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8
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 v.)
16 INTEL CORPORATION and)
RAYTHEON COMPANY,)
17 Defendants.)
18

Case No. 91-CV-20275 JW

FIRST AMENDED CONSENT DECREE

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1 This Consent Decree is made and entered into by and
2 between Plaintiff, the United States of America ("United States"),
3 on behalf of the Administrator of the United States Environmental
4 Protection Agency ("EPA") and the following Defendants: Intel
5 Corporation and Raytheon Company (hereafter collectively referred
6 to as the "Parties").
7

8 WHEREAS, the United States, on behalf of EPA, has filed a
9 Complaint in this matter pursuant to the Comprehensive
10 Environmental Response, Compensation, and Liability Act, 42 U.S.C.
11 § 9601 et seq., as amended by the Superfund Amendments and
12 Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613
13 (1986) (as so amended, "CERCLA"), seeking to compel Defendants
14 identified in Section II (Parties) of this Consent Decree to
15 perform remedial actions and to recover response costs that have
16 been and will be incurred by the United States, on behalf of EPA,
17 in response to releases and threatened releases of hazardous
18 substances from facilities in Mountain View, California, which have
19 contributed to soil and groundwater contamination in the
20 Middlefield-Ellis-Whisman (MEW) area of Mountain View and areas
21 north of U.S. Highway 101 in Moffett Field, and may have
22 contributed to contamination in the area of the Silva Well on
23 Sherland Avenue in Mountain View, California.

24
25 WHEREAS, EPA has determined that the past, present, and
26 potential migration of hazardous substances from the Site
27 constitute an actual or threatened release as defined in
28 Section 101 (22), of CERCLA, 42 U.S.C. § 9601 (22) of a hazardous

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1 substance, as defined in Section 101(14) of CERCLA, 42 U.S.C.
2 § 9601(14), and that the Defendants are potentially liable parties
3 pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

4
5 WHEREAS, in 1984, EPA proposed to list and subsequently
6 did list certain areas within the Site on the National Priorities
7 List ("NPL") for appropriate response actions pursuant to CERCLA.

8
9 WHEREAS, pursuant to an Administrative Order on Consent
10 signed by EPA; the California Department of Health Services
11 ("DOHS"); the Regional Water Quality Control Board, San Francisco
12 Bay Region ("RWQCB"); Fairchild Semiconductor Corporation; Intel
13 Corporation and Raytheon Company on August 15, 1985 (Docket
14 No. 85-03), Fairchild, Intel and Raytheon have conducted a Remedial
15 Investigation and a Feasibility Study with respect to the Site.

16
17 WHEREAS, during the course of conducting the Remedial
18 Investigation, sources of the area-wide groundwater contamination
19 were discovered at facilities in or near the Middlefield-Ellis-
20 Whisman area and at Moffett Naval Air Station and the NASA Ames
21 Research Center, and the Record of Decision for the Middlefield-
22 Ellis-Whisman area has been developed to address the area-wide
23 groundwater contamination and all sources of this contamination,
24 including soils.

25
26 WHEREAS, EPA has determined and Defendants agree that
27 entities other than Defendants are potentially responsible parties
28 for all or a portion of the contamination in the MEW Area and that

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1 if the United States enters into a separate settlement with one or
2 more of such other potentially responsible parties, it is the
3 policy of the United States and the EPA that any such settlement
4 shall be fair, adequate and reasonable taking into consideration,
5 among other factors, such other party's or parties' contribution to
6 contamination in the MEW Area and the provisions of the United
7 States' settlement with Defendants as expressed in this Consent
8 Decree.

9
10 WHEREAS, the Parties recognize that within the MEW Area
11 there are a number of separate facilities with individual sources
12 located at or immediately adjacent to such facilities and that to
13 achieve effective remediation of the regional groundwater plume,
14 it may be necessary for such sources to be separately removed or
15 controlled by the entities responsible for such sources.

16
17 WHEREAS, EPA has determined that the actions mandated by
18 this Decree are necessary to protect the public health, welfare and
19 the environment and are in accordance with Section 121 of CERCLA,
20 42 U.S.C. § 9621, and with the NCP, 40 C.F.R. Part 300, that the
21 work to be performed under this Consent Decree is a necessary
22 response to the conditions at the Site and that all costs incurred
23 for such work are necessary costs of response.

24
25 WHEREAS, pursuant to Section 122 of CERCLA, 42 U.S.C.
26 § 9622, the United States and the Defendants have each stipulated
27 and agreed to the making and entry of this Consent Decree

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1 (hereinafter "Decree" or "Consent Decree") prior to the taking of
2 any testimony.

3
4 WHEREAS, the United States and the Defendants agree that
5 settlement of this matter and entry of this Consent Decree are made
6 in good faith, in an effort to avoid further expensive and
7 protracted litigation, but without any admission as to any legal
8 or factual matter except for Defendants' consent to jurisdiction
9 for purposes of entry and enforcement of this Consent Decree as
10 provided above, and without any admission as to liability for any
11 purpose.

12
13 NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED as
14 follows:

15
16 I. JURISDICTION

17
18 The Court has jurisdiction over the subject matter of this
19 action and the signatories to this Consent Decree pursuant to
20 Sections 106, 107, 113 and 122 of CERCLA, 42 U.S.C. §§ 9606, 9607,
21 9613 and 9622, and 28 U.S.C. §§ 1331 and 1345. The Parties shall
22 not challenge the Court's jurisdiction to enter and enforce this
23 Consent Decree. Defendants waive service of summons and, for the
24 purpose of this Consent Decree, agree to submit themselves to the
25 jurisdiction of this Court. The Defendants further agree to accept
26 service by regular mail. The complaint states a claim upon which
27 relief can be granted.

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1 II. PARTIES

2

3 A. Initial Parties. The parties to this Consent Decree are
4 the United States, on behalf of EPA, and the following individuals
5 and entities: Intel Corporation and Raytheon Company (the
6 "Defendants").

7

8 B. United States. All references contained in this Consent
9 Decree to the rights, responsibilities, covenants or actions of the
10 United States, unless otherwise provided, are intended to refer to
11 the United States acting on behalf of the United States
12 Environmental Protection Agency. Unless otherwise provided, or
13 unless the term United States Government is used, no reference
14 contained in this Consent Decree to the rights, responsibilities,
15 covenants or actions of the United States is intended to refer to
16 the United States acting on behalf of either the United States
17 Department of the Navy or the National Aeronautic and Space
18 Administration (NASA), or to any other federal agency or department
19 including any other federal agency or department that succeeds to
20 the interests, rights or liabilities of the Navy or NASA with
21 respect to any property owned or occupied by the Navy or NASA in or
22 near the MEW Site.

23

24 C. Addition of Parties. Additional plaintiffs, individuals
25 or entities, including parties potentially responsible for ground-
26 water and soil contamination at the Site, may seek to join in the
27 settlement effected by this Decree. Any such additional individual
28 or entity shall become a Party to this Decree upon the execution of

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1 a supplemental decree by such individual or entity and all other
2 Parties hereto and the entry of such supplemental decree by the
3 Court.

4

5 III. BINDING EFFECT

6

7 This Consent Decree shall apply to and be binding upon the
8 signatories, their successors, and assigns and upon all persons,
9 contractors, and consultants acting under or for any of the
10 Parties. No change in ownership or corporate or partnership
11 status will in any way alter the responsibilities of any Defendant
12 under this Consent Decree. Following any such change, such
13 Defendant will remain responsible for carrying out all activities
14 required of such Defendant under this Consent Decree. Each
15 Defendant shall provide a copy of this Consent Decree, as entered,
16 and shall provide all relevant attachments to the Consent Decree,
17 as appropriate, to each person, including all contractors and
18 subcontractors, retained to perform the Work for which such
19 Defendant is responsible under this Decree, and shall condition any
20 contract for such Work on compliance with this Consent Decree.

21

22 IV. DEFINITIONS

23

24 The following terms used in this Consent Decree are defined as
25 follows:

26 A. "Additional Response Work" means any activities related
27 to the Remedial Action that are contained in any modification to
28 the Remedial Design or Remedial Implementation Plan pursuant to

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1 Section X (Modifications to the Remedial Action) of this Consent
2 Decree.

3

4 B. "ARARs" shall mean applicable or relevant and appropriate
5 requirements pursuant to CERCLA Section 121(d) and as further
6 defined in the National Contingency Plan.

7

8 C. "CERCLA" shall mean the Comprehensive Environmental
9 Response, Compensation, and Liability Act, 42 U.S.C. § 9601
10 et seq., as amended by the Superfund Amendments and
11 Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613
12 (1986).

13

14 D. "Conditional Interim Work" shall consist of all tasks
15 necessary to implement the ROD, including operation and
16 maintenance, during the first two years of the Interim Work
17 period.

18

19 E. "Contractor" shall mean the individual(s), company or
20 companies retained by or on behalf of any Defendant to undertake
21 and complete the Work. Each contractor or subcontractor shall be
22 qualified to do those portions of the Work for which it is
23 retained.

24

25 F. "Defendants" shall mean those parties listed as such in
26 Section II (Parties) of this Consent Decree and any additional
27 individuals or entities who become Defendants pursuant to the
28 provisions of this Decree.

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G. "EPA" shall mean the United States Environmental Protection Agency.

H. "Environment" shall have the meaning given to it in Section 101(8) of CERCLA, 42 U.S.C. § 9601(8).

I. "Explanation of Significant Differences" or "ESD" shall mean the document signed by the Regional Administrator of EPA Region IX in September 1990, which clarified the Record of Decision signed by the Regional Administrator on June 9, 1989, and which is attached hereto as Appendix A.

J. "Facility Coordinator" shall have the meaning given to it in Section VI.E. (Project and Facility Coordinators) below.

K. "Facility Specific Work" shall have the meaning given to it in Section VII.C.1 (Facility Specific Work) below.

L. "Future Work" shall consist of all tasks necessary to implement the ROD, including operation and maintenance, occurring after the termination of the Interim Work period, as determined by EPA pursuant to Section VII.B.5.b. (Termination).

M. "Hazardous substance" shall mean any substance included in the definition of hazardous substance set forth in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

1 N. "Initial Work" shall consist of all tasks necessary to
2 design, construct and commence operation of the RGRP, as specified
3 in Section VII.B.2.b.(1) (Initial Work).

4
5 O. "Interim Work" shall consist of all tasks necessary to
6 implement the ROD, including operation and maintenance, occurring
7 after the date of commencement of routine operation activities of
8 the RGRP, as specified in Section VII.B.2.b.(2) (Interim Work) and
9 terminating upon EPA's determination pursuant to Section VII.B.5.b.
10 (Termination).

11
12 P. "Joint Work" shall have the meaning given to it in
13 Section VII.B.1 (Joint Work) below.

14
15 Q. "MEW Area" shall mean the area bounded on the east by a
16 line 500 feet east of Ellis Street, bounded on the north by a line
17 500 feet north of U. S. Highway 101, bounded on the west by a line
18 500 feet west of Whisman Road, and bounded on the south by a line
19 500 feet south of Middlefield Road.

20
21 R. "MEW Plume" shall mean groundwater containing detectable
22 concentrations of the following chemicals that is beneath the
23 surface of the MEW Site and the areas surrounding the MEW Site to
24 the extent that the Defendants are jointly and severally liable to
25 investigate, control, remediate or take other response actions with
26 respect to such groundwater, as provided by applicable law, this
27 Consent Decree or the Record of Decision:

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1 trichloroethene 1,2 -dichlorobenzene
2 1,1,1, -trichloroethane chloroform
3 vinyl chloride freon 113
4 1,1 -dichloroethane tetrachloroethene
5 1,1 -dichloroethene phenol
6 1,2 -dichloroethene (cis and trans isomers)

7 S. "Mountain View Parks and Recreation Well" shall mean
8 Santa Clara Valley Water District Well Number 22J7.

9 T. "National Contingency Plan" or "NCP" shall refer to the
10 National Oil and Hazardous Substances Pollution Contingency Plan,
11 40 C.F.R. Part 300, and shall be used as that term is referred to
12 in Section 105 of CERCLA, 42 U.S.C. § 9605.

13 U. "Oversight" means EPA's monitoring and inspection of the
14 work, including actions necessary to review and verify the
15 adequacy of performance of such work and reports of the Defendants
16 that are required under the terms of this Consent Decree.

17 V. "Parties" shall mean all parties described in Section II
18 (Parties).

19 W. "Project Coordinator" shall have the meaning given to it
20 in Section VI.E (Project and Facility Coordinators).

21 X. "QA/QC" shall mean quality assurance and quality
22 control.

1 Y. "Record of Decision" or "ROD" shall mean the document
2 signed by the Regional Administrator of Region IX on June 9, 1989,
3 which describes the remedy to be implemented at the Site, as
4 clarified by the ESD signed by the Regional Administrator in
5 September 1990, and which is attached hereto as Appendix B.

6
7 Z. "Release" shall have the meaning given to it in
8 Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

9
10 AA. "Remedial Action" or "RA" shall mean the implementation
11 of that portion of the remedy set forth in the Record of Decision
12 that is described in Section VII hereof (Work to be Performed), as
13 further defined in this Consent Decree and as may be modified
14 pursuant to the provisions of this Consent Decree, and any
15 schedules or plans required to be submitted pursuant thereto.

16
17 BB. "Remedial Implementation Plan" shall mean the plans
18 developed and submitted by the Defendants pursuant to Section VII
19 (Work to be Performed) of this Consent Decree.

20
21 CC. "Remedial Design" or "RD" shall mean the phases of the
22 work wherein engineering plans and technical and performance
23 specifications are developed for implementation of the remedy, in
24 accordance with the ROD and this Consent Decree.

25
26 DD. "Response Costs" shall mean any costs incurred by
27 Plaintiff pursuant to CERCLA.

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1 EE. "Regional Groundwater Remediation Program" or "RGRP"
2 shall have the meaning given to it in Section VII.B.1 (Joint Work)
3 below.

4
5 FF. "Silva Well" shall mean Santa Clara Valley Water
6 District Well Number 22A3 on Sherland Avenue in Mountain View,
7 California.

8
9 GG. "Site" or "MEW Site" means areas of soil and groundwater
10 contamination in the MEW Area of Mountain View, California, and any
11 areas to which such groundwater has migrated. These areas may
12 include the Silva Well area near Sherland Avenue in Mountain View,
13 are expected to include groundwater beneath NASA Ames Research
14 Center (NASA Ames) in Moffett Field, California, and are known to
15 include groundwater beneath Moffett Field Naval Air Station (NAS).

16
17 HH. "United States Government" shall mean the United States
18 of America, all its departments, agencies, officers, administrators
19 and representatives and any successors thereto.

20
21 II. "Work" means the tasks to be performed by the Defendants
22 pursuant to this Consent Decree.

23
24 JJ. "Work Assumption Penalty" has the meaning given to it in
25 Section IX.C (Work Assumption Penalty) of this Consent Decree.

1 KK. "2010 ROD Amendment" shall mean the document signed by the Assistant Director
2 of the Superfund Division of Region IX on August 16, 2010, which describes the vapor
3 intrusion remedy to be implemented at the Site.

4 LL. "Vapor Intrusion Remedial Design and Remedial Action Statement of Work" shall
5 mean the document setting forth the Work to be conducted to implement the vapor
6 intrusion remedy, which is attached to the Decree as Appendix F.

7 MM. "Vapor Intrusion Work" shall mean the Work required in the Vapor Intrusion
8 Remedial Design and Remedial Action Statement of Work in Appendix F to the Decree.

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10 [Rest of Page Intentionally Left Blank]
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1 V. PURPOSE

2

3 A. In General. The purpose of this Consent Decree is to
4 serve the public interest by protecting the public health,
5 welfare, and the environment from releases and threatened releases
6 of hazardous substances at the Site through implementation of the
7 Work.

8

9 B. Consistency with the NCP. EPA has determined that the
10 actions mandated by this Decree and the remedy selected by EPA in
11 the Record of Decision are in accordance with Section 121 of
12 CERCLA, 42 U.S.C. § 9621, and with the NCP. Defendants expressly
13 waive their right to make any challenge to the remedy selected in
14 the ROD.

15

16 VI. GENERAL OBLIGATIONS RELATING TO THE WORK TO BE PERFORMED

17

18 A. Joint and Several Liability. The Defendants shall
19 jointly and severally finance and perform the Joint Work to the
20 extent required by this Consent Decree. The obligations of the
21 Defendants to finance and perform the Facility Specific Work shall
22 be joint and several only to the extent provided by applicable law.

23

24 B. Consistency with NCP and EPA Guidelines. The
25 Defendants, and each Defendant in the case of Facility Specific
26 Work, shall design, implement, and complete the Work in accordance
27 with the NCP, and all amendments thereto that are effective and
28 applicable to any activity undertaken pursuant to this Consent

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1 Decree, and in accordance with the standards, specifications, and
2 schedules of completion set forth in or approved by EPA pursuant to
3 Section VII (Work to be Performed) of this Consent Decree.
4 Defendants shall ensure that all designs, workplans and proposals
5 submitted by Defendants pursuant to this Decree are consistent
6 with the NCP and the U. S. EPA, Guidance on Remedial Design and
7 Remedial Action, OSWER Directive 9355.04A (June 1986). All
8 sampling plans shall be consistent with U. S. EPA, Region IX,
9 Preparation of a U.S. EPA Region 9 Sample Plan for EPA-Lead
10 Superfund Projects (April, 1989) 9QA-05-89 and Preparation of a
11 U.S. EPA Region IX Field Sampling Plan for Private and State-lead
12 Superfund Projects (April 1990) 9QA-06-89. All Worker Health and
13 Safety Plans shall satisfy the requirements of (1) Part 1910 of
14 Title 29 of the Code of Federal Regulations (54 Fed. Reg. 9294,
15 March 6, 1989); (2) the U. S. Department of Health and Human
16 Services Occupational Safety and Health Guidance for Hazardous
17 Waste Site Activities (October 1985 DHHS (NIOSH) Publication
18 No. 85-115); and (3) U. S. EPA, Standard Operating Safety Guides
19 (July 1988). All QA/QC plans shall follow guidelines listed in
20 Section XII below (Quality Assurance/Quality Control). In
21 addition, for any report, plan, specification, schedule, appendix
22 or attachment required to be submitted pursuant to this Consent
23 Decree, Defendants shall use due diligence to comply with any
24 applicable guidance document in effect 60 days prior to the due
25 date for such submission.

26
27 C. Standards for the Work. The Work performed in the
28 implementation of this Remedial Action shall meet the standards of

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1 all "applicable requirements" and "relevant and appropriate
2 requirements" as those terms are defined in 40 C.F.R. § 300.5, as
3 generally described in CERCLA Compliance with Other Laws Manual,
4 Part I (August 1988) EPA/540/G-89/006, Part II (August 1989)
5 EPA/540/G-89/009, and as is required by Section 121 of CERCLA, 42
6 U.S.C. § 9621.

7
8 D. Waiver of Certain Claims Re Government Approvals.

