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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. FMC CORPORATION, and J.R. SIMPLOT COMPANY, Defendants.	CIVIL ACTION NO. 99-296-E-BLW REMEDIAL DESIGN/ REMEDIAL ACTION CONSENT DECREE WITH DEFENDANT J.R. SIMPLOT COMPANY

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter against the J.R. Simplot Company ("Simplot") pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Eastern Michaud Flats ("EMF") Superfund Site ("Site") in Pocatello, Idaho, together with accrued interest; and (2) performance of response work by

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defendant Simplot for the Simplot OU Area of the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

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

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the U.S. Department of Interior, including the U.S. Fish and Wildlife Service, on August 15, 1997 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree.

E. The defendant entering into this Consent Decree, Simplot ("Settling Defendant"), does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint, and does not acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

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

Register on August 30, 1990, 55 Fed. Reg. 35502.

G. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, Settling Defendant and FMC Corporation ("FMC") commenced a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430, in June 1991, pursuant to an Administrative Order On Consent issued by EPA on May 30, 1991.

H. Settling Defendant completed a Remedial Investigation ("RI") Report and a Feasibility Study ("FS") Report in April 1997.

I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on April 21, 1997, in a major newspaper of general circulation, the Idaho State Journal, and in the Shoshone Bannock News. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. Public meetings to discuss the proposed remedial action were held on May 13-14, 1997 in Pocatello, and on the Fort Hall Reservation. Copies of written public comments submitted are available as part of the administrative record.

J. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), issued on June 8,1998, on which the State has given its concurrence. The ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

K. Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly

conducted by Settling Defendant if conducted in accordance with the requirements of this Consent Decree and its appendices.

L. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the ROD and the Work to be performed by Settling Defendant shall constitute a response action taken or ordered by the President.

M. This Consent Decree resolves the United States' claims against Simplot under Sections 106 and 107 of CERCLA for Past and Interim Response Costs incurred at the Site, and for Simplot's implementation of response actions for the Simplot OU Area of the Site, as those terms are defined herein, and its reimbursement of the United States' Future Response Costs associated with such response actions. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Simplot OU Area of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

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

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal

jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

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

3. Settling Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing Settling Defendant with respect to the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and

subcontractor shall be deemed to be in a contractual relationship with Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

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

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

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

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

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

"FMC OU Area" consists of the "FMC Plant Area" as that area

is defined by Section 1.3 of the ROD, which definition does not include the "Off-Plant Area" as defined by Section 1.3 of the ROD.

"Future Response Costs for the Simplot and FMC OUs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs with respect to the Simplot and FMC OU Areas of the Site in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV (Emergency Response Action), and Paragraph 85 of Section XXI (Work Takeover). Future Response Costs shall also include all Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from March 31, 1998 to the date of entry of this Consent Decree. Future Response Costs shall not include costs incurred by the Agency for Toxic and Substances Disease Registry ("ATSDR") for any health assessment or health effects study carried out under Section 104(i) of CERCLA, in response to a release or threatened release of hazardous substances from the Site.

"IDHW" shall mean the Idaho Department of Health and Welfare, Division of Environmental Quality, and any successor departments or agencies of the State.

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

"Interim Response Costs" shall mean all costs, including direct and indirect costs, paid by the United States in connection with the Site between March 31, 1998 and the effective date of this Consent Decree, or incurred prior to the effective date of this Consent Decree but paid after that date. "Interim Response Costs" shall not include costs incurred by ATSDR for any health assessment or health effects study carried out under Section 104(i) of CERCLA, in response to a release or threatened release of hazardous substances from the Site.

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

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

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

"Parties" shall mean the United States and Settling Defendant.

"Past Response Costs" shall mean all costs, including, but

not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through March 31, 1998, including Interest on all such costs accrued pursuant to 42 U.S.C. § 9607(a) through such date. "Past Response Costs" does not include costs incurred by ATSDR for any health assessment or health effects study carried out under Section 104(i) of CERCLA, in response to a release or threatened release of hazardous substances from the Site.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in Section 10 of the ROD and Section III of the SOW and any modified standards established by EPA pursuant to the "technical impracticability" provision of Paragraph 13.

"Plaintiff" shall mean the United States.

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

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on June 8, 1998, by the Regional Administrator, EPA Region 10, and all attachments thereto. The ROD is attached as Appendix A.

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

"Remedial Action Work Plan" shall mean the document developed pursuant to Paragraph 12 of this Consent Decree and

approved by EPA, and any amendments thereto.

"Remedial Design" shall mean those activities to be undertaken by Settling Defendant at the Simplot OU Area to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Reports.

"Remedial Design Reports" shall mean the documents that have been developed pursuant to Paragraph 11 of this Consent Decree and approved by EPA, and any amendments thereto.

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

"Settling Defendant" shall mean the J.R. Simplot Company.

"Simplot OU Area" consists of the "Simplot Plant Area" as that area is defined by Section 1.3 of the ROD, which definition does not include the "Off-Plant Area" as defined by Section 1.3 of the ROD.

