

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA *ex rel.*
Benjamin H. Grumbles, Director,
Arizona Department of Environmental
Quality,

Plaintiff,

v.

HONEYWELL INTERNATIONAL
INC., a Delaware corporation;
FREESCALE SEMICONDUCTOR,
INC., a Delaware corporation;
AVIALL Inc., a Delaware corporation;
KACHINA TECHNICAL SERVICES
AND PROCESSES, a dissolved
corporation; and JORAY
CORPORATION, a dissolved
corporation,
Defendants.

No. CV 07-01989-PHX- SRB

CONSENT DECREE BETWEEN
THE STATE OF ARIZONA AND
DEFENDANTS HONEYWELL
INTERNATIONAL INC.;
FREESCALE SEMICONDUCTOR,
INC.; AVIALL INC.; KACHINA
TECHNICAL SERVICES AND
PROCESSES; and JORAY
CORPORATION

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I. BACKGROUND

A. The State of Arizona, on its own behalf and on behalf of the Director of the Arizona Department of Environmental Quality (“State”), has filed a Complaint in this action pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9607 and A.R.S. §49-287 of the Arizona Water Quality Assurance Revolving Fund (“WQARF”).

B. The State seeks performance of the Interim Remedial Action by the work party defendants who have entered into this Consent Decree (“Work Party Settling Defendants”) at the Operable Unit 2 (“OU2”) Area of the 52nd Street Superfund Site (the “Site”), consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended), and reimbursement of costs to be incurred by the State for response actions at OU2. The remaining defendants are non-work parties (Non-Work Party Settling Defendants) because they have contributed to the OU2 costs by payments to the Work Party Settling Defendants. Collectively, the defendants are referred to herein as Settling Defendants.

C. The United States Environmental Protection Agency (“EPA”) placed the Site on the National Priorities List (“NPL”) pursuant to CERCLA by publication in the Federal Register on October 4, 1989 (54 Fed. Reg. 41000).

D. EPA has designated ADEQ as the lead agency with authority to plan and implement response actions under the National Contingency Plan, including enforcement activities related to removal and remedial actions, at the Site. ADEQ is further authorized to take or direct remedial actions in response to releases or threatened releases of hazardous substances, and to enter into settlements for cost recovery and remedial actions pursuant to

A.R.S. §49-287.

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the following NRD Trustees of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to natural resources under Federal and State trusteeship: ADEQ, U.S. Department of Defense, U.S. Department of Interior, National Oceanic and Atmospheric Administration and the U.S. Department of Agriculture on September 3, 2003. The U.S. Department of Energy was notified on October 3, 2003.

F. The State and EPA have identified additional potentially responsible parties for the Site who are not parties to this Consent Decree (the “non-participating parties”);

G. The decision by the State and EPA on an Interim Remedial Action to be implemented as OU2 is set forth in the Operable Unit 2 Record of Decision (“OU2 Record of Decision”) dated July 21, 1994.

H. EPA issued Order 98-15 on September 11, 1998, amended on November 30, 1998 and February 12, 1999 (UAO Docket No. 98-15), requiring Motorola, Inc. and AlliedSignal, Inc. to implement the Interim Remedial Action and two years of Operation and Maintenance for Operable Unit 2. EPA issued a second amendment to the 1998 Order, dated December 11, 2003, extending the Operation and Maintenance requirements and directing Motorola and Honeywell International Inc., AlliedSignal’s successor-in-interest, to perform the remaining Work for the interim remedy described in the July 21, 1994 OU2 Record of Decision for the Motorola 52nd Street Superfund Site. EPA will terminate the 1998 Order as amended on December 11, 2003, following entry of this

Consent Decree.

I. Subject to an agreement between Freescale Semiconductor, Inc and Motorola, Inc., Freescale Semiconductor, Inc. has assumed the obligations of Motorola, Inc. under the 1998 Order and the 2003 Order.

J. Work Party Settling Defendants agree to implement the Interim Remedial Action for the OU2- central groundwater treatment remedy through the continued maintenance and operation of the Treatment Facility located at 12 North 20th Street, Phoenix, Arizona.

K. Based on the information presently available to the State, the State believes that the Work will be properly and promptly conducted by the Work Party Settling Defendants in accordance with the requirements of this Consent Decree and its appendices.

L. Settling Defendants do not admit any liability to the State arising out of the transactions or occurrences alleged in the complaint, nor do they acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

M. The Interim Remedial Action selected by the ROD and the Work to be performed by the Work Party Settling Defendants shall constitute a response action taken or ordered by the President.

N. WHEREAS, the Parties to this Consent Decree recognize, and the Court by entering this Consent Decree finds, that this Consent Decree will expedite the cleanup of the Site 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 and supplemental jurisdiction over State law claims pursuant to 28 U.S.C. §§ 1331, 1345, and 1367 and 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge 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 State and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Prior to (1) any transfer by either Work Party Settling Defendant of its interest in the Treatment Facility, (2) the sale of substantially all of the assets of either Work Party Settling Defendant, or (3) the acquisition of a majority of the stock ownership in either Work Party Settling Defendant, the Work Party Settling Defendant shall provide a copy of this Consent Decree to the acquiring person or entity. Work Party Settling Defendants shall provide a copy of this Consent Decree to each contractor, subcontractor, laboratory, or consultant hired to perform the Work required by this Consent Decree and to each person representing any Work Party Settling Defendant with respect to the Work, and

shall condition all contracts entered into hereunder upon compliance with this Consent Decree. Work Party Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Work Party Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), and A.R.S. § 49-283(D)(3).

IV. DEFINITIONS

4. 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:

“1998 Order” shall mean the Amended Unilateral Administrative Order for the Motorola 52nd Street Superfund Site, UAO Docket no. 98-15, issued on September 11, 1998 and amended November 30, 1998 and February 12, 1999.

“2003 Order” shall mean the Second Amended Unilateral Administrative Order for the Motorola 52nd Street Superfund Site, UAO Docket No. 98-15 dated December 11, 2003.

“ADEQ” shall mean the Arizona Department of Environmental Quality.

“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, all appendices attached hereto (listed in Section XXIX) and all documents incorporated by reference into this Decree. In the event of conflict between this Decree and any appendix, this Consent Decree shall control.

“Day” shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or State holiday, the period shall run until the close of business of the next working day.

“Effective Date” shall be the date of entry of this Consent Decree.

“EPA” shall mean the United States Environmental Protection Agency.

“Freescale” shall mean Freescale Semiconductor, Inc. or its predecessors in interest, including Motorola Inc.

“Honeywell” shall mean Honeywell International Inc., or its predecessors in interest, including but not limited to, AiResearch Manufacturing Company of Arizona, The Garrett Corporation, Garrett Turbine Engine System Company, and AlliedSignal, Inc.

“Interest” shall mean interest accrued at the rate set forth in A.R.S. § 44-1201.

“Interim Remedial Action” shall mean those activities to be undertaken by the Work Party Settling Defendants to implement the ROD, in accordance with the Statement of Work (“SOW”), the O&M Manual and other plans or deliverables approved by ADEQ.

“Motorola 52nd Street Superfund Site” or “52nd Street Site” shall mean Operable Units 1, 2, and 3 of the Motorola 52nd Street Superfund Site, located within the approximate boundaries of 52nd Street to the east, 7th Avenue to the west, McDowell Road to the north and Buckeye Road to the south, and depicted generally on the map included as Appendix C to this Consent Decree.

“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 operate and maintain the Interim Remedial Action as required under the Operation and Maintenance Manual (“O & M Manual”), dated July 13, 2004, and approved by EPA and ADEQ on August 31, 2004.

“Operable Unit 2” or “OU2” shall mean the area bounded approximately by 44th Street to the east, 20th Street to the west, McDowell Road to the north, and Buckeye Road to the south.

“Oversight Costs” shall mean all costs, including, but not limited to, direct and indirect costs, not inconsistent with the NCP, that ADEQ will incur after the effective date of this Consent Decree in reviewing or developing plans, reports, and deliverables pursuant to this Consent Decree, verifying the Work, conducting Five-Year reviews of the OU2 Interim Remedial Action, or otherwise implementing, overseeing, or enforcing this Consent Decree. Such costs include, but are not limited to: payroll costs of ADEQ employees; travel costs of ADEQ personnel; contractor costs; compliance monitoring costs, such as costs associated with the collection and analysis of split or duplicate samples; site visits; community relations activities; costs associated with any disputes that may arise under this Consent Decree; costs incurred pursuant to Sections XIV [Access] (including, but not limited to, the cost of attorney time and any monies paid to secure access including, but not limited to, the amount of just compensation); Section XXIV

[Reservation of Rights/Work Takeover]; Section IX [Five Year Review] and costs of legal services performed on behalf of ADEQ by the Arizona Attorney General's Office.

