

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

IN THE MATTER OF: )

Lorentz Barrel and Drum Site )  
San Jose, California )

Proceeding under Section 122(g)(4) )  
of the Comprehensive Environmental )  
Response, Compensation, and )  
Liability Act of 1980, as amended, )  
42 U.S.C. § 9622(g)(4) )

U.S. EPA Docket No. 95-01

ADMINISTRATIVE ORDER  
ON CONSENT

## I. JURISDICTION

1. This Administrative Order on Consent ("Consent Order") is issued pursuant to the authority vested in the President of the United States by Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, ("CERCLA"), Pub. L. No. 99-499, 42 U.S.C. § 9622(g)(4), in order to settle specified United States Environmental Protection Agency ("EPA") claims under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) and 9607(a). The authority vested in the President has been delegated to the Administrator of the United States Environmental Protection Agency by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), further delegated to the Regional Administrators of EPA by EPA Delegation No. 14-14-E (issued Sept. 13, 1987, amended by memorandum June 17, 1988), and further delegated to the Hazardous Waste Management Division Director by Regional Order R290.45 (October 26, 1988). The State has jurisdiction over the matters set forth herein pursuant to the California Hazardous Substance Account Act, California Health and Safety Code Section 25300 et seq. ("the California Hazardous Substance Account Act") and Section 121(f) of CERCLA, 42 U.S.C. § 9621(f). The State has claims against the Settling Parties pursuant to CERCLA Section 107(a), 42 U.S.C. § 9607(a).

2. This Administrative Order on Consent is issued to each person identified in Appendix 1 ("Respondents") and each entity identified in Appendix 2 ("Settling Federal Agencies"). Appendices 1 and 2 are incorporated herein by reference. Each of the Respondents identified in Appendix 1 and Settling Federal Agencies identified in Appendix 2 ("Settling Parties") has certified that, to the best of its knowledge, it contributed no more than 1.0% of the total hazardous substances sent to the Lorentz Barrel and Drum Site in San Jose, California ("the Site"), as this information is reflected in the July 29, 1994, waste-in list, and that it contributed waste of minimal toxic and hazardous effect in comparison to the other waste at the Site. This Consent Order provides for the reimbursement of response costs which have been or may be incurred in response to releases or threatened releases of hazardous substances, pollutants or contaminants at the Site.

3. This Consent Order was executed by the Parties in good faith to avoid the expense and delay of litigation over the matters addressed by this Consent Order. Each Settling Party agrees to undertake all actions required by the terms and conditions of this Consent Order. Each Settling Party further consents to and will not contest EPA jurisdiction to issue this Consent Order or to implement or enforce its terms.

4. The Parties agree that this Consent Order is entered into without any admission of liability for any purpose as to any matter arising out of the transactions or occurrences alleged in the Order.

## II. STATEMENT OF PURPOSE

5. By entering into this Consent Order, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site that allows the Settling Parties to settle their alleged liability for response costs that EPA and the State incurred or may incur at or in connection with the Site, in exchange for a release from further civil liabilities in connection with the Site, thereby avoiding difficult, prolonged, and complicated litigation among the Parties;

b. to simplify the remaining enforcement activities concerning the Site by eliminating a substantial number of parties from further involvement in the case; and

c. to reimburse EPA and the State for the Settling Parties' share of liabilities in connection with the Site and to reduce the alleged potential liabilities of the other potentially responsible parties without waiving EPA and the State's assertion of joint and several liability against any persons who are not signatories to this settlement.

## III. PARTIES BOUND

6. This Consent Order shall apply to and be binding upon the Parties and their successors. Each signatory to this Consent Order represents that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to legally bind the party represented by him or her. Any change in ownership, political configuration or corporate status of a Settling Party, including, but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Party's responsibilities under this Consent Order. In the event of a conflict between this Order and any appendix, the Order shall control.

## IV. DEFINITIONS

7. Unless otherwise expressly provided herein, terms used in this Consent Order that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Order, including the attached appendices, the following definitions shall apply:

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

b. "Administrative Order on Consent" shall mean this "Consent Order" or "Order" and all appendices attached hereto; provided, however, that any reference to "EPA Order 92-29" is meant as a reference to that preexisting administrative order.

