

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

UNITED STATES OF AMERICA  
and STATE OF INDIANA,

Plaintiffs,

v.

BAYER HEALTHCARE LLC,  
*et. al.*

Defendants.

CIVIL ACTION NO.: 2:07-cv-304-TS

**CONSENT DECREE**

## I. BACKGROUND

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

B. The United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred and to be incurred by EPA and the Department of Justice ("DOJ") for response actions at the Himco Dump Superfund Site in Elkhart, Indiana, together with accrued interest; and (2) performance of studies and response work by the Defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

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

D. The State has also filed a complaint against the Defendants in this court, alleging that the Defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and Indiana Code ("IC") Sections 13-25-4 and 13-30. Both the Federal and State complaints are resolved by the entry of this Consent Decree.

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Department of Interior on December 22, 2004, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee to participate in the negotiation of this Consent Decree.

F. The Defendants that have entered into this Consent Decree, the Performing Settling Defendants, the Cashout Settling Defendants, and the Owner Settling Defendants (collectively, "Settling Defendants"), do not admit any liability to the Plaintiffs arising out of the transactions or occurrences alleged in the complaint, nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

G. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on February 21, 1990.

H. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, EPA commenced on July 1, 1990, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430.

I. EPA completed a Remedial Investigation ("RI") Report on August 14, 1992 and EPA issued a Feasibility Study ("FS") Report on August 14, 1992.

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the Proposed Plan for remedial action during May 1992, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the Proposed Plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

K. The initial decision by EPA on the remedial action to be implemented at the Site was embodied in a final Record of Decision ("ROD"), executed on September 23, 1993, with which the State concurred. The ROD included a responsiveness summary to the public comments. Notice of the Final Plan was published in accordance with Section 117(b) of CERCLA.

L. During the Remedial Design phase of implementation of the ROD, previously uninvestigated releases of hazardous substances were discovered. Subsequent investigation of these releases by EPA caused EPA to propose an amendment to the ROD that would replace the remedy in the September 23, 1993 ROD. EPA published notice of the completion of the subsequent investigation and of the revised Proposed Plan on April 16, 2003 in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the revised Proposed Plan and Amended ROD. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

M. The Amended ROD, which represents EPA's decision on the remedial action to be implemented at the Site, was executed on September 15, 2004. EPA provided an opportunity for written and oral comments from the public on the Amended ROD, on which the State has given its concurrence. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action. The Amended ROD included a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

N. Based on the information presently available to EPA and the State, EPA and the State believe that the Work will be properly and promptly conducted by the Performing Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

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

P. The Parties recognize, and the Court by entering this Consent Decree finds, that

this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

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

## II. JURISDICTION

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

## III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States, the State, and upon the Settling Defendants and their heirs, 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. Performing Settling Defendants shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing any Performing Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Performing Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Performing 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 Performing Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

## IV. DEFINITIONS

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

a. "Amended Record of Decision" or "Amended ROD" shall mean the EPA Amended Record of Decision relating to the Site signed on September 15, 2004, by the Director, Superfund Division, EPA Region 5, and all attachments thereto. The Amended ROD is attached as Appendix A.

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

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

d. "Contingent Remedial Actions" shall mean those remedial actions designated in the Amended ROD as implementation of a landfill gas treatment system, if necessary to meet the Performance Standards, extension of the municipal water supply system to additional residences, if necessary, and implementation of a groundwater treatment remedy, if necessary to meet Performance Standards.

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

f. "Effective Date" shall be the effective date of this Consent Decree as provided in Paragraph 106.

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

h. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, to the extent not inconsistent with the NCP, that the United States incurs after August 15, 2005 in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Paragraph 88 of Section XXI. Future Response Costs shall also include all Interim Response Costs, and all Interest that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from August 15, 2005 to the date of entry of this Consent Decree on the Interim Response Costs which Performing Settling Defendants have agreed to reimburse under Paragraph 55 of this Consent Decree.

i. "Cashout Settling Defendant" or "Cashout Settling Defendants" shall

mean those parties listed in Appendix D which shall have no obligations beyond payment of their share of Past Response Costs and the costs of performance of the Work, subject to the reservations of Paragraph 84.b. if Contingent Remedial Actions are required.

j. "IDEM" shall mean the Indiana Department of Environmental Management and any successor departments or agencies of the State.

k. "Interim Response Costs" shall mean all costs, including direct and indirect costs, (a) paid by the United States for response actions in connection with the Site between August 15, 2005 and the Effective Date, or (b) incurred between August 15, 2005 and the Effective Date but paid by the United States after the Effective Date.

l. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

m. "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.

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

o. "Owner Settling Defendants" shall mean Bayer Healthcare LLC as owner of Parcel C at the Site, which is identified on the map attached hereto as Appendix C, and Indiana Michigan Power Company as owner of Parcel G on Appendix C. Owners of other parcels at the Site are non-settling parties.

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

q. "Parties" shall mean the United States, the State and the Settling Defendants.

r. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that the United States paid for response actions at or in connection with the Site through August 15, 2005.

s. "Performance Standards" shall mean the Remedial Action Objectives set forth on Section 1.4 in Part I of the Amended ROD and the specifications and requirements

identified in Section II of the SOW.

t. "Performing Settling Defendants" shall mean Bayer Healthcare LLC and Himco Waste Away Service, Inc. ("HIMCO"), which shall be responsible for implementation of the Work pursuant to this Agreement.

u. "Plaintiffs" shall mean the United States and the State of Indiana.

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

w. "Remedial Action" or "Remedial Actions" shall mean those activities other than the Contingent Remedial Actions and O&M to be undertaken by the Performing Settling Defendants to implement the Amended ROD, in accordance with the SOW and the final Remedial Design and Remedial Action Work Plans and other plans approved by EPA.

x. "Remedial Action Work Plan" shall mean the document developed pursuant to Section III, Task 3 of the SOW and approved by EPA and any amendments thereto.

y. "Remedial Design" shall mean those activities to be undertaken by the Performing Settling Defendants to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

z. "Remedial Design Work Plan" shall mean the document developed pursuant to Section III, Task 1 of the SOW.

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

bb. "Settling Defendants" shall mean collectively the Performing Settling Defendants, the Cashout Settling Defendants, and the Owner Settling Defendants as defined herein.

cc. "Site" shall mean the Himco Dump Superfund Site, encompassing approximately 60 acres, located at the intersection of County Road 10 (Bristol Street) and John Weaver Parkway (Nappanee Street Extension), residential areas South and East of the landfill boundary, all locations where hazardous substances from the Site have come to be located, and all areas immediately adjacent thereto, in Elkhart, Elkhart County, Indiana, and depicted generally on the map attached as Appendix C.

dd. "State" shall mean the State of Indiana.

ee. "State Past Response Costs" shall mean those response costs incurred by the State in connection with the Site as of May 31, 2006. State Past Response Costs include past State oversight costs and costs associated with providing bottled water to residents residing near

the Site.

ff. "State Future Response Costs" shall mean all costs incurred after May 31, 2006, including, but not limited to, direct and indirect costs that the State incurs in the oversight of the Consent Decree including, but not limited to reviewing or developing plans, reports or other items pursuant to the Consent Decree, verifying the work, or otherwise implementing, overseeing, settling Defendant's activities or enforcing this Consent Decree, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, etc. State Future Response Costs shall also include the cost of providing bottled water from June 1, 2006, until such time as the Performing Settling Defendants take over the provision of bottled water to the Residences listed in Appendix C.

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

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

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

jj. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "extremely hazardous substance" within the meaning of IC 13-11-2-76; any "hazardous material" within the meaning of IC 13-11-2-96; and any "hazardous waste" within the meaning of IC 13-11-2-99.

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

## V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Settling Defendants, to reimburse response costs of the Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendants as provided in this Consent Decree.