Oversight Costs shall not include costs incurred by ADEQ or the Arizona Attorney General's Office in connection with: oversight of OU1 response actions; oversight of the Honeywell Administrative Order on Consent or any other investigation into or response actions conducted at the Honeywell facility located at 111 S. 34th Street, Phoenix, Arizona; oversight or performance of any facility-specific investigation of or response action at any other facility located in OU2; oversight or performance of any Feasibility Study encompassing OU2 or any portion thereof; or oversight or performance of any response actions in Operable Unit 3.

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

"Performance Standards" shall mean the groundwater treatment and containment standards of the Interim Remedial Action, set forth in the SOW and the containment standard set forth in the ROD.

"Record of Decision" or "ROD" shall mean the Interim Operable Unit 2 Record of Decision ("OU2 Record of Decision") dated July 21, 1994 as modified by the "Explanation of Significant Differences" dated September 10, 1999. The ROD is attached as Appendix A.

"Reimbursement" shall mean any payment by the Working Party Settling Defendants to the ADEQ for Oversight Costs, including cost advances as prescribed by Section XXII ("Reimbursement of Oversight Costs").

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Statement of Work” or “SOW” shall mean the Statement of Work for operating the OU2 groundwater remedy, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

“Submission” shall mean the deliverables identified in the SOW and any other report, plan or item required under the terms of this Consent Decree.

“Treatment Facility” shall mean the OU2 central groundwater treatment facility located at 12 North 20th Street, Phoenix, Arizona and its system components, consisting of groundwater extraction wells; conveyance piping from the extraction wells to the central groundwater treatment facility and from the central groundwater treatment facility to the point of discharge at the Salt River Project Grand Canal; and the monitor well network.

“Waste Material” shall mean (1) any hazardous substance under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); and (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33).

“Work” shall mean the activities Work Party Settling Defendants are required to perform under this Consent Decree, except those activities required by Section XVIII [Retention of Records].

“WQARF” shall mean the Water Quality Assurance Revolving Fund, A.R.S. § 49-281, *et seq.*

V. GENERAL PROVISIONS

5. Work Party Settling Defendants shall finance and perform the Work in

accordance with this Consent Decree, the ROD, the SOW, the O&M Manual, and all other plans, deliverables, standards, specifications, and schedules set forth herein or developed by Work Party Settling Defendants and approved by ADEQ pursuant to this Consent Decree. Work Party Settling Defendants shall also reimburse the State for its Oversight Costs as provided in this Consent Decree.

6. The obligations of Work Party Settling Defendants to finance and perform the Work and to pay Oversight Costs owed the State under this Consent Decree are joint and several. In the event of the insolvency or other failure by any one Work Party Settling Defendant to implement the requirements of this Consent Decree, the remaining Work Party Settling Defendant shall complete all requirements.

7. All activities undertaken by Work Party Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Activities conducted pursuant to this Consent Decree shall be considered to be consistent with the NCP.

VI. PERMITS

8. To the extent 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, but Work Party Settling Defendants shall comply with A.R.S. § 45-594 (Well construction standards; remedial measures), A.R.S. § 45-595 (Well construction requirements; licensing of well drillers and pump installation contractors), and A.R.S. § 45-596 (Notice of intention to drill; fee). The ADEQ Director has determined pursuant to A.R.S. § 49-290 that the Work Party Settling Defendants shall be exempted from any requirement to obtain an

Environmental Remediation Facility Use Permit to implement the Interim Remedial Action.

VII. PERFORMANCE OF THE WORK

9. Work Party Settling Defendants shall continue to implement the Interim Remedial Action until ADEQ issues a Certification of Completion of Interim Remedial Action or this Consent Decree is otherwise terminated in accordance with Section XXXVIII [Termination].

10. All aspects of the Work to be performed by Work Party Settling Defendants pursuant to Sections VII [Performance of the Work], VIII [Contingency Plan], and XIII [Quality Assurance, Sampling and Data] of this Consent Decree shall be under the direction and supervision of a qualified project manager, the selection of which shall be subject to approval by ADEQ. ADEQ approves of the project manager currently employed by Work Party Settling Defendants. If at any time Work Party Settling Defendants propose to use a different project manager, Work Party Settling Defendants shall notify ADEQ and shall obtain approval from ADEQ before the new project manager performs any Work under this Consent Decree.

11. If the project manager is changed, the identity of the successor will be forwarded to ADEQ at least five days before the change occurs. The Work Party Settling Defendants' project manager shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Work Party Settling Defendants' project manager shall not be an attorney for any Settling Defendant. ADEQ will review Work Party Settling Defendants' selection of a project manager within 14 days of receipt of notice of

the successor project manager. Approval of the Work Party Settling Defendants' selection of project manager shall not be unreasonably withheld. If ADEQ disapproves of the selection of the project manager, Work Party Settling Defendants shall submit to ADEQ within 30 days after receipt of ADEQ's disapproval, a list of project managers, including their qualifications, primary support entities and staff, which would be acceptable to Work Party Settling Defendants. ADEQ will thereafter provide written notice to Work Party Settling Defendants of the names of the project managers that are acceptable to ADEQ. Work Party Settling Defendants may then select any approved project manager from that list and shall notify ADEQ of the name of the project manager selected within twenty-one (21) days of ADEQ's designation of approved project managers.

12. Work Party Settling Defendants shall, prior to shipment of Waste Material derived from implementation of the Work to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving state and to the ADEQ Project Manager of such shipment of Waste Material. However, this notification requirement shall not apply when the total volume of any such shipment will not exceed 10 cubic yards.

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

another facility within the same state, or to a facility in another state.

b. Before shipping any Waste Material derived from implementation of the Work to an out-of-state waste management facility, Work Party Settling Defendants shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440.13. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Treatment Facility that constitutes an endangerment of, or may present an immediate threat to, public health or welfare or the environment, Work Party Settling Defendants shall immediately take all appropriate action. Work Party Settling Defendants shall take these actions in accordance with all applicable provisions of this Consent Decree and any other applicable federal or state law, in order to prevent, abate, or minimize such release or endangerment caused or threatened by the release. Work Party Settling Defendants shall also immediately notify the ADEQ Project Manager or, in the event of his/her unavailability, the ADEQ Superfund Programs Section Manager of the incident. In the event that Work Party Settling Defendants fail to take an appropriate response action, as determined by ADEQ, and ADEQ takes such action instead, Work Party Settling Defendants shall reimburse ADEQ all costs of the response action not inconsistent with the NCP in the manner described in Section XXII [Reimbursement of Oversight Costs].

13. The ADEQ Project Manager may designate other representatives, including, but not limited to, EPA and State employees, and federal and state contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this

Consent Decree. The ADEQ Project Manager shall have the authority, consistent with the NCP, to halt any Work required by this Consent Decree, and to take any necessary response action when the ADEQ Project Manager determines that conditions at OU2 constitute an endangerment of, or may present an immediate threat to, public health or welfare or the environment due to a release or threatened release of Waste Material. The absence of the ADEQ Project Manager from the Site shall not be cause for the stoppage or delay of the Work required by this Consent Decree.

VIII. CONTINGENCY PLAN

14. If, based on ADEQ review of the Effectiveness Report, Performance Standards for groundwater containment are not being met, Work Party Settling Defendants shall, within sixty (60) days of receiving written notice from ADEQ of its review, submit a contingency workplan to ADEQ for approval pursuant to Section XII [ADEQ Approval of Deliverables and Other Submissions]. The contingency workplan shall describe contingency response actions to be initiated within specified timeframes and completed pursuant to schedules set forth in the workplan. The contingency workplan may include, in addition to the contingency actions described in Section 2.C. of the SOW, a request for modification of the groundwater containment Performance Standard based on an evaluation of the protectiveness, technical feasibility, implementability, safety, cost effectiveness, and water resource considerations of the available alternatives. A request for modification of a groundwater containment Performance Standard shall be submitted for ADEQ's review and approval pursuant to Section XII [ADEQ Approval of Deliverables

and Other Submissions]. If Work Party Settling Defendants object to any determination made by ADEQ under this Paragraph, they may seek dispute resolution pursuant to Section XIX [Dispute Resolution].

15. In the event that the Performance Standards for groundwater treatment are not being met, Work Party Settling Defendants shall implement the actions set forth in Section 2.B. of the SOW. Work Party Settling Defendants shall notify ADEQ in writing of any system modifications to be implemented and a schedule for their implementation.

16. In the event that the Work Party Settling Defendants determine, in consultation with ADEQ, that major process modifications are required to return the Treatment Facility to compliance, Work Party Settling Defendants shall prepare and submit to ADEQ a workplan which shall include a schedule of activities to evaluate, design, permit, install, commission, and start up any major process modification(s) within specified timeframes.

IX. FIVE YEAR REVIEW

17. The CERCLA Section 121 Five Year Review for the 52nd Street Site was submitted to EPA Headquarters on September 26, 2006. Pursuant to that AOC entered into by the State and the Work Party Settling Defendants on December 13, 2006, ADEQ Docket No. SF-129-06, Work Party Settling Defendants have agreed to reimburse ADEQ for all reasonable and necessary costs of conducting the Second Five-Year Review of OU2 and preparing the Second OU2 Five-Year Review Report.