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

d. "EPA's Future Response Costs" shall mean those costs incurred by the United States in connection with the Site on or after January 1, 1994, including but not limited to direct and indirect costs that the United States incurs in implementing or overseeing the remedy, or in enforcing this Consent Order.

e. "EPA's Past Response Costs" shall mean those costs, including but not limited to direct and indirect costs and interest, incurred by the United States prior to January 1, 1994, in connection with the Site.

f. "DTSC" shall mean the California Department of Toxic Substances Control and any predecessor and successor departments or agencies.

g. "Parties" shall mean "EPA," the "State" and the "Settling Parties."

h. "Paragraph" shall mean a portion of this Consent Order identified by an Arabic numeral.

i. "Prior Settlers" shall mean those parties named in Paragraphs 19 or 20 of this Order that enter into this settlement agreement.

j. "Respondents" shall mean those individuals, corporations and other entities listed in Appendix 1.

k. "Section" shall mean a portion of this Consent Order identified by a Roman numeral.

l. "Settling Federal Agencies" shall mean those agencies, departments and instrumentalities of the United States listed in Appendix 2.

m. "Settling Parties" shall mean both the "Respondents" listed in Appendix 1 and the "Settling Federal Agencies" listed in Appendix 2.

n. "Site" shall mean the Lorentz Barrel and Drum Superfund Site, located in San Jose, California, including all land previously used for the Lorentz Barrel and Drum operations ("LB&D operations") and all areas where contamination emanating from the LB&D operations has come to be located.

o. "State" shall mean DTSC, California's Hazardous Substance Account and California's Hazardous Substance Cleanup Fund.

p. The "State's Future Response Costs" shall mean those costs incurred by the State in connection with the Site on or after January 1, 1994, including but not limited to direct and indirect costs that the State incurs in implementing and overseeing the remedy, or in enforcing this Consent Order.

q. The "State's Past Response Costs" shall mean those costs, including but not limited to direct and indirect costs and interest, incurred by the State prior to January 1, 1994, in connection with the Site.

r. "United States" shall mean the United States of America, its agencies, departments, and instrumentalities.

#### V. STATEMENT OF FACTS

8. The Lorentz Barrel and Drum ("LB&D") Superfund Site is located approximately 13 miles southeast of the southern tip of the San Francisco Bay, in San Jose, California. The Site is defined as all land previously used for LB&D operations and all areas where contamination from the LB&D operations has come to be located. The Site includes a contaminated shallow groundwater plume area and properties containing contaminated soil, structures, debris and residues.

9. In 1984, EPA completed a Preliminary Assessment and Site Investigation, and proposed the Site for the National Priorities List ("NPL"), set forth at 40 C.F.R. Part 300, Appendix B. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the NPL on October 4, 1987. The Site is listed in DTSC's Expenditure Plan for the Hazardous Substance Cleanup Bond Act of 1984, pursuant to Health and Safety Code Section 25356.

10. The Site was operated as a barrel and drum recycling facility from 1947 to 1987. Empty or nearly empty barrels and drums, many of which contained residues of hazardous substances, were to sent to the LB&D Site by over 3,000 private and public sources throughout California and Nevada. LB&D Company personnel at the LB&D operations then cleaned, resealed and repainted the barrels and drums for resale or reuse. Private sources included companies and individuals from the chemical, electronics, paint, ink, paper, health care and food industries. Public sources included military bases, research laboratories, cities and

counties. Many drums and barrels arrived at the Site containing residual aqueous wastes, organic solvents, acids, oxidizers and oils. The soil and shallow aquifer at the Site are contaminated with the residual contents of the recycled barrels and drums, as well as with the chemicals used in the recycling operation.

11. In 1968, a City of San Jose industrial waste inspector ordered the LB&D Company to switch sump discharge from the Coyote Creek storm drain to the sanitary sewer. In the 1980's, various local, State, and Federal agencies investigated the LB&D operations and cited the owner for numerous violations of environmental laws. In response, the owner of the LB&D Company performed some clean-up work, but failed to remediate the Site adequately. The California Department of Health Services ("DHS") took over the clean-up of the Site in May, 1987. (DTSC is a successor agency to DHS. Prior to 1991, the jurisdiction of DTSC pursuant to Health and Safety Code, division 20, chapters 6.5 and 6.8 was carried out first as a program and then as a division of DHS. In 1991, through the Governor's Reorganization Plan No. 1, dated May 17, 1991 this jurisdiction was transferred to DTSC. All references to DTSC in this Consent Order include jurisdiction exercised by and actions conducted by the Toxic Substances Control Program and Toxic Substances Control Division of the Department of Health Services prior to the enactment of this reorganization plan.) In late 1987 and early 1988, DTSC and EPA conducted emergency response actions at the Site, including the removal of approximately 3,000 cubic yards of soils and sludge at the main sump area that were highly contaminated with polychlorinated biphenyls ("PCBs") and other hazardous substances. These wastes were transported to Kettleman Hills, a permitted hazardous waste facility, for disposal. More than 26,000 drums and barrels were also crushed and transported to Kettleman Hills for disposal. In December, 1987, DTSC turned over the lead role at the Site to EPA.