"Site" shall mean the Eastern Michaud Flats ("EMF") Superfund Site, in the state of Idaho, approximately 2.5 miles northwest of the city of Pocatello.

"State" shall mean the State of Idaho.

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

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

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

"Waste Material" shall mean (1) any "hazardous substance"

under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); and (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

"Work" shall mean all activities Settling Defendant is required to perform for the Simplot OU Area under this Consent Decree, except those required by Section XXV (Retention of Records).

V. GENERAL PROVISIONS

5. Objectives of the Parties.

The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions for the Simplot OU Area of the Site by Settling Defendant, to reimburse response costs of the Plaintiff, and to resolve the claims of Plaintiff against Settling Defendant as provided in this Consent Decree.

6. Commitments by Settling Defendant.

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

7. Compliance With Applicable Law.

All activities undertaken by Settling Defendant pursuant to

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

8. Permits.

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

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

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

9. Notice to Successors-in-Title.

a. With respect to any property owned or controlled by

the Settling Defendant that is located within the Site, within 30 days after the entry of this Consent Decree, Settling Defendant shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, Bannock County, State of Idaho, which shall provide notice to all successors-in-title that the property is part of the Site, that EPA selected a remedy for the Site on June 8, 1998, and that Settling Defendant has entered into a Consent Decree requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. Settling Defendant shall record the notice(s) within 10 days of EPA's approval of the notice(s). Settling Defendant shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice(s).

b. Prior to the delisting of the Site, at least 30 days prior to the conveyance of any interest in property owned by Settling Defendant located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, Settling Defendant shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "restrictive easements") pursuant to Section IX (Access and

Institutional Controls). At least 30 days prior to such conveyance, Settling Defendant shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

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

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VI (Performance of the Work by Settling Defendant), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA. Within 30 days after the lodging of this Consent Decree, Settling Defendant shall notify

EPA in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendant proposes to change a Supervising Contractor, Settling Defendant shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree. The Settling Defendant's Project Coordinator designated pursuant to Section XII may also be designated to carry out the functions of the Supervising Contractor.

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

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendant from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendant may seek

relief under the provisions of Section XVIII (Force Majeure) hereof.

11. Remedial Design.

a. The Parties have divided Remedial Design reporting and deliverables for the Simplot OU into separate categories of Work with corresponding reports called Remedial Design Reports (RDRs) including Final Design Reports as set forth in the SOW, including a schedule for submission. This division reflects tasks previously undertaken, differences in time lines required for tasks, and is more efficient than use of a single Remedial Design Work Plan as contemplated by the Model RD/RA Consent Decree. Upon approval by EPA, each RDR shall be incorporated into and become enforceable under this Consent Decree. Within 60 days after EPA's issuance of an authorization to proceed, the Settling Defendant shall submit to EPA and the State a Health and Safety Plan for field design activities which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. Upon approval of each RDR by EPA, and submittal of the Health and Safety Plan for all field activities to EPA, Settling Defendant shall implement the RDRs. Settling Defendant shall submit all plans, submittals and other deliverables required under the approved RDR(s) to EPA in accordance with Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendant shall not commence further Remedial Design activities at the Site prior to approval of the RDR for such work.

12. Remedial Action.

a. Within 90 days after the approval of each Final Design Report, Settling Defendant shall submit a work plan to EPA for the performance of such component Remedial Action at the Simplot OU ("Remedial Action Work Plan") as set forth in the SOW. Together, the Remedial Action Work Plans shall provide for construction and implementation of the remedy set forth in the ROD for the Simplot OU Area and achievement of the applicable Performance Standards for the Simplot OU Area, in accordance with this Consent Decree, the ROD, the SOW, and the design plans and specifications developed in accordance with the Final RDR approved by EPA. Upon approval by EPA, each Remedial Action Work Plan shall be incorporated into and become enforceable under this Consent Decree. At the same time as it submits the first Remedial Action Work Plan, Settling Defendant shall submit a Health and Safety Plan to EPA for field activities required by the Remedial Action Work Plans which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. Remedial Action Work Plans shall include the following: (1) the schedule for completion of the Remedial Action; (2) method for selection of the contractor; (3) schedule for developing and submitting other required Remedial Action plans; (4) methodology for implementation of the Construction Quality Assurance Plan; (5) a groundwater monitoring plan; (6) methods for satisfying permitting requirements if applicable; (7) methodology for implementation of the Operation and Maintenance Plan; (8) methodology for implementation of the Contingency Plan;

(9) tentative formulation of the Remedial Action team; (10) construction quality control plan (by constructor); and (11) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. Remedial Action Work Plans also shall include a schedule for implementation of all applicable Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Settling Defendant's Remedial Action Project Team (including, but not limited to, the Supervising Contractor).

c. Upon approval of each Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by the State, Settling Defendant shall implement the activities required under such Remedial Action Work Plan. Settling Defendant shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the attached SOW. Unless otherwise directed by EPA, Settling Defendant shall not commence physical Remedial Action activities at the Site prior to approval of the applicable Remedial Action Work Plan.