9 Notwithstanding any approvals, permits, or other permissions which
10 may be granted by the United States Government or other
11 governmental entities, the Defendants shall not be relieved of any
12 and all liability, if any, which may arise from or relate to their
13 acts or omissions or the acts or omissions of any of their
14 contractors, subcontractors, or any other person acting on their
15 behalf in the performance of the Work or their failure to perform
16 fully or complete the Work because of any such approvals, permits
17 or other permissions, and agree not to argue that the United
18 States Government or other government entities are or should be
19 liable because of any such approvals, permits or other permissions.

20
21
22 E. Project and Facility Coordinators. The Defendants shall
23 appoint a representative ("Project Coordinator") to act on their
24 behalf to execute the Joint Work required pursuant to Section VII.B
25 below (Joint Work). In addition, each Defendant shall appoint a
26 representative ("Facility Coordinator") to act on its behalf to
27 execute the Facility Specific Work to be completed by each
28 Defendant pursuant to Section VII.C (Facility Specific Work). Each

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1 of the Facility Coordinators shall concurrently provide to the
2 Project Coordinator copies of all reports submitted to EPA pursuant
3 to Section XI (Reporting and Approvals/Disapprovals) of this Decree
4 and shall inform the Project Coordinator in writing of actions
5 taken by such Defendant to comply with its obligations under
6 Section VII.C of this Consent Decree (Facility Specific Work) and
7 any problems that have been encountered or are anticipated by such
8 Defendant in commencing or completing the Facility Specific Work.

9
10 F. Contractor and Employee Qualifications. All Work, other
11 than cost accounting, to be performed by the Defendants pursuant to
12 this Decree shall be performed by qualified contractors or
13 employees under the direction and oversight of a qualified
14 professional architect, engineer or geologist, as applicable, and
15 in accordance with the schedules set forth in Section VII below
16 (Work to be Performed). Prior to the initiation of Work at the
17 Site, the Defendant(s) responsible for such Work shall notify EPA
18 in writing, of the name, title, and qualifications of any engineer,
19 architect or geologist and the names of principal contractors
20 and/or subcontractors (including laboratories) proposed to be used
21 in carrying out the Work to be performed pursuant to this Decree.
22 Selection of any such architect, engineer, geologist, contractor
23 and/or subcontractor shall be subject to approval by EPA. EPA
24 retains the right to reject Defendants' selection of such
25 architect, engineer, geologist, contractor and/or subcontractor
26 within a reasonable time of receipt of the written notification
27 described above. Any dispute which may arise regarding Defendants'
28 selection under this subsection shall be subject to the Dispute

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1 Resolution provisions of Section XXV (Dispute Resolution) of the
2 Consent Decree.

3
4 G. Permits for Onsite Work. Pursuant to CERCLA
5 Section 121(e), 42 U.S.C. § 9621(e), no federal, state, or local
6 permit shall be necessary for the portion of the Work conducted
7 entirely onsite where such Work is carried out in compliance with
8 said Section.

9
10 H. Proposed Schedules and Quality Assurances. All designs,
11 workplans and proposals required by this Decree shall include,
12 where appropriate, proposals for schedules and quality assurance
13 provisions.

14
15 I. Calculation of Time. Except where noted otherwise, all
16 dates referred to in this Decree or any attachments to this Decree
17 are calendar days; however, should a deadline fall on a weekend or
18 a federal holiday, the deadline shall be construed to be the next
19 working day. The deadline for the submission of any notice, report
20 or information pursuant to this Consent Decree shall be deemed to
21 have been met if such notice, report or information is delivered by
22 hand on or before the date such notice, report or information is
23 due or if sent by next-day delivery service on or before the day
24 before the date due.

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1 VII. WORK TO BE PERFORMED

2

3 A. Work Requirements.

4

5 1. General Description. The Defendants shall
6 finance and perform all Work as defined by this Consent Decree.
7 The Work shall be in accordance with the ROD and shall consist of
8 two parts: that portion of the Joint Work required to be performed
9 by Defendants pursuant to this Consent Decree and Facility Specific
10 Work required to be performed by Defendants pursuant to this
11 Consent Decree.

12

13 2. Requirements of the Work and Cleanup Standards.

14

15 (a) Soil Remediation. Pursuant to the ROD, the
16 selected remedies for soils are: (1) in-situ vapor extraction with
17 treatment by vapor phase granular activated carbon (GAC) and (2)
18 excavation with treatment by aeration to meet federal, state and
19 local air standards and, to the extent applicable, OSWER Directive
20 9355.0-28 Control of Air Emissions From Superfund Air Strippers at
21 Superfund Groundwater Sites, June 15, 1989. For the purpose of
22 this Consent Decree only, this Directive shall not apply to sources
23 with actual emission rates less than three (3) pounds per hour or
24 fifteen (15) pounds per day or calculated rate less than ten (10)
25 tons per year of total VOCs. The soil cleanup standards are 0.5
26 parts per million (ppm) TCE for all soils outside of slurry walls
27 and 1.0 ppm TCE for all soils inside of slurry walls. If, upon
28 review of hydrogeological and any other applicable information, EPA

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1 determines that the slurry wall systems have failed at any time to
2 prevent or contain the release of contamination existing within the
3 slurry walls, then soil cleanup standards for the area within that
4 particular slurry wall shall be 0.5 ppm TCE.

5
6 (b) Groundwater Remediation. The selected remedy
7 under the ROD for groundwater is extraction and treatment by air
8 stripping tower or liquid phase GAC units. Defendants shall
9 provide vapor phase GAC units for air-stripping towers if required
10 by EPA, the Air Resources Board, or the Bay Area Air Quality
11 Management District to meet air emission standards and, to the
12 extent applicable, OSWER Directive 9355.0-28 Control of Air
13 Emissions From Superfund Air Strippers at Superfund Groundwater
14 Sites, June 15, 1989. For the purpose of this Consent Decree only,
15 this Directive shall not apply to sources with actual emission
16 rates less than three (3) pounds per hour or fifteen (15) pounds
17 per day or calculated rate less than ten (10) tons per year of
18 total VOCs. Groundwater cleanup standards are 5 parts per billion
19 (ppb) TCE for the shallow aquifers (including ground water inside
20 the slurry walls) and 0.8 ppb TCE for the deep aquifers.

21
22 (c) Cleanup Standards for 11 Organics of Concern.
23 According to the ROD, it is expected that achieving the cleanup
24 standards for TCE will result in the cleanup of the other Site
25 chemicals listed in Section IV.R (MEW Plume) (the "11 Organics")
26 and that the resulting concentrations of the 11 Organics will meet
27 ARARs and will not exceed maximum cumulative risk levels. The
28 Operation and Maintenance Plan shall provide for the continued

1 implementation of the remedy in the event that cleanup standards
2 for TCE are achieved, but that concentrations of any of the 11
3 Organics in the MEW Plume do not achieve ARARs or cause the
4 cumulative risk to exceed the maximum cumulative risk level.

5 (d) Groundwater Monitoring. Defendants shall
6 design and implement, as applicable, groundwater monitoring
7 programs as described in this Section. These groundwater
8 monitoring programs may be included as part of the area-wide
9 sampling plan required pursuant to Section VII.B.4.c.(2)(vii).

10 (1) Four Inorganic Chemicals of Concern.

11 Defendants shall provide to EPA a sampling plan capable of
12 determining the concentrations of antimony, cadmium, arsenic and
13 lead (the "four Inorganics") in the MEW Plume south of Highway 101.
14 This plan shall include a proposal for locations of those existing
15 wells that are appropriate for further sampling in light of
16 existing inorganic chemical data. This sampling plan shall be a
17 part of the RGRP Workplan referenced in Section VII.B.4(a). After
18 the initial sampling for the four Inorganics, if it is determined
19 by EPA to be appropriate after a review of the sampling results,
20 Defendants shall submit within sixty (60) days, for EPA's approval,
21 a sampling plan that provides for the periodic monitoring of the
22 four Inorganics at the MEW Site. If, at any time, EPA determines
23 that any of the four Inorganics has migrated, then EPA may require
24 the Defendants to undertake such additional sampling activities
25 that are necessary to determine the extent of such migration.

26 (2) Total Detected Chemicals. As part of the
27 area-wide sampling undertaken for both Part I and Part II of the
28 RGRP, Defendants shall provide to EPA analytical results which are

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1 sufficient for EPA to be able to determine the concentrations in the MEW Plume of all the
2 chemicals listed in Tables 2-3, 2-4 and 2-5 of the MEW Site Endangerment Assessment. Such
3 sampling to assess the concentrations of these chemicals in the MEW Plume shall be included as
4 part of the sampling round specified in the O&M Plan to be undertaken five (5) years after the
5 commencement of start-up activities of each of Parts I and II of the RGRP, and at specified
6 intervals thereafter. This plan shall include a proposal for locations of the existing wells that are
7 appropriate for further sampling in light of existing chemical data. Defendants' obligations to
8 perform such sampling shall be limited to the Initial Work period and the Conditional Interim
9 Work period, if there is one. Copies of Tables 2-3, 2-4 and 2-5 of the MEW Site Endangerment
10 Assessment are attached hereto as Appendix E.

11 (e) Vapor Intrusion Remedy. Where a vapor intrusion remedy is determined
12 to be required at existing or future buildings according to the protocol, and in the geographic
13 area, designated by attached Appendix F, the selected remedy for the vapor intrusion pathway in
14 the 2010 ROD Amendment is: (i) for existing buildings: installation, operation, maintenance,
15 and monitoring of an appropriate active sub-slab/sub-membrane ventilation system, where
16 determined necessary through indoor air sampling and other lines of evidence. Existing non-
17 residential buildings may utilize the building's indoor air ventilation system as the remedy if the
18 property/building owner agrees to use, operate, and allow for monitoring of the indoor air
19 ventilation system; (ii) for future construction/buildings: the installation of a vapor barrier and
20 passive sub-slab ventilation system with the ability to be made active except where multiple lines
21 of evidence show that there is no potential for vapor intrusion into a particular building
22 exceeding indoor air cleanup levels; and (iii) the implementation of institutional controls and
23 monitoring to ensure the long-term effectiveness of the remedy. Requirements for
24 implementation of the vapor intrusion remedy are set forth in the Vapor Intrusion Remedial
25 Design and Remedial Action Statement of Work (Appendix F). The MEW Site indoor air
26 cleanup levels for long-term exposure for residential and non-residential buildings are as set
27 forth in Table 1 of the Statement of Work.

1 B. Joint Work.

2

3 1. General Description. The Defendants are jointly and severally liable for

4 their portion of the Joint Work, which shall include the following: (a) the design, construction

5 and implementation of the groundwater extraction and treatment system remediating the MEW

6 Plume, which shall be referred to hereinafter as the “Regional Groundwater Remediation

7 Program” or “RGRP,” to the extent required by the provisions of Section VII B.2

8 (Implementation of the RGRP); (b) further characterization and subsequent extraction and

9 treatment of groundwater contamination in the vicinity of the Silva Well, as set forth in

10 Appendix C; (c) a proposal, for EPA approval, of a method to verify attainment of

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1 groundwater and soil cleanup standards; (d) operation and maintenance and monitoring of all
2 systems and media (i.e., groundwater and air), to the extent required by the provisions of Section
3 VII B.2 (Implementation of the RGRP); and (e) the implementation of the vapor intrusion
4 remedy as set forth in the Vapor Intrusion Remedial Design and Remedial Action Statement of
5 Work (Appendix F) in all areas of the Site except those properties designated for
6 Facility-Specific Work in either the April 10, 1992 Consent Decree or the CERCLA Section 106
7 Order captioned “In the Matter of MEW Study Area,” dated November 29, 1990. Obligations of
8 the Joint Work include all reporting requirements regarding Joint Work as outlined in Section XI
9 (Reporting and Approvals/Disapprovals) of this Decree. In the event of the insolvency or other
10 failure of any one or more of the Defendants to implement the requirements of the Joint Work,
11 any remaining Defendant(s) shall complete all such requirements, subject to all limitations and
12 provisions of this Consent Decree.

13
14 2. Implementation of the RGRP.

15
16 (a) Parts I and II. The Parties recognize that within the MEW Site
17 there are areas of groundwater contamination beneath Moffett Field and that, to maximize
18 effective remediation of the MEW Plume, it is expected to be necessary for the United States
19 Navy to control specified potential sources on Moffett Field for which it may be responsible
20 before Defendants are required to extend operation of the hydraulic remediation and treatment
21 system provided for in this Decree to those portions of the Site that lie beneath Moffett Field.
22 The specific mechanism for the United States Navy’s control of such sources beneath Moffett
23 Naval Air Station (NAS) is provided for in Attachments 4 and 5 to the Federal Facility
24 Agreement, attached hereto as Appendix D. Attachments 4 and 5 of the Federal Facility
25 Agreement are attached hereto as Appendix D solely for the purpose of providing reference and
26

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1 nothing in this Decree shall be deemed to create any right by
2 Defendants to enforce or otherwise interpret the provisions of
3 Attachments 4 and 5 or any other part of the Federal Facility
4 Agreement.

5
6 The RGRP shall be divided into two parts. Part I will
7 consist of all design and construction necessary to implement
8 hydraulic remediation on that part of the MEW Plume that is south
9 of Highway 101 and to implement hydraulic control of that part of
10 the MEW Plume that is north of Highway 101. Part II of the RGRP
11 will consist of all design and construction necessary to implement
12 hydraulic remediation of that part of the MEW Plume that is north
13 of Highway 101.

14
15 For the purposes of this section, "hydraulic control" is
16 the prevention of further migration of the MEW Plume.

17
18 (b) Four Phases. The Joint Work shall be divided
19 into four phases for each of Parts I and II of the RGRP: Initial
20 Work, Interim Work, Conditional Interim Work and Future Work.

21
22 (1) Initial Work. The first phase shall
23 consist of all the Initial Work and shall be 100% jointly and
24 severally financed and performed by the Defendants. Defendants
25 shall keep an accurate accounting of all expenses incurred by them
26 in connection with implementing the Initial Work.

1 (2) Interim Work. The second phase of the
2 Joint Work shall consist of the Interim Work and shall be 100%
3 jointly and severally financed and performed by entities other
4 than the Defendants (the "non-Defendants"), except as provided in
5 Section VII.B.2.b.(3) (Conditional Interim Work). The Interim
6 Work shall begin in accordance with the provisions of
7 Section VII.B.5.a (Commencement) and shall terminate when EPA
8 determines that the amount of the expenses incurred by the non-
9 Defendants, converted to 1990 dollars, based on acceptable
10 accounting practices, in performing Joint Work equals 1.857 times
11 the amount incurred by Defendants, converted to 1990 dollars,
12 based on acceptable accounting practices, both (i) in performing
13 the Initial Work and, if applicable, the Conditional Interim Work
14 and (ii) in paying any response and oversight costs pursuant to
15 this Decree. Any sums paid by non-Defendants to the United States
16 Government as reimbursement of the United States Government's
17 response and oversight costs shall not be considered part of the
18 calculation (for this Section only) of the expenses incurred by
19 non-Defendants.

20
21 (3) Conditional Interim Work. The third
22 phase of the Joint Work, if required, shall consist of the
23 Conditional Interim Work and shall be 100% jointly and severally
24 financed and performed by the Defendants. Defendants shall
25 perform the Conditional Interim Work if at any time during the
26 first two years of the Interim Work period: 1) the work required
27 to implement the remedy, including O&M, under an administrative
28 order issued pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606,

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1 is not substantially performed; and 2) EPA notifies Defendants of
2 their obligation to perform such Conditional Interim Work.

3 Defendants agree that, at the termination of the
4 Conditional Interim Work period, if there is one, Defendants
5 shall: 1) submit to EPA a written report, such report to be
6 submitted within 60 days of the end of such period and to be in
7 the form and substance of (and in lieu of) any quarterly or annual
8 report(s) that would have been due following such period,
9 describing the tasks performed by Defendants occurring within the
10 period; and 2) leave the Site in such condition that will not
11 result in increased risk of harm to human health or the
12 environment caused by leaving a particular task unfinished. (For
13 example, if there is a well that Defendants are in the process of
14 installing at the end of the Conditional Interim Work period,
15 Defendants shall finish the installation of that well if there is a
16 heightened risk of cross-aquifer contamination caused by leaving
17 the well partially installed. Similarly, if Defendants are in the
18 process of installation of a treatment system at the end of this
19 period, all construction in progress shall be left in a secure
20 state.) Within a reasonable time prior to expiration of this
21 period, Defendants shall submit to EPA a proposal outlining the
22 tasks to be performed prior to expiration and a procedure for
23 transition, if any, to occur following expiration.

24

25 (4) Future Work. The fourth phase of the
26 Joint Work shall consist of all Future Work. Non-Defendants shall
27 perform 100% of the Future Work; however, Defendants shall finance
28 35% of the Future Work as provided in Section VIII (Payment for

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1 Future Work).

2

3 3. Summary of Defendants' Joint Work Obligations. The
4 Defendants shall perform 100% of the Initial Work necessary to
5 implement the Remedial Action, as defined pursuant to this Consent
6 Decree and consistent with the ROD, up to and until the date that
7 Interim Work commences. In addition, Defendants shall perform 100%
8 of the Conditional Interim Work if required pursuant to Section
9 VII.B.2.b.(3). Finally, Defendants shall finance 35% of the Future
10 Work in accordance with Section VIII (Payment for Future Work).

11

12 4. Deliverables and Schedules for the Initial Work.

13

14 (a) RGRP Remedial Design Workplans. Defendants
15 shall submit to EPA two RD Workplans ("A" and "B") for EPA's
16 approval in accordance with the schedule set forth below. RD
17 Workplan A shall be for the design, construction and
18 implementation of the hydraulic remediation of the MEW Plume. RD
19 Workplan A shall include a Sampling Plan for existing monitoring
20 wells on the Site and shall include any proposed modifications to
21 the schedules established in this Section VII.B (Joint Work). RD
22 Workplan A shall be submitted within 60 days of lodging of this
23 Consent Decree. Defendants shall be allotted an additional 30
24 days if their RD contractor is not one of the contractors that
25 performed the Remedial Investigation or the Feasibility Study for
26 the MEW Site.

27 Defendants shall also submit for EPA's approval RD Workplan
28 B, which shall be for the design of an investigation of the area

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1 that is north of Highway 101, such investigation to be sufficient
2 both to define the leading edge (believed to be the northern
3 boundary) of that part of the MEW Plume and to design, if necessary
4 and appropriate, a hydraulic control system for that part of the
5 MEW Plume. Workplan B shall be submitted within 60 days of lodging
6 of this Consent Decree.

7
8 If RD Workplan B is submitted prior to the allotted 60 days,
9 then the number of days not used (i.e., the number of allotted days
10 minus the number of days actually used) will be added to the number
11 of days allotted for the submission of RD Workplan A, thereby
12 extending the submission date for Workplan A.

