time as is necessary to complete those obligations. In determining whether any
3 event constitutes Force Majeure, EPA will give due consideration to the unique
4 circumstances associated with the Site, including weather and transportation-related
5 considerations. An extension of the time for performance of the obligations affected
6 by the Force Majeure event shall not, of itself, extend the time for performance of
7 any other obligation. If EPA does not agree that the delay or anticipated delay has
8 been or will be caused by a Force Majeure event, EPA will notify KPC/L-P or
9 Gateway, in writing, of its decision. If EPA agrees that the delay is attributable to
10 a Force Majeure event, EPA will notify KPC/L-P or Gateway, in writing, of the
11 length of the extension, if any, for performance of the obligations affected by the
12 Force Majeure event.

13 (79) If KPC/L-P or Gateway elect to invoke the dispute resolution
14 procedures set forth in Section XIX (Dispute Resolution), they shall do so no later
15 than fifteen (15) days after receipt of EPA's notice. In any such proceeding, KPC/L-
16 P or Gateway shall have the burden of demonstrating by a preponderance of the
17 evidence that the delay or anticipated delay has been or will be caused by a Force
18 Majeure event, that the duration of the delay or the extension sought was or will be
19 warranted under the circumstances, that best efforts were exercised to avoid and
20 mitigate the effects of the delay, and that KPC/L-P or Gateway complied with the
21 requirements of Paragraphs (76) and (77), above. If KPC/L-P or Gateway carry this
22 burden, the delay at issue shall be deemed not to be a violation by KPC/L-P or
23 Gateway of the affected obligation of this Consent Decree identified to EPA and the
24 Court.

25 **XIX. DISPUTE RESOLUTION**

1 (80) Unless otherwise expressly provided for in this Consent Decree, the
2 dispute resolution procedures of this section shall be the exclusive mechanism to
3 resolve disputes arising under or with respect to this Consent Decree. However, the
4 procedures set forth in this section shall not apply to actions by the United States to
5 enforce obligations of the Settling Defendants that have not been disputed in
6 accordance with this section.

7 (81) Any dispute which arises under or with respect to this Consent Decree
8 shall in the first instance be the subject of informal negotiations between whichever
9 Settling Defendant is involved with the dispute (KPC/L-P and/or Gateway), and
10 EPA. The period for informal negotiations shall not exceed twenty (20) days from
11 the time the dispute arises, unless it is modified by written agreement of the parties
12 to the dispute. The dispute shall be considered to have arisen when one party sends
13 the other parties a written Notice of Dispute.

14 (82) **Statements of Position.**

15 (a) In the event that the parties cannot resolve a dispute by informal
16 negotiations under the preceding paragraph, then the position advanced by EPA shall
17 be considered binding unless, within thirty (30) days after the conclusion of the
18 informal negotiation period, KPC/L-P and/or Gateway invoke the formal dispute
19 resolution procedures of this section by serving on the United States (in accordance
20 with Section XXVI, "Notices and Submissions") a written Statement of Position on
21 the matter in dispute, including, but not limited to, any factual data, analysis, or
22 opinion supporting that position and any supporting documentation relied upon by
23 KPC/L-P and/or Gateway. The Statement of Position shall specify KPC/L-P's and/or
24 Gateway's position as to whether formal dispute resolution should proceed under
25 Paragraph (83) or Paragraph (84).

1 (b) Within thirty (30) days after receipt of KPC/L-P and/or
2 Gateway's Statement of Position, EPA will serve on KPC/L-P and/or Gateway its
3 Statement of Position, including, but not limited to, any factual data, analysis, or
4 opinion supporting that position and all supporting documentation relied upon by
5 EPA. EPA's Statement of Position shall include a statement as to whether formal
6 dispute resolution should proceed under Paragraph (83) or (84). Within twenty (20)
7 days after receipt of EPA's Statement of Position, KPC/L-P and/or Gateway may
8 submit a Reply.

9 (c) If there is disagreement between EPA and KPC/L-P and/or
10 Gateway as to whether dispute resolution should proceed under Paragraph (83) or
11 (84), the parties to the dispute shall follow the procedures set forth in the paragraph
12 determined by EPA to be applicable. However, if KPC/L-P and/or Gateway
13 ultimately appeal to the Court to resolve the dispute, the Court shall determine which
14 paragraph is applicable in accordance with the standards of applicability set forth in
15 Paragraphs (83) and (84).