13. Attainment of Performance Standards.

Settling Defendant shall continue to implement the Remedial Action and O&M until the Performance Standards are achieved for the Simplot OU Area and for so long thereafter as is otherwise required under this Consent Decree. Settling Defendant reserves the right to seek relief pursuant to 42 U.S.C. § 9621(d)(4)(C) or 40 C.F.R. § 300.430(f)(1)(ii)(C)(3).

14. Modification of the SOW or Related Work Plans.

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

b. For the purposes of this Paragraph 14 and Paragraphs 48 and 49 only, the "scope of the remedy selected in the ROD" is limited to the specific actions detailed for the Simplot OU Area in Section 10.1, entitled "Selected Remedy" of the ROD, as further detailed in Section III. D. of Appendix B.

c. If Settling Defendant objects to any modification determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 66 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

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

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

15. Settling Defendant acknowledges and agrees that nothing in this Consent Decree, the SOW, or the Remedial Design Reports or Remedial Action Work Plans constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

16. Shipments of Waste Material Out of State.

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

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

c. The identity of the receiving facility and state will be determined by Settling Defendant following the award of

the contract for Remedial Action construction. Settling Defendant shall provide the information required by Paragraph 16.b. as soon as practicable after the information is identified and seven days before the Waste Material is actually shipped.

VII. REMEDY REVIEW

17. Periodic Review. Settling Defendant shall conduct any studies and investigations as requested by EPA in writing for the Simplot OU Area, in order to permit EPA to conduct reviews of whether the Remedial Action is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

18. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select further response actions for the Site, including the Simplot OU Area of the Site, in accordance with the requirements of CERCLA and the NCP.

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

20. Settling Defendant's Obligation To Perform Further Response Actions. If EPA selects further response actions for the Simplot and/or FMC OU Areas, Settling Defendant shall undertake such further response actions to the extent that the reopener conditions in Paragraph 81 or Paragraph 82 (United

States' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 81 or Paragraph 82 of Section XXI (Covenants Not To Sue by Plaintiff) are satisfied, (2) EPA's determination that the Remedial Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 66 (record review).

21. Submissions of Plans. If Settling Defendant is required to perform further response actions pursuant to Paragraph 20, it shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendant) and shall implement the plan approved by EPA in accordance with the provisions of this Decree.

VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

22. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures for all samples in accordance with "EPA Requirements for Quality Assurance Project Plans for Environmental Data Operation," (EPA QA/R5; "Preparing Perfect Project Plans,") (EPA /600/9-88/087), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this

Consent Decree, Settling Defendant shall submit a Quality Assurance Project Plan ("QAPP") to EPA for approval that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendant shall ensure that EPA personnel and its authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendant in implementing this Consent Decree. Settling Defendant shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendant shall ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree. Settling Defendant shall ensure that all laboratories it uses for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendant shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

23. Upon request, Settling Defendant shall allow split or duplicate samples to be taken by EPA or its authorized representatives. Settling Defendant shall notify EPA not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Settling Defendant to take split or duplicate samples of any samples it takes as part of the Plaintiff's oversight of the Settling Defendant's implementation of the Work.

24. Settling Defendant shall submit four copies of the results to EPA of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendant with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

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

IX. ACCESS AND INSTITUTIONAL CONTROLS

26. Commencing upon the date of lodging of this Consent Decree, Settling Defendant agrees to provide the United States, and its representatives, including EPA and its contractors, access at all reasonable times to the Site and any other property to which access is required for the implementation of this Consent Decree, to the extent access to such property is controlled by Settling Defendant, for the purposes of conducting

any activity related to this Consent Decree including, but not limited to:

A. Monitoring the Work;

B. Verifying any data or information submitted to the United States or the State;

C. Conducting investigations relating to contamination at or near the Site;

D. Obtaining samples;

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

F. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XXIV;

G. Assessing Settling Defendant's compliance with this Consent Decree;

H. Implementing the Work pursuant to the conditions set forth in Paragraph 85 of this Consent Decree;

I. Determining whether the property is being used in a manner that is prohibited by this Consent Decree or related agreements, restrictions or easements;

J. Following delisting, the access granted by this Paragraph shall be limited to the performance by EPA of five year reviews, pursuant to Section 121(c) of CERCLA;

K. Commencing upon the date of lodging of this Consent Decree, and until EPA certifies that the Performance Standards for ground water have been met, Settling Defendant agrees not to use Site property for which land use restrictions are required by the Remedial Action to protect, the public health

or the environment during or after implementation of the Remedial Action, in violation of any of the following restrictions:

i. Affected ground water underlying the property shall not be consumed. Any changes in extraction of affected groundwater shall require 21 day advance notice and approval by EPA before implementation. However, in the event of an emergency in which the delay caused by this requirement would significantly impair plant operations or public health and safety, Settling Defendant need only provide notice within 24 hours after installation. Within 30 days after any emergency installation, Settling Defendant shall provide EPA with an analysis of the new installation's potential impacts on the groundwater monitoring network and the Site remedy, if any. The requirements of this Subparagraph 26(K)(i). shall not apply after the Performance Standards for ground water are achieved;

ii. No use or activity on property owned by Settling Defendant shall be permitted that will disturb any of the remedial measures that will be implemented pursuant to this Consent Decree; and

