

CASE

ATLAS
Consent
Decree

1 DONALD A. CARR
2 Acting Assistant Attorney General
3 Land & Natural Resources Division
4 United States Department of Justice

5 WILLIAM A. WEINISCHKE
6 Environmental Enforcement Section
7 P.O. Box 7611
8 Ben Franklin Station
9 Washington, D.C. 20044
10 Telephone: (202) 633-4592

11 DAVID F. LEVI
12 United States Attorney
13 Assistant United States Attorney
14 3305 Federal Building
15 650 Capitol Mall
16 Sacramento, California 95814
17 Telephone: (916)

18 GAIL B. COOPER
19 Acting Regional Counsel

20 LAURIE J. WILLIAMS
21 Assistant Regional Counsel
22 U.S. Environmental Protection Agency
23 Region 9
24 215 Fremont Street
25 San Francisco, CA 94105
26 Telephone: (415) 974-9579

27 ATTORNEYS FOR PLAINTIFF
28 UNITED STATES OF AMERICA

29 UNITED STATES DISTRICT COURT
30 EASTERN DISTRICT OF CALIFORNIA

31 UNITED STATES OF AMERICA,)
32 Plaintiff,)
33 v.)
34 SOUTHERN PACIFIC)
35 TRANSPORTATION COMPANY)
36 Defendant.)

Civ. #89-

CONSENT DECREE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

INTRODUCTION.....4

I. JURISDICTION6

II. DEFINITIONS7

III. SITE BACKGROUND9

IV. PURPOSE12

V. BINDING EFFECT13

VI. WORK TO BE PERFORMED/REMEDIAL ACTION.....14

VII. PROJECT COORDINATORS22

VIII. SITE ACCESS24

IX. SAMPLING AND INVESTIGATION25

X. INSURANCE/ASSURANCE OF ABILITY TO COMPLETE WORK....26

XI. COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS ...27

XII. RETENTION OF RECORDS27

XIII. REIMBURSEMENT OF COSTS28

XIV. STIPULATED PENALTIES29

XV. DISPUTE RESOLUTION35

XVI. FORCE MAJEURE38

XVII. FORM OF NOTICE40

XVIII. RESERVATION AND WAIVERS OF RIGHTS.....41

XIX. COVENANT NOT TO SUE.....43

XX. MODIFICATION47

1 XXI. ADMISSIBILITY OF DATA48

2 XXII. EFFECTIVE DATE48

3 XXIII. COMMUNITY RELATIONS48

4 XXIV. PUBLIC PARTICIPATION48

5 XXV. NOTICE TO THE STATE49

6 XXVI. CONSISTENCY WITH THE NCP49

7 XXVII. INDEMNIFICATION OF THE UNITED STATES50

8 XXVIII. OTHER CLAIMS.....50

9 XXIX. CONTRIBUTION PROTECTION.....51

10 XXX. COMPLETION OF THE REMEDIAL ACTION.....51

11 XXXI. OPERATION AND MAINTENANCE.....52

12 XXXII. CONTINUING JURISDICTION52

13 XXXIII. TERMINATION AND SATISFACTION53

14 XXXIV. SECTION HEADINGS53

15

16

17

18 APPENDICES

19

20

21

22

23

24

25

26

- A. RECORD OF DECISION (ROD)
- B. SCHEDULE
- C. OPERABLE UNIT FEASIBILITY STUDY (OUFS)
- D. DESCRIPTION OF FINAL CAP DESIGN
- E. CONDITIONS OF ALIENATION AND DEED RESTRICTIONS

1 WHEREAS, on July 19, 1989, the United States issued a Record
2 of Decision ("ROD," attached as Appendix A), which selected a
3 remedy with respect to the City of Coalinga Site.

4 WHEREAS, the Site constitutes a facility as defined in Sec-
5 tion 101(9) of CERCLA, 42 U.S.C. §9601(9).

6 WHEREAS, the Defendant is a person, as defined in Section
7 101(21) of CERCLA, 42 U.S.C. §9601(21) and the Defendant is a
8 person subject to liability under Section 107(a) of CERCLA, 42
9 U.S.C. §9607(a).

10 WHEREAS, the United States asserts that past, present, and
11 potential migrations of hazardous substances constitute actual
12 and threatened "releases," as defined in Section 101(22) of
13 CERCLA, 42 U.S.C. §9601(22), and wastes and constituents thereof
14 produced and disposed of at the Site are "hazardous substances,"
15 as defined in Section 101(14) of CERCLA, 42 U.S.C. §9601(14).

16 WHEREAS, the actions required by this Consent Decree are
17 necessary to protect the public health, welfare, and the environ-
18 ment.

19 WHEREAS, the remedial actions required by this Consent
20 Decree are in accordance with Section 121 of CERCLA, 42 U.S.C.
21 §9621, and with the National Oil and Hazardous Substances Pollu-
22 tion Contingency Plan, 40 C.F.R. Part 300, ("National Contingency
23 Plan" or "NCP").

1 (B). Defendant does not contest and agrees not to contest
2 the jurisdiction of the United States to maintain this action or
3 the Court's jurisdiction to enter and enforce this Consent
4 Decree. Defendant also does not contest and agrees not to con-
5 test that the complaint states a claim upon which relief can be
6 granted. The Defendant waives service of summons of Complaint.

7 **II. DEFINITIONS**

8 The following definitions shall apply to this Consent
9 Decree:

10 (A.) The City of Coalinga Site ("Site" or "Facility") means
11 the Site of the City of Coalinga Operable Unit defined in the ROD
12 and identified in Figure 1A therein.

13 (B.) CERCLA means the Comprehensive Environmental Response,
14 ~~Compensation and Liability Act, 42 U.S.C. §§9601 et seq.,~~ as
15 amended by the Superfund Amendments and Reauthorization Act of
16 1986, Public Law 99-499.

17 (C.) Hazardous Substances shall have the meaning set forth
18 by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

19 (E.) The National Contingency Plan ("NCP") means the plan
20 promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. §9605,
21 and codified at 40 C.F.R. Part 300, as amended.

22 (F.) OUFS means the Operable Unit/Feasibility Study com-
23 pleted for the Site and dated February, 1989, attached hereto as
24 Appendix C and incorporated herein by reference.

1 (G.) Oversight means the United States' and its contrac-
2 tors' review, inspection, analysis and verification of remedial
3 work and reports of the Defendant as required under the terms of
4 this Consent Decree.

5 (H.) Parties means all parties who are signatories to or
6 who are otherwise bound by this Consent Decree.

7 (I.) Record of Decision ("ROD") means the document, signed
8 by the EPA Region IX Regional Administrator on July 19, 1989,
9 describing the remedy selected by EPA for cleanup of the Site
10 and any subsequent amendments thereto. The ROD is attached as
11 Appendix A and is incorporated as an enforceable part of this
12 Decree.

13 (J.) Release shall be used as that term is defined in Sec-
14 tion 101(22) of CERCLA, 42 U.S.C. §9601(22).

15 (K.) Remedial Action ("RA") means the implementation of the
16 Remedial Design consistent with the NCP and the Superfund
17 Remedial Design and Remedial Action Guidance dated June 1986, in-
18 cluding on-site construction, treatment processes, removals, and
19 ~~any other tasks necessary to effectuate the requirements set~~
20 forth in the ROD.

21 (L.) Remedial Design ("RD") means all work undertaken to
22 design the technical aspects of the remedial activities to be
23 implemented at the Site.

1 (M.) Response Costs means all costs, including but not
2 limited to, administrative, enforcement, investigative, over-
3 sight, access, removal and remedial costs, incurred by EPA in
4 connection with the response taken by EPA at the Site pursuant to
5 CERCLA.

6 (N.) Schedule means the schedule which is attached hereto
7 as Appendix B and which is hereby incorporated by reference in
8 this Consent Decree.

9 (O.) Waste Management Unit ("WMU") means the vault into
10 which the contaminated materials from the Site will be deposited,
11 including its impermeable cap and drainage system.