6. Commitments by Settling Defendants.

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

b. The obligations of Settling Defendants to finance and perform the Work and to pay amounts owed the United States and the State under this Consent Decree are joint and several. In the event of the insolvency or other failure of any one or more Settling Defendants to implement the requirements of this Consent Decree, the remaining Settling Defendants shall complete all such requirements, except that the obligations of the Cashout Settling Defendants shall be limited to payment of the collective amount of \$2,800,000, subject to the reopener provisions of Paragraph 87.b.

7. Compliance With Applicable Law. All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and State laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all Federal and State environmental laws as set forth in the Amended ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

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

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

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

9. Notice to Successors-in-Title.

a. With respect to property owned or controlled by Owner Settling Defendants within the Site, within 45 days after the entry of this Consent Decree, Owner Settling Defendants shall submit to EPA for review and approval a notice, to be filed with the Elkhart County Recorder's Office, which shall provide notice to all successors-in-title that the property is part of the Site, that EPA, in executing the Amended ROD on September 15, 2004, selected a remedy for the Site, and that potentially responsible parties have entered into a Consent Decree requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. Owner Settling Defendants shall record the notice(s) within 10 days of EPA's approval of the notice(s) and shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice(s).

b. At least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, Owner Settling Defendants shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "restrictive easements") pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, Owner Settling Defendants shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

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

d. With respect to parcels within the Site that are owned or controlled by persons or entities other than Owner Settling Defendants, Performing Settling Defendants shall use best efforts, as that term is defined in Paragraph 28 of this Consent Decree, to secure from such persons or entities the record notice(s) to successors in title and the notice(s) of proposed conveyance applicable to such parcels, as defined in subsections a. through c. of this Paragraph.

VI. PERFORMANCE OF THE WORK BY PERFORMING SETTLING DEFENDANTS

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Performing Settling Defendants pursuant to Sections VI (Performance of the Work by Performing Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA. Within 30 days after the lodging of this Consent Decree, Performing Settling Defendants shall notify EPA in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Performing Settling Defendants shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Performing Settling Defendants propose to change a Supervising Contractor, Performing Settling Defendants shall give such notice to EPA and must obtain an authorization to proceed from EPA, before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Performing Settling Defendants in writing and articulate its substantive reasons for disapproval. EPA shall not unreasonably disapprove of the Supervising Contractor proposed by the Performing Settling Defendants. Performing Settling Defendants shall submit to EPA a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days of receipt of EPA's disapproval of the contractor previously proposed. After consulting with the State, EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Performing Settling Defendants may select any contractor from that list that is not disapproved and shall notify EPA of the name of the contractor selected within 21 days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Performing Settling Defendants from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Performing Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) hereof.

d. Within 60 days of the Effective Date of this Consent Decree, the Performing Settling Defendants shall arrange for the provision of bottled water to the

residences listed in Appendix E and shall continue to supply bottled water to those residences until such time as the municipal water supply is connected to each of those residences or the residents indicate in writing that they no longer wish to receive bottled water.

11. Remedial Design.

a. Within 60 days after EPA's issuance of an authorization to proceed pursuant to Paragraph 10, Performing Settling Defendants shall submit to EPA and the State a work plan for the design of the Remedial Action at the Site ("Remedial Design Work Plan" or "RD Work Plan") in accordance with the approved schedule set forth in the SOW. The Remedial Design Work Plan shall provide for design of the remedy set forth in the Amended ROD, in accordance with the SOW, and for achievement of the Performance Standards. Upon its approval by EPA, the Remedial Design Work Plan shall be incorporated into and become enforceable under this Consent Decree. Within 60 days after EPA's issuance of an authorization to proceed, the Performing Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field activities which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the Section III of the SOW.

c. Upon approval of the Remedial Design Work Plan by EPA (after a reasonable time for review and comment by the State to EPA), Performing Settling Defendants shall implement the Remedial Design Work Plan. The Performing Settling Defendants shall submit to EPA and the State all plans, submittals and other deliverables required under the approved Remedial Design Work Plan in accordance with the approved schedule set forth in the SOW and review and approval provisions pursuant to Section XI (EPA Approval of Plans and Other Submissions) of this Consent Decree. Unless otherwise directed by EPA, Performing Settling Defendants shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.

12. Remedial Action.

a. Within 60 days after the approval of the final design submittal, Performing Settling Defendants shall submit to EPA and the State a work plan for the performance of the Remedial Actions at the Site ("Remedial Action Work Plan"). The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the Amended ROD and achievement of the Performance Standards in accordance with this Consent Decree, the Amended ROD, and the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan and approved by EPA, in consultation with the State. Upon its approval by EPA (after a reasonable time for review and

comment by the State to EPA), the Remedial Action Work Plan shall be incorporated into and become enforceable under this Consent Decree. At the same time of the submittal of the Remedial Action Work Plan, Performing Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field activities required by the Remedial Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. Upon approval of the Remedial Action Work Plan by EPA, Performing Settling Defendants shall implement the activities required under the Remedial Action Work Plan. The Performing Settling Defendants shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Performing Settling Defendants shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

13. The Performing Settling Defendants shall continue to implement the Remedial Action, Contingent Remedial Actions if required and O&M, until the Performance Standards are achieved and until EPA certifies that the Work is complete pursuant to Paragraph 51 of this Consent Decree unless otherwise approved by EPA.

14. Modification of the SOW or Related Work Plans.

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

b. For the purposes of this Paragraph 14 and Paragraphs 50 and 51 only, the "Scope of the remedy selected in the Amended ROD" includes contouring, grading, installation, and repair of the landfill cover; excavation and disposal of contaminated soil or placement of a soil cover in the construction debris area; prevention of gas migration from the landfill at unacceptable concentrations in off-site areas; extension of municipal water to residences to the east of the landfill with a landfill-related impact or potential impacts on well water quality; abandonment of existing private wells to the east once a municipal water supply is established, abandonment of existing private wells for the residences to the south near the Construction Debris Area ("CDA"); long-term groundwater monitoring to assess Site-related impacts; remediation, as appropriate, of contaminated groundwater under conditions specified in the Amended ROD; and implementation of various institutional controls; all as described in the

September 15, 2004 Amended ROD.

c. If Performing Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX (Dispute Resolution) and Paragraph 68 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

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

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions that are consistent with the NCP and are required to meet the Performance Standards.

15. Settling Defendants acknowledge and agree that nothing in this Consent Decree, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards. EPA acknowledges and the Settling Defendants understand that EPA has a reasonable basis to expect, however, that implementation of the Work, in accordance with EPA-approved work plans as described in the SOW will meet the Performance Standards.

16. a. Performing Settling Defendants shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of such shipments is not expected to exceed 10 cubic yards.

1. The Performing 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. The Performing Settling Defendants shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

2. The identity of the receiving facility and state will be determined by the Performing Settling Defendants following the award of the contract for Remedial Action construction. The Performing Settling Defendants shall provide the information required by Paragraph 16.a as soon as practicable after the award of the contract and before the Waste

Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Performing 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. Performing Settling Defendants shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

## VII. REMEDY REVIEW

17. Periodic Review. Performing Settling Defendants shall conduct such studies and investigations as requested by EPA that are necessary to permit EPA to conduct reviews of whether the Amended ROD Remedial Action is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations. EPA acknowledges and the Performing Settling Defendants understand that EPA has a reasonable basis to expect, however, that annual progress reports, as described further in Section III (Task 6) of the SOW, will permit EPA to assess whether the Amended ROD Remedial Action is protective of human health and the environment.

18. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Action will not and can not meet the Performance Standards, and that the reopener provisions of Paragraphs 84 and 85 are satisfied, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

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

20. Performing Settling Defendants' Obligation To Perform Further Response Actions. If EPA selects further response actions for the Site, the Performing Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraph 84 (Plaintiffs' Pre-Certification Reservations) or Paragraph 85 (Plaintiffs' reservations of liability based on unknown conditions or new information) are satisfied. Performing Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 84 or Paragraph 85 of Section XXI (Covenants Not To Sue Performing Settling Defendants by Plaintiffs) are satisfied, (2) EPA's determination that the Remedial Action will not and can not meet the Performance Standards, or (3) EPA's selection of the further response actions. Disputes pertaining to the

whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 68 (record review).

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

#### VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

22. Performing Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all pre-design, design, compliance and monitoring samples in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001) "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998), , the UFP-QAPP format found at <http://www.epa.gov/fedfac/documents/qualityassurance.htm> and subsequent amendments to such guidelines upon notification by EPA to Performing Settling Defendants of such amendment. Amended guidelines shall apply only to Work commenced after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Performing Settling Defendants shall submit to EPA for approval a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Performing Settling Defendants shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Performing Settling Defendants in implementing this Consent Decree. In addition, Performing Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Performing Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree; however, upon approval by EPA, after opportunity for review and comment by the State, the Performing Settling Defendants may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Performing Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Performing Settling Defendants shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental

Technology Programs," (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality System requirements. Performing Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

23. Upon request, the Performing Settling Defendants shall allow split or duplicate samples to be taken by EPA and the State or their authorized representatives. Except as provided in the SOW or approved Work Plan, Performing Settling Defendants shall notify EPA and the State not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA and the State shall have the right to take any additional samples that EPA or the State deem necessary, consistent with the SOW and NCP. Upon request, EPA and the State shall allow the Performing Settling Defendants to take split or duplicate samples of any samples they take as part of the Plaintiffs' oversight of the Performing Settling Defendants' implementation of the Work.

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

25. Notwithstanding any provision of this Consent Decree, the United States and the State hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations, and the Settling Defendants retain all of their respective rights and defenses thereunder.

#### IX. ACCESS AND INSTITUTIONAL CONTROLS

26. As to all portions of the Site owned by Owner Settling Defendants, where access and/or land/water restrictions are needed to implement this Consent Decree, Owner Settling Defendants shall provide for access and land/water use restrictions as follows.

a. Commencing on the date of lodging of this Consent Decree, Owner Settling Defendants shall provide the United States, the State, and their representatives, including EPA and its contractors, with access at all reasonable times to its portion of the Site for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

1. Monitoring the Work;

2. Verifying any data or information submitted to the United States or the State;
3. Conducting investigations relating to contamination at or near the Site;
4. Obtaining samples;
5. Assessing the need for, planning, or implementing additional response actions at or near the Site;
6. Assessing implementation of construction quality assurance and quality control practices as defined in the approved construction Quality Assurance Project Plans;
7. Implementing the Work pursuant to the conditions set forth in Paragraph 95 of this Consent Decree;
8. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV (Access to Information);
9. Assessing Settling Defendants' compliance with this Consent Decree; and
10. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. Commencing on the date of lodging of this Consent Decree, Owner Settling Defendants shall refrain from using its portion of the Site in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Decree. For the purposes of both this subparagraph and Paragraph 27.b. of this Decree, such use restrictions shall include, but are not limited to:

1. Restrictions on Use of Landfill Property
  - A. Limit land use to industrial, recreational, or commercial uses either by recording a deed restriction or other appropriate institutional controls;
  - B. Prohibit future groundwater use either by recording a deed

restriction or other appropriate institutional controls;

C. Prohibit future drilling or digging into the landfill cover either by recording a deed restriction or other appropriate institutional controls;

2. Restrictions on Use of Residential Properties (East and South)

A. Prohibit installation of private water wells for groundwater use and abandon the private well for each residential property receiving municipal water as a result of the Remedial Action;

B. Prohibit installation of private water wells for groundwater use for each residential property which received municipal water supply in 1992 as a result of the Remedial Removal Action;

C. Prohibit the use of private water wells in the area located south of Himco Dump that are within the Elkhart city limits;

3. Restrictions on Use of Parcel F Located South of the Landfill

A. Limit land use to industrial, recreational or commercial only, either by recording a deed notice or other appropriate institutional controls;

B. Establish institutional controls in parallel with the landfill if the excavated materials from the Construction Debris Area are disposed of on Parcel F;

4. Restrictions on Use of Construction Debris Area Residential Soil. If a soil cover is used for the residential soil in the Construction Debris Area ("CDA"), fence the soil cover and establish institutional controls or other appropriate institutional controls in parallel with the landfill.

c. As to property within the Site that is owned by Owner Settling Defendants, Owner Settling Defendants shall execute and record in the Elkhart County Recorder's Office, an easement running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 26.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Owner Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, and/or (iii) other appropriate grantees. Owner Settling

Defendants shall, within 45 days of EPA's request, submit to EPA and IDEM for review and approval with respect to such property:

1. a draft easement, that is enforceable under the laws of the State, and
2. a current title insurance commitment or some other evidence of title acceptable to EPA and IDEM, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA and IDEM or when, despite best efforts, Owner Settling Defendants are unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's and IDEM's approval and acceptance of the easement and the title evidence, Owner Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, record the easement with the Elkhart County Recorder's Office. Within 30 days of recording the easement, Owner Settling Defendants shall provide EPA and IDEM with a final title insurance policy, or other final evidence of title acceptable to EPA and IDEM, and a certified copy of the original recorded easement showing the clerk's recording stamps. If the easement is to be conveyed to the United States, the easement and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 255.

27. As to portions of the Site owned or controlled by persons or entities other than Owner Settling Defendants, where access and/or land/water use restrictions are needed to implement this Consent Decree, Performing Settling Defendants shall use best efforts to secure from such persons or entities:

- a. An agreement to provide access thereto for Performing Settling Defendants, as well as for the United States, the State, and their representatives, including EPA and its contractors, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.a of this Consent Decree;
- b. An agreement, enforceable by Performing Settling Defendants, the United States, and the State, to refrain from using such property in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the Work to be performed pursuant to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.b.;
- c. The execution and recordation, in the Elkhart County Recorder's Office, of an easement running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in

Paragraph 26(a) of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 26(b) of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. The access rights and/or rights to enforce land/water use restrictions shall be granted to (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the Performing Settling Defendants and their representatives, and/or (iv) other appropriate grantees. Within 45 days of EPA's request, Performing Settling Defendants shall submit to EPA and IDEM for review and approval with respect to such property:

1. A draft easement that is enforceable under the laws of the State, and
2. a current title insurance commitment, or some other evidence of title acceptable to EPA and IDEM, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA and IDEM or when, despite best efforts, Performing Settling Defendants are unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's and IDEM's approval and acceptance of the easement and the title evidence, Performing Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, the easement shall be recorded with the Elkhart County Recorder's Office. Within 30 days of the recording of the easement, Performing Settling Defendants shall provide EPA and IDEM with a final title insurance policy, or other final evidence of title acceptable to EPA and IDEM, and a certified copy of the original recorded easement showing the clerk's recording stamps. If easement is to be conveyed to the United States, the easement and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 255.

