

MODEL SEP CAFO

Explanatory text is indicated in bracketed *italics* type, preceded by the word *Note*. Placeholder text in which fact specific information should be inserted is indicated in bracketed **bold** text.

January 1999

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION __
BEFORE THE ADMINISTRATOR**

In the Matter of)
)
[Respondent's Name]) Docket No.
[Respondent's Address])
)
Respondent.)

CONSENT AGREEMENT AND ORDER

1 Complainant, the United States Environmental Protection Agency ("EPA"), having filed
2 the Complaint herein on [date] against Respondent [Respondent's Name]; and

3 Complainant and Respondent having agreed that settlement of this matter is in the public
4 interest, and that entry of this Consent Agreement and Order without further litigation is the most
5 appropriate means of resolving this matter;

6 NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without
7 adjudication of any issue of fact or law, and upon consent and agreement of the Parties, it is
8 hereby Ordered and Adjudged as follows:

9 **I. PRELIMINARY STATEMENT**

10 1. EPA initiated this proceeding for the assessment of a civil penalty, pursuant to
11 [statute and regulations].

12 2. The Complaint alleges that Respondent [describe conduct] in violation of [relevant
13 legal requirements].

14 3. Respondent filed an Answer and requested a hearing pursuant to [statute and
15 regulations].

16 4. This Consent Agreement and Order shall apply to and be binding upon Respondent, its
17 officers, directors, employees, successors and assigns, including, but not limited to, subsequent
18 purchasers.

19 5. Respondent stipulates that EPA has jurisdiction over the subject matter alleged in the
20 Complaint and that the Complaint states a claim upon which relief can be granted against
21 Respondent. Respondent waives any defenses it might have as to jurisdiction and venue, and,

1 without admitting or denying the factual allegations contained in the Complaint, consents to the
2 terms of this Consent Agreement and Order.

3 6. Respondent hereby waives its right to a judicial or administrative hearing or appeal on
4 any issue of law or fact set forth in the Complaint.

5 **II. TERMS OF SETTLEMENT**

6 7. Pursuant to § ___ of [statute], the nature of the violations, Respondent's agreement to
7 perform a Supplemental Environmental Project (SEP) and other relevant factors, EPA has
8 determined that an appropriate civil penalty to settle this action is in the amount of
9 [_____ dollars (\$_____)].

10 *[Note: In order to avoid conflicts with the Miscellaneous Receipts Act, the civil*
11 *penalty provisions must be drafted separately from the provisions for*
12 *implementation of the SEP.]*

13 8. Respondent consents to the issuance of this Consent Agreement and consents for the
14 purposes of settlement to the payment of the civil penalty cited in the foregoing paragraph and to
15 the performance of the Supplemental Environmental Project.

16 *[Note: Remember that the Respondent must consent to the issuance of the Final*
17 *Order and the performance of the SEP]*

18 9. Not more than thirty (30) days after the date of issuance of the executed Consent Order
19 signed by the EPA Regional Administrator, Region __, Respondent shall submit a cashier's or
20 certified check, payable to the order of the "Treasurer, United States of America," in the amount
21 of [_____ dollars (\$_____)], to:

22 EPA -- Region __
23 P.O. Lock Box _____
24 [address]

25 Respondent shall provide a copy of the check to:

26 Regional Hearing Clerk
27 [Regional Address] and
28 [Attorney Name and Address]

29 The check shall bear the case docket number. Interest and late charges shall be paid as specified
30 in Paragraph 21 herein.

31 10. The penalty specified in Paragraph 7, above, shall represent civil penalties assessed
32 by EPA and shall not be deductible for purposes of Federal taxes.

33 **11. [Description of the SEP]**

34 a. Respondent shall complete the following supplemental environmental project
35 ("SEP"), which the parties agree is intended to secure significant environmental or public health
36 protection and improvements. Not more than (30) days after receiving a copy of this Consent
37 Agreement signed by the Regional Administrator, Respondent shall [brief description of SEP].