12 (P.) Work means the remedial design and remedial action
13 tasks necessary to implement alternative number 5 in the ROD
14 other than Operation and Maintenance.

15 (Q.) All terms not defined herein shall have the defini-
16 tions set forth in CERCLA or other applicable statute or regula-
17 tion. If not defined therein, they shall have their ordinary
18 meaning.

19 **III. SITE BACKGROUND**

20 (A.) Plaintiff, United States of America ("Plaintiff" or
21 "United States"), on behalf of the Administrator of the United
22 States Environmental Protection Agency ("EPA"), filed a complaint
23 in this matter simultaneously with this decree, pursuant to Sec-
24 tions 106 and 107 of CERCLA, 42 U.S.C. §§9606 and 9607, to compel
25 Defendant, Southern Pacific Transportation Company ("SPTC"), to
26

1 perform the Work pursuant to CERCLA, and to recover all response
2 costs that have been and will be incurred by the United States,
3 in a manner not inconsistent with the National Contingency Plan,
4 in response to releases and threatened releases of hazardous sub-
5 stances from the facility known as the City of Coalinga Site. The
6 Site covers approximately 107 acres and includes a combination of
7 building structures and property in the southwestern industrial
8 section of Coalinga, California.

9 (B.) In 1987, ongoing studies for the nearby Atlas and
10 Johns-Manville Coalinga Asbestos Superfund sites indicated that
11 airborne asbestos in the City of Coalinga might exceed the levels
12 measured in the surrounding area. Subsequent EPA investigations
13 in the City of Coalinga showed that various locations in the city
14 ~~were used as distribution points or storage facilities for milled~~
15 asbestos products from the Atlas and Johns-Manville Coalinga As-
16 bestos mills and mines from the late 1950's to the early 1980's.
17 Based partly on this information, an OUFs was undertaken. The
18 Site was divided into four areas: i) The Marmac Warehouse, a
19 ~~structure presently owned by Defendant and leased by Marmac~~
20 Resources, Inc., suspected of having been a chromite ore and as-
21 bestos distribution center; ii) The Storage Yard, an area con-
22 taining stacked pipes and piles that were suspected to contain
23 asbestos; iii) The Atlas Shipping Yard, an asbestos distribution
24 center located at the corner of Sixth Street and Glenn Avenue and
25 other lots located nearby suspected of being former railroad
26

1 shipping areas for asbestos; and iv) The U.S. Asbestos Company
2 area containing mounds of suspected asbestos waste. The land on
3 which these areas are located is currently, or has previously
4 been, owned by Defendant, Southern Pacific Transportation Company
5 ("SPTC") and the City of Coalinga and other owners and operators.

6 (C.) In August, 1987, EPA issued Administrative Order #8704
7 pursuant to Section 106 of CERCLA, 42 U.S.C. §9606. Order #8704
8 required SPTC to determine the location and amount of asbestos
9 present on lands presently or previously owned by SPTC in the
10 areas i-iv, as described above, and to fence off the abandoned
11 warehouse area, among other tasks. Results of an intensive sam-
12 pling program showed that the amount of asbestos in the soil in
13 the warehouse areas varies from below the detection limit to 98%
14 ~~asbestos by area in the samples studied.~~ In addition to asbes-
15 tos, the soil was found to contain nickel. SPTC took the follow-
16 ing emergency removal actions, under Order #8704, in the fall of
17 1987 and the spring of 1988 to reduce the threat to public health
18 from nickel and asbestos ore that could enter the air from con-
19 ~~taminated soils:~~ i) ~~Areas containing high asbestos levels were~~
20 fenced; ii) Signs warning of the presence of asbestos were posted
21 around the fenced areas and areas of greater than 1 area percent
22 by PLM; and iii) A temporary biodegradable sealant was sprayed on
23 the asbestos contaminated areas.

1 (D.) The California Regional Water Quality Control Board
2 ("RWQCB") has classified the asbestos waste material at this
3 facility as a Class B mining waste, as defined by Title 23 Chap-
4 ter 3 Subchapter 15 of the California Code of Regulations. EPA
5 has classified asbestos as a "hazardous substance" pursuant to
6 CERCLA and 40 C.F.R. §302.4.

7 IV. PURPOSE

8 (A.) The purpose of this Consent Decree is to serve the
9 public interest by protecting the public health, welfare, and the
10 environment from releases and threatened releases of hazardous
11 substances from the Site by implementation of the ROD.

12 (B.) Completion of the Work shall reduce the levels of as-
13 bestos and nickel ore waste released from the contaminated soils,
14 ~~building structures and equipment to the levels specified in the~~
15 ROD. The Work shall meet the substantive standards of all
16 "applicable requirements" and "relevant and appropriate require-
17 ments" as set forth in the ROD.

18 (C.) Defendant has agreed to the making and entry of this
19 ~~Consent Decree, pursuant to Section 122 of CERCLA, 42 U.S.C.~~
20 §9622, prior to the taking of any testimony, based upon the
21 pleadings filed in the case, without any admission of liability
22 or fault. Defendant agrees that settlement of this matter and
23 entry of this Consent Decree is made in good faith in an effort
24 to avoid further expense and protracted litigation.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

V. BINDING EFFECT

(A.) Each undersigned representative of the parties to the Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such party to this document.

(B.) This Consent Decree shall apply to and be binding upon Defendant and Plaintiff, their successors, and assigns.

(C.) Defendant agrees to provide a copy of this Consent Decree, along with all relevant additions and modifications to this Consent Decree, as appropriate, to each person, including all contractors and subcontractors, retained to perform the Work, within 10 days of entry of this Consent Decree, and shall condition any contract for the Work on compliance with this Consent Decree, provided, that any such contractor shall not thereby become subject to any of the penalties set forth herein for noncompliance, nor shall any such contractors in any way be deemed a party to this action. Defendant shall also provide a copy of this Consent Decree to all officers responsible for overseeing the implementation of this Consent Decree, within 10 days of entry of this Consent Decree, and to any successors and assigns at the time that the relationship of successor or assign is created.

1
2 **VI. WORK TO BE PERFORMED/REMEDIAL ACTION**

3 (A.) Defendant shall, at its own expense, implement and
4 complete the Work for the City of Coalinga Operable Unit accord-
5 ing to the ROD, the Schedule attached hereto as Appendix B and in
6 accordance with EPA oversight and approval as described and
7 provided for in this Consent Decree.

8 (B.) All Work to be performed by Defendant pursuant to this
9 Consent Decree shall be under the direction and supervision of a
10 qualified professional architect, engineer, laboratory or con-
11 sultant. Prior to the initiation of Work at the Site, Defendant
12 shall notify EPA, in writing, of the name, title, and qualifica-
13 tions of any engineer, architect, laboratory or consultant
14 ~~proposed to be used in carrying out the Work to be performed pur-~~
15 ~~suant to this Consent Decree. Selection of any such architect,~~
16 ~~engineer, laboratory or consultant shall be subject to disap-~~
17 ~~proval by EPA.~~

18 (C.) Any reports, plans, specifications, schedules, appen-
19 ~~dices, and attachments required by this Decree are, upon approval~~
20 ~~by EPA, incorporated into this Decree. Any noncompliance with~~
21 ~~such EPA approved reports, plans, specifications, schedules, ap-~~
22 ~~pendices, or attachments shall be considered a failure to comply~~
23 ~~with this Decree and shall subject Defendant to stipulated~~
24 ~~penalties as provided in Section XIV. (Stipulated Penalties) of~~
25 ~~this Decree.~~

1 (D.) As part of the City of Coalinga remedy, Defendant
2 shall complete the following tasks:

3 (1.) Design and Construction. Defendant shall design
4 and construct the WMU pursuant to the ROD for the City of
5 Coalinga Operable Unit. The contract for construction of the WMU
6 shall be awarded no later than October 16, 1989, unless this
7 Court does not enter this Consent Decree by October 15, 1989, in
8 which case Defendant shall award the contract for construction
9 within 14 days of entry of this Consent Decree, or unless Defen-
10 dant has been delayed by a condition of force majeure as defined
11 in Section XVI (Force Majeure), or unless a Final Design has not
12 been approved pursuant to Appendix B - Schedule. Defendant shall
13 complete the Work in accordance with the Schedule approved pur-
14 ~~suant to paragraph 4 of Appendix B (Schedule).~~

15 (2.) Excavation and Removal. Defendant shall excavate
16 the contaminated soil until the clean up levels specified in the
17 ROD are achieved, remove all contaminated materials (as defined
18 in the ROD) to the Waste Management Unit and dispose of the con-
19 ~~taminated materials in the WMU pursuant to the ROD for the City~~
20 of Coalinga Operable Unit.