18. At least every five years as required by Section 121(c) of CERCLA and any applicable regulations, Work Party Settling Defendants shall conduct appropriate studies

and investigations requested by ADEQ in order to permit ADEQ to conduct reviews of whether the Interim Remedial Action is protective of human health and the environment. Work Party Settling Defendants shall provide cost advances for future Five Year Reviews of the Interim OU2 Remedy in accordance with the provisions of Section XXII [Reimbursement of Oversight Costs].

X. MODIFICATION OF THE WORK

19. If ADEQ determines that modification to the Work is necessary to achieve the Performance Standards, ADEQ may require such modification. Such a modification may be required pursuant to this Paragraph only to the extent that it is consistent with the scope of the remedy selected in the ROD. If Work Party Settling Defendants object to any modification determined by ADEQ to be necessary pursuant to this Paragraph, they may seek Dispute Resolution pursuant to Section XIX [Dispute Resolution]. Subject to the outcome of Dispute Resolution, Work Party Settling Defendants shall implement such modification to the Work. Nothing in this Paragraph shall be construed to limit ADEQ's authority to require performance of further response actions as otherwise provided in this Consent Decree.

20. Work Party Settling Defendants acknowledge and agree that nothing in this Consent Decree, the SOW, or the O&M Manual constitutes a warranty or representation of any kind by ADEQ that compliance with the work requirements set forth in the SOW and the O&M Manual will achieve the Performance Standards.

XI. REPORTING REQUIREMENTS

21. Work Party Settling Defendants shall submit quarterly O&M Progress

Reports in accordance with Section 3 of the SOW or at such other intervals as the SOW may provide should the SOW be modified under Section XXXI [Modification]. If requested by ADEQ, Work Party Settling Defendants shall also provide briefings to discuss the progress of the Work.

22. Work Party Settling Defendants shall submit a Groundwater Monitoring Report within 45 days of the end of each monitoring period as defined in Section 4 of the SOW or at such other intervals as the SOW may provide should the SOW be modified under Section XXXI [Modification].

23. Unless ADEQ and the Work Party Settling Defendants agree to different dates, on or before March 31st of each year, Work Party Settling Defendants shall submit an Effectiveness Report for the period October 1 through September 30 in accordance with Section 5 of the SOW. Work Party Settling Defendants shall review the adequacy of the monitoring well network in the Annual Effectiveness Report and the need, if any, for new groundwater monitoring wells for demonstrating containment. ADEQ may request the installation of additional monitoring wells in the event that it is determined that new groundwater monitor wells are necessary to achieve the objectives of this Consent Decree. If Work Party Settling Defendants object to any request for additional groundwater monitor wells made by ADEQ pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX [Dispute Resolution].

XII. ADEQ APPROVAL OF DELIVERABLES AND OTHER SUBMISSIONS

24. After review of any deliverable, report or other item which is required to be submitted for approval pursuant to this Consent Decree, ADEQ shall: (a) approve, in

whole or in part, the submission; (b) approve the submission upon specified conditions; (c) disapprove, in whole or in part, the submission, directing that Work Party Settling Defendants modify the submission; or (d) any combination of the above.

25. In the event of approval, or approval upon conditions by ADEQ, pursuant to Paragraph 24(a), or (b), Work Party Settling Defendants shall proceed to take any action required by the deliverable or other submission, as approved by ADEQ, subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX [Dispute Resolution].

26. Upon receipt of a notice of disapproval pursuant to Paragraph 24(c) or (d), Work Party Settling Defendants shall, within 30 days or such longer time as specified by ADEQ in such notice, correct the deficiencies identified by ADEQ and resubmit the deliverable or other submission for approval. Any stipulated penalties applicable to the submission, as provided in Section XX [Stipulated Penalties], shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved due to a material defect as provided in Paragraph 29.

27. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 24, Work Party Settling Defendants shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by ADEQ. Implementation of any non-deficient portion of a submission shall not relieve Work Party Settling Defendants of any liability for stipulated penalties under Section XX [Stipulated Penalties].

28. Upon resubmission of a deliverable or other submission pursuant to

Paragraph 26, ADEQ shall review the submission and provide Work Party Settling Defendants written notice of the outcome of its review. If ADEQ identifies deficiencies in the resubmission, it may disapprove the submission, or a portion thereof. In the event that a deficiency represents a material defect, ADEQ retains the right to seek stipulated penalties or any other remedies available pursuant to this Consent Decree, as provided in Section XX [Stipulated Penalties], subject to Work Party Settling Defendants' right to invoke the procedures set forth in Section XIX [Dispute Resolution].

29. If upon resubmission, a deliverable or other submission is disapproved by ADEQ due to a material defect, Work Party Settling Defendants shall be deemed to have failed to submit such report or other item timely and adequately unless Work Party Settling Defendants invoke the dispute resolution procedures in accordance with Section XIX [Dispute Resolution] and ADEQ'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 ADEQ's disapproval 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 [Stipulated Penalties].

30. All deliverables and other submissions required to be submitted to ADEQ under this Consent Decree shall, upon approval or modification by ADEQ, be enforceable under this Consent Decree. In the event ADEQ approves or modifies a portion of a deliverable or other submission required to be submitted to ADEQ under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

31. Neither the failure of ADEQ to expressly approve or disapprove of Work Party Settling Defendants' submissions within a specified time period, nor the absence of ADEQ comments, shall be construed as approval by ADEQ.

XIII. QUALITY ASSURANCE, SAMPLING AND DATA

32. Work Party Settling Defendants shall assure that work performed, samples taken, and analyses conducted conform to the requirements of the SOW. Work Party Settling Defendants shall assure that field personnel used by the Work Party Settling Defendants are properly trained in the use of field equipment and in chain of custody procedures. Work Party Settling Defendants shall only use laboratories that are licensed by the Arizona Department of Health Services. ADEQ acknowledges that the field personnel and laboratories currently used by Work Party Settling Defendants meet the requirements of this Paragraph.

33. Upon request, the Work Party Settling Defendants shall allow split or duplicate samples collected in support of groundwater monitoring as required in the Statement of Work to be taken by ADEQ or its authorized representatives. Work Party Settling Defendants shall notify ADEQ not less than seven (7) days in advance of any sample collection activity under this Paragraph unless shorter notice is agreed to by ADEQ. The failure by Work Party Settling Defendants to notify ADEQ in advance of any sample collection under this Paragraph is a violation of this Consent Decree. ADEQ shall have the right to take any additional samples that ADEQ deems necessary and shall provide the results of such sampling to Work Party Settling Defendants. ADEQ or its authorized agent(s) shall provide reasonable notice to the Work Party Settling Defendants'

Project Managers of its intent to collect split, duplicate or additional samples. Upon request, ADEQ shall allow the Work Party Settling Defendants to take split or duplicate samples of any samples ADEQ or its representatives take as part of the State's oversight of the Work Party Settling Defendants' implementation of the Work.

34. Work Party Settling Defendants shall submit to ADEQ copies of the results of all sampling and/or tests or other data obtained or generated by, or on behalf of, Work Party Settling Defendants from any well in the OU2 monitoring well network as defined in the O&M Manual, or from any sampling point within the Treatment Facility, regardless of whether the sample was taken in compliance with the requirements of this Consent Decree or for any other purpose. Work Party Settling Defendants shall submit raw data to ADEQ upon request. Work Party Settling Defendants shall not withhold data from ADEQ on the basis that the data contains exceptions or qualifiers from the analyzing laboratory.

35. All data, factual information, and documents submitted to or obtained by the State pursuant to this Consent Decree shall be subject to public inspection at the ADEQ offices or information repositories. Work Party Settling Defendants, or each of them (including their officers, directors, principals, employees, consultants, laboratories, or attorneys) shall not withhold, or assert confidentiality or privilege claims with respect to any documents, reports, or other information produced or generated pursuant to the requirements of this Consent Decree, and shall not withhold data, or assert any claim of confidentiality or privilege with respect to data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data or any other documents or information evidencing conditions in OU2 which is not otherwise

entitled to protection from disclosure pursuant to 42 U.S.C. §9604(e)(7)(F) or A.R.S. §49-205. Work Party Settling Defendants shall not make any claim of confidentiality or privilege with respect to any data or documents that describe (a) the chemical constituents, concentrations, and amounts of any hazardous substances or pollutant discharges, or (b) the existence of, or a level of a concentration of, a hazardous substance or pollutant in groundwater or soils in OU2.

36. Except as provided in Paragraph 35, Work Party Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to ADEQ pursuant to this Consent Decree to the extent permitted by law and in accordance with A.R.S. §49-205. Documents or information determined to be confidential by ADEQ will be afforded the protection specified in A.R.S. §49-205. If no claim of confidentiality accompanies documents or information when they are submitted to ADEQ, or if ADEQ has notified Work Party Settling Defendant(s) that the documents or information are not confidential under State standards, the public may be given access to such documents or information without further notice to Work Party Settling Defendant(s).

