STATE OF MICHIGAN
IN THE 30th JUDICIAL CIRCUIT COURT
INGHAM COUNTY

MICHAEL A. COX, Attorney General
for the State of Michigan, and
the MICHIGAN DEPARTMENT
OF ENVIRONMENTAL QUALITY,

Plaintiffs,

CASE NO: 02-267-CE

v

Honorable William E. Collette

BRAZEWAY, INC,

Defendant.

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and Agriculture Division
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CONSENT DECREE

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CONSENT DECREE

The Plaintiffs are Michael A. Cox, Attorney General of the State of Michigan, and the Michigan Department of Environmental Quality (MDEQ).

The Defendant is Brazeway, Inc.

This Consent Decree (Decree) requires ongoing compliance with Section 20107a(1)(a)-(c) of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, MCL 324.20107a, and the Part 201 Rules; performance of interim response activities (IRA); the preparation and performance of a Remedial Investigation (RI), a Feasibility Study (FS), and a Remedial Action Plan (RAP) at the Brazeway Facility in Madison Township, Lenawee County, Michigan (hereafter "Facility"). Defendant agrees not to contest; (a) the authority or jurisdiction of the Court to enter this Decree or (b) any terms or conditions set forth herein. Defendant reserves the right to contest the application of any statutes and rules to the facts presented and the interpretation of this Decree as set forth in Section XVI (Dispute Resolution), except for Paragraph 6.13(a)-(b) of Section VI (Performance of Response Activities) and Section IX (Emergency Response) which are not subject to Dispute Resolution Defendant further reserves the right to contest the validity of any amendments to any statutes and rules in the event that MDEQ determines that any amended statutes or rules are applicable to the Facility pursuant to this Decree.

The entry of this Decree by Defendant is neither an admission or denial of liability with respect to any issue dealt with in this Decree nor an admission or denial of any factual allegations or legal conclusions stated or implied herein.

The Parties agree, and the Court by entering this Decree finds, that the response activities set forth herein are necessary to abate the release or threatened release of hazardous substances

into the environment, to control future releases, and to protect public health, safety, and welfare, and the environment.

NOW, THEREFORE, before the taking of any testimony, and without this Decree constituting an admission of any of the allegations in the Complaint or as evidence of the same, and upon the consent of the Parties, by their attorneys, it is hereby ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

1.1 This Court has jurisdiction over the subject matter of this action pursuant to MCL 324.20137. This Court also has personal jurisdiction over the Defendant. Defendant waives all objections and defenses that it may have with respect to jurisdiction of the Court or to venue in this Circuit.

1.2 The Court determines that the terms and conditions of this Decree are reasonable, adequately resolve the environmental issues raised, and properly protect the interests of the people of the State of Michigan.

1.3 The Court shall retain jurisdiction over the Parties and subject matter of this action to enforce this Decree and to resolve disputes arising under this Decree, including those that may be necessary for its construction, execution, or implementation, subject to Section XVI (Dispute Resolution).

II. PARTIES BOUND

2.1 This Decree shall apply to and be binding upon Plaintiffs and Defendant and their successors and assigns. Any change in the ownership or corporate status or other legal status of the Defendant, including, but not limited to, any transfer of assets or of real or personal property,

shall not in any way alter Defendant's responsibilities under this Decree. Defendant shall provide the MDEQ with written notice prior to the transfer of ownership of part or all of the Facility and shall also provide a copy of this Decree to any subsequent owners or successors prior to the transfer of any ownership rights. Defendant shall comply with the requirements of Section 20116 of the NREPA, and the Part 201 Rules.

2.2 Notwithstanding the terms of any contract that the Defendant may enter with respect to the performance of response activities pursuant to this Decree, the Defendant is responsible for compliance with the terms of this Decree and shall ensure that its contractors, subcontractors, laboratories, and consultants perform all response activities in conformance with the terms and conditions of this Decree.

2.3 The signatories to this Decree certify that they are authorized to execute this Decree and to legally bind the Parties they represent.

III. STATEMENT OF PURPOSE

In entering into this Decree, it is the mutual intent of the Plaintiffs and Defendant to accomplish the following purposes, to the extent they have not previously been accomplished and continue to be in conformance with the performance objectives set forth in Paragraph 6.1: (a) achieve and maintain compliance with Section 20107a(1)(a)-(c) of the NREPA and the Part 201 Rules; (b) perform interim response activities; (c) conduct a Remedial Investigation to determine the nature, extent, and impact of hazardous substances and any threat to the public health, safety, or welfare, or the environment or natural resources caused by the release or threatened release of hazardous substances at the Facility and to support the selection of a remedial action for the Facility; (d) conduct a Feasibility Study to determine and evaluate

alternatives for remedial action to prevent, mitigate, abate, or otherwise respond to or remedy any release or threatened release of hazardous substances at the Facility and to support the Defendant's selection, and the MDEQ's approval of, a Remedial Action Plan; (e) develop and submit to the MDEQ an approvable Remedial Action Plan that complies with Part 201; (f) conduct all work specified in the MDEQ-approved Remedial Action Plan in accordance with its approved implementation schedule; (g) reimburse Plaintiffs for Past and Future Response Activity Costs as described in Section XIV (Reimbursement of Costs); (h) resolve all claims for matters set forth in the Complaint, including but not limited to Plaintiffs' claims for civil fines for alleged violations of Part 31, Water Resources Protection, Part 111, Hazardous Waste Management, and Part 201 of the NREPA, and public nuisance; and (i) minimize litigation.

IV. DEFINITIONS

4.1 "Complaint" means the complaint filed on February 25, 2002 in *Granholm v Brazeway, Inc.*

4.2 "Decree" means this Consent Decree and any attachment hereto, including any future modifications, and any reports, plans, specifications and schedules required by the Consent Decree which, upon approval of the MDEQ, shall be incorporated into and become an enforceable part of this Consent Decree.

4.3 "Defendant" means Brazeway, Inc.

4.4 "Effective Date" means the date that the Court enters this Decree.

4.5 "Facility" means any area of the Property where a hazardous substance, in concentrations that exceed the requirements of Section 20120a(1)(a) or (17) of the NREPA, MCL 324.20120a(1)(a) or (17), and further defined in the Part 201 Rules, or the cleanup criteria for unrestricted residential use under Part 213, Leaking Underground Storage Tanks, of the

NREPA, has been released, deposited, or disposed of, or otherwise comes to be located; and any other area, place, or property where a hazardous substance, in concentrations that exceed these requirements or criteria, has come to be located as a result of the migration of the hazardous substance from the Property.

4.6 "Future Response Activity Costs" means costs lawfully incurred and paid by the State after April 31, 2004 to negotiate this Decree and to oversee, enforce, monitor, and document compliance with this Decree, and to perform response activities required by this Decree, including, but not limited to, costs incurred to: monitor response activities at the Facility; observe and comment on field activities; review and comment on Submissions; collect and analyze samples; evaluate data; purchase equipment and supplies specifically for, and limited to, the performance of monitoring activities pursuant to this Decree; attend and participate in meetings; prepare and review cost reimbursement documentation; and perform response activities pursuant to Paragraph 6.15 (The MDEQ's Performance of Response Activities) and Section IX (Emergency Response).

4.7 "MDEQ" means the Michigan Department of Environmental Quality, its successor entities, and those authorized persons or entities acting on its behalf.

4.8 "O&M Costs" means monitoring, operation and maintenance, oversight, and other costs that are determined by the MDEQ to be necessary to assure the effectiveness and integrity of the remedial action as set forth in an MDEQ-approved RAP.

4.9 "Part 201" means Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.20101 *et seq*, MSA 13A.20101 *et seq* and the Part 201 Administrative Rules.

4.10 "Part 201 Rules" means the administrative rules promulgated under Part 201.

4.11 "Party" means the Plaintiffs or Defendant. "Parties" means the Plaintiffs and Defendant.

4.12 "Past Response Activity Costs" means response activity costs that the State incurred and paid prior to April 30, 2004 and the costs incurred by GeoForensics prior to April 30, 2004, that have not been paid relating to the Brazeway Facility.

4.13 "Plaintiffs" means Michael A. Cox, Attorney General, of the State of Michigan, and the MDEQ, their successor entities, and those authorized persons or entities acting on their behalf.

4.14 "Property" means the property located at 2711 Maumee Road, Madison Township, Lenawee County, Michigan.

4.15 "Remedial Action Plan" or "RAP" means a plan for the Facility that satisfies the requirements of Part 201, including, but not limited to, Sections 20118, 20120a, 20120b, and 20120d of the NREPA; and the Part 201 Rules.

4.16 "Remedial Investigation" or "RI" means an evaluation to determine the nature, extent, and impact of a release or threat of release and the collection of data necessary to conduct a feasibility study of alternate response activities or to conduct a remedial action at a facility.

4.17 "RRD" means the Remediation and Redevelopment Division of the MDEQ and its successor entities.

4.18 "State" or "State of Michigan" means the Michigan Department of Attorney General (MDAG) and the MDEQ, and any authorized representatives acting on their behalf.

4.19 "Submissions" means all plans, reports, schedules, and other submittals that Defendant is required to provide to the State or the MDEQ pursuant to this Decree.

"Submissions" does not include the notifications set forth in Section X (Delays in Performance, Violations, and *Force Majeure*).

4.20 Unless otherwise stated herein, all other terms used in this Decree, which are defined in Part 3, Definitions, of the NREPA, MCL 324.301; Part 201; or the Part 201 Rules, shall have the same meaning in this Decree as in Parts 3 and 201 and the Part 201 Rules. Unless otherwise specified in this Decree, "day" means a calendar day.

V. COMPLIANCE WITH STATE AND FEDERAL LAWS

5.1 All actions required to be taken pursuant to this Decree shall be undertaken in accordance with the requirements of all applicable or relevant and appropriate state and federal laws, rules, and regulations, including, but not limited to, Part 201, the Part 201 Rules, and laws relating to occupational safety and health. Other agencies may also be called upon to review the performance of response activities under this Decree.

5.2 This Decree does not obviate the Defendant's obligations to obtain and maintain compliance with permits.

VI. PERFORMANCE OF RESPONSE ACTIVITIES

6.1 Performance Objectives

Defendant shall perform all necessary response activities at the Facility to comply with the requirements of Part 201, including Section 20114(g) and the response activities required to meet the performance objectives outlined in this Decree.

(a) To the extent that Defendant is the owner of part or all of the Facility, Defendant shall achieve and maintain compliance with Section 20107a(1)(a)- (c) of the NREPA and the Part 201 Rules.

(b) Defendant shall perform IRA. The performance objectives of the IRA are to:

(i) Provide documentation to demonstrate that all the relevant factors of the Part 201 Rules have been addressed.

(c) Defendant shall conduct a RI. The performance objectives of the RI are to:

(i) Assess Facility conditions, in order to select an appropriate remedial action that adequately addresses those conditions, by identifying the source or sources of any contamination and defining the nature and extent of contamination, in compliance with the requirements of the Part 201 Rules.

(d) Defendant shall perform a FS. The performance objectives of the FS are to:

(i) Provide information and comparisons in compliance with the Part 201 Rules that contribute to an effective remedy selection.