21 (3.) Conditions on Alienation and Deed Restrictions.
22 Defendant shall comply with all the requirements of Appendix E,
23 which is hereby incorporated by reference^c into this Consent
24 Decree.

1 (E.) Deliverables. Documents submitted and to be submitted:

2 (1.) Monthly Progress Reports:

3 Defendant shall provide written progress reports to EPA on a
4 monthly basis. These progress reports shall describe all actions
5 taken to comply with this Consent Decree, including a general
6 description of activities commenced or completed during the
7 reporting period, work projected to be commenced or completed
8 during the next reporting period, and any problems that have been
9 encountered or are anticipated by Defendant in commencing or com-
10 pleting the work. These progress reports shall be submitted to
11 EPA by the 10th of each month for work done the preceding month
12 and planned for the current month.

13 (2) Verification Sampling Program:

14 (a) Defendant shall comply with the Verifica-
15 tion Sampling Program as outlined in Section 5.0 of the OUFS un-
16 til such time as the Verification Sampling Program is superceded
17 by the Final Verification Sampling Program to be submitted for
18 EPA's review and approval as required in Appendix B - Schedule.

19 (b) Defendant shall, as directed by EPA,
20 comply with all relevant EPA guidance for preparing Sampling and
21 Analysis Plans. See EPA/540/G-89/004, Guidance for Conducting
22 Remedial Investigations and Feasibility Studies Under CERCLA, Oc-
23 tober, 1988.

1 (3) Quality Assurance Program:

2 (a.) Defendant shall comply with the current
3 Quality Assurance Program until such time as the Quality As-
4 surance Program is superceded by the Final Quality Assurance
5 Program to be submitted for EPA's review and approval as required
6 in Appendix B - Schedule. This Final Quality Assurance Program
7 shall contain all conditions necessary to assure that data sub-
8 mitted pursuant to this Decree are of a known quality and shall
9 comply with Documentation Requirements for Data Validation of
10 Non-CLP Laboratory Data for Organic and Inorganic Analyses (U.S.
11 EPA Region IX, May 1988). A copy of the aforementioned publica-
12 tion has been provided to Defendant.

13 (b.) Defendant shall utilize standard EPA sample
14 chain of custody procedures, as documented in National Enforce-
15 ment Investigations Center Policies and Procedures as revised in
16 May 1986 and the National Enforcement Investigations Center
17 Manual for the Evidence Audit published in April 1984, for all
18 sample collection and analysis activities. Copies of the
19 ~~mentioned publications have been provided to defendant.~~

20 (c.) In order to provide quality assurance and
21 maintain quality control regarding all samples collected pursuant
22 to this Consent Decree, Defendant shall:

1 (i.) Ensure that all contracts with
2 laboratories utilized by the Defendants for analysis of samples
3 taken pursuant to this Consent Decree provide for access of EPA
4 personnel and EPA authorized representatives to assure the ac-
5 curacy of laboratory results related to the site.

6 (ii.) Ensure that laboratories utilized
7 by the Defendant for analysis of samples taken pursuant to this
8 Consent Decree perform all analyses according to approved EPA
9 methods or other methods deemed in advance to be satisfactory to
10 EPA Region 9. Accepted EPA methods are documented in the Con-
11 tract Lab Program Statement of Work for Inorganic Analysis. The
12 "Interim Method for Determination of Asbestos in Bulk Samples,"
13 EPA 600/M4-82-020, December 1982, shall be used for all asbestos
14 analyses. Copies of the aforementioned publications have been
15 provided to Defendant. The final analytical methodology and
16 reporting requirements shall be discussed and approved by EPA
17 before beginning verification sampling.

18 (iii.) Ensure that all laboratories
19 ~~utilized by the Defendant for analysis of samples taken pursuant~~
20 to this Decree participate in an EPA or EPA equivalent QA/QC
21 program. As part of the QA/QC program and upon request by EPA,
22 such laboratories shall perform at Defendant's expense, analyses
23 of samples provided by EPA to demonstrate the quality of each
24 laboratory's data.

1 (iv.) Validate all data in accordance
2 with EPA requirements and the Quality Assurance Program.

3 (4.) Operable Unit Feasibility Study and Conceptual Design.

4 Defendant shall implement the Work in accordance with the concep-
5 tual design and details in the City of Coalinga OUFS, as modified
6 by the requirements of Appendix D - Description of Cap Design,
7 which is hereby incorporated into this Consent Decree by this
8 reference. The OUFS and conceptual design includes, but is not
9 limited to:

10 (a.) WMU plans and specifications.

11 (b.) compliance with the ARARs
12 as specified in the ROD.

13 (c.) equipment setup and employee and
14 consultant training.

15 (d.) source of cover material for regrading
16 removal areas (asbestos of one percent
17 (1%) or less by PLM analysis).

18 (e.) Site health and safety plan.

19 ~~(f.) verification sampling criteria (asbestos~~
20 ~~1% or less by PLM analysis).~~

21 (5.) Prefinal/Final Design. Defendant shall submit a
22 prefinal and final RA design in two parts as follows:

23 (a.) the Prefinal Plan shall show 90% comple-
24 tion of the design and include, but not be limited to:

25 (i.) all revisions of and additions to the
26

1 conceptual design, including those
2 required by Appendix D - Description
3 of Cap Design.

4 (ii.) construction drawings.

5 (iii.) specifications.

6 (iv.) schedules.

7 (v.) cost estimates.

8 (vi.) operation and maintenance plan.

9 (b.) Final Design shall include, but not be

10 limited to:

11 (i.) all revisions of and additions to the
12 90% design.

13 (ii.) final construction drawings.

14 The Final Design shall supercede those portions of the
15 OUFS related to design.

16 (6.) Health and Safety Plan.

17 The Defendant shall submit a Health and Safety
18 Plan pursuant to Appendix B - Schedule. The Health and Safety
19 ~~Plan must satisfy the requirements of Occupational Safety and~~
20 Health Guidance for Hazardous Waste Site Activities (October 1985
21 (DHH 5 NIOSH) Publication No. 85-115) and EPA's Standard Operat-
22 ing Safety Guides. The Health and Safety Plan shall address the
23 potential exposure of workers at the Site and the public to
24
25
26

1 potential releases at and from the Site during performance of the
2 Work. The Defendant shall implement the Health and Safety Plan
3 after consideration of any comments provided by EPA.

4 (F.) Defendant shall, pursuant to the Schedule in Appendix
5 B, submit a draft and final of each deliverable to EPA.

6 (G.) Any failure of Defendant to submit a deliverable in
7 compliance with the Schedule will be deemed a violation of this
8 Decree subject to stipulated penalties set forth in Section
9 XIV. (Stipulated Penalties).

10 (H.) EPA will, pursuant to the Schedule, review and provide
11 written comments on each draft deliverable submitted by Defen-
12 dant.

13 (I.) Defendant shall, within the time allotted in the
14 Schedule, fully incorporate EPA's comments on the draft into the
15 final and submit the final deliverable.