13
14 (b) Remedial Designs for the RGRP. Defendants
15 shall submit for EPA approval a separate Remedial Design (RD) for
16 each of Parts I and II of the RGRP containing final construction
17 plans and specifications for the RGRP described in the ROD and
18 this Section VII (Work to be Performed). Each RD shall provide
19 for installation of a "network" of remediation and monitoring
20 wells, the adequacy of such "network" to be evaluated based upon
21 the data available and best engineering practices. It is expected
22 that each "network" of wells will need to be augmented with
23 additional wells to fully implement the ROD and that each RD will
24 provide for such augmentation. Nothing in this paragraph is
25 intended either to require Defendants or to restrict the rights of
26 Defendants, consistent with the data available and best
27 engineering practices, to submit RDs for each of Parts I and II of
28 the RGRP in phases. Likewise, nothing in this paragraph is

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1 intended to require EPA to approve any RD submitted by Defendants
2 calling for installation of either Part I or II of the RGRP in
3 phases. The RDs shall contain (1) the locations of all the wells
4 specified in the RDs to be installed during the Initial Work
5 period and, (2) the estimated locations of additional wells, to be
6 installed during the Conditional Interim Work period, if there is
7 one, the Interim Work period or Future Work period as required,
8 based on available data. The locations and numbers of such
9 additional wells may be changed based on data generated after
10 operation and maintenance activities commence for each part of the
11 RGRP. A schedule providing for evaluation of the need for
12 augmentation of the "network" or for installation of later phases,
13 if any, shall be included as part of the Operation and Maintenance
14 Plan for each of Parts I and II of the RGRP. The submission of
15 supplements to the RDs (containing the applicable elements listed
16 in this subsection B.4 with respect to augmentation of the RGRP)
17 and the installation of any additional wells shall be performed by
18 Defendants only if required by EPA during the Initial Work period,
19 or the Conditional Interim Work period, if there is one.

20

21 (1) Preliminary Design of the RGRP.

22 Defendants shall submit a proposed preliminary design addressing no
23 less than 30% of the total design of the RGRP for the entire MEW
24 Plume and for hydraulic control of that part of the MEW Plume that
25 is north of Highway 101 within 90 days of EPA's approval of the
26 RGRP Remedial Design Workplan or within 90 days of entry of this
27 Consent Decree, whichever is later. The preliminary design shall
28 include, but not be limited to, the following:

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- 1 (i) Design analysis, including analysis
2 necessary to satisfy state or local
3 permitting requirements;
4 (ii) Major equipment list for the
5 treatment units;
6 (iii) Location and screen intervals for
7 monitoring wells;
8 (iv) Approximate extraction rates, screen
9 intervals and location for all
10 extraction wells;
11 (v) Site plan (piping/layout);
12 (vi) Piping and flow diagrams for
13 treatment units;
14 (vii) Ancillary equipment;
15 (viii) Preliminary description of how
16 cleanup standards and ARARs will be
17 attained;
18 (ix) Proposed schedule for sampling of
19 specified monitoring wells.

20 (2) Proposed Final Design for Part I of the
21 RGRP. Defendants shall submit the proposed Final Design of the
22 RGRP for hydraulic remediation of that part of the MEW Plume that
23 is south of Highway 101 and for hydraulic control of that part of
24 the MEW Plume that is north of Highway 101 (hereinafter referred to
25 as the "proposed Final Design for Part I of the RGRP"), with
26 specifications, within 90 days of EPA's approval of the
27 Preliminary Design. The proposed Final Design for Part I of the
28 RGRP shall include but not be limited to:

- 29 (i) Design analysis;
30 (ii) Complete plans and specifications;
31 (iii) All revisions of and additions to the

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Preliminary Design;

- (iv) Piping and instrument diagram for treatment units;
- (v) QA/QC Plan;
- (vi) Schedules;
- (vii) Cost estimates;
- (viii) Specifications for provisions for gaining access to and obtaining samples from adjacent properties;
- (ix) Detailed description of compliance with cleanup standards and ARARs.

(3) Proposed Final Design for Part II of the

RGRP. The Defendants shall submit the proposed Final Design for the RGRP for hydraulic remediation of that part of the MEW Plume that is north of Highway 101 (hereinafter referred to as "proposed Final Design for Part II of the RGRP") within 90 days of receipt of notice from EPA that EPA has approved the last Final Design Removal Work Plan required to be submitted pursuant to Attachment 5 of the Federal Facility Agreement and receipt of all Final Design Removal Work Plans. For the sole purpose of determining when Defendants' obligations to submit the proposed RD for Part II of the RGRP commence under this Decree, Defendants may dispute EPA's decision to approve any Final Design Removal Work Plan required to be submitted pursuant to Attachment 5 of the Federal Facility Agreement by invoking the dispute resolution provisions of Section XXV (Dispute Resolution) of this Decree. Failure to invoke dispute resolution within 10 days of receipt of notice from EPA that it has approved any Final Design Removal Work Plan and receipt of such Final Design Removal Work Plans shall constitute a waiver of any

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1 right to dispute EPA's approval of such Final Design Removal Work
2 Plan. A Defendant's election not to dispute EPA's approval of a
3 Final Design Removal Work Plan shall not be construed as a waiver
4 of that Defendant's rights, if any, against any other party except
5 Plaintiff. In the event that a dispute regarding EPA's approval of
6 a Final Design Removal Work Plan becomes subject to judicial
7 review, the court's jurisdiction shall be limited to determining
8 Defendants' obligations under this Decree. Nothing in this Section
9 or in this Decree shall be deemed as the United States' consent to
10 judicial review or interpretation of any portion of the Federal
11 Facility Agreement itself. In the event that the Court in dispute
12 resolution rules that Defendants are not obligated to submit to EPA
13 this proposed RD for Part II of the RGRP pursuant to this Section,
14 then Defendants agree to continue to maintain hydraulic control of
15 the MEW Plume north of highway 101 pending EPA's resolution of the
16 inconsistency between the approved Final Design Removal Work Plan
17 and this Court's decision regarding Defendants' obligations.

18

19 The proposed Final Design for Part II of the RGRP shall
20 include, but not be limited to:

21

- 22 (i) Design analysis;
- 23 (ii) Complete plans and specifications;
- 24 (iii) All revisions of and additions to the
25 Preliminary Design;
- 26 (iv) Piping and instrument diagram for
27 treatment units;
- 28 (v) QA/QC Plan;
- (vi) Schedules;

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- (vii) Cost estimates;
- (viii) Specifications for provisions for gaining access to and obtaining samples from adjacent properties;
- (ix) Detailed description of compliance with cleanup standards and ARARs.

(c) Remedial Implementation Plan (RIP).

Defendants shall submit a Remedial Implementation Plan outlining proposals for the implementation of the RGRP. The RIP shall be submitted in the following phases:

(1) Construction Operation and Maintenance Plans ("COMP"). A separate COMP shall be submitted each for Part I of the RGRP and Part II of the RGRP. The COMP for Part I of the RGRP shall be submitted within 60 days of EPA's approval of the proposed Final Design for Part I of the RGRP. The COMP for Part II of the RGRP shall be submitted within 60 days of EPA's approval of the proposed Final Design for Part II of the RGRP. Both COMPs shall contain detailed plans for construction and start-up activities and shall include the following:

- (i) Construction schedules;
- (ii) Project organization and responsibilities;
- (iii) QA/QC plans;
- (iv) Sampling plans;
- (v) Schedules associated with start-up activities;
- (vi) Health and safety plan;

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- (vii) Equipment and decontamination procedures;
- (viii) Plans for the disposal of contaminated or potentially contaminated material.

Within 60 days of EPA's approval of the COMP for Part I of the RGRP, Defendants shall begin construction of Part I of the RGRP in accordance with the approved COMP. Within 240 days of the commencement of construction of Part I of the RGRP or within 30 days of approval of the O&M Plan, whichever is later, Defendants shall begin start-up activities of Part I of the RGRP. Within 60 days of either EPA's approval of the COMP for Part II of the RGRP or start-up of all Removals provided for pursuant to Attachments 4 and 5 of the Federal Facility Agreement, whichever occurs later, Defendants shall begin construction of Part II of the RGRP in accordance with the approved COMP. Within 240 days of the commencement of construction of Part II of the RGRP or within 30 days of approval of the O&M Plan, whichever is later, Defendants shall begin start-up activities of Part II of the RGRP. For each of Parts I and II of the RGRP, Defendants shall provide written notice to EPA of the commencement of construction activities and start-up activities, within five (5) days of the actual date of commencement of such activities.

(2) Operation and Maintenance Plan (O&M Plan). Within 180 days of the initiation of construction of either Part I or Part II of the RGRP, Defendants shall submit a proposed plan for operating and maintaining RGRP equipment and

1 treatment units and ensuring the effectiveness of the RGRP through
2 continued monitoring. Each O&M Plan shall conform in all cases to
3 the plans, specifications, design conditions and other stipulations
4 set forth in the final RD's and this Decree. Each proposed O&M
5 Plan shall include the following:

6

7

(i) Proposed method for determining location and necessity of wells to be installed in later phases of the RGRP;

8

9

10

(ii) Recommended frequency of water level measurements and water quality testing for extraction and monitoring wells;

11

12

(iii) Proposed decision-making process and criteria for shutting down specific extraction wells;

13

14

(iv) Recommended frequency and methodologies for testing and monitoring groundwater, groundwater gradients, and air and water emissions from treatment units;

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(v) Recommended wells and sampling frequency for monitoring the "C" and "deep" aquifers;

18

19

(vi) Recommended wells and sampling frequency for monitoring the "A" and "B" aquifers;

20

21

(vii) A plan for area-wide sampling to evaluate movement of the MEW Plume and the effectiveness of the RGRP;

22

23

(viii) Project organization and responsibility;

24

25

(ix) Health and safety plans;

26

(x) Equipment decontamination procedures;

27

(xi) Plans for the disposal of contaminated or potentially contaminated material;

28

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1 (xii) Operation and maintenance schedule;
2 (xiii) QA/QC plan, including elements
3 necessary for the implementation of
4 trial test(s) of the pumping and
5 treatment system and a description of
6 the mechanism used to verify that the
7 extraction and treatment process is
8 operating within acceptable limits.

9

10 (d) Progress Reports. Defendants shall submit
11 progress reports as required in Section XI.A (Progress Reports).
12

13 (e) Silva Well Workplan. Defendants have
14 submitted and Plaintiffs have approved the Silva Well Workplan, for
15 work that is intended to characterize and remediate groundwater in
16 the Silva Well area. Such Silva Well Workplan has been attached as
17 Appendix C to this Consent Decree.

18

19 (f) Silva Well Remediation Report. Defendants
20 shall implement the Silva Well Workplan and submit the results in
21 a Silva Well Remediation Report pursuant to the schedule to be
22 submitted in accordance with the requirements of the Silva Well
23 Workplan.

24

25 (g) Data Management Plan. Defendants shall submit
26 a Data Management Plan as outlined in Section XVII (Submission of
27 Documents, Sampling and Analysis) of this Consent Decree.

28

29 (h) Quality Assurance Report. Defendants shall
30 submit a Quality Assurance Report as outlined in Section XII
31 (QA/QC) of this Decree.

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(i) Remediation Effectiveness Report. Defendants shall propose methodologies to assess the effectiveness of the RGRP and soil treatment technologies pursuant to the ROD and attainment of soil and groundwater cleanup standards. Such proposal shall be submitted within 360 days of EPA's approval of the Final Design for Part I of the RGRP.

5. Interim Work and Future Work.

(a) Commencement. As part of its approval of each of the O&M Plans for Part I and Part II of the RGRP, EPA shall select the dates upon which non-Defendants shall begin and thereafter maintain routine operation and maintenance activities, in accordance with the applicable approved O&M Plan. Each date shall mark commencement of the Interim Work period for that Part of the RGRP. For both Parts I and II of the RGRP, the dates set by EPA for the commencement of Interim Work shall provide for a reasonable time for the Defendants to complete start-up testing of all components and units necessary for routine operation. The dates set by EPA shall not be less than 120 days and not more than 360 days after completion of construction activities for each of Part I and Part II.

(b) Termination. The Interim Work period shall terminate and the Future Work period shall begin when EPA determines that the amount of the expenses incurred by the non-Defendants, converted to 1990 dollars, based on acceptable

1 accounting practices, in performing Joint Work equals 1.857 times the amount incurred by
2 Defendants, converted to 1990 dollars, based on acceptable accounting practices, both (i) in
3 performing the Initial Work and, if applicable, the Interim Conditional Work and (ii) in paying
4 any response and oversight costs pursuant to this Decree. Any sums paid by non-Defendants to
5 the United States Government as reimbursement of the United States Government's response
6 and oversight costs shall not be considered part of the calculation (for this Section only) of the
7 expenses incurred by non-Defendants. The Future Work period shall terminate in accordance
8 with the provisions of Section XXXVIII.D (Termination of the Consent Decree).

9
10 C. Facility Specific Work.

11 1. General Description. Raytheon shall perform Facility Specific Work for
12 350 Ellis Street, 415 East Middlefield Road, and 490 East Middlefield Road, and Intel shall
13 perform Facility Specific Work for 365 East Middlefield Road. Raytheon and Intel shall be
14 jointly and severally liable for the performance of Facility Specific Work for the vacant lot
15 between 415 East Middlefield Road and 365 East Middlefield Road. With respect to the facility
16 at 345 East Middlefield Road, Intel shall perform Facility Specific Work at this facility if EPA
17 notifies Intel that it must do so. If Intel disputes such requirement, then Intel must invoke
18 dispute resolution within sixty (60) days of receiving such notice. Facility Specific Work shall
19 also include implementation of the vapor intrusion remedy as set forth in the Vapor Intrusion
20 Remedial Design and Remedial Action Statement of Work (Appendix F) at all properties
21 designated for Facility Specific Work, as described in Paragraph C.1. of Section VII of the
22 Decree. Each Defendant shall be liable for any additional Facility Specific Work at the MEW
23 Site to the extent that such Defendant is liable for such work pursuant to Section 107(a) of
24

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28

1 CERCLA. Facility Specific Work shall consist of the following
2 tasks which are related to sources or potential sources of soil and
3 groundwater contamination at specific facilities or properties.
4 These tasks include, as appropriate: (a) design, construction and
5 implementation of source remediation systems; (b) operation,
6 maintenance and monitoring of source remediation systems; and (c)
7 maintenance of slurry wall systems including inward and upward
8 hydraulic gradients of groundwater within slurry walls.
9 Obligations for Facility Specific Work include all reporting
10 requirements regarding Facility Specific Work as outlined in
11 Section XI of this Decree (Reporting and Approvals/Disapprovals).

12

13

2. Deliverables and Schedules for Facility

14

Specific Work. Each Defendant shall submit the deliverables and
15 schedules specified in this subsection 2 simultaneously to EPA, to
16 the other Defendants, and to any non-defendant recipient of an
17 enforcement order issued pursuant to Section 106 of CERCLA. The
18 obligation to make such submissions to the non-defendant recipients
19 of a Section 106 order, as set forth in the previous sentence,
20 shall be conditioned upon the inclusion of a reciprocal obligation
21 for such recipients to submit the comparable deliverables and
22 schedules to Defendants under comparable terms.

23

24

(a) Source Control Workplan. Each Defendant shall
25 submit a Source Control Workplan to EPA for EPA's approval within
26 sixty (60) days after the lodging of this Consent Decree or
27 supplement thereto adding such Defendant as a Party. Defendants
28 shall be allotted an additional thirty (30) days if their Facility

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1 Specific Work RD contractor is not one of the contractors that
2 performed the facility specific portion of the Remedial
3 Investigation or the Feasibility Study for that facility. The
4 Workplan shall include any proposed modifications to the schedules
5 established in this Section VII.C (Facility Specific Work). The
6 Workplan shall outline the activities to be undertaken to remove,
7 remediate or otherwise control adequately all sources originating
8 from properties owned or operated (or formerly owned or operated)
9 by that Defendant. The Workplan shall include provisions to
10 investigate the presence, location and extent of sources;
11 provided, however, that in lieu of further investigation of a
12 particular source, any Defendant may submit evidence showing either
13 (i) that such source is controlled adequately or would be
14 controlled adequately under a specific source control system
15 proposed by such Defendant or (ii) that no source exists at that
16 facility.

17
18 (b) Source Control Remedial Design. Each
19 Defendant shall submit for EPA approval a Source Control Remedial
20 Design ("SCRD") that shall contain proposed final construction
21 plans and specifications for source control. The SCRD shall be
22 submitted in the following phases:

23
24 (1) Preliminary Design. The Defendant shall
25 submit a preliminary design addressing no less than 30% of the
26 total design and plans within ninety (90) days of EPA's approval of
27 the Source Control Workplan or within ninety (90) days of entry of
28 this Consent Decree, whichever is later. The preliminary design

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1 shall include, but not be limited to, the applicable guidelines
2 outlined in Section VII.B.4.b.(1) (Preliminary Design of the RGRP).

3
4 (2) Proposed Final Design. The Defendant
5 shall submit the proposed final design with specifications within
6 ninety (90) days of EPA's approval of the Preliminary Design. The
7 final design shall include, but not be limited to, the applicable
8 guidelines outlined in Section VII.B.4.b.(2) (Proposed Final Design
9 for Part I of the RGRP).

10

11 (c) Source Control Remedial Implementation Plan.
12 Each Defendant shall submit a Source Control Remedial
13 Implementation Plan ("SCRIP") outlining proposals for the
14 execution of the SCRD and other actions necessary to control
15 adequately any source. The SCRIP should be submitted in the
16 following phases:

17

18 (1) Construction Operation and Maintenance
19 Plan ("COMP"). This plan shall be submitted within sixty (60) days
20 of EPA's approval of the proposed final SCRD. It shall address
21 construction and start-up activities and include the applicable
22 provisions of Section VII.B.4.c.(1) (Construction, Operation and
23 Maintenance Plans). Within sixty (60) days of EPA's approval of
24 the COMP, the Defendant shall begin the construction phase of the
25 soil remediation or any other contamination source removal or
26 remedial action. Within 240 days of the approval of the COMP, the
27 Defendant shall begin facility specific start-up activities.

28

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1 (2) Operation and Maintenance Plan (O&M
2 Plan). Within 180 days of the initiation of construction, the
3 Defendant shall submit a proposed plan for operating and
4 maintaining source related equipment and treatment units and
5 ensuring the effectiveness of the remedy through continued
6 monitoring. The plan shall conform in all cases to the plans,
7 specifications, design conditions and other stipulations set forth
8 in the Final Remedial Design and this Decree. Such proposed O&M
9 Plan must include the applicable provisions of Section
10 VII.B.4.c.(2) (Operation and Maintenance Plan). By a date to be
11 established by EPA, the Defendant shall begin and thereafter
12 maintain routine operation and maintenance activities in accordance
13 with the approved O&M Plan. The date set by EPA shall permit a
14 reasonable time for Defendant to complete start-up testing of all
15 components and units necessary for the routine operation of the
16 remedy. The date shall not be more than 360 days after completion
17 of construction activities.