37. Except as provided in Paragraph 35, Work Party Settling Defendant(s) may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by law. Should any claim of privilege be asserted by either Work Party Settling Defendant or both of them, the Work Party Settling Defendant(s) shall promptly notify ADEQ of its assertion of the privilege, and provide (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 Work Party Settling Defendant(s).

38. A failure to identify to ADEQ any information or documents withheld on the basis of confidentiality or privilege in accordance with this Section is a violation of this Consent Decree.

39. If no claim of confidentiality or privilege accompanies documents or information when they are submitted to ADEQ, or if the ADEQ has notified Work Party Settling Defendants that the documents or information are not confidential, the public may be given access to such documents or information without further notice to Work Party Settling Defendants.

40. ADEQ reserves the right to challenge any claim of privilege by any Work Party Settling Defendant. The provisions of Section XIX [Dispute Resolution] shall be the exclusive procedure for resolving such challenges.

41. Work Party Settling Defendants waive any objections to any data gathered, generated, or evaluated by ADEQ in the performance or oversight of the Work that has been verified according to the Field Sampling Plan and the Quality Assurance Project Plan of the O&M Manual.

42. The Provisions of Section XII [ADEQ Approval of Deliverables and Other Submissions] shall not apply to violations of this Section. Work Party Settling Defendants shall not have the right to cure the withholding of data or information otherwise required to be produced under this Consent Decree. In the event ADEQ discovers that data or

information that a Work Party Settling Defendant is required to produce within the timeframe(s) set forth in this Consent Decree has been withheld in violation of this Consent Decree, ADEQ may seek against that Work Party Settling Defendant any applicable stipulated penalties and/or any other civil or criminal remedies available to the State under State or federal law.

XIV. ACCESS

43. Work Party Settling Defendants shall provide ADEQ or its authorized representatives access at all reasonable times to the Treatment Facility, and Settling Defendants shall provide ADEQ or its authorized representatives access at all reasonable times to property that is owned or controlled by Settling Defendants, or any of them, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- a. Monitoring the Work;
- b. Verifying any data or information submitted to ADEQ;
- c. Taking photographs or video, inspecting and copying records, operating logs, sampling data or other documents maintained or generated by Work Party Settling Defendants or their agents, consistent with Section XV [Access to Information];
- d. Conducting investigations relating to contamination at or near OU2;
- e. Obtaining samples;
- f. Assessing operational conditions at the Treatment Facility or compliance with the O&M Manual;
- g. Implementing the Work pursuant to a Work Takeover pursuant to

Section XXIV [Reservation of Rights/Work Takeover] of this Consent Decree; or

h. Assessing Work Party Settling Defendants' compliance with this Consent Decree.

44. ADEQ or its authorized agent(s) shall provide reasonable notice to the Work Party Settling Defendants' Project Managers of entry and inspection of the Treatment Facility pursuant to A.R.S. § 49-288(C).

45. To the extent that any property to which access is required for the implementation of this Consent Decree is owned or controlled by persons other than Work Party Settling Defendants, Work Party Settling Defendants shall use best efforts to secure from such persons access for Work Party Settling Defendants, as well as ADEQ, their representatives and contractors, as necessary to effectuate this Consent Decree. For purposes of this Paragraph, "best efforts" includes the payment of reasonable compensation for access. If any access required to implement the remedy is not obtained within 45 days of the date ADEQ notifies the Work Party Settling Defendants in writing that additional access beyond that previously required is necessary, Work Party Settling Defendants shall promptly notify ADEQ in writing, and shall include in that notification a summary of the steps Work Party Settling Defendants have taken to attempt to obtain access. ADEQ may, as it deems appropriate, assist Work Party Settling Defendants in obtaining access. Work Party Settling Defendants shall reimburse ADEQ, in accordance with the procedures in Section XXII [Reimbursement of Oversight Costs] for all costs incurred by ADEQ in obtaining access.

46. Notwithstanding any provision of this Consent Decree, the State retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, or Title 49 of Arizona Revised Statutes.

XV. ACCESS TO INFORMATION

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

XVI. NOTICES AND SUBMISSIONS

48. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed by U.S. Mail, certified mail, or by personal delivery to the individuals at the addresses specified below. All notices and submissions shall be considered effective upon receipt, unless otherwise provided.

(a) Work Party Settling Defendants shall send three hard copies and three electronic compact disc copies of all documents to be submitted to ADEQ to:

Sherri Zendri
Arizona Department of Environmental Quality
1110 W. Washington Street 4415B-1
Phoenix, AZ 85007
Zendri.sherri@azdeq.gov

Work Party Settling Defendants shall also send one hard copy and one electronic compact disc copy of all documents to:

Andria Benner
Superfund Division (SFD-8-2)
US EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105
Benner.Andria@epa.gov

(b) One hard copy and one electronic compact disc copy of all documents to be submitted to Work Party Settling Defendants should be sent to:

Troy Kennedy
Honeywell International Inc.
101 Columbia Turnpike
Morristown, NJ 07962
Troy.J.Meyer@Honeywell.com

Jenn McCall
Freescale Semiconductor, Inc.
2100 E. Elliot Road
Tempe, AZ 85284
Jenn.McCall@freescale.com

49. To the maximum extent possible, communications between the Work Party Settling Defendants and ADEQ shall be directed to the respective project managers by mail, with copies to such other persons as ADEQ and Work Party Settling Defendants may respectively designate. Communications include, but are not limited to, all documents, reports, approvals, and other correspondence submitted under this Consent Decree.

XVII. COMPLIANCE WITH OTHER APPLICABLE LAWS

50. Work Party Settling Defendants shall comply with all local, state, and federal laws that are applicable when performing the Work. No local, state, or federal permit shall be required for any portion of the Work. Notwithstanding the foregoing, Work Party Settling Defendants shall obtain all necessary well installation and well abandonment permits from the Arizona Department of Water Resources. Where any portion of the Work is to be conducted off-Site and requires a federal or state permit or approval, Work Party Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XVIII. RETENTION OF RECORDS

51. Each Work Party Settling Defendant shall preserve and retain for not less than 10 years after termination of this Consent Decree: (a) the final versions of documents in its possession or which come into its possession that are generated pursuant to the SOW, and (b) copies of all sampling data generated during the performance of the Work. Work Party Settling Defendants need not retain electronic copies of: (a) final versions of documents generated during performance of the Work that are printed in hard copy, or (b) e-mail. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

52. After this 10 year period, each Work Party Settling Defendant shall notify ADEQ at least ninety (90) days prior to the destruction of any such records or other

documents, and, upon request by the State, Work Party Settling Defendants shall deliver any such records or documents at no charge to the State.

XIX. DISPUTE RESOLUTION

53. 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.

54. 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 the parties to the dispute agree in writing to extend this time period. The dispute shall be considered to have arisen when Work Party Settling Defendants send a written Notice of Dispute to ADEQ.

55. In the event that the State and the Work Party Settling Defendants cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by ADEQ shall be considered binding unless, within fourteen (14) days after the conclusion of the informal negotiation period, Work Party Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on ADEQ a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the Work Party Settling Defendants.

56. Within fourteen (14) days after receipt of Work Party Settling Defendants' Statement of Position, ADEQ shall serve on Work Party Settling Defendants its Statement

of Position, including, but not limited to any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by ADEQ. Within five (5) days after receipt of ADEQ's Statement of Position, Work Party Settling Defendants may submit a Reply.

57. If there is disagreement between ADEQ and the Work Party Settling Defendants as to whether dispute resolution should proceed under Paragraph 58 or 59, these parties shall follow the procedures set forth in the paragraph determined by ADEQ to be applicable. However, if the Work Party Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 58 and 59.

58. 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 reports or other submissions, or any other items requiring approval by ADEQ 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 Work Party Settling Defendants regarding the validity of the ROD's provisions.

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

documentation, submitted pursuant to this Section. Where appropriate, ADEQ may allow submission of supplemental statements of position by the Work Party Settling Defendants.

b. The Director of the ADEQ Waste Programs Division will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 58(a). This decision shall be binding upon the Work Party Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 58(c) or 59(b).

c. Any administrative decision made by ADEQ pursuant to Paragraph 58(b) shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Work Party Settling Defendants or one of them with the Court and served on all parties to the dispute within 20 days of receipt of ADEQ's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to the dispute 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. ADEQ may file a response to Work Party Settling Defendants' motion.

d. In proceedings on any dispute governed by this Paragraph, Work Party Settling Defendants shall have the burden of demonstrating that the decision of the Waste Programs Division Director is not supported by

substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion. Judicial review of ADEQ's decision shall be on the administrative record compiled pursuant to Paragraph 58(a) and (b).

59. 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 the statements of position submitted pursuant to Paragraphs 55, 56, or 58, the Director of the Waste Programs Division will issue a final decision resolving the dispute. The Waste Program Division Director's decision shall be binding on the Work Party Settling Defendants unless, within 20 days of receipt of the decision, the Work Party Settling Defendants or one of them file with the Court and serve on ADEQ a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to the dispute 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. ADEQ may file a response to Work Party Settling Defendants' motion.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

60. The invocation of formal dispute resolution procedures under this Section

shall not extend, postpone, or affect in any way any obligation of the Work Party Settling Defendants under this Consent Decree not directly in dispute, unless ADEQ or the Court determines 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 58 or 59. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Work Party Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX [Stipulated Penalties].