16 (J.) Any failure of Defendant to fully incorporate into the
17 final deliverable EPA's comments or suggestions on and modifica-
18 tions to the draft deliverable, will be deemed a violation of
19 ~~this Decree, unless such comments suggestions or modifications go~~

20 beyond the purposes of this Consent Decree as set out in Section
21 IV (Purpose). EPA will provide written notice of such violation,
22 as provided in Section XVII. (Form of Notice).

23 (K.) EPA may determine that additional work, including,
24 without limitation, remedial work, investigations, engineering
25 analysis, and interim response measures are necessary to carry
26

1 out the purposes of this Decree as set forth in Section IV.
2 (Purpose). EPA shall provide Defendant with written notification
3 of the additional work required and will state why such addi-
4 tional work is required. Defendant shall perform the additional
5 work pursuant to EPA oversight and in accordance with the
6 specifications, standards, requirements and schedules determined
7 or approved by EPA.

8
9 **VII. PROJECT COORDINATORS**

10 (A.) Plaintiff and Defendant shall each designate a Project
11 Coordinator within 10 days after this Consent Decree is lodged.
12 The Project Coordinators shall monitor the progress of the Work
13 and coordinate communication between Plaintiff and Defendant.
14 Designation of the Project Coordinators shall occur as provided
15 in Section XVII. (Form of Notice).

16 (B.) Plaintiff's Project Coordinator will be an EPA
17 employee and shall have the authority vested in the On-Scene
18 Coordinator by 40 C.F.R. § 300 et seq., 50 Fed. Reg. 47912 (Nov.
19 ~~20, 1985~~), including such authority as may be added by amendments
20 to 40 C.F.R. § 300, as well as the authority to ensure that the
21 Work is performed in accordance with all applicable statutes,
22 regulations, and this Consent Decree.

23 (C.) Plaintiff's Project Coordinator will also have the
24 authority to require a cessation of the performance of the
25 Remedial Action or any other activity at the Site that, in the
26

1 opinion of Plaintiff's Project Coordinator, may present or con-
2 tribute to an imminent and substantial endangerment to public
3 health, welfare, or the environment.

4 (D.) The absence of Plaintiff's Project Coordinator from
5 the Site shall not be cause for stoppage of the Work. The
6 parties may change their respective Project Coordinators by
7 notifying the other party in writing at least seven calendar days
8 prior to the change.

9 (E.) Defendant's Project Coordinator may assign other rep-
10 resentatives, including other contractors, to serve as a Site
11 representative for oversight of performance of daily operations
12 during remedial activities.

13 (F.) Plaintiff's Project Coordinator may assign other rep-
14 resentatives, including other EPA employees or contractors, to
15 serve as a Site representative for oversight of performance of
16 daily operations during remedial activities.

17 (G.) When a site representative other than the Project
18 Coordinator is assigned, notice of this assignment will be
19 provided pursuant to Section XVII. (Form of Notice) within 10
20 days.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

VIII. SITE ACCESS

(A.) To the extent that access to or easements over property not owned by Defendant is required for the proper and complete performance of the Work and of this Decree, Defendant shall utilize its best efforts to obtain access agreements from the present owners or those persons who have control within 60 calendar days of the effective date of this Consent Decree. Site access agreements shall provide reasonable access to Defendant, contractor(s), the United States and any of its agencies, the State of California, and their representatives.

(B.) In the event that sufficient site access agreements are not obtained within the 60 day period, Defendant shall notify EPA within 65 calendar days of the effective date of this Consent Decree regarding both the lack of, and efforts to obtain, such agreements. In the event that Defendant is unable to obtain access to any property, Defendant may invoke the terms of Section XVI (Force Majeure) of this Decree.

(C.) During the effective period of this Decree, the United States, the State of California, and their representatives, including contractors, shall have access at all times to the Site and any contiguous property owned or controlled by Defendant.

(D.) Any person obtaining access pursuant to this provision shall comply with all applicable provisions of the Health and Safety Plan submitted by Defendant and reviewed by EPA.

1 IX. SAMPLING AND INVESTIGATION

2 (A.) At the request of Plaintiff's Project Coordinator,
3 Defendant shall provide to Plaintiff split or duplicate samples
4 of any samples taken during the course of the work. Plaintiff
5 shall, pursuant to Section 104 of CERCLA, 42 U.S.C. §9604, have
6 the right to take any samples it deems necessary to complete or
7 monitor progress of the Work.

8 (B.) During the design and construction of the Work, Defen-
9 dant shall notify Plaintiff's Project Coordinator of any planned
10 sampling conducted by Defendant or anyone acting on its behalf in
11 the monthly report submitted prior to the sampling. Such notice
12 will provide at least seventy-two (72) hours notice of planned
13 sampling to Plaintiff. Plaintiff shall be notified in writing
14 thirty (30) days prior to the disposal of any sample taken during
15 the Work, and shall have an opportunity to take possession of all
16 or a portion of such sample. Upon expiration of such 30 day
17 period, Defendant shall be free to dispose, in accordance with
18 applicable laws and regulations, of any portion of any sample of
19 ~~which Plaintiff has not taken possession.~~

20 (C.) Defendant shall permit Plaintiff to inspect and copy
21 all records, documents, photographs and other materials, includ-
22 ing all sampling and monitoring data, that in any way concerns
23 the asbestos or nickel waste problem at the City of Coalinga
24 Site.

1 (D.) At the request of Defendant, Plaintiff will provide
2 split or duplicate samples collected by Plaintiff and the
3 analytical results obtained from the samples. If Plaintiff col-
4 lects any samples, or undertakes any other testing work pursuant
5 to the Work, it will notify Defendant's Project Coordinator at
6 least forty-eight (48) hours in advance and permit Defendant to
7 observe the work.

8 (E.) All information gathered pursuant to this Consent
9 Decree shall be available to the public except as otherwise
10 provided in Section 104(e)(7) of CERCLA, 42 U.S.C. §9604(e)(7).
11

12 X. INSURANCE/ASSURANCE OF ABILITY TO COMPLETE WORK

13 (A.) Defendant or its general contractor shall purchase or
14 otherwise maintain in force a general liability insurance policy
15 in the amount of two million dollars, which shall protect the
16 United States and the public against any and all liability aris-
17 ing out of Defendant's and its contractors and other agents' acts
18 and omissions in performance of the Work at the Site. Prior to
19 ~~commencement of the Work at the Site,~~ Defendant shall provide EPA
20 with a certificate of insurance and a copy of the insurance
21 policy.

22 (B.) Defendant shall demonstrate its ability to complete
23 the Work by obtaining or providing any of the financial assurance
24 mechanisms permitted pursuant to 40 C.F.R. §264.143. Any such
25 mechanisms shall conform to the substantive requirements set
26

1 forth in §264.143 and shall use the sum of \$2.5 million in lieu
2 of the closure cost figure set forth in §264.143. At Defendant's
3 choice, and subject to Plaintiff's review as to adequacy, Defen-
4 dant may satisfy its obligations hereunder by providing Plaintiff
5 with a standard form performance bond issued by a surety company
6 qualified to issue such bonds within the State of California in
7 the above amount. Any financial assurance mechanism provided in
8 this Section shall remain in effect until the Work is accepted by
9 Plaintiff pursuant to Section XXX. (Completion of the Remedial
10 Action).

11 **XI. COMPLIANCE WITH OTHER LAWS AND REGULATIONS**

12 All actions required to be taken pursuant to this Consent
13 Decree shall be undertaken in accordance with the ARARs specified
14 in the ROD and in accordance with CERCLA, as amended, and the
15 NCP, provided, however, that this does not relieve Defendant of
16 its obligation to comply with any applicable laws not referenced
17 in the ROD, other than permitting requirements from which Defen-
18 dant is excused pursuant to Section 121(e) of CERCLA, 42 U.S.C.
19 §9621(e).

