

# **FRESNO SANITARY LANDFILL**

## **CONSENT DECREE**

# FRESNO SANITARY LANDFILL CONSENT DECREE DEADLINES

| <u>Section pp</u> | <u>Description</u>                               | <u>Deadline</u>                                                                |
|-------------------|--------------------------------------------------|--------------------------------------------------------------------------------|
| 12                | Record Consent Decree                            | 15 Days After Entry of CD                                                      |
| 12                | Record Notice of Obligation                      | 15 Days After Entry of CD                                                      |
| 13                | Notify EPA of Supervising Contractor             | 10 Days After Lodging <del>CD</del> <i>Council Action to select contractor</i> |
| 15                | Submit Health Safety & Workplan for OUI          | 8 Weeks After Lodging CD                                                       |
| 16                | Submit RD/RA for OU2                             | 16 Weeks After Lodging CD                                                      |
| 25                | Notice of Access Required                        | 45 Days After Lodging CD                                                       |
| 25                | Monthly Progress Reports of Activities           | 10 <sup>th</sup> Day of Month After Lodging CD                                 |
| <i>DM-30</i>      | Notify EPA of Project Coordinators (PC)          | 20 Days After Lodging CD                                                       |
| <i>DM-2</i>       | Alternate Project Coordinators (APC)             |                                                                                |
| 32                | Certify Financial Ability                        | 30 Days After Entry of CD                                                      |
| 38                | Reimbursement of \$454,599.15                    | 30 Days After Effective Date of CD                                             |
| OU1-12            | Draft RAWP                                       | 8 Weeks After Entry of CD                                                      |
|                   | Pre-final RAWP                                   | 8 Weeks After EPA Approval of Draft                                            |
|                   | Final RAWP                                       | 6 Weeks After EPA Approval of Pre-final                                        |
| OU2-12            | Draft RD/RA OU2 Report                           | 16 Weeks After Entry of CD                                                     |
| OU2-12            | Prefinal RD/RA OU2 Report                        | 6 Weeks After EPA Approval                                                     |
|                   | Final RD/RA Report                               | 3 Weeks After EPA Approval                                                     |
|                   | Pre-final Design - Phase I                       | 13 Weeks After EPA Approval                                                    |
|                   | Final design - Phase I                           | 6 Weeks After EPA Approval                                                     |
| 20                | Provide Periodic Review of Site                  | Every 5 Years                                                                  |
| 23                | Sample Collection                                | 28 Day Notice                                                                  |
| 25                | Monthly Progress Reports During O & M            | Annually of OU1<br>Semiannually for OU2                                        |
| 26                | Changes to Schedule                              | 7 Day Prior Notice                                                             |
| 26                | Occurrence of Hazardous Event - Oral Notice      | Notify Orally Within 24 Hours                                                  |
| 27                | Occurrence of Hazardous Event - Written Notice   | 20 Days After Event                                                            |
| 27                | Occurrence of Hazardous Event - Conclusion       | 30 Days After End of Event                                                     |
| 29                | Correct Deficiencies in Report, or Approval Item | 3 Weeks After Notice                                                           |
| 30                | Replacement of PC or APC                         | 5 Working Days Notice                                                          |
| 33                | Pre-certification Inspection                     | 90 Days After RA Completed                                                     |
| 34                | Pre-certification Written Report                 | 30 Days After Pre-certification Inspection                                     |
| 37                | Release of Hazardous Material                    | Notify EPA Immediately                                                         |
| 39                | Contest EPA Bill - Writing                       | 30 Days After Receipt                                                          |
| 39                | Pay all Future Uncontested Response Costs        | 30 Days After Receipt of Bill                                                  |
| 39                | EPA Wins Dispute - City to Pay Sum               | 5 Days After Resolution of Dispute                                             |
| 42                | Self-insurance Certification                     | 2 Weeks Prior to Commencing Work                                               |
| 42                | Self-insurance Annual Certification              | Annually                                                                       |
| 43                | Project Delays - Orally                          | 48 Hours After Event - Notify EPA Orally                                       |
| 43                | Project Delays - Writing                         | 5 Days Thereafter                                                              |
| 45                | Invoke Dispute Resolution Due to Delays          | 15 Days After Receipt of EPA Notice                                            |

| <u>ction pp</u> | <u>Description</u>                     | <u>Deadline</u>                                  |
|-----------------|----------------------------------------|--------------------------------------------------|
| 46              | Dispute Resolution - Moderator         | 5 Days After Filing Notice                       |
| 46              | EPA Position Binding in Dispute-Unless | 10 Days - City Invokes Formal Dispute Resolution |
| 46              | Statement of Position - EPA            | 2 Weeks-Serve                                    |
| 47              | Statement of Position - City           | 5 Days Reply                                     |
| 49              | City Protests to Court                 | 10 Days of Receipt of Decision                   |
| 53              | Penalties Payable - Bill               | 30 Days After Receipt of Demand                  |
| 53              | Dispute Resolved by Agreement          | 15 Days After Receipt of EPA's Order             |
| 53              | Appealed to Court-Denied               | 60 Days After Receipt of Order                   |
| 63              | Retention of Records                   | For 10 Years After Notification                  |
| 68              | CD Lodged With Court                   | 30 Days for Public Notice                        |

#### OU1/2 Deliverables

|        |                                              |                                            |
|--------|----------------------------------------------|--------------------------------------------|
| OU2-10 | Construction: Draft Construction             | 21 Months After Final RAWP Approval        |
|        | Complete report                              | 6 Weeks After Final RAWP Approval          |
|        | Add to Construction Schedule for Park Design | 3-9 Months Upon EPA Approval               |
|        | Final Construction Report                    | 6 Weeks After Approval of Draft Activities |
|        | Compliance Testing Periods - 2 Each          | 12 Months After Construction Activities    |
|        | Plume migration to Residential Well          | 5 Day Written Notice to EPA                |
|        | Construction: Completion Report              | 12 Months After EPA Approval               |
|        | Phase I Evaluation Report                    | 12 Months After Construction               |
|        | Prefinal Design, Phase II                    | 10 Weeks After EPA Approval                |
|        | Final Design, Phase III                      | 6 Weeks After EPA Approval                 |
|        | Construction Activities, Phase III           | 6 Months After EPA Approval                |

MLB/ems  
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06/15/98

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**ORIGINAL  
FILED**

FEB 25 1998

**CLERK, U.S. DIST. COURT  
Eastern District of California**

7  
8 PAUL SEAVE  
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10 Eastern District of California  
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16 Attorneys for the United States

17  
18 IN THE UNITED STATES DISTRICT COURT  
19 FOR THE EASTERN DISTRICT OF CALIFORNIA  
20

21  
22 UNITED STATES OF AMERICA,  
23  
24 Plaintiff,  
25  
26 v.  
27  
28 CITY OF FRESNO,  
29  
30 Defendant.

CIV F- 98 - 5195 REC SMS

CIVIL ACTION NO.

COMPLAINT

31  
32 The United States of America, by authority of the  
33 Attorney General, and at the request of the Administrator of the  
34 United States Environmental Protection Agency ("EPA"), for its  
35 complaint against the defendants, states as follows:

36  
37 PRELIMINARY STATEMENT

38  
39 1. This is a civil action under Sections 104, 106 and  
40 107 of the Comprehensive Environmental Response, Compensation,

41  
42 COMPLAINT



1 for injunctive relief and the recovery of response costs incurred  
2 by the United States in response to the release or threat of  
3 release of hazardous substances at the Fresno Sanitary Landfill  
4 Superfund Site located in Fresno County, California ("the Site").

5 JURISDICTION AND VENUE

6 2. This Court has jurisdiction over this matter  
7 pursuant to 28 U.S.C. § 1345 and 42 U.S.C. §§ 9604, 9606, 9607(a)  
8 and 9613(b).

9 3. Venue is proper in this district pursuant to 28  
10 U.S.C. § 1391(b) and (c) and 42 U.S.C. § 9613(b).

11 DEFENDANT

12 4. Defendant City of Fresno ("Fresno") is a  
13 California municipality located in this Judicial District.

14 GENERAL ALLEGATIONS

15 5. The Site occupies 145 acres that are located four  
16 miles southwest of Fresno and is bounded on the north by Jensen  
17 Avenue, on the east by West Avenue, on the south by North Avenue  
18 and on the west by agricultural fields. The landfill stands  
19 approximately 60 feet above the surrounding flat grade and  
20 extends approximately 35 feet below the surrounding grade.

21 6. The Site was operated by the City of Fresno as a  
22 sanitary landfill, accepting municipal and industrial waste  
23 averaging 16,500 tons per month from 1937 to 1987. The  
24 approximate total waste at the Site is 4.7 million tons.

25 7. EPA listed the Site on the National Priorities List  
26 ("NPL"), established pursuant to Section 105 of CERCLA, 43 U.S.C.  
27 § 9605, in 1990. The City of Fresno performed comprehensive  
28 studies, known as Remedial Investigation and Feasibility Studies

1 ("RI/FS"), of two operable units ("OU") for the Site: OU-1 which is  
2 known as the Source Control Operable Unit; and OU-2 which is  
3 known as the Groundwater Restoration Unit. These studies have  
4 been conducted under an administrative consent order with EPA,  
5 issued pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604,  
6 entered on November 21, 1990 and amended on December 19, 1993.

7 8. The RI/FS for OU-1 was completed by Fresno in  
8 March, 1993 and a public comment period was held from March 24,  
9 1993 to May 23, 1993. A Record of Decision ("ROD") for OU-1 was  
10 signed by EPA on September 30, 1993. The ROD for OU-1 documented  
11 the selected remedy: landfill gas extraction and treatment;  
12 landfill cover; and stormwater management.

13 9. A separate Feasibility Study ("FS") for OU-2 was  
14 completed by Fresno in July, 1996 and a public comment period was  
15 held from July 24, 1996 to August 23, 1996. A Record of Decision  
16 ("ROD") for OU-1 was signed by EPA on September 30, 1996. The  
17 ROD for OU-1 documented the selected remedy: phased control of  
18 groundwater by containment of contaminated water under the  
19 landfill in phase one, and prevention of the spread of the plume  
20 of contamination that has ~~previously~~ spread beyond the landfill—  
21 in phase two. Both phases will involve pumping and treating the  
22 groundwater.

23 10. Site investigations have established the presence  
24 of hazardous substances at the Site. These include landfill gas  
25 in the soil at the Site, containing hazardous substances,  
26 including vinyl chloride, PCE, TCE, and Freon. Hazardous  
27 substances in the groundwater include vinyl chloride, PCE, TCE  
28 and trans 1,2 DCE.

1           11. EPA has incurred at least \$909198.00 in response  
2 costs related to the Site. These costs have been incurred in a  
3 manner not inconsistent with the National Contingency Plan, 40  
4 C.F.R. Part 300.

5                               FIRST CLAIM FOR RELIEF

6                               (INJUNCTION)

7           12. The United States incorporates by reference the  
8 allegations of paragraphs 1-11, above, as if fully set forth  
9 below.

10           13. The Site is a "facility" within the meaning of  
11 Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

12           14. The defendant is a "person" within the meaning of  
13 Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

14           15. Fresno is a present owner and operator of the Site  
15 within the meaning of Section 107 (a)(1) of CERCLA, 42 U.S.C. §  
16 9607(a)(1). Fresno owned and operated the Site at the time of  
17 the disposal of hazardous substances with the meaning of Section  
18 101(29) of CERCLA, 42 U.S.C. § 9601(29).

19           16. At all times relevant to this action, there were,  
20 and continue to be, ~~releases~~ and threatened releases of hazardous  
21 substances into the environment at the Site.

22           17. The Regional Administrator of EPA Region IX acting  
23 pursuant to her delegated authority, determined that there is or  
24 may be an imminent and substantial endangerment to the public  
25 health or welfare or the environment because of the release or  
26 threatened release of hazardous substances at the Site.

27           18. Pursuant to Section 106(a) of CERCLA, 42 U.S.C. §  
28 9606(a), the United States is entitled to such relief from the

1 defendants as may be necessary to abate the danger or threat to  
2 the public interest posed by the release or threatened release of  
3 hazardous substances at the Site.

4  
5  
6 **SECOND CLAIM FOR RELIEF**

7 **(RESPONSE COSTS)**

8 19. The United States incorporates by reference  
9 paragraphs 1 through 18, above, as if fully set forth below.

10 20. The United States incurred costs authorized by  
11 Section 104 of CERCLA, 42 U.S.C. § 9604, and as defined by  
12 Sections 101(23) and (25) of CERCLA, 42 U.S.C. § 9601(23) and  
13 (25), as a result of the release or threat of release of  
14 hazardous substances from the Site.

15 21. The United States' actions at the Site were  
16 "response" actions as defined by Section 101(25) of CERCLA, 42  
17 U.S.C. § 9601(25).

18 22. The costs incurred by the United States in  
19 conducting the response actions at the Site were incurred in a  
20 manner not inconsistent with the National Contingency Plan  
21 promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605.

22 23. Defendant is liable to the United States for the  
23 payment of all costs incurred by the United States as a result of  
24 the response actions taken at the Site pursuant to Section 107(a)  
25 of CERCLA, 42 U.S.C. § 9607(a).

26 **PRAYER FOR RELIEF**

27 WHEREFORE: the United States of America requests that  
28 the court enter a judgment against the defendant as follows:

1           A.    Enter an order granting to plaintiff appropriate  
2 injunctive relief;

3           B.    Order defendant to pay all response costs incurred  
4 by the United States in response to the release and threat of  
5 release of hazardous substances at the Site;

6           C.    Enter a declaratory judgment pursuant to Section  
7 113 of CERCLA, 42 U.S.C. § 9613, against the defendant on  
8 liability for response costs that will be binding on any  
9 subsequent action to recover further response costs or damages;  
10 and

11           D.    Grant such other and further relief as the Court  
12 deems just and proper.

13                               Respectfully submitted,

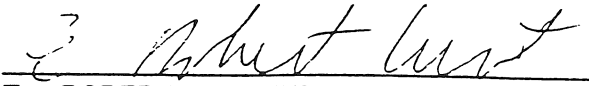
14                               *L. J. Schiffer*

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Eastern District of California  
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650 Capitol Mall  
Room 2546  
Sacramento, California 95814

Jack L. Wagner  
Clerk

REPLY TO:  
Divisional Office  
1130 "O" Street, Room 5000  
Fresno, California 93721  
209/498-7254

NOTICE

CASE NUMBER:

CIV.F- 98 - 5195 REC SMS

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TO COUNSEL OF RECORD OR PRO PER LITIGANT:

Please review the following documents:

1. Notice of Availability of Magistrate Judge;
2. Consent to Exercise of Jurisdiction by a U.S. Magistrate Judge and Order of Reference;
3. Notice of Availability of Voluntary Early Neutral Evaluation and Local Rule 16-271;
4. Stipulation and Order to Elect Early Neutral Evaluation;
5. Law and Motion Calendar Schedule for all judges.

NOTE: The plaintiff, or the defendant in removed actions, shall serve a copy of this packet upon all parties in an attachment to the Summons and Complaint.

NOTICE OF AVAILABILITY OF A MAGISTRATE JUDGE  
TO EXERCISE JURISDICTION AND APPEAL OPTION

You are hereby notified that in accordance with 28 U.S.C. 636(c), F.R.Civ.P. 73 and Local Rule 73-305, the U.S. Magistrate Judges sitting in Fresno are available to exercise the court's jurisdiction and to conduct any or all proceedings in this case including a jury or nonjury trial, and entry of a final judgement. Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent.

~~You may~~, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned.

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States Court of Appeals for the Ninth Circuit or, where appropriate, for the Federal Circuit in the same manner as an appeal from any other judgment of a district court. Alternatively, upon consent of all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the appropriate United States circuit court of appeals only by way of petition for leave to appeal.

A copy of the Form for "Consent to Exercise of Jurisdiction by a United States Magistrate Judge and Order of Reference" is attached hereto and additional forms are available from the clerk of court.

The district judges sitting in Fresno encourage the parties to consider the option of consenting to the exercise of the court's jurisdiction by a magistrate judge. The civil caseload of both district judges sitting in Fresno is currently well in excess of the national average and is increasing. Additionally the criminal caseload has and continues to increase not only in number of cases but also in complexity and number of trials. These factors have impacted the court's ability to continue to provide and hold to firm trial dates and to promptly rule on submitted matters. The magistrate judges' dockets include fewer civil cases than the district judges' and are not significantly impacted by the criminal caseload. Therefore the magistrate judges are generally able to provide firm trial dates for civil cases on their docket.

The magistrate judges in Fresno have, for the past several years, exercised this court's jurisdiction by consent in a significant number of cases and have presided over a significant percentage of the civil jury trials held in Fresno. Both are former California Superior Court Judges.



# UNITED STATES DISTRICT COURT

District of \_\_\_\_\_

Plaintiff

v.