(e) Defendant shall perform a remedial action as specified in an MDEQ-approved RAP. The performance objectives of the remedial action in the MDEQ-approved RAP are to:

(i) Meet and maintain compliance with the applicable cleanup criteria as established under Section 20120a(1)(a)-(j) or 20120a(2), and Section 20120a(15) and (17) of the NREPA, and further defined in the Part 201 Rules.

(ii) Comply with all applicable requirements of Sections 20118, 20120a, 20120b, and 20120d of the NREPA and the Part 201 Rules.

(iii) Assure the ongoing effectiveness and integrity of the remedial action specified in an MDEQ-approved RAP.

(iv) Allow for the continued use of the Facility consistent with local zoning pursuant to Section 20120a(6) of the NREPA.

6.2 In accordance with this Decree, Defendant shall assure that all work plans for conducting response activities are designed to achieve the performance objectives identified in

Paragraph 6.1(b) through (e). Defendant shall develop each work plan and perform the response activities contained in each MDEQ-approved work plan in accordance with the requirements of Part 201 and this Decree. Upon MDEQ approval, each component of each work plan and any approved modifications shall be deemed incorporated into this Decree and made an enforceable part of this Decree. If there is a conflict between the requirements of this Decree and any MDEQ-approved work plan, the requirements of this Decree shall prevail.

6.3 Quality Assurance Project Plan (QAPP)

Within thirty (30) days of the Effective Date of this Decree, Defendant shall submit to the MDEQ for review and approval a QAPP, which describes the quality control, quality assurance, sampling protocol and chain of custody procedures that will be used in carrying out the tasks required by this Decree. The QAPP shall be developed in accordance with the United States Environmental Protection Agency's (USEPA's) "EPA Requirements for Quality Assurance Project Plans," EPA QA/R-5, March 2001; "Guidance for Quality Assurance Project Plans," EPA QA/G-5, December 2002; and American National Standard ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs." Defendant shall utilize recommended sampling methods, analytical methods, and analytical detection levels specified in "Operational Memo No. 6, Analytical Method Detection Level Guidance for Environmental Contamination Response Activities under Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended" (Revision 6, January 2001 and May 5, 2003 Addendum for Vinyl Chloride). Defendant shall utilize the MDEQ 2002 Sampling Strategies and Statistics Training Materials for Part 201 Cleanup Criteria (S^3TM) to determine the number of samples required to verify the cleanup and to determine sampling strategy.

Defendant shall comply with the above documents or documents that supercede or amend these documents, subject to Section XVI (Dispute Resolution), and may utilize other methods demonstrated by the Defendant to be appropriate as approved by the MDEQ.

6.4 Health and Safety Plan (HASP)

Within thirty (30) days of the Effective Date of this Decree, Defendant shall submit to the MDEQ a HASP that is developed in accordance with the standards promulgated pursuant to the National Contingency Plan, 40 CFR 300.150; the Occupational Safety and Health Act of 1970, 29 CFR 1910.120; and the Michigan Occupational Safety and Health Act, 1974 PA 154, as amended, MCL 408.1001 *et seq*. Response activities performed by Defendant pursuant to this Decree shall be in accordance with the HASP. The HASP is not subject to the MDEQ's approval under Section XIII (Submissions and Approvals) of this Decree.

6.5 Documentation of Compliance with Section 20107a of the NREPA

To the extent that Defendant owns a part or all of the Facility, Defendant shall maintain and upon the MDEQ's request, submit documentation to the MDEQ for review and approval that summarizes the actions Defendant has taken or is taking to comply with Section 20107a(1)(a)-(c) of the NREPA and the related Part 201 Rules. Failure of Defendant to comply with the requirements of this paragraph, Section 20107a of the NREPA, and the Part 201 Rules shall constitute a violation of this Decree and shall be subject to the provisions of Section XV (Stipulated Penalties) of this Decree.

6.6 Interim Response Activities (IRA)

(a) Within sixty (60) days of the Effective Date of this Decree and throughout the duration of this Decree, Defendant shall continue to evaluate the appropriateness of IRA based on the relevant factors set forth in Part 201 and undertake IRA if required by Part 201. The

evaluation and compliance with IRA requirements of Part 201 shall be documented and provided to MDEQ in the Progress Reports submitted pursuant to Paragraph 6.14.

(b) After review of the documentation provided, if the MDEQ determines that IRA are required for compliance with Part 201, then MDEQ shall state in writing the specific reasons for such determination. MDEQ's determination may be disputed in accordance with Section XVI (Dispute Resolution) Defendant shall submit to the MDEQ, for review and approval, a work plan for IRA within sixty (60) days of the notice or need for IRA is determined. The work plan shall provide for the following:

(i) A detailed description of the specific work tasks that will be conducted pursuant to the work plan and a description of how these work tasks will meet the performance objectives described in Paragraph 6.1(b). The factors specified in the Part 201 Rules shall be addressed in the work plan, if relevant to the Facility.

(ii) A description of how the proposed IRA will be consistent with the remedial action that is anticipated to be selected for the Facility in an MDEQ-approved RAP.

(iii) Implementation schedules for conducting the response activities and for submission of progress reports and an IRA report.

(iv) A plan for obtaining access to any properties not owned or controlled by Defendant that is needed to perform the response activities contained in the work plan.

(v) A description of the nature and amount of waste materials expected to be generated during the performance of response activities and the name and location of the facilities Defendant proposes to use for the off-site transfer, storage, and treatment or disposal of those waste materials.

(vi) A description of how soil relocation will be in compliance with Section 20120c of the NREPA and the Part 201 Rules.

(c) Within thirty (30) days of receiving the MDEQ's approval of the IRA work plan, Defendant shall perform the response activities contained in the plan and submit progress reports and an IRA report in accordance with the approved implementation schedule.

6.7 Remedial Investigation (RI)

(a) Defendant has been conducting a RI in cooperation with the MDEQ prior to the Effective Date and as of the Effective Date, is continuing to do so. Within one hundred eighty (180) days of the Effective Date, Defendant shall submit to the MDEQ, for review and approval, a RI Report that meets the requirements of R299.5528 and incorporates the pathway and risk analysis found in rule R299.5532 (7) of the Part 201 Rules.

6.8 Feasibility Study (FS)

(a) Within sixty (60) days after the MDEQ's approval of the RI report, Defendant shall submit to the MDEQ, for review and approval, a work plan for conducting a FS. The work plan shall provide for the following:

(i) A detailed description of the specific work tasks that will be conducted pursuant to the work plan and a description of how these work tasks will meet the performance objectives described in Paragraph 6.1(d). The factors specified in the Part 201 Rules shall be addressed in the development of the work plan.

(ii) Implementation schedules for conducting the response activities and for submission of a FS report.

(iii) A plan for obtaining access to any properties not owned or controlled by Defendant that is needed to perform the response activities contained in the FS.

(b) Within sixty (60) days of receiving the MDEQ's approval of the FS work plan, Defendant shall initiate performance of the response activities contained in the plan and submit an FS report in accordance with the approved implementation schedule.

6.9 Remedial Action Plan

(a) Within one hundred eighty (180) days of receiving MDEQ approval of the FS report, Defendant shall submit a RAP to the MDEQ for review and approval. The RAP shall provide for the following:

(i) All components required by Sections 20118, 20120a, 20120b, and 20120d of the NREPA; and the Part 201 Rules.

(ii) A detailed description of the specific work tasks to be conducted pursuant to the RAP, a description of how these work tasks will meet the performance objectives described in Paragraph 6.1(e), and a description and supporting documentation of how the results of the RI, or other response activities that have been performed at the Facility, support the selection of the remedial action contained in the RAP.

(iii) Implementation schedules for conducting the response activities identified in the RAP and for submission of progress reports.

(iv) A plan for obtaining access to any properties not owned or controlled by Defendant that is needed to perform the response activities contained in the RAP. If the remedial action provided for in the RAP relies on the cleanup criteria established under Section 20120a(1)(b)-(j) or (2) of the NREPA, and further defined in the Part 201 Rules, and that RAP provides for land and resource use restrictions, monitoring, operation and maintenance, or permanent markers as prescribed by Section 20120b(3)(a)-(d) of the NREPA, the RAP shall include documentation from property owners, easement holders, or local units of government

that the necessary access to these properties has been or will be obtained and that any proposed land or resource use restrictions can or will be placed or enacted.

(v) A description of the nature and amount of waste materials expected to be generated during the performance of response activities and the name and location of the facilities Defendant propose to use for the off-site transfer, storage, and treatment or disposal of those waste materials.

(vi) A description of how soil relocation will be in compliance with Section 20120c of the NREPA and the Part 201 Rules.

(vii) Identification of the conditions, including the performance standards which may be used to define construction completion (if applicable); and voidance or nullification of the MDEQ's approval of the RAP.

(viii) The Parties stipulate, for purposes of this Decree, that the releases of hazardous substances that occurred prior to the April 30, 2004 were not grossly negligent or intentional as set forth in Section 20118(5). The RAP to be submitted by the Defendant may rely upon the provisions of Section 20118(5) of the NREPA, provided that the RAP complies with Section 20118(6) and is protective of public health, safety, and welfare and the environment.

(ix) As set forth above, the RAP shall be in compliance with Part 201. Any decision concerning the necessity of source removal shall be made based upon the criteria and objectives of Part 201. As of the Effective Date of this Decree no such determination has been made by either Party.

(b) Within thirty (30) days of receiving the MDEQ's approval of the RAP, Defendant shall initiate performance of the RAP activities in accordance with the MDEQ-approved implementation schedule and submit progress reports in accordance with the MDEQ-approved

RAP. All technical and administrative requirements submitted to the MDEQ, which in combination constitute an MDEQ-approved RAP, shall become incorporated into this Decree, and become an enforceable part of this Decree. The technical and administrative components of an MDEQ-approved RAP may include, but are not limited to, the following:

(i) Notices of Approved Environmental Remediation (NAERs)

If the remedial action provided for in the MDEQ-approved RAP relies on the cleanup criteria established under Section 20120a(1)(b)-(e) of the NREPA, and further defined in the Part 201 Rules, Defendant shall file for recording, or cause to be filed for recording, any NAERs required by Section 20120b(2) of the NREPA and the RAP, with the Lenawee County Register of Deeds within twenty-one (21) days after the MDEQ's approval of the RAP or within twenty-one (21) days after completion of construction of the remedial action provided for in the RAP, as appropriate to the circumstances. The NAER shall comply with the applicable requirements of Part 201. The form and content of the NAER must be approved by the MDEQ. Defendant shall provide documentation acceptable to the MDEQ that demonstrates that the twenty-one (21) day statutory time frame for recording the NAER was met (e.g., a date-stamped receipt from the Register of Deeds Office). Such documentation shall be submitted to the MDEQ within seven (7) days of the date the NAER was delivered to the Lenawee County Register of Deeds for recording. Defendant shall also provide a true copy of the recorded NAER and the liber and page numbers to the MDEQ within ten (10) days of Defendant's receipt of a copy from the Register of Deeds.