20 **XII. RETENTION OF RECORDS**

21 (A.) Defendant shall preserve and retain all records and
22 documents in its possession or control that relate in any manner
23 to the City of Coalinga Operable Unit, regardless of any document
24
25
26

1 retention policy to the contrary, for ten (10) years after the
2 completion of the Work or termination of this Consent Decree,
3 whichever is later.

4 (B.) Until completion of the Work and termination of this
5 Consent Decree, Defendant shall preserve, and shall instruct its
6 contractor, its contractor's subcontractors, and anyone else ac-
7 ting on Defendant's behalf with respect to the Site to preserve
8 (in the form of originals or exact copies, or in the alternative,
9 microfiche of all originals) all records, documents and informa-
10 tion of whatever kind, nature, or description relating to the
11 performance of the Work for the City of Coalinga Operable Unit.
12 Upon the completion of the Work copies of all such records, docu-
13 ments, and information shall be delivered to Plaintiff's Project
14 Coordinator.

15 **XIII. REIMBURSEMENT OF COSTS**

16 (A.) Within 5 days of the effective date of this Consent
17 Decree, Plaintiff shall submit to Defendant EPA's SPUR or cost
18 summary report and other cost documents deemed appropriate by EPA
19 ~~with respect to Site related response and oversight costs in-~~
20 curred by Plaintiff to the effective date of the Consent Decree.
21 In addition, at the end of each calendar year, Plaintiff shall
22 submit to Defendant a SPUR or cost summary report with respect to
23 all response and oversight costs incurred by Plaintiff with
24 respect to this Consent Decree. Failure to include all relevant
25 response costs in the submittal at the end of any particular
26

1 calendar year will not preclude Plaintiff from submitting such
2 costs in any subsequent year nor will such failure provide Defen-
3 dant with a reason to refuse payment.

4 (B.) Defendant agrees, within 30 calendar days of receipt
5 EPA's SPUR or cost summary report, to remit a certified check for
6 the amount of those costs and interest made payable to the "EPA-
7 Hazardous Substances Superfund." A copy of each check and trans-
8 mittal letter shall be sent to the Plaintiff's Project Coor-
9 dinator and the Department of Justice.

10 (C.) Checks should specifically reference the identity of
11 the Site and be addressed to:

12 U.S. Environmental Protection Agency
13 Superfund Accounting
14 P.O. Box 371003M
Pittsburgh, PA 15251
Attention: Collection Officer for Superfund

15 (D.) Payment made pursuant to this Section shall not con-
16 stitute an admission by Defendant of any liability to Plaintiff
17 or any other person. Defendant's reimbursement of costs will be
18 limited to such costs which are not inconsistent with the NCP.
19 ~~Defendant shall have the burden of demonstrating that such costs~~
20 are not consistent with the NCP.

21
22 **XIV. STIPULATED PENALTIES**

23 (A.) Except for any extensions allowed by Plaintiff in
24 writing, or excused by the provisions of the Section XVI. (Force
25 Majeure), for each day in which Defendant fails to submit a
26

1 deliverable in accordance with Appendix B - Schedule, fails to
2 make a payment, or in which Defendant otherwise fails to meet the
3 requirements of this Consent Decree, Defendant agrees to pay
4 stipulated penalties as set out in Subsection C. For purposes of
5 this Consent Decree references to days shall mean calendar days
6 unless otherwise specified.

7 (B.) These penalties shall begin to accrue commencing upon
8 Defendant's failure to comply with any term or provision of this
9 Consent Decree, shall continue accruing up to and including the
10 day on which Defendant's noncompliance is corrected, and shall be
11 payable 30 days after Defendant's receipt of Plaintiff's written
12 notice of violation; provided that for inadequate, as opposed to
13 untimely, submittals or for inadequate, as opposed to untimely,
14 performance of the requirements of this Consent Decree, EPA shall
15 provide to Defendant, as soon as possible, oral notification of
16 the occurrence of an event which triggers stipulated penalties,
17 with written confirmation within seven (7) days of the occurrence
18 of that event. If EPA so notifies Defendant within seven (7)
19 ~~days of the inadequate submittals or performance, penalties shall~~
20 accrue commencing with Defendant's violation, as described above.
21 In the event that EPA fails to so notify Defendant within seven
22 (7) days of inadequate submittals or performance, stipulated
23 penalties shall accrue from the date on which Defendant receives
24 such notice. These notice provisions will not apply to any
25 violation of this Consent Decree which causes a substantial harm
26

1 to health or the environment. Interest shall accrue beginning 31
2 days after Defendant's receipt of Plaintiff's written notice of
3 violation. Interest shall accrue at the rate specified in Sec-
4 tion 107(a) of CERCLA, 42 U.S.C. §9607(a). Nothing in this
5 Decree shall prevent the simultaneous accrual of penalties for
6 each separate violation of this Decree.

7 (C.) Specific Stipulated Penalty Amounts

8 1. Stipulated penalties shall accrue in the following
9 amounts and Defendant may not dispute the amounts set forth below
10 for each class of violations:

11 Class I

12 a. Submittal of the following:

- 13 1. Bid Specifications for all contractors and
14 subcontractors pursuant to 40 C.F.R. Part 61, Subpart M
15 2. Monthly Reports as required herein

16 b. Violation of the following:

- 17 1. Sampling Plan (other than Verification Sampling and
18 Analysis Plan listed in Appendix B - Schedule)
19 ~~2. Clean-up goals (failure to meet)~~

20 c. All other failures to comply in a timely and adequate manner
21 with the terms of this Consent Decree, including all ARARs iden-
22 tified in the ROD and all requirements of the Schedule and docu-
23 ments approved by EPA pursuant to this Consent Decree, that are
24 not Class II or Class III violations.

25 Penalties:

26

1	<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
2	Days 1 - 5	\$500
3	Days 6 - 30	\$2,000
4	After 30 Days	\$10,000
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		

1 Class II

2 a. Violation of the following:

3 1. Quality Assurance Program

4

5 Penalties:

6	<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
7	Days 1 - 5	\$2,000
8	Days 6 - 30	\$5,000
9	After 30 Days	\$12,000

10 Class III

11 a. Submittal of the following:

12 1. 90% Design

13 2. Final Design

14 b. Violation of the following:

15 1. 40 C.F.R. Sections 61.152, 61.153 and 61.156, except
16 those provisions included in Class IV

17 2. Air Monitoring Requirements of the Monitoring Plan

18 3. Health and Safety Plan

19 4. ~~Verification Sampling Program~~

20 5. Post-closure monitoring requirements

21 c. Award of Contract for Construction as provided in Appendix B
22 - Schedule.

23

24

25

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Penalties:

<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
Days 1 - 5	\$5,000
Days 6 - 30	\$12,000
After 30 Days	\$20,000

Class IV

a. Violation of the following:

40 C.F.R. Sections 61.152(b), 61.153(a) and 61.156(a)

Penalties:

<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
Days 1 - 5	\$500
Days 6 - 30	\$5,000
After 30 Days	\$20,000

(D.) Stipulated penalties shall be paid by certified check made payable to the "EPA-Hazardous Substance Superfund" by the 15th day of the month following the month in which the violation occurred. Failure to timely pay a stipulated penalty is an additional violation of the Decree, subject to stipulated penalties. A copy of the check and the letter forwarding the check, including a brief description of the violation, shall be submitted to the Plaintiff's Project Coordinator and the Department of Justice.

1 (E.) The stipulated penalties set forth above shall be
2 EPA's sole recourse for penalties against Defendant in this ac-
3 tion unless Defendant fails to pay any penalties demanded by
4 Plaintiff. If Defendant fails to timely pay all of any penalty
5 demanded by Plaintiff, these stipulated penalties will be in ad-
6 dition to any other remedies or sanctions available to Plaintiff
7 for violation of law or this Consent Decree.