L. If Settling Defendant seeks to undertake any restricted use or activity on Site property, it may file a petition with EPA setting forth the nature of the use or activity, the reason why the use or activity is necessary, and any expected impact of the use or activity on the remedy, the public health, and the environment. Settling Defendant may undertake the restricted use or activity only if EPA determines, in its sole and unreviewable discretion, to allow such use or activity to be implemented pursuant to an approved plan.

27. a. To the extent that the Site or any other property for which access or land use restrictions are required for the implementation of this Consent Decree is owned or controlled by persons other than a Settling Defendant including, but not limited to, such property described in Appendix "A", Settling Defendant shall use best efforts to secure from such persons an agreement to provide the United States and the State and their representatives, including, but not limited to, EPA and its contractors, as well as Settling Defendant: (i) access to the property for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in this Paragraph, and (ii) the right to enforce the land use restrictions required by this Consent Decree in the manner set forth in Appendix "C". For purposes of securing access pursuant to this Subparagraph "best efforts" includes the payment of reasonable sums of money in consideration of the agreement. If any agreement required by this Subparagraph is not obtained within 45 days after the date of lodging of this Consent Decree, or within 45 days after the date EPA notifies Settling Defendant in writing that additional agreements beyond those previously secured are necessary, Settling Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps Settling Defendant has taken to attempt to obtain the agreement. The United States or the State may, as it deems appropriate, assist Settling Defendant in obtaining these agreements.

b. To the extent that the Site or any other property for which access or land use restrictions are required for the

implementation of this Consent Decree is owned or controlled by persons other than a Settling Defendant including, but not limited to, the property described in Appendix "A", Settling Defendant shall use best efforts to secure from such persons agreements to file the easements described below. For the purposes of this Subparagraph "best efforts" includes the payment of reasonable sums of money in consideration of the filing of these easements in accordance with the procedures set forth in Appendix "A". Settling Defendant shall, within 90 days after entry of this Consent Decree, submit to the following for EPA review and approval:

i. A draft easement substantially in the form attached to this Consent Decree as Appendix "C", that grants to Settling Defendant and their representatives, including EPA and its contractors: (A) a right of access, running with the land for the full duration of the applicable easement period, for the purpose of conducting any activity related to this Consent Decree, and (B) a right, running with the land for the full duration of the applicable easement period, to enforce the land use restrictions required by this Consent Decree. The easement shall be enforceable under the laws of Idaho, shall be free and clear of all prior liens and encumbrances, shall be acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255, and any modification thereof by Settling Defendant and any Grantor must be pre-approved by EPA in writing; and

ii. A current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for

the Preparation of Title Evidence in Land Acquisitions by the United States ("the Standards").

c. Within 30 days after EPA approval and acceptance of the easement, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, file the easement with the Recorder's Office or Registry of Deeds or other appropriate office, of Bannock County, Idaho. Within 60 days of filing the easement, Settling Defendant shall provide EPA with a title insurance policy or other final title evidence acceptable under the Standards, and the original recorded easement or a certified copy thereof showing the clerk's recording stamps. If any easement required by this Subparagraph is not submitted to EPA for review and approval within 90 days after the date of entry of this Consent Decree, Settling Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps Settling Defendant has taken to attempt to obtain such easements. If EPA notifies Settling Defendant in writing that additional easements, with respect to property that is not owned or controlled by Settling Defendant, are required for implementation of this Consent Decree, Settling Defendant shall respond by following the procedure outlined in this Subparagraph as though the property had been identified in this Consent Decree, except that the time requirements shall commence with the date of receipt of the written notice, as opposed to the date of entry of the Consent Decree. Transfers of Simplot OU property owned by Settling Defendant must include all access grants and all

restrictions or limitations (institutional controls) as described in this Consent Decree in the transferee's deed or such transfers shall be void or voidable.

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

X. REPORTING REQUIREMENTS

29. In addition to any other requirement of this Consent Decree, Settling Defendant shall submit two copies of written monthly progress reports to EPA that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendant or its contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and/or Pert charts as appropriate; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include an explanation of any modifications to the work plans

or other schedules that Settling Defendant has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Settling Defendant shall submit these progress reports to EPA by the tenth day of every month following the lodging of this Consent Decree until EPA notifies the Settling Defendant pursuant to Paragraph 49.b of Section XIV (Certification of Completion). If requested by EPA, Settling Defendant shall also provide briefings for EPA to discuss the progress of the Work.