18
19 (d) Progress Reports. The Defendant shall submit
20 Progress Reports as required in Section XI.A (Progress Reports),
21 detailing the Facility Specific Work and the results of the
22 implementation of Facility Specific Work in this Section.

23
24 (e) Data Management Plan. The Defendant shall
25 submit a Data Management Plan as outlined in Section XVII
26 (Submission of Documents, Sampling and Analysis) of this Decree.

27
28 (f) Confirmatory Sampling Report. The Defendant

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1 shall submit a Confirmatory Sampling Report for EPA approval at the
2 conclusion of source remediation activities. The report shall be
3 based on work conducted pursuant to the Remediation Effectiveness
4 Report in Section VII.B.4.i. This report shall be attached to the
5 Proposal of Completion in Section XXXVIII.C.2 (Facility Specific
6 Work).

7
8 3. Failure to Perform Facility Specific Work. If
9 any Defendant fails to perform the Facility Specific Work it is
10 required to perform pursuant to this Subsection VII.C (Facility
11 Specific Work), any other Defendant or Defendants may perform such
12 Facility Specific Work, subject to EPA approval, or EPA may either
13 (i) finance and perform such Work pursuant to Section IX (Work
14 Assumption) or (ii) require such Work to be performed by the other
15 Defendants in accordance with Subsection X.C (Procedure For and
16 Effect of Modification of the RD and/or RIP) to the extent the
17 other Defendants are liable to finance and perform such Work in
18 accordance with applicable law.

19
20 VIII. PAYMENT FOR FUTURE WORK

21
22 A. Payment Obligations. Defendants' obligations to finance
23 35% of the Future Work (which includes both (1) the costs of Future
24 Work that is performed by non-defendant recipients of an
25 enforcement order issued pursuant to Section 106 of CERCLA, and (2)
26 the United States' future response costs, as provided in
27 Section XXI (Reimbursement of Response and Oversight Costs)), shall
28 be satisfied by the payment directly to the non-Defendants actually

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1 performing the Future Work (the "Performing Parties") of such
2 amounts as are due and owing in accordance with the following
3 paragraph and by payments to the United States for future oversight
4 costs in accordance with Section XXI (Reimbursement of Response and
5 Oversight Costs).

6
7 B. Payments to Performing Parties Other than the United
8 States Government. Payments ("A") to the Performing Parties for
9 Future Work shall be in accordance with the following formula:

10
11
$$A = .35 (X + Y) - Y$$

12

13 where "X" is the sum of all Qualified Costs, as defined below,
14 presented by the Performing Parties to Defendants during the given
15 calendar year, and "Y" is the amount of the payment made by the
16 Defendants to the United States pursuant to Section XXI
17 (Reimbursement of Response and Oversight Costs) during the given
18 calendar year.

19
20 A Qualified Cost is a cost for performance of Future Work
21 that is presented by a Performing Party (other than the United
22 States Government) to Defendants for payment with a copy of the
23 relevant invoice(s) and supporting documentation and a reasonably
24 detailed description of the work that was performed. For purposes
25 of this section, Qualified Costs do not include (1) any response
26 cost incurred by or on behalf of the United States Government as a
27 Performing Party for Future Work, (2) any oversight costs incurred
28 by the United States Government as a result of overseeing the

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1 performance of any Future Work, or (3) any penalties, fines,
2 interest or other costs incurred by any Performing Party.

3
4 All Qualified Costs that are not disputed in accordance
5 with Section VIII.C (Dispute of Qualified Costs) below shall be
6 paid within forty-five (45) days of receipt by Defendants of a
7 demand for payment of such Qualified Costs. Any Qualified Cost
8 that is not paid within forty-five (45) days shall bear interest at
9 the rate of 1% per month, unless the amount is disputed pursuant to
10 this subsection. In the event that Defendants dispute that any
11 cost submitted for payment is a Qualified Cost, Defendants shall
12 provide to the Performing Parties within forty-five (45) days of
13 receipt by Defendants of the demand for payment (along with
14 supporting documentation) both notice of the dispute and a
15 statement of the grounds for the dispute. In the event that
16 Defendants do not provide such notice within forty-five (45) days,
17 or in the event that Defendants actually pay a cost submitted for
18 payment and later decide that such cost was not a Qualified Cost,
19 Defendants will not be deemed to have waived their rights to
20 challenge the payment of such cost or to be reimbursed for the
21 payment of the cost, unless there is significant prejudice to the
22 Performing Parties caused by the delay, or unless Defendants are
23 otherwise barred by the applicable statute(s) of limitation.

24
25 C. Dispute of Qualified Costs. Defendants may dispute that
26 a cost submitted for payment is a Qualified Cost based on grounds
27 recognized by applicable law and any such disputed cost shall be
28 deemed a Disputed Qualified Cost until such time as it is agreed by

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1 all parties to the dispute or ordered by the Court pursuant to the
2 dispute resolution provisions of this subsection that such Disputed
3 Qualified Cost is a Qualified Cost. In the event that Defendants
4 dispute their obligations to make payments to the Performing
5 Parties in accordance with this subsection, such dispute shall be
6 resolved in accordance with the dispute resolution provisions set
7 forth in this subsection. For purposes of this subsection only,
8 Defendants agree that the Performing Parties shall have the right
9 to petition the federal district court having jurisdiction over
10 this case to enforce Defendants' obligations to make any payments
11 required to be made by Defendants pursuant to this subsection,
12 whether or not disputed by Defendants. Likewise, if the Performing
13 Party or Parties consent to the jurisdiction of the court,
14 Defendants may also petition the Court to resolve a dispute that
15 any cost submitted to Defendants for payment, whether or not such
16 cost has already been paid, is a Qualified Cost. In the event that
17 such a petition is filed by either party, the responding party
18 shall have forty-five (45) days from the date of receipt in which
19 to respond to the petition. The petitioning party shall, in turn,
20 have twenty-one (21) days in which to reply to the responding
21 party's response. Nothing in this Decree is intended to restrict
22 the rights of Defendants to bring an appropriate action under
23 applicable law against any party not a signatory to this Decree.

24
25 In the event that a Petition is served and filed against
26 Defendants with respect to any unpaid cost, Defendants shall be
27 obligated to make payment within forty-five (45) days of receipt of
28 the Petition of the disputed amounts into an escrow fund to be

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1 distributed, with appropriate interest, to the party or parties in
2 whose favor such dispute is resolved. The court costs and the
3 costs of creating and maintaining the escrow fund shall be assessed
4 against the non-prevailing party or parties or shall be allocated
5 in such other manner as is deemed fair and equitable by the Court.
6

7 D. Payments to EPA. In the event that EPA chooses to act as
8 a Performing Party and performs Future Work, Defendants shall be
9 obligated to pay directly to EPA as response and oversight costs
10 35% of the total response and oversight costs incurred by EPA for
11 such Future Work. The Defendants' obligations to make such
12 payments to EPA shall not exceed the obligations that would be
13 applicable according to the formula set forth above if a party
14 other than EPA were the Performing Party, and such obligations to
15 make payments to EPA shall be subject to the requirements and
16 procedures of Section XXI (Reimbursement of Response and Oversight
17 Costs). In the event that Defendants dispute their obligations to
18 make payments of oversight costs to EPA that are sought by EPA
19 pursuant to Section XXI (Reimbursement of Response and Oversight
20 Costs) or payments of costs for Future Work that are sought by EPA
21 pursuant to this subsection D, such dispute shall be resolved in
22 accordance with the procedures set forth in Section XXI
23 (Reimbursement of Response and Oversight Costs). Nothing in this
24 Section VIII.D (Payments to EPA) shall be interpreted to preclude
25 Defendants from arguing that their obligations to make payments to
26 EPA pursuant to this Section shall be subject to the requirements
27 and procedures of Section X (Modifications to the Remedial Action).

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1 E. Judicial Review. Nothing in this Section VIII provides
2 for judicial review of any EPA action or decision or confers
3 jurisdiction of a court over EPA, except as specifically provided
4 for in Section 113(h) of CERCLA or in a dispute between Defendants
5 and EPA pursuant to Section XXV (Dispute Resolution).

6
7 IX. WORK ASSUMPTION

8 A. Circumstances Under Which EPA May Assume Work. In the
9 event EPA determines that the Defendants (or a Defendant in the
10 case of Facility Specific Work) have failed to implement any
11 portion of the Work in a timely manner, EPA may perform any and
12 all portions of the Work as EPA determines to be necessary. For
13 purposes of this Section IX (Work Assumption), a performance shall
14 be deemed to be untimely if Defendants (or the applicable
15 Defendant in the case of Facility Specific Work) fail to meet the
16 schedule established pursuant to this Consent Decree or any
17 attachment hereto, or where EPA determines that a performance by
18 Defendants (or the applicable Defendant) does not constitute a
19 substantial performance. A performance of a portion of Work shall
20 be deemed a substantial performance within the meaning of this
21 section where it involves no omission in essential points from the
22 terms of this Consent Decree or any attachments hereto and the Work
23 has been honestly and faithfully performed in its material and
24 substantial particulars and the only variance from the strict and
25 literal obligations of this Decree or any attachments hereto
26 consists of unimportant omissions or defects. Prior to such
27 performance, EPA will provide Defendants' Project Coordinator (or a
28 Defendant's Facility Coordinator) with ten (10) days advance notice

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1 (the "advance notice period") of EPA's intention to perform a
2 portion of or all of the Work. In the event that EPA issues a
3 notice of its intention to perform a portion of or all of the Work
4 pursuant to this section, it shall refrain from actually performing
5 such Work if the Defendants (or a Defendant in the case of Facility
6 Specific Work) agree within the advance notice period to cure their
7 failure to perform and to perform such cure within a reasonable
8 time. Stipulated penalties shall accrue during any period of non-
9 performance in accordance with Section XXIII (Stipulated
10 Penalties).

11
12 B. Effect on Stipulated Penalties. In the event that EPA
13 assumes the performance of a portion or all of the Work, any
14 liability of Defendants (or a Defendant in the case of Facility
15 Specific Work) for stipulated penalties pursuant to Section XXIII
16 (Stipulated Penalties) arising from the acts or omissions that
17 prompted EPA's assumption of all or portions of the Work shall be
18 waived.

19
20 C. Work Assumption Penalty. In lieu of stipulated
21 penalties, EPA may, in its discretion, require Defendants (or a
22 Defendant in the case of Facility Specific Work) to pay a Work
23 Assumption Penalty if EPA assumes performance of a portion of or
24 all of the Work. Such Work Assumption Penalty shall be equal to
25 the lesser of (1) double the amount of response costs incurred by
26 EPA in assuming such Work or (2) one million dollars
27 (\$1,000,000.00). Such Work Assumption Penalty shall be paid thirty
28 (30) days after EPA provides written demand therefore unless

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1 Defendants (or a Defendant in the case of Facility Specific Work)
2 invoke Dispute Resolution. If Defendants (or a Defendant) invoke
3 Dispute Resolution, and unless the result of such Dispute
4 Resolution is a determination that EPA acted in an arbitrary and
5 capricious manner or failed to act in accordance with law and the
6 terms of this Consent Decree by determining to perform a portion or
7 all of the Work, Defendants (or a Defendant) shall pay the Work
8 Assumption Penalty, plus interest at the rate specified in 28
9 U.S.C. § 1961, running from 30 days after the date of EPA's demand,
10 at the conclusion of Dispute Resolution. Such Work Assumption
11 Penalty shall be in addition to reimbursement to EPA for the
12 response costs incurred as a result of EPA's assumption of a
13 portion or all of the Work, and such Work Assumption Penalty shall
14 not be recoverable by Defendants in whole or in part by a claim
15 against the United States, as set forth in Section XIX (Claims
16 Against the Fund).

17
18 D. Reimbursement of EPA. If EPA performs portions or all
19 of the Work after determining that Defendants (or a Defendant in
20 the case of Facility Specific Work) failed to comply with their
21 obligations under this Consent Decree, Defendants shall reimburse
22 EPA for the costs of doing such Work within sixty (60) calendar
23 days of receipt of demand for payment of such costs, except that
24 the Defendants need not reimburse EPA for those costs which
25 Defendants can show were incurred in an arbitrary and capricious
26 manner or in a manner not in accordance with law or the terms of
27 this Consent Decree (including all deliverables approved by EPA
28 hereunder). Any demand for payment made by EPA pursuant to this

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1 Section shall include cost documentation as described in
2 Section XXI.A (Reimbursement for All Response and Oversight Costs).
3 EPA may demand payment for costs under this Section at any time
4 after costs are incurred pursuant to EPA performance of the Work or
5 partial performance of the Work.

6
7
8 X. MODIFICATIONS TO THE REMEDIAL ACTION

9
10 A. Effect of EPA Approval. The Parties acknowledge and
11 agree that EPA's approval of any Remedial Design or any other
12 workplan or proposal does not constitute a warranty or
13 representation of any kind by Plaintiff or Defendants that the RD
14 or RA achieves the cleanup standards set forth in the ROD and in
15 Section VII (Work to be Performed) of this Decree and shall not
16 foreclose Plaintiff or Defendants from seeking performance of all
17 terms and conditions of this Consent Decree, including applicable
18 cleanup standards.

19
20 B. Changes to the Remedy. EPA will consider new
21 information generated during implementation of the remedy in
22 accordance with the procedures set forth in the NCP to determine
23 whether it is necessary to make any changes to the remedy,
24 including changes to the cleanup standards. In making such
25 changes, EPA may find that a waiver of one or more of the
26 applicable or relevant and appropriate requirements (ARARs) should
27 be invoked in accordance with the provisions of CERCLA
28 Section 121(d)(4), 42 U.S.C. § 9621(d)(4). If any changes are made

1 to the remedy that was selected in the ROD, including changes to
2 the cleanup standards, whether accomplished by an administrative
3 order, a judicial order of a court with authority to change the
4 remedy or to mandate that EPA change the remedy that was selected
5 in the ROD, or otherwise, including an action or proceeding
6 involving EPA and any Defendant or third-party non-Defendant, the
7 Defendants' obligations under this Decree, to the extent they are
8 affected by or related to such changes, shall be modified to
9 reflect such changes. Any such modifications shall be made subject
10 to the requirements of Section X.C (Procedure for and Effect of
11 Modification of the RD and/or RIP). In the event any such
12 modifications are made as a result of a judicial order of a lower
13 court, the United States may choose to appeal such order to an
14 appellate court. Should an appellate court then reverse that part
15 of the judicial order that changed the remedy or mandated that EPA
16 change the remedy, Defendants' original obligations to perform the
17 Work under this Decree, if any remain, shall be reactivated
18 automatically within ninety (90) days of the appellate court's
19 order and any payments that would have been required to be made
20 under Section IX (Work Assumption) and XXI (Reimbursement of
21 Response and Oversight Costs) during the pendency of the appeal
22 shall be paid in full, with interest, within thirty (30) days of
23 the appellate court's order.

24
25 C. Procedure for and Effect of Modification of the RD
and/or RIP

26
27 1. Decision to Modify. If, during the Initial Work
28 period, or Conditional Interim Work period, if there is any, EPA

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1 determines that the RD and/or RIP do not fully implement the ROD,
2 the NCP or CERCLA, and Defendants concur, or if the Parties
3 otherwise agree that the RD and/or RIP should be modified in a
4 manner consistent with the ROD, the Parties shall modify the RD
5 and/or RIP accordingly. If, during the Initial Work period or
6 Conditional Interim Work period, if there is any, EPA determines
7 that the RD and/or RIP do not fully implement the ROD (except as
8 required to be performed by non-Defendants pursuant to an
9 obligation outside of this Decree) and the Defendants disagree,
10 EPA may issue a revised RD and/or RIP containing the
11 modifications, including requirements involving the performance of
12 Additional Response Work, that EPA determines are necessary to
13 implement the ROD. Defendants may dispute EPA's determination(s)
14 regarding the modifications necessary to implement the ROD;
15 however, failure to comply with the requirements of the revised RD
16 and/or RIP shall constitute noncompliance with this Consent Decree
17 and shall be subject to stipulated penalties pursuant to Section
18 XXIII (Stipulated Penalties) of this Consent Decree.

19
20 2. Procedure for Modification. If, during the Initial
21 Work period or Conditional Interim Work period, if there is any,
22 the Parties agree to modify the RD and/or RIP, or it is determined
23 through Dispute Resolution that the RD and/or RIP should be
24 modified, and EPA has not already issued a modified RD and/or RIP,
25 then EPA shall allow the Defendants an initial opportunity to
26 prepare and submit a revised RD and/or RIP, within a reasonable
27 time period specified by EPA, for EPA's review and approval. If
28 EPA disapproves such a revised RD and/or RIP, EPA shall decide in

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1 its discretion whether it will issue a revised RD and/or RIP or
2 allow the Defendants to cure the disapproved RD and/or RIP within a
3 reasonable time period specified by EPA for EPA's approval. Any
4 Additional Response Work required by such a revised RD and/or RIP
5 shall be completed by the Defendants at their own expense in
6 accordance with the standards, specifications and schedules
7 approved by EPA.

8
9 If, following the Initial Work period, or the Conditional
10 Interim Work period, if there is one, EPA seeks to require
11 Defendants to perform any further response work not already
12 included as an obligation under this Consent Decree, EPA may do so
13 only subject to the procedures and provisions set forth in Section
14 XXXI (Covenant Not to Sue).

15
16 XI. REPORTING AND APPROVALS/DISAPPROVALS

17
18 A. Progress Reports.

19
20 1. Nature of Progress Reports. Progress Reports shall
21 describe all actions taken to comply with this Consent Decree,
22 including (a) a general description of the Work activities
23 commenced or completed during the reporting period; (b) Work
24 activities projected to be commenced or completed during the next
25 reporting period; (c) any problems that have been encountered or
26 are anticipated by the Defendants in commencing or completing the
27 Work activities; and (d) a summary assessment of the data, if
28 appropriate. Work activities include, but are not limited to,

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1 construction activities, sampling events, data collection and lab
2 results related to the Work.

3
4 2. Work Activities Monthly Report. For the Joint Work,
5 Defendants shall provide written progress reports to EPA on a
6 monthly basis, starting from the entry of this Decree and ending
7 with the beginning of the Interim Work period unless Conditional
8 Interim Work is required, in which case ending two years from the
9 beginning of the Interim Work period. In addition, for Facility
10 Specific Work, each Defendant shall provide written progress
11 reports to EPA and Defendants' Project Coordinator on a monthly
12 basis, starting from the entry of this Decree and ending with the
13 beginning of routine operation and maintenance of the source
14 related remedial action by such Defendant. These reports shall be
15 submitted to EPA by the 10th day of each month and shall describe
16 the Work completed the preceding month and planned for the current
17 month.