8 **XV. DISPUTE RESOLUTION**

9 (A.) If Defendant objects to any decision of Plaintiff pur-
10 suant to this Decree, Defendant shall notify Plaintiff's Project
11 Coordinator and the Department of Justice, Chief, Environmental
12 Enforcement Section, P.O. Box 7611, Ben Franklin Station,
13 Washington, D.C. 20044, in writing, within fourteen (14) days of
14 receipt of Plaintiff's decision. Plaintiff and Defendant shall
15 then have fourteen (14) days to informally discuss the respective
16 sides of the dispute. A meeting may be held at Defendant or
17 Plaintiff's request to facilitate resolution of the dispute. At
18 the end of the 14 day discussion period, Plaintiff will issue a
19 ~~written determination of its decision regarding the dispute.~~

20 (B.) Invocation of the Dispute Resolution procedure itself
21 will not postpone the work schedule with respect to the disputed
22 issue, or stay the accrual of stipulated penalties. Plaintiff
23 agrees not to demand payment of penalties accrued until comple-
24 tion of the Dispute Resolution process. The imposition or amount
25 of penalties are not subject to dispute resolution.

26

1 (C.) If Defendant refuses to implement Plaintiff's deci-
2 sion, Plaintiff may elect to perform the Work. If Plaintiff does
3 perform the Work after Defendant's refusal, stipulated penalties
4 will continue to accrue for the life of the Decree; provided that
5 Defendant may elect to perform the Work in dispute without waiv-
6 ing its right to further contest Plaintiff's decision pursuant to
7 Subsection (D.).

8 (D.) If Defendant refuses to follow the Plaintiff's deci-
9 sion regarding the dispute, Defendant may file with the Court a
10 Motion for Judicial Dispute Resolution briefly describing the
11 dispute and its suggested resolution within 10 days of
12 Plaintiff's written determination.

13 (E.) Plaintiff shall have 45 days to respond to the Motion.

14 (F.) In any judicial dispute resolution proceeding involv-
15 ing matters covered by CERCLA Section 113(j)(2), 42 U.S.C.
16 §9613(j)(2), the Court shall apply the standards and provisions
17 of that statutory subsection. In any dispute relating to the
18 technique, cost, effectiveness or adequacy of any aspect of the
19 Remedial Action or Work, the Court shall apply an arbitrary and
20 capricious standard of review. In any other dispute, and except
21 as specified in Section XVI (Force Majeure), the Court shall
22 determine the appropriate standard of judicial review, based on
23 general principals of administrative law. In any dispute, the
24 Defendant shall bear the burden of coming forward with evidence
25 and of persuasion on factual issues.

1 Upon Defendant's filing of a Motion for Judicial Dis-
2 pute Resolution, EPA shall prepare an administrative record of
3 EPA's decision on the disputed matter(s). Defendant shall be
4 responsible for submitting to EPA, during the informal period
5 described in paragraphs (A.) through (C.) above, for inclusion in
6 the administrative record, all information Defendant wants EPA to
7 consider before making a decision.

8 The custodian of the administrative record prepared
9 pursuant to the preceding paragraph shall certify and submit the
10 record to the Court upon EPA's filing of its opposition to
11 Defendant's Motion for Judicial Dispute Resolution. The Court's
12 review will be limited to this administrative record.

13 (G.) If the Court finds that Plaintiff's decision was ar-
14 bitrary and capricious or otherwise not in accordance with the
15 law (or if the Court has determined that the Plaintiff's decision
16 was not in conformance with this Consent Decree pursuant to
17 another standard of judicial review selected under Subsection
18 (F.), then the stipulated penalties for the alleged violation
19 ~~shall not be payable. A finding that Plaintiff's decision was~~
20 arbitrary and capricious or otherwise not in accordance with the
21 law, or otherwise not in accordance with this Consent Decree,
22 shall not excuse stipulated penalties for failure to perform ac-
23 tions not in dispute except to the extent Defendant can show that

1 it was beyond its control, as defined in Section XVI (Force
2 Majeure) of this Decree, to perform those actions pending resolu-
3 tion of the dispute.

4 (H.) Unless the Court finds that Plaintiff's decision was
5 arbitrary and capricious or otherwise not in accordance with law,
6 or otherwise not in accordance with this Consent Decree, Defen-
7 dant shall transmit payment of all penalties which have accrued
8 during the dispute, plus interest at the rate specified in 28
9 U.S.C. § 1961 to the EPA-Hazardous Substance Superfund within 15
10 working days of resolution of the dispute.

11 **XVI. FORCE MAJEURE**

12 (A.) Defendant shall perform all the requirements of this
13 Consent Decree according to the Schedule and referenced support-
14 ing documents or any modification thereto unless their perfor-
15 mance is prevented or delayed by events which constitute a force
16 majeure.

17 (B.) For the purposes of this Decree, a force majeure is
18 defined as any event arising from causes beyond the control of
19 ~~Defendant or its contractors, subcontractors or consultants,~~
20 which delays or prevents performance. Neither economic hardship
21 nor increased costs shall be considered an event beyond the con-
22 trol of Defendant, and shall not trigger the force majeure
23 clause. Without limiting the foregoing, a Court or Administra-
24 tive Order enjoining or otherwise preventing Defendant from
25
26

1 proceeding with the Work shall be deemed to be a force majeure,
2 provided that such order is not the result of any failure of
3 Defendant to exercise due diligence and due care.

4 (C.) Defendant has the burden of proving by clear and con-
5 vincing evidence that any delay is or will be caused by events
6 beyond its control and that the duration of the delay requested
7 is necessary.

8 (D.) In the event of a force majeure, the time for perfor-
9 mance of the activity delayed by the force majeure shall be ex-
10 tended for the minimum time necessary to allow completion of the
11 delayed activity, but in no event longer than the time period of
12 the delay attributable to the force majeure. The time for per-
13 formance of any activity dependent on the delayed activity shall
14 be similarly extended. Plaintiff will determine whether require-
15 ments are to be delayed and the time to be granted for any exten-
16 sion. Defendant shall adopt all practicable measures to avoid or
17 minimize any delay caused by a force majeure.

18 (E.) In the event of a force majeure, Defendant shall
19 orally notify Plaintiff's project coordinator immediately (no
20 later than 48 hours after Defendant becomes aware of the force
21 majeure) and shall notify Plaintiff in writing within seven (7)
22 calendar days after discovery of a force majeure. The written
23 notification shall describe the alleged force majeure, the an-
24 ticipated length of the delay and any measures Defendant is
25 taking to mitigate the event or the delay.

1 (F.) Failure of Defendant to comply with the notification
2 requirements of this Section shall result in automatic forfeiture
3 of any right to claim a force majeure delay, except that if
4 Defendant inadvertently fails to provide Plaintiff with timely
5 notice of an event determined by Plaintiff to be a valid force
6 majeure delay, then penalties for nonperformance of the terms and
7 provisions of the Consent Decree excused by the force majeure
8 will accrue from the day of such violation until the day on which
9 Plaintiff receives written notification of the force majeure as
10 described in paragraph (E.) of this Section.

11 **XVII. FORM OF NOTICE**

12 When notice is required to be given, a report or other sub-
13 mittal is required to be forwarded by one party to another, or
14 service of any papers is necessitated, by the terms of this Con-
15 sent Decree, such correspondence, report or submittal shall be in
16 writing and mailed postage prepaid and addressed as follows:

17 Plaintiff

18 Daniel A. Meer (3 copies) (415) 974-7951
19 Laurie J. Williams, Esq. (415) 974-9579
20 U.S. Environmental Protection Agency
21 Region IX
215 Fremont Street
San Francisco, CA 94105

22 Mr. Ruben Moreno (209) 445-5116
23 California Regional Water Quality Control Board
3614 East Ashlan
24 Fresno, CA 93726

1 Mr. Edward Cargile (916) 920-7708
Northern California Section
2 Department of Health Services
83 Scripps Drive, Suite 101
3 Sacramento, CA 95825

4 Mr. Tim Casagrande
Fresno County Department of Health
5 P.O. Box 11867
6 Fresno, California 93775

7 Mr. John Schroeder
Fresno County Air Pollution Control Division
1221 Fulton Mall
8 Fresno, CA 93721

9
10 Defendant

11 All submittals and notifications to Defendant pursuant to this
12 decree shall be made to Defendant Project Coordinator.