(ii) Restrictive Covenants

If the remedial action provided for in the MDEQ-approved RAP relies on the cleanup criteria established under Section 20120a(1)(f)-(j) or (2) of the NREPA, and further

defined in the Part 201 Rules, and the RAP requires the placement of restrictive covenants, Defendant shall file for recording, or cause to be filed for recording, the appropriate restrictive covenants required by the RAP with the Lenawee County Register of Deeds within twenty-one (21) days after MDEQ's approval of the RAP or within twenty-one (21) days after completion of construction of the remedial action provided for in the RAP, as appropriate to the circumstances. The restrictive covenants shall comply with applicable requirements of Part 201. The form and content of the restrictive covenants must be approved by the MDEQ. Defendant shall provide documentation acceptable to the MDEQ that demonstrates that the twenty-one (21) day statutory time frame for recording the restrictive covenants was met (e.g., a date-stamped receipt from the Register of Deeds Office). Such documentation shall be submitted to the MDEQ within seven (7) days of the date the restrictive covenants were delivered to the Lenawee County Register of Deeds for recording. Defendant shall also provide a true copy of the recorded restrictive covenants and the liber and page numbers to the MDEQ within ten (10) days of Defendant's receipt of a copy from the Register of Deeds.

(iii) Institutional Controls

If the remedial action provided for in the MDEQ-approved RAP relies on the cleanup criteria established under Section 20120a(1)(f)-(j) or (2) of the NREPA, and further defined in the Part 201 Rules, and the RAP relies upon the enactment of institutional controls, the institutional controls shall be enacted within thirty (30) days of the MDEQ's approval of the RAP. Institutional controls shall comply with applicable requirements of Part 201. Defendant shall provide documentation to the MDEQ that such institutional controls have been enacted within seven (7) days of enactment.

(iv) Land Use Restrictions

If the remedial action provided for in the MDEQ-approved RAP relies on the cleanup criteria established under Section 20120a(1)(b)- (j) or (2) of the NREPA, and further defined in the Part 201 Rules, and the RAP relies upon land use restrictions, within thirty (30) days of the MDEQ's approval of the RAP, Defendant shall provide notice of the land use restrictions to the zoning authority of the local unit of government within which the Facility is located. Land use restrictions shall comply with applicable requirements of Part 201.

(v) Financial Assurance

If the remedial action provided for in the MDEQ-approved RAP relies on the cleanup criteria established under Section 20120a(1)(f)-(j) or (2) of the NREPA, and further defined in the Part 201 Rules, and financial assurance is a necessary component of that RAP, Defendant shall establish and maintain a financial assurance mechanism (FAM) that will assure Defendant's ability to pay for monitoring, operation and maintenance, oversight, and other costs (collectively referred to as "O&M Costs") that are determined by the MDEQ to be necessary to assure the effectiveness and integrity of the remedial action as set forth in an MDEQ-approved RAP. The cost of activities covered by the FAM shall be documented on the basis of an annual estimate of maximum costs for the activity as if they were to be conducted by a person under contract to the state, not based on whether the activities were being conducted by employees of the Defendant. The proposed FAM shall be submitted to the MDEQ as part of the RAP pursuant to Paragraph 6.9(a) and shall be in an amount sufficient to cover O&M Costs at the Facility for a thirty (30)-year period. If a FAM is a component of the MDEQ-approved RAP, every five (5) years after the MDEQ's initial approval of the FAM, Defendant shall provide to the MDEQ an update of the thirty (30)- year O&M Costs estimate. The updated cost estimate shall include

documentation of O&M Costs for the previous five-year period and be signed by an authorized representative of Defendant who shall confirm the validity of the data. Defendant shall revise the amount of funds secured by the FAM in accordance with that updated five (5)-year cost estimate unless otherwise directed by the MDEQ. If, at any time, the MDEQ determines that the FAM does not adequately secure sufficient funds, Defendant shall capitalize or revise the existing FAM or establish a new FAM acceptable to the MDEQ. After a FAM has been established, if Defendant can demonstrate that the FAM provides funds in excess of those needed to cover O&M Costs for the Facility, Defendant may submit a request to the MDEQ to reduce the amount of funds secured by the FAM. Defendant shall maintain the FAM in perpetuity or until Defendant can demonstrate to the MDEQ that such FAM is no longer necessary to protect the public health, safety, or welfare, or environment, and is no longer necessary to assure the effectiveness and integrity of the remedial action as set forth in the MDEQ-approved RAP. Any modification of a FAM will be considered to be a modification of a RAP, and any such modifications must be made in accordance with Section XXII (Modifications).

(c) Defendant shall notify the MDEQ within ten (10) days of construction completion of a remedial action in an MDEQ-approved RAP that relies on the cleanup criteria established under Section 20120a(1)(b)- (j) of the NREPA, and further defined in the Part 201 Rules.

6.10 Venting Groundwater Discharge Authorization

(a) In the event that groundwater surface water interface (GSI) becomes applicable to the Facility and the RAP relies upon mixing zone-based GSI criteria, upon MDEQ's approval of the RAP the discharge of those hazardous substances identified in the RAP for which mixing zone-based GSI criteria have been developed by the MDEQ will be authorized pursuant to Section 20120a(15). At no time, does this Decree authorize the discharge of:

(i) hazardous substances in excess of the mixing zone-based GSI criteria established in the MDEQ-approved RAP;

(ii) hazardous substances that were not specified in the MDEQ-approved RAP and this Decree; or

(iii) hazardous substances in excess of the applicable criteria developed pursuant to Part 201 for which mixing zone-based GSI criteria are not provided in the MDEQ-approved RAP.

In the event the MDEQ-approved RAP is nullified pursuant to Paragraph 6.13(b)(ii) of this Decree and the nullification is based upon the groundwater discharge authorization no longer being protective of public health, safety, or welfare, or the environment, the Defendant shall, within thirty (30) days of acquiring knowledge of such nullification, provide to the MDEQ a request for a revised mixing zone determination and reauthorization of the venting groundwater discharge.

(b) At least one hundred eighty (180) days prior to the five (5)-year anniversary of the MDEQ's approval of the RAP, Defendant shall submit to the MDEQ for review and approval a GSI Report. Defendant shall submit subsequent GSI Reports every five (5) years thereafter until authorization of a discharge to the waters of the state is no longer required. The GSI Report shall provide all information and data concerning the discharge of contaminated groundwater venting from the Facility to the surface water that is necessary to assess Defendant's ongoing compliance with Part 201.

(c) The GSI Report shall, at a minimum, include the following information:

(i) Identity of the Facility and the MDEQ reference number of this Decree.

(ii) The name of the receiving surface water body and the location of the venting groundwater contaminant plume. This information should be provided in narrative form, which includes a quarter-quarter section description, and in map form.

(iii) The location, nature, and chemical characteristics of the past and ongoing source(s) of hazardous substances in the groundwater contaminant plume, including a description of whether the source has been removed or is still present. If the source is still present, identify the type, concentration, and mobility of these hazardous substances.

(iv) A summary of all GSI monitoring data and information collected over the previous five years. The summary shall include: (1) the Chemical Abstract Service (CAS) Number for each hazardous substance; (2) the worst case maximum concentrations of the hazardous substances in the groundwater contaminant plume at the GSI; (3) the identification of all hazardous substances that are non-aqueous phase liquids (light and dense), if present; (4) documentation of any changes in the groundwater contaminant plume's volume or concentrations of hazardous substances; and (5) the concentrations of the hazardous substances in the source area if hazardous substances from the source have not yet reached the groundwater, but are expected to do so. This information shall be provided in narrative and tabular form, and in map form that includes both a plan view showing groundwater concentration contours of the hazardous substances and a cross-sectional view, including the GSI.

(v) An analysis of the groundwater contaminant plume's general chemistry parameters, including, but not limited to, the major cations and anions, ammonia, chemical and biological oxygen demand, chlorides and phosphorus.

(vi) The discharge rate in cubic feet per second of the groundwater contaminant plume. The discharge rate of the groundwater contaminant plume shall be

calculated using that portion of the groundwater contaminant plume which is or may become contaminated above the generic GSI criteria.

(vii) The location of any other groundwater contaminant plumes entering the same surface water body in the vicinity of the Facility and their constituents and concentrations, if available.

(viii) Any other information required by the MDEQ at the time of the GSI report.

(ix) A certification statement and signature of an appropriate person. The certification statement shall be: "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this report and all attachments thereto and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information."

(d) The MDEQ shall review the GSI Report and determine if the discharge complies with the mixing zone-based GSI criteria applicable at the time the GSI Report is submitted. In the event the MDEQ determines that the discharge complies with the then- current applicable mixing zone-based GSI criteria, the authorization to discharge pursuant to Section 20120a(15) of the NREPA shall be reauthorized for a period of five (5) years subject to the conditions specified in Paragraph 6.10(a), and the MDEQ shall so notify Defendant.

In the event the MDEQ determines that the discharge does not comply with the then-current applicable mixing zone-based GSI criteria, the MDEQ approval of the RAP shall be immediately and automatically nullified in accordance with Paragraph 6.13(b) of this Decree and the MDEQ shall so notify Defendant.

6.11 Modification of a Response Activity Work Plan

(a) If the MDEQ determines that a modification to a response activity is necessary to meet and maintain the applicable performance objectives specified in Paragraph 6.1, to comply with Part 201, or to meet any other requirement of this Decree, the MDEQ may require that such modification be conducted under this Decree. If necessary, the MDEQ may require Defendant to develop and submit a new response activity work plan or amend an existing response activity work plan . Defendant may request that the MDEQ consider a modification to a response activity by submitting such request for modification along with the proposed change in the response activity and the justification for that change to the MDEQ for review and approval. Any such request for modification by Defendant must be forwarded to the MDEQ at least thirty (30) days prior to the date that the performance of any affected response activity is due. Any modifications shall be developed in accordance with the applicable requirements of this section and shall be submitted to the MDEQ for review and approval in accordance with the procedures set forth in Section XIII (Submissions and Approvals). Any MDEQ determinations pursuant to this Paragraph 6.11 shall be subject to dispute resolution in accordance with Section XVI (Dispute Resolution).

(b) Upon receipt of the MDEQ's determination under Paragraph 6.11(a), Defendant shall perform the response activities specified in the MDEQ's determination in accordance with an MDEQ-approved implementation schedule.

6.12 Public Notice and Public Meeting Requirements under Section 20120d of the NREPA

If the MDEQ determines there is significant public interest in the results of an RI, proposed FS, or proposed RAP required by this Decree; if Defendant proposes a RAP pursuant to Section 20120a(1)(f)-(j) or (2) of the NREPA; or if Section 20118(5) or (6) of the NREPA applies to the proposed RAP, the MDEQ will make those reports or plans available for public comment. When the MDEQ determines that the RI report, proposed FS, or proposed RAP is acceptable for public review, a public notice regarding the availability of those reports or plans will be published and those reports or plans shall be made available for review and comment for a period of not less than thirty (30) days. The dates and length of the public comment period shall be established by the MDEQ. If the MDEQ determines there is significant public interest or the MDEQ receives a request for a public meeting, the MDEQ will hold such public meeting in accordance with Section 20120d(1) and (3) of the NREPA. Following the public review and comment period or a public meeting, the MDEQ may refer the RI report, proposed FS, or proposed RAP back to Defendant for revision to address public comments and the MDEQ's comments. The MDEQ will prepare the final responsiveness summary document that explains the reasons for the selection or approval of a RAP in accordance with the provisions of Section 20120d(5) and (6) of the NREPA. Upon the MDEQ's request, Defendant shall provide information to the MDEQ for the final responsiveness summary document or Defendant shall prepare portions of the draft responsiveness summary document.