Defendant

CONSENT TO EXERCISE OF JURISDICTION  
BY A UNITED STATES MAGISTRATE JUDGE  
AND ORDER OF REFERENCE

Case Number: \_\_\_\_\_

## NOTICE OF AVAILABILITY OF A MAGISTRATE JUDGE TO EXERCISE OF JURISDICTION AND APPEAL

In accordance with the provisions of Title 28, U.S.C. 636(c), and Fed.R.Civ.P. 73, you are hereby notified that a United States magistrate judge of this district court is available to exercise the court's jurisdiction and to conduct any or all proceedings in this case including a jury or nonjury trial, and entry of a final judgment. Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent.

You may, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned.

An appeal from a judgment entered by a magistrate judge shall be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court.

Copies of the Form for the "Consent to Exercise of Jurisdiction by a United States Magistrate Judge and Order of Reference" are available from the clerk of the court.

## CONSENT TO EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. 636(c) and Fed.R.Civ.P. 73, the parties in this case hereby voluntarily consent to have a United States magistrate judge conduct any and all further proceedings in the case, including the trial, and order the entry of a final judgment.

| <u>Signatures</u> | <u>Party Represented</u> | <u>Date</u> |
|-------------------|--------------------------|-------------|
| _____             | _____                    | _____       |
| _____             | _____                    | _____       |
| _____             | _____                    | _____       |
| _____             | _____                    | _____       |

Any appeal shall be taken to the United States court of appeals for this circuit, in accordance with 28 U.S.C. 636(c) and Fed.R.Civ.P. 73(c).

## ORDER OF REFERENCE

IT IS HEREBY ORDERED that this case be referred to \_\_\_\_\_  
United States Magistrate Judge, for all further proceedings and the entry of judgment in accordance with 28 U.S.C. 636(c), Fed.R.Civ.P. 73 and the foregoing consent of the parties.

\_\_\_\_\_  
Date

\_\_\_\_\_  
United States District Judge

NOTE: RETURN THIS FORM TO THE CLERK OF THE COURT ONLY IF ALL PARTIES HAVE CONSENTED ON THIS FORM TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE.

UNITED STATES DISTRICT COURT  
Eastern District of California  
Office of the Clerk  
650 Capitol Mall  
Sacramento, California 95814

Jack L. Wagner  
Clerk

REPLY TO:  
Divisional Office  
1130 "O" Street  
Fresno, California 93721

NOTICE OF AVAILABILITY OF VOLUNTARY

EARLY NEUTRAL EVALUATION

PLEASE TAKE NOTICE that pursuant to Local Rule 16-271, all civil actions are eligible for referral to early neutral evaluation except for the following: (i) prisoner petitions and actions, (ii) actions in which one of the parties is appearing pro se, (iii) voting rights actions, (iv) social security actions, (v) deportation actions, (vi) Freedom of Information Act actions, and (vii) actions involving the constitutionality of federal, state or local statutes or ordinances.

It will be the responsibility of plaintiff to provide all other parties with copies of this notice at the time service is effected or, for parties already served, no more than ten (10) days after plaintiff receives this notice from the Court. After the filing of the original complaint or a removal action, any party who causes a new party to be joined in the action shall promptly serve a copy of this notice on the new party.

Parties may elect early neutral evaluation by filing a stipulation with the Court indicating that all parties to the action agree to submit the action to early neutral evaluation pursuant to Local Rule 16-271. Actions may not be assigned to early neutral evaluation over the objection of a party. At the time of filing, a copy of the stipulation shall be provided to the ENE Program Administrator designated below:

Judge Coyle:

Dorothy Gibson  
1130 O Street,  
Room 5000  
Fresno, CA 93721  
209/498-7258

Judge Wanger:

Greg Lucas  
1130 O Street,  
Room 5000  
Fresno, CA 93721  
209/498-7256

Judge Ishii:

Harold Nazaroff  
1130 O Street,  
Room 5000  
Fresno, CA 93721  
209/498-7287

## RULE 16-271

### VOLUNTARY EARLY NEUTRAL EVALUATION

(a) **Scope and Purpose of Rule.** In recognition of the economic burdens and delay in the resolution of disputes that can be imposed by full, formal litigation, this Rule governs the voluntary referral of certain actions to early neutral evaluation at the election of the parties. As used in this Rule only, the term "Clerk" means the Clerk of the Court or any other person designated by the Clerk to engage in the administration of activities under this Rule.

(b) **Actions Subject to this Rule.** All civil actions are eligible for referral to early neutral evaluation under this Rule except for the following: (i) prisoner petitions and actions, (ii) actions in which one of the parties is appearing pro se, (iii) voting rights actions, (iv) social security actions, (v) deportation actions, (vi) Freedom of Information Act actions, and (vii) actions involving the constitutionality of federal, state or local statutes or ordinances.

(c) **Notice of Availability.** The Clerk shall provide a notice of the availability of early neutral evaluation with a citation to this Rule to all plaintiffs upon the filing of the complaint or a removal action. The notice will order the plaintiff to provide all other parties with copies of the notice at the time service is effected or, for parties already served, no more than ten (10) days after plaintiff receives the notice from the Court. After the filing of the original complaint or a removal action, any party who causes a new party to be joined in the action shall promptly serve a copy of the notice on the new party.

(d) **Referral to Early Neutral Evaluation.**

(1) **Election by the Parties.** Parties may elect early neutral evaluation by filing with the Court a stipulation indicating that all parties to the action agree to submit the action to early neutral evaluation pursuant to this Rule. A copy of the stipulation shall be provided to the Clerk at the time of filing. See L.R. 83-141.

(2) **Authority of Assigned Judge and Magistrate Judge.** As part of a status or scheduling conference or otherwise, the assigned Judge or Magistrate Judge may inform the parties of the availability of early neutral evaluation. See L.R. 16-240(b)(16). Actions may not be assigned to early neutral evaluation over the objection of a party. Nevertheless, when complex actions including counterclaims, cross-actions or third-party actions are pending, the Court may assign discrete sub-parts of the complex action if all parties to the sub-part elect early neutral evaluation and the party objecting to early neutral evaluation is not a party to the sub-part of the complaint, counterclaim, cross-action or third-party action to be assigned to early neutral evaluation.

**(e) Selection of Evaluator.**

**(1) Selection by the Parties or Randomly by the Clerk.** Upon the filing of a stipulation for or assignment to early neutral evaluation, the assigned Judge or Magistrate Judge or the Clerk may assign an evaluator, or the Clerk may supply to the parties a list of not more than three (3) potential evaluators, from which list the parties shall agree upon one. If the identity of the evaluator is by selection of the parties, counsel for the party first asserting jurisdiction in the Court shall report the selection, in writing, to the Clerk within ten (10) days following service of the list by the Clerk. If the parties are unable to agree upon an evaluator or fail to communicate their agreement to the Clerk, the Clerk may designate an evaluator drawn randomly from the panel of evaluators to be the evaluator assigned to the action and shall notify the parties and the evaluator of that designation. If the evaluator so selected is unable or unwilling to serve, ~~the Clerk shall~~ select and notify another evaluator. When an evaluator has agreed to serve, the Clerk shall send notice to the evaluator and the parties of the selection.

**(2) Neutrality of the Evaluator.** No person may serve as an evaluator in any action in which any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist. If a circumstance specified in 28 U.S.C. § 455 exists, including the fact that the evaluator's law firm represents or has represented one of the parties or that one of the lawyers who would appear before the evaluator is involved in litigation in another action with the evaluator, the evaluator shall promptly disclose the circumstance to all parties in writing. A party who believes that an assigned evaluator has a conflict of interest shall bring the concern to the attention of the Clerk within ten (10) days after learning of the conflict or shall be deemed to have waived any objection based on that conflict.

**(3) Maintenance of the Panel of Evaluators.** The Clerk shall maintain a panel of evaluators, initially consisting of the evaluators who were selected to participate as evaluators in the early neutral evaluation pilot project. Evaluators may request that their names be dropped from the panel for specified periods of time or permanently. Additional names may be added to the panel by the Chief Judge, with the consent of the individuals to be named. The panel shall consist of experienced civil litigators who are familiar with practice in federal court.

**(f) Evaluation Proceedings.** Once an evaluator has been selected, the assigned Judge or Magistrate Judge, or the Clerk, or the evaluator, shall fix the date of the early neutral evaluation session after conferring with the parties. The session shall be held as soon as reasonably possible but in no event more than ninety (90) days after the evaluator is selected, unless otherwise ordered by the Court.

**(1) Written Evaluation Statements.** At least seven (7) days prior to the evaluation session, each party shall submit to the evaluator and serve on all other parties a written evaluation statement not to exceed ten (10) pages. Statements shall not be filed

(ii) assist the parties to identify areas of agreement and, when appropriate, to enter into stipulations,

(iii) assess and assist the parties in assessing the strengths and weaknesses of their contentions and evidence, their chance of success on important issues, the consequences of an unfavorable verdict on each important issue, the number of witnesses to be deposed regarding that issue and the costs and fees associated with proving that issue,

(iv) determine the settlement offers that parties are willing to make and whether offers may be communicated to the opposing parties,

(v) estimate when feasible the likelihood of liability and the dollar range of damages or other relief, and

(vi) undertake such other efforts at resolution of the action, of issues in the action, or of procedural steps to be taken in the action as may be appropriate.

**(6) Follow-Up Sessions.** If the action is not resolved at the initial session, the evaluator shall determine whether to schedule any follow-up sessions or procedures.

**(7) Report to the Court.** Within thirty (30) days following the early neutral evaluation session, the evaluator shall advise the Clerk by letter whether the action has settled and, if not, whether any follow-up sessions or procedures remain to be completed. The evaluator shall not report any of the substantive matters discussed in the evaluation nor the evaluator's substantive views of the merits of any party's position.

**(g) Confidentiality.** All written and oral communications made during any early neutral evaluation session shall be treated as absolutely confidential by the Court and the evaluator. The Court extends to all such communications all the protections federal courts and Federal Rule of Evidence 408 give to communications made in settlement negotiations or to offers of compromise. In addition, no communication made during any session may be disclosed by the parties, their counsel or the evaluator or used for any purpose (including impeachment or to prove bias or prejudice of a witness) in any pending or future proceeding in this Court. The privileged and confidential status afforded to communications made during any session is extended to include the evaluator's comments, assessments, evaluations and recommendations as to development of the action, discovery or motions.

**(h) Scope and Limitations on Powers of Evaluators.** Evaluators have authority to structure and conduct evaluation sessions and to fix their time and place. Evaluators shall promptly report violations of the requirements of this Rule, including failure to submit timely statements or to comply with attendance requirements, to the Magistrate Judge assigned to the action. Evaluators have no authority to order parties or counsel to take

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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

\_\_\_\_\_, )  
Plaintiff(s), )  
vs. )  
\_\_\_\_\_, )  
Defendant(s). )

No. CIV-F-\_\_\_\_\_

STIPULATION AND ORDER  
TO ELECT REFERRAL OF  
ACTION TO EARLY NEUTRAL  
EVALUATION PURSUANT TO  
LOCAL RULE 16-271

Pursuant to Local Rule 16-271, the parties hereby agree to  
submit the above-entitled action to early neutral evaluation.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Attorney for Plaintiff(s)

\_\_\_\_\_  
Attorney for Defendant(s)

IT IS SO ORDERED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
U.S. DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA AT FRESNO  
1130 O Street, Room 5000  
Fresno, CA 93721  
209/498-7483

**LAW AND MOTION CALENDAR SCHEDULE\***

Effective January 5, 1998

|                                                                                                                                                                                 |                                                                                                                                                                                                                                             |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ROBERT E. COYLE (REC)<br>Senior U.S. District Judge<br>Courtroom One/Fifth Floor                                                                                                | Clerk: Dorothy Gibson - 209/498-7258 Fax: 209/494-3916<br>Civil Motions: Mondays/1:30 p.m.<br>Criminal Motions: Mondays/10:00 a.m.<br>(All Motions heard on Tuesday when Monday is a holiday)                                               |
| OLIVER W. WANGER (OWW)<br>U.S. District Judge<br>Courtroom Two/Fifth Floor                                                                                                      | Clerk: Greg Lucas - 209/498-7256 Fax: 209/494-3912<br>Civil Motions: Mondays/10:00 a.m.<br>Criminal Motions: Mondays/1:30 p.m.<br>(Criminal Motions heard on Tuesday,<br>Civil Motions heard the following Monday when Monday is a holiday) |
| ANTHONY W. ISHII (AWI)<br>U.S. District Judge<br>Courtroom Three/Fifth Floor                                                                                                    | Clerk: Harold Nazaroff - 209/498-7287 Fax: 209/494-3911<br>Civil Motions: Mondays/1:30 p.m.<br>Criminal Motions: Mondays/9:00 a.m.<br>(All Motions heard on Tuesday when Monday is a holiday)                                               |
| M.D. CROCKER (MDC)<br>Senior U.S. District Judge<br>Courtroom One/Fifth Floor                                                                                                   | Clerk: Linda Lucas - 209/498-7491 Fax: 209/494-3914<br>Civil & Criminal Motions: Mondays/9:00 a.m.<br>(All Motions heard the following Monday when Monday is a holiday)                                                                     |
| DENNIS L. BECK (DLB)<br>U.S. Magistrate Judge<br>Courtroom Five/Third Floor                                                                                                     | Clerk: Dyana Dailey - 209/498-7374 Fax: 209/494-3919<br>Civil Motions: Mondays/9:00 a.m.<br>(All Motions heard on Tuesday when Monday is a holiday)                                                                                         |
| SANDRA M. SNYDER (SMS)<br>U.S. Magistrate Judge<br>Courtroom Four/Third Floor                                                                                                   | Clerk: Harriet Herman - 209/498-7252 Fax: 209/494-3920<br>Civil Motions: Mondays/10:00 a.m.<br>(All Motions heard on Tuesday when Monday is a holiday)                                                                                      |
| TO RESERVE A SPECIFIC HEARING DATE OR TO SCHEDULE PROCEEDINGS NOT LISTED ABOVE, CONTACT THE JUDGE'S CLERK. FOR GENERAL INFORMATION, CONTACT THE CLERK'S OFFICE AT 209/498-7483. |                                                                                                                                                                                                                                             |

**\*Unless otherwise set by the assigned Judge or Magistrate Judge**

FILED  
FEB 25 10 21 AM '98  
CLERK  
EAST  
BY \_\_\_\_\_

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CIV F- 98 - 5195 REC SMS  
No. \_\_\_\_\_

USA

Plaintiff(s),

v.

City of Fresno

Defendant(s).

ORDER SETTING MANDATORY  
SCHEDULING CONFERENCE

DATE: MAY 27, 1998

TIME: 9:15 AM

CTRM: #4 (3rd Floor)

SANDRA M. SNYDER  
U.S. MAGISTRATE JUDGE

Rule 16, F.R.Civ.P., requires the Court to enter a Scheduling Conference Order within 120 days of the date of the Complaint being served upon the defendant. Counsel are referred to F.R.Civ.P., Rule 4(a) regarding the requirement of timely service of the complaint. Therefore, it is ordered that you appear for a formal Scheduling Conference (formerly called Status Conference) before the Assigned Magistrate Judge at the United States Courthouse, 1130 "O" Street, Fresno, California, 93721.

Because of the mandates of Rule 16, *supra*, this Order may be served upon counsel for the plaintiff(s) before appearances of defendant(s) are due. It is the obligation of counsel for the plaintiff(s) to serve a copy of this Order on the defendant(s), or, if identified, on their counsel, promptly upon receipt of this



1 Order, and to file an appropriate proof of such service with the  
2 Court, in compliance with Rule 5-135(a) of the Local Rules of  
3 Practice for the Eastern District of California.

4 Attendance at the Scheduling Conference is *mandatory* upon each  
5 party not represented by counsel or, alternatively, by retained  
6 counsel. Only counsel who are thoroughly familiar with the facts  
7 and law of the instant case, and who have full authority to bind  
8 his or her client, shall appear. Trial counsel should participate  
9 in this Scheduling Conference whenever possible. It may be  
10 necessary for counsel to spend as much as 45 minutes in this  
11 Conference.

12 A Joint Scheduling Report, (formerly known as a Joint Status  
13 Report), carefully prepared and executed by all counsel, shall be  
14 filed with the Clerk of the Court, in full compliance with the  
15 requirements as set forth in Exhibit "A" attached hereto, one (1)  
16 full week prior to the Scheduling Conference, and shall be  
17 accompanied with an additional copy of the Joint Scheduling Report,  
18 on a 3½" computer disc, formatted for WordPerfect 6.1 preferably.  
19 The computer disc will not be returned unless the parties so  
20 request, and a self-addressed stamped mailing container or envelope  
21 is provided.

22 For reference purposes, the Court requires that counsels'  
23 Joint Scheduling Report indicate the date, time, and courtroom of  
24 the Scheduling Conference opposite the caption on the first page of  
25 the Report.

26 Among other things, counsel will be expected to discuss the  
27 possibility of settlement. Counsel are to thoroughly discuss

1 settlement with each other before undertaking the preparation of  
2 the Joint Scheduling Report and engaging in extensive discovery.  
3 However, even if settlement negotiations are progressing, counsel  
4 are expected to comply with the requirements of this Order unless  
5 otherwise excused by the Court. If the case is settled, please  
6 promptly inform the Court, and counsels' presence, as well as the  
7 Joint Scheduling Report, will not be required.