38 b. Respondent shall complete the SEP as follows: [Identify key components of the
39 SEP]. The SEP is more specifically described in the scope of work (hereinafter, the "Scope of
40 Work"), attached hereto as Exhibit A and incorporated herein by reference.

1 *[Note: a milestone schedule may be appropriate if implementation will take*
2 *longer than 6 months].*

3 *[Note: Ensure that the description of the project to be performed is clear,*
4 *complete and specific. Almost all the details of the project should be set forth in*
5 *the CAFO or scope of work; negotiations over the type and scope of the SEP*
6 *must be completed prior to finalization of the CAFO.]*

7 **[If applicable] 12. [New chemical not more toxic than eliminated chemical]**

8 Respondent anticipates that the facility will use **[new chemical]** as a substitute for **[eliminated**
9 **chemical]** in the new systems constituting the SEP. In no event, however, shall any substitute
10 chemical be used in connection with the SEP which is more toxic or hazardous than **[eliminated**
11 **chemical]**, as such characteristics are described on the material safety data sheet (MSDS) for
12 **[new chemical]** attached hereto as Exhibit B.]

13 13. **[Cost of SEP]** The total expenditure for the SEP shall be not less than **[e.g., \$x to**
14 **purchase the equipment and \$y to operate the equipment each year for z years]**, in
15 accordance with the specifications set forth in the Scope of Work. Respondent shall include
16 documentation of the expenditures made in connection with the SEP as part of the SEP
17 Completion Report.

18 14. **[Certifications that SEP is not otherwise required]** Respondent hereby certifies
19 that, as of the date of this Consent Agreement, Respondent is not required to perform or develop
20 the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or
21 develop the SEP by any other agreement, grant or as injunctive relief in this or any other case.
22 Respondent further certifies that it has not received, and is not presently negotiating to receive,
23 credit in any other enforcement action for the SEP.

24 *[Note: This language emphasizes that the SEP is not required by any other law*
25 *(federal, state or local); nor is it required by any other agreement, grant or as*
26 *injunctive relief in the instant or any other case. In addition, the language*
27 *precludes Respondent from attempting to obtain double credit for the same*
28 *project. Also, Respondent cannot be allowed to "bank" projects (i.e., Respondent*
29 *is not to be given credit for projects it has already commenced or completed in*
30 *advance of the enforcement action by EPA.)]*

31 **15. [SEP Reports]**

32 a. **SEP Completion Report** Respondent shall submit a SEP Completion Report to
33 EPA by **[date]**. The SEP (*Completion*) Report shall contain the following information:

- 34 (i) A detailed description of the SEP as implemented;
35 (ii) A description of any operating problems encountered and the solutions thereto;
36 (iii) Itemized costs;
37 (iv) Certification that the SEP has been fully implemented pursuant to the provisions
38 of this Consent Agreement and Order; and
39 (v) A description of the environmental and public health benefits resulting from
40 implementation of the SEP (with a quantification of the benefits and pollutant
41 reductions, if feasible).

1 b. **Periodic Reports** Respondent shall submit any additional reports required by the
2 Scope of Work to EPA in accordance with the schedule and requirements recited therein. (*Note:*
3 *For any SEP where implementation is expected to exceed one year, EPA should require*
4 *submission of periodic reports by Respondent*).

5 c. Respondent agrees that failure to submit the SEP Completion Report or any
6 Periodic Report required by subsections a) and b) above shall be deemed a violation of this
7 Consent Agreement and Order and Respondent shall become liable for stipulated penalties
8 pursuant to paragraph 20 below.

9 d. Respondent shall submit all notices and reports required by this Consent Agreement
10 and Order to **[specify name and address]** by first class mail.

11 e. In itemizing its costs in the SEP completion report, Respondent shall clearly
12 identify and provide acceptable documentation for all eligible SEP costs. Where the SEP
13 completion report includes costs not eligible for SEP credit, those costs must be clearly identified
14 as such. For purposes of this Paragraph, “acceptable documentation” includes invoices,
15 purchase orders, or other documentation that specifically identifies and itemizes the individual
16 costs of the goods and/or services for which payment is being made. Canceled drafts do not
17 constitute acceptable documentation unless such drafts specifically identify and itemize the
18 individual costs of the goods and/or services for which payment is being made.