28. For purposes of Paragraph 27 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access easements, land/water use restrictions, restrictive easements, and/or an agreement to release or subordinate a prior lien or encumbrance. If (a) any access or land/water use restriction agreements required by Paragraphs 27.a. or 27.b. of this Consent Decree are not obtained within 60 days of the date of EPA's request, or (b) any access easements or restrictive easements required by Paragraph 27.c. of this Consent Decree are not submitted to EPA in draft form within 45 days of the date of EPA's request or (c) Performing Settling Defendants are unable to obtain an agreement pursuant to Paragraph 26.c.(1) or Paragraph 27.c.(1) from the holder of a prior lien or encumbrance to release or subordinate such lien or encumbrance to the easement being created pursuant to this consent decree within 60 days of EPA's request, Performing Settling Defendants shall promptly notify the United States and the State in writing, and shall include in that notification a summary

of the steps that it has taken to attempt to comply with Paragraph 26 or Paragraph 27 of this Consent Decree. The United States or the State may, as it deems appropriate, assist Performing Settling Defendants in obtaining access or land/water use restrictions, either in the form of orders, contractual agreements or in the form of easements or covenants running with the land, or in obtaining the release or subordination of a prior lien or encumbrance. Performing Settling Defendants shall reimburse the United States and the State in accordance with the procedures in Section XVI (Reimbursement of Response Costs) for all direct and indirect costs incurred by the United States or the State in obtaining such access, land/water use restrictions, and/or the release/subordination of prior liens or encumbrances including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.

29. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the Amended ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Performing Settling Defendants shall cooperate with EPA's and the State's efforts to secure such governmental controls.

30. Notwithstanding any provision of this Consent Decree, the United States and the State retain all access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

#### X. REPORTING REQUIREMENTS

31. In addition to any other requirement of this Consent Decree, Performing Settling Defendants shall submit to EPA and the State three copies of written monthly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary or copy of all results of sampling and tests and all other data received or generated by Performing Settling Defendants or their contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Performing Settling Defendants have proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next month. Performing Settling Defendants shall submit these progress reports to EPA and the State by the tenth day of every month following the lodging of this Consent Decree until EPA notifies

the Performing Settling Defendants pursuant to Paragraph 51 of Section XIV (Certification of Completion). If requested by EPA, Performing Settling Defendants shall also provide briefings for EPA and the State to discuss the progress of the Work. Performing Settling Defendants may submit in electronic form all portions of any progress report to EPA and the State to fulfill their requirements under this Paragraph. Upon EPA certification that Remedial Action is complete, pursuant to Paragraph 50 herein, Performing Settling Defendants shall be relieved of the obligation to submit monthly progress reports pursuant to Paragraph 31.

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

33. Upon the occurrence of any event during performance of the Work that Performing Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Performing Settling Defendants shall within 24 hours of having knowledge of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 5, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

34. Within 20 days of having knowledge of a reportable event as defined in Paragraph 33, Performing Settling Defendants shall furnish to Plaintiffs a written report, signed by the Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such reportable event as defined in Paragraph 33, Performing Settling Defendants shall submit a report setting forth all actions taken in response thereto. Such followup reports as may be required under CERCLA or EPCRA may be submitted in satisfaction of this requirement.

35. Performing Settling Defendants shall submit three copies of all plans, reports, and data required by the SOW, to EPA in accordance with the schedules set forth in such plans. Performing Settling Defendants shall simultaneously submit three copies of all such plans, reports, and data to the State. Performing Settling Defendants, if requested or approved by EPA in advance, may submit in electronic form all portions of any report, plan or other deliverable to fulfill their requirements under this Paragraph. Performing Settling Defendants shall provide U.S. EPA with validated analytical data within sixty (60) days of each sampling activity, in the electronic format described at: <http://www.epa.gov/region5superfund/edman>.

36. All reports and other documents submitted by Performing Settling Defendants to

EPA (other than the monthly progress reports referred to above) which purport to document Performing Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Performing Settling Defendants.

#### XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

37. After review of any Work Plan, report (excepting reports required under Article X above) or other material item which is required to be submitted for EPA approval pursuant to this Consent Decree, EPA shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission directing that the Performing Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Performing Settling Defendants at least one notice of deficiency and an opportunity to cure within 10 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

38. a. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 37(a), (b) or (c), Performing Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 37(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

b. For purposes of this Consent Decree, EPA's approval of a plan, report, or other item that is required to be submitted for approval pursuant to this Consent Decree shall be construed as indicating that the item is in accordance with the Amended ROD and the SOW.

c. EPA shall notify the Performing Settling Defendants, in accordance with the notification requirements of Section XXVI, whenever EPA modifies a submission that it deems materially defective or deficient, including a description of each modification and defect or deficiency.

#### 39. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 37(d), Performing Settling Defendants shall, within 30 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue

during the 30-day or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 40 and 41.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 37(d), Performing Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Performing Settling Defendants of any liability for stipulated penalties under Section XX (Stipulated Penalties).

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

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

42. All plans, reports, and other items required to be submitted to EPA for approval under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree, unless after Dispute Resolution, the modification is not upheld. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree, unless after Dispute Resolution, the modification is not upheld.

## XII. PROJECT COORDINATORS

43. Within 20 days of lodging this Consent Decree, Performing Settling Defendants, the State and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes

occur, unless impracticable, but in no event later than the actual day the change is made. The Performing Settling Defendants' Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Performing Settling Defendants' Project Coordinator shall not be an attorney for any of the Settling Defendants in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

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

45. EPA's Project Coordinator, the State Project Coordinator, and the Performing Settling Defendants' Project Coordinator will meet as needed and mutually agreed.

### XIII. PERFORMANCE GUARANTEE

46.1. In order to ensure the full and final completion of the Work, Performing Settling Defendants shall establish and maintain a Performance Guarantee for the benefit of EPA in the amount of \$12 million (hereinafter "Estimated Cost of the Work") in one or more of the following forms, which must be satisfactory in form and substance to EPA:

a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. One or more irrevocable letters of credit, payable to or at the direction of EPA, that is issued by one or more financial institution(s) (i) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal or State agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee (i) that has the authority to act as a trustee and (ii) whose trust operations are regulated and examined by a U.S. Federal or State agency;

d. A policy of insurance that (i) provides EPA with acceptable rights as a beneficiary thereof; and (ii) is issued by an insurance carrier (a) that has the authority to issue insurance policies in the applicable jurisdiction(s) and (b) whose insurance operations are regulated and examined by a State agency;

e. A demonstration by one or more Performing Settling Defendants that each such Performing Settling Defendant meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied; or

f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (i) a direct or indirect parent company of a Performing 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 Performing Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work that it proposes to guarantee hereunder.

46.2. Performing Settling Defendants have selected, and EPA has approved as an initial Performance Guarantee, a corporate guarantee from the parent company of Bayer Healthcare LLC, on behalf of the Performing Settling Defendants pursuant to Paragraph 46.1.f.(i), a prototype of which is attached hereto as Appendix G. Within ten days after entry of this Consent Decree, Performing Settling Defendants shall execute or otherwise finalize all instruments or other documents required in order to make the selected Performance Guarantee legally binding in a form substantially identical to the documents attached hereto as Appendix G, and such Performance Guarantee shall thereupon be fully effective. Within thirty days of entry of this Consent Decree, Performing Settling Defendants shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Performance Guarantee legally binding to EPA in accordance with Section XXVI ("Notices and Submissions") of this Consent Decree and to the United States and the State as specified in Section XXVI.

46.3. If at any time during the effective period of this Consent Decree, the Performing Settling Defendants provide a Performance Guarantee for completion of the Work by means of a demonstration or guarantee pursuant to Paragraph 46.1(e) or Paragraph 46.1(f) above, such Performing Settling Defendant shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these methods unless otherwise provided in this Consent Decree, including but not limited to (i) the initial submission of required financial reports and statements from the relevant entity's chief financial officer and independent certified public accountant; (ii) the annual re-submission of such reports and statements within ninety days after the close of each such entity's fiscal year; and (iii) the notification of EPA within ninety days after the close of any fiscal year in which

such entity no longer satisfies the financial test requirements set forth at 40 C.F.R. § 264.143(f)(1). For purposes of the Performance Guarantee methods specified in this Section XIII, references in 40 C.F.R. Part 264, Subpart H, to “closure,” “post-closure,” and “plugging and abandonment” shall be deemed to refer to the Work required under this Consent Decree, and the terms “current closure cost estimate” “current post-closure cost estimate,” and “current plugging and abandonment cost estimate” shall be deemed to refer to the Estimated Cost of the Work.