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

31. Upon the occurrence of any event during performance of the Work that Settling Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendant shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 10, U.S. EPA. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

32. Within 20 days of the onset of such an event, Settling

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

33. Settling Defendant shall submit 3 copies of all plans, reports, and data required by the SOW, the Remedial Design Reports, the Remedial Action Work Plans, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendant shall simultaneously submit 1 copy of all such plans, reports and data to the State.

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

XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

35. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, shall: (a) approve the submission in whole or in part; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove the submission in whole or in part, directing that Settling Defendant modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendant at least one notice of deficiency and an opportunity to cure within seven days, except where to do

so would cause serious disruption to the Work or where previous submissions have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

36. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 35(a), (b), or (c), Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to its right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. If EPA modifies the submission to cure the deficiencies pursuant to Paragraph 35(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

37. a. Upon receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendant shall, within seven days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the seven-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 38 and 39.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendant shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of

any non-deficient portion of a submission shall not relieve Settling Defendant of any liability for stipulated penalties under Section XX (Stipulated Penalties).

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

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

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

report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XII. PROJECT COORDINATORS

41. Within 20 days of the lodging of this Consent Decree, Settling Defendant and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Party at least five working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. Settling Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. Settling Defendant's Project Coordinator shall not be an attorney. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

42. Plaintiff may designate other representatives, including, but not limited to, EPA and State employees, and federal or State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In

addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

43. EPA's Project Coordinator and the Settling Defendant's Project Coordinator will meet in person or by teleconference, at a minimum, on a monthly basis.

XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

44. Within 30 days of entry of this Consent Decree, Settling Defendant shall establish and maintain financial security in the amount of $4,409,723.50 in one or more of the following forms:

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

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

(c) A trust fund;

(d) A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with Settling Defendant; and

(e) A demonstration that Settling Defendant satisfies the requirements of 40 C.F.R. Part 264.143(f).

45. If Settling Defendant seeks to demonstrate the ability to complete the Work through a guarantee by a third party

pursuant to Paragraph 44(d) of this Consent Decree, Settling Defendant shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendant seeks to demonstrate the ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 44(d) or (e), it shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. If EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendant shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 44 of this Consent Decree. Settling Defendant's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

46. If Settling Defendant can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 44 above after entry of this Consent Decree, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Settling Defendant shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Settling Defendant

may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

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

XIV. CERTIFICATION OF COMPLETION

48. Completion of the Remedial Action.

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

statement, signed by a responsible corporate official of Settling Defendant or Settling Defendant's Project Coordinator:

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

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved at the Simplot OU, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards for the Simplot OU Area. Provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require Settling Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

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

49. Completion of the Work.

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

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

violations."

If, after review of the written report, EPA determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Work. Provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on any request for Certification of Completion by Settling Defendant that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendant in writing.

XV. EMERGENCY RESPONSE

50. In the event of any action or occurrence in connection with the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public

health or welfare or the environment, Settling Defendant shall, subject to Paragraph 51, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendant shall notify the EPA Emergency Response Unit, Region 10. Settling Defendant shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. If Settling Defendant fails to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendant shall reimburse EPA for all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Reimbursement of Response Costs).

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

XVI. REIMBURSEMENT OF RESPONSE COSTS

52. Within 30 days after the effective date of this Consent Decree, Settling Defendant shall pay the sum of $90,436.90 to the EPA Hazardous Substance Superfund in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing the U.S.A.O. file number provided by the United States, the EPA Region and Site/Spill ID #10D2 and DOJ case number 90-7-1-889/2. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section XXVI (Notices and Submissions) and to:

Joseph Penwell
Finance Section
U.S. EPA Region X, OMP-143
1200 Sixth Avenue
Seattle, Washington 98101

53. Settling Defendant shall reimburse the EPA Hazardous Substance Superfund for all Future Response Costs for the Simplot OU and one-half of all Interim Response Costs for the Site incurred by the United States, subject to Paragraph 54. The United States will send Settling Defendant a bill requiring payment that includes a Scores cost summary, which includes

direct and indirect costs incurred by EPA and its contractors. Settling Defendant shall make all payments within 30 days after Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 54. Settling Defendant shall make all payments required by this Paragraph in the form of a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA Region and Site/Spill ID #10D2, the DOJ case number 90-7-1-889/2, and the name and address of the party making payment. Settling Defendant shall send the check(s) to:

Mellon Bank
U.S. EPA Region 10
ATTN: Superfund Accounting
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

and shall send copies of the check(s) to the United States as specified in Section XXVI (Notices and Submissions) and to Joseph Penwell at the address specified in the preceding Paragraph.

54. Settling Defendant may contest payment of any Future Response Costs under Paragraph 53 if it determines that the United States has made an accounting error or if it alleges that a cost item that is included represents costs for response actions that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Settling Defendant shall within the 30 day period pay all uncontested Future Response Costs to the United States in the manner described in

Paragraph 53. Simultaneously, Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Idaho and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Settling Defendant shall send to the United States, as provided in Section XXVI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Settling Defendant shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States prevails in the dispute, within five days of the resolution of the dispute, Settling Defendant shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 53. If Settling Defendant prevails concerning any aspect of the contested costs, Settling Defendant shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to the United States in the manner described in Paragraph 53; Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendant's obligation to reimburse the United

States for its Future Response Costs.

