

1 Defendant's best efforts to fulfill the obligation. The
2 requirement that the Settling Defendant exercise "best efforts to
3 fulfill the obligation" includes using best efforts to anticipate
4 any potential force majeure event and best efforts to address the
5 effects of any potential force majeure event (1) as it is
6 occurring and (2) following the potential force majeure event,
7 such that the delay is minimized to the greatest extent possible.
8 "Force majeure" does not include financial inability to complete
9 the O&M Activities or a failure to attain the Performance
10 Standards.

11 B. If any event occurs or has occurred that may delay the
12 performance of any O&M Activities under this Consent Decree, or
13 any other response activities performed under this Consent
14 Decree, whether or not caused by a force majeure event, the
15 Settling Defendant responsible for performing the activities
16 shall notify orally EPA's Project Coordinator or, in his or her
17 absence, EPA's Alternate Project Coordinator or, in the event
18 both of EPA's designated representatives are unavailable, the
19 Director of the Superfund Division, EPA Region IX, as soon as
20 possible under the circumstances. It shall be presumed that
21 notice not made within two (2) Working Days of when such Settling
22 Defendant first knew or should have known that the event might
23 cause a delay is untimely unless evidence credible to EPA and to
24 the contrary is provided to EPA by the Settling Work Defendant.
25 Within ten (10) days thereafter, such Settling Defendant shall
26 provide in writing to EPA and the State an explanation and
27 description of the reasons for the delay; the anticipated
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1 duration of the delay; all actions taken or to be taken to
2 prevent or minimize the delay; a schedule for implementation of
3 any measures to be taken to prevent or mitigate the delay or the
4 effect of the delay; the Settling Defendant's rationale for
5 attributing such delay to a force majeure event if it intends to
6 assert such a claim; and a statement as to whether, in the
7 opinion of the Settling Defendant, such event may cause or
8 contribute to an endangerment to public health, welfare or the
9 environment. The Settling Defendant shall include with any
10 notice all available documentation supporting its claim that the
11 delay was attributable to a force majeure. Unless the force
12 majeure event is a natural catastrophe or similar event which
13 inherently justifies departure from the above requirements,
14 failure to comply with the above requirements shall preclude
15 Settling Defendant from asserting any claim of force majeure for
16 that event. A Settling Defendant shall be deemed to have notice
17 of any circumstance of which its contractors or subcontractors
18 had or should have had notice.

19 C. If EPA, after a reasonable opportunity for review and
20 comment by the State, agrees that the delay or anticipated delay
21 is attributable to a force majeure event, the time for
22 performance of the obligations under this Consent Decree that are
23 affected by the force majeure event will be extended by EPA,
24 after a reasonable opportunity for review and comment by the
25 State, for such time as is necessary to complete those
26 obligations. An extension of the time for performance of the
27 obligations affected by the force majeure event shall not, of
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1 | itself, extend the time for performance of any other obligation.
2 | If EPA, after a reasonable opportunity for review and comment by
3 | the State, does not agree that the delay or anticipated delay has
4 | been or will be caused by a force majeure event, EPA will notify
5 | the Settling Defendant claiming force majeure in writing of its
6 | decision. If EPA, after a reasonable opportunity for review and
7 | comment by the State, agrees that the delay is attributable to a
8 | force majeure event, EPA will notify the Settling Defendant
9 | claiming force majeure in writing of the length of the extension,
10 | if any, for performance of the obligations affected by the force
11 | majeure event. Notification to EPA of any other claimed force
12 | majeure event affecting other obligations of parties to this
13 | Consent Decree shall be made by the party claiming force majeure
14 | in writing to EPA within five (5) Working Days of when such party
15 | knew or should have known that the event might cause a delay in
16 | such party's obligations. It shall be presumed that notice not
17 | made within such time is untimely unless evidence credible to EPA
18 | and to the contrary is provided to EPA by such party.

