



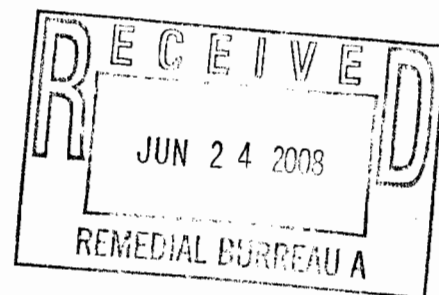
**DEPARTMENT OF THE ARMY**  
NEW YORK DISTRICT, CORPS OF ENGINEERS  
JACOB K. JAVITS FEDERAL BUILDING  
NEW YORK, N.Y. 10278-0090

June 19, 2008

REPLY TO  
ATTENTION OF

Programs and Project Management

Patricia Simmons Pierre  
United States Environmental Protection Agency  
Region II  
Remedial Project Manager  
290 Broadway, 20<sup>th</sup> Floor  
New York, New York 10007-1866



RE: Malta Test Station Formerly Used Defense Site / Malta Rocket Fuel Area Superfund Site

Dear Ms. Simmons Pierre:

The U.S. Army Corps of Engineers (USACE) recently performed a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) site inspection (SI) at the subject Formerly Used Defense Site (FUDS) under its military munitions response program (MMRP), and issued a report in September 2007. The results of the SI were that munitions debris was present at the site, and there is a potential that munitions and explosives of concern may remain at the site. In accordance with our FUDS guidance, and because the site was Government-owned but contractor-operated, an MMRP Potentially Responsible Party (PRP) investigation was recommended.

Our preliminary investigation uncovered the fact that the United States entered into a Consent Decree to settle liability for response actions at the Malta Rocket Fuel Area Superfund Site in 1997 (the Malta Test Station FUDS is within the boundaries of the Malta Superfund site). The Consent Decree settled liability at the Malta Superfund site with regards to the Department of Defense (DOD) and several other PRPs. The lead PRP, General Electric, performed the response action. The Consent Decree provided a broad covenant settling liability for the settling Federal agencies, including DOD and its sub-agencies. Since the Malta Test Station is still on the U. S. Environmental Protection Agency's (USEPA's) National Priority List (NPL), we are now writing to notify USEPA of our determination and current site status. Based on our analysis of the Consent Decree, we have determined that the prior 1997 Consent Decree resolved all of DOD's liability.

Notwithstanding the execution of the consent decree settling DOD's liability, we have identified numerous PRPs other than the DOD who contributed to the munitions related issues at the site. Consequently, DOD has no further responsibility at this site.

The USACE SI report was previously sent to you in September 2007, and the 1997 Consent Decree is contained on the enclosed compact disk. We remain committed to remedy, as necessary, environmental hazards at all former sites for which DOD is responsible. Please contact me at 917-790-8235, should you care to discuss this matter further.

Sincerely,

A handwritten signature in black ink, reading "Gregory J. Goepfert". The signature is fluid and cursive, with the first name "Gregory" and last name "Goepfert" clearly legible.

Gregory J. Goepfert  
Project Manager

Encl.: CD, Consent Decree

cc: NYSDEC/ Mr. John Swartwout, P.E., w/ encl.

Luther Forest Technology Campus Economic Development Corporation/ Mr. Jon Dawes, w/encl.

CENAB-OC/ Mr. Jon Owens, Esq., w/ encl.

CENAN-OC/ Ms. Barbara Hebel, Esq., w/ encl.

COPY

COPY

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CURTISS-WRIGHT CORPORATION,  
GENERAL ELECTRIC COMPANY,  
MECHANICAL TECHNOLOGY, INC.,  
NEW YORK STATE ENERGY RESEARCH,  
AND DEVELOPMENT AUTHORITY,  
OLIN CORPORATION,  
POWER TECHNOLOGIES, INC.,  
WRIGHT MALTA CORPORATION,

Defendants.

U. S. DISTRICT COURT  
N.D. OF N.Y.  
ORIGINAL FILED

JAN 06 1998

LAWRENCE K. BAERMAN, CLERK  
ALBANY

CIVIL ACTION NO.

92-CV-0014

NPM DRP

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|-------------------------------------|
| U.S. DISTRICT COURT—N.D. OF N.Y.    |
| FILED                               |
| MAR 17 1998                         |
| AT _____                            |
| Lawrence K. Baerman, Clerk—Syracuse |

CONSENT DECREE

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TEL: 518 431 0249

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of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree.

Performing Defendant and Paying Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS 16th DAY OF March, 1998.

Rebecca M. Gurn  
United States District Judge

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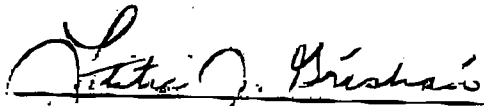
THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Curtiss Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: 12/17/97

  
Joe M. Gross  
Section Chief  
Environmental Enforcement Section

Date: 12/9/97

  
Letitia J. Grishaw  
Section Chief  
Environmental Defense Section

Date: 12/10/97

  
Alex Beehler  
Environmental Enforcement Section  
Environment & Natural Resources  
Division  
U. S. Department of Justice  
Washington, D.C. 20530  
(202) 514-4185

Date: 12/10/97

  
Eric G. Hostetler  
Environmental Defense Section  
Environment & Natural Resources  
Division  
P. O. Box 23986  
Washington, D.C. 20026-3986  
(202) 305-2326

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL ACTION NO.

CURTISS-WRIGHT CORPORATION,

GENERAL ELECTRIC COMPANY,

MECHANICAL TECHNOLOGY, INC.,

NEW YORK STATE ENERGY RESEARCH,

AND DEVELOPMENT AUTHORITY,

OLIN CORPORATION,

POWER TECHNOLOGIES, INC.,

WRIGHT MALTA CORPORATION,

Defendants.

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CONSENT DECREE

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## CONSENT DECREE

### I. BACKGROUND

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

B. The Plaintiff in its complaint seeks, inter alia:

(1) reimbursement of costs incurred by EPA and the Department of Justice ("DOJ"), on behalf of EPA, for response actions at the Malta Rocket Fuel Area Superfund Site ("Site") in the Towns of Malta and Stillwater, Saratoga County, New York, together with accrued interest; and (2) performance of response actions at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New York (the "State") on May 13, 1997 of EPA's negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has

provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the relevant natural resource trustee(s) on May 20, 1997 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship.

E. The Performing Defendant and Paying Defendants that have entered into this Consent Decree do not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment. The Performing Defendant, Paying Defendants, and Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim or cross claim that has been or could be asserted against them.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40

C.F.R. Part 300, Appendix B, by publication in the Federal Register on July 22, 1987, 52 Fed. Reg. 27643.

G. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site was commenced by certain of the Settling Federal Agencies, the General Electric Company, and the New York State Energy Research and Development Authority ("NYSERDA") pursuant to the NCP on November 3, 1989.

H. A Remedial Investigation ("RI") Report was completed in February 1995 and a Feasibility Study ("FS") was completed in October 1995.

I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on or about April 17, 1996, in the Saratogian, a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

J. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on July 18, 1996, on which the State has given its concurrence. The ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

K. Based on the information presently available to EPA, EPA believes that the Work, as defined herein, will be properly and promptly conducted by the Performing Defendant if conducted in accordance with the requirements of this Consent Decree and its appendices.

L. Solely for the purposes of Section 113(j) of CERCLA, the Work, as defined herein, to be performed by the Performing Defendant shall constitute a response action taken or ordered by the President.

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

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

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Performing Defendant and Paying Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, Performing Defendant and Paying Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Performing Defendant and Paying Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States, and upon Performing Defendant and Paying Defendants and their heirs, successors and assigns. Any change in ownership or corporate status of a Performing Defendant or Paying Defendant, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter any Party's responsibilities under this Consent Decree.

3. Performing Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing Performing Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Performing Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Performing Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Performing Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below

are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

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

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

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

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

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States (not including the Settling Federal Agencies) incurs in reviewing

or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing the Work and this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid in connection with access and Institutional Controls), XV, and Paragraph 85 of Section XXI. Future Response Costs shall also include all Interim Response Costs, and all Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from December 30, 1996 to the effective date of this Consent Decree.

"Interim Response Costs" shall mean all costs, including direct and indirect costs, (a) paid by the United States in connection with the Site between September 14, 1996 and the effective date of this Consent Decree, or (b) incurred prior to the effective date of this Consent Decree but paid after that date.

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

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

"Institutional Controls" shall mean land and/or water use restrictions which may include, but need not be limited to, restrictions in the form of contractual agreements, deed restrictions, state or local laws, regulations, ordinances or other governmental action.

"Matters Addressed" shall mean all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or any other person with respect to the Site. Matters Addressed does not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against the Performing Defendant and/or the Paying Defendants, and/or EPA or federal natural resource trustees assert rights against the Settling Federal Agencies, coming within the scope of such reservations.