16 (83) Formal dispute resolution for disputes pertaining to the selection or
17 adequacy of any response action and all other disputes that are accorded review on
18 the administrative record under applicable principles of administrative law shall be
19 conducted pursuant to the procedures set forth in this paragraph. For purposes of
20 this paragraph, the adequacy of any response action includes, without limitation: (a)
21 the adequacy or appropriateness of plans, procedures to implement plans, or any
22 other items requiring approval by EPA under this Consent Decree; and (b) the
23 adequacy of the performance of response actions taken pursuant to this Consent
24 Decree. Nothing in this Consent Decree shall be construed to allow any dispute by
25 KPC/L-P and/or Gateway regarding the validity of the RODs' provisions.

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

5 (b) The Director of Office of Environmental Cleanup, EPA Region
6 10, will issue a final administrative decision resolving the dispute based on the
7 administrative record described in Paragraph (83)(a). This decision shall be binding
8 upon KPC/L-P and/or Gateway, subject only to the right to seek judicial review
9 pursuant to Paragraph (83)(c) and (d).

10 (c) Any administrative decision made by EPA pursuant to
11 Paragraph (83)(b) shall be reviewable by this Court, provided that a motion for
12 judicial review of the decision is filed by KPC/L-P and/or Gateway with the Court
13 and served on all Parties within ten (10) days of receipt of EPA's decision. The
14 motion shall include a description of the matter in dispute, the efforts made by the
15 parties to resolve it, the relief requested, and the schedule, if any, within which the
16 dispute must be resolved to ensure orderly implementation of this Consent Decree.
17 The United States may file a response to KPC/L-P and/or Gateway's motion.

18 (d) In proceedings on any dispute governed by this paragraph,
19 KPC/L-P and/or Gateway shall have the burden of demonstrating that the decision
20 of the Office of Environmental Cleanup Director is arbitrary and capricious or
21 otherwise not in accordance with law. Judicial review of EPA's decision shall be on
22 the administrative record compiled pursuant to Paragraph (83)(a).

23 (84) Formal dispute resolution for disputes that neither pertain to the
24 selection or adequacy of any response action nor are otherwise accorded review on
25 the administrative record under applicable principles of administrative law, shall be
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1 governed by this paragraph.

2 (a) Following receipt of KPC/L-P's and/or Gateway's Statement of
3 Position submitted pursuant to Paragraph (82), the Director of the Office of
4 Environmental Cleanup, EPA Region 10, will issue a final decision resolving the
5 dispute. The Office of Environmental Cleanup Director's decision shall be binding
6 on KPC/L-P and/or Gateway unless, within ten (10) days of receipt of the decision,
7 KPC/L-P and/or Gateway file with the Court and serve on the parties a motion for
8 judicial review of the decision setting forth the matter in dispute, the efforts made by
9 the parties to resolve it, the relief requested, and the schedule, if any, within which
10 the dispute must be resolved to ensure orderly implementation of the Consent
11 Decree. The United States may file a response to KPC/L-P's and/or Gateway's
12 motion.

13 (b) Notwithstanding Paragraph (11) of Section I (Background) of
14 this Consent Decree, judicial review of any dispute governed by this paragraph shall
15 be governed by applicable principles of law.

16 (85) The invocation of formal dispute resolution procedures under this
17 section shall not extend, postpone, or affect in any way any obligation of KPC/L-P
18 and/or Gateway under this Consent Decree not directly in dispute, unless EPA or the
19 Court agrees otherwise. Stipulated penalties with respect to the disputed matter
20 shall continue to accrue but payment shall be stayed pending resolution of the
21 dispute as provided in Paragraph (92). Notwithstanding the stay of payment,
22 stipulated penalties shall accrue from the first day of noncompliance with any
23 applicable provision of this Consent Decree. In the event that KPC/L-P and/or
24 Gateway do not prevail on the disputed issue, stipulated penalties shall be assessed
25 and paid as provided in Section XX (Stipulated Penalties).

1 **XX. STIPULATED PENALTIES**

2 (86) A Settling Defendant that fails to comply with requirements under this
3 Consent Decree (KPC/L-P or Gateway) shall be liable for stipulated penalties in the
4 amounts set forth in Paragraphs (86)(a) and (b) to the United States for failure to
5 comply with the requirements of this Consent Decree specified below, unless
6 excused under Section XVIII (Force Majeure). "Compliance" by KPC/L-P or
7 Gateway shall include completion of the activities under this Consent Decree or any
8 Work Plan or other plan approved under this Consent Decree identified below in
9 accordance with all applicable requirements of law, this Consent Decree, the SOW,
10 any plans or other documents approved by EPA pursuant to this Consent Decree,
11 and within the specified time schedules established by and approved under this
12 Consent Decree.