6.13 Voidance and Nullification of the MDEQ's Approval of a RAP

(a) If the remedial action provided for in the MDEQ-approved RAP relies on the cleanup criteria established under Section 20120a(1)(f)-(j) or (2) of the NREPA, and further

defined in the Part 201 Rules, and a lapse occurs, or Defendant does not comply, with the provisions of Section 20120b(3) of the NREPA as provided for in this Decree or an MDEQ-approved RAP or other requirements specified below, the MDEQ's approval of the RAP is void from the time of the lapse or violation until the lapse or violation is corrected in accordance with Paragraph 6.13(c) and to the satisfaction of the MDEQ. Provisions and requirements addressed by this Paragraph include:

(i) Required land use or resource use restrictions, including, but not limited to, the following:

(1) A court of competent jurisdiction determines that a land use or resource use restriction is unlawful;

(2) A land use or resource use restriction is not filed or enacted in accordance with this Decree or the MDEQ-approved RAP;

(3) A land use or resource use restriction is violated or is not enforced by the controlling entity; or

(4) A land use or resource use restriction expires or is modified or revoked without MDEQ's approval.

(ii) Monitoring

(iii) Operation and Maintenance

(iv) Permanent markers

(v) Financial assurance

(b) The MDEQ's approval of the RAP shall be nullified until the lapse or violation is corrected to the satisfaction of the MDEQ if any of the following occur:

(i) If unknown conditions that existed at the Facility when the RAP was implemented are discovered and such conditions result in the remedial action no longer being protective of the public health, safety, or welfare, or the environment;

(ii) Failure of the remedial action or response activity to comply with the applicable cleanup criteria and conditions, including the MDEQ-approved RAP performance standards, or this Decree;

(iii) Failure to maintain a reliable mechanism for ongoing compliance with Section 20120b(3)(a)-(e) of the NREPA or to comply with this Decree; or

(iv) The MDEQ determines that the RAP is not effective or reliable because the remedial action or response activity repeatedly fails, notwithstanding repeated cures within ninety (90) days of discovery of the failure by either Defendant or the MDEQ.

(c) Within thirty (30) days of Defendant becoming aware of a lapse or violation under Paragraph 6.13(a) or (b), Defendant shall provide to the MDEQ a written notification of such lapse or violation. This notification shall include a description of the nature of the lapse or violation, an evaluation of the impact or potential impact of the lapse or violation on the effectiveness and integrity of the RAP, and one of the following:

(i) If Defendant has corrected the lapse or violation, a written demonstration of how and when Defendants corrected the lapse or violation.

(ii) If Defendant has not yet corrected the lapse or violation, a work plan and implementation schedule for addressing the lapse or violation.

(iii) If Defendant believes it will not be able to correct the lapse or violation without modifying the MDEQ-approved RAP, an action plan and implementation schedule

outlining the response activities Defendant will take to comply with Part 201 to assure that the Facility does not pose a threat to public health, safety, or welfare, or the environment.

The action plan and implementation schedule identified in 6.13(c)(iii) shall provide for the development of any response activity work plans and associated implementation schedules that are necessary to assure protection of public health, safety, and welfare, and the environment, including work plans for interim response activities, an RI to provide additional information to support the selection and approval of an alternate RAP, and an approvable alternate RAP that meets the performance objectives specified in Paragraph 6.1 and that complies with Part 201. Defendant shall develop those response activity work plans pursuant to the requirements specified in this Decree and shall submit those plans in accordance with the schedule established in an MDEQ-approved action plan. The MDEQ will review and approve any plans submitted pursuant to this section in accordance with the procedures set forth in Section XIII (Submissions and Approvals). Upon receipt of the MDEQ's approval, Defendant shall perform the response activities in accordance with the MDEQ-approved work plans.

(d) If Defendant does not comply with all of the requirements of Paragraph 6.13(c), or do not comply with the provisions of Section XIII (Submissions and Approvals), and independent of the statutory consequences of nullification of the MDEQ's approval of a RAP pursuant to Part 201, stipulated penalties as specified in Paragraph 15.2 shall begin to accrue the day the lapse or violation under Paragraph 6.13(a) or (b) occurred and continue to accrue until the lapse or violation is corrected to the satisfaction of the MDEQ.

6.14 Progress Reports

(a) Defendant shall provide to the MDEQ Project Coordinator written progress reports regarding response activities and other matters at the Facility related to the implementation of this Decree. These progress reports shall include the following:

(i) A description of the activities that have been taken toward achieving compliance with this Decree during the specified reporting period.

(ii) All results of sampling and tests and other data that relate to the response activities performed pursuant to this Decree received by Defendant, its employees or authorized representatives, during the specified reporting period.

(iii) The status of any access issues that have arisen, which affect or may affect the performance of response activities, and a description of how Defendant proposes to resolve those issues and the schedule for resolving the issues.

(iv) A description of the nature and amount of waste materials that were generated and the name and location of the facilities that were used for the off-site transfer, storage, and treatment or disposal of those waste materials.

(v) A description of data collection and other activities scheduled for the next reporting period.

(vi) Any other relevant information regarding other activities or matters at the Facility that affect or may affect the implementation of the requirements of this Decree, including but not limited to, documentation that the factors specified in Part 201 for IRA have been evaluated and complied with.

(b) The first progress report shall be submitted to the MDEQ within forty five (45) days following the Effective Date of this Decree. Thereafter, progress reports shall be submitted

quarterly unless otherwise specified in the MDEQ-approved work plans. Pursuant to Paragraph 6.11, either the MDEQ may modify the schedule or Defendant may request modification of the schedule for the submittal of progress reports contained in an MDEQ-approved work plan.

6.15 The MDEQ's Performance of Response Activities

If Defendant ceases to perform the response activities required by this Decree, is not performing response activities in accordance with this Decree, or is performing response activities in a manner that causes or may cause an endangerment to human health or the environment, the MDEQ may, at its option and upon providing thirty (30) days prior written notice to Defendant, take over the performance of those response activities. The MDEQ, however, is not required to provide thirty (30) days written notice prior to performing response activities that the MDEQ determines are necessary pursuant to Section IX (Emergency Response). If the MDEQ finds it necessary to take over the performance of response activities that Defendant is obligated to perform under this Decree, Defendant shall reimburse the State for its costs to perform these response activities, including any accrued interest. Interest, at the rate specified in Section 20126a(3) of the NREPA, shall begin to accrue on the State's costs on the day the State begins to incur costs for those response activities. Costs incurred by the State to perform response activities pursuant to this paragraph shall be considered to be "Future Response Activity Costs" and Defendant shall provide reimbursement of these costs and any accrued interest to the State in accordance with Paragraphs 14.3, 14.5, and 14.6 of Section XIV (Reimbursement of Costs.)

VII. ACCESS

7.1 Upon the Effective Date of this Decree, Defendant shall allow the MDEQ and its authorized employees, agents, representatives, contractors and consultants to enter the Facility

and associated properties at all reasonable times to the extent access to the Facility and any associated properties are owned, controlled by, or available to Defendant. Upon presentation of proper credentials and upon making a reasonable effort to contact the person in charge of the Facility, MDEQ and its authorized employees, agents, representatives, contractors, and consultants shall be allowed to enter the Facility and associated properties for the purpose of conducting any activity to which access is required for the implementation of this Decree or to otherwise fulfill any responsibility under state or federal laws with respect to the Facility, including, but not limited to the following:

(a) Monitoring response activities or any other activities taking place pursuant to this Decree at the Facility;

(b) Verifying any data or information submitted to the MDEQ;

(c) Assessing the need for, or planning, or conducting investigations relating to the Facility;

(d) Obtaining samples;

(e) Assessing the need for, or planning, or conducting, response activities at or near the Facility;

(f) Assessing compliance with requirements for the performance of monitoring, operation and maintenance, or other measures necessary to assure the effectiveness and integrity of a remedial action;

(g) Inspecting and copying non-privileged records, operating logs, contracts or other documents;

(h) Communicating with Defendant's Project Coordinator or other personnel, representatives, or consultants for the purpose of assessing compliance with this Decree;

(i) Determining whether the Facility or other property is being used in a manner that is or may need to be prohibited or restricted pursuant to this Decree; and

(j) Assuring the protection of public health, safety, and welfare, and the environment.

7.2 To the extent that the Facility, or any other property where the response activities are to be performed by Defendant under this Decree, is owned or controlled by persons other than Defendant, Defendant shall use its best efforts to secure from such persons written access agreements for the Parties and their authorized employees, agents, representatives, contractors and consultants. Defendant shall provide the MDEQ with a copy of each written access agreement secured pursuant to this section. For purposes of this paragraph, "best efforts" includes, but is not limited to, providing reasonable consideration acceptable to the owner or taking judicial action to secure such access. If judicial action is required to obtain access, Defendant shall provide documentation to the MDEQ that such judicial action has been filed in a court of appropriate jurisdiction no later than sixty (60) days after Defendant's receipt of the MDEQ's approval of the work plan for which such access is needed. If Defendant has not been able to obtain access within sixty (60) days after filing judicial action, Defendant shall promptly notify the MDEQ of the status of its efforts to obtain access and shall describe how any delay in obtaining access may affect the performance of response activities for which the access is needed. Any delay in obtaining access shall not be an excuse for delaying the performance of response activities, unless the State determines that the delay was caused by a *Force Majeure* event pursuant to Section X (Delays in Performance, Violations, and *Force Majeure*). To the extent Defendant is subject to the requirements of Section 20114 of the NREPA, Defendant's failure to secure access or petition the court within one (1) year of having reason to believe that access to another person's property is necessary to comply with Section 20114 of the NREPA,

subjects the Defendant to both stipulated penalties pursuant to Paragraph 15.3 of Section XV (Stipulated Penalties) and civil penalties under Part 201.

7.3 Any lease, purchase, contract or other agreement entered into by Defendant, that transfers to another person a right of control over the Facility or a portion of the Facility, shall contain a provision preserving for the MDEQ or any other person undertaking the response activities, and their authorized representatives, the access provided under this section and Section XI (Record Retention/Access to Information).

7.4 Any person granted access to the Facility pursuant to this Decree shall comply with all applicable health and safety laws and regulations.

VIII. SAMPLING AND ANALYSIS

8.1 All sampling and analysis conducted pursuant to this Decree shall be in accordance with the QAPP specified in Paragraph 6.3 and the MDEQ-approved work plans.

8.2 Defendant, or its consultants or subcontractors, shall provide the MDEQ ten (10)-day notice prior to any sampling activity to be conducted pursuant to this Decree to allow the MDEQ Project Coordinator, or his or her authorized representative, the opportunity to take split or duplicate samples or to observe the sampling procedures. In circumstances where a ten (10)-day notice is not possible, Defendant, or its consultants or subcontractors, shall provide notice of the planned sampling activity as soon as possible to the MDEQ Project Coordinator and explain why earlier notification was not possible. If the MDEQ Project Coordinator concurs with the explanation provided, Defendant may forego the ten (10)-day notification period for that particular sampling event.