XX. STIPULATED PENALTIES

61. Work Party Settling Defendants shall be liable to the State for stipulated penalties in the amounts set forth in this Section for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XXI [Force Majeure]. "Compliance" by Work Party Settling Defendants shall include completion of the activities under this Consent Decree or any submission approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, the O&M Manual, and any plans, reports, or other documents approved by ADEQ pursuant to this Consent Decree, and within the specified time schedules established by and approved under this Consent Decree.

62. Stipulated Penalty Amounts.

a. The following stipulated penalties shall accrue per day for any failure to submit any of the following in a timely fashion and/or free of material defect: Quarterly

Progress Report; Groundwater Monitoring Report, Annual Effectiveness Report, proof of insurance pursuant to Paragraph 103; proof of financial assurance pursuant to Paragraphs 104-05.

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 250.00	1 st through 14 th day
\$ 500.00	15 th through 30 th day
\$1,000.00	31 st day and beyond

b. The following stipulated penalties shall accrue per day for any other noncompliance with the requirements of this Consent Decree concerning any other deliverable or submission, or for any other violation of this Consent Decree, including, but not limited to, specified time schedules established by or approved under this Consent Decree; or failure to implement the remedy, or for the non-disclosure of any data or other information otherwise required to be submitted in accordance with the terms of this Consent Decree. Stipulated penalties shall accrue from the date the data or information was initially required to be submitted to ADEQ.

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500.00	1 st through 14 th day
\$ 1000.00	15 th through 30 th day
\$ 2000.00	31 st day and beyond

63. 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 XII

[ADEQ Approval of Deliverables and Other Submissions], during the period, if any, beginning on the 31st day after ADEQ's receipt of such submission until the date that ADEQ notifies Work Party Settling Defendants of any deficiency; (2) with respect to a decision by the ADEQ Waste Programs Division Director, under Section XIX [Dispute Resolution], during the period, if any, beginning on the 21st day after the date that Work Party Settling Defendants' reply to ADEQ's Statement of Position is received until the date that the Division Director issues a final decision regarding such dispute; or (3) with respect to judicial review by the 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.

64. Following ADEQ's determination that any or all Work Party Settling Defendants have failed to comply with a requirement of this Consent Decree, ADEQ shall give the Work Party Settling Defendant that has failed to comply written notification of the same and describe the noncompliance. ADEQ may send the Work Party Settling Defendant(s) a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether ADEQ has notified the Settling Defendant(s) of a demand for stipulated penalties.

65. All penalties accruing under this Section shall be due and payable within sixty (60) days of Work Party Settling Defendant(s)' receipt from ADEQ of a demand for payment of the penalties, unless Work Party Settling Defendant(s) timely invoke the

Dispute Resolution procedures under Section XIX [Dispute Resolution]. All payments due under this Section shall be paid by certified or cashier's checks made payable to the State of Arizona State General Fund, shall reference Site Code 43-0000-04, and shall be mailed to ADEQ in accordance with Paragraphs 81 or 82, with a copy of such payment and transmittal letter provided to the ADEQ Project Manager.

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

67. Penalties shall continue to accrue 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 ADEQ that is not appealed to this Court, accrued penalties determined to be owing shall be paid to the State within 15 days of the agreement or the receipt of ADEQ's decision or order;

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

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

to be owing to the State into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to the State or to Work Party Settling Defendants to the extent that they prevail.

68. If Work Party Settling Defendants fail to pay stipulated penalties when due, ADEQ may institute proceedings to collect the penalties, as well as interest. Work Party Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of ADEQ's demand pursuant to Paragraph 65.

69. Notwithstanding any other provision of this Section, ADEQ may, in its unreviewable discretion, waive any portion of stipulated penalties or interest thereon that has accrued pursuant to this Consent Decree.

70. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of ADEQ to seek any other remedies or sanctions available by virtue of Work Party Settling Defendants' violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, remedies available to ADEQ pursuant to A.R.S. § 49-287, provided, however, that ADEQ may not seek any other remedies or sanctions pursuant to A.R.S. § 49-287 for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

XXI. FORCE MAJEURE

71. Work Party Settling Defendants agree to perform all requirements of this Consent Decree within the time limits established under this Consent Decree, unless the performance is delayed by a *force majeure*. For purposes of this Consent Decree, *force majeure* is defined as any event arising from causes beyond the control of the Work Party Settling Defendants or of any entity controlled by the Work Party Settling Defendants, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Consent Decree despite the Work Party Settling Defendants' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance, or a failure to attain the Performance Standards.

72. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a *force majeure* event, the Work Party Settling Defendants shall notify the ADEQ Project Manager or, in his or her absence, the ADEQ Superfund Program Section Manager within forty-eight (48) hours of when Work Party Settling Defendants first knew that the event might cause a delay. Within five (5) business days thereafter, the Work Party Settling Defendants shall provide in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to mitigate the effect of the delay; the Work Party Settling Defendants' rationale and documentation for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as

to whether, in the opinion of the Work Party Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Work Party Settling Defendants shall exercise best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the above requirements, unless such failure is a result of the *force majeure* event, shall preclude the Work Party Settling Defendants from asserting any claim of *force majeure* for that event for the period of time of such failure to comply, and for any additional delay caused by such failure

73. If ADEQ 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 ADEQ for such time as ADEQ deems 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 ADEQ does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, ADEQ will notify the Work Party Settling Defendants in writing of its decision. If ADEQ agrees that the delay is attributable to a *force majeure* event, ADEQ will notify the Work Party Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event. ADEQ's decisions pursuant to this Section shall be binding subject only to Section XIX [Dispute Resolution].

74. If the Work Party Settling Defendants elect to invoke dispute resolution, they shall do so no later than 15 days after receipt of ADEQ's notice pursuant to Paragraph 73. In any such proceeding, Work Party Settling Defendants shall have the burden of

demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a *force majeure* event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Work Party Settling Defendants complied with the requirements of Paragraphs 71 and 72. If Work Party Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Work Party Settling Defendants of the affected obligation of this Consent Decree.

XXII. REIMBURSEMENT OF OVERSIGHT COSTS

75. Within sixty (60) days of the effective date of this Consent Decree, Work Party Settling Defendants shall pay to ADEQ \$75,000 toward the State's Oversight Costs that will be incurred after the effective date of this Consent Decree. Payment shall be made as provided for in Paragraph 81 or 82 and shall be deposited in a separate Water Quality Assurance Revolving Fund account. Such account shall be referred to as the "M52 OU2 Oversight Account". ADEQ shall thereafter draw down on this account from time to time to fund its oversight activities of the Work pursuant to this Consent Decree. The M52 OU2 Oversight Account, and all interest it may accrue, shall be for the exclusive use of ADEQ for its Oversight Costs pursuant to this Consent Decree which are not inconsistent with the National Contingency Plan. Work Party Settling Defendants shall not be liable for reimbursing the account for any other use of the funds.

76. Beginning on a quarterly basis after the effective date of this Consent Decree, the State shall provide to the Work Party Settling Defendants a cost accounting

summary consisting of invoices and summaries of ADEQ costs incurred and costs paid by its contractors in that quarter, and a summary of ADEQ drawdowns made from the M52 OU2 Oversight Account. The State shall also provide a report on the status of the M52 OU2 Oversight Account including any interest accrued during the reporting period.

77. Work Party Settling Defendants may dispute payment of response costs within sixty (60) days of receipt of the ADEQ cost accounting summary if Work Party Settling Defendants determine that the costs: (i) are not Oversight Costs; (ii) are inconsistent with the NCP; or (iii) represent an accounting error. Any such objection shall specifically identify the contested cost(s) and the basis for objection. The parties to the dispute shall first conduct informal negotiations to resolve the dispute. The period for informal negotiations shall not exceed sixty (60) days unless extended by these parties. In the event that the negotiations are not successful, the Work Party Settling Defendants shall initiate the Dispute Resolution procedures in Section XIX [Dispute Resolution]. If Work Party Settling Defendants prevail concerning any aspect of the disputed costs, ADEQ shall refund the M52 OU2 Oversight Account the relevant amounts within sixty (60) days of the resolution of the dispute.

78. Subject to Paragraph 79, for as long as this Consent Decree remains in effect, if the balance of the M52 OU2 Oversight Account is \$10,000.00 or less, ADEQ may notify Work Party Settling Defendants. Within thirty (30) days after receipt of such notice, Work Party Settling Defendants shall deposit an amount sufficient to bring the balance of that account up to \$75,000.00.