13 (a) The following stipulated penalties shall accrue per violation per
14 day for failure to submit timely or adequate Work Plans pursuant to Paragraphs (25)
15 through (28), failure to commence or complete Work by EPA-approved milestone
16 or deadline dates, or failure to comply with deadline dates set forth in this Consent
17 Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1 st through 30 th day
\$5,000	31 st through 60 th day
\$10,000	61 st day and beyond

22 (b) The following stipulated penalties shall accrue per violation per
23 day for failure to submit adequate or timely reports or other written documents
24 required under this Consent Decree, including but not limited to, monthly progress
25 reports, certifications of insurance coverage and financial information.

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

5 (c) KPC/L-P shall not be liable for stipulated penalties set forth in
6 subparagraphs (a) and (b) above if the stipulated penalty is associated with Work or
7 any other activity that is assigned solely to Gateway under this Consent Decree.
8 Similarly, Gateway shall not be liable for stipulated penalties set forth in
9 subparagraphs (a) and (b) above if the stipulated penalty is associated with Work or
10 any other activity that is assigned solely to KPC/L-P under this Consent Decree.

11 (87) In the event that EPA assumes performance of a portion or all of the
12 Work pursuant to Paragraph (101) of Section XXI (Covenants Not to Sue by
13 Plaintiff), KPC/L-P or Gateway shall be liable for an additional stipulated penalty
14 in the amount of three (3) times the cost incurred by EPA to perform the Work or the
15 amount of \$95,000.00, whichever is less.

16 (88) All penalties shall begin to accrue on the day after the complete
17 performance is due or the day a violation occurs, and shall continue to accrue
18 through the final day of the correction of the noncompliance or completion of the
19 activity. However, stipulated penalties shall not accrue: (a) with respect to a
20 deficient submission under Section XI (EPA Approval of Plans and Other
21 Submissions), during the period, if any, beginning on the thirty-first (31st) day after
22 EPA's receipt of such submission until the date that EPA notifies KPC/L-P or
23 Gateway of any deficiency; (b) with respect to a decision by the Director of the
24 Office of Environmental Cleanup, EPA Region 10, under Paragraph (83) or (84) of
25 Section XIX (Dispute Resolution), during the period, if any, beginning on the twenty-

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

9 (89) Following EPA's determination that KPC/L-P or Gateway has failed
10 to comply with a requirement of this Consent Decree, EPA may give KPC/L-P or
11 Gateway written notification of the same and describe the noncompliance. EPA may
12 send KPC/L-P or Gateway a written demand for the payment of the penalties.
13 However, penalties shall accrue as provided in the preceding paragraph regardless
14 of whether EPA has notified KPC/L-P or Gateway of a violation.

15 (90) All penalties accruing under this section shall be due and payable to
16 the United States within thirty (30) days of KPC/L-P's or Gateway's receipt from
17 EPA of a demand for payment of the penalties, unless KPC/L-P or Gateway invokes
18 the Dispute Resolution procedures under Section XIX (Dispute Resolution). All
19 payments to the United States under this section shall be paid by certified or
20 cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall
21 be mailed to: U.S. Environmental Protection Agency – Region 10, Attn: Superfund
22 Accounting, P.O. Box 360903M, Pittsburgh, PA 15251, and shall indicate that the
23 payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill
24 ID Numbers 104E (Marine OU) or 104F (Uplands OU), the DOJ case number 90-11-
25 3-1726, and the name and address of the party making payment. Copies of check(s)
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1 paid pursuant to this section, and any accompanying transmittal letter(s), shall be
2 sent to the United States as provided in Section XXVI (Notices and Submissions),
3 and to the EPA Region 10 Finance Unit (OMP-146), 1200 Sixth Avenue, Seattle,
4 Washington.

5 (91) The payment of penalties shall not alter in any way KPC/L-P's or
6 Gateway's obligation to complete the performance of the Work required under this
7 Consent Decree.

8 (92) Penalties shall continue to accrue as provided in Paragraph (88) during
9 any dispute resolution period, but need not be paid until the following:

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

14 (b) If the dispute is appealed to this Court and the United States
15 prevails in whole or in part, KPC/L-P or Gateway shall pay all accrued penalties
16 determined by the Court to be owed to EPA within sixty (60) days of receipt of the
17 Court's decision or order, except as provided in Subparagraph (c) below;

18 (c) If the District Court's decision is appealed by any Party, KPC/L-
19 P or Gateway shall pay all accrued penalties determined by the District Court to be
20 owing to the United States into an interest-bearing escrow account within sixty (60)
21 days of receipt of the Court's decision or order. Penalties shall be paid into this
22 account, as they continue to accrue, at least every sixty (60) days. Within fifteen
23 (15) days of receipt of the final appellate court decision, the escrow agent shall pay
24 the balance of the account to EPA or to KPC/L-P or Gateway to the extent that they
25 prevail.