19 **[If applicable] 16. [EPA right to inspect]** Respondent agrees that EPA may inspect the
20 facility at any time in order to confirm that the SEP is being undertaken in conformity with the
21 representations made herein.

22 *[Note: Consistent with the provisions below for Failure to Complete SEP and*
23 *EPA To Judge Achievement of SEP, this language provides vehicle for EPA to*
24 *exercise its discretion in determining if SEP has been completed satisfactorily and*
25 *whether stipulated penalties should be assessed.]*

26 **[If applicable:] 17. [Respondent must use SEP]** Respondent shall continuously use or
27 operate the systems installed as the SEP for not less than **[number]** year(s) subsequent to
28 installation, and Respondent shall not reinstate the use of **[eliminated chemical]** at any time.

29 **18. [Document retention and certification]** Respondent shall maintain legible copies
30 of documentation of the underlying research and data for any and all documents or reports
31 submitted to EPA pursuant to this Consent Agreement and shall provide the documentation of
32 any such underlying research and data to EPA not more than seven days after a request for such
33 information. In all documents or reports, including, without limitation, any SEP reports,
34 submitted to EPA pursuant to this Consent Agreement, Respondent shall, by its officers, sign and
35 certify under penalty of law that the information contained in such document or report is true,
36 accurate, and not misleading by signing the following statement:

37 I certify under penalty of law that I have examined and am familiar with
38 the information submitted in this document and all attachments and that, based on
39 my inquiry of those individuals immediately responsible for obtaining the
40 information, I believe that the information is true, accurate, and complete. I am

1 aware that there are significant penalties for submitting false information,
2 including the possibility of fines and imprisonment.

3 **19. [EPA acceptance of SEP Report]**

4 a. After receipt of the SEP Completion Report described in paragraph 15.a above,
5 EPA will notify the Respondent, in writing, regarding: i) any deficiencies in the SEP Report itself
6 along with a grant of an additional thirty (30) days for Respondent to correct any deficiencies; or
7 (ii) indicate that EPA concludes that the project has been completed satisfactorily or (iii)
8 determine that the project has not been completed satisfactorily and seek stipulated penalties in
9 accordance with paragraph 20 herein.

10 b. If EPA elects to exercise option (i) above, i.e., if the SEP Report is determined to
11 be deficient but EPA has not yet made a final determination about the adequacy of SEP
12 completion itself, EPA shall permit Respondent the opportunity to object in writing to the
13 notification of deficiency given pursuant to this paragraph within ten (10) days of receipt of such
14 notification. EPA and Respondent shall have an additional thirty (30) days from the receipt by
15 EPA of the notification of objection to reach agreement on changes necessary to the SEP Report.
16 If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall
17 provide a written statement of its decision on adequacy of the completion of the SEP to
18 Respondent, which decision shall be final and binding upon Respondent. Respondent agrees to
19 comply with any requirements imposed by EPA as a result of any failure to comply with the
20 terms of this Consent Agreement and Order. In the event the SEP is not completed as
21 contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by
22 Respondent to EPA in accordance with paragraph 20 herein.

23 **20. [Stipulated Penalties for Failure to Complete SEP/Failure to spend agreed-on**
24 **amount]**

25 a. In the event that Respondent fails to comply with any of the terms or provisions of
26 this Agreement relating to the performance of the SEP described in paragraph 11 above and/or to
27 the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP
28 described in paragraph 13 above, Respondent shall be liable for stipulated penalties according to
29 the provisions set forth below:

30 (i) Except as provided in subparagraph (ii) immediately below, for a SEP which has
31 not been completed satisfactorily pursuant to this Consent Agreement and Order,
32 Respondent shall pay a stipulated penalty to the United States in the amount of \$ [**EPA**
33 **to set a number 75 - 150 percent of the amount by which the settlement penalty was**
34 **mitigated on account of the SEP]**.