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

"NYSDEC" shall mean the New York State Department of Environmental Conservation and any successor departments or agencies of the State.

"Operation and Maintenance" or "O&M" shall mean all activities required to operate, maintain, and monitor the effectiveness of the Remedial Action as required under the O&M Manuals approved or developed by EPA pursuant to this Consent Decree and the Statement of Work ("SOW").

"Owner Settling Defendants" shall mean the New York State Energy Research and Development Authority ("NYSERDA") and Wright Malta Corporation.

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

"Party" or "Parties" shall mean the United States (including on behalf of EPA and on behalf of the Settling Federal Agencies), the Performing Defendant, and the Paying Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States (not including the Settling Federal Agencies) paid at or in connection with the Site through September 14, 1996, plus Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through December 30, 1996.

"Paying Defendants" shall mean Curtiss-Wright Corporation, Mechanical Technology, Inc., NYSERDA, Olin Corporation, Power Technologies, Inc., and Wright Malta Corporation, as well as their successors and assigns.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the remedy selected in the ROD, set forth in the Statutory Determinations Section of the ROD and Section I of the SOW.

"Performing Defendant" shall mean General Electric Company, as well as its successors and assigns.

"Plaintiff" shall mean the United States on behalf of EPA.

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

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on July 18, 1996, by the Regional Administrator, EPA Region II, all attachments, and any amendments thereto. The ROD is attached as Appendix A.

"Remedial Action" or "RA" shall mean those activities, except for O&M, to be undertaken by the Performing Defendant to implement the ROD, in accordance with the SOW and the EPA-approved Remedial Design Reports and other plans approved by EPA.

"Remedial Design" or "RD" shall mean those activities to be undertaken by the Performing Defendant to develop the final plans and specifications for the RA.

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

"Settling Federal Agencies" shall mean those departments, agencies, and instrumentalities of the United States identified in Appendix H.

"Site" shall mean the Malta Rocket Fuel Area Superfund Site, located in the Towns of Malta and Stillwater, Saratoga County, New York, encompassing the following areas: 1) a square parcel of approximately 165 acres of developed land, known as the Malta Test Station (the Test Station); 2) portions of the predominantly undeveloped woodlands that surround the Test Station, including a) the former G.E./Exxon Nuclear building; b) Area D-3; c) the Triangular Parcel; and d) areas adjacent to the Test Station that have been impacted by hazardous substances in ground water as identified in the ROD; 3) all other areas where hazardous substances migrating from the Test Station may come to be located; and 4) all suitable areas in very close proximity to the hazardous substances necessary for implementation of the Work. The Site is depicted generally on the map attached as Appendix C.

"State" shall mean the State of New York.

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

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

"Supplemental Institutional Controls" shall mean Institutional Controls (other than those which are required pursuant to Paragraph 27 below) that are developed, requested, or approved by EPA for one or more of the following purposes: (1) to ensure non-interference with the performance, operation and maintenance of any response actions at or pertaining to the Site, other than the remedy selected in the ROD; (2) to ensure the integrity and effectiveness of any response actions at or pertaining to the Site, other than the remedy selected in the ROD; and (3) to otherwise ensure the protection of public health, welfare, or the environment at and in connection with the Site.

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

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

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

#### V. GENERAL PROVISIONS

##### 5. Objectives of the Parties

The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site, to reimburse response costs of EPA and DOJ on behalf of EPA, and to resolve the claims of EPA and DOJ on behalf of EPA against the Performing Defendant, Paying Defendants, and Settling Federal Agencies, as well as the claims of the Performing Defendant, Paying Defendants, and Settling Federal Agencies which have been or could have been asserted against each other, as provided in this Consent Decree.

6. Commitments by Performing Defendant, Paying Defendants,  
and Settling Federal Agencies

a. Performing Defendant shall finance and perform the Work in accordance with this Consent Decree, the ROD, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Performing Defendant and approved by EPA pursuant to this Consent Decree. Performing Defendant shall also reimburse the Hazardous Substance Superfund for Past Response Costs and Future Response Costs as provided in this Consent Decree. The Paying Defendants shall deposit monies in the MRFA Site Trust Fund and shall reimburse the Hazardous Substance Superfund for Past Response Costs as provided in Paragraph 53.a. and b. and Appendix I (the "Green Flame Trust Agreement") of this Consent Decree. The Settling Federal Agencies shall reimburse the Hazardous Substance Superfund for Past Response Costs as provided in Paragraph 53.c. of this Consent Decree.

b. The obligation of Performing Defendant and Paying Defendants to make the payment required under Paragraph 53.b. is joint and several. In the event of the insolvency or other failure of the Performing Defendant and/or any one or more of the Paying Defendants to reimburse Past Response Costs as required

under this Consent Decree, the remaining Performing Defendant and/or Paying Defendants shall make such payment.

7. Compliance With Applicable Law

All activities undertaken by Performing Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Performing Defendant must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits

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

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

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

9. Notice of Obligations to Successors-in-Title

a. With respect to any real property owned or controlled by any of the Owner Settling Defendants that is located within the Site, within fifteen (15) days after the entry of this Consent Decree, each such Owner Settling Defendant shall submit to EPA for review and approval a notice to be filed with the County Clerk's Office, Saratoga County, State of New York, which shall provide notice to all successors-in-title that such property is part of the Site, that EPA selected a remedy for the Site on July 18, 1996, and that a Consent Decree requiring the implementation of the remedy by potentially responsible parties exists. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was

entered by the Court. Such notice(s) shall be filed within 10 days of EPA's approval of the notice(s). Each Owner Settling Defendant shall provide EPA with a certified copy of the recorded notice(s) within ten (10) days of recording such notice(s).

b. At least thirty (30) days prior to the conveyance of any interest in real property located within the Site, including, but not limited to, fee interests and mortgage interests (except leasehold interests, in which case, at least ten (10) days prior to the conveyance of any leasehold interest), the Owner Settling Defendant conveying the interest shall give the grantee written notice of this Consent Decree and any instrument by which an interest in real property has been conveyed that confers a right of access to the Site or any other property (hereinafter referred to as "access easements"), and any Institutional Controls in the form of deed restrictions that have been filed with respect to the property pursuant to Section IX (Access and Institutional Controls). At least thirty (30) days prior to such conveyance (except leasehold interests, in which case, at least ten (10) days prior to the conveyance of any leasehold interest), the Owner Settling Defendant conveying the interest shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on

which notice of the Consent Decree and access easements or Institutional Controls in the form of deed restrictions was given to the grantee. In the event of any such conveyance, the Owner Settling Defendants' obligations under this Consent Decree, including their obligations to provide or secure access and Institutional Controls, as well as abide by such Institutional Controls, pursuant to Section IX (Access and Institutional Controls), shall continue to be met by the Owner Settling Defendants. In no event shall the conveyance release or otherwise affect the liability of the Performing Defendant, the other Paying Defendants and the Settling Federal Agencies to comply with this Consent Decree. If the United States approves, the grantee may perform some or all of the Work under this Consent Decree.

VI. PERFORMANCE OF THE WORK BY PERFORMING DEFENDANT

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Performing Defendant pursuant to Sections VI (Performance of the Work by Performing Defendant), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and

supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA. Performing Defendant's Supervising Contractor, as well as all other contractors and subcontractors who engage in the "practice of engineering" at the Site on behalf of Performing Defendant, as the "practice of engineering" is defined at Section 7201 of the New York State Education Law, must comply with all applicable New York State legal requirements regarding the practice of professional engineering within the State of New York, including, but not limited to, all applicable requirements of the New York State Education Law and Articles 15 and 15-A of the Business Corporation Law. Within ten (10) days after the lodging of this Consent Decree, Performing Defendant shall notify EPA and the State in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Performing Defendant propose to change a Supervising Contractor, Performing Defendant shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Performing Defendant in writing of such disapproval and the reasons therefore. Performing Defendant shall then submit to EPA a list of contractors, including the qualifications of each contractor, that would be acceptable to Performing Defendant within thirty (30) days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Performing Defendant may select any contractor from that list that is not disapproved and shall notify EPA of the name of the contractor selected within twenty-one (21) days of EPA's authorization to proceed.

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

11. Remedial Design.

a. Separate RD Reports for Remedial Work Elements I (Drinking Water), II (Ground Water), III (Soil), and IV (Institutional Controls) are attached as Appendices D through G, respectively. The RD Reports provide for design of the remedy set forth in the ROD, in accordance with the SOW, and provide for attainment of Performance Standards and other requirements set forth in the ROD, this Consent Decree and/or the SOW. The RD Reports are incorporated into and made an enforceable part of this Consent Decree.