55. If the payments required by Paragraph 52 are not made within 30 days after the effective date of this Consent Decree or the payments required by Paragraph 53 are not made within 30 days after Settling Defendant's receipt of the bill, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue 30 days after the effective date of this Consent Decree. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments under this Section. Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 53.

XVII. INDEMNIFICATION AND INSURANCE

56. a. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in

carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Further, Settling Defendant agrees to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither Settling Defendant nor any such contractor shall be considered an agent of the United States.

b. The United States shall give Settling Defendant notice of any claim for which the United States plans to seek indemnification pursuant to Paragraph 56.a, and shall consult with Settling Defendant prior to settling such claim.

57. Settling Defendant waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant

shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

58. No later than 15 days before commencing any on-site Work, Settling Defendant shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 48.b of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of one million dollars, combined single limit, and automobile liability insurance with limits of one million dollars, combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Decree, Settling Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendant shall provide certificates of such insurance and a copy of each insurance policy to EPA. Settling Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the effective date of this Consent Decree. If Settling Defendant demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or

insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XVIII. FORCE MAJEURE

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

60. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Settling Defendant shall orally notify EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Environmental Cleanup Office Director, EPA Region 10, within 48

hours after Settling Defendant first knew the event might cause a delay. Within seven days thereafter, Settling Defendant shall provide an explanation and description of the reasons for the delay in writing to EPA; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Settling Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors knew or should have known.

61. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for

performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Settling Defendant in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

62. If Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraphs 59 and 60 above. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XIX. DISPUTE RESOLUTION

63. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set

forth in this Section shall not apply to actions by the United States to enforce obligations of Settling Defendant that have not been disputed in accordance with this Section.

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

65. a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within fourteen (14) days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving a written Statement of Position on the United States on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by Settling Defendant. The Statement of Position shall specify Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 66 or Paragraph 67.

b. Within fourteen days after receipt of Settling Defendant's Statement of Position, EPA will serve its Statement of Position on Settling Defendant, including, but not limited to, any factual data, analysis, or opinion supporting that position

and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 66 or 67. Within seven days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and Settling Defendant as to whether dispute resolution should proceed under Paragraph 66 or 67, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 66 and 67.

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

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position,

including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Environmental Cleanup Office (ECL Director), EPA Region 10, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 66.a. This decision shall be binding upon Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 66.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 66.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendant with the Court and served on all Parties within ten (10) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendant's motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the ECL Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 66.a.

67. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor

are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendant's Statement of Position submitted pursuant to Paragraph 65, the ECL Director will issue a final decision resolving the dispute. The ECL Director's decision shall be binding on Settling Defendant unless, within ten days of receipt of the decision, Settling Defendant files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendant's motion.

b. Notwithstanding Paragraph L of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law. Settling Defendant may waive any formal decision by the ECL Director of disputes governed by this Paragraph by setting forth its reasons for doing so in its Statement of Position to EPA, and petitioning for judicial dispute resolution not less than 30 days after having submitted its Statement of Position. EPA may issue a Statement of Position during this 30-day period.

68. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of Settling Defendant under this Consent

Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 76. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. If Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

XX. STIPULATED PENALTIES

69. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 70 and 71 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). "Compliance" by Settling Defendant shall include completion of the activities under this Consent Decree or any report or work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

70. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph b:

Penalty Per Violation	Period of Noncompliance
$500	1st through 7th day

$1,000	8th through 14th day
$3,000	15th through 30th day
$7,500	31st through 90th day.

b. Failure to timely or adequately complete any Remedial Action task(s) or work in accordance with the SOW or deliverables and schedules in such deliverables which have been approved by EPA pursuant to this Consent Decree; and such failure does not constitute Force Majeure as defined in this Consent Decree, and prior written consent or approval therefore was not obtained by Settling Defendant from EPA.

71. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents, including periodic reports, required pursuant to this Consent Decree:

Penalty Per Violation	Period of Noncompliance
$300	1st through 7th day
$750	8th through 14th day
$1,500	15th through 30th day
$3,000	31st through 90th day.

72. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendant of any deficiency; (2) with respect to a decision by the ECL Director under Paragraph 66.b. or 67.a. of Section XIX (Dispute Resolution), during the

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

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

74. All penalties accruing under this Section shall be due and payable to the United States within 30 days of Settling Defendant's receipt from EPA of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to:

Mellon Bank
U.S. EPA Region 10
ATTN: Superfund Accounting
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

and shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #10D2, the DOJ Case Number 90-7-1-889/2, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVI, and to Joseph Penwell at the address specified in Paragraph 52.

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

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

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

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

c. If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties

determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendant to the extent it prevails.