35 (ii) If the SEP is not completed in accordance with paragraphs [X-Y], but the
36 Complainant determines that the Respondent: a) made good faith and timely efforts to
37 complete the project; and b) certifies, with supporting documentation, that at least 90
38 percent of the amount of money which was required to be spent was expended on the
39 SEP, Respondent shall not be liable for any stipulated penalty.

40 (iii) If the SEP is completed in accordance with paragraphs [X-Y], but the Respondent
41 spent less than 90 percent of the amount of money required to be spent for the project,
42 Respondent shall pay a stipulated penalty to the United States in the amount of \$ [**10 - 25**

1 **percent of the amount by which the settlement penalty was mitigated on account of**
2 **the SEP].**

3 (iv) If the SEP is completed in accordance with paragraphs [X-Y], and the Respondent
4 spent at least 90 percent of the amount of money required to be spent for the project,
5 Respondent shall not be liable for any stipulated penalty.

6 (v) For failure to submit the SEP Completion Report required by paragraph 15(a)
7 above, Respondent shall pay a stipulated penalty in the amount of \$[amount] for each
8 day after [date in paragraph 15] until the report is submitted.

9 (vi) For failure to submit any other report required by paragraph 15(b) above,
10 Respondent shall pay a stipulated penalty in the amount of \$[amount] for each day after
11 the report was originally due until the report is submitted.

12 b. The determinations of whether the SEP has been satisfactorily completed and
13 whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the
14 sole discretion of EPA.

15 c. Stipulated penalties for subparagraphs (v) and (vi) above shall begin to accrue on
16 the day after performance is due, and shall continue to accrue through the final day of the
17 completion of the activity.

18 d. Respondent shall pay stipulated penalties not more than fifteen (15) days after
19 receipt of written demand by EPA for such penalties. Method of payment shall be in accordance
20 with the provisions of paragraph 9 above. Interest and late charges shall be paid as stated in
21 paragraph 21 herein.

22 e. Nothing in this agreement shall be construed as prohibiting, altering or in any way
23 limiting the ability of EPA to seek any other remedies or sanctions available by virtue of
24 Respondent's violation of this agreement or of the statutes and regulations upon which this
25 agreement is based, or for Respondent's violation of any applicable provision of law.

26 *[Note: Language included for payment of an additional penalty for non-completion of*
27 *SEP or failure to expend amount of funds committed to in Consent Agreement must not*
28 *appear to give EPA a choice between: 1) collection of an additional penalty; or 2)*
29 *additional SEP expenditures by Respondent. Such a provision might appear to give EPA*
30 *control or discretion over the use of penalty dollars. Unlike a SEP, all assessed penalty*
31 *dollars must be deposited in the Treasury.]*

32 **21. Payment Provisions** Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess
33 interest and penalties on debts owed to the United States and a charge to cover the cost of
34 processing and handling a delinquent claim. Interest will therefore begin to accrue on a civil or
35 stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of
36 the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A charge
37 will be assessed to cover the costs of debt collection, including processing and handling costs and
38 attorneys fees. In addition, a non-payment penalty charge of six (6) percent per year compounded
39 annually will be assessed on any portion of the debt which remains delinquent more than ninety
40 (90) days after payment is due. Any such non-payment penalty charge on the debt will accrue
41 from the date the penalty payment becomes due and is not paid. 4 C.F.R. §§ 102.13(d) and (e).

42 *[Note: Penalty and interest provisions and recovery of attorneys fees may vary by*
43 *statute. If appropriate, substitute a statute-specific collection authority in this*

1 *paragraph. The maximum non-payment penalty charge is six (6) percent unless a*
2 *statute specifically provides otherwise.]*

3 **22. [Public statements must acknowledge enforcement action]** Any public statement,
4 oral or written, in print, film, or other media, made by Respondent making reference to the SEP
5 shall include the following language, "This project was undertaken in connection with the
6 settlement of an enforcement action taken by the U.S. Environmental Protection Agency for
7 violations of **[citation to legal requirements violated].**"

8 **23. [No relief from compliance; no endorsement by EPA]** This Consent Agreement
9 and Order shall not relieve Respondent of its obligation to comply with all applicable provisions
10 of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any
11 issue related to any federal, state or local permit, nor shall it be construed to constitute EPA
12 approval of the equipment or technology installed by Respondent in connection with the SEP
13 undertaken pursuant to this Agreement.