8 Counsel, whose office is more than fifty (50) miles from the  
9 Courthouse, may request that their attendance be by telephonic  
10 conference. If two or more parties wish to appear telephonically,  
11 counsel shall decide which will be responsible for making prior  
12 arrangements for the conference call with the AT&T operator (if  
13 counsel do not have conference call capabilities on their telephone  
14 systems), and shall initiate the call at the above-designated time.  
15 After all parties are on the line, the call should then be placed  
16 to Judge Snyder's chambers at (209) 498-7325. Additionally,  
17 counsel are directed to indicate on the face page of their Joint  
18 Scheduling Report that the conference will be telephonic.

19  
20 UNITED STATES MAGISTRATE JUDGE

21 SANDRA M. SNYDER  
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## EXHIBIT "A"

At least twenty (20) days prior to the Mandatory Scheduling Conference, the actual trial counsel for all parties shall conduct and conclude a conference at a time and place arranged by counsel for the plaintiff(s). This conference shall preferably be a personal conference between counsel but, due to the distances involved in this District, a telephonic conference call involving all counsel is permissible. The Joint Scheduling Report shall respond to the following items by corresponding numbered paragraphs:

1. Summary of the factual and legal contentions set forth in the pleadings of each party, including the relief sought by any party presently before the Court.
2. Any proposed amendment to the pleadings presently on file shall be filed by its proponent contemporaneously with the Scheduling Conference Report. If the matter cannot be resolved at the Scheduling Conference, the matter will be set as a Motion to Amend in accordance with the Rules of Practice of the Eastern District of California.
3. A summary detailing the uncontested and contested facts.
4. A summary of the legal issues as to which there is no dispute, i.e., jurisdiction, venue, applicable federal or state law, etc., as well as a summary of the disputed legal issues.
5. The status of all matters which are presently set before the Court, i.e., hearing all motions, etc.
6. A complete and detailed discovery plan, including a firm cut-off date for discovery, as outlined in the Federal Rules of Civil Procedure, Rule 26(f)(2), and a proposed date for disclosure of expert witnesses.
7. Dates agreed to by all counsel for:
  - (a) Filing pre-trial motions, with the understanding that motions will not be entertained after the agreed upon date. (No later than 45 days prior to the proposed Pre-Trial Conference date.)
  - (b) Pre-Trial Conference date.
  - (c) Trial date.

All of these dates should be considered firm dates. Dates should be set to allow the Court to decide any matters under submission before the Pre-Trial Conference is set.
8. At the conference referred to above, counsel are encouraged to discuss settlement, and the Court will expect a statement in the Joint Scheduling Report as to the possibility of settlement. Counsel shall indicate whether they feel a settlement conference is desired, and when it should occur, i.e., before further discovery, after discovery, after pre-trial motions, etc.
9. A statement as to whether the case is a jury or non-jury case.
10. An estimate of the number of trial days required. When counsel cannot agree, each party shall give his or her best estimate.
11. Whether either party requests bifurcation of trial or has any other suggestion for shortening trial. It should be noted that all federal tort claim cases are bifurcated as a matter of course.
12. Whether this matter is related to any matter pending in this court or any other court, including any bankruptcy court.
13. Joint Scheduling Reports are to be submitted with an additional copy, on a 3 1/2" computer disc, formatted for WordPerfect 6.1 preferably.

**SHOULD COUNSEL FAIL TO APPEAR AT THE MANDATORY SCHEDULING CONFERENCE, OR FAIL TO COMPLY WITH THE DIRECTIONS AS SET FORTH ABOVE, AN EX PARTE HEARING MAY BE HELD AND JUDGMENT OF DISMISSAL, DEFAULT, OR OTHER APPROPRIATE JUDGMENT MAY BE ENTERED, OR SANCTIONS, INCLUDING CONTEMPT OF COURT, MAY BE IMPOSED AND/OR ORDERED.**

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

### I (a) PLAINTIFFS

UNITED STATES OF AMERICA

### DEFENDANTS

CITY OF FRESNO

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

PAUL L. SEAVE, UNITED STATES ATTORNEY  
E. ROBERT WRIGHT, ASSISTANT U.S. ATTORNEY  
1130 "O" STREET, ROOM 3654  
FRESNO, CA 93721

ATTORNEYS (IF KNOWN)

### II. BASIS OF JURISDICTION

(PLACE AN X IN ONE BOX ONLY)

- ☒ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

### III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

|                                         | PTF                        | DEF                        |                                                               | PTF                        | DEF                        |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation                                                | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

### IV. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY

Action for response costs under CERCLA, 42 U.S.C. §§ 9604, 9606 and 9607

### V. NATURE OF SUIT

(PLACE AN X IN ONE BOX ONLY)

| CONTRACT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | TORTS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | FORFEITURE/PENALTY                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | BANKRUPTCY                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | OTHER STATUTES                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholders' Suits<br><input type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input checked="" type="checkbox"/> 360 Other Personal Injury<br><b>PERSONAL INJURY</b><br><input type="checkbox"/> 362 Personal Injury—Med Malpractice<br><input type="checkbox"/> 365 Personal Injury—Product Liability<br><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability<br><b>PERSONAL PROPERTY</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 375 Other<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 610 Agriculture<br><input type="checkbox"/> 620 Other Food & Drug<br><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881<br><input type="checkbox"/> 630 Liquor Laws<br><input type="checkbox"/> 640 R.R. & Truck<br><input type="checkbox"/> 650 Airline Regs<br><input type="checkbox"/> 660 Occupational Safety/Health<br><input type="checkbox"/> 690 Other<br><b>LABOR</b><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Mgmt. Relations<br><input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act<br><input type="checkbox"/> 740 Railway Labor Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | <input type="checkbox"/> 422 Appeal 28 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><b>PROPERTY RIGHTS</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 840 Trademark<br><b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (1395f)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DRWC/DWW (405(g))<br><input type="checkbox"/> 864 SSID Title XVI<br><input type="checkbox"/> 865 RSI (405(g))<br><b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)<br><input type="checkbox"/> 871 IRS—Third Party 28 USC 7609 | <input type="checkbox"/> 400 State Reapportionment<br><input type="checkbox"/> 410 Antitrust<br><input type="checkbox"/> 430 Banks and Banking<br><input type="checkbox"/> 450 Commerce/ICC Rates/etc.<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations<br><input type="checkbox"/> 810 Selective Service<br><input type="checkbox"/> 850 Securities/Commodities/Exchange<br><input type="checkbox"/> 875 Customer Challenge 12 USC 3410<br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 892 Economic Stabilization Act<br><input checked="" type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 894 Energy Allocation Act<br><input type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice<br><input type="checkbox"/> 950 Constitutionality of State Statutes<br><input type="checkbox"/> 890 Other Statutory Actions |

### VI. ORIGIN

(PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify) \_\_\_\_\_  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

### VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION  
☐ UNDER F.R.C.P. 23

DEMAND \$

All response costs

Check YES only if demanded in complaint:

JURY DEMAND:

☐ YES ☒ NO

### VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE  
2/25/98

SIGNATURE OF ATTORNEY OF RECORD

*E. Robert Wright*

1 LOIS J. SCHIFFER  
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Division  
3 U.S. Department of Justice  
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8 Eastern District of California  
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9 Assistant U.S. Attorney  
1130 "O" Street, Room 3654  
10 Fresno, CA 93721  
(209) 498-7272

11  
12 Attorneys for the United States

13 MARTIN D. KOCZANOWICZ  
Deputy City Attorney  
14 City of Fresno  
2600 Fresno Street  
15 Fresno, CA 93721-3602

16 Attorney for the City of Fresno

17 IN THE UNITED STATES DISTRICT COURT

18 FOR THE EASTERN DISTRICT OF CALIFORNIA

19 UNITED STATES OF AMERICA, ) CIVIL NO.

20 Plaintiff, )

21 v. )

22 CITY OF FRESNO, )

23 Defendant. )

CIV F- 98 - 5195 REC SMS

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FEB 25 1998

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

|                          |   |
|--------------------------|---|
|                          | ) |
| UNITED STATES OF AMERICA | ) |
|                          | ) |
| Plaintiff,               | ) |
|                          | ) |
| v.                       | ) |
|                          | ) |
| CITY OF FRESNO,          | ) |
|                          | ) |
| Defendant                | ) |

CIVIL ACTION NO.

CONSENT DECREE

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1 I. BACKGROUND

2 I. The United States of America ("United States"), on behalf of  
3 the Administrator of the United States Environmental Protection  
4 Agency ("EPA"), filed a complaint in this matter pursuant to  
5 Sections 106 and 107 of the Comprehensive Environmental Response,  
6 Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606,  
7 9607.

8 A. The United States in its complaint seeks, inter alia:

9 (1) reimbursement of costs incurred by EPA and the Department of  
10 Justice ("DOJ") for response actions at the Fresno Sanitary  
11 Landfill Superfund Site in Fresno, California, together with  
12 accrued interest; and (2) performance of response work by the  
13 defendant at the Site consistent with the National Contingency  
14 Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

15 B. In accordance with the NCP and Section 121(f)(1)(F) of  
16 CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of  
17 California (the "State") on April 10, 1997, of negotiations with  
18 potentially responsible parties regarding the implementation of  
19 the remedial action for the Site, and EPA has provided the State  
20 with an opportunity to participate in such negotiations and be a  
21 party to this Consent Decree.

22 [C. RESERVED.]

23 D. In accordance with Section 122(j)(1) of CERCLA, 42  
24 U.S.C. § 9622(j)(1), EPA notified the Department of Interior,  
25 Regional Environmental Officer, the natural resource damage  
26 trustee for this Site on April 1, 1997, of negotiations with the  
27 City regarding the release of hazardous substances that may have  
28 resulted in injury to the natural resources under Federal

1 trusteeship and encouraged the trustee(s) to participate in the  
2 negotiation of this Consent Decree.

3 E. The Defendant, the City of Fresno ("City"), in entering  
4 into this Consent Decree, neither admits any liability to the  
5 Plaintiff arising out of the transactions or occurrences alleged  
6 in the complaint, nor does the City acknowledge that the release  
7 or threatened release of hazardous substance(s) at or from the  
8 Site constitutes an imminent or substantial endangerment to the  
9 public health or welfare or the environment.

10 F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA  
11 placed the Site on the National Priorities List, set forth at 40  
12 C.F.R. Part 300, Appendix B, by publication in the Federal  
13 Register on October 4, 1989, 54 Fed. Reg. 41020.

14 G. In response to a release or a substantial threat of a  
15 release of a hazardous substance(s) at or from the Site, on  
16 September 21, 1990, pursuant to 40 C.F.R. 300.430, the City  
17 commenced a Remedial Investigation and Feasibility Study  
18 ("RI/FS") for the Site.

19 H. The City issued a Feasibility Study ("FS") Report in  
20 September 1992 for Operable Unit 1 ("OU1") which pertains to the  
21 containment of the trash prism. The City completed a Remedial  
22 Investigation ("RI") Report in May 1994 and issued an FS Report  
23 in July 1996 for Operable Unit 2 ("OU2") which pertains to the  
24 cleanup of the groundwater impacted by the landfill contaminants.

25 I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA  
26 published notice of the completion of the FS and of the proposed  
27 plan for the remedial action for OU1 in March 1993 and published  
28 notice of the completion of the FS and of the proposed plan for

1 the remedial action for OU2 in July 1996. Both notices were  
2 published in a major local newspaper of general circulation. EPA  
3 provided an opportunity for written and oral comments from the  
4 public on the proposed plans for the remedial actions for OU1 and  
5 OU2. A copy of the transcript of the public meetings is  
6 available to the public as part of the administrative records  
7 upon which the Regional Administrator based the selection of the  
8 response actions.

9 J. The decision by EPA on the remedial actions to be  
10 implemented at the Site is embodied in two final Records of  
11 Decision ("ROD"). The ROD for OU1 was executed on September 30,  
12 1993, and the ROD for OU2 was executed on September 30, 1996.  
13 The State has given its concurrence on these two RODs. The RODs  
14 include a responsiveness summary to the public comments. Notice  
15 of the final plans were published in accordance with Section  
16 117(b) of CERCLA.

17 K. Based on the information presently available to EPA, EPA  
18 believes that the Work for OU1 and OU2 will be properly and  
19 promptly conducted by the City if conducted in accordance with  
20 the requirements of this Consent Decree and its appendices.

21 L. Solely for the purposes of Section 113(j) of CERCLA, the  
22 remedial actions selected by the RODs and the Work to be  
23 performed by the City shall constitute response actions taken or  
24 ordered by the President.

25 M. The Parties recognize, and the Court by entering this  
26 Consent Decree finds, that this Consent Decree has been  
27 negotiated by the Parties in good faith and implementation of  
28 this Consent Decree will expedite the cleanup of the Site and

1 will avoid prolonged and complicated litigation between the  
2 Parties, and that this Consent Decree is fair, reasonable, and in  
3 the public interest.

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

5  
6 II. JURISDICTION

7  
8 1. This Court has jurisdiction over the subject matter of  
9 this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C.  
10 §§ 9606, 9607, and 9613(b). This Court also has personal  
11 jurisdiction over the City. Solely for the purposes of this  
12 Consent Decree and the underlying complaint, the City waives all  
13 objections and defenses that it may have to jurisdiction of the  
14 Court or to venue in this District. The City shall not challenge  
15 the terms of this Consent Decree or this Court's jurisdiction to  
16 enter and enforce this Consent Decree.

17 III. PARTIES BOUND

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

24 3. The City shall provide a copy of this Consent Decree to  
25 each contractor hired to perform the Work (as defined below)  
26 required by this Consent Decree and to each person representing  
27 the City with respect to the Site or the Work and shall condition  
28 all contracts entered into hereunder upon performance of the Work

1 in conformity with the terms of this Consent Decree. The City or  
2 its contractors shall provide written notice of the Consent  
3 Decree to all subcontractors hired to perform any portion of the  
4 Work required by this Consent Decree. The City shall nonetheless  
5 be responsible for ensuring that its contractors and  
6 subcontractors perform the Work contemplated herein in accordance  
7 with this Consent Decree. With regard to the activities  
8 undertaken pursuant to this Consent Decree, each contractor and  
9 subcontractor shall be deemed to be in a contractual relationship  
10 with the City within the meaning of Section 107(b)(3) of CERCLA,  
11 42 U.S.C. § 9607(b)(3).

#### 12 IV. DEFINITIONS

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

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

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

27 "Day" shall mean a calendar day unless expressly stated to  
28 be a working day. "Working day" shall mean a day other than a

1 Saturday, Sunday, or Federal holiday. In computing any period of  
2 time under this Consent Decree, where the last day would fall on  
3 a Saturday, Sunday, or Federal holiday, the period shall run  
4 until the close of business of the next working day.

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

8 "Future Response Costs" shall mean all costs, including, but  
9 not limited to, direct and indirect costs, that the United States  
10 incurs in reviewing or developing plans, reports and other items  
11 pursuant to this Consent Decree, verifying the Work, or otherwise  
12 implementing, overseeing, or enforcing this Consent Decree,  
13 including, but not limited to, payroll costs, contractor costs,  
14 travel costs, laboratory costs, the costs incurred pursuant to  
15 Sections VII, IX (including, but not limited to, attorneys fees  
16 and any monies paid to secure access and/or to secure  
17 institutional controls, including the amount of just  
18 compensation), XV, and Paragraph 85 of Section XXI. Future  
19 Response Costs shall also include all Interim Response Costs.

20 "Interim Response Costs" shall mean all costs, including  
21 direct and indirect costs, (a) paid by the United States in  
22 connection with the Site between January 1, 1996 and the  
23 effective date of this Consent Decree, or (b) incurred prior to  
24 the effective date of this Consent Decree but paid after that  
25 date.

26 "Interest," shall mean interest at the rate specified for  
27 interest on investments of the Hazardous Substance Superfund  
28 established under Subchapter A of Chapter 98 of Title 26 of the

1 U.S. Code, compounded on October 1 of each year, in accordance  
2 with 42 U.S.C. § 9607(a).

3 "Municipal Solid Waste" shall mean all waste materials  
4 generated by households, including single- and multi-family  
5 residences, and hotels and motels. The term also includes waste  
6 materials generated by commercial, institutional, and industrial  
7 sources, to the extent such wastes (A) are essentially the same  
8 as waste normally generated by households, or (B) are collected  
9 and disposed of with other municipal solid waste or sewage sludge  
10 as part of normal municipal solid waste collection services and,  
11 regardless of when generated, would be considered conditionally  
12 exempt small quantity generator waste under regulations issued  
13 pursuant to Section 3001(d)(4) of the Solid Waste Disposal Act  
14 (42 U.S.C. 6921(d)(4)). Examples of Municipal Solid Waste  
15 include food and yard waste, paper, clothing, appliances,  
16 consumer product packaging, disposable diapers, office supplies,  
17 cosmetics, glass and metal food containers, elementary or  
18 secondary school science laboratory waste, and household  
19 hazardous waste. The term does not include combustion ash  
20 generated by resource recovery facilities or municipal  
21 incinerators, or waste from manufacturing or processing  
22 (including pollution control) operations not essentially the same  
23 as waste normally generated by households.