12. Remedial Action.

a. Following the lodging of the Consent Decree, Performing Defendant shall award a contract for and/or begin implementation of the remedial activities required by the RD Reports for Remedial Work Elements III and IV, in accordance with the schedules contained therein.

b. Within fourteen (14) days after completion of the remedial activities required by the RD Report for Remedial Work Element III, Performing Defendant shall schedule and conduct an inspection to be attended by Performing Defendant and EPA.

c. The Performing Defendant shall submit to EPA and the State all plans, submittals, or other deliverables required under

the approved RD Reports in accordance with the approved schedule for review and approval pursuant to Section XII (Submissions Requiring Agency Approval).

d. Within thirty (30) days after completion of the remedial activities required by the RD Reports for Remedial Work Elements III or IV, Performing Defendant shall submit to EPA a separate Remedial Action Report documenting the remedial activities performed for the given Remedial Work Element, in accordance with the requirements set forth in the SOW.

e. EPA will either approve each Remedial Action Report or will require modification of it, and/or require corrective measures to fully and properly implement the Remedial Action, in accordance with Section XI (EPA Approval of Plans and Other Submissions).

### 13. Operation and Maintenance

a. Within ten (10) days after the effective date of this Consent Decree, Performing Defendant shall submit to EPA an O&M Manual for Remedial Work Element I (Drinking Water), in accordance with the requirements set forth in the SOW.

b. Within ten (10) days after the effective date of this Consent Decree, Performing Defendant shall submit to EPA an O&M

Manual for Remedial Work Element II (Ground Water), in accordance with the requirements set forth in the SOW.

c. Within fifteen (15) days after EPA's approval of the Remedial Action Report for Remedial Work Element IV, Performing Defendant shall submit to EPA an O&M Manual for Remedial Work Element IV (Institutional Controls), in accordance with the requirements set forth in the SOW.

d. EPA will either approve each O&M Manual or will require modification of it, in accordance with Section XI (EPA Approval of Plans and Other Submissions).

e. Upon approval by EPA, the O&M Manuals for Remedial Work Elements I, II and IV shall be incorporated into and become enforceable under this Consent Decree.

f. Performing Defendant shall perform the O&M activities in accordance with the approved O&M Manuals, which include the O&M schedules contained therein. The O&M activities for Remedial Work Elements I and II shall continue until the Performance Standards have been attained for three consecutive years (or a shorter period if approved by EPA in its sole discretion).

g. Within forty (40) days after attaining the Performance Standards as specified in the ROD and the SOW for the third

consecutive year (or a shorter period if approved by EPA in its sole discretion), Performing Defendant shall schedule and conduct an inspection in accordance with the SOW.

h. Within thirty (30) days of the inspection, Performing Defendant shall submit to EPA for approval a Notice of Completion and Final Report for the selected remedy as described in the SOW.

i. EPA will either approve the Final Report for the selected remedy or will require modification of it, and/or require corrective measures to complete the Remedial Action and attain Performance Standards, in accordance with Section XI (EPA Approval of Plans and Other Submissions).

14. Modification of the SOW or Related Plans or Other Submissions.

a. If EPA determines that modification to the work specified in the SOW and/or in plans or other submissions developed pursuant to the SOW is necessary to attain and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, EPA may require that such modification be incorporated in the SOW and/or such plans or submissions. Provided, however, that a modification may

only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the ROD.

b. For the purposes of this Paragraph 14 and Paragraphs 49. and 50. only, the "scope of the remedy selected in the ROD" is: Remedial Work Elements I (Drinking Water), II (Ground Water), III (Soils), and IV (Institutional Controls), as described in the SOW.

c. If Performing Defendant objects to any modification determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XIX (Dispute Resolution) and Paragraph 67 (record review). The SOW and/or related plans or submissions shall be modified in accordance with final resolution of the dispute.

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

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

15. Performing Defendant acknowledges and agrees that nothing in this Consent Decree, the SOW, a Remedial Design Report, a

Remedial Action Report, or an O&M Manual constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW and the EPA-approved plans or other submissions will achieve the Performance Standards.

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

a. The Performing Defendant shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Performing Defendant shall notify the state in which the planned receiving facility is located of major changes in the shipment

plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be proposed by the Performing Defendant in the RD Report. The Performing Defendant shall provide the information required by Paragraph 16.a. as soon as practicable after the award of the contract or the date implementation begins, whichever occurs first, but no later than ten (10) days before the Waste Material is actually shipped.

#### VII. REMEDY REVIEW

17. Periodic Review. Performing Defendant shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the response action selected in the ROD is protective of human health and the environment at least every five (5) years as required by Section 121(c) of CERCLA and any applicable regulations.

18. EPA Selection of Further Response Actions. If EPA determines, at any time, that the response action selected in the ROD is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

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

20. Performing Defendant's Obligation To Perform Further Response Actions. If EPA selects further response actions for the Site, the Performing Defendant shall undertake such further response actions to the extent that the reopener conditions in Paragraph 81 or Paragraph 82 (United States' reservations of rights based on unknown conditions or new information) are satisfied. Performing Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 81 or Paragraph 82 of Section XXI (Covenants by United States) are satisfied, (2) EPA's determination that the response action selected in the ROD is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to whether the response action selected in the ROD is protective or to EPA's selection of

further response actions shall be resolved pursuant to Paragraph 67 (record review).

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

VIII. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

22. Performing Defendant shall use the quality assurance ("QA"), quality control ("QC"), and chain of custody procedures for all samples in accordance with EPA guidance: "EPA Requirements for Quality Assurance Project Plans for Environmental Data Operation," (EPA QA/R5; "Preparing Perfect Project Plans," (EPA/600/9-88/087), and subsequent amendments to such guidance upon notification by EPA to Performing Defendant of such amendment. Any amended guidance shall apply only to procedures conducted after such notification. Any Quality Assurance Project Plan ("QAPP") submitted to EPA shall be consistent with the SOW, the NCP and the above guidance documents. If relevant to the proceeding, the Parties agree that

validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree.

b. Performing Defendant shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Consent Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

c. Performing Defendant shall ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Consent Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" (ILM04.0) and the "Contract Lab Program Statement of Work for Organic Analysis," (OLM03.2), and any amendments made thereto during the course of the implementation of this Consent Decree. Performing Defendant shall also ensure that all laboratories it uses for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program.

d. Performing Defendant shall ensure that EPA personnel and its authorized representatives are allowed access at

reasonable times to all laboratories utilized by Performing Defendant in implementing this Consent Decree.. Performing Defendant shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP.

23. Upon request, the Performing Defendant shall allow split or duplicate samples to be taken by EPA, the State, or their authorized representatives. Performing Defendant shall notify EPA not less than twenty-eight (28) days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA shall have the right to take any additional samples that EPA or the State deems necessary. Upon request, EPA shall allow the Performing Defendant to take split or duplicate samples of any samples it takes as part of EPA's oversight of the Performing Defendant's implementation of the Work.

24. Performing Defendant shall submit to EPA the validated results of all sampling and/or tests or other data obtained or generated by or on behalf of Performing Defendant with respect to the Site and/or the implementation of this Consent Decree within fifteen (15) days of the date when those results or data become available to Performing Defendant unless EPA agrees otherwise. If EPA so requests, Performing Defendant shall submit unvalidated results of sampling or other tests.

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

IX. ACCESS AND INSTITUTIONAL CONTROLS

26. a. Commencing upon the date of the signing of this Consent Decree by or on behalf of the Regional Administrator of EPA Region II, the Owner Settling Defendants and Mechanical Technology, Inc. ("MTI") agree to provide the United States, the State, and their representatives, including EPA and its contractors, with access at all reasonable times to the Site and any other property to which access is required to implement this Consent Decree, the SOW, or the remedy selected in the ROD, to the extent that the property is owned by, or access to the property is controlled by, any of the Owner Settling Defendants and MTI, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- i. Monitoring the Work;
- ii. Verifying any data or information submitted to the United States or the State;

iii. Conducting investigations relating to contamination at or near the Site;

iv. Obtaining samples;

v. Assessing the need for, planning, or implementing additional response actions at or near the Site;

vi. Implementing the Work pursuant to the conditions set forth in Paragraph 85 of this Consent Decree;

vii. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Performing Defendant or its agents, consistent with Section XXIV (Access to Information);

viii. Assessing Performing Defendant's compliance with this Consent Decree; and

ix. Determining whether the Site is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, pursuant to Paragraph 27 of this Consent Decree or the Institutional Controls established pursuant to this Consent Decree.

b. If EPA so requests, in regard to property owned or controlled by one or more of the Owner Settling Defendants to which access is needed to implement this Consent Decree, the SOW, or the remedy selected in the ROD, for each parcel of property

each such Owner Settling Defendant shall record in the County Clerk's Office of Saratoga County, New York, access easements that grant to one or more of the following persons or entities, as directed by EPA:

- i. the United States, on behalf of EPA, and its representatives,
- ii. the State, on behalf of NYSDEC, and its representatives,
- iii. the Performing Defendant and its representatives, or
- iv. other appropriate grantees,

a right of access, running with the land, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Subparagraph a. of this Paragraph. Each Owner Settling Defendant shall, within forty-five (45) days of EPA's request, submit to EPA for review and approval with respect to such property:

- i. Draft access easements that are enforceable under the laws of the State of New York, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and

- ii. a current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

Within fifteen (15) days of EPA's approval and acceptance of such easements, each Owner Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, file the easements with the County Clerk's Office of Saratoga County. Within thirty (30) days of filing the easements, each Owner Settling Defendant shall provide EPA with a title insurance policy or other final title evidence acceptable under the Standards, and a certified copy of the original recorded easements showing the clerk's recording stamps.

c. To the extent that the Site or any other property to which access is required to implement this Consent Decree, the SOW, or the remedy selected in the ROD is owned or controlled by persons other than an Owner Settling Defendant, Performing Defendant shall use best efforts to secure from such persons access thereto for Performing Defendant, as well as for the United States on behalf of EPA, and the State on behalf of NYSDEC, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Subparagraph a. of this Paragraph.

d. If EPA so requests, to the extent that the Site or any other property to which access is required to implement this Consent Decree, the SOW, or the remedy selected in the ROD is owned or controlled by persons other than an Owner Settling Defendant, Performing Defendant shall also use best efforts to secure from such persons the recordation in the County Clerk's Office of Saratoga County, New York, of access easements that grant to one or more of the following persons or entities, as directed by EPA:

- i. the United States, on behalf of EPA, and its representatives,
- ii. the State, on behalf of NYSDEC, and its representatives,
- iii. the Performing Defendant and its representatives, or
- iv. other appropriate grantees,

a right of access to the property, running with the land, for the purpose of conducting any activity related to this Consent Decree, including, but not limited to, those activities listed in Subparagraph a. of this Paragraph. If such access easements are requested, Performing Defendant shall proceed in accordance with the requirements of Subparagraph b. of this Paragraph.

e. For purposes of Subparagraphs c. and d. of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access and/or access easements. If

any access required by Subparagraph c. is not obtained within forty-five (45) days of the date of lodging of this Consent Decree, or within forty-five (45) days of the date EPA notifies the Performing Defendant in writing that additional access beyond that previously secured is necessary, or if any access easements requested by EPA under Subparagraph d. are not submitted to EPA in draft form within forty-five (45) days of a request by EPA for such easements, Performing Defendant shall promptly notify the Plaintiff in writing, and shall include in that notification a summary of the steps (including requests, offers and responses thereto) that Performing Defendant has taken to attempt to obtain access or access easements. The Plaintiff may, as it deems appropriate, assist Performing Defendant in obtaining access or access easements. Performing Defendant shall reimburse the Plaintiff in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for all costs incurred by the United States (not including the Settling Federal Agencies) in obtaining access or access easements, including, but not limited to, attorneys fees and the amount of monetary consideration paid.

27. a. Commencing upon the date of the signing of this Consent Decree by or on behalf of the Regional Administrator of EPA Region II, the Performing Defendant, the Owner Settling

Defendants, and MTI agree to refrain, and with respect to the Test Station, Owner Settling Defendants agree to ensure that their lessees other than MTI refrain, from using the Site (or any other property affected by the remedy selected in the ROD) in any manner, or engaging in any other activities, that would interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree. For example, Owner Settling Defendants, Performing Defendant and MTI shall abide by the following land and/or water use restrictions contained in the ROD:

- i. preventing human ingestion of ground water containing concentrations of volatile organic compounds ("VOCs") in excess of the Performance Standards for drinking water,

- ii. restricting the withdrawal of ground water at the Test Station and in the vicinity of the ground water plume; and

- iii. restricting the Test Station to commercial/industrial use, which is its current land use.

b. In regard to property owned or controlled by one or more of the Owner Settling Defendants, at which Institutional Controls are needed, each such Owner Settling Defendant shall: 1) grant to one or more of the following persons or entities, as directed by EPA:

- i. the United States, on behalf of EPA, and its representatives,

- ii. the State, on behalf of NYSDEC, and its representatives,
- iii. the Performing Defendant and its representatives, or
- iv. other appropriate grantees, and

2) record in the County Clerk's Office of Saratoga County, New York, Institutional Controls in the form of deed restrictions, running with the land, that impose the obligations and restrictions established by Subparagraph a. of this Paragraph or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Each Owner Settling Defendant shall, in accordance with the schedule contained in the RD Report for Remedial Work Element IV (Institutional Controls), submit to EPA for review and approval with respect to such property:

- i. Draft deed restrictions that are enforceable under the laws of the State of New York, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and

- ii. a current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

Within fifteen (15) days of EPA's approval and acceptance of such deed restrictions, each Owner Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, file the deed restrictions with the County Clerk's Office of Saratoga County, New York. Within thirty (30) days of filing the deed restrictions, each Owner Settling Defendant shall provide EPA with a title insurance policy or other final title evidence acceptable under the Standards and a certified copy of the original recorded deed restrictions showing the clerk's recording stamps.

c. To the extent that the Site or any other property at which Institutional Controls are needed is owned or controlled by persons other than an Owner Settling Defendant, Performing Defendant shall use best efforts to secure a commitment by such persons to abide by the obligations and restrictions established by Subparagraph a. of this Paragraph.

d. To the extent that the Site or any other property at which Institutional Controls are needed is owned or controlled by persons other than an Owner Settling Defendant, Performing Defendant shall also use best efforts to secure from such persons

the 1) granting to one or more of the following persons or entities, as directed by EPA:

- i. the United States, on behalf of EPA, and its representatives,
- ii. the State, on behalf of NYSDEC, and its representatives,
- iii. the Performing Defendant and its representatives, or
- iv. other appropriate grantees, and

2) recordation in the County Clerk's Office of Saratoga County, New York, of Institutional Controls in the form of deed restrictions, running with the land, that impose the obligations and restrictions established by Subparagraph a. of this Paragraph or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Performing Defendant shall proceed in accordance with the requirements of Subparagraph b. of this Paragraph with regard to submission and approval of deed restrictions.

e. For purposes of Subparagraphs c. and d. of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of Institutional Controls in the form of commitments or deed restrictions. If any commitments required under Subparagraph c. are not obtained within forty-five (45) days of the date of lodging of this Consent Decree, or any deed

restrictions requested by EPA under Subparagraph d. of this Paragraph are not submitted to EPA in draft form within forty-five (45) days of EPA's request for such deed restrictions, Performing Defendant shall promptly notify the Plaintiff in writing, and shall include in that notification a summary of the steps (including requests, offers and responses thereto) that Performing Defendant has taken to attempt to obtain such commitments or deed restrictions. The Plaintiff may, as it deems appropriate, assist Performing Defendant in obtaining such commitments or deed restrictions. Performing Defendant shall reimburse the Plaintiff in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for all costs incurred by the United States (not including the Settling Federal Agencies) in obtaining such commitments or deed restrictions, including, but not limited to, attorneys fees and the amount of monetary consideration paid.

28. If EPA determines that land and/or water use restrictions in the form of state or local laws, regulations, ordinances or other governmental action are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Performing

Defendant shall cooperate with EPA's and the State's efforts to secure such governmental controls.

29. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

#### X. REPORTING REQUIREMENTS

30. In addition to any other requirement of this Consent Decree, Performing Defendant shall submit to EPA and the State written monthly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Performing Defendant or its contractors or agents in the previous month; (c) identify all plans and other submissions required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of plans and other submissions that are scheduled for the next six weeks, and provide other information relating to the progress of construction, including, but not limited to, critical path

diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; and (f) include any modifications to the plans and other submissions or schedules that Performing Defendant has proposed to EPA or that have been approved by EPA. Performing Defendant shall submit these progress reports to EPA and the State by the tenth day of every month following the effective date of this Consent Decree until approval of the Remedial Action Report for Remedial Work Element III and approval of the O&M Manuals for Remedial Work Elements I, II, and IV, at which time Performing Defendant shall report in accordance with the schedules approved in such Manuals. If requested by EPA, Performing Defendant shall also provide briefings for EPA to discuss the progress of the Work.

31. The Performing Defendant shall notify EPA of any change in the schedule described in the monthly progress report and in the reports submitted pursuant to the EPA-approved O&M Manuals for Remedial Work Elements I, II, IV for the performance of any activity, including, but not limited to, data collection and

implementation of plans or other submissions, no later than seven (7) days prior to the performance of the activity.

32. Upon the occurrence of any event during performance of the Work that Performing Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act ("EPCRA"), Performing Defendant shall within twenty-four (24) hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator nor Alternate EPA Project Coordinator is available, the Response and Prevention Branch, EPA Region II at (732) 321-6656. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

33. Within twenty (20) days of the onset of such an event, Performing Defendant shall furnish to EPA a written report, signed by the Performing Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within thirty (30) days of the conclusion of such an event, Performing Defendant shall submit a report setting forth all actions taken in response thereto.