8.3 Defendant shall provide the MDEQ with the results of all environmental sampling and other analytical data generated in the performance or monitoring of any requirement under

this Decree, Part 201 of the NREPA, or other relevant authorities. These results shall be included in the progress reports set forth in Paragraph 6.14.

8.4 For the purpose of quality assurance monitoring, Defendant shall assure that the MDEQ and its authorized representatives are allowed access to any laboratory used by Defendant in implementing this Decree.

IX. EMERGENCY RESPONSE

9.1 If during the course of Defendant performing response activities conducted pursuant to this Decree, an act or the occurrence of an event causes a release or threat of release of a hazardous substance at or from the Facility, or causes exacerbation of existing contamination at the Facility, and the release, threat of release, or exacerbation poses or threatens to pose an imminent and substantial endangerment to public health, safety, or welfare or the environment, Defendant shall immediately undertake all appropriate actions to prevent, abate or minimize such release, threat of release, or exacerbation; and shall immediately notify the MDEQ Project Coordinator. In the event of the MDEQ Project Coordinator's unavailability, Defendant shall notify the Pollution Emergency Alerting System (PEAS) at 1-800-292-4706. In such an event, any actions taken by Defendant shall be in accordance with all applicable health and safety laws and regulations and with the provisions of the HASP referenced in Paragraph 6.4.

9.2 Within ten (10) days of notifying the MDEQ of such an act or event, Defendant shall submit a written report setting forth a description of the act or event that occurred and the measures taken or to be taken to mitigate any release, threat of release, or exacerbation caused or threatened by the act or event and to prevent recurrence of such an act or event. Regardless of whether Defendant notifies the MDEQ under this section, if an act or event causes a release,

threat of release, or exacerbation, and the release, threat of release, or exacerbation poses or threatens to pose an imminent and substantial endangerment to public health, safety, or welfare or the environment, the MDEQ may: (a) require Defendant to stop response activities at the Facility for such period of time as may be needed to prevent or abate any such release, threat of release, or exacerbation; (b) require Defendant to undertake any actions that the MDEQ determines are necessary to prevent or abate any such release, threat of release, or exacerbation; or (c) undertake any actions that the MDEQ determines are necessary to prevent or abate such release, threat of release, or exacerbation. This section is not subject to the dispute resolution procedures set forth in Section XVI (Dispute Resolution).

X. DELAYS IN PERFORMANCE, VIOLATIONS, AND *FORCE MAJEURE*

10.1 If either (a) an event occurs that causes or may cause a delay in the performance of any obligation under this Decree, whether or not such delay is caused by a *Force Majeure* event, or (b) a delay in performance or other violation occurs due to Defendant's failure to comply with this Decree, Defendant shall do the following:

(i) Notify the MDEQ by telephone or telefax within five (5) business days of discovering the event or violation; and

(ii) Within ten (10) days of providing the five (5)business day notice, provide a written notification and a plan of action, with supporting documentation, to the MDEQ, which includes the following:

(1) A description of the event, delay in performance, or violation and the anticipated length and precise causes of the delay, potential delay, or violation.

(2) The specific obligations of this Decree that may be or have been affected by the delay in performance or violation.

(3) The measures Defendant has taken or proposes to take to avoid, minimize or mitigate the delay in performance or the effect of the delay, or to cure the violation, and an implementation schedule for performing those measures.

(4) If Defendant intends to assert a claim of *Force Majeure*, Defendant's rationale for attributing a delay or potential delay to a *Force Majeure* event.

(5) Whether Defendant is requesting an extension for the performance of any of its obligations under this Decree and, if so, the specific obligations for which it is seeking such an extension, the length of the requested extension, and its rationale for needing the extension.

(6) A statement as to whether, in the opinion of Defendant, the event, delay in performance, or violation may cause or contribute to an endangerment to public health, safety, or welfare, or the environment and how the measures taken or to be taken to address the event, delay in performance or violation will avoid, minimize, or mitigate such endangerment.

10.2 For the purposes of this Decree, a "*Force Majeure*" event is defined as any event arising from causes beyond the control of and without the fault of Defendant, of any person controlled by Defendant, or of Defendant's contractors, that delays or prevents the performance of any obligation under this Decree despite Defendant's "best efforts to fulfill the obligation." The requirement that Defendant exercise "best efforts to fulfill the obligation" includes Defendant using best efforts to anticipate any potential *Force Majeure* event and to address the effects of any potential *Force Majeure* event during and after the occurrence of the event, such that Defendant minimize any delays in the performance of any obligation under this Decree to

the greatest extent possible. A *Force Majeure* event does not include, among other things, unanticipated or increased costs, changed financial circumstances, labor disputes, or failure to obtain a permit or license as a result of Defendant's acts or omissions.

10.3 Defendant shall perform the requirements of this Decree within the time limits established herein, unless performance is prevented or delayed by events that constitute a "*Force Majeure.*" Defendant shall not be deemed to be in violation of this Decree if the State agrees that a delay in performance is attributable to a *Force Majeure* event pursuant to Paragraph 10.4(a) or if Defendant's position prevails at the conclusion of a dispute resolution proceeding between the Parties regarding an alleged *Force Majeure* event. If Defendant otherwise fails to comply with or violate any requirement of this Decree and such noncompliance or violation is not attributable to a *Force Majeure* event, Defendant shall be subject to the stipulated penalties set forth in Section XV (Stipulated Penalties).

10.4 The State will provide written approval, approval with modifications, or disapproval of Defendant's written notification under Paragraph 10.1 and will notify Defendant as follows:

(a) If the State agrees with Defendant's assertion that a delay or potential delay in performance is attributable to a *Force Majeure* event, the MDEQ's written approval or approval with modifications, will include the length of the extension, if any, for the performance of specific obligations under this Decree that are affected by the *Force Majeure* event and for which Defendant is seeking an extension, and any modifications to the plan of action submitted pursuant to Paragraph 10.1. An extension of the schedule for performance of a specific obligation affected by a *Force Majeure* event shall not, by itself, extend the schedule for performance of any other obligation.

(b) If the State does not agree with Defendant's assertion that a delay or anticipated delay in performance has been or will be caused by a *Force Majeure* event, the State will notify Defendant of its decision. If Defendant disagrees with the State's decision, Defendant may initiate the dispute resolution process specified in Section XVI (Dispute Resolution) of this Decree. In any such proceeding, Defendant shall have the burden of demonstrating by the preponderance of the evidence that; (i) the delay or anticipated delay in performance has been or will be caused by a *Force Majeure* event; (ii) the duration of the delay or of any extension sought by Defendant was or will be warranted under the circumstances; (iii) Defendant exercised its best efforts to fulfill the obligation; and (iv) Defendant has complied with all requirements of this section.

(c) If Defendant's notification pertains to a delay in performance or other violation that has occurred because of its failure to comply with the requirements of this Decree, Defendant shall undertake those measures determined to be necessary and appropriate by the MDEQ to address the delay in performance or violation, including the modification of a response activity work plan, and shall pay stipulated penalties upon receipt of the MDEQ's demand for payment as set forth in Section XV (Stipulated Penalties). Penalties shall accrue as provided in Section XV (Stipulated Penalties) regardless of when the MDEQ notifies Defendant or when Defendant notifies the MDEQ of a violation.

10.5 This Decree shall be modified as set forth in Section XXII (Modifications) to reflect any modifications to the implementation schedule in the applicable response activity work plan that are made pursuant to Paragraph 10.4 or that are made pursuant to the resolution of a dispute between the Parties under Section XVI (Dispute Resolution).

10.6 Defendant's failure to comply with the applicable notice requirements of Paragraph 10.1 shall render this section void and of no force and effect with respect to an assertion of *Force Majeure* by Defendant; however, the State may waive these notice requirements in its sole discretion and in appropriate circumstances. The State will provide written notice to Defendant of any such waiver.

10.7 Defendant's failure to notify the MDEQ as required by Paragraph 10.1 constitutes an independent violation of this Decree and shall subject Defendant to stipulated penalties as set forth in Section XV (Stipulated Penalties).

XI. RECORD RETENTION/ACCESS TO INFORMATION

11.1 Defendant shall preserve and retain, during the pendency of this Decree and for a period of five (5) years after completion of operation and maintenance and long-term monitoring at the Facility, all records, sampling and test results, charts, and other documents relating to the release or threatened release of hazardous substances and the storage, generation, disposal, treatment and handling of hazardous substances at the Facility, and any other records that are maintained or generated pursuant to any requirement of this Decree, including records that are maintained or generated by representatives, consultants, or contractors of Defendants. However, if Defendant chooses to perform a remedial action from an MDEQ-approved RAP that relies on the cleanup criteria established under Section 20120a(1)(f)-(j) or (2) of the NREPA, and further defined in the Part 201 Rules, and the RAP provides for land use or resource use restrictions, Defendant shall retain any records pertaining to these land use or resource use restrictions until the MDEQ determines that land use and resource use restrictions are no longer needed. After the five (5) -year period of document retention following completion of operation and maintenance and long-term monitoring at the Facility, Defendant may seek the MDEQ's written permission to

destroy any documents that are not required to be held in perpetuity. In the alternative, Defendant may make a written commitment, with the MDEQ's approval, to continue to preserve and retain the documents for a specified period of time, or Defendant may offer to relinquish custody of all documents to the MDEQ. In any event, Defendant shall obtain the MDEQ's written permission prior to the destruction of any documents. Defendant's request shall be accompanied by a copy of this Decree and sent to the address listed in Section XII (Project Coordinators and Communications/Notices) or to such other address as may subsequently be designated in writing by the MDEQ.

11.2 Upon request, Defendant shall provide to the MDEQ copies of all non-privileged documents and information within its possession, or within the possession or control of its employees, contractors, agents or representatives, relating to the performance of response activities or other requirements of this Decree, including, but not limited to, records regarding the collection and analysis of samples, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing forms, or other correspondence, documents, or information related to response activities. Upon request, Defendant also shall make available to the MDEQ, upon reasonable notice, Defendant's employees, contractors, agents or representatives with knowledge of relevant facts concerning the performance of response activities.

11.3 If Defendant submits documents or information to the MDEQ that Defendant believes are entitled to protection as provided for in Section 20117(10) of the NREPA, Defendant may designate in that submittal the documents or information to which it believes are entitled to such protection. If no such designation accompanies the information when it is submitted to the MDEQ, the information may be made available to the public by the MDEQ

without further notice to Defendant. Information described in Section 20117(11)(a)-(h) of the NREPA shall not be claimed as confidential or privileged by Defendant. Information or data generated under this Decree shall not be subject to Part 148, Environmental Audit Privilege and Immunity, of the NREPA, MCL 324.14801 *et seq.*

XII. PROJECT COORDINATORS AND COMMUNICATIONS/NOTICES

12.1 Each Party shall designate one or more Project Coordinators. Whenever notices, progress reports, information on the collection and analysis of samples, sampling data, work plan submittals, approvals, or disapprovals, or other technical submissions are required to be forwarded by one Party to the other Party under this Decree, or whenever other communications between the Parties is needed, such communications shall be directed to the designated Project Coordinator at the address listed below. If any Party changes its designated Project Coordinator, the name, address and telephone number of the successor shall be provided to the other Party, in writing, as soon as practicable.