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

28 "Operation and Maintenance" or "O & M" shall mean all

1 activities required to maintain the effectiveness of the Remedial  
2 Action as required under the Operation and Maintenance Plan  
3 approved or developed by EPA pursuant to this Consent Decree and  
4 the Statement of Work (SOW).

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

7 "Parties" shall mean the United States and the City.

8 "Past Response Costs" shall mean all costs, including, but  
9 not limited to, direct and indirect costs, that the United States  
10 paid at or in connection with the Site through December 31,  
11 1995, plus Interest on all such costs which has accrued pursuant  
12 to 42 U.S.C. § 9607(a) through such date.

13 "Performance Standards" shall mean the cleanup standards and  
14 other measures of achievement of the goals of the Remedial  
15 Actions, set forth in Sections 9 and 10 of the September 30, 1993  
16 ROD, Section 10 of the September 30, 1996 ROD, Section 7.0 of the  
17 SOW for Operable Unit One, and Section 7.0 of the SOW for  
18 Operable Unit Two.

19 "Plaintiff" shall mean the United States.

20 "Project Coordinator" for the City shall mean the City's  
21 designated representative who shall have the authority, duties,  
22 and responsibilities for overseeing the implementation of this  
23 Consent Decree.

24 "RCRA" shall mean the Solid Waste Disposal Act, as amended,  
25 42 U.S.C. §§ 6901 et seq. (also known as the Resource  
26 Conservation and Recovery Act).

27 "Records of Decision" or "RODs" shall mean the EPA Records  
28 of Decision relating to the two Operable Units at the Site: for



1 OU1 signed on September 30, 1993, by the Regional Administrator,  
2 EPA Region 9, or his/her delegate, and all attachments thereto;  
3 for OU2 signed on September 30, 1996, by the Regional  
4 Administrator, EPA Region 9 or his/her delegate, and all  
5 attachments thereto. The RODs are attached as Appendix A and are  
6 hereby incorporated by reference into this Decree.

7 "Remedial Actions" shall mean those activities, except for  
8 Operation and Maintenance, to be undertaken by the City to  
9 implement the RODs, in accordance with the SOW, the final  
10 Remedial Action Work Plan for OU1, the Remedial Design and  
11 Remedial Action Report for OU2, and other plans approved by EPA.

12 "Remedial Action Work Plan" shall mean the documents  
13 developed pursuant to Paragraph 11 of this Consent Decree and  
14 approved by EPA, and any amendments thereto.

15 "Remedial Design/Remedial Action Report" shall mean the  
16 documents developed pursuant to Paragraph 12 of this Consent  
17 Decree and approved by EPA, and any amendments thereto.

18 "Site" shall mean the Fresno Sanitary Landfill Superfund  
19 Site, encompassing approximately 145 acres, that is located four  
20 miles southwest of the City of Fresno, bounded on the north by  
21 Jensen Avenue, on the east by West Avenue, on the south by North  
22 Avenue and on the west by agricultural fields, in Fresno County,  
23 California, and depicted generally on the map attached as  
24 Appendix C.

25 "State" shall mean the State of California, its employees  
26 and authorized representatives represented by the Department of  
27 Toxic Substances and Control (DTSC) as the lead agency.

28 "Statement of Work" or "SOW" shall mean the statement of

1 work for implementation of the Remedial Designs, Remedial  
2 Actions, and Operation and Maintenance at the Site, as set forth  
3 in Appendix B to this Consent Decree and any modifications made  
4 in accordance with this Consent Decree.

5 "Supervising Contractor" shall mean the principal contractor  
6 retained by the City to supervise and direct the implementation  
7 of the Work on either of the two operable units under this  
8 Consent Decree.

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

10 "Waste Material" shall mean (1) any "hazardous substance"  
11 under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any  
12 pollutant or contaminant under Section 101(33), 42 U.S.C.  
13 § 9601(33); [(3) any "solid waste" under Section 1004(27) of  
14 RCRA, 42 U.S.C. § 6903(27)].

15 "Work" shall mean all activities the City is required to  
16 perform under this Consent Decree, except those required by  
17 Section XXV (Retention of Records).

## 18 V. GENERAL PROVISIONS

### 19 5. Objectives of the Parties

20 The objectives of the Parties in entering into this Consent  
21 Decree are to protect public health or welfare or the environment  
22 at the Site expeditiously by agreeing upon the design and  
23 implementation of response actions at the Site by the City, to  
24 reimburse Interim and Future Response Costs of the Plaintiff, and  
25 to resolve the claims of Plaintiff including claims for past  
26 costs against the City as provided in this Consent Decree.

27

28

1           6. Commitments by the City

2           The City shall finance and perform the Work in accordance  
3 with this Consent Decree, the RODs, the SOWs, and all work plans  
4 and other plans, standards, specifications, and schedules set  
5 forth herein or developed by the City and approved by EPA  
6 pursuant to this Consent Decree. The City shall also reimburse  
7 the United States for Interim and Future Response Costs as  
8 provided in this Consent Decree.

9           7. Compliance With Applicable Law

10          All activities undertaken by the City pursuant to this  
11 Consent Decree shall be performed in accordance with the  
12 requirements of all applicable federal and state laws and  
13 regulations. The City must also comply with all applicable or  
14 relevant and appropriate requirements of all Federal and state  
15 environmental laws as set forth in the RODs and the SOWs. The  
16 activities conducted pursuant to this Consent Decree, if approved  
17 by EPA, shall be considered to be consistent with the NCP.

18          8. Permits

19           a. As provided in Section 121(e) of CERCLA and Section  
20 300.400(e) of the NCP, no permit shall be required for any  
21 portion of the Work conducted entirely on site (i.e., within the  
22 areal extent of contamination or in very close proximity to the  
23 contamination and necessary for implementation of the Work).  
24 Where any portion of the Work that is not on site requires a  
25 federal or state permit or approval, the City shall submit timely  
26 and complete applications and take all other actions necessary to  
27 obtain all such permits or approvals.

28           b. The City may seek relief under the provisions of

1 Section XVIII (Force Majeure) of this Consent Decree for any  
2 delay in the performance of the Work resulting from a failure to  
3 obtain, or a delay in obtaining, any permit required for the  
4 Work.

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

8 9. Notice of Obligations to Successors-in-Title

9 a. Within fifteen (15) days after the entry of this  
10 Consent Decree, the City shall record a certified copy of this  
11 Consent Decree with the Recorder's Office or Registry of Deeds or  
12 other appropriate office in Fresno County, State of California.  
13 Thereafter, each deed, title, or other instrument conveying an  
14 interest in the property included in the Site shall contain a  
15 notice stating that the property is subject to this Consent  
16 Decree and shall reference the recorded location of the Consent  
17 Decree and any restrictions applicable to the property under this  
18 Consent Decree.

19 b. The obligations of the City with respect to the  
20 provision of access under and the implementation of institutional  
21 controls under Section IX (Access) shall be binding upon the City  
22 and any and all persons who subsequently acquire any such  
23 interest or portion thereof (hereinafter "Successors-in-Title").  
24 Within fifteen (15) days after the entry of this Consent Decree,  
25 the City shall record at the Recorder's Office, or Registry of  
26 Deeds or other appropriate office where land ownership and  
27 transfer records are maintained for the property owned by the  
28 City which is included in the Site a notice of obligation to

1 provide access under Section IX (Access) and related covenants,  
2 if any. Each subsequent instrument conveying an interest to any  
3 such property included in the Site shall reference the recorded  
4 location of such notice and covenants applicable to the property.

5 c. The City and any Successor-in-Title shall, at  
6 least thirty (30) days prior to the conveyance of any such  
7 interest, give written notice of this Consent Decree to the  
8 grantee and written notice to EPA of the proposed conveyance,  
9 including the name and address of the grantee, and the date on  
10 which notice of the Consent Decree was given to the grantee. In  
11 the event of any such conveyance, the City's obligations under  
12 this Consent Decree, including its obligations to provide or  
13 secure access pursuant to Section IX, shall continue to be met by  
14 the City. In addition, if the United States approves, the  
15 grantee may perform some or all of the Work under this Consent  
16 Decree. In no event shall the conveyance of an interest in  
17 property that includes, or is a portion of, the Site release or  
18 otherwise affect the liability of the City to comply with the  
19 Consent Decree, without prior EPA approval.

20 VI. PERFORMANCE OF THE WORK BY THE CITY

21 10. Selection of Supervising Contractor

22 a. All aspects of the Work to be performed by the  
23 City pursuant to Sections VI (Performance of the Work by the  
24 City), VII (Remedy Review), VIII (Quality Assurance, Sampling and  
25 Data Analysis), and XV (Emergency Response) of this Consent  
26 Decree shall be under the direction and supervision of the  
27 Supervising Contractor for each operable unit, the selection of  
28 which shall be subject to disapproval by EPA. Within ten (10)

1 days after the bid approval by the City Council, the City shall  
2 notify EPA in writing of the name, title, and qualifications of  
3 any contractor proposed to be the Supervising Contractor. EPA  
4 will issue a notice of disapproval or an authorization to  
5 proceed. EPA shall not withhold approval of the City's  
6 Supervising Contractor unreasonably. If EPA disapproves the  
7 City's Supervising Contractor, EPA shall state the grounds for  
8 its disapproval. If at any time thereafter, the City proposes  
9 to change a Supervising Contractor, the City shall give such  
10 notice to EPA and must obtain an authorization to proceed from  
11 EPA, after a reasonable opportunity for review and comment by the  
12 State, before the new Supervising Contractor performs, directs,  
13 or supervises any Work under this Consent Decree.

14           b. If EPA disapproves a proposed Supervising  
15 Contractor, EPA will notify the City in writing. The City shall  
16 submit to EPA a list of contractors, including the  
17 qualifications of each contractor, that would be acceptable to it  
18 within thirty (30) days of receipt of EPA's disapproval of the  
19 contractor previously proposed. EPA will provide written notice  
20 of the names of any contractor(s) that it disapproves and an  
21 authorization to proceed with respect to any of the other  
22 contractors. The City may select any contractor from that list  
23 that is not disapproved and shall notify EPA of the name of the  
24 contractor selected within twenty one (21) days of EPA's  
25 authorization to proceed.

26           c. If EPA fails to provide written notice of its  
27 authorization to proceed or disapproval as provided in this  
28 Paragraph and this failure prevents the City from meeting one or

1 more deadlines in a plan approved by the EPA pursuant to this  
2 Consent Decree, the City may seek relief under the provisions of  
3 Section XVIII (Force Majeure) herein.

4 11. Remedial Action for OU1

5 a. The City agreed to perform remedial design for OU1  
6 pursuant to Administrative Order on Consent ("AOC"), U.S. EPA  
7 Docket No. 94-07, effective December 1993. EPA and the United  
8 States hereby agree that the requirements of the approved  
9 Remedial Design, which is appended to said AOC, will become an  
10 enforceable part of this Consent Decree on the effective date of  
11 this Consent Decree, and that all other requirements of said AOC  
12 will be superseded by the requirements of this Consent Decree, as  
13 of the effective date of this Consent Decree. The Remedial  
14 Design for OU1 has been completed by the City and approved by  
15 EPA.

16 b. Within eight weeks after the lodging of this Consent  
17 Decree, the City shall submit to EPA and the State, a Work Plan  
18 for the performance of the Remedial Action for OU1 (hereinafter  
19 referred to as "Remedial Action Work Plan."). The Remedial  
20 Action Work Plan shall provide for construction and  
21 implementation of the remedy set forth in the OU1 ROD, and  
22 achievement of the Performance Standards, in accordance with this  
23 Consent Decree, the OU1 ROD, the SOW, and the design plans and  
24 specifications developed in accordance with the Remedial Design  
25 for OU1 approved by EPA. Upon approval by EPA, the Remedial  
26 Action Work Plan shall be incorporated into and become  
27 enforceable under this Consent Decree. At the same time as it  
28 submits the Remedial Action Work Plan, the City shall submit to

1 EPA and the State a Health and Safety Plan for field activities  
2 required by the Remedial Action Work Plan which conform to the  
3 applicable Occupational Safety and Health Administration and EPA  
4 requirements including, but not limited to, 29 CFR 1910.120.

5 c. The Remedial Action Work Plan shall include those  
6 activities and deliverables identified in the SOW for OU1 and  
7 upon approval by EPA, shall be incorporated into and become  
8 enforceable under this Consent Decree.

9 d. The comprehensive schedule for the entire project  
10 identified in the Remedial Action Work Plan and approved by EPA  
11 becomes enforceable under this Consent Decree.

12 e. Upon approval of the Remedial Action Work Plan by  
13 EPA, after a reasonable opportunity for review and comment by the  
14 State, the City shall implement the activities required under the  
15 Remedial Action Work Plan. The City shall submit to EPA and the  
16 State all plans, submittals, or other deliverables required under  
17 the approved Remedial Action Work Plan in accordance with the  
18 approved schedule for review and approval pursuant to Section XI  
19 (EPA approval of Plans and Other Submissions). Unless otherwise  
20 approved by EPA, the City shall not commence physical Remedial  
21 Action activities at OU1 prior to approval of the Remedial Action  
22 Work Plan.

23 12. Remedial Design/ Remedial Action for OU2

24 a. Within twelve weeks after the lodging of this  
25 Consent Decree, the City shall submit to EPA and the State, a  
26 Work Plan for the performance of the Remedial Design and Remedial  
27 Action for OU2 (hereinafter referred to as "Remedial  
28 Design/Remedial Action Report"). The Remedial Design/Remedial



1 Action Report shall provide for the design elements and  
2 construction and implementation of the remedy set forth in the  
3 OU2 ROD and achievement of the Performance Standard, in  
4 accordance with this Consent Decree, the OU2 ROD, and the SOW for  
5 OU2. Upon approval by EPA, the Remedial Design/Remedial Action  
6 Report shall be incorporated into and become enforceable under  
7 this Consent Decree.

8           b. The Remedial Design/Remedial Action Report shall  
9 include the activities and deliverables identified in the SOW for  
10 OU2 and upon approval by EPA, shall be incorporated into and  
11 become enforceable under this Consent Decree.

12           c. The comprehensive schedule for the entire project  
13 identified in the Remedial Design/Remedial Action Report for OU2  
14 and approved by EPA becomes enforceable under this Decree.

15           d. Upon approval of the Remedial Design/Remedial Action  
16 Report by EPA, after a reasonable opportunity for review and  
17 comment by the State, the City shall implement the activities  
18 required under the Remedial Design Report. The City shall submit  
19 to EPA and the State all plans, submittals, or other deliverables  
20 required under the approved Remedial Design Report in accordance  
21 with the approved schedule for review and approval pursuant to  
22 Section XI (EPA approval of Plans and Other Submissions). Unless  
23 otherwise approved by EPA, the City shall not commence physical  
24 Remedial Action activities at OU2 prior to approval of the  
25 Remedial Design Report. Such approval shall not be unreasonably  
26 withheld by EPA.

27           13. The City shall continue to implement the Remedial  
28 Actions and O&M for OU1 and OU2 until the Performance Standards

1 are achieved and for so long thereafter as is otherwise required  
2 under this Consent Decree.

3 14. Modification of the SOW or Related Work Plans.

4 a. If EPA determines that modification to the work  
5 specified in the SOWs and/or in work plans developed pursuant to  
6 the SOWs is necessary to achieve and maintain the Performance  
7 Standards or to carry out and maintain the effectiveness of the  
8 remedy set forth in the RODs, EPA may require that such  
9 modification be incorporated in the SOWs and/or such work plans.  
10 Provided, however, that a modification may only be required  
11 pursuant to this Paragraph to the extent that it is consistent  
12 with the scope of the remedy selected in the RODs.

13 b. For the purposes of this Paragraph 14 and  
14 Paragraphs 48 and 49 only, the "scope of the remedy selected in  
15 the RODs" are: for OU1: containing subsurface migration, surface  
16 emissions of landfill gas, leachate generation and migration, and  
17 erosion and transport of waste materials; for OU2: phased  
18 remediation of the contaminated groundwater, with phase one  
19 containing the contaminated groundwater underneath the landfill  
20 by installing pumping wells along the perimeter of the landfill,  
21 phase two preventing the spread of the groundwater plume into the  
22 clean portions of the aquifer, and phase three reducing the  
23 contaminant levels at the contained groundwater plume to maximum  
24 contaminant levels ("MCLs") by pump and treat, unless shown to be  
25 technically impracticable.

26 c. If the City objects to any modification determined  
27 by EPA to be necessary pursuant to this Paragraph, it may seek  
28 dispute resolution pursuant to Section XIX (Dispute Resolution),

1 Paragraph 65 (record review). The SOW and/or related work plans  
2 shall be modified in accordance with final resolution of the  
3 dispute.

4 d. The City shall implement any work required by any  
5 modifications incorporated in the SOW and/or in work plans  
6 developed pursuant to the SOWs in accordance with this  
7 Paragraph. Nothing in this Paragraph shall be construed to limit  
8 EPA's authority to require performance of further response  
9 actions as otherwise provided in this Consent Decree.

10 15. The City acknowledges and agrees that nothing in this  
11 Consent Decree, the SOWs, or the Remedial Actions Work Plans  
12 constitutes a warranty or representation of any kind by Plaintiff  
13 that compliance with the work requirements set forth in the SOWs  
14 and the Work Plans will achieve the Performance Standards. .