77. a. If Settling Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. Settling Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 74.

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

78. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

79. In exercising its discretion, EPA may take into account, among other things, the reason for the non-compliance, whether Settling Defendant cured the violation in a timely manner, whether the non-compliance caused delays in completing the activities under the Consent Decree, and whether Settling Defendant made a good faith effort to comply with the Consent Decree.

XXI. COVENANTS NOT TO SUE BY PLAINTIFF

80. In consideration of the actions that will be performed and the payments that will be made by Settling Defendant under this Consent Decree, and except as specifically provided in Paragraphs 81, 82 and 84 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA for recovery of Past and Interim Response Costs at the Site, for implementation of response actions for the Simplot OU and FMC OU Areas of the Site, and for recovery of Future Response Costs for the Simplot and FMC OU Areas of the Site. The covenant not to sue for Past Response Costs shall take effect upon the receipt by EPA of the payments required by Paragraph 52 of Section XVI (Reimbursement of Response Costs). The covenant not to sue for each Future Response Cost and Interim Response Cost Payment(s) shall take effect upon the receipt by EPA of each such payment required by Paragraph 53. The covenant not to sue under Section 106 of CERCLA, 42 U.S.C. § 9606, for the work to be performed for the Simplot OU and FMC OU Areas of the Site shall take effect upon Certification of Completion of Remedial Action by EPA

pursuant to Paragraph 48.b of Section XIV (Certification of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to Settling Defendant and do not extend to any other person.

81. United States' Pre-certification reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant (1) to perform further response actions relating to the Simplot and FMC OU Areas or (2) to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Remedial Action:

(i) conditions at the Simplot or FMC OU Areas, previously unknown to EPA, are discovered, or

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

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

82. United States' Post-certification reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant (1) to perform further response

actions relating to the Simplot and FMC OU Areas of the Site, or (2) to reimburse the United States for additional costs of response if, subsequent to Certification of Completion of the Remedial Action:

(i) conditions at the Simplot or FMC OU Areas, previously unknown to EPA, are discovered, or

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

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

83. For purposes of Paragraph 81, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 82, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

84. General reservations of rights. The covenants not to

sue set forth above do not pertain to any matters other than those expressly specified in Paragraph 80. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;

(b) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Simplot and FMC OU Areas of the Site;

(c) liability for future disposal of Waste Materials at the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA;

(d) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

(e) criminal liability;

(f) liability for violations of federal or state law which occur during or after implementation of the Remedial Action;

(g) liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Modification of the SOW or Related Work Plans);

(h) liability under Section 107 of CERCLA, 42 U.S.C. § 9607, for the costs of any health assessment or health effects study carried out under Section 104(i) of CERCLA, in response to a release or threatened release of hazardous substances from the Site; and

(i) liability under Sections 106 and 107 of CERCLA for (a) additional response actions within the Simplot OU Area to address releases of hazardous substances in the off-plant areas of the Site, as defined in Section 1.3 of the ROD, other than any federally permitted release as defined in 42 U.S.C. § 9601(10) and as established by Simplot; and (b) liability for response costs incurred in connection with such response actions.

(j) liability under Sections 106 and 107 of CERCLA for releases of orthophosphates to groundwater from Simplot sources other than the phosphogypsum stack.

85. Work Takeover. If EPA determines Settling Defendant has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in performance of the Work, or in implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 66, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph

shall be considered Future Response Costs that Settling Defendant shall pay pursuant to Section XVI (Reimbursement of Response Costs).

86. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

XXII. COVENANTS BY SETTLING DEFENDANT

87. Covenant Not to Sue. Subject to the reservations in Paragraph 88, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Simplot and FMC OU Areas of the Site, and Past and Interim and Future Response Costs as defined herein, or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Simplot and FMC OU Areas of the Site, or

c. any claims arising out of response activities for the Simplot and FMC OU Areas of the Site, including claims based on EPA's selection of response actions, oversight of response activities or approval of plans for such activities.

88. Settling Defendant reserves, and this Consent Decree is

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

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

XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

90. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person

not a signatory to this Decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

91. The Parties agree, and by entering this Consent Decree this Court finds, Settling Defendant is entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for matters addressed in this Consent Decree. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters addressed in this Consent Decree, it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim. For purposes of this Paragraph, "matters addressed in this Consent Decree" shall mean all response actions taken or to be taken and all response costs incurred or to be incurred by any party or any other person or entity, including any of their officers, directors, employees, with respect to Simplot and FMC OU Areas.

92. Settling Defendant also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree it will notify in writing the United States within 10 days of service of the complaint on it. In addition, Settling Defendant shall notify the United States

within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

93. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by Plaintiff). Settling Defendant does not waive or limit any defense that it may assert in such subsequent proceedings except as specified in this paragraph.