34. Performing Defendant shall submit to EPA all plans, reports, other submissions, and data required by the SOW, the RD Reports, the Remedial Action Reports, the O&M Manuals, or any other approved plans in accordance with the schedules set forth in Section VI, above, and such approved plans. Performing Defendant shall simultaneously submit to the State copies of all such plans, reports and data, in accordance with the requirements of Section XXVI, below.

35. All reports and other documents submitted by Performing Defendant to EPA (other than the monthly progress reports referred to above) which purport to document Performing Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Performing Defendant.

XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

36. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that

the Performing Defendant modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Performing Defendant at least one (1) notice of deficiency and an opportunity to cure within fourteen (14) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

37. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 36(a), (b), or (c), Performing Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to its right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 36(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

38. a. Upon receipt of a notice of disapproval pursuant to Paragraph 36(d), Performing Defendant shall, within fourteen (14)

days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the 14-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 39 and 40.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 36(d), Performing Defendant shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Performing Defendant of any liability for stipulated penalties under Section XX (Stipulated Penalties).

39. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Performing Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Performing Defendant shall implement any such plan, report, or item as modified or developed by EPA, subject only to its right

to invoke the procedures set forth in Section XIX (Dispute Resolution).

40. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Performing Defendant shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Performing Defendant invokes the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, or if Performing Defendant does not invoke the dispute resolution procedures of Section XIX, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX.

41. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this

Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

### XII. PROJECT COORDINATORS

42. Within twenty (20) days of lodging this Consent Decree, Performing Defendant and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to each other at least five (5) working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Performing Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Performing Defendant's Project Coordinator shall not be an attorney for the Performing Defendant in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

43. Plaintiff may designate other representatives, including, but not limited to, EPA and State employees, and federal and

State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and an On-Scene Coordinator ("OSC") by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

44. Performing Defendant's Project Coordinator shall be available to meet with EPA at EPA's request.

### XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

45. a. Within thirty (30) days of entry of this Consent Decree, Performing Defendant shall establish and maintain financial security in the amount of \$300,000 in one or more of the following forms:

(a) A surety bond guaranteeing performance of the Work;

(b) One or more irrevocable letters of credit equaling the total estimated cost of the Work;

(c) A trust fund;

(d) A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with the Performing Defendant;

(e) A demonstration that the Performing Defendant satisfies the requirements of 40 C.F.R. Part 264.143(f).

46. If the Performing Defendant seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 45(d) of this Consent Decree, Performing Defendant shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Performing Defendant seeks to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 45(d) or (e), it shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Performing Defendant shall, within 30

days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 45 of this Consent Decree.

Performing Defendant's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

47. If Performing Defendant can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 45 above after entry of this Consent Decree, Performing Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Performing Defendant shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Performing Defendant may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

48. Performing Defendant may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance

meets the requirements of this Section. In the event of a dispute, Performing Defendant may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### XIV. CERTIFICATION OF COMPLETION

##### 49. Completion of the Remedial Action

a. Within sixty (60) days after the Remedial Action has been fully performed and the Performance Standards have been attained for 3 consecutive years, Performing Defendant shall schedule and conduct a pre-certification inspection to be attended by Performing Defendant and EPA. If, after the pre-certification inspection, the Performing Defendant still believes that the Remedial Action has been fully performed and the Performance Standards have been attained, it shall submit a written report as described in the SOW and this Consent Decree requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and the Performing Defendant's Project Coordinator shall state that the Remedial Action has been completed and Performance Standards attained in full satisfaction of the requirements of this Consent Decree. The written report

shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of the Performing Defendant or the Performing Defendant's Project Coordinator:

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

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity for review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been attained, EPA will notify Performing Defendant in writing of the activities that must be undertaken by Performing Defendant pursuant to this Consent Decree to complete the Remedial Action and attain the Performance Standards.

Provided, however, that EPA may only require Performing Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph

14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Performing Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Performing Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

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

50. Completion of the Work

a. Within 90 days after Performing Defendant concludes that all phases of the Work (including O & M), have been fully performed, Performing Defendant shall schedule and conduct a pre-certification inspection to be attended by Performing Defendant and EPA. If, after the pre-certification inspection, the Performing Defendant still believes that the Work has been fully performed, Performing Defendant shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of the Performing Defendant or the Performing Defendant's Project Coordinator:

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

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Performing Defendant in

writing of the activities that must be undertaken by Performing Defendant pursuant to this Consent Decree to complete the Work. Provided, however, that EPA may only require Performing Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Performing Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Performing Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Performing Defendant and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Performing Defendant in writing.

XV. EMERGENCY RESPONSE

51. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Performing Defendant shall, subject to Paragraph 52, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Performing Defendant shall notify the Response and Prevention Branch of the Emergency and Remedial Response Division, EPA Region II at (732) 321-6656. Performing Defendant shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of health and safety plans and any other applicable plans or documents identified in or developed pursuant to the SOW. In the event that Performing Defendant fails to take appropriate response action as required by this Section, and EPA takes such action instead, Performing Defendant shall reimburse EPA for all costs of the response action not inconsistent with

the NCP pursuant to Section XVI (Reimbursement of Response Costs).

52. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants by United States).

XVI. REIMBURSEMENT OF RESPONSE COSTS

53. a. Within seventy (70) days of the effective date of this Consent Decree, Paying Defendants shall make their respective payments as identified in Appendix I (the Green Flame Trust Agreement) into the MRFA Site Trust Fund. Payment shall be made by certified or cashier's check to the MRFA Site Trust Fund and sent to:

de maximis, inc.  
301 Gallaher View Rd.  
Suite 227  
Knoxville, TN 37919  
ATTN: Thomas Dorsey,

or by wire transfer, using routing number 064207441 and account number 5677688, to the bank where the MRFA Site Trust Fund is located (Suntrust Bank, East Tennessee, N.A., Knoxville, TN).

All checks shall reference on their face the "Malta Rocket Fuel Area Site" and the civil action number of this case. All wire transfers shall be confirmed by a letter referencing the account number of the MRFA Trust Fund (5677688), the amount of the payment, the date of the payment, the "Malta Rocket Fuel Area Site" and the civil action number of this case. Notice of the payment shall be sent to EPA as specified in Section XXVI (Notices and Submissions).

b. Within ninety (90) days of the effective date of this Consent Decree, Performing Defendant and Paying Defendants shall cause \$719,763.42, to be paid from the MRFA Site Trust Fund into the Hazardous Substances Superfund in reimbursement of Past Response Costs. Performing Defendant and Paying Defendants are jointly and severally liable for ensuring the timely disbursement of funds from the MRFA Site Trust Fund into the Superfund.

c. As soon as reasonably practicable, but in no event later than one-hundred fifty (150) days after the effective date of this Consent Decree, the United States, on behalf of the

Settling Federal Agencies, shall pay to the Hazardous Substance Superfund \$236,818.35, in reimbursement of Past Response Costs.

d. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of the Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

e. In the event that the payment required by Paragraph 53 c. above is not made within the time period specified therein, Interest on the unpaid balance shall be paid commencing on the 151st day after the effective date of this Consent Decree and accruing through the date of the payment.

f. The payment required under Paragraph 53.b. shall be made by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (\_\_\_\_\_), the EPA Region and Site/Spill ID Number (# NYD980535124), and DOJ case number (90-11-3-1575). Payment shall be made in accordance with instructions provided to the

Performing Defendant and Paying Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of New York following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Performing Defendant and Paying Defendants shall send notice that such payment has been made to the Plaintiff as specified in Section XXVI (Notices and Submissions) and to:

Ronald Gherardi, Chief  
Financial Management Branch  
U.S. Environmental Protection Agency  
Region II  
290 Broadway  
New York, NY 10007-1866.

g. The payment required under Paragraph 53.c. shall be made by check drawn on the U.S. Treasury made payable to the "EPA Hazardous Substance Superfund," or by electronic means. The Settling Federal Agencies shall cause payment to be made to:

EPA - Region 2  
Attention: Superfund Accounting  
P.O. Box 360188M  
Pittsburgh, Pennsylvania 15251

A letter accompanying a check or confirming an electronic transfer shall reference the Site name, the EPA Region and Site/Spill ID Number (# NYD980535124), and the DOJ, Environmental Enforcement Section case number (90-11-3-1575). Settling Federal

Agencies shall send notice that such payment has been made to the Plaintiff as specified in Section XXVI (Notices and Submissions) and to:

Ronald Gherardi, Chief  
Financial Management Branch  
U.S. Environmental Protection Agency  
Region II  
290 Broadway  
New York, NY 10007-1866.