15 16. The City shall, prior to any off-Site shipment of Waste  
16 Material from the Site to an out-of-state waste management  
17 facility, provide written notification to the appropriate state  
18 environmental official in the receiving facility's state and to  
19 the EPA Project Coordinator of such shipment of Waste Material.  
20 However, this notification requirement shall not apply to any  
21 off-Site shipments when the total volume of all such shipments  
22 will not exceed 10 cubic yards.

23 a. The City shall include in the written notification  
24 the following information, where available: (1) the name and  
25 location of the facility to which the Waste Material is to be  
26 shipped; (2) the type and quantity of the Waste Material to be  
27 shipped; (3) the expected schedule for the shipment of the Waste  
28 Material; and (4) the method of transportation. The City shall

1 notify the state in which the planned receiving facility is  
2 located of major changes in the shipment plan, such as a decision  
3 to ship the Waste Material to another facility within the same  
4 state, or to a facility in another state.

5           b. The identity of the receiving facility and state  
6 will be determined by the City following the award of the  
7 contract for Remedial Action construction. The City shall  
8 provide the information required by Paragraph 16(a) as soon as  
9 practicable after the award of the contract and before the Waste  
10 Material is actually shipped.

11                                   VII. REMEDY REVIEW

12           17. Periodic Review. At least every five years as required  
13 by Section 121(c) of CERCLA and any applicable regulations, the  
14 City shall conduct any studies and investigations as requested by  
15 EPA, in order to permit EPA to conduct reviews of whether the  
16 Remedial Actions are protective of human health and the  
17 environment.

18           18. EPA Selection of Further Response Actions. If EPA  
19 determines, at any time, that the Remedial Actions are not  
20 protective of human health and the environment, EPA may select  
21 further response actions for the Site in accordance with the  
22 requirements of CERCLA and the NCP.

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

1           20. The City's Obligation To Perform Further Response  
2 Actions. If EPA selects further response actions for the Site,  
3 the City shall undertake such further response actions to the  
4 extent that the reopener conditions in Paragraph 81 or Paragraph  
5 82 (United States' reservations of liability based on unknown  
6 conditions or new information) are satisfied. The City may  
7 invoke the procedures set forth in Section XIX (Dispute  
8 Resolution) to dispute (1) EPA's determination that the reopener  
9 conditions of Paragraph 81 or Paragraph 82 of Section XXI  
10 (Covenants Not To Sue by Plaintiff[s]) are satisfied, (2) EPA's  
11 determination that the Remedial Actions are not protective of  
12 human health and the environment, or (3) EPA's selection of  
13 further response actions. Disputes pertaining to whether the  
14 Remedial Actions are protective or to EPA's selection of further  
15 response actions shall be resolved pursuant to Paragraph 65  
16 (record review).

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

24           VIII. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

25           22. The City shall use quality assurance, quality control,  
26 and chain of custody procedures for all treatability, design,  
27 compliance and monitoring samples in accordance with "EPA  
28 Requirements for Quality Assurance Project Plans for

1 Environmental Data Operation," (EPA QA/R5; "Preparing Perfect  
2 Project Plans," (EPA /600/9-88/087), and subsequent amendments  
3 to such guidelines upon notification by EPA to the City of such  
4 amendment. Amended guidelines shall apply only to procedures  
5 conducted after such notification. Prior to the commencement of  
6 any monitoring project under this Consent Decree, the City shall  
7 submit to EPA for approval, after a reasonable opportunity for  
8 review and comment by the State, a Quality Assurance Project Plan  
9 ("QAPP") that is consistent with the SOWs, the NCP and applicable  
10 guidance documents. If relevant to the proceeding, the Parties  
11 agree that validated sampling data generated in accordance with  
12 the QAPP, and reviewed and approved by EPA shall be admissible as  
13 evidence, without objection, in any proceeding under this Decree.  
14 The City shall ensure that EPA and State personnel and their  
15 authorized representatives are allowed access at reasonable times  
16 to all laboratories utilized by the City in implementing this  
17 Consent Decree. In addition, the City shall ensure that such  
18 laboratories shall analyze all samples submitted by EPA pursuant  
19 to the QAPP for quality assurance monitoring. The City shall  
20 ensure that the laboratories, which it utilizes for the analysis  
21 of samples taken pursuant to this Decree, perform all analyses  
22 according to accepted EPA methods. Accepted EPA methods consist  
23 of those methods which are documented in the "Contract Lab  
24 Program Statement of Work for Inorganic Analysis" and the  
25 "Contract Lab Program Statement of Work for Organic Analysis,"  
26 dated February 1988, and any amendments made thereto during the  
27 course of the implementation of this Decree. The City shall  
28 ensure that all laboratories it uses for analysis of samples

1 taken pursuant to this Consent Decree participate in an EPA or  
2 EPA-equivalent QA/QC program. The City shall ensure that all  
3 field methodologies utilized in collecting samples for subsequent  
4 analysis pursuant to this Decree will be conducted in accordance  
5 with the procedures set forth in the QAPP approved by EPA.

6 23. Upon request, the City shall allow split or duplicate  
7 samples to be taken by EPA and the State or their authorized  
8 representatives. The City shall notify EPA and the State not  
9 fewer than twenty eight (28) days in advance of any sample  
10 collection activity, unless shorter notice is agreed to by EPA.  
11 In addition, EPA and the State shall have the right to take any  
12 additional samples that EPA or the State deem necessary. Upon  
13 request, EPA and the State shall allow the City to take split  
14 or duplicate samples of any samples they take as part of the  
15 Plaintiff's oversight of the City's implementation of the Work.

16 24. The City shall submit to EPA and the State two copies  
17 of the results of all sampling and/or tests or other data  
18 obtained or generated by or on behalf of the City with respect to  
19 the Site and/or the implementation of this Consent Decree, unless  
20 EPA agrees otherwise.

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

26 IX. ACCESS AND INSTITUTIONAL CONTROLS

27 26. Commencing upon the date of lodging of this Consent  
28 Decree, the City agrees to provide the United States and the

1 State and their representatives, including EPA and its  
2 contractors, upon reasonable notice, access at all reasonable  
3 times to the Site and any other property to which access is  
4 required for the implementation of this Consent Decree, to the  
5 extent access to the property is controlled by the City, for the  
6 purposes of conducting any activity related to this Consent  
7 Decree including, but not limited to:

- 8 a. Monitoring the Work;
- 9 b. Verifying any data or information submitted to the  
10 United States;
- 11 c. Conducting investigations relating to  
12 contamination at or near the Site;
- 13 d. Obtaining samples;
- 14 e. Assessing the need for, planning of, or  
15 implementation of additional response actions at or near the  
16 Site;
- 17 f. Inspecting and copying records, operating logs,  
18 contracts, or other documents maintained or generated by the City  
19 or its agents, consistent with Section XXIV; and
- 20 g. Assessing the City's compliance with this Consent  
21 Decree.

22 27. To the extent that the Site or any other property to  
23 which access is required for the implementation of this Consent  
24 Decree is owned or controlled by persons other than the City, the  
25 City shall use best efforts to secure from such persons access  
26 for the City, as well as for the United States and the State and  
27 their representatives, including, but not limited to, its  
28 contractors, as necessary to effectuate this Consent Decree. For



1 purposes of this Paragraph, "best efforts" includes the payment  
2 of reasonable sums of money in consideration of access. If,  
3 after best efforts by the City, any access required to complete  
4 the Work is not obtained within forty five (45) days of the date  
5 of lodging of this Consent Decree, or within forty five (45) days  
6 of the date EPA notifies the City in writing that additional  
7 access beyond that previously secured is necessary, the City  
8 shall promptly notify the United States in writing, and shall  
9 include in that notification a summary of the steps the City has  
10 taken to attempt to obtain access. The United States or the  
11 State may, as it deems appropriate, assist the City in obtaining  
12 access. The City shall reimburse the United States or the State  
13 in accordance with the procedures in Section XVI (Reimbursement  
14 of Response Costs), for all costs incurred by the United States  
15 in obtaining access.

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

20 X. REPORTING REQUIREMENTS

21 29. In addition to any other requirement of this Consent  
22 Decree, the City shall submit to EPA and the State two copies of  
23 written monthly progress reports that: (a) describe the actions  
24 which have been taken toward achieving compliance with this  
25 Consent Decree during the previous month; (b) include a summary  
26 of all results of sampling and tests and all other data received  
27 or generated by the City or its contractors or agents in the  
28 previous month; (c) identify all work plans, plans and other

1 deliverables required by this Consent Decree completed and  
2 submitted during the previous month; (d) describe all actions,  
3 including, but not limited to, data collection and implementation  
4 of work plans, which are scheduled for the next six weeks and  
5 provide other information relating to the progress of  
6 construction, including, but not limited to, critical path  
7 diagrams, Gantt charts and Pert charts; (e) include information  
8 regarding percentage of completion, unresolved delays encountered  
9 or anticipated that may affect the future schedule for  
10 implementation of the Work, and a description of efforts made to  
11 mitigate those delays or anticipated delays; (f) include any  
12 modifications to the work plans or other schedules that the City  
13 has proposed to EPA or that have been approved by EPA; and (g)  
14 describe all activities undertaken in support of the Community  
15 Relations Plan during the previous month and those to be  
16 undertaken in the next six weeks. The City shall submit these  
17 progress reports to EPA and the State by the tenth day of every  
18 month following the lodging of this Consent Decree until EPA  
19 notifies the City pursuant to Paragraph 49.b of Section XIV  
20 (Certification of Completion). During Operation and Maintenance,  
21 the City shall submit progress reports annually for OU1 and semi-  
22 annually for OU2. If requested by EPA or the State, the City  
23 shall also provide briefings for EPA to discuss the progress of  
24 the Work.

25 30. The City shall notify EPA of any change in the schedule  
26 described in the monthly progress report for the performance of  
27 any activity, including, but not limited to, data collection and  
28 implementation of work plans, no later than seven (7) days prior

1 to the performance of the activity.

2 31. Upon the occurrence of any event during performance of  
3 the Work that the City is required to report pursuant to Section  
4 103 of CERCLA or Section 304 of the Emergency Planning and  
5 Community Right-to-Know Act (EPCRA). The City shall within  
6 twenty four (24) hours of the onset of such event, orally notify  
7 the EPA Project Coordinator or the Alternate EPA Project  
8 Coordinator (in the event of the unavailability of the EPA  
9 Project Coordinator), or, in the event that neither the EPA  
10 Project Coordinator nor Alternate EPA Project Coordinator is  
11 available, the Emergency Response Section, Region 9, United  
12 States Environmental Protection Agency. These reporting  
13 requirements are in addition to the reporting required by CERCLA  
14 Section 103 or EPCRA Section 304.

15 32. Within twenty (20) days of the onset of such an event,  
16 the City shall furnish to Plaintiff a written report, signed by  
17 the City's Project Coordinator, setting forth the events which  
18 occurred and the measures taken, and to be taken, in response  
19 thereto. Within thirty (30) days of the conclusion of such an  
20 event, the City shall submit a report setting forth all actions  
21 taken in response thereto.

22 33. The City shall submit two copies of all plans, reports,  
23 and data required by the SOWs, the Remedial Actions Work Plans,  
24 or any other approved plans to EPA in accordance with the  
25 schedules set forth in such plans.

26 34. All reports and other documents submitted by the City  
27 to EPA (other than the monthly progress reports referred to  
28 above) which purport to document the City's compliance with the

1 terms of this Consent Decree shall be signed by an authorized  
2 representative of the City, who shall be designated in writing by  
3 the City's governing body.

4 XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

5 35. After review of any plan, report or other item which is  
6 required to be submitted for approval pursuant to this Consent  
7 Decree, EPA, after reasonable opportunity for review and comment  
8 by the State, shall: (a) approve, in whole or in part, the  
9 submission; (b) approve the submission upon specified conditions;  
10 modify the submission to cure the deficiencies; or (d)  
11 disapprove, in whole or in part, the submission, directing that  
12 the City modify the submission. However, EPA shall not modify a  
13 submission without first providing the City at least one notice  
14 of deficiency and an opportunity to cure within three weeks,  
15 except where to do so would cause serious disruption to the Work  
16 or where previous submission(s) have been disapproved due to  
17 material defects and the deficiencies in the submission under  
18 consideration indicate a bad faith lack of effort to submit an  
19 acceptable deliverable.

20 36. In the event of approval, approval upon conditions, or  
21 modification by EPA, pursuant to Paragraph 35(a), (b), or (c),  
22 the City shall proceed to take any action required by the plan,  
23 report, or other item, as approved or modified by EPA subject  
24 only to its right to invoke the Dispute Resolution procedures set  
25 forth in Section XIX (Dispute Resolution) with respect to the  
26 modifications or conditions made by EPA. In the event that EPA  
27 modifies a submission to cure deficiencies in the original  
28 submission by following the procedure set forth in Paragraph

1 35(c), if the original submission had a material defect, EPA  
2 retains its right to seek stipulated penalties, as provided in  
3 Section XX (Stipulated Penalties).

4 37. a. Upon receipt of a notice of disapproval pursuant  
5 to Paragraph 35(d), the City shall, within three weeks or such  
6 longer time as specified by EPA in such notice, correct the  
7 deficiencies and resubmit the plan, report, or other item for  
8 approval. Any stipulated penalties applicable to the submission,  
9 as provided in Section XX, shall accrue during the three-week  
10 period or otherwise specified period but shall not be payable  
11 unless the resubmission is disapproved or modified due to a  
12 material defect as provided in Paragraphs 38 and 39.

13 b. Notwithstanding the receipt of a notice of  
14 disapproval pursuant to Paragraph 35(d), the City shall proceed,  
15 at the direction of EPA, to take any action required by any non-  
16 deficient portion of the submission. Implementation of any non-  
17 deficient portion of a submission shall not relieve the City of  
18 any liability for stipulated penalties under Section XX  
19 (Stipulated Penalties).

20 38. In the event that a resubmitted plan, report or other  
21 item, or portion thereof, is disapproved by EPA, EPA may again  
22 require the City to correct the deficiencies, in accordance with  
23 the preceding Paragraphs. EPA also retains the right to modify  
24 or develop the plan, report or other item. The City shall  
25 implement any such plan, report, or item as modified or developed  
26 by EPA, subject only to its right to invoke the procedures set  
27 forth in Section XIX (Dispute Resolution).

28 39. If upon resubmission, a plan, report, or item is

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

13 40. All plans, reports, and other items required to be  
14 submitted to EPA under this Consent Decree shall, upon approval  
15 or modification by EPA, be enforceable under this Consent Decree.  
16 In the event EPA approves or modifies a portion of a plan,  
17 report, or other item required to be submitted to EPA under this  
18 Consent Decree, the approved or modified portion shall be  
19 enforceable under this Consent Decree.

20 XII. PROJECT COORDINATORS

21 41. Within twenty (20) days of lodging this Consent Decree,  
22 the City and EPA will notify each other, in writing, of the name,  
23 address and telephone number of their respective designated  
24 Project Coordinators and Alternate Project Coordinators. If a  
25 Project Coordinator or Alternate Project Coordinator initially  
26 designated is changed, the identity of the successor will be  
27 given to the other Parties at least five (5 ) working days before  
28 the changes occur, unless impracticable, but in no event later

1 than the actual day the change is made. The City's Project  
2 Coordinator shall be subject to disapproval by EPA and shall have  
3 the technical expertise sufficient to oversee all aspects of the  
4 Work adequately. The City's Project Coordinator shall not be an  
5 attorney for the City in this matter. He or she may assign other  
6 representatives, including other contractors, to serve as a Site  
7 representative for oversight of performance of daily operations  
8 during remedial activities.

9 42. Plaintiff may designate other representatives,  
10 including, but not limited to, EPA and State employees, and  
11 federal and State contractors and consultants, to observe and  
12 monitor the progress of any activity undertaken pursuant to this  
13 Consent Decree. EPA's Project Coordinator and Alternate Project  
14 Coordinator shall have the authority lawfully vested in a  
15 Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC)  
16 by the National Contingency Plan, 40 C.F.R. Part 300. In  
17 addition, EPA's Project Coordinator or Alternate Project  
18 Coordinator shall have authority, consistent with the National  
19 Contingency Plan, to halt any Work required by this Consent  
20 Decree and to take any necessary response action when s/he  
21 determines that conditions at the Site constitute an emergency  
22 situation or may present an immediate threat to public health or  
23 welfare or the environment due to release or threatened release  
24 of Waste Material. The City may dispute the decision when to  
25 restart the Work halted by EPA's Project Coordinator or Alternate  
26 Project Coordinator.

27 43. EPA's Project Coordinator and the City's Project  
28 Coordinator will confer, at a minimum, on a monthly basis.