13
14 In case of written notice or submittals notice shall be
15 deemed given on the date the notification or submittal is
16 received by the party to whom notice must be given pursuant to
17 this Consent Decree.

18
19 **XVIII. RESERVATIONS AND WAIVERS OF RIGHTS**

20 (A.) Except as provided for in Section XIX (Covenant Not To
21 Sue), Plaintiff reserves the right to take any enforcement action
22 pursuant to CERCLA and/or any other legal authority, including
23 the right to seek injunctive relief, response costs, natural
24 resource damages, monetary penalties, and punitive damages for
25 any civil or criminal violation of law or this Consent Decree.

1 (B.) Plaintiff reserves the right to disapprove of work
2 performed by Defendant which does not comply with this Consent
3 Decree.

4 (C.) Plaintiff reserves the right to require that Defendant
5 perform tasks with respect to this Site, consistent with CERCLA,
6 in addition to those required to perform the ROD, except as
7 otherwise provided in the Section XIX. (Covenant Not To Sue).

8 (D.) Plaintiff reserves its rights pursuant to CERCLA to
9 undertake removal actions and/or remedial actions at any time,
10 except as provided in Section XIX. (Covenant Not To Sue). Plain-
11 tiff reserves the right to recover all costs of those actions not
12 reimbursed by Defendant.

13 (E.) Defendant reserves any defenses or rights it may have
14 with respect to any actions concerning the Site except any rights
15 expressly waived in this Consent Decree.

16 (F.) Defendant waives any right it might have to challenge
17 Plaintiff's or the Court's authority to issue, enter into or en-
18 force this Decree.

19 ~~(G.) Defendant waives any right it might have to seek reim-~~
20 ~~bursement from the Superfund pursuant to the provisions of Sec-~~
21 ~~tions 106(b)(2) and 112 of CERCLA, 42 U.S.C. §§9606(b)(2) and~~
22 ~~9612, for any costs incurred by it which are related to the Site.~~

23
24
25
26

1 (H.) Defendant waives any right it might have to initiate a
2 challenge to the imposition or amount of stipulated penalties set
3 out in Section XIV (A-D) of this Decree except as provided in
4 Section XV. (Dispute Resolution).

5 (I.) By entering into and performing this Consent Decree,
6 Defendant does not admit liability for (1) the site, or (2) any
7 response costs which may have been incurred by any person.

8 (J.) Compliance with the terms of this Consent Decree, in-
9 cluding the completion of the approved work, does not constitute
10 a release of Defendant by Plaintiff from any liability other than
11 as specified in Section XIX. (Covenant Not to Sue).

12 (K.) Defendant reserves any right it may have to file any
13 claim or action with respect to the City of Coalinga Site, in-
14 cluding any claim or action for reimbursement, contribution or
15 indemnity for its costs incurred at the Site, except as otherwise
16 expressly waived herein.

17 XIX. COVENANT NOT TO SUE

18 (A.) In consideration of actions which will be performed
19 ~~and payments which will be made by Defendant under this Decree,~~
20 and except as otherwise specifically provided in this Decree in-
21 cluding specifically as provided in Paragraph C of this Section
22 XIX, the United States covenants not to sue Defendant for any and
23 all claims pertaining to the City of Coalinga Site pursuant to
24 Sections 106 and 107(a) of CERCLA. This Covenant Not To Sue

1 shall take effect upon certification by EPA of the completion of
2 the Work, pursuant to Section XXX. (Completion of the Remedial
3 Action).

4 (B.) This Covenant Not To Sue does not include:

5 (1.) Liability arising from hazardous substances
6 removed from the facility, except as authorized by
7 Plaintiff pursuant to the ROD;

8 (2.) Criminal liability;

9 (3.) Claims for injunctive relief based on a
10 failure by the Defendant to meet the requirements of this
11 Consent Decree;

12 (4.) Liability for violations of federal law
13 which occur during implementation of the Work, except that
14 if Defendant is liable for stipulated penalties pursuant to
15 this Consent Decree for any violation of CERCLA, Defendant
16 shall not be civilly liable to Plaintiff for any other
17 monetary penalty for any such violation of CERCLA;

18 (5.) Liability arising from the past, present, or
19 ~~future release or threat of release of hazardous substances~~
20 other than at the City of Coalinga Site;

21 (6.) Claims arising from contamination of
22 groundwater resulting from migration of contaminants from
23 the WMU, at and in the vicinity of the City of Coalinga
24 Site;

1 (7.) Claims based on the Defendant's liability
2 arising from the past, present, or future disposal of haz-
3 arduous substances outside of the City of Coalinga Site.

4 (8.) Any claim or demand for damage to federal
5 property located anywhere that the actions contemplated in
6 this Decree are being performed; or

7 (9.) Claims based on liability for damage to
8 natural resources as defined in Section 107(a)(4)(C) of
9 CERCLA, 42 U.S.C. §9607(a)(4)(C).

10 (10.) Claims based on the release or threat of
11 release of hazardous substances from the disposal vault into
12 the environment, provided that the continued undisturbed
13 presence of the substances within the vault without migra-
14 tion shall not be deemed to be a threat of release, except
15 in the event that the circumstances described in paragraphs
16 (C.) (2) (a) or (b) of this Section occur, and indicate that
17 the undisturbed presence of the substances within the vault
18 may be a threat.

19 ~~(11.) Claims based on liability for expenses in-~~
20 ~~curred in connection with any five (5) year review pursuant~~
21 ~~to CERCLA Section 121(c);~~

22 (12.) Claims based on liability for operation
23 and maintenance of the remedy including repairs to the im-
24 permeable cap.

1 (C.) Notwithstanding any other provision of this Consent
2 Decree, the Plaintiff reserves the right to institute proceedings
3 in this action or in a new action (1) seeking to compel Defendant
4 to perform additional response work at the site or (2) seeking
5 reimbursement of the Plaintiff's response costs, if:

6 (a.) conditions at the Site, previously un-
7 known to the Plaintiff, are discovered after certification
8 of the remedy; or

9 (b.) information is received, in whole or in
10 part, after certification of the remedy;

11 and these previously unknown conditions indicate or this informa-
12 tion indicates that the Work is not protective of human health
13 and the environment;

14 (D.) This Covenant Not To Sue shall not relieve Defendant
15 of their obligation to meet and maintain compliance with the re-
16 quirements set forth in this Decree, including complete implemen-
17 tation of the ROD, attached as Appendix A.

18 (E.) Nothing in this Consent Decree shall constitute or be
19 ~~construed to constitute a release or a covenant not to sue~~
20 regarding any claim or cause of action against any person or
21 other entity not a signatory to this Consent Decree for any
22 liability it may have, arising out of or relating to any person
23 or other entity than the Defendant, in connection with the City
24 of Coalinga Site.

1 (F.) Defendant hereby releases and covenants not to sue the
2 United States, including any and all departments, agencies, of-
3 ficers, administrators, and representatives thereof, for any
4 claim, cross-claim, or counter-claim asserted, or that could have
5 been asserted, on or before the effective date of this Consent
6 Decree arising out of or relating to the Site provided that this
7 release shall not cover any claim by Defendant asserted under
8 Section XV. (Dispute Resolution) resulting from a decision or or-
9 der of Plaintiff's pursuant to this Consent Decree.

10 (G.) The parties to this Consent Decree agree that the
11 Plaintiff shall be under no obligation to assist the Defendant in
12 any way in defending against suits for contribution brought
13 against the Defendant which allege liability for matters covered
14 by this covenant not to sue by persons or entities that have not
15 entered this settlement

16
17 **XX. MODIFICATION**

18 There shall be no modification of this Consent Decree
19 without written approval of all parties to this Decree and entry
20 by the Court.