18
19 3. Operation and Maintenance Quarterly Reports. For
20 Joint Work required pursuant to this Decree, Defendants shall
21 provide written progress reports to EPA on a quarterly basis,
22 commencing at the beginning of routine operation and maintenance
23 of the Remedial Action up until such time that EPA certifies that
24 Defendants have completed the Initial Work pursuant to Section
25 XXXVIII.C (EPA Certification) or at the termination of the
26 Conditional Interim Work period, if required. In addition, for
27 Facility Specific Work, each Defendant shall provide written
28 progress reports to EPA and the Defendants' Project Coordinator on

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1 a quarterly basis, commencing at the beginning of routine
2 operation and maintenance of such Defendant's source control
3 remedial action up until such time that EPA certifies pursuant to
4 Section XXXVIII.C.2 (EPA Certification) that such Defendant has
5 completed all Facility Specific Work. These reports shall be
6 submitted to EPA by the last day of the months of January, April,
7 July and October and shall describe the Work completed during the
8 preceding quarter and planned for the current quarter.

9
10 4. Annual Progress Reports. Defendants shall submit
11 annual progress reports which summarize and evaluate all Joint Work
12 activities required pursuant to this Decree and conducted during
13 the previous year and outline planned activities for the upcoming
14 year commencing with the entry of this Decree up and until EPA
15 certifies that Defendants have completed the Initial Work pursuant
16 to Section XXXVIII.C. (EPA Certification) or at the termination of
17 the Conditional Interim Work period, if required. In addition,
18 each Defendant shall submit to EPA and the Defendants' Project
19 Coordinator annual reports which summarize and evaluate all
20 Facility Specific Work activities conducted during the previous
21 year and outline planned activities for the upcoming year. Such
22 Annual Reports must include an evaluation of the results of any
23 required monitoring or, for Facility Specific Work, an evaluation
24 of the results of that Work. Annual Reports shall be submitted by
25 March 1 for the preceding calendar year.

26
27 5. Failure to Submit. If the Defendants fail to
28 submit any progress report for the Joint Work, or if any Defendant

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1 fails to submit any progress report for Facility Specific Work, in
2 accordance with the schedule set forth above, then the Defendants
3 (or the applicable Defendant) shall be subject to stipulated
4 penalties pursuant to Section XXIII.B (Stipulated Penalties).

5
6 B. All Deliverables and Schedules.

7
8 1. Any report, plan, specification (including
9 discharge or emission limits), schedule, appendix, or attachment
10 required or established by this Consent Decree is, upon approval
11 by EPA, incorporated into this Consent Decree. Any noncompliance
12 with any such EPA approved report, plan, specification (including
13 discharge or emission limits), schedule, appendix, or attachment
14 shall be considered a failure to comply with this Consent Decree
15 and subject to stipulated penalties in accordance with
16 Section XXIII (Stipulated Penalties) of this Consent Decree. A
17 determination of noncompliance with such submittal with which the
18 Defendants disagree shall be deemed a dispute and subject to the
19 provisions of Section XXV (Dispute Resolution), if Defendants
20 invoke Dispute Resolution.

21
22 2. At any time, EPA may, in its discretion, grant a
23 request by any Defendant for an extension of any deadline for any
24 submittal or Work. In addition, EPA may, in its discretion, waive
25 any required submittal or report or any requirement regarding
26 specific contents of any submittal or report.

27
28 3. If EPA disapproves any plan, report or other item

1 required to be submitted to EPA for approval pursuant to
2 Section VII (Work to be Performed) or Section XII (Quality
3 Assurance/Quality Control), EPA shall provide the Defendants with
4 written notice of the disapproval.

5
6 4. The notice of disapproval shall be in writing,
7 shall include an explanation by EPA of why the plan, report, or
8 item is being disapproved and shall state a reasonable time period
9 of not less than 10 working days (the "Cure Period") within which
10 Defendants may correct any deficiencies and resubmit the plan,
11 report or item for EPA approval.

12
13 5. In attempting to correct any deficiency, the
14 Defendants shall address each of EPA's comments and resubmit to
15 EPA the previously disapproved plan, report, or item with the
16 required changes within the Cure Period specified by EPA pursuant
17 to subsection D.4 of this Section.

18
19 6. If EPA determines that any plan, report or item is
20 substantively deficient after resubmission under subsection D.5 of
21 this Section, EPA shall notify the Defendants in writing that the
22 resubmission is deficient. Such notice shall include an
23 explanation of why the resubmission is deficient and shall state
24 whether EPA deems the Defendants to be in violation of the Consent
25 Decree and subject to stipulated penalties as governed by
26 Section XXIII (Stipulated Penalties) of this Consent Decree. If
27 EPA determines the Defendants to be in violation of the Consent
28 Decree, stipulated penalties shall begin to accrue on the date of

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1 receipt by the Defendants of EPA's notice that the resubmission is
2 deficient. If the Defendants do not attempt to correct a deficient
3 plan, report or item during the Cure Period, stipulated penalties
4 shall begin to accrue no earlier than the day after the last day of
5 the Cure Period. Any such determination by EPA of non-compliance
6 with which the Defendants disagree shall be deemed a dispute and
7 subject to the provisions of Section XXV (Dispute Resolution).

8
9

10 XII. QUALITY ASSURANCE/QUALITY CONTROL

11

12 A. QA/QC Procedures. The Defendants shall use sample chain
13 of custody, chemical analysis and data validation procedures
14 described in (i) Quality Assurance/Quality Control Plan: Remedial
15 Investigation, Feasibility Study, and Operable Unit Feasibility
16 Study, Middlefield-Ellis-Whisman Study Area, Mountain View,
17 California -- April 7, 1986, Harding Lawson Associates, as approved
18 by EPA, and (ii) Quality Assurance/Quality control Plan Addendum,
19 Soil Sampling and Analysis, Remedial Investigation, Feasibility
20 Study, Middlefield-Ellis-Whisman Study Area, Mountain View,
21 California -- August 1986, Canonie Engineers, as approved by EPA.
22 The applicable procedures described in these documents shall be
23 used for field work, sample collection and analysis activities
24 except that the QA/QC procedures must be modified to conform with
25 the EPA Method 500 Series approved for safe drinking water
26 analysis, and the procedures described in Section XII.B below.
27 Defendants may, however, substitute the EPA Method 600 Series in
28 any sampling plan except when the sampling results are to be used

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1 to verify that cleanup standards have been attained either for a
2 portion or all of the MEW Plume.

3

4 B. In order to provide quality assurance and maintain
5 quality control regarding all samples collected pursuant to this
6 Consent Decree, the Defendants shall:

7

8 1. Ensure that all contracts with laboratories used by
9 the Defendants for analysis of samples taken pursuant to this
10 Consent Decree provide for access of EPA personnel and EPA
11 authorized representatives to verify the accuracy of laboratory
12 results related to the Work.

13

14

15 2. Specify, as part of the QA/QC program and upon
16 request of EPA, that all laboratories used by Defendants for
17 analysis of samples taken pursuant to this Consent Decree shall
18 perform, upon reasonable advance notice to such laboratories and to
19 Defendants and not at EPA's expense, analyses of samples provided
20 by EPA to demonstrate the quality of each laboratory's data. If a
21 laboratory used by Defendants is certified for drinking water
22 analyses by the California Department of Health Services, (although
23 no such certification is required by this Consent Decree),
24 Defendants will request that the laboratory include a notation of
25 the valid certification on the title page of the analyses results
26 reports.

27

28 3. Specify that laboratories used must maintain and

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1 provide, upon request, the records outlined in The Laboratory
2 Documentation Requirements for Data Validation. (January 1990)
3 9QA-07-90.

4
5 4. Include a quality assurance report as part of their
6 monthly reports for the months of December, March, June and
7 September each year, or as part of their quarterly reports,
8 whichever is applicable pursuant to Section XI.A. Such reports
9 shall contain information that demonstrates that Defendants are
10 complying with this Section and the QA/QC Plan submitted pursuant
11 to this Decree. In addition, each Defendant shall submit quality
12 assurance reports as part of such Defendants' Progress Reports
13 with respect to Facility Specific Work undertaken by such
14 Defendant.

15
16 5. Agree not to contest EPA's authority to conduct
17 field or laboratory audits to verify compliance by any Defendant
18 with the QA/QC requirements contained in this Consent Decree.

19
20 XIII. PROJECT COORDINATOR

21
22 A. Designation; Authority of EPA Project Coordinator. By
23 the effective date of this Decree, EPA and the Defendants shall
24 each designate and notify each other in writing of the name
25 address and telephone number of their respective Project
26 Coordinators and, in the case of each Defendant, such Defendant's
27 Facility Coordinator, to monitor the progress of the Work and to
28 coordinate communication between EPA and the Defendants. The EPA

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1 Project Coordinator shall have the authority vested in the
2 Remedial Project Manager and the On-Scene Coordinator by the NCP,
3 as well as the authority to ensure that the Work is performed in
4 accordance with all applicable statutes, regulations, and
5 provisions of this Consent Decree.

6
7 B. Suspension of Work. The EPA Project Coordinator shall
8 also have the authority, in accordance with applicable law, to
9 suspend the Work or any other activity at the Site that, in the
10 opinion of the EPA Project Coordinator, may present or contribute
11 to an endangerment to public health, welfare, or the environment or
12 cause or threaten to cause the release of hazardous substances from
13 the Site.

14
15 C. Extension of Compliance Schedule. In the event that the
16 EPA Project Coordinator suspends the Work or any other activity at
17 the Site, EPA may, upon request of the Defendant(s) affected by
18 such suspension, extend the compliance schedule of this Consent
19 Decree as appropriate for the minimum period of time necessary and
20 appropriate to perform the Work. Should the affected Defendant(s)
21 propose an extension of the compliance schedule pursuant to this
22 Section, EPA shall determine the length of any extension. A
23 disagreement regarding such an extension shall be resolved through
24 Section XXV (Dispute Resolution). If the EPA Project Coordinator
25 suspends the Work or any other activity for any of the reasons set
26 forth in this Section and determines that those reasons are due
27 entirely to Defendant's acts or omissions of acts required by this
28 Consent Decree (such suspension and determination to be subject to

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1 the dispute resolution provisions of Section XXV), unless the
2 suspension or determination is overturned, any extension of the
3 compliance schedule shall be decided at EPA's discretion, without
4 resort to the Dispute Resolution provisions of Section XXV of this
5 Consent Decree. If the suspension or determination is overturned,
6 then EPA's decision regarding the extension of the compliance
7 schedule is subject to dispute resolution.

8

9 D. General Provisions Relating to Project Coordinators.

10 The Project Coordinators do not have the authority to modify in
11 any way the terms of this Consent Decree, including the terms of
12 any Appendices or any design or construction plans. The absence of
13 the EPA Project Coordinator from the Site shall not be cause for
14 stoppage of the Work. EPA and the Defendants may change their
15 respective Project Coordinators by notifying the other parties in
16 writing at least seven (7) calendar days, where practicable, prior
17 to the change. In addition, any Defendant may change its Facility
18 Coordinator by notifying EPA and the other Defendants in writing at
19 least seven (7) calendar days, where practicable, prior to the
20 change.

21

22 E. Assignment of Other Site Representatives. The
23 Defendants' Project Coordinator may assign other representatives,
24 including other contractors, to serve as a Site Representative
25 solely for purposes of oversight of performance of daily
26 operations during remedial activities. The EPA Project
27 Coordinator may assign other representatives, including other EPA
28 employees, State employees or contractors, to serve as a Site

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1 Representative solely for purposes of oversight of performance of
2 daily operations during remedial activities.

3
4 F. Referral of Disputes. Prior to invoking dispute
5 resolution procedures, any unresolved disputes arising between the
6 EPA Site Representative and the Defendants' Site Representative
7 shall be referred to the EPA Project Coordinator.

8
9 XIV. ACCESS

10
11 A. Access to Other Properties. To the extent that access
12 to or easements over property on the Site but not owned or
13 controlled by the Defendants or access or easements over property
14 other than the Site is required for the proper and complete
15 performance by Defendants (or any Defendant) of their obligations
16 under this Consent Decree, the Defendant(s) shall use its (their)
17 best efforts to obtain access agreements from the present owner or
18 those persons who have control within thirty (30) calendar days of
19 EPA's approval of the applicable proposed Final Design. EPA may,
20 upon request, agree to extend the time for obtaining such access
21 agreements. Access agreements shall provide reasonable access to
22 the Defendants, the United States, and its authorized
23 representatives, including EPA and its contractors. In the event
24 that access agreements are not obtained within the thirty (30) day
25 period (or such period as extended by EPA), the Defendant(s)
26 requiring access shall notify EPA within five (5) calendar days
27 thereafter regarding both the lack of, and efforts to obtain, such
28 agreements. If EPA determines that it is necessary, EPA agrees,

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1 consistent with its legal authority, to assist the Defendant(s)
2 requiring access in obtaining such access. In the event EPA
3 exercises its legal authorities, including its powers under
4 Section 104(e) of CERCLA, to obtain access related to the
5 performance of Work under this Consent Decree, the Defendant(s)
6 requiring such access shall reimburse EPA for any costs incurred in
7 the exercise of such powers, as provided in Section XXI.B (Amount,
8 Timing and Method of Payment).

9
10 B. Access to Defendants' Properties. After the effective
11 date of this Decree, the Defendants shall assure that the United
12 States, and its authorized representatives, including EPA and its
13 contractors, shall have access, subject to federal security
14 restrictions, at all reasonable times, to the Site and any
15 contiguous property owned or controlled by any Defendant. Access
16 shall be for purposes of conducting any activity required by this
17 Consent Decree, including, but not limited to:

- 18
19 1. Monitoring the progress of activities taking place;
- 20
21 2. Verifying any data or information submitted to EPA;
- 22
23 3. Conducting investigations relating to contamination
24 at or near the Site;
- 25
26 4. Obtaining samples at or near the Site; and
- 27
28 5. Inspecting and copying records, operating logs,

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1 contracts, or other documents in order to assess the Defendants'
2 compliance with this Consent Decree.

3
4 In the event any Defendant transfers some or all of its
5 property located within the boundaries of the Site to a third
6 party after the effective date of this Decree, such Defendant
7 shall: (a) assure that the instrument effecting the conveyance or
8 transfer of title contains a copy of this Consent Decree, the ROD
9 and the listing or assessments for listing the property on the NPL;
10 and (b) use its best efforts to assure access to the property from
11 the third party.

12
13 C. Notice Prior to Access. If the United States, or its
14 authorized representatives including EPA and its contractors,
15 desires to obtain access pursuant to Section XIV (Access), it shall
16 notify the Facility Coordinator of the applicable Defendant at
17 least twenty-four (24) hours in advance of such access. Such
18 Defendant's Facility Coordinator shall furnish a mutually
19 acceptable time and date to Plaintiff. Such Plaintiff, or its
20 representative(s), shall comply with all applicable provisions of
21 the Worker Health and Safety Plan submitted as part of the
22 workplans required by this Consent Decree and approved by EPA. In
23 case of an urgent situation, EPA may determine that less notice to
24 such Defendant's Facility Coordinator to obtain access is
25 necessary. EPA recognizes that Plaintiff or its representatives
26 will be accompanied by a representative of Defendant, where
27 appropriate.

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1 XV. ASSURANCE OF ABILITY TO COMPLETE WORK

2

3 A. The Defendants (and each Defendant in the case of
4 Facility Specific Work) shall demonstrate their ability to complete
5 the Work and to pay all claims that arise from the performance of
6 the Work by obtaining, and presenting to EPA for approval within
7 thirty (30) calendar days after the effective date of this Consent
8 Decree, one of the following items: (1) performance bond;
9 (2) letter of credit; or (3) guarantee by a third party. In lieu
10 of any of the three items listed above, the Defendant(s) may
11 present to EPA, within twenty (20) calendar days after the
12 effective date, financial information sufficient to satisfy EPA
13 that the Defendant(s) have sufficient assets (such as evidence of
14 net worth in excess of \$1 billion) to make it unnecessary to
15 require additional assurances.

16

17 B. If the Defendants (or any individual Defendant) rely on
18 financial information for financial assurance, the Defendants (or
19 Defendant) shall annually submit such financial information. If
20 EPA determines the financial assurances to be inadequate, EPA
21 shall notify the Defendants (or applicable Defendant) in writing
22 of the basis of its determination and the Defendants (or
23 applicable Defendant) shall obtain one of the three other
24 financial instruments listed above within thirty (30)
25 calendar days of such determination.

26

27

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1 XVI. COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS

2

3 All actions required to be taken pursuant to this Consent
4 Decree shall be undertaken in accordance with the requirements of
5 all applicable federal, state and local laws, regulations,
6 appendices to this Consent Decree and permitting provisions
7 required by CERCLA and the NCP.

8

9

10 XVII. SUBMISSION OF DOCUMENTS, SAMPLING AND ANALYSIS

11

12 A. Sampling Results. The Defendants shall make the
13 results of all sampling and/or tests or other data generated by
14 the Defendants, or on the Defendants' behalf, required to be
15 generated pursuant to this Consent Decree, available to EPA in
16 accordance with the provisions of this Consent Decree. EPA will
17 make available to the Defendants the results of sampling and/or
18 tests or other data generated by EPA.

19

20 B. Observation of Work; Split Samples. Under the
21 provisions of Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), EPA
22 explicitly reserves the right to observe the Work of the
23 Defendants as it is performed. In addition, at the request of
24 EPA, any Defendant shall allow EPA and/or its authorized
25 representatives to take split or replicate samples of any samples
26 collected by the Defendants or anyone acting on the Defendants'
27 behalf pursuant to the implementation of this Consent Decree.

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1 C. Notice of Sampling Activities. The applicable
2 Defendant(s) shall notify EPA at least seven (7) days in advance
3 of any sampling activity under an approved sampling plan. The
4 Defendant(s) shall also notify EPA at least 48 hours prior to any
5 modifications or proposed changes to the date of any sampling
6 activity. The Project Coordinators may agree upon a shorter
7 notice period for any such modifications or changes.

8
9 D. Technical Data. Defendants agree to provide EPA with
10 all technical data and information required to be generated
11 pursuant to this Consent Decree relating to the environmental
12 problems, public health threats, Site conditions, Site use and
13 history, contaminant incidence and migration, and regional
14 environmental conditions relating to the MEW Site as such data and
15 information becomes available, including but not limited to:

16
17 1. Raw analytical, monitoring, sampling, geographical,
18 hydrogeological, geologic, meteorological, surface water, seismic,
19 landfill gas, subsurface gas, or ambient air data, resulting from
20 any environmental testing relating to the Site;

21
22 2. Technical working drafts and final reports, letter
23 reports, workplans, documents, records, files, memoranda, status
24 reports, and written material developed using any source, including
25 EPA, relating to the Site;

26
27 3. Technical maps, computer generated graphics, charts,
28 tables, data sheets, geologic cross-sections, lithologic logs,

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1 graphs, photographs, slides, or other such material developed
2 relating to the Site; and

3
4 4. Computerized technical data and information relating
5 to the Site, including any creation, sorting, display and
6 organization of a data base, the form and format of such data to be
7 determined in the Data Management Plan (DMP).