19 | D. If the Settling Defendant claiming force majeure elects
20 | to invoke the dispute resolution procedures set forth in Section
21 | XX (Dispute Resolution), it shall do so no later than fifteen
22 | (15) days after receipt of EPA's notice. In any such proceeding,
23 | the Settling Defendant shall have the burden of demonstrating by
24 | a preponderance of the evidence that the delay or anticipated
25 | delay has been or will be caused by a force majeure event, that
26 | the duration of the delay or the extension sought was or will be
27 | warranted under the circumstances, that best efforts were
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1 exercised to avoid and mitigate the effects of the delay, and
2 that the Settling Defendant complied with the requirements of
3 this Section, Paragraphs A and B, above or was excused from such
4 compliance under the terms of this Decree. If the Settling
5 Defendant carries this burden, the delay at issue shall be deemed
6 not to be a violation by such Settling Defendant of the affected
7 obligation of this Consent Decree identified to EPA and the
8 Court.

9 XX. DISPUTE RESOLUTION

10 A. Unless otherwise expressly provided for in this Consent
11 Decree, the dispute resolution procedures of this Section shall
12 be the exclusive mechanism to resolve disputes arising under or
13 with respect to this Consent Decree. However, the procedures set
14 forth in this Section shall not apply to actions by the United
15 States to enforce obligations of a Settling Defendant that have
16 not been disputed in accordance with this Section.

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

25 C. In the event that the parties cannot resolve a dispute
26 by informal negotiations under the preceding Paragraph, then the
27 position advanced by EPA shall be considered binding unless,
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1 within ten (10) days after the conclusion of the informal
2 negotiation period, the Settling Defendant asserting that there
3 is a dispute invokes the formal dispute resolution procedures of
4 this Section by serving on the United States a written Statement
5 of Position on the matter in dispute, including, but not limited
6 to, any factual data, analysis or opinion supporting that
7 position and any supporting documentation relied upon by such
8 Settling Defendant. The Statement of Position shall specify the
9 Settling Defendant's position as to whether formal dispute
10 resolution should proceed under this Section XX, Paragraph F or
11 G.

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

20 E. If there is disagreement between EPA and a Settling
21 Defendant asserting there is a dispute as to whether dispute
22 resolution should proceed under Section XX, Paragraph F or G, the
23 parties to the dispute shall follow the procedures set forth in
24 the Paragraph determined by EPA to be applicable. However, if
25 the Settling Defendant ultimately appeals to the Court to resolve
26 the dispute, the Court shall determine which Paragraph is
27 applicable in accordance with the standards of applicability set
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1 | forth in Section XX, Paragraphs F and G.

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

15 | 1. An administrative record of the dispute shall be
16 | maintained by EPA and shall contain all Statements of Position,
17 | including supporting documentation, submitted pursuant to this
18 | Paragraph. Where appropriate, EPA may allow submission of
19 | supplemental Statements of Position by the parties to the
20 | dispute.

21 | 2. The Director of the Superfund Division, EPA Region
22 | IX, will issue a final administrative decision resolving the
23 | dispute based on the administrative record described in this
24 | Section, Paragraph F.1. This decision shall be binding upon the
25 | Settling Defendant asserting that there is a dispute, subject
26 | only to the right to seek judicial review pursuant to this
27 | Section, Paragraphs F.3 and F.4.
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1 3. Any administrative decision made by EPA pursuant to
2 this Section, Paragraph F.2 shall be reviewable by this Court,
3 provided that a notice of judicial appeal is filed by the
4 Settling Defendant with the Court and served on all parties
5 within thirty (30) days of receipt of EPA's decision. The notice
6 of judicial appeal shall include a description of the matter in
7 dispute, the efforts made by the parties to resolve it, the
8 relief requested, and the schedule, if any, within which the
9 dispute must be resolved to ensure orderly implementation of this
10 Consent Decree. The United States may file a response to the
11 Settling Defendant's notice of judicial appeal.

12 4. In proceedings on any dispute governed by this
13 Paragraph, the Settling Defendant asserting that there is a
14 dispute shall have the burden of demonstrating that the decision
15 of the Superfund Division Director is arbitrary and capricious or
16 otherwise not in accordance with law. Judicial review of EPA's
17 decision shall be on the administrative record compiled pursuant
18 to this Section, Paragraph F.1.