1                   XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

2           44. Within thirty (30) days of entry of this Consent  
3 Decree, the City shall certify that it has the financial ability  
4 to complete the total estimated cost of the Work remaining to be  
5 performed by demonstrating that the City satisfies the  
6 requirements of 40 C.F. R. Part 254.143)f), or in one or more of  
7 the following forms:

8                   a. Internal financial information to allow EPA to  
9 determine that the City has sufficient assets available to  
10 perform the work;

11                   b. A surety bond guaranteeing performance of the  
12 Work;

13                   c. One or more irrevocable letters of credit equal to  
14 the total estimated cost of the Work;

15                   d. A trust fund;

16           45. If the City can show that the estimated cost to  
17 complete the remaining Work has diminished below the amount set  
18 forth in Paragraph 44 above after entry of this Consent Decree,  
19 the City may, on any anniversary date of entry of this Consent  
20 Decree, or at any other time agreed to by the Parties, reduce the  
21 amount of the financial security provided under this Section to  
22 the estimated cost of the remaining work to be performed. The  
23 City shall submit a proposal for such reduction to EPA, in  
24 accordance with the requirements of this Section, and may reduce  
25 the amount of the security upon approval by EPA. In the event of  
26 a dispute, the City may reduce the amount of the security in  
27 accordance with the final administrative or judicial decision  
28 resolving the dispute.



1       46. The City may change the form of financial assurance  
2 provided under this Section at any time, upon notice to and  
3 approval by EPA, provided that the new form of assurance meets  
4 the requirements of this Section. In the event of a dispute, the  
5 City may change the form of the financial assurance only in  
6 accordance with the final administrative or judicial decision  
7 resolving the dispute.

8       47. The City shall resubmit sworn statements certifying  
9 assurance of ability to complete the Work annually, on the  
10 anniversary of the effective date of this Consent Decree. In the  
11 event that EPA determines at any time that the financial  
12 assurances provided pursuant to this Section are inadequate, the  
13 City shall, within thirty (30) days of receipt of notice of EPA's  
14 determination, obtain and present to EPA for approval another  
15 form or forms of financial assurance required by EPA. The City's  
16 inability to demonstrate financial ability to complete the Work  
17 shall not excuse performance of any activities required under  
18 this Consent Decree.

19                   XIV. CERTIFICATION OF COMPLETION

20       48. Completion of the Remedial Action

21           a. Within ninety (90) days after the City concludes  
22 that the Remedial Actions have been fully performed and the  
23 Performance Standards have been attained, the City shall schedule  
24 and conduct a pre-certification inspection to be attended by the  
25 City, EPA and the State. If, after the pre-certification  
26 inspection, the City still believes that the Remedial Actions  
27 have been fully performed and the Performance Standards have been  
28 attained, it shall submit a written report requesting

1 certification to EPA for approval, with a copy to the State,  
2 pursuant to Section XI (EPA Approval of Plans and Other  
3 Submissions) within thirty (30) days of the inspection. In the  
4 report, a registered professional engineer and the City's Project  
5 Coordinator shall state that the Remedial Actions have been  
6 completed in full satisfaction of the requirements of this  
7 Consent Decree. The written report shall include as-built  
8 drawings signed and stamped by a professional engineer. The  
9 report shall contain the following statement, signed by a  
10 responsible official who shall be designated in writing by the  
11 governing body of the City, or the City's Project Coordinator:

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

16 If, after completion of the pre-certification inspection and  
17 receipt and review of the written report, EPA, after reasonable  
18 opportunity to review and comment by the State, determines that  
19 the Remedial Actions or any portion thereof have not been  
20 completed in accordance with this Consent Decree or that the  
21 Performance Standards have not been achieved, EPA will notify the  
22 City in writing of the activities that must be undertaken by the  
23 City pursuant to this Consent Decree to complete the Remedial  
24 Actions and achieve the Performance Standards. Provided,  
25 however, that EPA may only require the City to perform such  
26 activities pursuant to this Paragraph to the extent that such  
27 activities are consistent with the "scope of the remedy selected  
28 in the RODs," as that term is defined in Paragraph 14.b. EPA

1 will set forth in the notice a schedule for performance of such  
2 activities consistent with the Consent Decree and the SOWs or  
3 require the City to submit a schedule to EPA for approval  
4 pursuant to Section XI (EPA Approval of Plans and Other  
5 Submissions). The City shall perform all activities described in  
6 the notice in accordance with the specifications and schedules  
7 established pursuant to this Paragraph, subject to its right to  
8 invoke the dispute resolution procedures set forth in Section XIX  
9 (Dispute Resolution).

10           b. If EPA concludes, based on the initial or any  
11 subsequent report requesting Certification of Completion that the  
12 Remedial Actions have been performed in accordance with this  
13 Consent Decree and that the Performance Standards have been  
14 achieved, EPA, within a reasonable time, will so certify in  
15 writing to the City. Certification of Completion for OU2 shall  
16 constitute the Certification of Completion of the Remedial  
17 Actions for this Site for purposes of this Consent Decree,  
18 including, but not limited to, Section XXI (Covenants Not to Sue  
19 by Plaintiff). Certification of Completion of the Remedial  
20 Actions shall not affect the City's obligations under this  
21 Consent Decree.

22           49. Completion of the Work

23           a. Within ninety (90) days after the City concludes  
24 that all phases of the Work (including O & M), have been fully  
25 performed, the City shall schedule and conduct a pre-  
26 certification inspection to be attended by the City, EPA and the  
27 State. If, after the pre-certification inspection, the City  
28 still believes that the Work has been fully performed, the City

1 shall submit a written report by a registered professional  
2 engineer stating that the Work has been completed in full  
3 satisfaction of the requirements of this Consent Decree. The  
4 report shall contain the following statement, signed by a  
5 responsible official who shall be designated in writing by the  
6 governing body of the City, or the City's Project Coordinator:

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

11 If, after review of the written report, EPA, after reasonable  
12 opportunity to review and comment by the State, determines that  
13 any portion of the Work has not been completed in accordance with  
14 this Consent Decree, EPA will notify the City in writing of the  
15 activities that must be undertaken by the City pursuant to this  
16 Consent Decree to complete the Work. Provided, however, that EPA  
17 may only require the City to perform such activities pursuant to  
18 this Paragraph to the extent that such activities are consistent  
19 with the "scope of the remedy selected in the ROD," as that term  
20 is defined in Paragraph 14.b. EPA will set forth in the notice  
21 a schedule for performance of such activities consistent with the  
22 Consent Decree and the SOWs or require the City to submit a  
23 schedule to EPA for approval pursuant to Section XI (EPA Approval  
24 of Plans and Other Submissions). The City shall perform all  
25 activities described in the notice in accordance with the  
26 specifications and schedules established therein, subject to its  
27 right to invoke the dispute resolution procedures set forth in  
28 Section XIX (Dispute Resolution).

1           b.    If EPA concludes, based on the initial or any  
2 subsequent request for Certification of Completion by the City  
3 and after a reasonable opportunity for review and comment by the  
4 State, that the Work has been performed in accordance with this  
5 Consent Decree, EPA, within a reasonable time, will so notify the  
6 City in writing.

7                           XV.   EMERGENCY RESPONSE

8           50.   In the event any action or occurrence arising out of  
9 the performance of the Work causes or threatens a release of  
10 Waste Material from the Site that constitutes an emergency  
11 situation or may present an immediate threat to public health or  
12 welfare or the environment, the City shall, subject to Paragraph  
13 51, immediately take all appropriate action to prevent, abate, or  
14 minimize such release or threat of release, and shall immediately  
15 notify the EPA's Project Coordinator, or, if the Project  
16 Coordinator is unavailable, EPA's Alternate Project Coordinator.  
17 If neither of these persons is available, the City shall notify  
18 the EPA Emergency Response Unit, Region 9. The City shall take  
19 such actions in consultation with EPA's Project Coordinator or  
20 other available authorized EPA officer and in accordance with all  
21 applicable provisions of the Health and Safety Plans, the  
22 Contingency Plans, and any other applicable plans or documents  
23 developed pursuant to the SOWs. In the event that the City  
24 fails to take appropriate response action as required by this  
25 Section, and EPA or, as appropriate, the State takes such action  
26 instead, the City shall reimburse EPA and the State all costs of  
27 the response action not inconsistent with the NCP pursuant to  
28 Section XVI (Reimbursement of Response Costs).

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

11                           XVI. REIMBURSEMENT OF RESPONSE COSTS

12           52. The City shall:

13               a. Within thrity (30) days of the effective date of  
14 this Consent Decree, Reimburse the EPA Hazardous Substance  
15 Superfund for all Past Response Cost in the amount of Four  
16 Hundred Fifty Four Thousand Five Hundred Ninety Nine Dollars and  
17 fifteen cents (\$454,599.15)

18               b. Reimburse the EPA Hazardous Substance Superfund  
19 for all Future Response Costs not inconsistent with the National  
20 Contingency Plan. The United States will send the City a bill,  
21 on an annual basis, requiring payment. The bill shall include a  
22 Summary of Cost Information or an equivalent summary, which  
23 includes direct and indirect costs incurred by EPA, DOJ and EPA's  
24 contractors. The City shall make all payments within twelve  
25 weeks of the City's receipt of each bill requiring payment,  
26 except as otherwise provided in Paragraph 53.

27               c. The City shall make all payments required by this  
28 Paragraph in the form of a certified or cashier's check or checks

1 made payable to "EPA Hazardous Substance Superfund" and  
2 referencing the EPA Region and Site/Spill ID #09-H7, the DOJ case  
3 number 90-11-2-1203 and the name and address of the party making  
4 payment. The City shall send the check(s) to:

5 United States Environmental Protection Agency  
6 Region IX  
7 Superfund Accounting  
8 P.O. Box 360863M  
9 Pittsburgh, PA 15251  
10 Attn: Collection Officer for Superfund

11 The City shall send copies of the check(s) to the United States  
12 and to the EPA Project Coordinator as specified in Section XXVI  
13 (Notices and Submissions).

14 53. The City may contest payment of any Future Response  
15 Costs under Paragraph 52 if it determines that the United States  
16 has made an accounting error or if it alleges that a cost item  
17 that is included represents costs that are inconsistent with the  
18 NCP. Such objection shall be made in writing within thirty (30)  
19 days of receipt of the bill and must be sent to the United States  
20 pursuant to Section XXVI (Notices and Submissions). Any such  
21 objection shall specifically identify the contested Future  
22 Response Costs and the basis for objection. In the event of an  
23 objection, the City shall within the thirty (30) day period pay  
24 all uncontested Future Response Costs to the United States in  
25 the manner described in Paragraph 52. The City shall send to the  
26 United States, as provided in Section XXVI (Notices and  
27 Submissions), a copy of the transmittal letter and check paying  
28 the uncontested Future Response Costs. Simultaneously, the City  
shall initiate the Dispute Resolution procedures in Section XIX  
(Dispute Resolution) for the contested Future Response Costs. If

1 the United States prevails in the dispute, within five (5) days  
2 of the resolution of the dispute, the City shall pay the sums due  
3 (with accrued interest) to the United States in the manner  
4 described in Paragraph 53. If the City prevails concerning any  
5 aspect of the contested costs, the City shall pay that portion of  
6 the costs (plus associated accrued interest) for which it did not  
7 prevail to the United States in the manner described in  
8 Paragraph 53. The dispute resolution procedures set forth in  
9 this Paragraph in conjunction with the procedures set forth in  
10 Section XIX (Dispute Resolution) shall be the exclusive  
11 mechanisms for resolving disputes regarding the City's obligation  
12 to reimburse the United States for its Future Response Costs.

13 54. In the event that the payments required by Paragraph 52  
14 are not made within twelve weeks of the City's receipt of the  
15 bill, the City shall pay Interest on the unpaid balance. The  
16 Interest on Future Response Costs shall begin to accrue on the  
17 date of the bill. The Interest shall accrue through the date of  
18 the City's payment. Payments of Interest made under this  
19 Paragraph shall be in addition to such other remedies or  
20 sanctions available to Plaintiffs by virtue of the City's failure  
21 to make timely payments under this Section. The City shall make  
22 all payments required by this Paragraph in the manner described  
23 in Paragraph 52.

24 XVII. INDEMNIFICATION AND INSURANCE

25 55. a. The United States does not assume any liability by  
26 entering into this agreement or by virtue of any designation of  
27 the City as EPA's authorized representatives under Section 104(e)  
28 of CERCLA. The City shall indemnify, save and hold harmless the



1 United States and its officials, agents, employees, contractors,  
2 subcontractors, or representatives for or from any and all claims  
3 or causes of action arising from, or on account of, negligent or  
4 other wrongful acts or omissions of the City, its officers,  
5 directors, employees, agents, contractors, subcontractors, and  
6 any persons acting on its behalf or under its control, in  
7 carrying out activities pursuant to this Consent Decree,  
8 including, but not limited to, any claims arising from any  
9 designation of the City as EPA's authorized representatives under  
10 Section 104(e) of CERCLA. Further, the City agrees to pay the  
11 United States all reasonable costs it incurs including, but not  
12 limited to, attorneys fees and other expenses of litigation and  
13 settlement arising from, or on account of, claims made against  
14 the United States based on negligent or other wrongful acts or  
15 omissions of the City, its officers, directors, employees,  
16 agents, contractors, subcontractors, and any persons acting on  
17 its behalf or under its control, in carrying out activities  
18 pursuant to this Consent Decree. The United States shall not be  
19 held out as a party to any contract entered into by or on behalf  
20 of the City in carrying out activities pursuant to this Consent  
21 Decree. Neither the City nor any such contractor shall be  
22 considered an agent of the United States.

23           b. The United States shall give the City notice of  
24 any claim for which the United States plans to seek  
25 indemnification pursuant to Paragraph 55.a., and shall consult  
26 with the City prior to settling such claim.

27           56. The City waives all claims against the United States  
28 for damages or reimbursement, or for set-off of any payments made

1 or to be made to the United States, arising from or on account of  
2 any contract, agreement, or arrangement between the City and any  
3 person for performance of Work on or relating to the Site,  
4 including, but not limited to, claims on account of construction  
5 delays. In addition, the City shall indemnify and hold harmless  
6 the United States with respect to any and all claims for damages  
7 or reimbursement arising from or on account of any contract,  
8 agreement, or arrangement between the City and any person for  
9 performance of Work on or relating to the Site, including, but  
10 not limited to, claims on account of construction delays.

11       57. No later than two weeks before commencing any on-site  
12 Work, the City shall certify to EPA of its ability and practice  
13 to act as its self-insurer, and provide comprehensive general  
14 liability, including automobile liability, insurance with limits  
15 of up to two and one-half million dollars, naming the United  
16 States as an additional insured. The City shall make this  
17 certification of self-insurance annually, until the first  
18 anniversary of EPA's Certification of Completion of the Remedial  
19 Actions pursuant to Paragraph 48.b. of Section XIV (Certification  
20 of Completion) In addition, for the duration of this Consent  
21 Decree, the City shall satisfy, or shall ensure that its  
22 contractors or subcontractors satisfy, all applicable laws and  
23 regulations regarding the provision of worker's compensation  
24 insurance for all persons performing the Work on behalf of the  
25 City in furtherance of this Consent Decree. Prior to  
26 commencement of the Work under this Consent Decree, the City  
27 shall provide to EPA certificates of such insurance and a copy of  
28 each insurance policy. The City shall resubmit such certificates

1 and copies of policies each year on the anniversary of the  
2 effective date of this Consent Decree. If the City demonstrates  
3 by evidence satisfactory to EPA that any contractor or  
4 subcontractor maintains insurance equivalent to that described  
5 above, or insurance covering the same risks but in a lesser  
6 amount, then, with respect to that contractor or subcontractor,  
7 the City need provide only that portion of the insurance  
8 described above which is not maintained by the contractor or  
9 subcontractor.

10 XVIII. FORCE MAJEURE

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

25 59. If any event occurs or has occurred that may delay the  
26 performance of any obligation under this Consent Decree, whether  
27 or not caused by a force majeure event, the City shall notify  
28 orally EPA's Project Coordinator or, in his or her absence, EPA's

1 Alternate Project Coordinator or, in the event both of EPA's  
2 designated representatives are unavailable, the Director of the  
3 Superfund Division, EPA Region IX, within forty-eight (48) hours  
4 of when the City first knew that the event might cause a delay.  
5 Within five (5) days thereafter, the City shall provide in  
6 writing to EPA and the State an explanation and description of  
7 the reasons for the delay; the estimated duration of the delay;  
8 all actions taken or to be taken to prevent or minimize the  
9 delay; a schedule for implementation of any measures to be taken  
10 to prevent or mitigate the delay or the effect of the delay; the  
11 City's rationale for attributing such delay to a force majeure  
12 event if it intends to assert such a claim; and a statement as to  
13 whether, in the opinion of the City, such event may cause or  
14 contribute to an endangerment to public health, welfare or the  
15 environment. The City shall include with any notice all  
16 available documentation supporting its claim that the delay was  
17 attributable to a force majeure. Failure to comply with the  
18 above requirements shall preclude the City from asserting any  
19 claim of force majeure for that event for the period of time of  
20 such failure to comply, and for any additional delay caused by  
21 such failure.