1 (93) If KPC/L-P or Gateway fails to pay stipulated penalties when due, the
2 United States may institute proceedings to collect the penalties, as well as Interest.
3 KPC/L-P or Gateway shall pay Interest on the unpaid balance, which shall begin to
4 accrue on the date of demand made pursuant to Paragraph (89).

5 (94) Nothing in this Consent Decree shall be construed as prohibiting,
6 altering, or in any way limiting the ability of the United States to seek any other
7 remedies or sanctions available by virtue of KPC/L-P or Gateway's violation of this
8 Decree or of the statutes and regulations upon which it is based, including, but not
9 limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l).
10 Provided, however, that the United States shall not seek civil penalties pursuant to
11 Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), for any violation for which a
12 stipulated penalty is provided herein, except in the case of a willful violation of the
13 Consent Decree.

14 (95) Notwithstanding any other provision of this section, the United States
15 may, in its unreviewable discretion, waive any portion of stipulated penalties that
16 have accrued pursuant to this Consent Decree.

17 **XXI. COVENANTS NOT TO SUE BY PLAINTIFF**

18 (96) In consideration of the actions that will be performed and the payments
19 that will be made by the Settling Defendants under the terms of the Consent Decree,
20 and except as specifically provided in Paragraphs (97), (98), and (100) of this
21 section, the United States covenants not to sue or to take administrative action
22 against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, 42
23 U.S.C. §§ 9606 and 9607(a), relating to the Site. Except with respect to future
24 liability for Work to be performed at the Marine OU, these covenants not to sue shall
25 take effect upon the receipt by EPA of the payments required by Paragraph (69) of
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1 Section XVI (Reimbursement of Response Costs). With respect to future liability
2 for Work to be performed at the Marine OU, these covenants not to sue shall take
3 effect upon Certification of Completion of Remedial Action by EPA pursuant to
4 Paragraph (66)(c) of Section XIV (Certification of Completion). These covenants
5 not to sue are conditioned upon the satisfactory performance by Settling Defendants
6 of their obligations under this Consent Decree. These covenants not to sue extend
7 only to the Settling Defendants and do not extend to any other person.

8 (97) **United States' Pre-Certification Reservations.** Notwithstanding any
9 other provision of this Consent Decree, the United States reserves, and this Consent
10 Decree is without prejudice to, the right to institute proceedings in this action or in
11 a new action, or to issue an administrative order seeking to compel KPC/L-P: (a) to
12 perform further response actions relating to the Site, or (b) to reimburse the United
13 States for additional costs of response if, prior to Certification of Completion of the
14 Remedial Action:

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

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

22 (98) **United States' Post-certification reservations.** Notwithstanding any
23 other provision of this Consent Decree, the United States reserves, and this Consent
24 Decree is without prejudice to, the right to institute proceedings in this action or in
25 a new action, or to issue an administrative order seeking to compel KPC/L-P (a) to
26 perform further response actions relating to the Site, or (b) to reimburse the

1 United States for additional costs of response if, subsequent to Certification of
2 Completion of the Remedial Action:

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

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

10 (99) For purposes of Paragraph (97), the information and the conditions
11 known to EPA shall include only that information and those conditions known to
12 EPA as of the date the ROD was signed for each Operable Unit and only to the
13 extent set forth in that ROD or the administrative record supporting that ROD. For
14 purposes of Paragraph (98), the information and the conditions known to EPA shall
15 include only that information and those conditions known to EPA as of the date of
16 Certification of Completion of the Remedial Action and set forth in the ROD, the
17 administrative record supporting the ROD, the post-ROD administrative record, or
18 in any information received by EPA pursuant to the requirements of this Consent
19 Decree prior to Certification of Completion of the Remedial Action.

20 (100) **General reservations of rights.** The covenants not to sue set forth
21 above do not pertain to any matters other than those expressly specified in Paragraph
22 (96). The United States reserves, and this Consent Decree is without prejudice to,
23 all rights against Settling Defendants with respect to all other matters, including, but
24 not limited to, the following:

25 (a) Claims based on a failure by Settling Defendants to meet a
26 requirement of this Consent Decree.