54. Performing Defendant shall reimburse the EPA Hazardous Substance Superfund for all Future Response Costs not inconsistent with the National Contingency Plan. The Plaintiff will periodically send Performing Defendant billings for such costs. Those billings will be accompanied by a printout of cost data in EPA's financial management system. The billings will also be accompanied by a calculation of EPA's indirect costs. Performing Defendant shall make all payments within thirty (30) days of Performing Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 55. The Performing Defendant shall make all payments required by this Paragraph in the form of a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA Region and Site/Spill ID Number (#980535124), the DOJ case number (90-11-3-1575), and the name and address of

the party making payment. The Performing Defendant shall send the check(s) to:

EPA - Region 2  
Attention: Superfund Accounting  
P.O. Box 360188M  
Pittsburgh, Pennsylvania 15251

and shall send copies of the check(s) to the Plaintiff as specified in Section XXVI (Notices and Submissions) and to:

Ronald Gherardi, Chief  
Financial Management Branch  
U.S. Environmental Protection Agency  
Region II  
290 Broadway  
New York, NY 10007-1866.

55. Performing Defendant may contest payment of any Future Response Costs under Paragraph 54 if it determines that the Plaintiff has made a mathematical error or if it alleges that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the Plaintiff pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Performing Defendant shall within the thirty (30) day period pay all uncontested Future Response Costs to the

Plaintiff in the manner described in Paragraph 54.

Simultaneously, the Performing Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New York and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Performing Defendant shall send to the Plaintiff, as provided in Section XXVI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Performing Defendant shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the Plaintiff prevails in the dispute, within five (5) days of the resolution of the dispute, the Performing Defendant shall pay the sums due (with accrued interest) to the Plaintiff in the manner described in Paragraph 54. If the Performing Defendant prevails concerning any aspect of the contested costs, the Performing Defendant shall pay that portion of the costs (plus

associated accrued interest) for which it did not prevail to the Plaintiff in the manner described in Paragraph 54; Performing Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Performing Defendant's obligation to reimburse the Plaintiff for its Future Response Costs.

56. a. In the event that the payments required by Paragraph 53.a. are not made by each Paying Defendant within the time period specified therein, each Paying Defendant shall pay Interest on the unpaid balance of its respective payment.

b. In the event that the payment required by Paragraph 53.b. is not made by Performing Defendant and Paying Defendants within the time period specified therein, Performing Defendant and Paying Defendants shall pay Interest on the unpaid balance.

c. In the event that the payments required by Paragraph 54. are not made by Performing Defendant within the time period specified therein, Performing Defendant shall pay Interest on the unpaid balance.

d. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue ninety (90) days after the

effective date of this Consent Decree. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Performing Defendant's and/or Paying Defendants' failure to make timely payments under this Section. The Performing Defendant and Paying Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 54.

XVII. INDEMNIFICATION AND INSURANCE

57. a. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Performing Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Performing Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Performing Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree,

including, but not limited to, any claims arising from any designation of Performing Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Performing Defendant agrees to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Performing Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of Performing Defendant in carrying out activities pursuant to this Consent Decree. Neither the Performing Defendant nor any such contractor shall be considered an agent of the United States.

b. The United States shall give Performing Defendant notice of any claim for which it plans to seek indemnification pursuant to Paragraph 57.a., and shall consult with Performing Defendant prior to settling such claim.

58. Performing Defendant waives all claims against the United States for damages or reimbursement or for set-off of any

payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Performing Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Performing Defendant shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Performing Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

59. No later than fifteen (15) days before commencing any on-site Work, Performing Defendant shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 49.b. of Section XIV (Certification of Completion) comprehensive general and automobile insurance liability insurance with limits of five million dollars, combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Decree, Performing Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of

worker's compensation insurance for all persons performing the Work on behalf of Performing Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Performing Defendant shall provide to EPA certificates of such insurance and a copy of each insurance policy. Performing Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the effective date of this Consent Decree. If Performing Defendant demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Performing Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XVIII. FORCE MAJEURE

60. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Performing Defendant, of any entity controlled by Performing Defendant, or of Performing Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Performing Defendant's best efforts to fulfill the

obligation. The requirement that the Performing Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

61. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Performing Defendant shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Chief of the New York Remediation Branch, Emergency and Remedial Response Division, EPA Region II, within forty-eight (48) hours of when Performing Defendant first knew that the event might cause a delay. Within five (5) days thereafter, Performing Defendant shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to

prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Performing Defendant's rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Performing Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Performing Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Performing Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Performing Defendant shall be deemed to know of any circumstance of which Performing Defendant, any entity controlled by Performing Defendant, or Performing Defendant's contractors knew or should have known.

62. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the

time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Performing Defendant in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify the Performing Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

63. If the Performing Defendant elects to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), it shall do so no later than fifteen (15) days after receipt of EPA's notice under the preceding Paragraph. In any such proceeding, Performing Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Performing Defendant complied with the requirements of Paragraphs 61 and 62, above. If Performing

Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Performing Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

#### XIX. DISPUTE RESOLUTION

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

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

66. a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph,

the position advanced by EPA shall be considered binding unless, within ten (10) days after the conclusion of the informal negotiation period, Performing Defendant invokes the formal dispute resolution procedures of this Section by serving on the Plaintiff a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Performing Defendant. The Statement of Position shall specify the Performing Defendant's position as to whether formal dispute resolution should proceed under Paragraph 67 or Paragraph 68.

b. Within fourteen (14) days after receipt of Performing Defendant's Statement of Position, EPA will serve on Performing Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 67 or 68. Within fourteen (14) days after receipt of EPA's Statement of Position, Performing Defendant may submit a Reply.

c. If there is disagreement between EPA and the Performing Defendant as to whether dispute resolution should proceed under

Paragraph 67 or 68, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Performing Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 67 and 68.

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

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this

Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Chief of the New York Remediation Branch of the Emergency and Remedial Response Division ("ERRD"), EPA Region II, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 67.a. This decision shall be binding upon the Performing Defendant, subject only to the right to seek judicial review pursuant to Paragraph 67.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 67.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Performing Defendant with the Court and served on all Parties within ten (10) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. EPA may file a response to Performing Defendant's motion.

d. In proceedings on any dispute governed by this Paragraph, Performing Defendant shall have the burden of

demonstrating that the decision of the Chief of the New York Remediation Branch, EPA Region II, is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 67.a.

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

a. Following receipt of Performing Defendant's Statement of Position submitted pursuant to Paragraph 66, the Chief of the New York Remediation Branch, EPA Region II, will issue a final decision resolving the dispute. The Branch Chief's decision shall be binding on the Performing Defendant unless, within ten (10) days of receipt of the decision, the Performing Defendant files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the

Consent Decree. The Plaintiff may file a response to Performing Defendant's motion.

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

69. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Performing Defendant under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 77. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Performing Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

XX. STIPULATED PENALTIES

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

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

| <u>Penalty Per Violation<br/>Per Day</u> | <u>Period of Noncompliance</u> |
|------------------------------------------|--------------------------------|
| \$ 2,500                                 | 1st through 14th day           |
| \$ 5,000                                 | 15th through 30th day          |
| \$10,000                                 | 31st day and beyond            |

b. Performance of the Work required pursuant to the SOW as follows: removal of contaminated soils; monitoring of the air

stripper; monitoring of the surface and ground water; implementation and monitoring of Institutional Controls; and first submittals containing a material defect or second submittals of the reports identified in Paragraph 71.d., below.

c. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate plans, reports or other written documents as identified in Subparagraph d:

| <u>Penalty Per Violation</u><br><u>Per Day</u> | <u>Period of Noncompliance</u> |
|------------------------------------------------|--------------------------------|
| \$ 1,500                                       | 1st through 14th day           |
| \$ 2,000                                       | 15th through 30th day          |
| \$ 4,000                                       | 31st day and beyond            |

d. First submittals of the following reports that do not contain a material defect: Remedial Action Reports, O & M Manuals, Final Report for the selected remedy.

e. The following stipulated penalties shall accrue per violation per day for any noncompliance related to operation and maintenance of the air stripper:

| <u>Penalty Per Violation</u><br><u>Per Day</u> | <u>Period of Noncompliance</u> |
|------------------------------------------------|--------------------------------|
| \$ 500                                         | 1st through 7th day            |
| \$ 2,500                                       | 8th through 14th day           |
| \$ 5,000                                       | 15th through 30th day          |
| \$10,000                                       | 31st day and beyond            |

72. The following stipulated penalties shall accrue per violation per day for any noncompliance related to 1) the obligation of each Paying Defendant other than NYSERDA to make its respective payment as required pursuant to Paragraph 53.a. and Appendix I (the Green Flame Trust Agreement) of this Consent Decree, and 2) the obligation of the Performing Defendant and Paying Defendants to make the payment required pursuant to Paragraph 53.b. of this Consent Decree, and 3) submittals of monthly progress reports:

| <u>Penalty Per Violation</u><br><u>Per Day</u> | <u>Period of Noncompliance</u> |
|------------------------------------------------|--------------------------------|
| \$ 500                                         | 1st through 7th day            |
| \$1,500                                        | 8th through 14th day           |
| \$2,000                                        | 15th through 30th day          |
| \$4,000                                        | 31st day and beyond            |

73. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Performing Defendant of any deficiency; (2)

with respect to a decision by the Chief of the New York Remediation Branch, EPA Region II, under Paragraph 67.b. or 68.a. of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Performing Defendant's reply to EPA's Statement of Position is received until the date that the Branch Chief issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

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

75. All penalties accruing under this Section shall be due and payable to Plaintiff within thirty (30) days of the Performing Defendant's and Paying Defendants' receipt from EPA of a demand for payment of the penalties, unless, with respect to penalties against Performing Defendant only, Performing Defendant invokes the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the Plaintiff under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to:

EPA - Region II  
Attention: Superfund Accounting  
P.O. Box 360188M  
Pittsburgh, Pennsylvania 15251

and shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number (# NYD9085053124), the DOJ Case Number (90-11-3-1575), and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the Plaintiff as provided in Section XXVI (Notices and Submissions), and to:

Ronald Gherardi, Chief  
Financial Management Branch  
U.S. Environmental Protection Agency  
Region II  
290 Broadway  
New York, NY 10007-1866.