19 G. Formal dispute resolution for disputes that neither
20 pertain to the selection or adequacy of any response action nor
21 are otherwise accorded review on the administrative record under
22 applicable principles of administrative law, shall be governed by
23 this Paragraph.

24 1. Following receipt of the Settling Defendant's
25 Statement of Position submitted pursuant to Section XX, Paragraph
26 C, the Director of the Superfund Division, EPA Region IX, will
27 issue a final written decision resolving the dispute. The
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1 Superfund Division Director's decision shall be binding on the
2 Settling Defendant asserting that there is a dispute unless,
3 within thirty (30) days of receipt of the decision, such Settling
4 Defendant files with the Court and serves on the other party or
5 parties a notice of judicial appeal setting forth the matter in
6 dispute, the efforts made by the parties to resolve it, the
7 relief requested, and the schedule, if any, within which the
8 dispute must be resolved to ensure orderly implementation of the
9 Consent Decree. The United States may file a response to
10 Settling Defendant's notice of judicial appeal.

11 2. Notwithstanding Paragraph R of Section I
12 (Background) of this Consent Decree, judicial review of any
13 dispute governed by this Paragraph shall be governed by
14 applicable provisions of law.

15 H. The invocation of formal dispute resolution procedures
16 under this Section shall not extend, postpone or affect in any
17 way any obligation not directly in dispute of the Settling
18 Defendant asserting that there is a dispute under this Consent
19 Decree, unless EPA or the Court agrees otherwise. If a Settling
20 Defendant prevails, the deadlines for any requirements which it
21 could not practicably meet because of the dispute resolution
22 proceedings shall be extended to account for any delays because
23 of such proceedings. Stipulated penalties with respect to the
24 disputed matter shall continue to accrue but payment shall be
25 stayed pending resolution of the dispute as provided in Section
26 XXI (Stipulated Penalties), Paragraph I. Notwithstanding the
27 stay of payment, stipulated penalties shall accrue from the first
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1 day of noncompliance with any applicable provision of this
2 Consent Decree. In the event that the Settling Defendant does
3 not prevail on the disputed issue, stipulated penalties shall be
4 assessed and paid as provided in Section XXI (Stipulated
5 Penalties), unless EPA in its discretion elects not to assess
6 some or all of such penalties.

7 XXI. STIPULATED PENALTIES

8 Unless excused by EPA or a force majeure event, a Settling
9 Defendant shall be liable for stipulated penalties to the United
10 States, as set forth in this Section, for each failure by such
11 Settling Defendant to comply with the requirements of this
12 Consent Decree. "Compliance" by the Settling Work Defendant
13 shall include completion of the O&M activities under this Consent
14 Decree or any work plan or deliverable approved under this
15 Consent Decree or incorporated by this Consent Decree, in
16 accordance with all applicable requirements of law, this Consent
17 Decree, the Second Stage O&M Work Plan and any plans or other
18 documents approved by EPA pursuant to this Consent Decree or any
19 such work plan or deliverable, and within the specified time
20 schedules established by and approved under this Consent Decree
21 or any such work plan or deliverable.

22 A. Unless expressly stated otherwise in this Consent
23 Decree, any reports, plans, specifications, schedules,
24 deliverables, appendices, and attachments required by this
25 Consent Decree, or implemented in whole or in part by this
26 Consent Decree, are, upon approval by EPA, incorporated into this
27 Consent Decree. A failure by the Settling Work Defendant to
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1 comply with applicable EPA-approved reports, plans, specifica-
2 tions, schedules, deliverables, appendices or attachments shall
3 be considered a failure to comply with this Consent Decree and
4 shall subject such Settling Work Defendant to stipulated
5 penalties as provided in Paragraphs D through F of this Section.