12. Hazardous substances within the definitions of both Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) and Sections 25316 and 25317 of the California Health and Safety Code, have been or are threatened to be released into the environment at or from the Site. The contaminants at the Site are primarily volatile organic compounds ("VOCs"), industrial pesticides, PCBs and some heavy metals.

13. Based on preliminary site assessment studies, EPA determined that contamination of the shallow groundwater aquifer at the Site presented an imminent hazard to human health and the environment, requiring an expedited cleanup. The shallow aquifer overlies the local municipal drinking water aquifer. EPA studies showed that the VOC-contaminated shallow groundwater plume had migrated nearly 2,000 feet to the north of the original LB&D operations. In May 1988, EPA completed an Engineering Evaluation/Cost Analysis and determined that a groundwater pumping and treatment system would be necessary to clean up the shallow

aquifer at the Site. This determination was set forth in a Record of Decision dated September 25, 1988.

14. In 1988, EPA began conducting a Remedial Investigation and Feasibility Study to define the extent of additional contamination at the Site and to evaluate methods to address the remaining problems. EPA issued its Record of Decision regarding the additional cleanup necessary at the Site on August 26, 1993. This selected remedy is to include removal of additional contaminated soils and debris, construction of an asphaltic concrete "cap" over the Site and in-situ treatment of VOC-contaminated soil with soil vapor extraction.

15. In response to a release or threatened release of hazardous substances into the environment, EPA has undertaken response action at the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake response action in the future.

16. In response to a release or threatened release of hazardous substances into the environment, DTSC has undertaken response action at the Site under California Health and Safety Code Sections 25355 and 25358.3, and will undertake response action in the future.

17. In performing this response action, the United States has incurred and will continue to incur response costs at or in connection with the Site. As of December 31, 1993, the United States has incurred at least \$8,957,680.00 in past costs.

18. In performing this response action, the State has incurred and will continue to incur response costs at or in connection with the Site. As of December 31, 1993, the State has incurred at least \$4,653,382.00 in past costs. DTSC is currently reviewing and making final the indirect rate for fiscal year 1987 to 1988 through fiscal year 1992 to 1993. The indirect rate used to calculate the States' Past Response Costs for this settlement for these fiscal years is an adjusted interim rate. The amount that Settling Parties are required to pay pursuant to Section VIII of this Order will not be adjusted to reflect changes, if any, to the State's indirect rate.

19. In 1990, EPA entered into a judicial Consent Decree with the following eleven potentially responsible parties: E.I. duPont de Nemours & Company, Union Oil Company of California, Great Western Chemical Company, KTI Chemicals Inc., Ashland Oil, Inc., International Business Machines Corp., Romic Chemical Corporation, Vi-Tex Packaging, Inc., Esselte Pendaflex Corporation, H.H. Robertson Company and A.J. Daw Printing Ink Company, Inc. U.S. v. E.I. duPont de Nemours & Co., et al., (N.D. Cal.) C-90-0488. The signatories to the Decree, which was entered on July 9, 1990, have constructed and are currently operating the treatment system that will clean up the shallow groundwater aquifer. The Decree also provides that these parties

will pay response costs related to the United States' oversight of the work performed under the Decree. The work performed and to be performed by this group and the costs to be paid pursuant to the Decree will total an estimated \$7,131,530.00. See Appendix 3. The barrels attributed to these parties by EPA total in the aggregate 237,737 in the July 29, 1994, waste-in list. Therefore, this group of parties has agreed to perform work and pay costs, the value of which collectively represents approximately \$30.00 per barrel.