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

77. Penalties shall continue to accrue against Performing Defendant as provided in Paragraph 73 during any dispute resolution period, but need not be paid until the following:

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

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

c. If the District Court's decision is appealed by any Party, Performing Defendant shall pay all accrued penalties determined by the District Court to be owing to the Plaintiff

into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Performing Defendant to the extent that they prevail.

78. a. If Performing Defendant and/or Paying Defendants fail to pay stipulated penalties when due, the Plaintiff may institute proceedings to collect the penalties, as well as interest. Performing Defendant and Paying Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 74.

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the Plaintiff to seek any other remedies or sanctions available by virtue of Performing Defendant's violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(1) of CERCLA. Provided, however, that the Plaintiff shall not seek civil penalties pursuant to Section 122(1) of CERCLA for any

violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

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

#### XXI. COVENANTS BY UNITED STATES

80. In consideration of the actions that will be performed and the payments that will be made by the Performing Defendant and the payments that will be made by the Paying Defendants and Settling Federal Agencies under the terms of the Consent Decree, and except as specifically provided in Paragraphs 81, 82, and 84 of this Section, the United States covenants not to sue or to take administrative action against Performing Defendant and Paying Defendants, and EPA covenants not to take administrative action against the Settling Federal Agencies, pursuant to Sections 106, 107(a), and 113(f)(2) of CERCLA relating to the Site. Except with respect to future liability, these covenants shall take effect with respect to the Performing Defendant and Paying Defendants upon the receipt by EPA of the payment required by Paragraphs 53.b. of Section XVI (Reimbursement of Response Costs), and with respect to the Settling Federal Agencies, upon

receipt by EPA of the payment required by Paragraph 53.c. of Section XVI (Reimbursement of Response Costs). With respect to future liability, these covenants shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 49.b of Section XIV (Certification of Completion). These covenants are conditioned upon the satisfactory performance by Performing Defendant, Paying Defendants and Settling Federal Agencies of their respective obligations under this Consent Decree. These covenants extend only to the Performing Defendant, Paying Defendants, and the Settling Federal Agencies, and do not extend to any other person.

81. United States' Pre-certification reservations.

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel the Performing Defendant and Paying Defendants, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies, (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Remedial Action:

(i) conditions at the Site, previously unknown to EPA,  
are discovered, or

(ii) information, previously unknown to EPA, is received,  
in whole or in part,

and these previously unknown conditions or information together  
with any other relevant information indicates that the Remedial  
Action is not protective of human health or the environment.

82. United States' Post-certification reservations.

Notwithstanding any other provision of this Consent Decree, the  
United States reserves, and this Consent Decree is without  
prejudice to, the right to institute proceedings in this action  
or in a new action, or to issue an administrative order seeking  
to compel Performing Defendant and Paying Defendants, and EPA  
reserves the right to issue an administrative order seeking to  
compel the Settling Federal Agencies, (1) to perform further  
response actions relating to the Site or (2) to reimburse the  
United States for additional costs of response if, subsequent to  
Certification of Completion of the Remedial Action:

(i) conditions at the Site, previously unknown to EPA,  
are discovered, or

(ii) information, previously unknown to EPA, is  
received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

83. For purposes of Paragraph 81, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 82, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

84. General reservations of rights. The covenants set forth above do not pertain to any matters other than those expressly specified in Paragraph 80. The United States reserves, and this Consent Decree is without prejudice to, all rights against

Performing Defendant and Paying Defendants, and EPA and the federal natural resources trustees reserve, and this Consent Decree is without prejudice to, all rights against the Settling Federal Agencies, with respect to all other matters, including but not limited to, the following:

- (1) claims based on a failure by Performing Defendant, Paying Defendants, or the Settling Federal Agencies to meet their respective obligations under this Consent Decree;
- (2) claims seeking, or liability for, the securing and implementation of Supplemental Institutional Controls, and liability for any response costs incurred relating to the implementation or securing of Supplemental Institutional Controls;
- (3) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;
- (4) liability for future disposal of Waste Material at the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA;
- (5) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

(6) criminal liability;

(7) liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and

(8) liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Modification of the SOW or Related Plans or other Submissions).

85. Work Takeover. In the event EPA determines that Performing Defendant has ceased implementation of any portion of the Work, is materially or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Performing Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 67, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the Plaintiff in performing the Work pursuant to this Paragraph shall be considered Future

Response Costs that Performing Defendant shall pay pursuant to Section XVI (Reimbursement of Response Costs).

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

XXII. COVENANTS BY PERFORMING DEFENDANT AND PAYING DEFENDANTS

87. Covenant Not to Sue. Subject to the reservations in Paragraph 88, Performing Defendant and Paying Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to the Site or this Consent Decree, including, but not limited to:

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

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

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

88. The Performing Defendant and Paying Defendants reserve, and this Consent Decree is without prejudice to, (1) contribution claims against the Settling Federal Agencies in the event that any claim is asserted by the United States against the Performing Defendant and/or Paying Defendants under the authority of, or under, Paragraphs 81, 82, 84(2)-(5) or 84(8) of Section XXI (Covenants by United States), but only to the same extent and for the same matters, transactions, or occurrences as are raised in the claim of the United States, and (2) claims arising after the effective date of this Consent Decree against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim

based on EPA's selection of response actions, or the oversight or approval of the Performing Defendant's plans or activities. The foregoing reservation in clause (2) of this Paragraph applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

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

XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

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

91. The Parties agree, and by entering this Consent Decree this Court finds, that the Performing Defendant, Paying Defendants, and Settling Federal Agencies are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for Matters Addressed in this Consent Decree.

92. The Performing Defendant and Paying Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the Plaintiff in writing no later than sixty (60) days prior to the initiation of such suit or claim.

93. The Performing Defendant and Paying Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the Plaintiff within ten (10) days of service of the complaint on them. In addition, Performing Defendant and Paying Defendants shall notify the Plaintiff within ten (10) days of service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial.

94. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Performing Defendant and Paying Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants by United States).

#### XXIV. ACCESS TO INFORMATION

95. Performing Defendant shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Performing Defendant shall also make available to EPA, for purposes of investigation, information

gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

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

b. The Performing Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Performing Defendant assert such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or

information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Performing Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged.

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

#### XXV. RETENTION OF RECORDS

98. a. Until ten (10) years after the Performing Defendant's receipt of EPA's notification pursuant to Paragraph 49.b. of Section XIV (Certification of Completion of the Remedial Action), each Performing Defendant and Paying Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person

for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary. Until ten (10) years after the Performing Defendant's receipt of EPA's notification pursuant to Paragraph 49.b. of Section XIV (Certification of Completion of Remedial Action), Performing Defendant shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

b. Settling Federal Agencies hereby certify that (1) they have complied, and will continue to comply, with all applicable Federal record retention laws, regulations, and policies, and (2) to the best of their knowledge and belief, after thorough inquiry, they have not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to their potential liability regarding the Site since notification of potential liability by EPA or the filing of suit against it regarding the Site.

99. At the conclusion of this document retention period, Performing Defendant and Paying Defendants shall notify the Plaintiff at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the

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

100. Each Performing Defendant and Paying Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential

liability regarding the Site since notification of potential liability by the Plaintiff or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

XXVI. NOTICES AND SUBMISSIONS

101. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the Plaintiff, the Settling Federal Agencies, the Performing Defendant, and the Paying Defendants.