1 (b) Liability arising from the past, present, or future disposal,
2 release, or threat of release of Waste Materials outside of the Site.

3 (c) Liability for future disposal of Waste Material at the Site, other
4 than as provided in the ROD, the Work Plan, or otherwise ordered by EPA.

5 (d) Liability for damages for injury to, destruction of, or loss of
6 natural resources, and for the costs of any natural resource damage assessments.

7 (e) Criminal liability.

8 (f) Liability for violations of federal or state law which occur
9 during or after implementation of the Remedial Action.

10 (101) **Work Takeover.** In the event EPA determines that KPC/L-P or
11 Gateway have ceased implementation of any portion of the Work, are seriously or
12 repeatedly deficient or late in their performance of the Work, or are implementing the
13 Work in a manner which may cause an endangerment to human health or the
14 environment, EPA may assume the performance of all or any portions of the Work
15 as EPA determines necessary. KPC/L-P or Gateway may invoke the procedures set
16 forth in Section XIX (Dispute Resolution), Paragraph (83), to dispute EPA's
17 determination that takeover of the Work is warranted under this paragraph. Costs
18 incurred by the United States in performing the Work pursuant to this paragraph shall
19 be considered Future Response Costs that KPC/L-P or Gateway shall pay pursuant
20 to Section XVI (Reimbursement of Response Costs).

21 (102) Notwithstanding any other provision of this Consent Decree, the United
22 States retains all authority and reserves all rights to take any and all response actions
23 authorized by law.

24 **XXII. COVENANTS BY SETTLING DEFENDANTS**

25 (103) **Covenant Not to Sue.** Subject to the reservations in Paragraph (104),
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1 Settling Defendants hereby covenant not to sue and agree not to assert any claims
2 or causes of action against the United States with respect to the Work, past response
3 actions, Past Response Costs, Interim Response Costs, Future Response Costs, or
4 this Consent Decree, including, but not limited to:

5 (a) any direct or indirect claim for reimbursement from the
6 Hazardous Substance Superfund (established pursuant to the Internal Revenue Code,
7 26 U.S.C. § 9507) through Sections 106(b)(2), 107, 111, 112, 113 of CERCLA, 42
8 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, 9613, or any other provision of law.

9 (b) any claims against the United States, including any department,
10 agency, or instrumentality of the United States under Sections 107 or 113 of
11 CERCLA, 42 U.S.C. §§ 9607 or 9613, with respect to the contamination existing at
12 the Site as of the effective date of this Consent Decree, or

13 (c) any claims arising out of response activities at the Site,
14 including claims based on EPA's selection of response actions, oversight of response
15 activities, or approval of plans for such activities.

16 (104) The Settling Defendants reserve, and this Consent Decree is without
17 prejudice to, claims against the United States, subject to the provisions of Chapter
18 171 of Title 28 of the United States Code, for money damages for injury or loss of
19 property or personal injury or death caused by the negligent or wrongful act or
20 omission of any employee of the United States while acting within the scope of his
21 office or employment under circumstances where the United States, if a private
22 person, would be liable to the claimant in accordance with the law of the place where
23 the act or omission occurred. However, any such claim shall not include a claim for
24 any damages caused, in whole or in part, by the act or omission of any person,
25 including any contractor, who is not a federal employee as that term is defined in 28
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1 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection
2 of response actions, or the oversight or approval of the Settling Defendants' plans or
3 activities. The foregoing applies only to claims which are brought pursuant to any
4 statute other than CERCLA and for which the waiver of sovereign immunity is found
5 in a statute other than CERCLA.

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

9 **XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

10 (106) Except as expressly provided elsewhere in this Consent Decree,
11 nothing in this Consent Decree shall be construed to create any rights in, or grant any
12 cause of action to, any person not a Party to this Consent Decree. The preceding
13 sentence shall not be construed to waive or nullify any rights that any person not a
14 signatory to this Consent Decree may have under applicable law. Each of the Parties
15 expressly reserves any and all rights (including, but not limited to, any right to
16 contribution), defenses, claims, demands, and causes of action which each Party may
17 have with respect to any matter, transaction, or occurrence relating in any way to the
18 Site against any person not a Party hereto. Settling Defendants do not intend that this
19 Section alter or modify agreements between or among KPC, L-P and Gateway.

20 (107) The Parties agree, and by entering this Consent Decree this Court finds,
21 that the Settling Defendants are entitled, as of the effective date of this Consent
22 Decree, to protection from contribution actions or claims as provided by Section
23 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for matters addressed in this Consent
24 Decree.