A. As to the MDEQ:

(1) For all matters pertaining to this Decree, except those specified in Paragraphs 12.1 A.(2), (3) and (4) below:

Vicki Katko, Project Coordinator
Jackson District
Remediation and Redevelopment Division
Michigan Department of Environmental Quality
301 E. Louis Glick Highway
Jackson, Michigan 49201
Telephone: (517) 780-7 914
Fax: (517) 780-7855
E-mail address: katkov@michigan.gov

This Project Coordinator will have primary responsibility for the MDEQ for overseeing the performance of response activities at the Facility and other requirements specified in this Decree.

(2) For all matters specified in this Decree that are to be directed to the RRD Chief:

Chief, Remediation and Redevelopment Division
Michigan Department of Environmental Quality
P.O. Box 30426
Lansing, MI 48909-7926
Telephone: 517-335-1104
Fax: 517-373-2637

Via courier
Chief, Remediation and Redevelopment Division
Michigan Department of Environmental Quality
Constitution Hall, 4th Floor, South Tower,
525 West Allegan Street
Lansing, MI 48933-2125

A copy of all correspondence that is sent to the Chief of the RRD shall also be provided to the MDEQ Project Coordinator designated in Paragraph 12.1A(1).

(3) For providing a true copy of a recorded NAER, a restrictive covenant, and documentation that an institutional control has been enacted pursuant to Section VI (Performance of Response Activities); for Record Retention pursuant to Section XI (Record Retention/Access to Information); and for questions concerning financial matters pursuant to Section VI (Performance of Response Activities), including financial assurance mechanisms associated with a RAP, Section XIV (Reimbursement of Costs), and Section XV (Stipulated Penalties):

Chief, Compliance and Enforcement Section
Remediation and Redevelopment Division
Michigan Department of Environmental Quality
P.O. Box 30426
Lansing, MI 48909-7926
Telephone: (517)373-7818
Fax: 517-373-2637

Via courier
Chief, Compliance and Enforcement Section
Remediation and Redevelopment Division
Michigan Department of Environmental Quality
Constitution Hall, 4th Floor, South Tower,
525 West Allegan Street
Lansing, MI 48933-2125

A copy of all correspondence that is sent to the Chief of the Compliance and Enforcement Section, RRD, shall also be provided to the MDEQ Project Coordinator designated in Paragraph 12.1A(1).

(4) For all payments pursuant to Section XIV (Reimbursement of Costs) and Section XV (Stipulated Penalties):

Revenue Control Unit
Financial and Business Services Division
Michigan Department of Environmental Quality
P.O. Box 30657
Lansing, MI 48909-8157

Via courier:
Revenue Control Unit
Financial and Business Services Division
Michigan Department of Environmental Quality
Constitution Hall, 5th Floor, South Tower
525 West Allegan Street
Lansing, MI 48933-2125

To ensure proper credit, all payments made pursuant to this Decree must reference the Brazeway Facility, the Court Case No. 02-000267-CE and the RRD Account Number RRD2190.

A copy of all correspondence that is sent to the Revenue Control Unit shall also be provided to the MDEQ Project Coordinator designated in Paragraph 12.1A(1), the Chief of the Compliance and Enforcement Section designated in Paragraph 12.1A(3), and the Assistant Attorney General in Charge designated in Paragraph 12.1B.

B. As to the MDAG:

Assistant Attorney General in Charge
Environment, Natural Resources, and Agriculture Division
Michigan Department of Attorney General
G. Mennen Williams Bldg, 6th Floor
525 West Ottawa Street
P.O. Box 30755
Lansing, MI 48909
Telephone: 517-373-7540
Fax: 517-373-1610

C. As to Defendant:

Michael B. Adams
Vice President and CQO
Brazeway, Inc.
2711 Maumee Street (or P.O. Box 7491)
Adrian, MI 49221
Telephone: (517) 265-2121
Fax: (517) 263-6416
E-mail address: madams@brazeway.com

12.2 Defendant's Project Coordinator shall have primary responsibility for overseeing the performance of the response activities at the Facility and other requirements specified in this Decree for Defendant.

12.3 The MDEQ may designate other authorized representatives, employees, contractors, and consultants to observe and monitor the progress of any activity undertaken pursuant to this Decree.

XIII. SUBMISSIONS AND APPROVALS

13.1 All Submissions required by this Decree shall comply with all applicable laws and regulations and the requirements of this Decree and shall be delivered to the MDEQ in accordance with the schedule set forth in this Decree. All Submissions delivered to the MDEQ pursuant to this Decree shall include a reference to the Brazeway Facility and the Court Case Number 02-000267-CE. All Submissions delivered to the MDEQ for approval shall also be marked "Draft" and shall include, in a prominent location in the document, the following disclaimer: "Disclaimer: This document is a DRAFT document that has not received approval from the Michigan Department of Environmental Quality (MDEQ). This document was prepared pursuant to a court order. The opinions, findings, and conclusions expressed are those of the authors and not those of the MDEQ."

13.2 With the exception of the submittal of a RAP, after receipt of any Submission relating to response activities that is required to be submitted for approval pursuant to this Decree, the MDEQ District Supervisor will in writing: (a) approve the Submission; (b) approve the Submission with modifications; or (c) disapprove the Submission and notify Defendant of the deficiencies in the Submission. Upon receipt of a notice of approval or approval with modifications from the MDEQ, Defendant shall proceed to take the actions and perform the response activities required by the Submission, as approved or as modified, and shall submit a new cover page and any modified pages of the Submission marked "Approved."

13.3 Upon receipt of a notice of disapproval from the MDEQ pursuant to Paragraph 13.2(c), Defendant shall correct the deficiencies and provide the revised Submission to the MDEQ for review and approval within thirty (30) days, unless the notice of disapproval specifies a longer time period for resubmission. Unless otherwise stated in the MDEQ's notice of disapproval, Defendant shall proceed to take the actions and perform the response activities not directly related to the deficient portion of the Submission. Any stipulated penalties applicable to the delivery of the Submission shall accrue during the thirty (30)-day period or other time period specified for Defendant to provide the revised Submission, but shall not be payable unless the resubmission is also disapproved. The MDEQ will review the revised Submission in accordance with the procedure set forth in Paragraph 13.2. If the MDEQ disapproves a revised Submission, the MDEQ will so advise Defendant and, as set forth above, stipulated penalties shall accrue from the date of the MDEQ's disapproval of the original Submission and continue to accrue until Defendant delivers an approvable Submission.

13.4 Within six (6) months of receipt of a RAP, the RRD Chief will make a decision regarding the RAP and will in writing: (a) approve the RAP; (b) reject the RAP as insufficient if

the RAP lacks any information necessary or required by the MDEQ to make a decision regarding RAP approval; or (c) deny approval of the RAP. The time period for a decision regarding the submitted RAP may be extended by the mutual consent of the Parties. Upon receipt of a notice of approval from the MDEQ, Defendant shall proceed to take the actions and perform the response activities required by the MDEQ-approved RAP and shall submit a new cover page marked "Approved."

13.5 Within sixty (60) days of receipt of a rejection or denial of approval of a RAP from the MDEQ pursuant to 13.4(b) or (c), Defendant shall submit the revised RAP to the MDEQ for review and approval. The time period for resubmission may be extended by the MDEQ. If the MDEQ does not approve the RAP upon resubmission, the MDEQ will so advise Defendant. Any stipulated penalties applicable to the delivery of the RAP shall accrue during the thirty (30) -day period or other time period specified for Defendant to submit another RAP, but shall not be payable unless the revised RAP is also rejected or approval is denied. The MDEQ will review the revised RAP in accordance with the procedure stated in Paragraph 13.4. If the MDEQ rejects or denies a revised RAP, the MDEQ will so advise Defendant and, as set forth above, stipulated penalties shall accrue from the date of the MDEQ's disapproval of the original RAP Submission and continue to accrue until Defendant delivers an approvable RAP.

13.6 If any initial Submission, including a RAP, contains significant deficiencies such that the Submission is not in the judgment of the MDEQ a good faith effort by Defendant to deliver an acceptable Submission that complies with Part 201 and this Decree, the MDEQ will notify Defendant of such and will deem Defendant to be in violation of this Decree. Stipulated penalties, as set forth in Section XV (Stipulated Penalties), shall begin to accrue on the day after the Submission was due and continue to accrue until an approvable Submission is provided to

the MDEQ. Any other delay in the delivery of a Submission, noncompliance with a Submission or attachment to this Decree; or failure to cure a deficiency of a Submission in accordance with Paragraphs 13.3 or 13.5 shall subject Defendant to penalties pursuant to Section XV (Stipulated Penalties) or other remedies available to the State pursuant to this Decree.

13.7 Upon approval by the MDEQ, any Submission and attachments to Submissions required by this Decree shall be considered part of this Decree and are enforceable pursuant to the terms of this Decree. If there is a conflict between the requirements of this Decree and any Submission or an attachment to a Submission, the requirements of this Decree shall prevail.

13.8 An approval or approval with modifications of a Submission shall not be construed to mean that the MDEQ concurs with any of the conclusions, methods, or statements in the Submission or warrants that the Submission comports with law.

13.9 Informal advice, guidance, suggestions or comments by the MDEQ regarding any Submission provided by Defendants shall not be construed as relieving Defendant of its obligation to obtain any formal approval required under this Decree.

XIV. REIMBURSEMENT OF COSTS

14.1 Defendant shall pay the MDEQ One Million Two Hundred Thousand Dollars ($1,200,000.00) to resolve all State claims for Past Response Activity Costs relating to matters covered in this Decree. Payment shall be made in four quarterly payments of $300,000.00. The first payment shall be due within thirty (30) days of the Effective Date of this Decree. The second, third and fourth payments shall each be due three (3) calendar months after the due date of the prior payment. Interest is not payable on payments to be made pursuant to this Paragraph 14.1, except to the extent interest is accrued pursuant to Paragraph 14.5.

14.2 Defendant shall reimburse the State for all Future Response Activity Costs incurred by the State. As soon as possible after each anniversary of the Effective Date of this Decree, the MDEQ will provide Defendant with a written demand for payment of Future Response Activity Costs that have been lawfully incurred by the State. Any such demand will set forth, with reasonable specificity, the nature of the costs incurred. Except as provided by Section XVI (Dispute Resolution), Defendant shall reimburse the MDEQ for such costs within thirty (30) days of Defendant's receipt of a written demand from the MDEQ.

14.3 Defendant shall have the right to request a full and complete accounting of all MDEQ demands made hereunder, including time sheets, travel vouchers, contracts, invoices, and payment vouchers as may be available to the MDEQ. The MDEQ's provision of these documents to Defendant may result in the MDEQ incurring additional Future Response Activity Costs, which will be included in the annual demand for payment of Future Response Activity Costs.