47. In the event that EPA determines at any time that a Performance Guarantee provided by any Performing Settling Defendant pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, or in the event that any Performing Settling Defendant becomes aware of information indicating that a Performance Guarantee provided pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, Performing Settling Defendants, within thirty days of receipt of notice of EPA's determination or, as the case may be, within thirty days of any Performing Settling Defendant becoming aware of such information, shall obtain and present to EPA for approval a proposal for a revised or alternative form of Performance Guarantee listed in Paragraph 46.1 of this Consent Decree that satisfies all requirements set forth in this Section XIII. In seeking approval for a revised or alternative form of Performance Guarantee, Performing Settling Defendants shall follow the procedures set forth in Paragraph 50(b)(ii) of this Consent Decree. Performing Settling Defendants' inability to post a Performance Guarantee for completion of the Work shall in no way excuse performance of any other requirements of this Consent Decree, including, without limitation, the obligation of Performing Settling Defendants to complete the Work in strict accordance with the terms hereof.

48. The commencement of any Work Takeover pursuant to Paragraph 88 of this Consent Decree shall trigger EPA's right to receive the benefit of any Performance Guarantees provided pursuant to Paragraph 46.1(a), (b), (c), (d), or (f), and at such time EPA shall have immediate access to resources guaranteed under any such Performance Guarantees, whether in cash or in kind, as needed to continue and complete the Work assumed by EPA under the Work Takeover. If for any reason EPA is unable to promptly secure the resources guaranteed under any such Performance Guarantees, whether in cash or in kind, necessary to continue and complete the Work assumed by EPA under the Work Takeover, or in the event that the Performance Guarantee involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 46.1(e), Performing Settling Defendants shall immediately upon written demand from EPA deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, subject to the dispute resolution provisions in Section XIX herein, 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 EPA.

49. Modification of Amount and/or Form of Performance Guarantee

a. Reduction of Amount of Performance Guarantee. If Performing Settling Defendants believe that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 46.1 above, Performing Settling Defendants may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by EPA, petition EPA in writing to request a reduction in the amount of the Performance Guarantee provided pursuant to this Section so that the amount of the Performance Guarantee is equal to the estimated cost of the remaining Work to be performed. Performing Settling Defendants shall submit a written proposal for such reduction to EPA that shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval for a revised or alternative form of Performance Guarantee, Performing Settling Defendants shall follow the procedures set forth in Paragraph 50(b)(ii) of this Consent Decree. If EPA decides to accept such a proposal, EPA shall notify the petitioning Performing Settling Defendants of such decision in writing. After receiving EPA's written acceptance, Performing Settling Defendants may reduce the amount of the Performance Guarantee in accordance with and to the extent permitted by such written acceptance. In the event of a dispute, Performing Settling Defendants may reduce the amount of the Performance Guarantee required hereunder only in accordance with a final administrative or judicial decision resolving such dispute. No change to the form or terms of any Performance Guarantee provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraphs 48 or 50(b) of this Consent Decree.

b. Change of Form of Performance Guarantee

(i) If, after entry of this Consent Decree, Performing Settling Defendants desire to change the form or terms of any Performance Guarantee provided pursuant to this Section, Performing Settling Defendants may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by EPA, petition EPA in writing to request a change in the form of the Performance Guarantee provided hereunder. The submission of such proposed revised or alternative form of Performance Guarantee shall be as provided in Paragraph 49(b)(ii) of this Consent Decree. Any decision made by EPA on a petition submitted under this subparagraph (b)(i) shall be made in EPA's sole and unreviewable discretion, and such decision shall not be subject to challenge by Performing Settling Defendants pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.

(ii) Performing Settling Defendants shall submit a written proposal for a revised or alternative form of Performance Guarantee to EPA which shall specify, at a minimum, the estimated cost of the remaining Work to be performed, the basis upon which such cost was calculated, and the proposed revised form of Performance Guarantee, including all proposed instruments or other documents required in order to make the proposed Performance Guarantee legally binding. The proposed revised or alternative form of Performance Guarantee

must satisfy all requirements set forth or incorporated by reference in this Section. Performing Settling Defendants shall submit such proposed revised or alternative form of Performance Guarantee to EPA. EPA shall notify Performing Settling Defendants in writing of its decision to accept or reject a revised or alternative Performance Guarantee submitted pursuant to this subparagraph. Within ten days after receiving a written decision approving the proposed revised or alternative Performance Guarantee, Performing Settling Defendants shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected Performance Guarantee legally binding in a form substantially identical to the documents submitted to EPA as part of the proposal, and such Performance Guarantee shall thereupon be fully effective. Performing Settling Defendants shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding to the United States and EPA and the State as specified in Section XXVI.

c. Release of Performance Guarantee. If Performing Settling Defendants receive written notice from EPA in accordance with Paragraph 51 hereof that the Work has been fully and finally completed in accordance with the terms of this Consent Decree, or if EPA otherwise so notifies Performing Settling Defendants in writing, Performing Settling Defendants may thereafter release, cancel, or discontinue the Performance Guarantee(s) provided pursuant to this Section. Performing Settling Defendants shall not release, cancel, or discontinue any Performance Guarantee provided pursuant to this Section except as provided in this subparagraph. In the event of a dispute, Performing Settling Defendants may release, cancel, or discontinue the Performance Guarantee(s) required hereunder only in accordance with a final administrative or judicial decision resolving such dispute.

#### XIV. CERTIFICATION OF COMPLETION

##### 50. Completion of the Remedial Action.

a. Within 90 days after Performing Settling Defendants conclude that the Remedial Action has been fully performed and the Performance Standards have been attained, Performing Settling Defendants shall so notify EPA and the State. In support thereof, the Performing Settling Defendants shall submit a written Completion of Remedial Action Report to EPA and the State requesting certification to EPA for approval, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within 90 days of giving notice, or within 60 days of a pre-certification inspection that identifies no significant incomplete work, whichever is later. In the Completion of Remedial Action Report, a registered professional engineer and the Performing Settling Defendants' Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of a Performing Settling Defendant or the Performing Settling Defendants' Project Coordinator:

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

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

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

51. Completion of the Work.

a. Within 90 days after Performing Settling Defendants conclude that all phases of the Work (including O & M), have been fully performed, Performing Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Performing Settling Defendants, EPA and the State. If, after the pre-certification inspection, the Performing Settling Defendants still believe that the Work has been fully performed, Performing

Settling Defendants shall submit a written report by a registered professional engineer and the Performing Settling Defendants' Project Coordinator stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall contain the following statement, signed by a responsible corporate official of a Performing Settling Defendant or the Performing Settling Defendants' Project Coordinator:

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

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

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Performing Settling Defendants and after a reasonable opportunity for review and comment by the State to EPA, that the Work has been performed in accordance with this Consent Decree, EPA will so certify to the Performing Settling Defendants in writing, in accordance with the notification requirements of Section XXVI and EPA shall take necessary steps to promptly delete the Site from the National Priorities List.

## XV. EMERGENCY RESPONSE

52. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that may constitute an immediate threat to public health or welfare or the environment, Performing Settling Defendants shall, subject to Paragraph 53, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator.

If neither of these persons is available, the Settling Defendants shall notify the EPA Emergency Response Unit, Region 5. Performing Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Performing Settling Defendants fail to take appropriate response action as required by this Section, and EPA takes such action instead, Performing Settling Defendants shall reimburse EPA and the State all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Payments for Response Costs).