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

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

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

20 **XXIV. ACCESS TO INFORMATION**

21 (111) Settling Defendants shall provide to EPA, upon request, copies of all
22 documents and information within their possession or control or that of their
23 contractors or agents relating to activities at the Site or to the implementation of this
24 Consent Decree, including, but not limited to, sampling, analysis, chain-of-custody
25 records, manifests, trucking logs, receipts, reports, sample traffic routing,
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1 correspondence, or other documents or information related to the Work. Settling
2 Defendants shall also use their best efforts to make available to EPA, for purposes
3 of investigation, information gathering, or testimony, their employees, agents, or
4 representatives with knowledge of relevant facts concerning the performance of the
5 Work.

6 (112) (a) **Business Confidentiality.** Settling Defendants may assert business
7 confidentiality claims covering part or all of the documents or information submitted
8 to Plaintiff under this Consent Decree to the extent permitted by and in accordance
9 with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R.
10 § 2.203(b). Documents or information determined to be confidential by EPA will
11 be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of
12 confidentiality accompanies documents or information when they are submitted to
13 EPA, or if EPA has notified Settling Defendants that the documents or information
14 are not confidential under the standards of Section 104(e)(7) of CERCLA, 42 U.S.C.
15 § 9604(e)(7), the public may be given access to such documents or information
16 without further notice to Settling Defendants.

17 (b) **Privileged Information.** The Settling Defendants may assert that certain
18 documents, records, and other information are privileged under the attorney-client
19 privilege or any other privilege recognized by federal law. If the Settling Defendants
20 assert such a privilege in lieu of providing documents, they shall provide Plaintiff
21 with the following: (i) the title of the document, record, or information; (ii) the date
22 of the document, record, or information; (iii) the name and title of the author of the
23 document, record, or information; (iv) the name and title of each addressee and
24 recipient; (v) a description of the contents of the document, record, or information;
25 and (vi) the privilege asserted by Settling Defendants. However, no documents,
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1 reports, or other information created or generated pursuant to the requirements of the
2 Consent Decree shall be withheld on the grounds that they are privileged.

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

7 **XXV. RETENTION OF RECORDS**

8 (114) Until ten (10) years after the Settling Defendants' receipt of EPA's
9 notification pursuant to Paragraph (66)(c) of Section XIV (Certification of
10 Completion of the Work), each Settling Defendant shall preserve and retain all
11 records and documents now in its possession or control or which come into its
12 possession or control that relate in any manner to the performance of the Work or
13 liability of any person for response actions conducted and to be conducted at the
14 Site, regardless of any corporate retention policy to the contrary. Until ten (10) years
15 after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph
16 (66)(c) of Section XIV (Certification of Completion), Settling Defendants shall also
17 instruct their contractors and agents to preserve all documents, records, and
18 information of whatever kind, nature, or description relating to the performance of
19 the Work.

20 (115) Prior to the conclusion of the ten-year document retention period, the
21 Settling Defendants may notify EPA's and the State's project managers that Settling
22 Defendants intend to destroy records that are required to be retained pursuant to
23 Paragraph (114) above. The notice shall be transmitted no later than ninety (90)
24 days prior to the intended date of destruction. The notice submitted by Settling
25 Defendants shall include a general summary of the contents of such documents. If
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1 requested by EPA's or the State's project manager, Settling Defendants shall provide
2 an opportunity to review such documents. If EPA's or the State's project manager
3 objects to the destruction of any or all such documents, Settling Defendants shall not
4 destroy such documents but may invoke the dispute resolution process set forth in
5 Section XIX herein.

6 (116) Each Settling Defendant hereby certifies individually that, to the best
7 of its knowledge and belief, after thorough inquiry, it has not altered, mutilated,
8 discarded, destroyed, or otherwise disposed of any records, documents, or other
9 information that relate to its potential liability regarding the Site since July 19, 2000,
10 and that it has fully complied with any and all EPA requests for information pursuant
11 to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and
12 Section 3007 of RCRA, 42 U.S.C. § 6927, and the records retention provisions of
13 the AOC (¶¶ 14.4 through 14.8).