79. Sixty (60) days prior to July 1 of each year, the ADEQ and the Work Party

Settling Defendants may meet and review Oversight Costs incurred and paid since the effective date of this Consent Decree, and Oversight Costs estimated to be incurred for the upcoming year. If these parties agree the sum of \$75,000.00 is an overestimation or underestimation of projected costs for the upcoming year, these parties may renegotiate the amount of money to be paid into the M52 OU2 Oversight Account. If these parties cannot agree on a renegotiated amount, the provisions of Paragraph 75 shall apply. Any funds remaining in the M52 OU2 Oversight Account at the time of termination of this Consent Decree shall be returned by ADEQ to the Work Party Settling Defendants in the form of a check made payable to an escrow account designated by the Work Party Settling Defendants.

80. The State reserves the right to incur Oversight Costs and to bill Work Party Settling Defendants for reimbursement of such Oversight Costs incurred if at any time the balance of funds available in the M52 OU2 Oversight Account is insufficient to cover such costs. Any billing pursuant to this Paragraph shall be made in accordance with the procedures established in this Section. Payment shall be made as provided in Paragraphs 81 or 82 and shall be deposited to the State WQARF Fund if ADEQ has incurred and paid such Oversight Costs from the State WQARF Fund; otherwise, such payment shall be deposited to the M52 OU2 Oversight Account.

81. Checks should be made payable to the Arizona Department of Environmental Quality and forwarded to:

Michael D. Clark, Chief Financial Officer
Arizona Department of Environmental Quality
1111 West Washington Street

Phoenix, Arizona 85007

A copy of the check should be sent simultaneously to the ADEQ Project Manager.

82. . . Alternatively, Work Party Settling Defendants may make payments required by this Paragraph by Electronic Funds Transfer (“EFT”) in accordance with EFT procedures to be provided to Work Party Settling Defendants by ADEQ, and shall be accompanied by a statement identifying the name and address of the Party making payment, referencing the 52nd Street Superfund Site/M52 OU2 Oversight Account [or the State WQARF Fund, if the payment is for reimbursement of Oversight Costs] and Site Code 43-0000-04. At the time of payment, Work Party Settling Defendants shall send notice that payment has been made to the ADEQ Project Manager.

83. . . In the event that the payments for Oversight Costs are not made within sixty (60) days of Work Party Settling Defendants’ receipt of a bill, Work Party Settling Defendants shall pay Interest on the unpaid balance at the rate set forth in A.R.S. § 44-1201. The Interest on Oversight Costs shall begin to accrue on the 61st day after Work Party Settling Defendants’ receipt of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies available to ADEQ by virtue of Work Party Settling Defendants’ failure to make timely payments under this Section, including but not limited to, payments of stipulated penalties pursuant to Section XX [Stipulated Penalties].

XXIII. COVENANT NOT TO SUE BY THE STATE

84. . . In consideration of the actions that will be performed and the payments that will be made by Work Party Settling Defendants under the terms of this Consent Decree,

and the contribution payments that the Non-Work Party Settling Defendants will make to Work Party Settling Defendants, and except as otherwise specifically provided in Section XXIV [Reservation of Rights/Work Takeover], the State covenants not to sue or take administrative action against Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. §§ 9607(a), and A.R.S. § 49-285 for performance of the Work and for recovery of Oversight Costs. These covenants not to sue are conditioned upon the complete and satisfactory performance by the Settling Defendants of all obligations under this Consent Decree. These covenants extend only to Settling Defendants and their successors in interest and do not extend to any other person.

85. Notwithstanding any other provision of this Consent Decree, the State 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 Work Party Settling Defendants to perform further response actions related to the Interim Remedial Action, or to reimburse the State for additional costs of response if, prior to the termination of this Consent Decree:

- (a) conditions at the Site, previously unknown to the State, are discovered; or
- (b) information, previously unknown to the State, is received, in whole or in part, and ADEQ determines that these previously unknown conditions or information together with any other relevant information indicates that the Work is not protective of human health or the environment. The State acknowledges that all information in the administrative record is known to the State. Work Party Settling Defendants reserve all rights and defenses for any actions taken under this Paragraph.

XXIV. RESERVATION OF RIGHTS/WORK TAKEOVER

86. Notwithstanding any other provision of this Consent Decree, ADEQ retains all authority and reserves all rights to take, direct, or order all response actions authorized by law.

87. The State reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within the State's covenant not to sue as follows.

a. Notwithstanding any other provision of this Consent Decree except for the State's covenant not to sue, the State reserves all rights against Work Party Settling Defendants with respect to:

- i. Claims based on a failure by Work Party Settling Defendant(s) to meet a requirement of this Consent Decree.
- ii. Liability for the final Operable Unit 2 or 52nd Street site-wide remedy.
- iii. Liability for additional interim remedies within Operable Unit 2.
- iv. Liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Treatment Facility.
- v. Liability based upon the Work Party Settling Defendant(s)' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage or disposal of Waste Material at or in connection with the Treatment Facility, other than as provided in the ROD, the Work, the O&M Manual, or otherwise ordered by ADEQ.

vi. Liability for violations of federal or state law which occur on or after the effective date of this Consent Decree.

vii. Liability for performance of response actions other than the Work.

viii. Criminal liability.

ix. Liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

x. Liability for costs that the State incurs related to the Work but are not otherwise enumerated within the definition of Oversight Costs.

xi. Liability for costs for epidemiological or risk assessment studies.

Work Party Settling Defendants reserve all rights and defenses with respect to alleged claims or liabilities reserved by the State.

b. Notwithstanding any other provision of this Consent Decree except for the covenant not to sue, the State reserves all rights against Non-Work Party Settling Defendants with respect to:

i. Liability arising from the future disposal, release, or threat of release of Waste Material.

ii. Liability for violations of federal or state law which occur on or after the effective date of this Consent Decree.

iii. Liability for performance of facility-specific investigations and response actions, as directed by ADEQ, to address sources of contamination on property within OU2 currently or formerly owned or operated by any Non-Work Party Settling Defendant;

iv. Criminal liability.

v. Liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

Non-Work Party Settling Defendants reserve all rights and defenses with respect to alleged claims or liabilities reserved by the State.

88. In the event ADEQ determines that Work Party Settling Defendants have (i) ceased implementation of the Work, or (ii) are seriously or repeatedly deficient/late in their performance of the Work, or (iii) are implementing the Work in a manner which may cause an endangerment to human health or the environment, ADEQ may issue a written Work Takeover Notice to the Work Party Settling Defendants for all or any portion of the Work. Any Work Takeover Notice will specify the grounds upon which such notice was issued and will provide Work Party Settling Defendants a period of 20 days within which to remedy the circumstances giving rise to ADEQ's issuance of such notice.

89. If, after expiration of the 20-day notice period specified in Paragraph 88, Work Party Settling Defendants have not remedied to ADEQ's satisfaction the circumstances giving rise to ADEQ's issuance of the Work Takeover Notice, ADEQ may at any time thereafter assume the performance of all or any portion of the Work ("Work Takeover"). ADEQ shall notify Work Party Settling Defendants in writing if ADEQ determines that implementation of a Work Takeover is warranted under this Paragraph.

90. Work Party Settling Defendants may invoke the procedures set forth in Section XIX [Dispute Resolution], Paragraph 58, to dispute ADEQ's issuance of a Work Takeover Notice under Paragraph 88. However, notwithstanding Work Party Settling

Defendants' invocation of such dispute resolution procedures, and during the pendency of any such dispute, ADEQ may in its sole discretion commence and continue a Work Takeover under Paragraph 89 until the earlier of (i) the date that Work Party Settling Defendant(s) remedy, to ADEQ's satisfaction, the circumstances giving rise to ADEQ's issuance of the relevant Work Takeover Notice, or (ii) the date that a final decision is rendered in accordance with Section XIX [Dispute Resolution], Paragraph 58, requiring ADEQ to terminate such Work Takeover.

91. After commencement and for the duration of any Work Takeover, ADEQ shall have immediate access to and benefit of any performance guarantee(s) provided pursuant to Section XXVIII [Financial Assurance], Paragraph 105. If and to the extent that ADEQ is unable to secure the resources guaranteed under any such performance guarantee(s) and the Work Party Settling Defendant(s) fail to remit a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed, all in accordance with the provisions of Section XXVIII, Paragraph 107, any unreimbursed costs incurred by ADEQ in performing Work under the Work Takeover shall be considered Oversight Costs that Work Party Settling Defendants shall pay pursuant to Section XXII [Reimbursement of Oversight Costs].

92. Work Party Settling Defendant(s) shall cooperate with ADEQ in effecting a Work Takeover commenced in accordance with this Section.

XXV. COVENANTS BY WORK PARTY SETTLING DEFENDANTS

93. Subject to the reservations in Paragraph 94, Work Party Settling Defendants each covenant not to sue and agree not to assert any claims or causes of action against the

State of Arizona, its officials, departments, agencies, employees, or contractors with respect to the Work, past response actions, Oversight Costs, or this Consent Decree, including, but not limited to:

- a. With the exception of claims for contribution made pursuant to Paragraph 94(a), any claim against the State of Arizona related to the Work;
- b. Any claims arising out of response actions in connection with the Work, including any claim under the United States or Arizona Constitutions, statutory or common law;
- c. Any claim for reimbursement from the WQARF Fund pursuant to A.R.S. § 49-287(F) or any other provision of law.