A. As to the Plaintiff or EPA:

5 copies: Chief, Central New York Remediation Section  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency, Region II  
290 Broadway, 20th Floor  
New York, NY 10007  
Attention: Project Coordinator (RPM)  
Malta Rocket Fuel Area Site

One copy of all required written communications other than work plans, design documents and technical reports shall also be sent to each of the following individuals:

Chief, New York/Caribbean Superfund Branch  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region II  
290 Broadway, 17th Floor  
New York, NY 10007  
Attention: Malta Rocket Fuel Area Site Attorney

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
Re: DOJ # (90-11-3-1575)

B. As to the State:

When submitting to EPA any written communication required hereunder, Performing Defendant shall simultaneously submit two copies of that communication (unless the given document is a plan or report, in which case seven copies shall be submitted) to:

Director, Division of Hazardous Waste Remediation  
New York State Department of Environmental  
Conservation  
Room 222  
50 Wolf Road  
Albany, NY 12233-7010  
Attention: Project Manager, Malta Rocket Fuel Area Site

(or to such other addressee or addressees at the State as  
the State or EPA shall specify by notice to Performing  
Defendant's Project Coordinator)

C. As to the Performing Defendant:

General Electric Company  
Corporate Environmental Programs  
One Computer Drive South  
Albany, N.Y. 12205  
Attn: Paul W. Hare

D. As to the Settling Federal Agencies:

Chief, Environmental Defense Section  
United States Department of Justice  
Environment and Natural Resources Division  
P.O. Box 23986  
Washington D.C. 20026-3986

Re: DJ # \_\_\_\_\_

E. As to the Paying Defendants:

New York State Energy Research  
and Development Authority  
Corporate Plaza West  
286 Washington Ave. Ext.  
Albany, N.Y. 12203-6399  
Attn: Hal Brody, Esq.

Raymond J. Kazyaka, President  
Wright Malta Corporation  
Malta Test Station  
Plains Road  
Ballston Spa, N.Y. 12020

Curtiss-Wright Corporation  
1200 Wall Street West - Suite 501  
Lyndhurst, NJ 07071  
Attn: James V. Maher, Esq.

Olin Corporation  
501 Merritt 7  
Norwalk, CT 06856  
Attn: Arthur D. Rheingold, Esq.

Steven J. Balser, President  
Power Technologies, Inc.  
1482 Erie Boulevard  
Schenectady, N.Y. 12301-1058

Martin Mastroanni, President  
Mechanical Technology, Inc.  
968 Albany Shaker Rd.  
Latham, N.Y. 12110

XXVII. EFFECTIVE DATE

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

XXVIII. RETENTION OF JURISDICTION

103. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Performing Defendant and Paying Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

XXIX. APPENDICES

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

"Appendix A" is the ROD.

"Appendix B" is the SOW.

"Appendix C" is the description and/or map of the Site.

"Appendix D" is the RD Report for Remedial Work Element I (Drinking Water).

"Appendix E" is the RD Report for Remedial Work Element II (Ground Water).

"Appendix F" is the RD Report for Remedial Work Element III (Soil).

"Appendix G" is the RD Report for Remedial Work Element IV (Institutional Controls).

"Appendix H" is a list of the Settling Federal Agencies.

"Appendix I" is the Green Flame Trust Agreement.

#### XXX. COMMUNITY RELATIONS

105. Performing Defendant shall cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Performing Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

#### XXXI. MODIFICATION

106. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Performing Defendant. All such modifications shall be made in writing.

107. Except as provided in Paragraph 14 ("Modification of the SOW or Related Plans or Other Submissions"), no material modifications shall be made to the SOW without written notification to and written approval of the Plaintiff, Performing

Defendant, and the Court. Prior to providing its approval to any modification, the Plaintiff will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Performing Defendant.

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

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

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

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

XXXIII. SIGNATORIES/SERVICE

111. Each undersigned representative of a Performing Defendant and Settling Defendant to this Consent Decree and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

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

113. Each Performing Defendant and Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service

of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree.

Performing Defendant and Paying Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_.

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

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Curtiss Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

FOR THE UNITED STATES OF AMERICA

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

\_\_\_\_\_  
Lois J. Schiffer  
Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530

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

\_\_\_\_\_  
Alex Beehler  
Environmental Enforcement Section  
Environment & Natural Resources  
Division  
U.S. Department of Justice  
Washington D.C. 20530  
(202) 514-4185

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

\_\_\_\_\_  
Eric G. Hostetler  
Environmental Defense Section  
Environment & Natural Resources  
Division  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 305-2326

Date:

9/22/97

Will M. Fox  
Jeanne M. Fox  
Regional Administrator  
U.S. Environmental Protection Agency  
Region II

Date:

9/24/97

Virginia Capon  
Virginia Capon  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region II

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Curtiss Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

FOR

Leonard H. Shen  
General Electric Company  
 [Name of Company]

Date: Sept. 18, 1997

Leonard H. Shen, Counsel-Environmental Remediation &  
 [Name, Please Type] Compliance  
 [Title, Please Type] General Electric Company  
 [Address, Please Type] 3135 Easton Turnpike  
 Fairfield, CT 06431

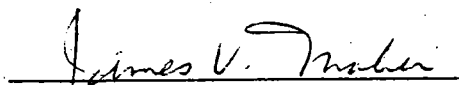
Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Leslie A. Hulse  
 [Please Type]  
 Title: Counsel, Environmental Matters  
General Electric Company  
 Address: 1 Computer Drive South  
Albany, NY 12205  
 Tel. Number: (518) 458-6631

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Curtiss-Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

For: Curtiss-Wright Corporation

Dated: 9/18/97

  
James V. Maher,  
Associate General Counsel  
1200 Wall Street West  
Suite 501  
Lyndhurst, New Jersey 07071

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

Name: James V. Maher

Address: 1200 Wall Street West  
Suite 501  
Lyndhurst, New Jersey 07071

Telephone #: 201-896-8601

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Curtiss Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

FOR Mechanical Technology Incorporated  
[Name of Company]

Date: Sept 18, 1997

Martin J. Mastroianni  
[Name, Please Type]

[Title, Please Type]

[Address, Please Type]

Martin J. Mastroianni  
President & Chief Operating Officer  
968 Albany-Shaker Road  
Latham, NY 12110

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

Name: Rodney Knight, Esq.  
[Please Type]

Title: Company Attorney

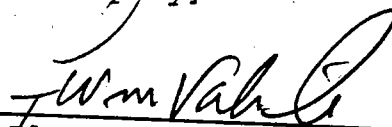
Address: 800 W. Long Lake Road, Suite 180  
Bloomfield Hills, MI 48302

Tel. Number: (248) 647-4824

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Curtiss Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

FOR New York State Energy Research and Development Authority  
[Name of Company]

Date: September 18, 1997

  
[Name, Please Type] F. William Valentino

[Title, Please Type] President

[Address, Please Type] Corporate Plaza West  
286 Washington Avenue Extension  
Albany, New York 12203-6399

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

Name: Roger D. Avent

[Please Type]

Title: General Counsel

Address: Corporate Plaza West, 286 Washington Avenue Extension, Albany, New York  
12203-6399

Tel. Number: 518-862-1090

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Curtiss Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

FOR Olin Corporation

[Name of Company]

Date: SEPTEMBER 18, 1997

*P. C. Kosche*

[Name, Please Type]

Peter C. Kosche

[Title, Please Type]

Senior V.P. Corporate Affairs

[Address, Please Type]

Olin Corporation

501 Merritt 7, P.O. Box 4500

Norwalk, CT 06856

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

Name: Arthur D. Rheingold

[Please Type]

Title: Chief Counsel Environmental

Address: 501 Merritt 7, P.O. Box 4500  
Norwalk, CT 06856

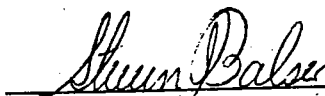
Tel. Number: (203) 750-3911

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Curtiss Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

FOR Power Technologies, Inc.

[Name of Company]

Date: 9/17/97

  
[Name, Please Type] Steven J. Balser  
[Title, Please Type] President  
[Address, Please Type]  
1482 Erie Blvd.  
P.O. Box 1058  
Schenectady, NY 12301-1058

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

Name: John L. Greenthal, Esq.  
[Please Type]

Title: Partner, Nixon, Hargrave, Devans & Doyle LLP

Address: One KeyCorp Plaza — Suite 900  
Albany, NY 12207

Tel. Number: 518-427-2650

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Curtiss Wright Corporation, et al., relating to the Malta Rocket Fuel Area Superfund Site.

Raymond J. Kaznyka

FOR Wright-Malta Corporation  
[Name of Company]

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

[Name, Please Type] RAYMOND J. Kazyaka  
[Title, Please Type] PRESIDENT  
[Address, Please Type] WRIGHT-MALTA, CORP.  
MALTA TEST STATION  
PLAINS ROAD  
BALLSTON SPA, N.Y. 12020

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

Name: McGIVERAL Shaw and OCONNOR  
[Please Type]

Title: General Counsel

Address: 207 Mohawk Ave. Scotia, N.Y. 12302

Tel. Number: (518) 346-4249