14 **XXVI. NOTICES AND SUBMISSIONS**

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

23 **AS TO THE UNITED STATES:**

24 Chief, Environmental Enforcement Section
25 Environment and Natural Resources Division

1 U.S. Department of Justice
2 P.O. Box 7611, Ben Franklin Station
3 Washington, D.C. 20044

4 Re: DOJ case number 90-11-3-1726

5 **AS TO EPA:**

6 **For Uplands Operable Unit:**

7 Dianne Soderlund
8 EPA Project Coordinator
9 United States Environmental Protection Agency (AOO/A)
10 Alaska Operations Office/Anchorage
11 222 W. 7th Ave. No. 19
12 Anchorage, AK 99513-7588

13 Amber Wong
14 Alternate Project Coordinator
15 United States Environmental Protection Agency (ECL-115)
16 Region 10
17 1200 Sixth Avenue
18 Seattle, Washington 98101

19 **For Marine Operable Unit:**

20 Karen Keeley
21 EPA Project Coordinator
22 United States Environmental Protection Agency (ECL-111)
23 Region 10
24 1200 Sixth Avenue
25 Seattle, Washington 98101

26 Lori Cohen
27 Alternate Project Coordinator
28 United States Environmental Protection Agency (ECL-111)
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

29 **AS TO THE SETTLING DEFENDANTS:**

30 **For Uplands Operable Unit:**

31 Barry Hogarty
32 KPC/L-P Project Coordinator
33 Louisiana-Pacific Corp.

1 7559 North Tongass Highway
Ketchikan, AK 99901

2
3 Allyn Hayes
Gateway Project Coordinator
Gateway Forest Products, Inc.
4 7366 North Tongass Highway
Ketchikan, AK 99901

5 **For Marine Operable Unit:**

6
7 Barry Hogarty
KPC/L-P Project Coordinator
Louisiana-Pacific Corp.
8 7559 North Tongass Highway
Ketchikan, AK 99901

9
10 Allyn Hayes
Gateway Project Coordinator
Gateway Forest Products, Inc.
11 7366 North Tongass Highway
Ketchikan, AK 99901

12
13 **XXVII. EFFECTIVE DATE**

14 (118) The effective date of this Consent Decree shall be the date upon which
15 this Consent Decree is entered by the Court, except as otherwise provided herein.

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19 **XXVIII. RETENTION OF JURISDICTION**

20 (119) This Court retains jurisdiction over both the subject matter of this
21 Consent Decree and the Settling Defendants for the duration of the performance of
22 the terms and provisions of this Consent Decree for the purpose of enabling any of
23 the Parties to apply to the Court at any time for such further order, direction, and
24 relief as may be necessary or appropriate for the construction or modification of this
25 Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve

1 disputes in accordance with Section XIX (Dispute Resolution) hereof.

2 **XXIX. APPENDICES**

3 (120) The following appendices are attached to and incorporated into this
4 Consent Decree:

5 "Appendix A" is the ROD for the Uplands OU.

6 "Appendix B" is the ROD for the Marine OU.

7 "Appendix C" is the Institutional Controls Plan.

8 "Appendix D" is a map depicting "Patented Tidelands" within Ward Cove.

9 "Appendix E" is a map describing the Site.

10 "Appendix F" is the Statement of Work.

11 "Appendix G" is a map that shows the uplands areas of the Site that were
12 characterized during the RI, not including off-site areas that were
13 characterized as a result of aerial deposition or off-site use of grit or dredge
14 spoil material. A more thorough discussion of areas characterized or
15 evaluated for potential contamination can be found in the Scoping Document
16 (PTI, 1997) and in the Work Plan for the Remedial Investigation and
17 Feasibility Study (PTI, 1997).

18 "Appendix H" is a Draft Equitable Servitude [And Easement] [And Right of
19 Entry] dated November 18, 1999.

20 **XXX. COMMUNITY RELATIONS**

21 (121) EPA intends to amend the community relations plan (the Plan) currently
22 in existence for the Site. Each Settling Defendant that performs Work (KPC/L-P or
23 Gateway) shall propose to EPA their participation in the Plan to be amended by
24 EPA. EPA will determine the appropriate role for KPC/L-P or Gateway under the
25 amended Plan. KPC/L-P or Gateway shall also cooperate with EPA in providing
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1 information regarding the Work to the public. As requested by EPA, KPC/L-P or
2 Gateway shall participate in the preparation of such information for dissemination
3 to the public and in public meetings which may be held or sponsored by EPA to
4 explain activities at or relating to the Site.

5 **XXXI. MODIFICATION**

6 (122) Schedules specified in this Consent Decree for completion of the Work
7 may be modified by agreement of EPA and KPC/L-P or Gateway. All such
8 modifications shall be made in writing.