14.4 All payments made pursuant to this Decree shall be by certified check, made payable to the "State of Michigan - Environmental Response Fund," and shall be sent by first class mail to the Revenue Control Unit at the address listed in Paragraph 12.1A(4) of Section XII (Project Coordinators and Communications/Notices). The Brazeway Facility, the Court Case No. 02-000267-CE, and the RRD Account Number RRD2190 shall be designated on each check. A copy of the transmittal letter and the check shall be provided simultaneously to the MDEQ Project Coordinator at the address listed in Paragraph 12.1A(1), the Chief of the Compliance and Enforcement Section, RRD, at the address listed in Paragraph 12.1A(3), and the Assistant Attorney General in Charge at the address listed in Paragraph 12.1B. Costs recovered pursuant to this section and payment of stipulated penalties pursuant to Section XV (Stipulated Penalties),

shall be deposited into the Environmental Response Fund in accordance with the provisions of Section 20108(3) of the NREPA.

14.5 If Defendant fails to make full payment to the MDEQ for Past Response Activity Costs or Future Response Activity Costs as specified in Paragraphs 14.1 and 14.2, interest, at the rate specified in Section 20126a(3) of the NREPA, shall begin to accrue on the unpaid balance on the day after payment was due until the date upon which Defendant makes full payment of those costs and the accrued interest to the MDEQ. In any challenge by Defendant to an MDEQ demand for reimbursement of costs, Defendant shall have the burden of establishing that the MDEQ did not lawfully incur those costs in accordance with Section 20126a(1)(a) of the NREPA.

XV. STIPULATED PENALTIES

15.1 Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 15.2 and 15.3 for failure to comply with the requirements of this Decree, unless excused under Section X (Delays in Performance, Violations, and *Force Majeure*). "Failure to Comply" by Defendant shall include failure to complete Submissions and notifications as required by this Order, failure to perform response activities in accordance with MDEQ-approved plans and this Decree, and failure to pay response activity costs and penalties in accordance with all applicable requirements of law and this Decree within the specified implementation schedules established by or approved under this Decree.

15.2 The following stipulated penalties shall accrue per violation per day for any violation of Section VI (Performance of Response Activities):

Penalty Per Violation Per Day	Period of Noncompliance
$300	1st through 30th day
$1000	31st day and beyond

15.3 Except as provided in Paragraph 15.2 and Section X (Delays in Performance, Violations, and *Force Majeure*) and Section XVI (Dispute Resolution), if Defendant fails or refuses to comply with any other term or condition of this Decree, Defendant shall pay the MDEQ stipulated penalties of $250 a day for each and every failure or refusal to comply.

15.4 All penalties shall begin to accrue on the day after performance of an activity was due or the day a violation occurs, and shall continue to accrue through the final day of completion of performance of the activity or correction of the violation. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Decree.

15.5 Except as provided in Section XVI (Dispute Resolution), Defendant shall pay stipulated penalties owed to the State no later than thirty (30) days after Defendant's receipt of a written demand from the State. Payment shall be made in the manner set forth in Paragraph 14.4 of Section XIV (Reimbursement of Costs). Interest, at the rate provided for in Section 20126a(3) of NREPA, shall begin to accrue on the unpaid balance at the end of the thirty (30)- day period on the day after payment was due until the date upon which Defendant makes full payment of those stipulated penalties and the accrued interest to the MDEQ. Failure to pay the stipulated penalties within thirty (30) days after receipt of a written demand constitutes a further violation of the terms and conditions of this Decree.

15.6 The payment of stipulated penalties shall not alter in any way Defendant's obligation to perform the response activities required by this Decree.

15.7 If Defendant fails to pay stipulated penalties when due, the State may institute proceedings to collect the penalties, as well as any accrued interest. However, the assessment of stipulated penalties is not the State's exclusive remedy if Defendant violates this Decree. For any failure or refusal of Defendants to comply with the requirements of this Decree, the State also

reserves the right to pursue any other remedies to which it is entitled under this Decree or any applicable law including, but not limited to, seeking civil penalties, injunctive relief, the specific performance of response activities, reimbursement of costs, exemplary damages pursuant to Section 20119(4) of the NREPA in the amount of three (3) times the costs incurred by the State as a result of Defendants' violation of or failure to comply with this Decree, and sanctions for contempt of court.

15.8 Notwithstanding any other provision of this section, the State may waive, in its unreviewable discretion, any portion of stipulated penalties and interest that has accrued pursuant to this Decree.

XVI. DISPUTE RESOLUTION

16.1 Unless otherwise expressly provided for in this Decree, the dispute resolution procedures of this section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Decree, except for Paragraph 6.13(a)-(b) (Voidance and Nullification of the MDEQ's Approval of a RAP) of Section VI (Performance of Response Activities) and Section IX (Emergency Response), which are not disputable. However, the procedures set forth in this section shall not apply to actions by the State to enforce any of Defendant's obligations that have not been disputed in accordance with this section. Engagement of dispute resolution under this section shall not be cause for Defendant to delay the performance of any response activity required under this Decree.

16.2 The State shall maintain an administrative record of any disputes initiated pursuant to this section. The administrative record shall include the information Defendant provides to the State under Paragraphs 16.3 through 16.5 and any documents the MDEQ and the State rely on to make the decisions set forth in Paragraphs 16.3 through 16.5. Defendant shall

have the right to request that the administrative record be supplemented with other material involving matters in dispute pursuant to MCL 324.20137(5).

16.3 Except for undisputable matters identified in Paragraph 16.1 and disputes related to the RAP, any dispute that arises under this Decree with respect to the MDEQ's disapproval, modification, or other decision concerning requirements of Section VI (Performance of Response Activities), Section VIII (Sampling and Analysis), Section X (Delays in Performance, Violations, and *Force* Majeure), Section XI (Record Retention/Access to Information) or Section XIII (Submissions and Approvals), shall in the first instance be the subject of informal negotiations between the Project Coordinators representing the MDEQ and the Defendant. A dispute shall be considered to have arisen on the date that a Party to this Decree receives a written Notice of Dispute from the other Party. The Notice of Dispute shall state the issues in dispute; the relevant facts upon which the dispute is based; factual data, analysis, or opinion supporting the Party's position; and supporting documentation upon which the Party bases its position. The period of informal negotiations shall not exceed ten (10) days from the date a Party receives a Notice of Dispute, unless the time period for negotiations is modified by written agreement between the Parties. If the Parties do not reach an agreement within ten (10) days or within the agreed-upon time period, the RRD District Supervisor will thereafter provide the MDEQ's Interim Statement of Decision, in writing, to Defendants. In the absence of initiation of formal dispute resolution by Defendant under Paragraph 16.4, the MDEQ's position as set forth in the MDEQ's Interim Statement of Decision shall be binding on the Parties.

16.4 If Defendants and the MDEQ cannot informally resolve a dispute under Paragraph 16.3 or if the dispute involves a RAP, Defendant may initiate formal dispute resolution by submitting a written Request for Review to the RRD Chief, with a copy to the

MDEQ Project Coordinator, requesting a review of the disputed issues. This Request for Review must be submitted within ten (10) days of Defendant's receipt of the MDEQ's Interim Statement of Decision issued by the MDEQ pursuant to Paragraph 16.3. If the dispute is in regard to a RAP, either Party may initiate formal dispute resolution by filing a Request for Review with the other Party. The Request for Review shall state the issues in dispute; the relevant facts upon which the dispute is based; factual data, analysis, or opinion supporting the Party's position; and supporting documentation upon which the Party bases its position. When the MDEQ issues a Request for Review, the Defendant will have twenty (20) days to submit a written rebuttal to the RRD Chief, with copy to the MDEQ Project Coordinator. Within twenty (20) days of the RRD Chief's receipt of Defendant's Request for Review or Defendant's rebuttal, the RRD Chief will provide the MDEQ's Statement of Decision, in writing, to Defendant, which will include a statement of his/her understanding of the issues in dispute; the relevant facts upon which the dispute is based; factual data, analysis, or opinion supporting her/his position; and supporting documentation he/she relied upon in making the decision. The time period for the RRD Chief's review of the Request for Review may be extended by written agreement between the Parties. The MDEQ's Statement of Decision shall be binding on the Parties.

16.5 If Defendant seeks to challenge any decision or notice issued by the MDEQ or the State under Section VII (Access), Section XIV (Reimbursement of Costs), Section XV (Stipulated Penalties), Section XVII (Indemnification and Insurance), Section XVIII (Covenants Not to Sue by Plaintiffs), or Section XIX (Reservation of Rights by Plaintiffs), of this Decree, Defendant shall send a written Notice of Dispute to both the RRD Chief and the Assistant Attorney General assigned to this matter within ten (10) days of Defendant's receipt of the decision or notice from the MDEQ or the State. The Notice of Dispute shall include all relevant

facts that provide the basis for the dispute; factual data, analysis, or opinion supporting its position; and supporting documentation upon which Defendant bases its position. The Parties shall have fourteen (14) days from the date of the State's receipt of the Notice of Dispute to reach an agreement. If the Parties do not reach an agreement on any dispute within the fourteen (14)-day period, the State will thereafter issue, in writing, the State's Statement of Decision to Defendant, which shall be binding on the Parties.

16.6 The MDEQ Statement of Decision or the State's Statement of Decision pursuant to Paragraph 16.4 or 16.5, respectively, shall control unless, within twenty (20) days after Defendant's receipt of one of the Decisions, Defendant files with this Court a motion for resolution of the dispute. The motion shall set forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to insure orderly implementation of this Decree. Within thirty (30) days of Defendant's filing of a motion asking the Court to resolve a dispute, Plaintiffs will file with the Court the administrative record that is maintained pursuant to Paragraph 16.2.

16.7 Any judicial review of the MDEQ Statement of Decision or the State's Statement of Decision shall be limited to the administrative record. In proceedings on any dispute relating to the selection, extent, or adequacy of any aspect of the response activities that are the subject of this Decree, Defendant shall have the burden of demonstrating on the administrative record that the position of the MDEQ is arbitrary and capricious or otherwise not in accordance with law. In proceedings on any dispute, Defendant shall bear the burden of persuasion on factual issues under the applicable standards of review. Nothing herein shall prevent Plaintiffs from arguing that the Court should apply the arbitrary and capricious standard of review to any dispute under this Decree.

16.8 Notwithstanding the invocation of a dispute resolution proceeding, stipulated penalties shall accrue from the first day of Defendant's failure or refusal to comply with any term or condition of this Decree, but payment shall be stayed pending resolution of the dispute. In the event, and to the extent that Defendants do not prevail on the disputed matters, the MDEQ may demand payment of stipulated penalties and Defendant shall pay stipulated penalties as set forth in Paragraph 15.5 of Section XV (Stipulated Penalties). Defendant shall not be assessed stipulated penalties for disputes that are resolved in their favor.

16.9 Notwithstanding the provisions of this section and in accordance with Section XIV (Reimbursement of Costs) and Section XV (Stipulated Penalties), Defendant shall pay to the MDEQ that portion of a demand for reimbursement of costs or for payment of stipulated penalties that is not the subject of an on-going dispute resolution proceeding.

XVII. INDEMNIFICATION AND INSURANCE

17.1 The State of Michigan does not assume any liability by entering into this Decree. This Decree shall not be construed to be an indemnity by the State for the benefit of Defendant or any other person.