20. On October 7, 1992, EPA entered into a separate administrative settlement agreement with the following seven companies: Eastman Kodak Company, Grace Sierra Horticultural Products Company, Hewlett-Packard Company, Minwax Company, Inc., National Semiconductor Corporation, National Starch and Chemical Corporation and Solvent Service Company, Inc. EPA Order No. 92-29. That agreement requires the companies to remove contaminated buildings, contaminated sumps, debris, drums with residues of hazardous substances, and asbestos wastes from the Site. The settlement also provides that these parties will pay response costs related to the United States' oversight of the work performed under the agreement. The work performed and to be performed by this group and the costs to be paid pursuant to this settlement will total an estimated \$1,644,649.00. See Appendix 3. The barrels attributed to these parties by EPA total in the aggregate 53,867 in the July 29, 1994, waste-in list. Therefore, this group of parties has agreed to perform work and pay costs, the value of which collectively represents approximately \$30.53 per barrel.

21. Information currently known to EPA and DTSC indicates that each Settling Party listed in Appendix 1 or Appendix 2 to this Consent Order arranged for disposal or treatment at the Site, or arranged with a transporter for disposal or treatment at the Site, of a hazardous substance owned or possessed by such Settling Party, or accepted a hazardous substance for transport to the Site.

22. Information currently known to EPA and DTSC indicates that the amount of hazardous substances contributed to the Site individually by each Settling Party is minimal in comparison to other hazardous substances at the facility, and that the hazardous substances contributed by each Settling Party to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.

23. In developing the settlement embodied in this Consent Order, EPA and the State have considered:

a. the costs already incurred or committed in connection with remediating the Site, including EPA's Past Response Costs, the State's Past Response Costs, the costs incurred or committed pursuant to both the Consent Decree in U.S. v. E.I. duPont de Nemours & Co., et al. (N.D. Cal.), C-90-0488 and the administrative settlement embodied in EPA Order 92-29. The specific amounts or

estimates calculated for each of these items is set forth in Appendix 3; and

b. the potential costs of remediating the remaining contamination at the Site, including (i) reasonably ascertainable future response costs, including but not limited to the cost of implementing the remedial action consistent with the second Record of Decision for this Site (issued August 26, 1993) and costs for oversight of long term operation and maintenance of the overall remedy for the Site; (ii) possible cost overruns in implementing the second Record of Decision; and, (iii) costs which may be incurred if EPA determines that the remedial action consistent with the Record of Decision is not protective of human health and the environment. The specific premiums or estimates calculated for each of these items is set forth in Appendix 3.

24. The payment required to be made by each Settling Party pursuant to this Consent Order is a minor portion of the total response costs at the Site.

#### VI. DETERMINATIONS

25. Based upon the Findings of Fact set forth above, EPA has made the following determinations:

a. The Lorentz Barrel and Drum Site is a "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. Each Settling Respondent is a "person" as that term is defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

c. Each Settling Party is a potentially responsible party within the meaning of Sections 107(a) and 122(g)(1) of CERCLA, 42 U.S.C. §§ 9607(a) and 9622(g)(1).

d. There has been an actual or threatened "release" of a hazardous substance from the Site as that term is defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

e. Prompt settlement with the Settling Parties is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).

f. The amount of hazardous substances contributed to the Site by each Settling Party and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Settling Party does not exceed 1.0% of the total hazardous substances sent to the Site as reflected in the July 29, 1994, waste-in list and therefore is minimal in comparison to other hazardous substances at the Site, as required by Section 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A).

## VII. ORDER

26. Based upon the Findings of Fact and Determinations set forth above, and in consideration of the promises and covenants set forth herein, it is hereby AGREED AND ORDERED as follows.

## VIII. PAYMENT

27. Each Settling Party shall pay the amount set forth in the columns opposite its name in Appendix 1 or Appendix 2 to this Consent Order, as required under Paragraphs 28 or 29 of this Order. Payment shall be made by a payment of either (a) the 100% amount to the Lorentz Superfund Site De Minimis Escrow Account pursuant to Paragraph 28; or, (b) the 68% amount to the Superfund Special Account and the 32% amount to the Cashier, California Department of Toxic Substances Control, pursuant to Paragraph 29. EPA and DTSC shall instruct each settling party as to which payment mechanism is to be utilized in accordance with this Section. EPA and DTSC shall give this instruction in the document that provides written notice of settlement approval as provided in Section XIX of this Order.