6 B. Failure to comply with this Consent Decree shall also
7 include but is not limited to the following:

8 1. Failure by Settling Work Defendant to submit
9 deliverables specified in this Consent Decree in an acceptable
10 manner and by the date due pursuant to this Consent Decree;
11 provided, however, that if the failure to comply results from a
12 determination by EPA that a written deliverable is inadequate,
13 the Settling Work Defendant shall have ten (10) working days from
14 receipt of EPA's written notice of disapproval, or such other
15 longer time period as provided by EPA in the notice of
16 disapproval, within which to correct the inadequacy and resubmit
17 the deliverable for approval. Any disapproval by EPA shall
18 include an explanation of why the deliverable is inadequate. If
19 the resubmitted deliverable is inadequate, the Settling Work
20 Defendant shall be deemed to be in violation of this Consent
21 Decree.

22 2. Failure by Settling Work Defendant to use best
23 efforts to obtain any permits necessary for offsite work which
24 Settling Work Defendant is required to perform or failure by
25 Settling Work Defendant to use best reasonable efforts to obtain
26 necessary access agreements.

27 3. Failure by Settling Work Defendant to comply with
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1 any permit obtained for the purpose of implementing the
2 requirements of this Consent Decree in any offsite location.

3 C. Stipulated penalties for failure to perform any require-
4 ment of this Consent Decree for which a deadline is specified
5 shall begin to accrue on the first day after the deadline.

6 Stipulated penalties for any other violation of this Consent
7 Decree shall begin to accrue on the first day after a Settling
8 Defendant subject to penalties receives notice from EPA of such
9 violation. For any violation, stipulated penalties shall
10 continue to accrue up to and including the day on which the non-
11 compliance is corrected. EPA, in its sole discretion, may waive
12 or reduce stipulated penalties. If EPA does not waive stipulated
13 penalties, EPA shall provide the Settling Defendant subject to
14 penalties with written notice of the alleged deficiency in
15 compliance with this Consent Decree, and accrued stipulated
16 penalties shall become payable thirty (30) days after such
17 Settling Defendant's receipt of EPA's written notice of
18 deficiency; provided, however, that if EPA provides notice of an
19 alleged deficiency, and that deficiency continues, EPA shall not
20 be required to provide any additional notice in order for
21 stipulated penalties to continue to accrue and become payable.

22 D. Stipulated penalties shall accrue in the following
23 amounts for the violations described in this Paragraph, and a
24 Settling Defendant subject to such penalties may not dispute the
25 amount of stipulated penalties due per type of violation:

26 1. Monthly Progress Reports and Other Periodic Reports

27 Settling Work Defendant shall pay a stipulated
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1 penalty of \$ 750 per day for the submission of a late or
2 deficient periodic progress report.

3 2. MCL Effluent Violations

4 a. At any time if the concentration of TCE in the
5 treated water is greater than 5.0 parts per billion ("ppb"),
6 Settling Work Defendant shall be considered to have been out of
7 compliance for each day for which the representative treated
8 water sample indicates that the concentration of TCE was greater
9 than 5.0 ppb. Settling Work Defendant shall be subject to
10 stipulated penalties in the amount of \$ 3,750 per day for each
11 such day of noncompliance.

12 b. At any time if the concentration of PCE in the
13 treated water is greater than 5.0 ppb, Settling Work Defendant
14 shall be considered to have been out of compliance for each day
15 for which the representative treated water sample indicates that
16 the concentration of PCE was greater than 5.0 ppb. Settling Work
17 Defendant shall be subject to stipulated penalties in the amount
18 of \$ 3,750 per day for each such day of noncompliance.

19 c. At any time if the concentration of a volatile
20 organic compound ("VOC") other than TCE or PCE in the treated
21 water is greater than the MCL in effect at that time for such
22 VOC, Settling Work Defendant shall be considered to have been out
23 of compliance for each day for which the representative treated
24 water sample indicates that the concentration of that VOC was
25 greater than the MCL in effect, provided that the MCL in effect
26 was promulgated on or before the Effective Date of this Consent
27 Decree. Settling Work Defendant shall be subject to stipulated
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