14 **24. [Force Majeure--if appropriate and requested by Respondent]**

15 a. If any event occurs which causes or may cause delays in the completion of the
16 SEP as required under this Agreement, Respondent shall notify Complainant in writing not more
17 than 10 days after the delay or Respondent's knowledge of the anticipated delay, whichever is
18 earlier. The notice shall describe in detail the anticipated length of the delay, the precise cause or
19 causes of the delay, the measures taken and to be taken by Respondent to prevent or minimize the
20 delay, and the timetable by which those measures will be implemented. The Respondent shall
21 adopt all reasonable measures to avoid or minimize any such delay. Failure by Respondent to
22 comply with the notice requirements of this paragraph shall render this paragraph void and of no
23 effect as to the particular incident involved and constitute a waiver of the Respondent's right to
24 request an extension of its obligation under this Agreement based on such incident.

25 b. If the parties agree that the delay or anticipated delay in compliance with this
26 Agreement has been or will be caused by circumstances entirely beyond the control of
27 Respondent, the time for performance hereunder may be extended for a period no longer than the
28 delay resulting from such circumstances. In such event, the parties shall stipulate to such
29 extension of time.

30 c. In the event that the EPA does not agree that a delay in achieving compliance with
31 the requirements of this Consent Agreement and Order has been or will be caused by
32 circumstances beyond the control of the Respondent, EPA will notify Respondent in writing of
33 its decision and any delays in the completion of the SEP shall not be excused.

34 d. The burden of proving that any delay is caused by circumstances entirely beyond the
35 control of the Respondent shall rest with the Respondent. Increased costs or expenses associated
36 with the implementation of actions called for by this Agreement shall not, in any event, be a basis
37 for changes in this Agreement or extensions of time under section (b) of this paragraph. Delay in
38 achievement of one interim step shall not necessarily justify or excuse delay in achievement of
39 subsequent steps.

1 25. *[If Respondent has agreed that it will not treat the cost of performing the SEP as a*
2 *business expense to be deducted for purposes of federal taxes, and the tax rate in the PROJECT*
3 *computer model was thus set at zero, include this paragraph. If not, exclude this paragraph.]*

4 Respondent hereby agrees not to claim any funds expended in the performance of the SEP as a
5 deductible business expense for purposes of Federal taxes. In addition, Respondent hereby
6 agrees that, within thirty (30) days of the date it submits its Federal tax reports for the calendar
7 year in which the above-identified SEP is completed, it will submit to EPA **[identify EPA**
8 **official]** certification that any funds expended in the performance of the SEP have not been
9 deducted from Federal taxes.

10
11 26. This Consent Agreement and Order constitutes a settlement by EPA of all claims for
12 civil penalties pursuant to **[cite statute]** for the violations alleged in the Complaint. Nothing in
13 this Consent Agreement and Order is intended to nor shall be construed to operate in any way to
14 resolve any criminal liability of the Respondent. Compliance with this Consent Agreement and
15 Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws
16 and regulations administered by EPA, and it is the responsibility of Respondent to comply with
17 such laws and regulations.

18 27. Each undersigned representative of the parties to this Consent Agreement certifies
19 that he or she is fully authorized by the party represented to enter into the terms and conditions of
20 this Consent Agreement and to execute and legally bind that party to it.

21 28. Each party shall bear its own costs and attorneys fees in connection with the action
22 resolved by this Consent Agreement and Order.

23
24 For Complainant:

For Respondent:

25 _____
26 Director
27 U.S. Environmental Protection
28 Agency, Region ____
29 Date: _____

President, ----- Company

Date: _____

30 _____
31 _____
32 Assistant Regional Counsel
33 Date: _____

_____, Esq.
[Firm Name]
Date: _____

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III. ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Order. The Respondent is hereby ordered to comply with the terms of the above Consent Agreement, effective immediately.

Date: _____

[Regional Administrator or delegatee]
[Title]
U.S. Environmental Protection Agency Region __