8
9 E. Notice of Future Projects. Defendants (or any
10 applicable Defendant in the case of Facility Specific Work) shall
11 notify EPA no less than twenty-one (21) days in advance of
12 commencement of any project which is likely to affect
13 implementation of the remedy or to produce data or information that
14 would significantly affect an evaluation of the remedy required to
15 be submitted pursuant to this Consent Decree, including but not
16 limited to, projects involving removal of underground tanks,
17 construction or removal of facilities, pilot studies and well
18 sealings. Defendants' notification of such activities shall not,
19 in any manner, constitute a waiver of any applicable privilege with
20 respect to such activities, data or information.

21
22 F. Confidentiality and Privileges. Defendants (or any
23 individual Defendant in the case of Facility Specific Work) may
24 assert business confidentiality claims covering part or all of the
25 information provided in connection with this Consent Decree in
26 accordance with CERCLA Section 104(e)(7), 42 U.S.C. § 9604(e)(7),
27 and pursuant to 40 C.F.R. §2.203(b) or applicable state law. Any
28 such claim shall be subject to EPA's confidentiality determination

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1 procedures and, if determined to be confidential, afforded the
2 protection by EPA provided in 40 C.F.R. Part 2, Subpart B.

3 Defendants agree that the data and reports generated
4 pursuant to this Consent Decree are not subject to the protection
5 of Section 1905 of Title 18 and 40 C.F.R. Part 2 as confidential
6 information. Moreover, the parties explicitly agree that the
7 provisions of CERCLA Section 104(e)(7)(F), 42 U.S.C.
8 § 9604(e)(7)(F), apply to such data and information generated by
9 the Defendants. Neither the Defendants nor any individual
10 Defendant shall assert a claim of business confidentiality
11 regarding any hydrogeological or chemical data or any data
12 submitted in support of the Work. Notwithstanding the foregoing,
13 nothing in this Consent Decree shall be construed as a waiver by
14 Defendants or any Defendant of any applicable attorney work product
15 or attorney-client privilege.

16
17 G. Public Inspection. Subject to any applicable
18 limitations of Section XVII.F (Confidentiality and Privileges),
19 all data, factual information, and documents submitted by the
20 Defendants to EPA pursuant to this Consent Decree shall be subject
21 to public inspection.

22
23 H. Data Management Plan. Within 60 days of the effective
24 date of this Decree, the Defendants shall propose to EPA a Data
25 Management Plan, in accordance with Section VII of this Decree, to
26 manage and organize data collected pursuant to this Decree. Upon
27 approval by EPA, the Defendants shall immediately implement the
28 Data Management Plan.

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XVIII. RETENTION OF RECORDS

A. Preservation by Defendants. The Defendants (and each individual Defendant) shall preserve and retain all records required to be generated pursuant to the provisions of the Administrative Order on Consent dated August 15, 1985, and the terms of this Consent Decree. Such documents shall be preserved and retained regardless of any document retention policy to the contrary, for a period of no less than six years after the termination of this Consent Decree, except as provided in Subsection B of this section. Until completion of the Work and termination of this Consent Decree, except as provided in Subsection B of this section, the Defendants (and each individual Defendant) shall preserve, and instruct all of its contractors, its contractors' subcontractors and anyone else acting on the Defendants' behalf at the Site to preserve (in the form of originals, or if allowed pursuant to the Records Destruction Plan below, exact copies or microfiche of all originals), all such records and documents. Such records and documents shall be made available to the EPA Project Coordinator at any reasonable time upon reasonable notice.

B. Procedure for Destruction. After the expiration of the six (6) year period described in subsection A above, any Defendant who desires to destroy any documents covered by subsection A above shall notify the EPA no later than sixty (60) days prior to the destruction of such documents. Upon any request by EPA made within

1 thirty (30) days of such notice, the Defendant(s) proposing to
2 destroy records shall make available to the EPA originals or
3 microfiche of any such records which are not confidential or
4 privileged under the provisions of Section XVII.F (Confidentiality
5 and Privileges) prior to their destruction.

6
7 C. Records Destruction Plan. Within ninety (90) days of
8 the effective date of this Decree, the Defendants shall propose to
9 EPA a Records Destruction Plan to address the destruction of any
10 documents relating to performance of the remedy or covered by
11 CERCLA Section 104(e). Upon approval by EPA, Defendants shall
12 implement the Records Destruction Plan.

13
14
15 XIX. CLAIMS AGAINST THE FUND

16
17 This Consent Decree shall not be deemed to constitute a
18 preauthorization of a CERCLA claim within the meaning of CERCLA
19 Sections 111 or 112, or 40 C.F.R. § 700(d)(3). In consideration of
20 the entry of this Consent Decree, Defendants (and each individual
21 Defendant) agree not to make any claims pursuant to Section 112 or
22 Section 106(b)(2) of CERCLA, 42 U.S.C. §§ 9612 and 9606(b)(2), or
23 any other provision of law directly or indirectly, against the
24 Hazardous Substances Superfund, for any response costs incurred in
25 connection with this Consent Decree, even if a Defendant is later
26 determined, based upon its assertion of defenses in a subsequent
27 proceeding, to be liable for response costs less than those paid,
28 or expended, pursuant to this Decree.

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XX. RESERVATION OF RIGHTS

A. Reservation of Enforcement Actions. Notwithstanding compliance with the terms of this Consent Decree, including the completion of the Remedial Action, the United States does not release the Defendants from liability for any matters beyond the terms of this Consent Decree. Notwithstanding any other provision in this Decree, the Covenant Not to Sue, as provided in Section XXXI (Covenant Not to Sue), shall not relieve any Defendant of its obligation to meet and maintain compliance with the requirements set forth in this Decree. Except as provided in Section XXXI (Covenant Not to Sue), the United States, on behalf of EPA, and EPA reserve all rights to take enforcement actions for violations of this Decree, of CERCLA and/or of any other authority, including the right to seek response costs, injunctive relief, monetary penalties, and punitive damages for any civil or criminal violation of law or this Consent Decree.

B. Reservation of Response Authority. Except as provided in Section XXXI (Covenant Not to Sue), nothing in this Consent Decree shall be deemed to limit the response authority of the United States on behalf of EPA, including the right to undertake response actions at any time, under Section 104 of CERCLA, 42 U.S.C. § 9604, or under Section 106 of CERCLA, 42 U.S.C. § 9606, or under any other federal response authority.

1 C. Right to Disapprove Work. The United States, on behalf
2 of EPA, expressly reserves all rights and defenses that it may
3 have, including the right both to disapprove of Work performed by
4 the Defendants (or an individual Defendant) and to require that the
5 Defendants (or any individual Defendant in the case of Facility
6 Specific Work) perform Additional Response Work as specified in
7 Section X (Modifications to the Remedial Action).

8
9 D. Non-Parties. The United States expressly reserves all
10 rights to bring any appropriate action(s) against persons and
11 entities not signatories hereto.

12
13 XXI. REIMBURSEMENT OF RESPONSE AND OVERSIGHT COSTS

14
15 A. Reimbursement for All Response and Oversight Costs. The
16 Defendants shall reimburse EPA for response costs, including
17 oversight costs, expended by EPA with regard to the MEW Site--
18 including costs associated with the sealing of the Silva Well, the
19 sealing of the Mountain View Parks and Recreation Well and all EPA
20 funds expended by the State of California (including the State,
21 DOHS and the RWQCB) related to the Site pursuant to Cooperative
22 Agreements that EPA has signed with the State of California (the
23 "Cooperative Agreements Costs")--that are not inconsistent with the
24 NCP. EPA and the Department of Justice shall make available to
25 Defendants an accounting of their costs in support of any claim for
26 reimbursement of response costs, including oversight costs, made
27 pursuant to this Section. EPA's accounting shall consist of: a
28 Cost Documentation Monitoring System narrative summary. EPA and

1 the Department of Justice reserve their rights to seek response
2 costs, including oversight costs, incurred by EPA or the Department
3 of Justice in connection with the MEW Site that are not reimbursed
4 by Defendants pursuant to this Section.

5

6 B. Amount, Timing and Method of Payment.

7

8 1. Defendants shall pay to the Hazardous Substances
9 Superfund a total of Two Million, Four Hundred Five Thousand
10 Dollars (\$2,405,000.00), one half of such amount to be paid within
11 thirty (30) days of entry of this Decree and the remainder to be
12 paid within one year of such date, as reimbursement of and
13 resolution of all their liability under Section 107 (a) of CERCLA
14 for response costs, including oversight costs, (except for those
15 costs related to the sealing of the Silva Well, the sealing of the
16 Mountain View Parks and Recreation Well and the Cooperative
17 Agreements) incurred by EPA in connection with the MEW Site up to
18 December 20, 1988, including all interest that has accrued or will
19 accrue thereon.

20

21 2. Within ninety (90) days of the provision by EPA to
22 Defendants of the cost documentation described in Section XXI.A,
23 Defendants shall pay to the Hazardous Substance Superfund an amount
24 equal to the sum of all response costs, including oversight costs,
25 incurred by EPA in connection with the MEW Site for the following
26 categories of cost: 1) costs not related to the categories listed
27 below that are incurred during the period December 21, 1988, until
28 the effective date of this Decree; 2) costs related to the sealing

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1 of the Silva Well; 3) costs related to the sealing of the Mountain
2 View Parks and Recreation Well; and 4) Cooperative Agreements
3 Costs. Defendants shall pay to the Hazardous Substances Superfund
4 a total of Forty-Five Thousand Dollars (\$45,000) as reimbursement
5 of and resolution of all their liability under Section 107(a) of
6 CERCLA to the Department of Justice for all response costs,
7 including oversight costs, incurred by the Department of Justice in
8 connection with the MEW Site prior to the effective date of this
9 Decree (including all response costs relating to the negotiation
10 and entry of this Decree), including all interest that has accrued
11 or will accrue thereon.

12

13 3. Defendants shall reimburse the Hazardous Substances
14 Superfund at the end of each calendar year for all response costs,
15 including oversight costs, incurred by EPA with regard to this Site
16 or in the exercise of its powers under Section 104(a) of CERCLA as
17 provided in Section XIV.A (Access to Other Properties). Defendants
18 shall also reimburse the Department of Justice for all response
19 costs, including oversight costs, incurred by the Department of
20 Justice for the enforcement, oversight or implementation of the
21 provisions of this Decree. Defendants shall, within 90
22 calendar days of receipt of the annual demand for payment and cost
23 documentation as described in Section XXI.A, remit a check for the
24 amount of those costs made payable to the Hazardous Substances
25 Superfund. EPA's failure to issue a demand for payment for a
26 particular year does not prevent EPA from recovering those costs in
27 a subsequent year.

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1 4. All checks remitted to the United States pursuant
2 to this Decree should reference the MEW Site (09K 6A4), and be
3 addressed to:

4 U.S. Environmental Protection
5 Agency Region 9
6 Attention: Superfund Accounting
7 Post Office Box 360863M
8 Pittsburgh, PA 15251

9 A copy of the transmittal letter and a copy of the check shall be
10 sent to the EPA Project Coordinator.

11 C. Method for Disputing Response and Oversight Costs.

12
13 1. Defendants reserve the right to contest through the
14 Dispute Resolution process set forth in Section XXV (Dispute
15 Resolution), whether EPA's demand for payment under Sections IX.D.
16 (Reimbursement of EPA), XXI.B.2 and XXI.B.3 (Amount, Timing and
17 Method of Payment) includes claims for costs not actually incurred
18 in connection with the MEW site or incurred in a manner
19 inconsistent with the NCP. If Defendants choose to raise any such
20 objection, they must notify, in writing, EPA's Project Coordinator
21 within 90 days of the date of receipt of the demand for payment.
22 If Defendants choose to raise such an objection, Defendants may, at
23 their discretion, either withhold payment of the disputed amount
24 due, subject to the provisions of Section XXV (Dispute Resolution),
25 and Section XXIII (Stipulated Penalties), or pay the disputed
26 amount subject to and in accordance with the provisions of this
27 Section XXI.C.1. Any objection raised pursuant to this Section
28 shall specifically identify each cost contested and the basis for

1 the objection. Should it be determined in Dispute Resolution that
2 the Defendants have overpaid EPA's response costs or oversight
3 costs the Defendants shall receive the amount overpaid as a credit
4 toward payment of response costs or oversight costs in a subsequent
5 demand for payment. Plaintiff reserves the right to argue that any
6 judicial review of Plaintiff's demand for payment pursuant to
7 Section XXI (Reimbursement of Response and Oversight Costs) shall
8 be limited to the cost documentation provided to Defendants
9 pursuant to Section XXI.A (Reimbursement for All Response and
10 Oversight Costs), and Defendants reserve their rights to argue to
11 the contrary.

12
13 2. Within 120 days of EPA's issuance of a written
14 certification pursuant to Section XXXVIII (Termination and
15 Satisfaction) of this Decree, EPA shall provide Defendants a final
16 demand for payment of all unreimbursed response costs and oversight
17 costs. Within 90 days of receipt of EPA's final demand for
18 payment, the Defendants shall either pay to the United States all
19 demanded costs reduced by the amount of any credits due pursuant to
20 subsection C.1, or invoke Dispute Resolution, pursuant to
21 Section XXV of this Consent Decree. If the Defendants invoke
22 Dispute Resolution, the Defendants shall identify each cost
23 contested and the basis for the objection. Defendants shall
24 deposit an amount of money equal to the contested costs into an
25 interest-bearing escrow account within thirty (30) days of invoking
26 Dispute Resolution. Should it be determined in Dispute Resolution
27 that Defendants are required to pay less than the full amount of
28 EPA's final demand for payment, the difference between the amount

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1 paid into the escrow account by Defendants and the amount
2 determined to be owed by Defendants in the Dispute Resolution shall
3 be released to Defendants, including interest earned on the
4 difference, minus escrow account fees. The remaining balance in
5 the escrow account, if any, shall be released to the United States.
6 Should it be determined in Dispute Resolution that Defendants are
7 required to pay the full amount of EPA's final demanded payment,
8 all money in the escrow account, including any interest earned
9 thereon, minus escrow account fees, shall be released to the United
10 States.

11 Nothing in this Consent Decree, except the waiver provisions
12 set forth in Section XIX (Claims Against the Fund), is intended to
13 waive Defendants' rights, if any, to make a claim (following EPA's
14 final demand for payment) against the United States Government for
15 any overpayment of money to the United States that cannot be
16 recovered either as a credit or from an escrow account pursuant to
17 this subsection.

18

19 **XXII. PRIORITY OF CLAIMS**

20

21 The Defendants' claims against any other responsible party for
22 contribution or indemnification of all or a portion of the cost of
23 their settlement herein shall be subordinate to any claim of the
24 United States against such other responsible party relating to the
25 MEW Site as to any unreimbursed costs for the response actions
26 taken or other costs incurred by the United States related to the
27 Site, as provided for by Section 113(f)(3)(C) of CERCLA, 42 U.S.C.
28 § 113(f)(3)(C), and shall also be subordinate to any claim by the

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1 United States Navy or NASA for costs incurred by either of them
2 related to the Site in the exercise of its enforcement authority
3 against a third party pursuant to Section 104 of CERCLA. The
4 United States shall have priority over the Defendants in the
5 collection of any judgment obtained against any non-settling
6 responsible party for such costs.

7

8 **XXIII. STIPULATED PENALTIES**

9

10 **A. General Provisions.**

11

12 **1. Accrual.** Stipulated penalties, if sought by EPA,
13 shall apply for failure to comply with any provision of this
14 Consent Decree, including but not limited to untimely or
15 inadequate submittals or Work required under the terms of this
16 Decree. Except as provided in paragraph XI.B.6 (All Deliverables
17 and Schedules), penalties shall begin to accrue from the first
18 day after the deadline for performance of a requirement of this
19 Decree and shall continue to accrue until the requirement is
20 satisfied.

21

22 **2. Payment.** Stipulated penalties under this Section
23 shall be paid by check made payable to the Hazardous Substance
24 Fund, and addressed as indicated in Section XXI, (Reimbursement of
25 Response and Oversight Costs), and shall be paid within thirty
26 (30) days of receipt of the demand for payment of stipulated
27 penalties. Failure to pay a stipulated penalty on time also
28 constitutes a violation of this Decree and is an event subject to

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1 stipulated penalties. A copy of the check and the letter
2 forwarding the check, including a brief description of the
3 triggering event, shall be submitted to the United States in
4 accordance with Section XXVI (Form of Notice), herein.

5
6 3. Election of Remedies. Notwithstanding the
7 stipulated penalties provisions of this Section, EPA may elect to
8 assess civil penalties or bring an action in District Court to
9 enforce the provisions of this Consent Decree, pursuant to CERCLA
10 Sections 107 and 122, 42 U.S.C. §§ 9607 and 9622. Payment of
11 stipulated penalties shall not preclude EPA from electing to pursue
12 any other remedy or sanction to enforce this Consent Decree, and
13 nothing shall preclude EPA from seeking statutory penalties against
14 the Defendants for violations of statutory or regulatory
15 requirements relating to the performance of the Work under this
16 Decree, provided that if Plaintiff collects statutory penalties the
17 total of all penalties shall not exceed \$25,000 per day per
18 violation.

19
20 4. Liability for Stipulated Penalties. The Defendants
21 are jointly and severally liable for any stipulated penalties
22 pursuant to the provisions of this Section with respect to the
23 Joint Work; provided, that the total amount due and payable for
24 each day of each violation shall not exceed those limits specified
25 in this Section. Each Defendant shall be solely responsible for
26 stipulated penalties assessed with respect to Facility Specific
27 Work at a property owned or operated (or formerly owned or
28 operated) by such Defendant.

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1 B. Stipulated Penalties for Progress Reports. Defendants
2 shall pay stipulated penalties of \$1,250 per day for the submission
3 of late Progress Reports as required in Section XI.A. (Progress
4 Reports) and \$2,500 per day for the submission of inadequate
5 Progress Reports as specified in Section XI.A. (Progress Reports),
6 subject to the procedures set out in Section XI.B (All Deliverables
7 and Schedules).