28. If Prior Settlers join this settlement, EPA will instruct Settling Parties under this agreement to pay all settlement amounts into the "Lorentz Superfund Site De Minimis Escrow Account" ("Escrow Account"), established pursuant to Section IX. (Escrow Account) as follows:

a. Within 120 days of the effective date of this Order, each Respondent shall pay to the Lorentz De Minimis Escrow Account the 100% amount set forth in Column A of Appendix 1 to this Order. Each such payment shall be made by certified or cashier's check made payable to "The Lorentz Superfund Site De Minimis Escrow Account." Each check shall reference the site name, the name and address of the Respondent, and the EPA docket number for this action (from the front page of this Order), and shall be sent to the address provided to Respondents by EPA with the written notice of settlement approval, as provided in Paragraph 61 of this Order and, pursuant to Paragraph 32.

b. Within 120 days of the effective date of this Order, each Settling Federal Agency shall pay to the Lorentz Superfund Site De Minimis Escrow Account the 100% amount set forth in Column A of Appendix 2 to this Order. Each such payment shall be made by certified, cashier's or U.S. Treasury check made payable to "The Lorentz Superfund Site De Minimis Escrow Account" and shall be sent to the address provided to the Settling Federal Agency by EPA with the written notice of settlement approval, as provided in Paragraph 61 of this Order and, pursuant to Paragraph 32.

29. If no Prior Settlers join this settlement, EPA will instruct Settling Parties under this agreement to pay all settlement amounts into the "The Lorentz Superfund Site Special

Account" ("Special Account") and to the Cashier, California Department of Toxic Substances Control ("DTSC Account"), in a 68%/32% ratio, as provided below.

a. Within 120 days of the effective date of this Order, each Respondent shall pay the amounts set forth in Appendix 1 to this Order by two checks as follows:

i. One certified or cashier's check for the 68% amount as set forth in Column B of Appendix 1 to this Order shall be made payable to "The Lorentz Superfund Site Special Account" and sent to the address provided to Respondents by EPA with the written notice of settlement approval, as provided in Paragraph 61 of this Order, and pursuant to Paragraph 32; and,

ii. One certified or cashier's check for the 32% amount as set forth in Column C of Appendix 1 to this Order shall be made payable to "Cashier, California Department of Toxic Substances Control," and sent to the address provided to Respondents by DTSC with the written notice of settlement approval, as provided in Paragraph 61 of this Order, and pursuant to Paragraph 32.

iii. Each check shall reference the site name, the name and address of the Respondent, and the EPA docket number for this action (from the front page of this Order).

b. Within 120 days of the effective date of this Order, each Settling Federal Agency shall pay the amounts set forth in Appendix 2 to this Order by two checks as follows:

i. One certified, cashier's or U.S. Treasury check for the 68% amount as set forth in Column B of Appendix 2 to this Order shall be made payable to "The Lorentz Superfund Site Special Account" and sent to the address provided to the Settling Federal Agency by EPA with the written notice of settlement approval, as provided in Paragraph 61 of this Order, and pursuant to Paragraph 32; and,

ii. One certified, cashier's or U.S. Treasury check for the 32% amount as set forth in Column C of Appendix 2 to this Order shall be made payable to "Cashier, California Department of Toxic Substances Control," and shall be sent to the address provided to the Settling Federal Agency by DTSC with the written notice of settlement approval, as provided in Paragraph 61 of this Order, and pursuant to Paragraph 32.

30. Payment of money by Settling Parties into the Escrow Account, the Special Account or the DTSC Account is not a fine, penalty or monetary sanction.

31. No provision of this Order shall be interpreted as or constitute a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

32. At the time each Settling Party sends any check to the Escrow Account, the Special Account or the DTSC Account pursuant to this Section, that Settling Party shall simultaneously send a copy of such check to the two people listed below:

Mr. Darrin Swartz-Larson, Remedial Project Manager  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street (H-6-2)  
San Francisco, California 94105

Ms. Barbara J. Cook, P.E., Chief  
Site Mitigation Branch  
Department of Toxic Substances Control  
700 Heinz Avenue, Suite 200  
Berkeley, California 94710

#### **IX. ESCROW ACCOUNT**

33. If Prior Settlers join the settlement, those Prior Settlers shall establish the "Lorentz Superfund Site De Minimis Escrow Account" (the "Escrow Account") no later than thirty (30) days after the effective date of this Decree. The Prior Settlers shall ensure that the Escrow Account meets all the requirements set forth in this Section. The Escrow Account shall be an interest bearing account. The Escrow Agreement establishing the Escrow Account shall provide an address to which payments into the account shall be mailed and shall identify the entity to receive and disburse funds from the Escrow Account ("Escrow Manager").