The covenant set forth in this Paragraph does not apply to claims or causes of action arising out of the negligence of the State of Arizona or its officials, departments, agencies, employees, or contractors.

94. The Work Party Settling Defendants reserve, and this Consent Decree is without prejudice to:

- a. Claims for contribution where a department or agency of the state is determined to be a potentially responsible party pursuant to CERCLA §107, 42 U.S.C. §9607, at OU2 and for which there is a waiver of sovereign immunity.
- b. Claims against the State of Arizona otherwise authorized by Title 41, Chapter 3.1. 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 state employee as that term is defined in A.R.S. §41-762; nor shall any such claim

include a claim based on ADEQ's selection of response actions, or the oversight or approval of the Work Party Settling Defendants' plans or activities.

c. Claims for contribution or cost recovery against any other person. In the event that ADEQ enters into a settlement with any person or non-participating party in OU2 that involves the payment of response costs, such response costs shall be deposited by ADEQ into an "M52 OU2 Work Account" after deduction of the costs ADEQ incurred in investigating the basis for the settlement and negotiating and entering the settlement agreement or consent decree. Funds in the M52 OU2 Work Account shall be managed and utilized by ADEQ for the purpose of conducting investigations or remedial activities within the Site and shall not be co-mingled with the M52 OU2 Oversight Account which ADEQ acknowledges is a separate account from the M52 OU2 Work Account.

XXVI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

95. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to any person, or be construed as a release from any claim, or cause of action, or against any person not a signatory to this Consent Decree. Except as otherwise provided in this Consent Decree, each of the Parties expressly reserves any and all rights, 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 OU2 against any person not a party hereto.

96. The Parties agree, and by entering this Consent Decree this Court finds, that the Work Party Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C.

§9613(f)(2), and A.R.S. §49-292(C) for matters addressed in this Consent Decree. Upon payment to the Work Party Settling Defendants, Non-Work Party Settling Defendants are entitled to all benefits of this Consent Decree received by Work Party Settling Defendants, including the State's covenant not to sue in Paragraph 84 (subject to the reservations of rights of the State as set forth in Paragraph 87.b) and protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. §9613(f)(2), and A.R.S. §49-292(C) for matters addressed in this Consent Decree.

97. The Work Party Settling Defendants agree that with respect to any suit or claim for cost recovery or contribution brought by them for matters related to this Consent Decree, they will notify the ADEQ in writing no later than 60 days prior to the initiation of such suit or claim.

98. The Work Party Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify ADEQ in writing within 10 days of service of the complaint upon them.

99. In any subsequent administrative or judicial proceeding initiated by the State for injunctive relief, recovery of response costs, or other appropriate relief outside this Consent Decree, Work Party Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defense based upon any contention that the claims raised by the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXIII [Covenant Not to Sue

by the State].

100. Settling Defendants each shall bear its own costs and attorneys' fees in connection with the negotiation of this Consent Decree.

XXVII. INDEMNIFICATION

101. The State does not assume any liability by entering into this agreement or by virtue of any designation of Work Party Settling Defendants as authorized representatives under Section 104(e) of CERCLA. Work Party Settling Defendants shall indemnify and hold harmless the State of Arizona, its officials, agencies, departments, agents, employees, boards, commissions, contractors and subcontractors from any and all claims or causes of action, liabilities, costs, losses, or expenses (including reasonable attorneys' fees) arising from, or on account of, negligent, willful, or other wrongful acts or omissions of Work Party Settling Defendants and each of them, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Work Party Settling Defendants as ADEQ's authorized representatives under Section 104(e) of CERCLA. The State shall not be held out as a party to any contract entered into by or on behalf of Work Party Settling Defendants in carrying out activities pursuant to this Consent Decree. Work Party Settling Defendants, their officers, directors, employees, agents, or contractors shall not be considered employees, contractors, or agents of the State.

102. The State shall give Work Party Settling Defendants notice of any claim for which the State plans to seek indemnification pursuant to Paragraph 101 and shall consult

with Work Party Settling Defendants prior to settling such claim. If the State receives notice of a claim under A.R.S. § 12-821.01, the State shall provide notice to Work Party Settling Defendants in a timely manner (but not later than 90 days), along with any other information in the State's possession regarding the claim. The State shall cooperate with Work Party Settling Defendants in the investigation and defense of any claim for which the State seeks indemnification.

103. Work Party Settling Defendants (a) waive all claims against the State for damages or reimbursement or for set-off of any payments made or to be made to the State, arising from or on account of any contract, agreement, or arrangement between the Work Party Settling Defendants and any person for performance of Work on or relating to OU2. In addition, as provided in Paragraphs 101 and 102, Work Party Settling Defendants shall indemnify and hold harmless the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between the Work Party Settling Defendants and any person for performance of the Work, and (b) shall maintain the following insurance coverages:

- (i) General Liability – \$1,000,000.00 per Occurrence, \$2,000,000.00 in the Aggregate;
- (ii) Automobile Liability – \$1,000,000.00 combined single limit; and
- (iii) Workers Compensation and Employer's Liability – Statutory Limits.

XXVIII. FINANCIAL ASSURANCE

104. Pursuant to EPA Amended Order 98-15, Work Party Settling Defendants have provided EPA with the assurance of ability to complete the Work using internal financial information that allowed EPA to determine that Work Party Settling Defendants have sufficient assets available to perform the Work, including a demonstration that Work Party Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f). If Work Party Settling Defendants continue to seek to demonstrate ability to complete the Interim Remedial Action by means of internal financial information, they shall re-submit such information to ADEQ, first upon entry of this Consent Decree, and annually thereafter, on the anniversary of the effective date of this Consent Decree. If ADEQ determines that such financial information is inadequate, Work Party Settling Defendants shall, within forty-five (45) days after receipt of ADEQ's notice of determination, obtain and present to ADEQ for approval one of the other forms of financial assurance set forth in Paragraph

105. ADEQ acknowledges that the financial information previously submitted to EPA has been adequate to demonstrate Work Party Settling Defendants have sufficient assets available to complete the Work. Any disputes under this Paragraph are subject to Section XIX [Dispute Resolution].

105. If Work Party Settling Defendants elect to demonstrate their ability to complete the Work required by this Consent Decree by a mechanism other than that set forth in Paragraph 104, or in the event that ADEQ conducts a Work Takeover in accordance with Section XXIV [Reservation of Rights/Work Takeover], Work Party Settling Defendants shall, within 45 days after the effective date of this Consent Decree or

other date as specified by ADEQ, establish and maintain financial security for the benefit of the State in the amount required to fully and adequately complete the Work, or a portion of the Work (if only a portion of the Work is involved in the Work Takeover), in one or more of the following forms:

- a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;
- b. one or more irrevocable letters of credit, payable to or at the direction of ADEQ issued by financial institution(s) acceptable in all respects to ADEQ equaling the total estimated cost of the Work;
- c. a trust fund established for the benefit of the State administered by a trustee acceptable in all respects to ADEQ;
- d. a policy of insurance that provides the State with acceptable rights as a beneficiary thereof, and is issued by an insurance carrier regulated by the Arizona Department of Insurance and which is acceptable in all respects to ADEQ; and/or
- e. a written guarantee to fund or perform the Work executed in favor of the State by one or more of the following: (i) a direct or indirect parent company of a Settling Defendant, or (ii) a company that has a "substantial business relationship" (as defined in 40 C.F.R. §264.141(h)) with at least one Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of ADEQ that it satisfies the financial test requirements of 40 C.F.R. Part 264.143(f) with respect to the estimated cost of the Work that it proposes to guarantee hereunder.

106. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to ADEQ, subject to Work Party Settling Defendants rights under Section XIX [Dispute Resolution]. In the event that ADEQ determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Work Party Settling Defendants shall, within forty-five (45) days of receipt of notice of ADEQ's determination, obtain and present to ADEQ for approval one of the other forms of financial assurance listed in Paragraph 105. Within thirty (30) days of receipt of ADEQ approval, Work Party Settling Defendants shall execute or otherwise finalize all instruments or other documents required in order to make the selected financial assurance instrument legally binding. Work Party Settling Defendants shall not release, cancel, or discontinue any financial assurance instrument provided pursuant to this Section until (1) Work Party Settling Defendants have received written notice from ADEQ in accordance with Section XXXVIII [Termination] that the Work has been fully completed in accordance with the terms of this Consent Decree, (2) ADEQ otherwise so notifies Work Party Settling Defendants in writing, or (3) in the event of a dispute, Settling Defendant(s) may release, cancel or discontinue the financial assurance instrument(s) required hereunder only in accordance with a final administrative or judicial decision resolving such dispute. Settling Defendant(s)' inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Consent Decree.