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

#### XVI. PAYMENTS FOR EPA AND STATE RESPONSE COSTS

##### 54. Payments for Past Response Costs.

a. Within 30 days after the effective date of this Consent Decree, Settling Defendants other than HIMCO shall (1) reimburse the United States the amount of \$3,275,000 in full satisfaction of their obligations hereunder for Past Response Costs; and (2) reimburse the State in the amount of \$28,348.15 in full satisfaction of their obligations for State Past Response Costs. Payment to the United States shall be made by FedWire Electronic Funds Transfer ("EFT") to the DOJ account in accordance with current EFT procedures, referencing United States Attorney's Office ("USAO") 054J, and DOJ Case Number 90-11-2865/1. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the USAO for the Northern District of Indiana following entry of this Consent Decree. Any payments received by the DOJ after 4:00 PM (Eastern Time) will be credited on the next business day. Payment to the State of Indiana will be by certified check referencing Site number 7500044 to IDEM, 100 North Senate Avenue, Mail Code 50-10C, Indianapolis IN 46204-2241, Attn: Cashier.

b. Performing Settling Defendant HIMCO shall reimburse the United States the amount of \$600,000 for Past Response Costs. Said amount will be paid in three installments of \$200,000 each, plus interest as set forth in Paragraph 57, due on the first, second, and third anniversary of the effective date of this Consent Decree. HIMCO shall make each such payment in the manner prescribed in subparagraph a. above.

c. At the time of payment, Settling Defendants shall send notice that payment has been made to the United States, to EPA and to the State, in accordance with Section XXVI (Notices and Submissions).

d. All amounts paid by Settling Defendants to EPA pursuant to Paragraph 54 shall be deposited into the Himco Dump Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

55. Payments for Future Response Costs.

a. Performing Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis the United States will send Performing Settling Defendants a bill requiring payment that includes an Itemized Cost Summary, which includes direct and indirect costs incurred by EPA and its contractors, and the DOJ cost summary which reflects costs incurred by DOJ and its contractors, if any. Performing Settling Defendants shall make all payments within 30 days of Performing Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 56. Performing Settling Defendants shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, EPA Site/Spill ID Number 054J, and DOJ Case Number 90-11-2868/1. Performing Settling Defendants shall send the check(s) to:

Environmental Protection Agency, Region 5  
P.O. Box 371531  
Pittsburgh PA 15251-7531

b. At the time of payment, Performing Settling Defendants shall send notice that payment has been made to the United States and to EPA, in accordance with Section XXVI (Notices and Submissions).

c. All amount paid by Performing Settling Defendants pursuant to Paragraph 55 shall be deposited in the Himco Dump Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

d. Payments for State Future Response Costs.

1. Performing Settling Defendants agree to reimburse IDEM for all State Future Response Costs not inconsistent with the NCP. On a periodic basis, IDEM will send Performing Settling Defendants an invoice requiring payment that includes a cost summary, including direct and indirect costs incurred by IDEM and its contractors. Performing Settling Defendants shall make all payments within 30 days of receipt of each invoice requiring payment, except as otherwise provided in Section XVII (Dispute Resolution) of this Consent Decree.

2. Performing Settling Defendants shall make all payments required by this Consent Decree by a certified or Cashier's check or checks made payable to the Indiana Hazardous Substances Response Trust Fund. The check, and the a transmittal letter

accompanying the check, shall reference the name and address of the party making payment, the invoice number (if applicable), the Site name, and the IDEM Site Identification Number 75 000 44 and shall be sent to:

Indiana Department of Environmental Management  
100 N. Senate Avenue  
Mail Code 50-10C  
Indianapolis, IN 46205-2251  
Attn: Cashier

Any payments received by IDEM after 12:30 p.m. Eastern Time will be credited on the next business day. A copy of the check and transmittal letter shall be sent to IDEM's Project Manager in accordance with Section X (Notices and Submissions).

56. Performing Settling Defendants may contest payment of any Future Response Costs under Paragraph 55 if they determine that the United States or the State, if applicable, has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States or the State pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Performing Settling Defendants shall within the 30 day period pay all uncontested Future Response Costs to the United States or the State, if applicable, in the manner described in Paragraph 55. Simultaneously, the Performing Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Indiana and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Performing Settling Defendants shall send to the United States, or the State if applicable, as provided in Section XXVI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Performing Settling Defendants shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States or the State prevails in the dispute, within 5 days of the resolution of the dispute, the Performing Settling Defendants shall pay the sums due (with accrued interest) in the manner described in Paragraph 55. If the Performing Settling Defendants prevail concerning any aspect of the contested costs, the Performing Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States or the State if applicable. Performing Settling Defendants shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Performing Settling Defendants' obligation to reimburse the United States and the State for their Future Response Costs.

57. In the event that the payments required by Paragraph 54 are not made when due, or the payments required by Paragraph 55 are not made within 30 days of the Performing Settling Defendants' receipt of the bill, the Settling Defendants responsible for the late payment shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs and State Past Response Costs under this Paragraph shall begin to accrue on the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the responsible Settling Defendants' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendants' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 79. The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 55.

## XVII. INDEMNIFICATION AND INSURANCE

### 58. Performing Settling Defendants' Indemnification of the United States and the State

a. The United States and the State do not assume any liability by entering into this agreement or by virtue of any designation of Performing Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Performing Settling Defendants shall indemnify, save and hold harmless the United States, the State and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Performing Settling Defendants, 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 Performing Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Performing Settling Defendants agree to pay the United States and the State all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Performing Settling Defendants, 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. Provided, however, that Performing Settling Defendants shall have no obligation under this Paragraph to indemnify, defend or hold harmless the United States or the State from the negligent or wrongful acts or omissions of the United States or the State. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Performing Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the Performing Settling Defendants nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State shall give Performing Settling Defendants notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph 58, and shall consult with Performing Settling Defendants prior to settling

such claim.

59. Settling Defendants waive all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Performing Settling Defendants shall indemnify and hold harmless the United States and 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 any one or more of Performing Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

60. No later than 15 days before commencing any on-site Work, Performing Settling Defendants shall secure, and shall maintain, until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Subparagraph 50.b of Section XIV (Certification of Completion), comprehensive general liability insurance with limits of two million dollars, combined single limit, and automobile liability insurance with limits of two million dollars, combined single limit, naming the United States and the State as additional insureds. In addition, for the duration of this Consent Decree, Performing Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Performing Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Performing Settling Defendants shall provide to EPA and the State certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Performing Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Performing Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

#### XVIII. FORCE MAJEURE

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

62. 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 Performing Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 5, within seven days of when Performing Settling Defendants first knew that the event might cause a delay. Within 10 days thereafter, Performing Settling Defendants shall provide in writing to EPA and the State 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 prevent or mitigate the delay or the effect of the delay; the Performing Settling Defendants' rationale 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 Performing Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Performing Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements shall preclude Performing 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. Performing Settling Defendants shall be deemed to know of any circumstance of which Performing Settling Defendants, any entity controlled by Performing Settling Defendants, or Performing Settling Defendants' contractors knew or should have known.

63. If EPA, after a reasonable opportunity for review and comment by the State to EPA, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State to EPA, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Performing Settling Defendants in writing of its decision within 30 days of receipt of the Performing Settling Defendants' notice. If EPA, after a reasonable opportunity for review and comment by the State to EPA, agrees that the delay is attributable to a force majeure event, EPA will notify the Performing Settling Defendants in writing, within 30 days of receipt of the Performing Settling Defendants' notice, of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

64. If the Performing Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Performing 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 Performing Settling Defendants complied with the requirements of Paragraphs 61 and 62, above. If Performing Settling

Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Performing Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court, and the schedules for performance shall be extended accordingly.

#### XIX. DISPUTE RESOLUTION

65. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

66. 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 30 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one Party receives the other Party's written Notice of Dispute.