34. A copy of the instrument establishing the Escrow Account (the "Escrow Agreement") shall be sent to EPA for approval as soon as possible after the account is established. Upon approval of the Escrow Account, EPA shall notify the Settling Parties that the Escrow Account is approved and provide the Settling Parties with the address to which payments made pursuant to Section VIII shall be sent.

35. The Escrow Agreement shall provide for the following:

a. The Prior Settlers shall bear all costs related to the establishment and maintenance of the Escrow Account; provided, however, that the Prior Settlers may use interest earned on the Escrow Account to pay maintenance fees related to the Escrow Account. Any interest not so used shall be included in the Escrow Account and shall be used in the same manner and for the same purposes as the other funds in the account.

b. EPA and the State may enter into subsequent de minimis settlements for this Site in which parties to those settlements may also be required to deposit money into the Escrow Account. Any money deposited into the Escrow Account pursuant to such settlements shall be divided between the two sub-accounts in accordance with the ratio set forth in Subparagraph 35.c.ii of this Section, unless the parties to that agreement agree on a different division between the two accounts.

c. The Escrow Manager shall be instructed to divide the money deposited into the Escrow Account into two sub-accounts (Sub-account One and Sub-account Two), as further described below:

i. the first \$400,806.00 that is deposited into the Escrow Account shall be transferred to Sub-account One;

ii. any other money (beyond the first \$400,806.00) that is deposited into the Escrow Account shall be divided between Sub-account One and Sub-account Two at 32% and 68%, respectively.

36. The Escrow Agreement shall direct the Escrow Manager to disburse funds from Sub-account One within ten (10) days of receiving a letter from the State directing the disbursement of any funds in that sub-account. DTSC may direct that the money in Sub-account One be used only for any of the following purposes: reimbursement of the State's Future Response Costs; reimbursement of the State's Past Response Costs; and performance of future response actions at the Site.

37. The Escrow Agreement shall direct the Escrow Manager to disburse funds from Sub-account Two within ten (10) days of receiving a letter from EPA directing the disbursement of any funds in that sub-account. The Escrow Agreement shall direct the Escrow Manager to disburse the funds in Sub-account Two in accordance with the directions provided by EPA in any such letters. EPA may direct that the money in Sub-account Two be used only for any of the following purposes: reimbursement of EPA's Future Response Costs; reimbursement of EPA's Past Response Costs; and funding of a CERCLA Section 122(b)(3), 42 U.S.C. § 9622(b)(3) special account for performance of future response actions at the Site.

38. The Escrow Agreement shall require that every two months the Escrow Manager shall prepare and submit to the Prior Settlers, EPA and DTSC statements on money received in and disbursed from both sub-accounts in the prior two month period, and the balance in each sub-account at the end of the two month period.

39. The Escrow Agreement shall terminate upon the earlier of either: (a) 24 months from the date of its establishment; or, (b) the receipt of written instructions from both EPA and DTSC to the Escrow Manager that the Escrow Account be terminated. Any funds which are present in the Escrow Account upon its termination shall be deposited into California's Hazardous Substance Account and the EPA Hazardous Substance Superfund; any such money shall be divided between these two funds, 32% and 68%, respectively.

#### X. CIVIL PENALTIES

40. In addition to any other remedies or sanctions available to EPA, any Respondent who fails or refuses to comply with any term or condition of this Consent Order shall be subject to a civil penalty of up to \$25,000 per day for each such failure or refusal, pursuant to Sections 109 and 122(1) of CERCLA, 42 U.S.C. §§ 9609 and 9622(1).

#### XI. CERTIFICATIONS OF EACH SETTLING PARTY

41. Each Settling Party certifies, individually, that, to the best of its knowledge, it contributed no more than 1.0% of the total hazardous substances sent to the Site, as reflected in the July 29, 1994, waste-in list, and that it contributed waste of minimal toxic and hazardous effect in comparison to the other waste at the Site.

42. Each Settling Party further certifies, individually, that it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site since receipt from EPA of an Information Request regarding the Site, pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). Provision of false, fictitious, or fraudulent statements or representations to the United States may subject a Respondent to criminal penalties under 18 U.S.C. § 1001.