107. The commencement of any Work Takeover pursuant to Section XXIV

[Reservation of Rights/Work Takeover] shall trigger ADEQ's right to receive the benefit of any financial assurance instrument(s) provided pursuant to Paragraph 105 and at such time ADEQ shall have immediate access to resources guaranteed under any such financial assurance instrument(s), whether in cash or in kind, as needed to continue and complete the Work assumed by ADEQ under the Work Takeover. If for any reason ADEQ is unable to promptly secure the resources guaranteed under any such financial assurance instrument(s), or in the event that the financial assurance instrument(s) involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 105, Work Party Settling Defendant(s) shall immediately upon written demand from ADEQ deposit into an account specified by ADEQ, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed as of such date, as determined by ADEQ. Such determination by ADEQ shall be subject to Section XIX [Dispute Resolution]. Notwithstanding Work Party Settling Defendants' invocation of Dispute Resolution under this Section, and during the pendency of any such dispute, ADEQ may in its sole discretion continue a Work Takeover pursuant to Section XXIV.

XXIX. APPENDICES

108. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and

incorporated into this Consent Decree: "Appendix A" is the July 1994 ROD for the Operable Unit 2 Interim Remedial Action 52nd Street Site and the "Explanation of Significant Differences" dated September 10, 1999. "Appendix B" is the SOW. "Appendix C" is the map of the 52nd Street Site.

XXX. COMMUNITY RELATIONS

109. Work Party Settling Defendants shall provide reasonable cooperation to ADEQ in its conduct of community relations regarding the Treatment Facility or OU2. Work Party Settling Defendants shall also cooperate with the State in providing information regarding the Work to the public. As requested by ADEQ, Work Party Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings to explain activities at or relating to the Work.

XXXI. MODIFICATION

110. Modifications of the SOW may be made by written agreement between the ADEQ and the Work Party Settling Defendants.

111. No informal advice, guidance, suggestions, or comments by ADEQ regarding reports, plans, specifications, schedules, or any other writing submitted by Work Party Settling Defendants shall be construed as relieving Work Party Settling Defendants of their obligation to obtain such formal approval as may be required by this Consent Decree.

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

XXXII. ADMINISTRATIVE RECORD

113. ADEQ will determine the contents of the administrative record file for the Work and shall incorporate such administrative record into the existing Motorola 52nd Street Site repositories located at the Burton Barr and Saguaro Phoenix Public Libraries and the ADEQ Records Center located at 1110 W. Washington, Phoenix Arizona. Work Party Settling Defendants shall be entitled to submit records or other documents to supplement the administrative record.

XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

114. 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 A.R.S. §49-292(G). The State reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

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

XXXIV. EFFECTIVE DATE

116. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XXXV. TERMINATION OF EPA UNILATERAL ORDER

117. On or about December 11, 2003, EPA issued a Second Amended Order,

UAO Docket No. 98-15, requiring Work Party Settling Defendants to, *inter alia*, continue to perform the OU2 Remedy as set forth in the OU2 ROD and the O&M Manual. EPA will terminate UAO Docket No. 98-15 after entry of this Consent Decree by the Court. If EPA fails to terminate UAO Docket No. 98-15 within sixty (60) days after entry of this Consent Decree by the Court, Settling Defendants shall have no further obligations under this Consent Decree. However, if the Court declines to enter this Consent Decree, or the State withdraws or withholds its consent to the Consent Decree because comments received disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper or inadequate, then EPA and the State reserve all of their rights against the Settling Defendants, and UAO Docket No. 98-15 shall remain in effect. Notwithstanding EPA's termination of UAO Docket No. 98-15, this Order does not affect any reservation by EPA of its rights to take further action at this Site in the future not inconsistent with this Consent Decree.

XXXVI. TERMINATION OF ADEQ ADMINISTRATIVE ORDER ON CONSENT

118. The Administrative Order on Consent for Reimbursement of Response Costs for the second Operable Unit 2 Five-Year Review, Motorola 52nd Street Superfund Site, Docket No. SF-129-06 shall be terminated upon entry of this Consent Decree.

XXXVII. RETENTION OF JURISDICTION

119. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Work Party Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be

necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX [Dispute Resolution].

XXXVIII. TERMINATION

120. Work Party Settling Defendants may petition the State to terminate this Consent Decree if the Work is inconsistent with a final remedy selected for OU2. ADEQ shall respond to the Work Party Settling Defendants' petition for termination within forty-five (45) days of its receipt. ADEQ's decision regarding such petition is subject to the provisions of Section XIX [Dispute Resolution]. This Consent Decree may also be terminated by stipulation of the State and Work Party Settling Defendants or by ADEQ's issuance of Certificate of Completion of Interim Remedial Action.

XXXIX. SIGNATORIES/SERVICE

121. Each undersigned representative certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

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

XLI. NON-WORK PARTY SETTling DEFENDANTS

123. Non-Work Party Settling Defendants do not have any of the obligations of the Work Party Settling Defendants under this Consent Decree. Their sole obligation under this Consent Decree is payment of monies to the Work Party Settling Defendants pursuant to their settlement agreements with Work Party Settling Defendants, and to allow access to property owned or controlled by Non-Work Party Settling Defendants in accordance with Paragraph 43 of this Consent Decree.

Should Work Party Settling Defendants reach settlement agreements with other persons, such other persons shall execute a signature page and lodge it with the Court as part of a stipulation signed by the State, the Work Party Settling Defendants, and the proposed additional Non-Work Party Settling Defendant (“proposed party”) that states: “The undersigned stipulate to the inclusion of [name of the proposed party] as a Non-Work Party Settling Defendant in *State of Arizona v. Honeywell International Inc., et al.*, No. CV 07-01989-PHX-SRB. A signature page executed the proposed party is herewith lodged with the Court to represent acceptance of the terms of the Consent Decree.” The stipulation and signature page of the proposed party shall be subject to a thirty (30) day public notice and comment period in accordance with A.R.S. §49-292(G) before the State requests an Order of the Court adding the proposed party as a Non-Working Party Settling Defendant to this Consent Decree. Upon payment to the Work Party Settling Defendants and entry of a Court Order adding the proposed party as a Non-Work Party Settling Defendant, such Non-Work Party Defendant is entitled to all benefits of this Consent Decree received by Work Party Settling Defendants, including the State’s covenant not to

sue in Paragraph 84 (subject to the reservations of rights of the State as set forth in Paragraph 87.b) and protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. §9613(f)(2), and A.R.S. §49-292(C) for matters addressed in this Consent Decree.

XL. FINAL JUDGMENT

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

SO ORDERED THIS _____ DAY OF _____, 2009.

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree as a Work Party Settling Defendant in the matter of *State of Arizona v. Honeywell International Inc. and Freescale Semiconductor, Inc.*, relating to the Operable Unit 2 Interim Remedial Action at the 52nd Street Superfund Site.

FOR HONEYWELL INTERNATIONAL INC.

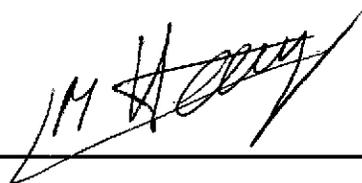
By:  _____

Date: 21 July 2009

THE UNDERSIGNED PARTY enters into this Consent Decree as a Work Party Settling Defendant in the matter of *State of Arizona v. Honeywell International Inc. and Freescale Semiconductor, Inc.*, relating to the Operable Unit 2 Interim Remedial Action at the 52nd Street Superfund Site.

FOR FREESCALE SEMICONDUCTOR, INC.

By: _____



Date: _____

Jul 16, 09

THE UNDERSIGNED PARTY enters into this Consent Decree as a Non-Work Party Settling Defendant in the matter of *State of Arizona v. Honeywell International Inc. and Freescale Semiconductor, Inc.*, relating to the Operable Unit 2 Interim Remedial Action at the 52nd Street Superfund Site.

FOR AVIALL, INC.

By: _____



Date: July 20, 2009

THE UNDERSIGNED PARTY enters into this Consent Decree as a Non-Work Party Settling Defendant in the matter of *State of Arizona v. Honeywell International Inc. and Freescale Semiconductor, Inc.*, relating to the Operable Unit 2 Interim Remedial Action at the 52nd Street Superfund Site.

FOR JORAY CORPORATION, a dissolved corporation

By: 

Date: 7/16/07

THE UNDERSIGNED PARTY enters into this Consent Decree as a Non-Work Party Settling Defendant in the matter of *State of Arizona v. Honeywell International Inc. and Freescale Semiconductor, Inc.*, relating to the Operable Unit 2 Interim Remedial Action at the 52nd Street Superfund Site.

FOR KACHINA TECHNICAL SERVICES AND PROCESSES, a dissolved corporation

By: 

Date: 7.17.2009

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *State of Arizona v. Honeywell International Inc. and Freescale Semiconductor, Inc.*, relating to the Operable Unit 2 Interim Remedial Action at the 52nd Street Superfund Site.

FOR THE ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

By: 
Benjamin H. Grumbles, Director
Arizona Department of Environmental Quality

Date: July 30, 2009