67. Statements of Position.

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA, or the State if State response costs or State approvals under Paragraphs 26, 27, or 28 are disputed, shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States and the State 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 Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 68 or Paragraph 69.

b. Within 30 days after receipt of Settling Defendants' Statement of Position, EPA or the State will serve on 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 EPA or the State. EPA's or the State's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 68 or 69. Within 30 days after receipt of EPA's or the State's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA, or the State if State response costs or State approval pursuant to Paragraph 26, 27, or 28 are in dispute, and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 68 or 69, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the 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 68 and 69.

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

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section, and shall include the administrative record for the Site. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Superfund Division, EPA Region 5, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 68.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 68.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 68.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendants with the Court and served on all Parties within 30 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States and the State may file a response to Settling Defendants' motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Superfund Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 68.a.

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

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 67, the Director of the Superfund Division, EPA Region 5, will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be binding on the Settling Defendants unless, within 30 days of receipt of the decision, the Settling Defendants file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief

requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States and the State may file a response to Settling Defendants' motion.

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

70. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 79. 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 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**

71. Performing Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 72, 73, and 74, to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). "Compliance" by Performing Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

72. Stipulated Penalty Amounts - Work.

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

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 30th day
\$2,500	31st through 60th day
\$5,000	61st day and beyond

b. Compliance Milestones.

1. Submission of Remedial Design Work Plan;
2. Submission of Preliminary Design;;
3. Submission of Final Design;
4. Submission of Remedial Action Work Plan;
5. Perfection of all required institutional controls;
6. Completion of extension of municipal water;
7. Completion of construction of gas mitigation system;
8. Completion of construction-related activities for landfill cover.

73. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to complete any task not identified in Paragraph 72 in a timely or adequate manner :

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

74. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 88 of Section XXI (Covenants Not to Sue by Plaintiffs), Performing Settling Defendants shall be liable for a stipulated penalty in the amount of \$ 1,000,000.

75. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Performing Settling Defendants of any deficiency; (2) with respect to a decision by the Director of the Superfund Division, EPA Region 5, under Paragraph 68 or 69 of Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the date that Performing Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court

issues a final decision regarding such dispute; (4) any period during which EPA has agreed in writing to extend any deadline. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

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

77. All penalties accruing under this Section shall be due and payable to the United States within 30 days of the Performing Settling Defendants' receipt of a demand for payment of the penalties, unless Performing Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to the Himco Dump Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund "EPA Hazardous Substances Superfund," shall be mailed to:

U.S. Environmental Protection Agency, Region 5  
P.O. Box 371531  
Pittsburgh PA 15251-7531

With a copy to EPA Project Manager:

Gwendolyn S. Massenburg (SR-6J),  
U.S. EPA, Region 5  
77 W. Jackson Blvd  
Chicago, Illinois 60604

and shall indicate that the payment is for stipulated penalties, and shall reference EPA Region 5 and Site/Spill ID # 054J, the DOJ Case Number 90-11-2-865/1, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVI (Notices and Submissions).

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

79. Penalties shall continue to accrue as provided in Paragraph 75 during any dispute resolution period, but need not be paid until the following:

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

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

c. If the District Court's decision is appealed by any Party, Performing Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 30 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Performing Settling Defendants to the extent that they prevail.

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

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

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

## XXI. COVENANTS NOT TO SUE SETTLING DEFENDANTS BY PLAINTIFFS

83. a. In consideration of the actions that will be performed and the payments that will be made by the Performing Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 84, 85, and 87 of this Section, the United States and the State covenant not to sue or to take any administrative action against the Performing Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, Section 7003 of RCRA, and any analogous State laws relating to the Site. For purposes of this Paragraph only, "Performing Settling Defendants" shall include these parties' subsidiaries and parent corporations, predecessors, successors and assigns, but only to the extent that the liability of any such related entity is based on the alleged liability of the individual Performing Settling

Defendant. For purposes of this paragraph only, "Performing Settling Defendants" shall also include these parties' officers, directors, shareholders and employees, but only to the extent that the alleged liability of any such person is based on the alleged liability of the individual Performing Settling Defendant and is the result of conduct within the scope of such person's employment or authority. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA and the State of the payments required by Paragraph 54 of Section XVI (Payments for Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 50.b (Certification of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Performing Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Performing Settling Defendants as defined in this Paragraph and do not extend to any other person.

b. In consideration of the payments that will be made under the terms of this Consent Decree, the United States and the State covenant not to sue or to take administrative action against any Cashout Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA and any analogous State laws relating to the Site, for any Past Response Costs and State Past Response Costs or response actions undertaken to date at the Site by the United States or the State or by any other person, any Work to be undertaken to implement any interim or final remedy for the Site by the United States or the State or any other person, or any Future Response Costs and State Future Response Costs, including but not limited to oversight costs, incurred or to be incurred by the United States, the State or any other person in connection with the Site, it being the Parties' intent to resolve any claim pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA and any analogous State laws relating to the Site the United States or the State now has or may have in the future against any Cashout Settling Defendant subject only to the reservations of Paragraph 87.b. For purposes of this Paragraph only, "Cashout Settling Defendants" shall include these parties' subsidiaries and parent corporations, predecessors, successors and assigns, but only to the extent that the liability of any such related entity is based on the alleged liability of the individual Cashout Settling Defendant. For purposes of this Paragraph only, "Cashout Settling Defendants" shall also include these parties' officers, directors, shareholders and employees, but only to the extent that the alleged liability of such person(s) is based on the alleged liability of the individual Cashout Settling Defendant and as the result of conduct within the scope of such person's employment or authority. These covenants not to sue shall take effect upon the receipt by EPA and the State of the payments required by Paragraph 54.a. of Section XVII (Reimbursement of Response Costs).

84. Plaintiffs' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve, 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 each Performing Settling Defendant:

- a. to perform further response actions relating to the Site, or
- b. to reimburse the United States and the State for additional costs of

response if, prior to Certification of Completion of the Remedial Action:

1. conditions at the Site, previously unknown to EPA, are discovered,  
or

2. information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

85. Plaintiffs' Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve, 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 Performing Settling Defendants:

a. to perform further response actions relating to the Site, or

b. to reimburse the Plaintiffs for additional costs of response if, subsequent to Certification of Completion of the Remedial Action:

1. conditions at the Site, previously unknown to EPA, are discovered,  
or

2. information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

86. For purposes of Paragraph 84, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the Amended ROD was signed and set forth in the administrative record supporting the Amended ROD. For purposes of Paragraph 85, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date Certification of Completion of the Remedial Action was issued and set forth in the administrative record supporting the Amended ROD, the post-Amended ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

87. General reservations of rights.

a. The Plaintiffs reserve, and this Consent Decree is without prejudice to, all rights against Performing Settling Defendants with respect to all matters not expressly included within Plaintiffs' covenant not to sue. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve all rights against Performing Settling Defendants with respect to:

1. claims based on a failure by Performing Settling Defendants to meet a requirement of this Consent Decree applicable to Performing Settling Defendants;
2. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
3. liability based upon the Performing Settling Defendants' ownership or operation of the Site, or upon the Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the Amended ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by the Performing Settling Defendants;
4. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
5. criminal liability;
6. liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and
7. liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Modification of the SOW or Related Work Plans);
8. as to Performing Settling Defendants only, liability for costs that the Plaintiffs will incur related to the Site but are not within the definition of Future Response Costs or Future State Response Costs; and
9. as to Performing Settling Defendants only, liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

b. The Plaintiffs reserve, and this Consent Decree is without prejudice to, all rights against each Cashout Settling Defendant with respect to all matters not expressly included within Plaintiffs' covenant not to sue. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve all rights against Cashout Settling Defendants with respect to:

1. claims based on a failure by any Cashout Settling Defendant to meet a requirement of this Consent Decree applicable to that Cashout Settling Defendant;
2. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;

3. liability based upon the Cashout Settling Defendants' ownership or operation of the Site, or upon the Cashout Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the Amended ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by the Cashout Settling Defendants;

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

5. criminal liability;

6. liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and

7. liability for Contingent Remedial Action as specified in the Amended ROD.