8
9 C. Stipulated Penalties for All Other Requirements or
10 Deliverables. Except for the stipulated penalties specified in
11 Subsection B, above, the Defendants shall pay, (subject to the
12 procedures in Section XI.B (All Deliverables and Schedules), if
13 applicable), the following stipulated penalties for each failure to
14 comply with the following requirements of this Decree for each
15 class of violations:

16
17 1. Class I

18
19 (a) Submittal of the following:

- 20
21 (1) RGRP Remedial Design Workplan (Subsection
22 VII.B.4.a.)
23 (2) Preliminary Design of the RGRP (Subsection
24 VII.B.4.b.(1))
25 (3) Proposed Final Design for Part I of the
26 RGRP (Subsection VII.B.4.b.(2))
27 (4) Proposed Final Design for Part II of the
28 RGRP (Subsection VII.B.4.b.(3))

- 1 (5) Construction Operation and Maintenance Plan (COMP) for Part I
- 2 of the RGRP (Subsection VII.B.4.c.(1))
- 3 (6) Construction Operation and Maintenance Plan (COMP) for Part II
- 4 of the RGRP (Subsection VII.B.4.c.(1))
- 5 (7) Operation and Maintenance Plan (O&M Plan) for Part I of RGRP
- 6 (Subsection VII.B.4.c.(2))
- 7 (8) Operation and Maintenance Plan (O&M Plan) for Part II of RGRP
- 8 (Subsection VII.B.4.c.(2))
- 9 (9) Silva Well Workplan and Silva Well Remediation Report
- 10 (Subsections VII.B.4.e. and f.)
- 11 (10) Source Control Workplan (Subsection VII.C.2.a.)
- 12 (11) Source Control Preliminary Design (Subsection VII.C.2.b.(1))
- 13 (12) Source Control Proposed Final Design (Subsection VII.C.2.b.(2))
- 14 (13) Source Control Construction Operation and Maintenance Plan
- 15 (Subsection VII.C.2.c.(1))
- 16 (14) Source Control Operation and Maintenance Plan (Subsection
- 17 VII.C.2.c.(2))
- 18 (15) Site-wide Vapor Intrusion Sampling and Analysis Work Plan for
- 19 Response Action Tiering (Appendix F)
- 20 (16) Supplemental Building/Property-Specific Vapor Intrusion
- 21 Sampling and Analysis Work Plans (Appendix F)
- 22 (17) Site-wide Long-term Vapor Intrusion Operations, Maintenance,
- 23 Monitoring and Management Plan (including Long-term
- 24 Operations, Maintenance, and Monitoring for Tier 2 and Former
- 25 Tier 1 and Tier A Buildings and Long-term Monitoring and
- 26 Management for Tier 3A Buildings) (Appendix F)
- 27 (18) Site-wide Vapor Intrusion Institutional Controls Implementation,
- 28 Management, and Monitoring Plan (Appendix F)

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- (19) Building/Property-Specific Vapor Intrusion Sampling and Evaluation Reports (Appendix F)
- (20) Building-Specific Vapor Intrusion Control System Remedial Designs (Appendix F)
- (21) Building-Specific Long-term Operations, Maintenance and Monitoring Plans (for Tier 2 and Former Tier 1 and Tier A Buildings) (Appendix F)
- (22) Building-Specific Long-Term Monitoring and Management Plans (for Tier 3A Buildings) (Appendix F)
- (23) Building-Specific Vapor Intrusion Response Action Implementation Reports (Appendix F)
- (24) Site-wide Vapor Intrusion Remedial Action Completion Report (Appendix F)
- (25) Monthly Vapor Intrusion Field Activity and Progress Reports (Appendix F)
- (26) Annual Vapor Intrusion Progress Reports (Appendix F)

(b) Penalties

<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
Days 1-7	\$5,000

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1 Days 8-30 \$10,000
2 After 30 days \$15,000

3 2. Class II

4
5 (a) Submittal of the following:

6
7 (1) Data Management Plan (Subsection
8 VII.B.4.(g).)

9 (2) Quality Assurance Report (Subsection
10 VII.B.4.(h).)

11 (3) Remediation Effectiveness Report
12 (Subsection VII.B.4.(i).)

13 (4) Facility Specific Progress Reports
14 (Subsection VII.C.2.(d).)

15 (5) Facility Specific Data Management Plan
16 (Subsection VII.C.2.(e).)

17 (6) Facility Specific Confirmatory Sampling
18 Report (Subsection VII.C.2.(f).)

19 (b) All other submittals or requirements required
20 by this Consent Decree, excluding those specified as Class I above
21 or in Section XI.A (Progress Reports) above.

22
23 (c) Penalties.

24	<u>Period of</u>	<u>Penalty Per</u>
25	<u>Noncompliance</u>	<u>Day Per Violation</u>
26	Days 1-7	\$ 2,000
27	Days 8-30	\$ 5,000
28	After 30 days	\$12,000

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1 XXIV. FORCE MAJEURE

2
3 A. Definition. For purposes of this Consent Decree, force
4 majeure is defined as any event arising from causes beyond the
5 control of the Defendants, or their contractors, subcontractors or
6 consultants, that delays or prevents the performance of any
7 obligation under this Consent Decree and could not have been
8 overcome or prevented by Defendants' exercise of due diligence.
9 Force majeure shall not include increased costs or expenses of the
10 remedy to be implemented pursuant to the ROD and this Consent
11 Decree, nor include the financial inability of the Defendants to
12 perform the Work, nor the failure of Defendants to make timely
13 application for any required permits or approvals or to provide all
14 information required for such applications in a timely manner.

15
16 B. Procedure for Determining Force Majeure. When a force
17 majeure event occurs that will delay or may delay the completion
18 of any portion of the Work, the Defendants shall notify EPA's
19 Project Coordinator orally within two (2) working days of the day
20 when Defendants knew or should have known that such delay would
21 result from such event, and shall, within seven (7) days of oral
22 notification to EPA, notify the EPA Project Coordinator in writing
23 of: the anticipated length and cause of the delay; the tasks
24 directly affected by the delay; the measures taken and/or to be
25 taken to prevent or minimize the delay; and the timetable by which
26 the Defendants propose to implement these measures.

27
28 The Defendants shall have the burden of proving that the

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1 delay was caused by circumstances beyond the control of the
2 Defendants. The EPA shall determine whether the event constitutes
3 force majeure. If EPA determines that the event did not constitute
4 force majeure, and the delay was not beyond the control of the
5 Defendants, this delay shall constitute non-compliance with the
6 Consent Decree and any stipulated penalties shall accrue from the
7 time of noncompliance. If the EPA determines the event does
8 constitute force majeure, it shall determine the appropriate
9 modification to the schedules for the work to be performed. No
10 deadline shall be extended beyond that period of time which is
11 necessary to complete the activities with the least amount of delay
12 possible through the exercise of due diligence. The Defendants
13 shall exercise due diligence to avoid or minimize delay.

14
15 If the EPA and the Defendants cannot agree as to whether the
16 reason for the delay was a force majeure event, the determination
17 of the EPA shall control. If the Defendants dispute this
18 determination, the dispute shall be resolved by the procedures
19 outlined in Section XXV (Dispute Resolution) of this Consent
20 Decree.

21
22 C. Waiver of Claim. Failure of the Defendants (or any
23 individual Defendant) to comply with the notice requirements of
24 this Section shall constitute a waiver of that claim.

25
26 XXV. DISPUTE RESOLUTION

27
28 A. General. As required by CERCLA Section 121(e)(2), 42

1 U.S.C. § 9621(e)(2), the parties to this Consent Decree shall
2 attempt to resolve expeditiously and informally any disagreements
3 concerning implementation of this Consent Decree or any Work
4 required hereunder.

5
6 If a dispute arises with respect to the meaning or
7 application of this Consent Decree, it shall in the first instance
8 be the subject of informal negotiations between EPA and Defendants,
9 pursuant to Section XXV.C (Informal Resolution Mechanism). In the
10 event that the parties cannot resolve any dispute arising under
11 this Consent Decree, then the interpretation advanced by EPA shall
12 be considered binding unless Defendants invoke the dispute
13 resolution provisions of this Section. Defendants' decision to
14 invoke dispute resolution shall not constitute a force majeure
15 under Section XXIV (Force Majeure), herein.

16
17 B. Notice. If any Defendant raises a good faith objection
18 to any EPA notice of disapproval, determination of inadequacy, or
19 other decision made pursuant to this Consent Decree, or if EPA and
20 any Defendant otherwise reach an impasse with regard to the
21 requirements of this Consent Decree, the Defendant(s) affected by
22 such decision or impasse shall orally notify EPA of all objections
23 within five (5) working days after receiving EPA's notice of
24 decision or after EPA and the Defendants have reached an impasse.
25 Such Defendants shall subsequently provide written notice to the
26 EPA Project Coordinator within seven (7) calendar days of oral
27 notification.

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1 C. Informal Resolution Mechanism. EPA and the Defendants
2 shall then have fourteen (14) additional days from the receipt of
3 written notification as provided in Section XXV.B (Notice) to
4 reach agreement. If possible, such disputes shall be resolved by
5 informal telephone conferences. Either Party may also request that
6 the Parties confer to resolve the dispute through an informal in-
7 person conference, to be held within this fourteen (14) day period.
8 At the end of this fourteen (14) day period, or within seven (7)
9 days after an informal conference is held, whichever is later, EPA
10 shall provide a written statement of its decision to the
11 Defendants and Defendants shall implement the directives contained
12 in such decision, subject to the provisions of Paragraph D of this
13 Section. If Defendants refuse to implement such directives, EPA
14 may elect to perform such Work, pursuant to Section XX (Reservation
15 of Rights) and subject to the provisions of Section IX (Work
16 Assumption). If Paragraph D of this Section is invoked, EPA may
17 also elect to perform the Work required by the disputed directive,
18 as provided in Sections IX (Work Assumption) and XX (Reservation of
19 Rights).

20
21 D. Judicial Resolution.

22
23 1. Filing of Petition. In the event that the dispute
24 cannot be resolved by the informal negotiation procedures outlined
25 in Paragraphs A, B and C of this Section and should any
26 Defendant(s) choose not to follow EPA's position, such
27 Defendant(s) may file with the Court a petition, which shall
28 describe the nature of the dispute and include a proposal for its

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1 resolution. No Defendant may file such a petition either (a) until
2 informal negotiations pursuant to Paragraph C of this Section are
3 completed, or (b) more than thirty (30) days after the completion
4 of informal negotiations. The filing of a petition asking the
5 Court to resolve a dispute shall not extend or postpone any
6 Defendant(s)' obligations under this Consent Decree with respect to
7 the disputed issue, or stay the provisions of Section XXIII
8 (Stipulated Penalties) except that the United States will not
9 demand payment of penalties accrued until completion of the Dispute
10 Resolution process. If the United States does not respond to the
11 petition within thirty (30) days, then any stipulated penalties
12 that would have accrued because of the dispute during the period of
13 time from the end of the thirty day response period until EPA
14 responds to the petition are waived.

15
16 2. Standard for Review. In any judicial dispute
17 resolution proceeding involving matters covered by CERCLA Section
18 113 (j)(2), 42 U.S.C. § 9613 (j)(2), the Court shall apply the
19 standards and provisions of that statutory subsection. In any
20 other dispute, the Court shall determine the appropriate standard
21 of judicial review based on general principles of administrative
22 law. In any dispute, the Defendant(s) shall bear the burden of
23 coming forward with evidence and of persuasion on factual issues.
24 Nothing herein shall prevent the United States from arguing that
25 the Court should apply the arbitrary and capricious standard of
26 review to any dispute under this Consent Decree. If the Court
27 finds that Defendant(s) have not satisfied their burdens,
28 Defendant(s) shall transmit payment of all penalties which EPA

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1 determines, in its discretion, shall be imposed, plus interest, at
2 the rate specified in Section 107(a) of CERCLA, 42 U.S.C. § 9607,
3 to the Hazardous Substance Superfund within fifteen (15) working
4 days of resolution of the dispute, and perform the work which was
5 the subject of the dispute.

6
7 E. Dispute Resolution Among Defendants.

8
9 1. Procedure. Any Defendant may, within sixty (60)
10 days of EPA's approval, and receipt by that Defendant of knowledge
11 of such approval, or within one (1) year of EPA's approval,
12 whichever is earlier, of any submittal made by another Defendant
13 pursuant to Section VII.C (Facility Specific Work), dispute such
14 approval. Any such dispute shall be resolved pursuant to the
15 applicable procedures specified in this Section XXV (Dispute
16 Resolution). A Defendant's election not to dispute EPA's approval
17 of any such submittal shall not be construed as a waiver of that
18 Defendant's rights, if any, against any other party except
19 Plaintiff.

20
21 2. Effect of Determination. If, as a result of
22 dispute resolution under this Subsection E, it is determined that
23 a source exists or is not effectively controlled, the applicable
24 Defendant shall prepare and submit to EPA a remedial design
25 workplan with respect to the control of such source within 60 days
26 after the determination and shall thereafter make the submittals
27 specified in Section VII.C.2 (Deliverables and Schedules for
28 Facility Specific Work) above with respect to such source by the

1 deadlines specified in said Section.

2

3 XXVI. FORM OF NOTICE

4

5 All notices, correspondence and communications under this
6 Consent Decree shall be in writing, postage prepaid, and addressed
7 as follows:

8

9 As to EPA:

9

10

11

12

13

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15

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16 As to the
17 Defendants:

17

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Patti Collins (H-6-3)
EPA Project Coordinator
MEW Site
Superfund Programs
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3 Embarcadero Center
San Francisco, CA 94111

John R. Masterman
Intel Corporation
1900 Prairie City Road, FM1-86
Folsom, CA 95630

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1 Any submission to EPA for approval pursuant to this
2 Consent Decree shall be made to the address shown above. These
3 names and addresses may be changed by EPA or the Defendants,
4 respectively, by notifying the other parties in writing at least
5 seven (7) calendar days, where practicable, prior to the change.

6
7
8
9 XXVII. MODIFICATION

10
11 Except as provided for in this Consent Decree, there shall be
12 no modification of this Consent Decree without written approval of
13 all parties to this Consent Decree and entry by the Court.

14
15
16 XXVIII. ADMISSIBILITY OF DATA

17
18 A. For the purpose of this action only, the Parties waive
19 any evidentiary objection as to the admissibility or authenticity
20 of data gathered, generated, or evaluated by any Party in the
21 performance or oversight of the Work under this Decree that has
22 been verified using the Quality Assurance and Quality Control
23 procedures specified in Section XII (Quality Assurance/Quality
24 Control).

25
26 B. The Parties also waive any objections to the
27 introduction of such data based on hearsay for the purpose of this
28 action only.

1 XXIX. EFFECTIVE DATE

2

3 Except as provided in Paragraphs VII.B.4.(a) (RGRP Remedial
4 Design Workplans) and VII.C.2.(a) (Source Control Workplan), this
5 Consent Decree is effective upon the date of its entry by the
6 Court.

7

8 XXX. CONTRIBUTION PROTECTION

9

10 Pursuant to CERCLA Sections 113(f)(2) and 122(h)(4),
11 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and other applicable
12 federal and state law, Defendants shall not be liable to other
13 persons or entities not parties to this Consent Decree for
14 contribution claims regarding matters covered by this Consent
15 Decree. Nothing in this Section shall constitute or be construed
16 as providing any Covenant Not to Sue or Contribution Protection
17 with respect to the matters covered by this Consent Decree to any
18 person not a signatory to this Decree or to any Defendant who
19 defaults on its obligations under this Decree.

20

21 XXXI. COVENANT NOT TO SUE

22

23 A. Except as specifically provided in Sections XXXI.D and E,
24 the United States covenants not to sue the Defendants for matters
25 covered by this Consent Decree, including any and all civil
26 liability to the United States for causes of action arising under
27 CERCLA Section 106 and RCRA Section 7003 relating to the Site, and
28 any and all claims available to EPA under CERCLA Section 107(a)

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1 relating to the Site. This Covenant Not to Sue does not apply to
2 any removal or remedial actions taken at the MEW Site beyond those
3 actions specified in the ROD or any amendments thereto and does not
4 apply to any claims for the Site that may be available to federal
5 entities other than EPA under CERCLA Section 107(a), 42 U.S.C. §
6 9607(a).

7
8 B. This Covenant Not to Sue shall take effect upon entry of
9 the Consent Decree and shall remain in effect so long as
10 Defendants continue to perform, completely and satisfactorily,
11 their obligations under this Consent Decree. With respect to
12 future liability, this Covenant Not to Sue shall take effect upon
13 certification by EPA of the completion of the Initial Work,
14 Facility Specific Work and Future Work as provided in Section
15 XXXVIII (Termination and Satisfaction).

16
17 C. Defendants hereby covenant not to sue the United States
18 Government, except the Navy and NASA, for any claim, counter-claim
19 or cross-claim asserted, or that could have been asserted, arising
20 out of or relating to the MEW Site, up and until the effective date
21 of this Consent Decree, except if such claim, counter-claim or
22 cross-claim arises from or relates to one or more claims expressly
23 reserved by EPA under subparagraph D below and only if EPA asserts
24 that specific claim or claims.

25
26 D. Defendants are expressly not released from, and
27 Plaintiff expressly does not covenant not to sue for, the
28 following claims:

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1. Claims based on a failure by the Defendants to meet the obligations of this Decree or any amendments thereto, including claims for costs incurred by the United States as a result of such failure;

2. Any other claims of the United States for any other costs or actions necessary at the MEW Site which are not undertaken pursuant to the ROD;

3. Claims based on the Defendants' liability arising from the past, present, or future disposal of hazardous substances at any location other than the MEW Site;

4. Any claim or demand for damage to federal property located any place that the Remedial Actions are being performed;

5. Claims based on criminal liability;

6. Claims based on liability for damage to natural resources, as defined in CERCLA;

7. Claims based on liability for hazardous substances removed from the Site; or

8. Liability for any violations of federal or state law which occur during implementation of the remedy.

1 E. Notwithstanding any other provision of this Consent
2 Decree, the United States reserves the right to institute
3 proceedings in this action or in a new action (1) seeking to compel
4 Defendants to perform further response work at the Site or
5 (2) seeking reimbursement of the United States' response costs if:

6
7 1. for proceedings prior to EPA certification
8 (pursuant to Section XXXVIII.C (EPA Certification)) of completion
9 of Initial Work, and termination of Conditional Interim Work, if
10 required, pursuant to Section VII.B.2.(b).(3) (Conditional Interim
11 Work), conditions at the Site, previously unknown to the United
12 States, are discovered after the entry of this Consent Decree, or
13 information is received, in whole or in part, after the entry of
14 this Consent Decree, and these previously unknown conditions or
15 this information indicates that the remedy set forth in the ROD is
16 not protective of human health and the environment;

17 2. for proceedings subsequent to EPA certification
18 (pursuant to Section XXXVIII.C (EPA Certification)) of completion
19 of Initial Work,

20 (i) conditions at the Site, previously unknown to
21 the United States, are discovered after the certification of
22 completion by EPA, or information is received, in whole or in
23 part, after the certification of completion by EPA, and these
24 previously unknown conditions or this information indicates
25 that the remedy set forth in the ROD is not protective of
26 human health and the environment, or

27 (ii) performance of all or any portion of that part
28 of the remedy set forth in the ROD which is not assigned to

1 Defendants as Work to be performed under this Consent Decree
2 (the "Non-Assigned Work") is not being performed by any non-
3 signatory, as defined below, and a voluntary or involuntary
4 proceeding under Title XI of the United States Code, Section
5 301 or Section 303 is commenced by or against the non-
6 signatory that had been performing such work. The United
7 States' right to institute proceedings against Defendants
8 pursuant to this subsection (ii) shall be limited to an action
9 to (1) direct Defendants under CERCLA Section 106 and/or RCRA
10 Section 7003 to perform that portion of the Non-Assigned Work
11 that is not being performed by the non-signatory, or (2) seek
12 reimbursement under CERCLA Section 107(a) for costs incurred
13 by the United States in connection with its performance of
14 such work. For the purposes of this subsection (ii) and the
15 following subsection (iii), a non-signatory is Fairchild
16 Semiconductor Corporation, Schlumberger Ltd., Schlumberger
17 Technology Corporation, National Semiconductor Corporation,
18 NEC Electronics, Inc., Siltec Corporation, Sobrato Development
19 Companies, or General Instrument Corporation, or any
20 successors to these entities, or any purchaser of assets
21 belonging to any of these entities that are related to the
22 Remedial Action, or

23 (iii) performance of all or any portion of that
24 part of the remedy set forth in the ROD which is not assigned
25 to the Defendants as Work to be performed under this Consent
26 Decree (the "Non-Assigned Work") is not being performed by any
27 non-signatory, as defined below, and a judicial decision is
28 issued in a United States District Court in an action

1 involving the United States finding that the non-signatory
2 that had been performing the work is not liable under CERCLA
3 or RCRA for performing such work. The United States' right to
4 institute proceedings against Defendants pursuant to this
5 subsection (iii) shall be limited to an action to (1) direct
6 Defendants under CERCLA Section 106 and/or RCRA Section 7003
7 to perform that portion of the Non-Assigned Work that is not
8 being performed by a non-signatory, or (2) seek reimbursement
9 under CERCLA Section 107(a) for response costs incurred by the
10 United States in connection with its performance of such work.
11

12 3. for proceedings subsequent to termination of the
13 Consent Decree pursuant to Section XXXVIII.D (Termination of the
14 Consent Decree) conditions at the Site, previously unknown to the
15 United States, are discovered after the certification of
16 completion by EPA, or information is received, in whole or in
17 part, after the certification of completion by EPA, and these
18 previously unknown conditions or this information indicates that
19 the remedy set forth in the ROD is not protective of human health
20 and the environment.
21

22 F. Except as may be provided by subsection XXV (Dispute
23 Resolution), the United States' right to institute proceedings in
24 this action or in a new action seeking to compel Defendants to
25 perform further response work at the Site or seeking reimbursement
26 of the United States for response costs, including oversight costs,
27 at the Site, may only be exercised where the conditions in Section
28 XXXI.E are met.