9 (123) Except as provided in Paragraph (28)("Modification of the SOW or
10 related Work Plans"), no material modifications shall be made to the SOW without
11 written notification to and written approval of the United States, Settling Defendants,
12 and the Court. Prior to providing its approval to any modification, the United States
13 will provide the State with a reasonable opportunity to review and comment on the
14 proposed modification. Modifications to the SOW that do not materially alter that
15 document may be made by written agreement between EPA, after providing the State
16 with a reasonable opportunity to review and comment on the proposed modification,
17 and the Settling Defendants.

18 (124) Nothing in this Decree shall be deemed to alter the Court's power to
19 enforce, supervise, or approve modifications to this Consent Decree.

20 **XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

21 (125) This Consent Decree shall be lodged with the Court for a period of not
22 less than thirty (30) days for public notice and comment in accordance with Section
23 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United
24 States reserves the right to withdraw or withhold its consent if the comments
25 regarding the Consent Decree disclose facts or considerations which indicate that the
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1 Consent Decree is inappropriate, improper, or inadequate. Settling Defendants
2 consent to the entry of this Consent Decree without further notice.

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

7 **XXXIII. SIGNATORIES/SERVICE**

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

13 (128) Each Settling Defendant hereby agrees not to oppose entry of this
14 Consent Decree by this Court or to challenge any provision of this Consent Decree
15 unless the United States has notified the Settling Defendants, in writing, that it no
16 longer supports entry of the Consent Decree.

17 (129) Each Settling Defendant shall identify, on the attached signature page,
18 the name, address, and telephone number of an agent who is authorized to accept
19 service of process by mail on behalf of that Party with respect to all matters arising
20 under or relating to this Consent Decree. Settling Defendants hereby agree to accept
21 service in that manner and to waive the formal service requirements set forth in Rule
22 4 of the Federal Rules of Civil Procedure and any applicable local rules of this
23 Court, including, but not limited to, service of a summons.

24 SO ORDERED THIS ____ DAY OF _____, 2000.

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UNITED STATES DISTRICT JUDGE

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of
2 United States v. Gateway Forest Products, et al., relating to the Ketchikan Pulp
3 Company Superfund Site.

4 FOR THE UNITED STATES OF
5 AMERICA

6 Date: _____

7 LOIS J. SCHIFFER
8 Assistant Attorney General
9 Environment and Natural Resources
10 Division
11 U.S. Department of Justice
12 Washington, D.C. 20530

13 BRUCE S. GELBER, Deputy Chief
14 Environmental Enforcement Section
15 Environment and Natural Resources
16 Division
17 U.S. Department of Justice
18 Washington, D.C. 20044-7611

19 REGINA R. BELT
20 Environmental Enforcement Section
21 Environment and Natural Resources
22 Division
23 U.S. Department of Justice
24 801 B. St., Suite 504
25 Anchorage, AK 99501-3657

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CHUCK CLARKE
Regional Administrator, Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

TOD A. GOLD
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, SO-158
Seattle, Washington 98101

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of
2 United States v. Gateway Forest Products, et al., relating to the Ketchikan Pulp
Company Superfund Site.

3
4 FOR GATEWAY FOREST PRODUCTS, INC.

5 Date: _____
6 JAMES K. ERICKSON
7 President
8 Gateway Forest Products, Inc.
9 P.O. Box 779
10 Ward Cove, Alaska 99928

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

12 Pete Haller
13 Ater Wynne LLP
14 Suite 5450
15 Two Union Square
16 Seattle, Washington 98101
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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of
2 United States v. Gateway Forest Products, et al., relating to the Ketchikan Pulp
3 Company Superfund Site.

4 FOR KETCHIKAN PULP COMPANY

5 Date: _____

6 _____
7 CHRIS PAULSON
8 President and General Manager
9 Ketchikan Pulp Company
10 P.O. Box 6600
11 Ketchikan, Alaska 99901

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

13 Eric B. Fjelstad
14 Perkins Coie LLP
15 1029 West Third Avenue, Suite 300
16 Anchorage, AK 99501-1970
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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of
2 United States v. Gateway Forest Products, et al., relating to the Ketchikan Pulp
3 Company Superfund Site.

4 FOR LOUISIANA-PACIFIC CORPORATION

5 Date: _____
6 CURT STEVENS
7 Chief Financial Officer
8 Louisiana-Pacific Corporation
9 111 S.W. Fifth Avenue
10 Portland, Oregon 97204

11 Agent Authorized to Accept Service on Behalf of Above-signed Party:
12 Eric B. Fjelstad
13 Perkins Coie LLP
14 1029 West Third Avenue, Suite 300
15 Anchorage, AK 99501-1970