88. Work Takeover

a. In the event EPA determines that Performing Settling Defendants have (i) ceased implementation of any portion of the Work, or (ii) are seriously or repeatedly deficient or 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, EPA may issue a written notice ("Work Takeover Notice") to the Performing Settling Defendants. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Performing Settling Defendants a period of 10 days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 10-day notice period specified in Paragraph 88(a), Performing Settling Defendants have not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portions of the Work as EPA deems necessary ("Work Takeover"). EPA shall notify Performing Settling Defendants in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 88(b).

c. Performing Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute EPA's implementation of a Work Takeover under Paragraph 88(b). However, notwithstanding Performing Settling Defendants' invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 88(b) until the earlier of (i) the date that Performing Settling Defendants remedy, to EPA's satisfaction, the circumstances giving rise to EPA'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) requiring EPA to

terminate such Work Takeover.

d. After commencement and for the duration of any Work Takeover, EPA shall have immediate access to and benefit of any performance guarantee(s) provided pursuant to Section XIII of this Consent Decree, in accordance with the provisions of Paragraph 48 of that Section. If and to the extent that EPA is unable to secure the resources guaranteed under any such performance guarantee(s) and the Performing 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 Paragraph 48, any unreimbursed costs incurred by EPA in performing Work under the Work Takeover shall be considered Future Response Costs that Performing Settling Defendants shall pay pursuant to Section XVI (Payment for Response Costs).

89. Notwithstanding any other provision of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

## XXII. COVENANTS BY SETTLING DEFENDANTS

90. Covenant Not to Sue. Subject to the reservations in Paragraph 91, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States or the State with respect to the Site, past response actions, and Past and Future Response Costs as defined herein or this Consent Decree, including, but not limited to:

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

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

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

Except as provided in Paragraph 93 (Waiver of Claims Against De Micromis Parties), and Paragraph 98 (waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States or the State brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 84, 85, 87(b) - (d) or 85(g) - (k), but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

91. The Settling Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States and the State, subject to the provisions of Chapter 171 of Title

28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of the United States or the State or any employee of the United States or the State while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal or State employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

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

93. a. Settling Defendants agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if the materials contributed by such person to the Site containing hazardous substances did not exceed 110 gallons of liquid materials or 200 pounds of solid materials.

b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

### XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

94. Except as provided in Paragraph 93 (Waiver of Claims Against De Micromis Parties), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Except as provided in Paragraph 93 (Waiver of Claims Against De Micromis Parties), each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

95. The Parties agree, and by entering this Consent Decree this Court finds, that the 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) for matters addressed in this Consent Decree. The "matters addressed" in this settlement are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or the State or any other person with respect to the Site. The "matters addressed" in this settlement do not include those response costs or response actions as to which the United States or the State has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendants coming within the scope of such reservations.

96. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim.

97. The 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 in writing the United States and the State within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States and the State within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

98. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, 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 defenses based upon any contention that the claims raised by the United States or 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 XXI (Covenants Not to Sue by Plaintiffs).

#### XXIV. ACCESS TO INFORMATION

99. Settling Defendants shall provide to EPA and the State, 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 Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

100. Business Confidential and Privileged Documents.

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

b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

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

## XXV. RETENTION OF RECORDS

102. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 51 of Section XIV (Certification of Completion of the Work), each Performing Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site, provided, however, that Settling Defendants who are potentially liable as owners or operators of the Site must retain, in addition, all documents and records that relate to the liability of any other person under CERCLA with respect to the Site. Each Performing Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each Performing Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any

corporate retention policy to the contrary.

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

104. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

## XXVI. NOTICES AND SUBMISSIONS

105. 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 to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the State and the Settling Defendants, respectively.

As to the United States: Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DOJ # 90-11-2-865/1

As to EPA: Director, Superfund Division

U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604

Gwendolyn S. Massenburg  
EPA Project Manager/Coordinator  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard, SR-6J  
Chicago, Illinois 60604

Larry L. Johnson  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard, C-14J  
Chicago, Illinois 60604

As to the State:

Jessica Huxhold Fliss  
Senior Environmental Manager  
IDEM, Federal Programs  
MC 66-31, Room 1101  
100 N. Senate Avenue  
Indianapolis, Indiana 46206-6015

As to the Performing  
Settling Defendant  
Bayer Healthcare LLC

Joel E. Robinson  
Project Coordinator  
Bayer MaterialScience LLC  
100 Bayer Road  
Pittsburgh, PA 15205-9741  
Phone: 412-777-4871  
Fax: 412-777-3063

With copies to:

Christian C. Semonsen  
Kirkland & Ellis LLP  
655 15th Street, N.W.  
Washington D.C. 20005  
Phone: 202-879-5076  
Fax: 202-879-5200

As to Performing  
Settling Defendant Himco

Richard W. Paulen  
Barnes & Thornburg  
Bank One Building, Suite 200  
121 West Franklin Street  
Elkhart, Indiana 46516

As to the Cashout

Jerome I. Maynard, Esq.

Settling Defendants

Dykema Gossett PLLC  
10 South Wacker Drive  
Suite 2300  
Chicago, IL 60606-7509  
Phone (312) 627-2185  
Fax (312) 627-2320  
emailto:jmaynard@dykema.com

With a copy to:

W. C. Blanton  
Blackwell Sanders Peper Martin LLP  
4801 Main Street, Suite 1000  
Kansas City, MO 64112  
Phone (816) 983-8151 (Main Office)  
Fax (816) 983-9151 (fax)  
E-mail:wblanton@blackwellsanders.com

**XXVII. EFFECTIVE DATE**

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

**XXVIII. RETENTION OF JURISDICTION**

107. This Court retains jurisdiction over both the subject matter of this Consent Decree and the 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) hereof.

**XXIX. APPENDICES**

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

- "Appendix A" is the Amended ROD;
- "Appendix B" is the SOW;
- "Appendix C" is the description and/or map of the Site;
- "Appendix D" is the complete list of the Cashout Settling Defendants;
- "Appendix E" is the list of bottled water recipients;
- "Appendix F" is the list of municipal water recipients;
- "Appendix G" is the prototype Performance Guarantee.

**XXX. COMMUNITY RELATIONS**

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

#### XXXI. MODIFICATION

110. a. There shall be no modification to a provision of this Consent Decree directly applicable to the Cashout Settling Defendants without written agreement of all Parties and approval of the Court. Except as provided in subparagraph b., there shall be no other modification of this Consent Decree (excluding the SOW, which is addressed in Paragraphs 14 and 111) without written agreement of the United States, the State, and Performing Settling Defendants. Any such modification that is material shall be subject to approval by the Court.

b. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Performing Settling Defendants. All such modifications shall be made in writing and shall not be considered material modifications.

111. Except as provided in Paragraph 14 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the United States, the State, Settling Defendants, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii). Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii), may be made by written agreement between EPA and the Settling Defendants. Prior to providing approval to any modification, the United States shall provide the State with a reasonable opportunity to review and comment to EPA on the proposed modification.

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

#### XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

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

114. 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 between the Parties.

### XXXIII. SIGNATORIES/SERVICE

115. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice and the representative of the State 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.

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

117. 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. The parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the court expressly declines to enter this Consent Decree.

### XXXIV. FINAL JUDGMENT

118. 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 the 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.

119. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, 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. C. P. 54 and 58.

Himco CERCLA RD/RA Consent Decree

SO ORDERED ON November 28, 2007.

s/ Theresa L. Springmann  
THERESA L. SPRINGMANN  
UNITED STATES DISTRICT COURT