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1 G. Nothing in this Consent Decree shall constitute or be
2 construed as a release or covenant not to sue regarding any claim
3 or cause of action against any person, as defined in CERCLA
4 Section 101(21), or other entity not a signatory to this Consent
5 Decree for any liability it may have arising out of or relating to
6 the Site.

7
8 H. Except as may otherwise be required by law, and without
9 waiving any rights to assert or contest the applicability of any
10 such provisions of law, the parties to this Consent Decree agree
11 that the United States shall be under no obligation to assist the
12 Defendants in any way in defending against suits for contribution
13 brought against the Defendants which allege liability for matters
14 covered by this Covenant Not to Sue by persons or entities that
15 have not entered into this settlement.

16
17
18 XXXII. INDEMNIFICATION AND INSURANCE

19
20 A. The Defendants shall indemnify the United States
21 Government and save and hold the United States Government, its
22 agencies, departments, agents and employees harmless for any and
23 all claims or causes of action arising from any acts or omissions
24 of the Defendants, their officers, employees, agents, receivers,
25 trustees, successors, assigns, contractors, subcontractors, or any
26 other person acting on their behalf in carrying out any Joint Work
27 activities pursuant to the terms of this Consent Decree, or any
28 Facility Specific Work Activities for which Defendants are jointly

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1 and severally liable, unless the act or omission giving rise to
2 such claim or cause of action was proximately caused by the United
3 States Navy or NASA, its officers, employees, agents, receivers,
4 trustees, successors, assigns, contractors or subcontractors. For
5 those Facility Specific Work Activities for which Defendants are
6 not jointly and severally liable, each individual Defendant is
7 liable for such work. Each Defendant shall indemnify the United
8 States and save and hold the United States Government, its
9 agencies, departments, agents and employees harmless for any and
10 all claims or causes of action arising from any acts or omissions
11 or such Defendant, its officers, employees, agents, receivers,
12 trustees, successors, assigns, contractors, subcontractors, or any
13 other person acting on its behalf in carrying out any Facility
14 Specific Work Activities pursuant to the terms of this Consent
15 Decree. EPA is not a party to any contract entered into by or on
16 behalf of any Defendant in carrying out activities pursuant to this
17 Decree. The indemnity set forth in this Section XXXII
18 (Indemnification and Insurance) shall be for the benefit of the
19 United States Government only and shall not inure to the benefit of
20 any other individual or entity.

21

22 B. Prior to commencing any of the Work, Defendants shall
23 secure, and shall maintain for the duration of this Consent
24 Decree, commercial general liability and automobile insurance with
25 limits of ten million dollars, combined single limit. Any
26 Defendant may satisfy a portion or all of these requirements by
27 (a) one or more self-insurance programs deemed satisfactory by
28 EPA, (b) one or more policies of excess liability insurance

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1 coverage, or (c) appropriate financial information demonstrating
2 that such insurance is not necessary (such as evidence of net worth
3 in excess of \$1 billion). In addition, for the duration of this
4 Decree, Defendants shall satisfy, or ensure that their contractors
5 satisfy, all applicable laws and regulations regarding the
6 provision of workers' compensation insurance for all persons
7 performing Work on behalf of the Defendants in furtherance of this
8 Decree. Prior to commencement of Work under this Decree,
9 Defendants shall provide to EPA certificates of such insurance and,
10 if requested by EPA after review of such certificates, a copy of
11 each insurance policy, or, in the case of self-insurance,
12 Defendants shall provide to EPA appropriate financial
13 documentation. If Defendants demonstrate by evidence satisfactory
14 to EPA that any contractor or subcontractor maintains insurance
15 equivalent to that described above, or insurance covering the same
16 risks but in a lesser amount, then with respect to that contractor
17 or subcontractor, Defendants need provide only that portion of the
18 insurance described above which is not maintained by the contractor
19 or subcontractor.

20
21
22 XXXIII. COMMUNITY RELATIONS

23
24 Defendants shall cooperate with EPA in providing information
25 to the public. As requested by EPA or otherwise allowed by
26 applicable law, Defendants shall participate in the preparation of
27 all appropriate information disseminated to the public and in
28 public meeting(s) which may be held or sponsored by EPA to explain

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1 activities at or concerning the Site.

2

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4 XXXIV. LODGING AND PUBLIC PARTICIPATION

5

6 Pursuant to CERCLA Section 122(d), 42 U.S.C. § 9622(d), this
7 Consent Decree will be lodged with the Court for thirty (30) days
8 and the United States shall publish a Notice of Availability of
9 review to allow public comment prior to entry by the Court. The
10 United States will file with the Court a copy of any comments
11 received and the responses of the United States to such comments.

12

13

14 XXXV. OTHER CLAIMS

15

16 With respect to any person, firm, partnership, or corporation
17 not a signatory to this Consent Decree, nothing in this Consent
18 Decree shall constitute or be construed as a covenant not to sue by
19 any signatory with respect to, or as a release from any claim,
20 cause of action, or demand in law or equity.

21

22

23 XXXVI. CONTINUING JURISDICTION

24

25 The Court specifically retains jurisdiction over both the
26 subject matter of and the parties to this action for the duration
27 of this Consent Decree and subject to the terms of this Consent
28 Decree for the purposes of issuing such further orders or

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1 directions as may be necessary or appropriate (i) to construe,
2 implement, modify, enforce, terminate, or reinstate the terms of
3 this Consent Decree or (ii) for any further relief as the interest
4 of justice may require.

5
6
7 **XXXVII. REPRESENTATIVE AUTHORITY**

8
9 Each undersigned representative of the Parties to this
10 Consent Decree certifies that he or she is fully authorized by the
11 Party to enter into and execute the terms and conditions of this
12 Consent Decree, and to legally bind such Party to this Consent
13 Decree.

14
15
16 **XXXVIII. TERMINATION AND SATISFACTION**

17
18 A. Initial Work. Upon completion of the Initial Work
19 required pursuant to Section VII of this Consent Decree for both
20 Part I and Part II of the RGRP, Defendants shall submit to EPA for
21 EPA approval, a written Proposal of Completion stating that the
22 Initial Work has been completed in accordance and in full
23 compliance, or that they have otherwise satisfied their
24 obligations to perform the Initial Work in accordance and in full
25 compliance, with this Consent Decree. Unless Defendants are
26 required to perform Conditional Interim Work, Defendants'
27 obligations under Section VII (Work to be Performed), IX (Work
28 Assumption Penalty), X (Modifications to the Remedial Action), and

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1 XI (Reporting and Approvals/Disapprovals) shall be deemed
2 satisfied upon Defendants' receipt of written certification from
3 EPA pursuant to Section XXXVIII.C below. If Defendants are
4 required to perform Conditional Interim Work, Defendants'
5 obligations under Sections VII (Work to be Performed), IX (Work
6 Assumption Penalty), X (Additional Work), and XI (Reporting and
7 Approvals/Disapprovals) shall be deemed fully satisfied at the end
8 of the first two years of the Interim Work period, or if such
9 obligations are otherwise performed.

10

11 B. Facility Specific Work. Upon completion of all Facility
12 Specific Work at a facility, the applicable Defendant may submit to
13 EPA a Proposal of Completion and Work Completion Report for such
14 Facility Specific Work.

15

16 C. EPA Certification.

17

18 1. Initial Work. The Initial Work and plans for all
19 Initial Work tasks shall be deemed to have been finally completed
20 when EPA certifies in writing and in conformity with CERCLA
21 Section 122(f)(3), 42 U.S.C. § 9622(f)(3), that all of the elements
22 related to Initial Work set forth in the ROD, this Decree and the
23 RD and any changes to the remedy pursuant to Section X.B (Changes
24 to the Remedy) have been satisfactorily completed in accordance
25 with the requirements of CERCLA, 42 U.S.C. § 9601 et seq. Upon
26 receipt of the Proposal for Completion, EPA shall undertake a
27 review of the Initial Work performed under Section VII (Work to be
28 Performed) of this Decree and shall respond to Defendants within

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1 sixty (60) days of receipt. EPA shall issue a Certificate of
2 Completion upon its determination that (1) Defendants have
3 satisfactorily completed the Initial Work; and (2) all stipulated
4 penalties and other monies required to be paid under this Decree
5 prior to the beginning of the Interim Work period have been paid in
6 full by Defendants. If EPA believes that the Initial Work has not
7 been completed in accordance with the standards and specifications
8 set out in plans required under Section VII (Work to be Performed)
9 of this Decree and under CERCLA, it shall notify Defendants in
10 writing of what it believes should be done to complete the Initial
11 Work, referencing the specific portion(s) of the Initial Work and
12 proposing a schedule for completion.

13

14 2. Facility Specific Work. The Facility Specific Work
15 and plans for all Facility Specific Work tasks shall be deemed to
16 have been finally completed when EPA certifies in writing and in
17 conformity with CERCLA Section 122(f)(3), 42 U.S.C. § 9622(f)(3),
18 that all of the elements related to Facility Specific Work set
19 forth in the ROD, and this Consent Decree and any changes to the
20 remedy pursuant to Section X.B (Changes to the Remedy) have been
21 satisfactorily completed in accordance with the requirements of
22 CERCLA, 42 U.S.C. § 9601 et seq. Upon receipt of the Proposal of
23 Completion for Facility Specific Work from a Defendant, EPA shall
24 undertake a review of the Facility Specific Work performed by such
25 Defendant under Section VII (Work to be Performed) of this Decree
26 and shall respond to Defendants within sixty (60) days of receipt.
27 EPA shall issue a Certificate of Completion upon its determination
28 that (1) the Defendant has satisfactorily completed the Facility

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1 Specific Work for which such Defendant is responsible; and (2) all
2 stipulated penalties and other monies related to Facility Specific
3 Work required to be paid by such Defendant under this Decree have
4 been paid in full by such Defendant. If EPA believes that the
5 Facility Specific Work has not been completed in accordance with
6 the standards and specifications set out in plans related to
7 Facility Specific Work required under Section VII (Work to be
8 Performed) of this Decree and under CERCLA, it shall notify such
9 Defendant in writing of what it believes should be done to complete
10 the Facility Specific Work, referencing the specific portion(s) of
11 the Facility Specific Work and proposing a schedule for completion.

12
13
14 D. Termination of Consent Decree. The remaining provisions
15 of this Consent Decree including Defendants' obligations under
16 Sections XXI (Reimbursement of Response and Oversight Costs) and
17 XXIII (Stipulated Penalties) shall terminate upon determination and
18 issuance of written certification by EPA that (i) all Future Work
19 has been satisfactorily completed and cleanup standards specified
20 in the ROD, or cleanup standards specified in a change to the
21 remedy pursuant to Section X.B (Changes to the Remedy) have been
22 achieved, (ii) no other corrective action is necessary at the Site,
23 and (iii) all monies required to be paid under this Decree have
24 been paid in full by Defendants. At any time during the Future
25 Work or Interim Work periods Defendants may submit to EPA a written
26 Proposal for Termination setting forth Defendants' analysis that
27 each of points i, ii and iii above have been satisfied and asking
28 EPA to terminate the Decree, and EPA shall respond to Defendants

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1 within sixty (60) days of receipt. If EPA does not agree with
2 Defendants' analysis and believes that remediation of the Site is
3 not complete, it shall notify Defendants in writing of the actions
4 it believes are necessary before the Decree can be terminated.

5
6 E. Surviving Rights and Obligations. Termination of this
7 Consent Decree shall not alter the provisions of Section XX
8 (Reservation of Rights), Section XXX (Contribution Protection),
9 Section XXXI (Covenant Not to Sue), Section XXI (Reimbursement of
10 Response and Oversight Costs) and other such continuing rights and
11 obligations of Defendants under this Consent Decree.

12
13 XXXIX. SECTION HEADINGS

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

19
20
21 XL. NOTICE TO THE STATE

22
23 EPA has noticed the State of California pursuant to the
24 requirements of CERCLA Section 106(a), 42 U.S.C. § 9606(a).

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1 SIGNED AND ENTERED THIS ___ day of _____, 1991.

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UNITED STATES DISTRICT JUDGE

CONSENTED TO:

UNITED STATES OF AMERICA

By: Richard B. Stewart
Richard B. Stewart
Assistant Attorney General
Environment and Natural
Resources Division
U.S. Department of Justice

By: Daniel W. McGovern
Daniel W. McGovern
Regional Administrator
U.S. Environmental
Protection Agency
Region IX

Date: 4.18.91

Date: 3.25.91

By: Steven C. Silverman
Steven C. Silverman
Environmental Enforcement
Section
Environment and Natural
Resources Division
U.S. Department of Justice

By: Raymond D. Ludwizewski
Raymond D. Ludwizewski
Acting Assistant
Administrator
Office of Enforcement
U.S. Environmental
Protection Agency
Washington, D.C.

Date: 4/13/91

Date: _____

INTEL CORPORATION

By: Richard D. Boucher
Richard D. Boucher
Vice President

LEGAL OK
JM 3/8/91

Date: 3/8/91

By: William T. McGivern
William T. McGivern
United States Attorney
Northern District of Calif.
450 Golden Gate Avenue
San Francisco, CA 94103

RAYTHEON COMPANY

By: David A. Deardorf
David A. Deardorf
Vice President

Date: 5/9/91

Date: 3/8/91

By: Paul E. Locke
Paul E. Locke
Assistant U.S. Attorney
Northern District of Calif.
450 Golden Gate Avenue
San Francisco, CA 94103

Date: 5-9-91

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APPENDIX A

**FAIRCHILD, INTEL, AND RAYTHEON SITES
MIDDLEFIELD/ELLIS/WHISMAN (MEW) STUDY AREA
MOUNTAIN VIEW, CALIFORNIA**

EXPLANATION OF SIGNIFICANT DIFFERENCES

United States Environmental Protection Agency

Region IX -- San Francisco, California

September 1990

Fairchild, Intel, and Raytheon Sites
Middlefield/Ellis/Whisman Study Area
Mountain View, California

EXPLANATION OF SIGNIFICANT DIFFERENCES

I. INTRODUCTION

The purpose of this document is to explain the significant differences between the Record of Decision (ROD) signed by the U.S. Environmental Protection Agency (EPA) on June 9, 1989 and the remedy that will be implemented at the Middlefield/Ellis/Whisman Study Area (MEW Site). Under Section 117 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendment and Reauthorization Act of 1986 (CERCLA), 42 U.S.C. § 9617, EPA is required to publish an Explanation of Significant Differences (ESD) whenever a significant change is made to a final remedial action plan. This document provides a brief background on the MEW Site, describes the change to the ROD that EPA is now making and explains the ways in which this change affects implementation of the remedy selected by EPA in June of 1989.

Based on the technical data in the administrative record, EPA is changing the ROD to provide that the numerical standards characterized as "goals" in the original ROD are final cleanup "standards". This change is made to clarify and ensure that EPA is selecting in the ROD a specific remedial action rather than

deferring to a later date to set these standards. EPA is issuing this ESD to effectuate this change in lieu of amending the ROD because the change does not result in a fundamental change to the overall remedy selected in the June 9, 1989 ROD.

II. BACKGROUND

A. Site Name and Location. The MEW Site is located in Santa Clara County in the City of Mountain View, California. The MEW Site is divided into a Local Study Area (LSA) and a Regional Study Area (RSA). Figure 1-1 identifies the LSA and RSA, along with local roads and landmarks. The LSA consists of (i) two National Priority List (NPL) sites: Intel Corporation (Intel) and Raytheon Company (Raytheon); (ii) one proposed NPL site: Fairchild Semiconductor Corporation (Fairchild); and (iii) several non-NPL sites. The LSA encompasses about 1/2 square mile of the RSA and contains primarily light industrial and commercial areas, with some residential areas west of Whisman Road. The RSA encompasses approximately 8 square miles and includes Moffett Naval Air Station (another NPL site) and NASA Ames Research Center, along with light industrial, commercial, agricultural, residential, recreational, and municipal land uses.

Various owners or occupants in the area around the intersection of Middlefield Road, Ellis Street, Whisman Road, and the Bayshore Freeway (U.S. Highway 101), are or were involved in the manufacture of semiconductors, metal finishing operation, parts cleaning, aircraft maintenance, and other activities requiring the use of a variety of chemicals. Local facilities with current occupants are presented in Figure 1-2. Site investigations at several of these facilities have revealed the presence of toxic chemicals in the subsurface soils and in the groundwater.

B. Identification of Lead and Support Agencies. Since May 1985, EPA has been the lead agency at the MEW Site. The California Regional Water Quality Control Board - San Francisco Bay Region (RWQCB) and the California State Department of Health Services (DHS) are the support agencies for the MEW Site.

C. Circumstances. During negotiations with Potentially Responsible Parties (PRPs) to implement the remedy selected by EPA in the June 9, 1989 ROD, EPA determined that the language contained in the ROD and in the administrative record concerning the selected remedial action was ambiguous. EPA is issuing this ESD to clarify that it has selected a remedial action with final cleanup standards for the MEW Site.