#### XII. COVENANTS BY EPA

43. In consideration of the payments that will be made by the Respondents under the terms of this Consent Order, and except as specifically provided in Section XV of this Consent Order, EPA covenants not to sue or take administrative action against any of the Respondents pursuant to Sections 106(a) or 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) or 9607(a), and Section 7003 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6973, relating to the Site. These covenants not to sue shall take effect with respect to each Respondent upon the receipt of the entire payment from that Respondent as required by Section VIII of this Consent Order. With respect to each Respondent, these covenants not to sue are conditioned upon the complete and satisfactory performance by that Respondent of its obligations under this

Consent Order. These covenants not to sue extend only to the Respondents and their successors and do not extend to any other person.

44. In consideration of the payments that will be made by the Settling Federal Agencies under the terms of this Consent Order, and except as specifically provided in Section XV of this Consent Order, EPA covenants not to take administrative action against any of the Settling Federal Agencies pursuant to Sections 106(a) or 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) or 9607(a), and Section 7003 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6973, relating to the Site. These covenants not to take administrative action shall take effect with respect to each Settling Federal Agency upon the receipt of the entire payment from that Settling Federal Agency as required by Section VIII of this Consent Order. With respect to each Settling Federal Agency, these covenants not to take administrative action are conditioned upon the complete and satisfactory performance by that Settling Federal Agency of its obligations under this Consent Order.

#### **XIII. COVENANTS BY STATE OF CALIFORNIA**

45. In consideration of the payments that will be made by the Settling Parties under the terms of this Consent Order, and except as specifically provided in Section XV of this Consent Order, DTSC, California's Hazardous Substance Account and California's Hazardous Substance Cleanup Fund covenant not to sue or take administrative action against any of the Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and the California Hazardous Substance Account Act, California Health and Safety Code Sections 25300 et seq. relating to the Site. These covenants not to sue shall take effect with respect to each Settling Party upon the receipt of the entire payment from that Settling Party as required by Section VIII of this Consent Order. With respect to each Settling Party, these covenants not to sue are conditioned upon the complete and satisfactory performance by that Settling Party of its obligations under this Consent Order. These covenants not to sue extend only to the Settling Parties and their successors and do not extend to any other person.

#### **XIV. COVENANTS NOT TO SUE BY SETTLING PARTIES**

46. In consideration of EPA and the State's covenants not to sue set forth in Sections XII and XIII, the Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, except any agency of the United States that may have contributed hazardous substances to the Site and are not listed in Appendix 2 of this Consent Order, or DTSC, California's Hazardous Substance Account, or California's Hazardous Substance Cleanup Fund with respect to the Site or this Consent Order, including, but not limited to, any direct or indirect claim under Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42

U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law, or any claims arising out of response activities at the Site.

47. a. In consideration of the Respondents' covenant not to sue set forth in Paragraph 46, the Settling Federal Agencies covenant not to sue and agree not to assert any claims or causes of action against the Respondents with respect to the Site or this Consent Order, including, but not limited to, any direct or indirect claim under Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law, or any claims arising out of response activities at the Site.

b. In consideration of the State's covenant not to sue set forth in Paragraph 45, the Settling Federal Agencies covenant not to sue and agree not to assert any claims or causes of action against DTSC, California's Hazardous Substance Account, or California's Hazardous Substance Cleanup Fund with respect to the Site or this Consent Order, including, but not limited to, any direct or indirect claim under Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law, or any claims arising out of response activities at the Site.

48. a. The Settling Parties also agree not to make any claims for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) with respect to the Site. Nothing in this Consent Order shall be deemed to constitute preauthorization of a claim within the meaning of Sections 111 or 112 of CERCLA, 42 U.S.C. §§ 9611 and 9612, or 40 C.F.R. § 300.700(d).

b. The Settling Parties also covenant not to sue and agree not to assert any claims or causes of action with respect to the Site or this Consent Order against any person determined by EPA to have contributed less than 25,784 barrels (1.0% of the total hazardous substances sent to the Site, based on the July 29, 1994, waste-in list) to the Site.