17.2 Defendant shall indemnify and hold harmless the State of Michigan and its departments, agencies, officials, agents, employees, contractors and representatives for any claims or causes of action that arise from, or on account of, acts or omissions of Defendant, its officers, employees, agents, or any other person acting on its behalf or under its control, in performing the activities required by this Decree.

17.3 Defendant shall indemnify and hold harmless the State of Michigan and its departments, agencies, officials, agents, employees, contractors and representatives for any claims or causes of action for damages or reimbursement from the State that arise from, or on

account of, any contract, agreement, or arrangement between Defendant and any person for the performance of response activities at the Facility, including any claims on account of construction delays.

17.4 The State shall provide Defendant notice of any claim for which the State intends to seek indemnification pursuant to Paragraphs 17.2 or 17.3.

17.5 Neither the State of Michigan nor any of its departments, agencies, officials, agents, employees, contractors or representatives shall be held out as a party to any contract that is entered into by or on behalf of Defendant for the performance of activities required by this Decree. Neither Defendant nor any contractor shall be considered an agent of the State.

17.6 Defendant waives all claims or causes of action against the State of Michigan and its departments, agencies, officials, agents, employees, contractors, and representatives for damages, reimbursement, or set-off of any payments made or to be made to the State, that arise from, or on account of, any contract, agreement or arrangement between Defendant and any other person for the performance of response activities at the Facility, including any claims on account of construction delays.

17.7 Prior to commencing any response activities pursuant to this Decree and for the duration of this Decree, Defendant shall secure and maintain comprehensive general liability insurance with limits of One Million Dollars ($1,000,000.00), combined single limit, which names the MDEQ, the MDAG, and the State of Michigan as additional insured parties. If Defendant demonstrates by evidence satisfactory to the MDEQ that any contractor or subcontractor maintains insurance equivalent to that described above, then with respect to that contractor or subcontractor, Defendant needs to provide only that portion, if any, of the insurance described above that is not maintained by the contractor or subcontractor. Regardless of the

insurance method used by Defendant, and prior to the commencement of response activities pursuant to this Decree, Defendant shall provide the MDEQ Project Coordinator and the MDAG with certificates evidencing said insurance and the MDEQ, the MDAG, and the State of Michigan's status as additional insured parties. In addition, and for the duration of this Decree, Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of Workers' Disability Compensation Insurance for all persons performing response activities on behalf of Defendant in furtherance of this Decree.

XVIII. COVENANTS NOT TO SUE BY PLAINTIFFS

18.1 In consideration of the actions that will be performed and the payments that will be made by Defendant under the terms of this Decree, and except as specifically provided for in this section and Section XIX (Reservation of Rights by Plaintiffs), the State of Michigan hereby covenants not to sue or to take further administrative action against Defendant for matters set forth in the Complaint, as follows:

(a) Response activities that Defendant performs pursuant to MDEQ-approved work plans under this Decree.

(b) Reimbursement by Defendant of Past Response Activity Costs incurred by the State as set forth in Paragraphs 14.1 and 14.5 of Section XIV (Reimbursement of Costs) of this Decree.

(c) Reimbursement by Defendant of Future Response Activity Costs that are incurred by the State as set forth in Paragraphs 14.2 and 14.5 of Section XIV (Reimbursement of Costs) of this Decree.

(d) Civil fines for alleged violations of Parts 31, 111, and 201 as set forth in the Complaint.

18.2 The covenants not to sue shall take effect under this Decree as follows:

(a) With respect to Defendant's liability for response activities performed in compliance with MDEQ–approved work plans under this Decree, the covenant not to sue shall take effect upon MDEQ's approval of the RAP submitted pursuant to Section VI (Performance of Response Activities).

(b) With respect to Defendant's liability for Past Response Activity Costs and Future Response Activity Costs incurred by the State and paid by Defendant, the covenants not to sue shall take effect upon the MDEQ's receipt of payments for those costs.

(c) With respect to civil fines for alleged violations of Parts 31, 111, and 201, the covenants not to sue shall take effect upon the Effective Date of this Decree.

18.3 The covenants not to sue extend only to Defendant and do not extend to any other person.

XIX. RESERVATION OF RIGHTS BY PLAINTIFFS

19.1 The covenants not to sue apply only to those matters specified in Paragraph 18.1 of Section XVIII (Covenants Not to Sue by Plaintiffs). These covenants not to sue do not apply to, and the State reserves its rights on, the matters specified in Paragraph 18.1 of Section XVIII (Covenants Not to Sue by Plaintiffs) until such time as these covenants become effective as set forth in Paragraph 18.2 of Section XVIII (Covenants Not to Sue by Plaintiffs). The MDEQ and the MDAG reserve the right to bring an action against Defendant under state and federal laws for any matters for which Defendant has not received a covenant not to sue as set forth in Section XVIII (Covenants Not to Sue by Plaintiffs). The State reserves, and this Decree is without

prejudice to, all rights to take administrative action or to file a new action pursuant to any applicable authority against Defendant with respect to all other matters, including, but not limited to, the following:

(a) The performance of response activities that are required to comply with Part 201 and to achieve and maintain the performance objectives specified in Paragraph 6.1 of Section VI (Performance of Response Activities).

(b) Response activity costs that Defendant has not paid.

(c) The past, present or future treatment, handling, disposal, release or threat of release of hazardous substances that occur outside of the Facility and that are not attributable to the Facility.

(d) The past, present or future treatment, handling, disposal, release or threat of release of hazardous substances taken from the Facility;

(e) Damages for injury to, destruction of, or loss of natural resources and the costs for any natural resource damage assessment.

(f) Criminal acts.

(g) Any matters for which the State is owed indemnification under Section XVII (Indemnification and Insurance) of this Decree.

(h) The release or threatened release of hazardous substances or violations of state or federal law that occur during or after the performance of response activities required by this Decree.

19.2 The State reserves the right to take action against Defendant if it discovers at any time that any material information provided by Defendant prior to or after entry of this Decree was false or misleading.

19.3 The MDEQ and the MDAG expressly reserve all of their rights and defenses pursuant to any available legal authority to enforce this Decree or to compel Defendant to comply with the NREPA.

19.4 In addition to, and not as a limitation of any other provision of this Decree, the MDEQ retains all authority and reserves all of its rights to perform, or contract to have performed, any response activities that the MDEQ determines are necessary.

19.5 In addition to, and not as a limitation of any provision of this Decree, the MDEQ and the MDAG retain all of their information gathering, inspection, access, and enforcement authorities and rights under Part 201 and any other applicable statute or regulation.

19.6 Failure by the MDEQ or the MDAG to enforce any term, condition, or requirement of this Decree in a timely manner shall not:

(a) Provide or be construed to provide a defense for Defendant's noncompliance with any such term, condition or requirement of this Decree.

(b) Estop or limit the authority of MDEQ or the MDAG to enforce any such term, condition, or requirement of the Decree, or to seek any other remedy provided by law.

19.7 This Decree does not constitute a warranty or representation of any kind by the MDEQ that the response activities performed by Defendant in accordance with the MDEQ-approved work plans required by this Decree will result in the achievement of the performance objectives stated in Paragraph 6.1 of Section VI (Performance of Response Activities) or the remedial criteria established by law, or that those response activities will assure protection of public health, safety, or welfare, or the environment.

19.8 Except as provided in Paragraph 18.1(a) of Section XVIII (Covenants Not to Sue by Plaintiffs), nothing in this Decree shall limit the power and authority of the MDEQ or the

State of Michigan, pursuant to Section 20132(8) of the NREPA, to direct or order all appropriate action to protect the public health, safety, or welfare, or the environment; or to prevent, abate or minimize a release or threatened release of hazardous substances, pollutants, or contaminants on, at, or from the Facility.

XX. COVENANT NOT TO SUE BY DEFENDANT

20.1 Defendant hereby covenants not to sue or to take any civil, judicial, or administrative action against the State, its agencies, or their authorized representatives, for any claims or causes of action against the State that arise from this Decree, including, but not limited to, any direct or indirect claim for reimbursement from the Cleanup and Redevelopment Fund pursuant to Section 20119(5) of the NREPA or any other provision of law.

20.2 After the Effective Date of this Decree, if the MDAG initiates any administrative or judicial proceeding for injunctive relief, recovery of response activity costs, or other appropriate relief relating to the Facility, Defendant agrees not to assert and shall not maintain any defenses or claims that are based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, or claim-splitting, or that are based upon a defense that contends any claims raised by the MDEQ or the MDAG in such a proceeding were or should have been brought in this case; provided, however, that nothing in this paragraph affects the enforceability of the covenants not to sue set forth in Section XVIII (Covenants Not to Sue by Plaintiffs).

XXI. CONTRIBUTION PROTECTION

Pursuant to Section 20129(5) of the NREPA and Section 9613(f)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, 1980 PL 96-510; as amended (CERCLA or Superfund), 42 USC 9613; and to the extent provided in Section XVIII

(Covenants Not to Sue by Plaintiffs), Defendant shall not be liable for claims for contribution for the matters set forth in Paragraph 18.1 of Section XVIII (Covenants Not to Sue by Plaintiffs) of this Decree, to the extent allowable by law. Entry of this Decree does not discharge the liability of any other person that may be liable under Section 20126 of the NREPA, or Sections 9607 and 9613 of the CERCLA. Pursuant to Section 20129(9) of the NREPA, any action by Defendants for contribution from any person that is not a Party to this Decree shall be subordinate to the rights of the State of Michigan if the State files an action pursuant to the NREPA or other applicable state or federal law.

XXII. MODIFICATIONS

22.1 The Parties may only modify this Decree according to the terms of this section. The modification of any Submission required by this Decree, excluding a RAP, may be made only upon written approval from the MDEQ Project Coordinator. Any modifications to an MDEQ-approved RAP must be approved in writing by the RRD Chief or his or her authorized representative.

22.2 Modification of any other provision of this Decree shall be made only by written agreement between Defendant's Project Coordinator, the RRD Chief, or his or her authorized representative, and the designated representative of the MDAG, and shall be entered with the Court.

XXIII. SEPARATE DOCUMENTS

The parties may execute this Decree in duplicate original form for the primary purpose of obtaining multiple signatures, each of which shall be deemed an original, but all of which together shall constitute the same instrument.

IT IS SO AGREED AND ORDERED BY:

MICHAEL A. COX
Attorney General
Attorney for Plaintiffs

By: _____ 10/21/04
Kathleen L. Cavanaugh (P38006) Date
Assistant Attorney General
Environment, Natural Resources, and
Agriculture Division
525 W. Ottawa, 6th Floor, Williams Bldg.
P.O. Box 30755
Lansing, Michigan 48909
Telephone: (517) 373-7540

_____ 10/20/04
Andrew Hogarth, Chief Date
Remediation and Redevelopment Division
Michigan Department of Environmental Quality

_____ 10/19/04
Neil Juliar (P15625) Date
Attorneys for Defendant
CONLIN MCKENNEY PHILBRICK
350 South Main Street, Suite 400
Ann Arbor, Michigan 48104
Telephone: (734) 761-9000

IT IS SO ORDERED, ADJUDGED AND DECREED THIS 21st day of Oct, 2004.

WILLIAM E. COLLETTE

Honorable William E. Collette
Circuit Court Judge

S: NR/cases/2000064109/Brazeway/final consent decree 10/8/04