22       60. If EPA agrees that the delay or anticipated delay is  
23 attributable to a force majeure event, the time for performance  
24 of the obligations under this Consent Decree that are affected by  
25 the force majeure event will be extended by EPA for such time as  
26 is necessary to complete those obligations. An extension of the  
27 time for performance of the obligations affected by the force  
28 majeure event shall not, in and of itself, extend the time for

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

8 61. If the City elects to invoke the dispute resolution  
9 procedures set forth in Section XIX (Dispute Resolution), it  
10 shall do so no later than fifteen (15) days after receipt of  
11 EPA's notice. In any such proceeding, the City shall have the  
12 burden of demonstrating by a preponderance of the evidence that  
13 the delay or anticipated delay has been or will be caused by a  
14 force majeure event, that the duration of the delay or the  
15 extension sought was or will be warranted under the  
16 circumstances, that best efforts were exercised to avoid and  
17 mitigate the effects of the delay, and that the City complied  
18 with the requirements of Paragraphs 58 and 59, above. If the  
19 City carries this burden, the delay at issue shall be deemed not  
20 to be a violation by the City of the affected obligation of this  
21 Consent Decree identified to EPA and the Court.

#### 22 XIX. DISPUTE RESOLUTION

23 62. Unless otherwise expressly provided for in this Consent  
24 Decree, the dispute resolution procedures of this Section shall  
25 be the exclusive mechanism to resolve disputes arising under or  
26 with respect to this Consent Decree. However, the procedures set  
27 forth in this Section shall not apply to actions by the United  
28 States to enforce obligations of the City that have not been

1 disputed in accordance with this Section.

2       63. Any dispute which arises under or with respect to this  
3 Consent Decree shall in the first instance be the subject of  
4 informal negotiations between the parties to the dispute. Within  
5 five (5) days of the filing of an informal notice of dispute,  
6 either party may opt for the assistance of a neutral moderator to  
7 resolve the dispute. Unless the parties agree otherwise,  
8 mediation shall not last longer than thirty (30) days. Mediation  
9 expenses shall be borne by the City. In the absence of a request  
10 for mediation, the period for informal negotiations shall not  
11 exceed twenty (20) days from the time the dispute arises, unless  
12 it is modified by written agreement of the parties to the  
13 dispute. The dispute shall be considered to have arisen when one  
14 party sends the other parties a written Notice of Dispute.

15       64. a. In the event that the parties cannot resolve a  
16 dispute by informal negotiations under the preceding Paragraph,  
17 then the position advanced by EPA shall be considered binding  
18 unless, within ten (10) days after the conclusion of the informal  
19 negotiation period, the City invokes the formal dispute  
20 resolution procedures of this Section by serving on the United  
21 States a written Statement of Position on the matter in dispute,  
22 including, but not limited to, any factual data, analysis or  
23 opinion supporting that position and any supporting documentation  
24 relied upon by the City. The Statement of Position shall specify  
25 the City's position as to whether formal dispute resolution  
26 should proceed under Paragraph 65 or Paragraph 66.

27       b. Within two weeks after receipt of the City's  
28 Statement of Position, EPA will serve on the City its Statement

1 of Position, including, but not limited to, any factual data,  
2 analysis, or opinion supporting that position and all supporting  
3 documentation relied upon by EPA. EPA's Statement of Position  
4 shall include a statement as to whether formal dispute resolution  
5 should proceed under Paragraph 65 or 66. Within five (5) days  
6 after receipt of EPA's Statement of Position, the City may submit  
7 a Reply.

8           c. If there is disagreement between EPA and the City  
9 as to whether dispute resolution should proceed under Paragraph  
10 66 or 67, the parties to the dispute shall follow the procedures  
11 set forth in the paragraph determined by EPA to be applicable.  
12 However, if the City ultimately appeals to the Court to resolve  
13 the dispute, the Court shall determine which paragraph is  
14 applicable in accordance with the standards of applicability set  
15 forth in Paragraphs 65 and 66.

16           65. Formal dispute resolution for disputes pertaining to  
17 the selection or adequacy of any response action and all other  
18 disputes that are accorded review on the administrative record  
19 under applicable principles of administrative law shall be  
20 conducted pursuant to the procedures set forth in this Paragraph.  
21 For purposes of this Paragraph, the adequacy of any response  
22 action includes, without limitation: (1) the adequacy or  
23 appropriateness of plans, procedures to implement plans, or any  
24 other items requiring approval by EPA under this Consent Decree;  
25 and (2) the adequacy of the performance of response actions taken  
26 pursuant to this Consent Decree. Nothing in this Consent Decree  
27 shall be construed to allow any dispute by the City regarding the  
28 validity of the RODs' provisions.

1           a.    An administrative record of the dispute shall be  
2 maintained by EPA and shall contain all statements of position,  
3 including supporting documentation, submitted pursuant to this  
4 Section. Where appropriate, EPA may allow submission of  
5 supplemental statements of position by the parties to the  
6 dispute.

7           b.    The Director of the Superfund Division, EPA Region  
8 9, will issue a final administrative decision resolving the  
9 dispute based on the administrative record described in Paragraph  
10 65.a. This decision shall be binding upon the City , subject  
11 only to the right to seek judicial review pursuant to Paragraph  
12 65.c. and d.

13           c.    Any administrative decision made by EPA pursuant  
14 to Paragraph 65.b. shall be subject to review by this Court,  
15 provided that a motion for judicial review of the decision is  
16 filed by the City with the Court and served on EPA within three  
17 weeks of receipt of EPA's decision. The motion shall include a  
18 description of the matter in dispute, the efforts made by the  
19 parties to resolve it, the relief requested, and the schedule, if  
20 any, within which the dispute must be resolved to ensure orderly  
21 implementation of this Consent Decree. The United States may  
22 file a response to the City's motion.

23           d.    In proceedings on any dispute governed by this  
24 Paragraph, the City shall have the burden of demonstrating that  
25 the decision of the Superfund Division Director is arbitrary and  
26 capricious or otherwise not in accordance with law. Judicial  
27 review of EPA's decision shall be on the administrative record  
28 compiled pursuant to Paragraph 65.a.



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

6            a. Following receipt of the City's Statement of  
7        Position submitted pursuant to Paragraph 64, the Director of the  
8        Superfund Division, EPA Region 9, will issue a final decision  
9        resolving the dispute. The Superfund Division Director's  
10       decision shall be binding on the City unless, within three weeks  
11       of receipt of the decision, the City files with the Court and  
12       serves on EPA a motion for judicial review of the decision  
13       setting forth the matter in dispute, the efforts made by the  
14       parties to resolve it, the relief requested, and the schedule, if  
15       any, within which the dispute must be resolved to ensure orderly  
16       implementation of the Consent Decree. The United States may file  
17       a response to the City's motion.

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

20       67. The invocation of formal dispute resolution procedures  
21       under this Section shall not extend, postpone or affect in any  
22       way any obligation of the City under this Consent Decree, not  
23       directly in dispute, unless EPA or the Court agrees otherwise.  
24       Stipulated penalties with respect to the disputed matter shall  
25       continue to accrue, but payment shall be stayed pending  
26       resolution of the dispute as provided in Paragraph 77.  
27       Notwithstanding the stay of payment, stipulated penalties shall  
28       accrue from the first day of noncompliance with any applicable

1 provision of this Consent Decree. Only in the event that the  
2 City does not prevail on the disputed issue shall stipulated  
3 penalties be assessed and paid as provided in Section XX  
4 (Stipulated Penalties).

5 XX. STIPULATED PENALTIES

6 68. The City shall be liable for stipulated penalties in  
7 the amounts set forth in Paragraphs 69, 70 and 71 to the United  
8 States for failure to comply with the requirements of this  
9 Consent Decree specified below, unless excused under Section  
10 XVIII (Force Majeure). "Compliance" by the City shall include  
11 completion of the activities under this Consent Decree or any  
12 work plan or other plan approved under this Consent Decree  
13 identified below in accordance with all applicable requirements  
14 of law, this Consent Decree, the SOWs, and any plans or other  
15 documents approved by EPA pursuant to this Consent Decree and  
16 within the specified time schedules established by and approved  
17 under this Consent Decree.

18 69. a. The following stipulated penalties shall accrue  
19 per violation per day for any failure(s) to submit timely and  
20 adequate reports identified in Subparagraphs b or c, or for any  
21 failure to timely perform the work identified and scheduled in  
22 those reports:

| 23 | Penalty Per Violation<br>Per Day | Period of Noncompliance<br>Number of Days |
|----|----------------------------------|-------------------------------------------|
| 24 | \$5,000 . .                      | 1 through 7                               |
| 25 | \$10,000 . .                     | 8 through 14                              |
| 26 | \$15,000 . .                     | 15 and beyond                             |
| 27 | b. Reports for OUI:              |                                           |
| 28 |                                  |                                           |

- 1                   i.    Draft Remedial Action Work Plan
- 2                   ii. Prefinal Remedial Action Work Plan
- 3                   iii. Final Remedial Action Work Plan
- 4                   iv. Construction Complete Report
- 5                   v.    Yearly Status Reports
- 6           c.    Reports for OU2:
- 7                   i.    Draft Remedial Design/Remedial Action Report
- 8                   ii. Prefinal Remedial Design/Remedial Action
- 9                         Report
- 10                  iii. Final Remedial Design/Remedial Action Report
- 11                  iv. Construction Completion Report - Phase I
- 12                  v.    Evaluation of Phase I Report
- 13                  vi. Construction Completion Report - Phase II
- 14                  vii. Evaluation of Phase II Report
- 15                  viii. Construction Completion Report - Phase III
- 16                  ix. Evaluation of Phase III Report
- 17                  x.    Yearly Status Reports

18           70. For failure to submit timely or adequate reports or  
 19 documents required by this Consent Decree, other than those  
 20 identified in subparagraph 69(b) and (c), the following  
 21 stipulated penalties shall accrue per violation per day:

| 22           Penalty Per Violation |     | Period of Noncompliance |
|------------------------------------|-----|-------------------------|
| 23 <u>Per Day</u>                  |     | <u>Number of Days</u>   |
| 24           \$1,500               | . . | 1 through 7             |
| 25           \$3,000               | . . | 8 and beyond            |

26           71. In the event that EPA assumes performance of a portion  
 27 or all of the Work pursuant to Paragraph 85 of Section XXI  
 28 (Covenants Not to Sue by Plaintiffs), the City shall be liable

1 for a stipulated penalty in the amount of \$1 million or the  
2 amount of stipulated penalties otherwise due for the City's  
3 failure to comply with the requirements of this Decree, whichever  
4 is greater.

5       72. All penalties shall begin to accrue on the day after  
6 the complete performance is due or the day a violation occurs,  
7 and shall continue to accrue through the final day of the  
8 correction of the noncompliance or completion of the activity.  
9 However, stipulated penalties shall not accrue: (1) with respect  
10 to a deficient submission under Section XI (EPA Approval of Plans  
11 and Other Submissions), during the period, if any, beginning on  
12 the 15th day after EPA's receipt of such submission until the  
13 date that EPA notifies the City of any deficiency; (2) with  
14 respect to a decision by the Director of the Superfund Division,  
15 EPA Region 9, under Paragraph 65.b. or 66.a. of Section XIX  
16 (Dispute Resolution), during the period, if any, beginning on the  
17 11th day after the date that the City replies to EPA's Statement  
18 of Position is received until the date that the Director issues a  
19 final decision regarding such dispute; or (3) with respect to  
20 judicial review by this Court of any dispute under Section XIX  
21 (Dispute Resolution), during the period, if any, beginning on the  
22 15th day after the Court's receipt of the final submission  
23 regarding the dispute until the date that the Court issues a  
24 final decision regarding such dispute. Nothing herein shall  
25 prevent the simultaneous accrual of separate penalties for  
26 separate violations of this Consent Decree.

27       73. Following EPA's determination that the City has failed  
28 to comply with a requirement of this Consent Decree, EPA may

1 give the City written notification of the same and describe the  
2 noncompliance. EPA shall send the City a written demand for the  
3 payment of the penalties.

4 74. All penalties accruing under this Section shall be due  
5 and payable to the United States within thirty (30) days of the  
6 City's receipt from EPA of a demand for payment of the penalties,  
7 unless the City invokes the Dispute Resolution procedures under  
8 Section XIX (Dispute Resolution). All payments to the United  
9 States under this Section shall be paid by certified or cashier's  
10 check(s) made payable to "EPA Hazardous Substances Superfund,"  
11 shall be paid in the manner directed in paragraph 52 of this  
12 Consent Decree and shall also indicate that the payment is for  
13 stipulated penalties.

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

17 76. Penalties shall continue to accrue as provided in  
18 Paragraph 70 during any dispute resolution period, but need not  
19 be paid until the following:

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

25 b. If the dispute is appealed to this Court and the  
26 United States prevails in whole or in part, the City shall pay  
27 all accrued penalties determined by the Court to be owed to EPA  
28 within sixty (60) days of receipt of the Court's decision or

1 order, except as provided in Subparagraph c below;

2 c. If the District Court's decision is appealed by  
3 any Party, the City shall pay all accrued penalties determined by  
4 the District Court to be owing to the United States into an  
5 interest-bearing escrow account within sixty (60) days of receipt  
6 of the Court's decision or order. Penalties shall be paid into  
7 this account as it continue to accrue, at least every sixty (60)  
8 days. Within fifteen (15) days of receipt of the final appellate  
9 court decision, the escrow agent shall pay the balance of the  
10 account to EPA or to the City to the extent that it prevail.

11 77. a. If the City fails to pay stipulated penalties when  
12 due, the United States may institute proceedings to collect the  
13 penalties, as well as interest. The City shall pay Interest on  
14 the unpaid balance, which shall begin to accrue on the date of  
15 demand made pursuant to Paragraph 73.

16 b. Nothing in this Consent Decree shall be construed  
17 as prohibiting, altering, or in any way limiting the ability of  
18 the United States to seek any other remedies or sanctions  
19 available by virtue of the City's violation of this Decree or of  
20 the statutes and regulations upon which it is based, including,  
21 but not limited to, penalties pursuant to Section 122(1) of  
22 CERCLA. Provided, however, that the United States shall not seek  
23 civil penalties pursuant to Section 122(1) of CERCLA for any  
24 violation for which a stipulated penalty is provided herein,  
25 except in the case of a willful violation of the Consent Decree.

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

1 this Consent Decree.

2 XXI. COVENANTS NOT TO SUE BY PLAINTIFF

3 79. In consideration of the actions that will be performed  
4 and the payments that will be made by the City under the terms  
5 of the Consent Decree, and except as specifically provided in  
6 Paragraphs 81, 82, and 83 of this Section, the United States  
7 covenants not to sue or to take administrative action against the  
8 City pursuant to Sections 106 and 107(a) of CERCLA relating to  
9 the Site. Except with respect to future liability, these  
10 covenants not to sue shall take effect upon the receipt by EPA of  
11 the payments required by Paragraph 52 of Section XVI  
12 (Reimbursement of Response Costs). With respect to future  
13 liability, these covenants not to sue shall take effect upon  
14 Certification of Completion of Remedial Action by EPA pursuant to  
15 Paragraph 48.b of Section XIV (Certification of Completion).  
16 These covenants not to sue are conditioned upon the satisfactory  
17 performance by the City of its obligations under this Consent  
18 Decree. These covenants not to sue extend only to the City and  
19 do not extend to any other person.

20 80. United States' Pre-certification reservations.

21 Notwithstanding any other provision of this Consent Decree, the  
22 United States reserves, and this Consent Decree is without  
23 prejudice to, the right to institute proceedings in this action  
24 or in a new action, or to issue an administrative order seeking  
25 to compel the City (1) to perform further response actions  
26 relating to the Site or (2) to reimburse the United States for  
27 additional costs of response if, prior to Certification of  
28 Completion of the Remedial Actions:

1 (I) conditions at the Site, previously unknown to EPA,  
2 are discovered, or  
3 (ii) information, previously unknown to EPA, is  
4 received, in whole or in part,  
5 and these previously unknown conditions or information together  
6 with any other relevant information indicate that the Remedial  
7 Actions are not protective of human health or the environment.

8 81. United States' Post-certification reservations.

9 Notwithstanding any other provision of this Consent Decree, the  
10 United States reserves, and this Consent Decree is without  
11 prejudice to, the right to institute proceedings in this action  
12 or in a new action, or to issue an administrative order seeking  
13 to compel the City (1) to perform further response actions  
14 relating to the Site or (2) to reimburse the United States for  
15 additional costs of response if, subsequent to Certification of  
16 Completion of the Remedial Actions:

17 (I) conditions at the Site, previously unknown to EPA,  
18 are discovered, or  
19 (ii) information, previously unknown to EPA, is  
20 received,  
21 in whole or in part,  
22 and these previously unknown conditions or this information  
23 together with other relevant information indicate that the  
24 Remedial Actions are not protective of human health or the  
25 environment.

26 82. For purposes of Paragraph 81, the information and the  
27 conditions known to EPA shall include only that information and  
28 those conditions known to EPA as of the dates the RODs were



1 signed and set forth in the Records of Decision for the Site and  
2 the administrative records supporting the Records of Decision.  
3 For purposes of Paragraph 82, the information and the conditions  
4 known to EPA shall include only that information and those  
5 conditions known to EPA as of the date of Certification of  
6 Completion of the Remedial Actions and set forth in the Records  
7 of Decision, the administrative record supporting the Records of  
8 Decision, the post-RODs administrative record, or in any  
9 information received by EPA pursuant to the requirements of this  
10 Consent Decree prior to Certification of Completion of the  
11 Remedial Actions.