1 **XXI. ADMISSIBILITY OF DATA**

2 In the event that the Court is called upon to resolve a
3 dispute concerning implementation of this Consent Decree, the
4 parties waive any evidentiary objection to the admissibility into
5 evidence of data gathered, generated, or evaluated pursuant to,
6 and in compliance, with this Decree.

7 **XXII. EFFECTIVE DATE**

8 This Consent Decree is effective upon the date of its entry
9 by the Court.

10 **XXIII. COMMUNITY RELATIONS**

11 Defendant shall cooperate with Plaintiff and the State in
12 providing information to the public. As requested by Plaintiff
13 or the State, Defendant shall participate in the preparation of
14 all appropriate information disseminated to the public and in
15 public meetings(s) which may be held or sponsored by Plaintiff or
16 the State to explain activities at or concerning the Site.

17 **XXIV. PUBLIC PARTICIPATION**

18 (A.) Plaintiff will publish notice of the availability for
19 review and comment of this Consent Decree upon its lodging with
20 the United States District Court as a proposed settlement in this
21 matter.

1 (B.) Plaintiff will provide persons who are not parties to
2 the proposed settlement with the opportunity to file written com-
3 ments during a thirty (30) day period following such notice.
4 Plaintiff will file with the Court a copy of any comments
5 received and its responses to such comments.

6 (C.) After the closing of the public comment period, Plain-
7 tiff will review all comments and determine whether the comments
8 disclose facts or considerations which indicate that the proposed
9 judgment is inappropriate, improper or inadequate, and therefore
10 that the Consent Decree should be modified. If a modification is
11 deemed necessary by Plaintiff based on public comment, Plaintiff
12 will notify Defendant.

13
14 **XXV. NOTICE TO THE STATE**

15 Plaintiff has notified the State of California pursuant to
16 the requirements of Section 106(a) of CERCLA, 42 U.S.C. §9606.

17
18 **XXVI. CONSISTENCY WITH THE NCP**

19 Plaintiff and Defendant agree that the Work, if performed in
20 full accordance with the requirements of this Consent Decree, is
21 consistent with the provisions of the NCP, pursuant to Section
22 105 of CERCLA, 42 U.S.C. §9605.

1
2 **XXVII. INDEMNIFICATION OF THE UNITED STATES**

3 Notwithstanding any approvals which may be granted by the
4 United States or other government entities, Defendant agrees to
5 indemnify, save, and hold harmless the United States, its offi-
6 cials, employees, agencies, and contractors from any and all
7 claims or causes of action which may arise from the execution of
8 the Work or compliance with this Decree by Defendant and its sub-
9 contractors and agents. Defendant also agrees to assume any
10 liability arising from or relating to its acts or omissions or
11 the acts or omissions of any of its contractors, subcontractors,
12 or any other person acting on its behalf in the performance or
13 non-performance of the Work.

14
15 **XXVIII. OTHER CLAIMS**

16 (A.) With respect to any person, firm, partnership, or
17 corporation not a signatory to this Decree, nothing in this Con-
18 sent Decree shall constitute or be construed as a covenant not to
19 sue with respect to, or as release from any claim, cause of ac-
20 tion, or demand in law or equity.

21 (B.) This Consent Decree does not constitute a
22 preauthorization of funds under Section 111(a)(2) of CERCLA.

23 (C.) In consideration of entry of this Consent Decree,
24 Defendant agrees not to make any claims pursuant to CERCLA Sec-
25 tions 112 or 106(b)(2), 42 U.S.C. §§9612, 9606(b)(2), or any
26

1 other provisions of law directly or indirectly against the Haz-
2 arduous Substance Superfund, or make other claims against the
3 United States for costs expended in connection with this Consent
4 Decree.

5 **XXIX. CONTRIBUTION PROTECTION**

6 Pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C.
7 §9613(f)(2), Defendant shall not be liable for claims of con-
8 tribution regarding matters addressed in this Consent Decree.

9
10 **XXX. COMPLETION OF THE REMEDIAL ACTION**

11 (A.) EPA shall issue a Certificate of Completion stating
12 that the Remedial Action is complete when EPA has determined that
13 all of the following have occurred: (1) completion of the con-
14 struction of the WMU, (2) verification sampling demonstrating
15 achievement of the clean up goals specified in the ROD, and (3)
16 recordation of deed restrictions as required by Appendix E.

17 (B.) If EPA denies certification, Defendant shall either
18 (1) expeditiously complete the work EPA describes as necessary
19 for completion, and submit a new Certification Report, or (2) in-
20 voke the Dispute Resolution process of Section XV. (Dispute
21 Resolution) of this Consent Decree. If EPA fails to respond
22 within ninety (90) days of receiving the Remedy Certification
23 Report, then Defendant may invoke the dispute resolution proce-
24 dure of Section XV.

1 **XXXI. OPERATION AND MAINTENANCE**

2 (A.) Defendant shall perform and maintain the selected
3 remedy to ensure that asbestos and nickel ore wastes are not
4 released into the environment. Monitoring and maintenance of
5 the Site following completion of the construction shall be per-
6 formed in accordance with the ROD. The ROD requires continuous
7 operation and maintenance of the WMU so as to forever insure that
8 there be no migration of the hazardous substances from the WMU.

9 (B.) Defendant agrees that it shall remain liable for the
10 stipulated penalties provided for in Section XIV. (Stipulated
11 Penalties) for any failure to adequately perform its operation
12 and maintenance responsibilities under this Consent Decree and in
13 accordance with the ROD even following termination of this Decree
14 in as provided in Section XXXIII. (Termination).

15
16 **XXXII. CONTINUING JURISDICTION**

17 This Court specifically retains jurisdiction over both the
18 subject matter of and the Parties to this action for the duration
19 of this Consent Decree for the purposes of issuing such further
20 orders or directions as may be necessary or appropriate to
21 construe, implement, modify, enforce, terminate, or reinstate the
22 terms of this Consent Decree or for any further relief as the
23 interest of justice may require.

1
2 **XXXIII. TERMINATION AND SATISFACTION**

3 Upon notice by EPA to the Court that EPA has certified that
4 the Remedial Action is complete and that Defendant has satisfied
5 its obligations under this Consent Decree, this Consent Decree
6 shall terminate upon the motion of any party. Termination of
7 this Consent Decree shall not affect the Covenant Not To Sue, in-
8 cluding all reservations pertaining to the Covenant, and shall
9 not affect any continuing obligation of Defendant under Section
10 XXXI. (Operation and Maintenance) of this Consent Decree.
11

12 **XXXIV. SECTION HEADINGS**

13 The section headings set forth in this Decree and its Table
14 of Contents are included for convenience of reference only and
15 shall be disregarded in the construction and interpretation of
16 any of the provisions of this Decree.
17
18

19 SIGNED AND ENTERED this ___ day of _____, 1989.
20

21 _____
22 UNITED STATES DISTRICT JUDGE

23 By the signatures below, the Parties hereby consent to the
24 foregoing Consent Decree
25
26

1 FOR DEFENDANT:

2 *E.L. Johnson*
3 E.L. JOHNSON
4 VICE PRESIDENT FINANCE

DATE: July 27, 1989

5
6 FOR PLAINTIFF, UNITED STATES:

7 *Donald Carr*
8 DONALD A. CARR
9 Acting Assistant Attorney General
10 Land and Natural Resources
11 U.S. Department of Justice
12 Washington, D.C. 20044

DATE: August 7, 1989

13
14 United States Attorney

15
16
17 Assistant United States Attorney

DATE: _____

18 *Daniel W. McGovern*
19 DANIEL W. MCGOVERN
20 Regional Administrator
21 U.S. Environmental Protection Agency
22 Region IX
23 215 Fremont Street
24 San Francisco, California 94105

DATE: 7.27.89

25 *William A. Weinischke*
26 WILLIAM A. WEINISCHKE
Trial Attorney
Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20530
(202) 633-4592