#### **XV. RESERVATIONS OF RIGHTS**

49. The Covenants Not to Sue by EPA and the State set forth in Section XII and XIII of this Consent Order do not pertain to any matters other than those expressly specified therein. The United States, including EPA, and the State of California, including DTSC, reserve, and this Consent Order is without prejudice to, all rights against Settling Parties with respect to all other matters, including but not limited to the following:

a. claims based on a failure to make the payments required by Section VIII of this Consent Order;

- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources;
- d. liability for future disposal at the Site;
- e. liability arising from the past, present, or future disposal, release or threat of release of hazardous substances outside of the Site;
- f. claims by any agency or agent of the State of California other than DTSC, California's Hazardous Substance Account, or California's Hazardous Substance Cleanup Fund; or
- g. liability for any failure of any respondent to comply with the terms of any prior settlement, consent decree, administrative order or other document to which that respondent was a signatory.

50. Nothing in this Consent Order constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, or the State of California, including DTSC, California's Hazardous Substance Account, and California's Hazardous Substance Cleanup Fund to seek or obtain further relief from any Respondent or Settling Federal Agency if information not currently known to the EPA or the State is discovered which indicates that any Settling Party contributed hazardous substances to the Site in such greater amount or of such greater toxic or other hazardous effects that the Settling Party no longer qualifies as a de minimis party at the Site because the Settling Party contributed greater than 1.0% of the waste sent to the Site, as reflected in the July 29, 1994, waste-in list, or contributed wastes which are significantly more toxic or are of significantly greater hazardous effect than other hazardous substances at the Site.

51. Nothing in this Consent Order constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, to enforce the terms of the Partial Consent Decree entered on July 9, 1990, in U.S. v. E.I. duPont de Nemours & Co., et al., C-90-0488, including EPA's authority to seek and obtain penalties for violations of that Decree.

52. Nothing in this Consent Order constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, to enforce the terms of EPA Administrative Order No. 92-29, including EPA's authority to seek and obtain penalties for violations of that Order.

## **XVI. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

53. Nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Order. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Order may have under applicable law. The United States, the State of California, and the Settling Parties each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

54. The Parties agree that the actions undertaken by the Settling Parties in accordance with this Consent Order do not constitute an admission of any liability for any purpose by any Settling Party.

55. Subject to the reservation of rights set forth in Section XV, the Parties agree that by entering into and carrying out all the terms of this Consent Order, each Settling Party will have resolved its liability to the United States relating to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5). With regard to claims for contribution against each Settling Party for matters addressed by this Consent Order, the Parties hereto agree that each Settling Party is entitled, as of the effective date of this Consent Order, to such protection from contribution actions or claims as is provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

56. Subject to the reservation of rights set forth above, the Parties agree that by entering into and carrying out all the terms of this Consent Order, each Settling Party will have resolved its liability to the State relating to the Site pursuant to CERCLA Section 113(f)(2) and is entitled to such contribution protection as is provided by that section.

## **XVII. PUBLIC COMMENT**

57. This Consent Order shall be subject to a thirty (30) day public comment period pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, 42 U.S.C. § 9622(i)(3), EPA may withdraw or modify consent to this Consent Order if comments received disclose facts or considerations which indicate that this Consent Order is inappropriate, improper or inadequate.

### **XVIII. ATTORNEY GENERAL APPROVAL**

58. Before issuing this Consent Order, the EPA must obtain the written approval of the U.S. Attorney General or her designee of the settlement embodied in this Consent Order in accordance with Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4). This Consent Order will not become effective unless and until such approval is obtained.

### **XIX. NOTICE OF SETTLEMENT APPROVAL AND EFFECTIVE DATE**

59. The effective date of this Consent Order shall be the date upon which EPA issues written notice of settlement approval to the Settling Parties that both of the following have occurred: (1) the public comment period pursuant to Section XVII of this Consent Order has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order; and (2) the EPA has obtained the written approval of the U.S. Attorney General or her designee.

60. In the document providing written notice of settlement approval as described at Paragraph 59, above, EPA shall instruct Settling Parties, in accordance with Section VIII of this Order, to make payment either as provided in Paragraph 28 or as provided in Paragraph 29 of this Order.

61. In the document providing written notice of settlement approval as described at Paragraph 59 of this Order, EPA and DTSC shall provide the names and addresses to whom payment should be sent.

### **XX. AMENDMENTS**

62. This Consent Order may be amended by mutual agreement of EPA, the State and the Settling Parties. Any amendment to this Consent Order shall be in writing, signed by EPA, the State and the Settling Parties, and shall have as the effective date the date upon which EPA issues written notice to the State and the Settling Parties that the amendment is effective.

### **XXI. COUNTERPARTS**

63. This Consent Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one and the same document.