12 83. General reservations of rights. The covenants not to  
13 sue set forth above do not pertain to any matters other than  
14 those expressly specified in Paragraph 80. The United States  
15 reserves, and this Consent Decree is without prejudice to, all  
16 rights against the City with respect to all other matters,  
17 including but not limited to, the following:

- 18 (1) claims based on a failure by the City to meet a  
19 requirement of this Consent Decree;
- 20 (2) liability for future disposal of Waste Material at  
21 the Site, other than as provided in the RODs, the Work, or  
22 otherwise ordered by EPA;
- 23 (3) liability for damages for injury to, destruction  
24 of, or loss of natural resources, and for the costs of any  
25 natural resource damage assessments, pursuant to 107  
26 (a) (4) (C) of CERCLA;
- 27 (4) criminal liability;
- 28 (5) liability for violations of federal or state law

1       which occur during or after implementation of the Remedial  
2       Actions; and

3               (6)   liability, prior to Certification of  
4       Completion of the Remedial Actions, for additional  
5       response actions that EPA determines are necessary to  
6       achieve Performance Standards, but that cannot be  
7       required pursuant to Paragraph 14 (Modification of the  
8       SOWs or Related Work Plans);

9               (7)   liability for additional operable units at the  
10      Site;

11              (8)   liability for costs that the United States will  
12      incur related to the Site but are not within the definition  
13      of Future Response Costs.

14      84.   Work Takeover   In the event EPA determines that the  
15   City has ceased implementation of any portion of the Work, is  
16   seriously or repeatedly deficient or late in its performance of  
17   the Work, or is implementing the Work in a manner which may cause  
18   an endangerment to human health or the environment, EPA may  
19   assume the performance of all or any portions of the Work as EPA  
20   determines necessary.   The City may invoke the procedures set  
21   forth in Section XIX (Dispute Resolution), Paragraph 65, for the  
22   sole purpose of disputing EPA's determination that takeover of  
23   the Work is warranted under this Paragraph.   In no event shall  
24   the dispute delay EPA's takeover of the Work.   Costs incurred by  
25   the United States in performing the Work pursuant to this  
26   Paragraph shall be considered Future Response Costs that the City  
27   shall pay pursuant to Section XVI (Reimbursement of Response  
28   Costs).

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

4  
5                                    XXII. COVENANTS BY THE CITY

6        86. Covenant Not to Sue. Subject to the reservations in  
7 Paragraph 87, the City hereby covenants not to sue and agrees not  
8 to assert any claims or causes of action against the United  
9 States with respect to work pertaining to the Site and Future  
10 Response Costs as defined herein or this Consent Decree,  
11 including, but not limited to:

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

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

20                c. any claims arising out of response activities at  
21 the Site, including claims based on EPA's selection of response  
22 actions, oversight of response activities or approval of plans  
23 for such activities.

24        87. The City reserves, and this Consent Decree is without  
25 prejudice to, claims against the United States, subject to the  
26 provisions of Chapter 171 of Title 28 of the United States Code,  
27 for money damages for injury or loss of property or personal  
28 injury or death caused by the negligent or wrongful act or

1 omission of any employee of the United States while acting within  
2 the scope of his or her office or employment under circumstances  
3 where the United States, if a private person, would be liable to  
4 the claimant in accordance with the law of the place where the  
5 act or omission occurred. However, any such claim shall not  
6 include a claim for any damages caused, in whole or in part, by  
7 the act or omission of any person, including any contractor, who  
8 is not a federal employee as that term is defined in 28 U.S.C. §  
9 2671; nor shall any such claim include a claim based on EPA's  
10 selection of response actions, or the oversight or approval of  
11 the City's s plans or activities. The foregoing applies only to  
12 claims which are brought pursuant to any statute other than  
13 CERCLA and for which the waiver of sovereign immunity is found in  
14 a statute other than CERCLA;

15 88. Nothing in this Consent Decree shall be deemed to  
16 constitute preauthorization of a claim within the meaning of  
17 Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.  
18 § 300.700(d).

19 XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

20 89. Nothing in this Consent Decree shall be construed to  
21 create any rights in, or grant any cause of action to, any person  
22 not a Party to this Consent Decree. The preceding sentence shall  
23 not be construed to waive or nullify any rights that any person  
24 not a signatory to this decree may have under applicable law.  
25 Each of the Parties expressly reserves any and all rights  
26 (including, but not limited to, any right to contribution),  
27 defenses, claims, demands, and causes of action which each Party  
28 may have with respect to any matter, transaction, or occurrence

1 relating in any way to the Site against any person not a Party  
2 hereto.

3 90. The Parties agree, and by entering this Consent Decree  
4 this Court finds, that the City is entitled, as of the effective  
5 date of this Consent Decree, to protection from contribution  
6 actions or claims as provided by CERCLA Section 113(f)(2), 42  
7 U.S.C. § 9613(f)(2) for matters addressed in this Consent Decree.

8 91. The "matters addressed" in this settlement are all  
9 response actions taken or to be taken and all response costs  
10 incurred or to be incurred by the United States or any other  
11 person with respect to the Site. The "matters addressed" in this  
12 settlement do not include those response costs or response action  
13 as to which the United States has reserved its rights under this  
14 Consent Decree (except for claims for failure to comply with this  
15 Decree), in the event that the United States asserts rights  
16 against the City coming within the scope of such reservations.

17 92. [RESERVED]

18 93. [RESERVED]

19 94. In any subsequent administrative or judicial proceeding  
20 initiated by the United States for injunctive relief, recovery of  
21 response costs, or other appropriate relief relating to the Site,  
22 the City shall not assert, and may not maintain, any defense or  
23 claim based upon the principles of waiver, res judicata,  
24 collateral estoppel, issue preclusion, claim-splitting, or other  
25 defenses based upon any contention that the claims raised by the  
26 United States in the subsequent proceeding were or should have  
27 been brought in the instant case; provided, however, that nothing  
28 in this Paragraph affects the enforceability of the covenants not

1 to sue set forth in Section XXI (Covenants Not to Sue by  
2 Plaintiff).

3 XXIV. ACCESS TO INFORMATION

4 95. The City shall provide to EPA, upon request, copies of  
5 all nonprivileged documents and information within its possession  
6 or control or that of its contractors or agents relating to  
7 activities at the Site or to the implementation of this Consent  
8 Decree, including, but not limited to, sampling, analysis, chain  
9 of custody records, manifests, trucking logs, receipts, reports,  
10 sample traffic routing, correspondence, or other documents or  
11 information related to the Work. The City shall also make  
12 available to EPA, for purposes of investigation, information  
13 gathering, or testimony, its employees, agents, or  
14 representatives with knowledge of relevant facts concerning the  
15 performance of the Work.

16 96. a. The City may assert business confidentiality  
17 claims covering part or all of the documents or information  
18 submitted to Plaintiff under this Consent Decree to the extent  
19 permitted by and in accordance with Section 104(e)(7) of CERCLA,  
20 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or  
21 information determined to be confidential by EPA will be afforded  
22 the protection specified in 40 C.F.R. Part 2, Subpart B. If no  
23 claim of confidentiality accompanies documents or information  
24 when it are submitted to EPA, or if EPA has notified the City  
25 that the documents or information are not confidential under the  
26 standards of Section 104(e)(7) of CERCLA, the public may be given  
27 access to such documents or information without further notice to  
28 the City.

1           b.    The City may assert that certain documents,  
2 records and other information are privileged under the attorney-  
3 client privilege or any other privilege recognized by federal  
4 law.  If the City asserts such a privilege in lieu of providing  
5 documents, it shall provide Plaintiff with the following:  (1)  
6 the title of the document, record, or information; (2) the date  
7 of the document, record, or information; (3) the name and title  
8 of the author of the document, record, or information; (4) the  
9 name and title of each addressee and recipient; (5) a description  
10 of the contents of the document, record, or information: and (6)  
11 the privilege asserted by the City.  However, no documents,  
12 reports or other information created or generated at the request  
13 of EPA pursuant to the requirements of the Consent Decree shall  
14 be withheld on the grounds that they are privileged.

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

20                           XXV.  RETENTION OF RECORDS

21           98.  Until 10 years after the City's receipt of EPA's  
22 notification pursuant to Paragraph 49(b) of Section XIV  
23 (Certification of Completion of the Work), the City shall  
24 preserve and retain all records and documents now in its  
25 possession or control or which come into its possession or  
26 control that relate in any manner to the performance of the Work  
27 or liability of any person for response actions conducted and to  
28 be conducted at the Site, regardless of any document retention

1 policy to the contrary. Until ten (10) years after the City's  
2 receipt of EPA's notification pursuant to Paragraph 49.b of  
3 Section XIV (Certification of Completion), the City shall also  
4 instruct its contractors and agents to preserve all documents,  
5 records, and information of whatever kind, nature or description  
6 relating to the performance of the Work for a period of ten (10)  
7 years.

8       99. At the conclusion of this document retention period,  
9 the City shall deliver these documents to EPA. The City may  
10 assert that certain documents, records and other information are  
11 privileged under the attorney-client privilege or any other  
12 privilege recognized by federal law. If the City asserts such a  
13 privilege, it shall provide Plaintiff with the following: (1)  
14 the title of the document, record, or information; (2) the date  
15 of the document, record, or information; (3) the name and title  
16 of the author of the document, record, or information; (4) the  
17 name and title of each addressee and recipient; (5) a description  
18 of the subject of the document, record, or information; and (6)  
19 the privilege asserted by the City. However, no documents,  
20 reports or other information created or generated pursuant to the  
21 requirements of the Consent Decree shall be withheld on the  
22 grounds that they are privileged. The City hereby certifies  
23 that, to the best of its knowledge and belief, after thorough  
24 inquiry, it has not altered, mutilated, discarded, destroyed or  
25 otherwise disposed of any records, documents or other information  
26 relating to its potential liability regarding the Site since  
27 notification of potential liability by the United States or the  
28 State or the filing of suit against it regarding the Site and



1 that it has fully complied with any and all EPA requests for  
2 information pursuant to Section 104(e) and 122(e) of CERCLA, 42  
3 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C.  
4 6927.

5 XXVI. NOTICES AND SUBMISSIONS

6 100. Whenever, under the terms of this Consent Decree,  
7 written notice is required to be given or a report or other  
8 document is required to be sent by one Party to another, it shall  
9 be directed to the individuals at the addresses specified below,  
10 unless those individuals or their successors give notice of a  
11 change to the other Parties in writing. All notices and  
12 submissions shall be considered effective upon receipt, unless  
13 otherwise provided. Written notice as specified herein shall  
14 constitute complete satisfaction of any written notice  
15 requirement of the Consent Decree with respect to the United  
16 States, EPA, and the City, respectively.

17 As to the United States:

18 Chief, Environmental Enforcement Section  
19 Environment and Natural Resources Division  
20 U.S. Department of Justice  
21 P.O. Box 7611  
22 Ben Franklin Station  
23 Washington, D.C. 20044  
24 Re: DJ # 90-11-2-753

22 As to EPA:

23 Keith Takata  
24 Director, Superfund Division  
25 United States Environmental Protection Agency  
26 Region 9  
27 75 Hawthorne St.  
28 San Francisco, CA 94105

and

Cynthia Wetmore  
EPA Project Coordinator

1 United States Environmental Protection Agency  
2 Region IX  
3 75 Hawthorne St.  
4 San Francisco, CA 94105

5 As to the City :

6 City Project Coordinator to be designated by the City  
7 and

8 Ronald C. Anderson, Jr.  
9 Assistant Public Utilities Director  
10 Department of Public Utilities  
11 City of Fresno  
12 2600 Fresno Street  
13 Fresno, CA 93721-3624

14 and

15 Martin D. Koczanowicz  
16 Deputy City Attorney  
17 City Attorney's Office  
18 City of Fresno  
19 2600 Fresno Street  
20 Fresno, CA 93721-3602

21 XXVII. EFFECTIVE DATE

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

25 XXVIII. RETENTION OF JURISDICTION

26 102. This Court retains jurisdiction over both the subject  
27 matter of this Consent Decree and the City for the duration of  
28 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

1 with Section XIX (Dispute Resolution) hereof.

2 XXIX. APPENDICES

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

5 "Appendix A" is the ROD signed September 30, 1993

6 "Appendix B" is the ROD signed September 30, 1996.

7 "Appendix C" is the SOW for Operable Unit One.

8 "Appendix D" is the SOW for Operable Unit Two.

9 XXX. COMMUNITY RELATIONS

10 104. The City shall propose to EPA its participation in the  
11 community relations plan to be developed by EPA. EPA will  
12 determine the appropriate role for the City under the Plan. The  
13 City shall also cooperate with EPA in providing information  
14 regarding the Work to the public. As requested by EPA, the City  
15 shall participate in the preparation of such information for  
16 dissemination to the public and in public meetings which may be  
17 held or sponsored by EPA to explain activities at or relating to  
18 the Site.

19 XXXI. MODIFICATION

20 105. Schedules specified in this Consent Decree for  
21 completion of the Work may be modified by agreement of EPA and  
22 the City. All such modifications shall be made in writing.

23 106. Except as provided in Paragraph 14 (Modification of the  
24 SOWs or Related Work Plans), no material modifications shall be  
25 made to the SOWs without written notification to and written  
26 approval of the United States, the City, and the Court. Prior to  
27 providing its approval to any modification, the United States  
28 will provide the State with a reasonable opportunity to review

1 and comment on the proposed modification. Modifications to the  
2 SOWs that do not materially alter that document may be made by  
3 written agreement between EPA, after providing the State with a  
4 reasonable opportunity to review and comment on the proposed  
5 modification, and the City.

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

9 XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

10 108. This Consent Decree shall be lodged with the Court for  
11 a period of not less than thirty (30) days for public notice and  
12 comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C.  
13 § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves  
14 the right to withdraw or withhold its consent if the comments  
15 regarding the Consent Decree disclose facts or considerations  
16 which indicate that the Consent Decree is inappropriate,  
17 improper, or inadequate. The City consents to the entry of this  
18 Consent Decree without further notice.

19 109. If for any reason the Court should decline to approve  
20 this Consent Decree in the form presented, this agreement is  
21 voidable at the sole discretion of any Party and the terms of the  
22 agreement may not be used as evidence in any litigation between  
23 the Parties.

24 XXXIII. SIGNATORIES/SERVICE

25 110. The undersigned representative of the City to this  
26 Consent Decree and the Assistant Attorney General for Environment  
27 and Natural Resources of the Department of Justice certify that  
28 he or she is fully authorized to enter into the terms and

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1 conditions of this Consent Decree and to execute and legally bind  
2 such Party to this document.

3 111. The City hereby agrees not to oppose entry of this  
4 Consent Decree by this Court or to challenge any provision of  
5 this Consent Decree prior to entry, unless the United States has  
6 notified the City in writing that it no longer supports entry of  
7 the Consent Decree.

8 112. The City shall identify, on the attached signature  
9 page, the name, address and telephone number of an agent who is  
10 authorized to accept service of process by mail on behalf of that  
11 Party with respect to all matters arising under or relating to  
12 this Consent Decree. The City hereby agrees to accept service in  
13 that manner and to waive the formal service requirements set  
14 forth in Rule 4 of the Federal Rules of Civil Procedure and any  
15 applicable local rules of this Court, including, but not limited  
16 to, service of a summons.

17 SO ORDERED THIS 9th DAY OF June, 1988

18 [Signature]  
19 United States District Judge  
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28

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the  
2 matter of United States v. the City of Fresno, relating  
3 to the Fresno Sanitary Landfill Superfund Site.

4  
5 FOR THE UNITED STATES OF AMERICA

6 Date: \_\_\_\_\_

7 LOIS J. SCHIFFER  
8 Assistant Attorney General  
9 Environment and Natural Resources  
10 Division  
11 U.S. Department of Justice  
12 Washington, D.C. 20530

13 RICHARD L. BEAL  
14 Environmental Enforcement Section  
15 Environment and Natural Resources  
16 Division  
17 U.S. Department of Justice  
18 P.O. Box 7611  
19 Ben Franklin Station  
20 Washington, D.C. 20044-7611

21  
22 Assistant United States Attorney  
23 Eastern District of California  
24 3654 Federal Building  
25 Fresno, California 93721

26  
27 STEVE A. HERMAN  
28 Assistant Administrator for  
Enforcement and Compliance  
Assurance  
U.S. Environmental Protection  
Agency  
401 M Street, S.W.  
Washington, D.C. 20460

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FELICIA MARCUS  
Regional Administrator, Region IX  
U.S. Environmental Protection  
Agency  
75 Hawthorne Street  
San Francisco, CA 94105

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THELMA ESTRADA  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

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THE UNDERSIGNED PARTY enters into this Consent Decree in the  
matter of United States v. the City of Fresno relating  
to the Fresno Sanitary Landfill Superfund Site.

FOR THE CITY OF FRESNO

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JEFFREY M. REID  
City Manager  
City of Fresno  
2600 Fresno Street  
Fresno, CA 93721-3601



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

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[Please type]  
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Tel. Number: \_\_\_\_\_

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