XXIV. ACCESS TO INFORMATION

94. Settling Defendant shall provide EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendant shall also make available to EPA, for purposes of investigation, information

gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

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

b. Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6)

the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

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

XXV. RETENTION OF RECORDS

97. Until 10 years after Settling Defendant's receipt of EPA's notification pursuant to Paragraph 49.b of Section XIV (Certification of Completion of the Work), Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary. This obligation does not extend to other records associated with the operation of the plant. Until 10 years after Settling Defendant's receipt of EPA's notification pursuant to Paragraph 49.b of Section XIV (Certification of Completion), Settling Defendant shall also instruct all contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

98. At the conclusion of this document retention period,

Settling Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendant shall deliver any such records or documents to EPA. Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

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

3007 of RCRA, 42 U.S.C. § 6927.

XXVI. NOTICES AND SUBMISSIONS

100. Whenever, under this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and the Settling Defendant, respectively. Whenever notice to the United States is required, Settling Defendant shall send such notice to the U.S. Department of Justice and to EPA as specified herein. Where notice to EPA is required, Settling Defendant need not send notice to the Department of Justice.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DJ #90-7-1-8891/1

As to EPA:

Wallace Reid
EPA Project Coordinator
United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, WA 98101

As to Settling Defendant:

Mr. Pat Avery
Project Coordinator
J.R. Simplot Company
999 Main Street, P.O. Box 27
Boise, ID 83702

XXVII. EFFECTIVE DATE

101. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXVIII. RETENTION OF JURISDICTION

102. This Court retains jurisdiction over both the subject matter of this Consent Decree and Settling Defendant for the duration of the performance of the provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

XXIX. APPENDICES

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

"Appendix A" is the ROD.

"Appendix B" is the SOW.

"Appendix C" is a model Environmental Protection Easement and Declaration of Restrictive Covenants.

XXX. COMMUNITY RELATIONS

104. Settling Defendant shall propose participation in the

community relations plan to be developed by EPA. EPA will determine the appropriate role for Settling Defendant under the Plan. Settling Defendant shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

XXXI. MODIFICATION

105. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and Settling Defendant. All such modifications must be in writing.

106. Except as provided in Paragraph 14 ("Modification of the SOW or related Work Plans"), no modifications shall be made to the SOW without written approval of EPA and Settling Defendant.

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

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

108. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate,

improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

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

XXXIII. SIGNATORIES/SERVICE

110. The undersigned representative of Settling Defendant and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice certifies that he or she is fully authorized to enter into this Consent Decree and to execute and legally bind such Party to this document.

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

112. Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court,

including, but not limited to, service of a summons.

SO ORDERED THIS 9th DAY OF May, 2000.

B. Lynn Winmill
United States District Judge

dkh

United States District Court
for the
District of Idaho
May 13, 2002

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:99-cv-00296

I certify that a copy of the attached document was mailed or faxed to the following named persons:

Lois J Schiffer, Esq.
US DEPT OF JUSTICE
Environmental Enforcement Section
c/o NOAA Damage Assessment
7600 Sand Point Way NE
Seattle, WA 98115

Sean Carman, Esq.
US DEPT OF JUSTICE
Environmental Enforcement Section
c/o NOAA Damage Assessment
7600 Sand Point Way NE
Seattle, WA 98115

D Marc Haws, Esq. 1-208-334-1414
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Gregory T Costello, Esq.
MARTEN BROWN, INC

1191 2nd Ave #220[redacted]
Seattle, WA 9810[redacted]

Bradley M Marten, Esq.
MARTEN LAW GROUP
1191 2nd Ave #2200
Seattle, WA 98101

Terry T Uhling, Esq.
JR SIMPLOT CO
999 Main St #1300
Boise, ID 83702

✓ Chief Judge B. Lynn Winmill
_____ Judge Edward J. Lodge
_____ Chief Magistrate Judge Larry M. Boyle
_____ Magistrate Judge Mikel H. Williams

Cameron S. Burke, Clerk

Date: 5-13-02

BY: _____
(Deputy Clerk)

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. J.R. Simplot Company, relating to the Eastern Michaud Flats Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: 10-25-01

SEAN CARMAN
Environmental Enforcement Section
Environment and Natural Resources Division
c/o NOAA Damage Assessment
7600 Sand Point Way, NE
Seattle, WA 98115
(206) 526-6617

D. MARC HAWS
Civil Chief
Office of the United States Attorney
District of Idaho
P.O. Box 32
Boise, Idaho 83707
(208) 334-1211

CHARLES E. FINDLEY
Acting Regional Administrator,
Region 10
U.S. Environmental Protection
Agency
1200 Sixth Avenue
Seattle, WA 98101

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. J.R. Simplot Company, relating to the Eastern Michaud Flats Superfund Site.

FOR J.R. SIMPLOT COMPANY:

Date: 8/6/01

Ronald Graves
Vice-President, Secretary
999 Main Street, Suite 1300
P.O. Box 27
Boise, Idaho 83702

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

Name:	Ronald Graves
Title:	Vice-President, Secretary
Address:	999 Main Street, P.O. Box 72 Boise, Idaho 83702
Tel. Number:	(208) 389-7312