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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

METALLICS, INC., and  
TOWN OF ONALASKA, WISCONSIN,

Defendants.

DEC 18 1996

Civ. No. 96-C-0275-S

Consolidated with

STATE OF WISCONSIN,

Plaintiff,

v.

METALLICS, INC., and  
TOWN OF ONALASKA, WISCONSIN,

Defendants.

Civ. No. 96-C-651-S

PARTIAL CONSENT DECREE

Copies of this document has been  
provided to Pameli, Soltykus,  
Kucandowski + Donn  
the 18<sup>th</sup> day of Dec., 1996  
by C. Wilson

DEPT. CLERK

20-11-3-05B

DEPARTMENT OF JUSTICE

JAN 21 1997

I. BACKGROUND

A. Plaintiff United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("U.S. EPA"), commenced this action pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607. Plaintiff, State of Wisconsin commenced this action pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, and Section 144.442, Wisconsin Statutes.

B. The complaint filed by plaintiff United States seeks reimbursement of costs incurred by the United States at the Onalaska Municipal Landfill site in Onalaska, Wisconsin (hereafter "the Site") and seeks performance of studies and response work by the Settling Defendant at the Site in conformity with U.S. EPA's Record of Decision ("ROD") for the Site and the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP"). The complaint filed by plaintiff State of Wisconsin seeks reimbursement of costs incurred by the State of Wisconsin at the Site.

C. The complaints allege that the Settling Defendant is the current owner of the Site, that the defendant owned the Site at the time of disposal of hazardous substances at the Site, that there was a release or threatened release of hazardous substances at the Site, and that these releases or threatened releases

caused the United States and the State to incur response costs at the Site.

D. Plaintiffs and Settling Defendant agree that a settlement of this action and the entry of this Consent Decree are in the public interest and that entry of this Consent Decree without further litigation is the most appropriate means of resolving the claims asserted by the United States and the State against Settling Defendant in this action.

E. The Parties agree to the terms of this Consent Decree in good faith, without the adjudication of any issue of law or fact, and without any admission of liability.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

## II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties to this Decree, pursuant to Sections 106, 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9606, 9607(a) and 9613(b), and pursuant to 28 U.S.C. §§ 1331 and 1345. The parties agree to be bound by the terms of this Decree. The complaint filed by the United States states a claim upon which relief may be granted under Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a). The complaint filed by the State of Wisconsin states a claim upon which relief may be granted under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Section 144.442, Wisconsin Statutes.

2. Venue is proper in this Court pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b) and (c).

### III. DEFINITIONS

3. Terms not otherwise defined herein shall have their ordinary meaning unless defined in CERCLA or in the NCP, in which case the definition in CERCLA or the NCP shall control.

Whenever the following terms are used in this Decree, the following definitions apply:

"Adjacent Properties" means the properties now presently owned by Defendant described in Appendices B, C, and D, attached hereto and made part of this Consent Decree;

"Consent Decree" or "Decree" means this Consent Decree and all appendices and exhibits hereto;

"Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substances Superfund established under subchapter A of chapter 98 of Title 26 of the U.S. Code, in accordance with 42 U.S.C. § 9607(a);

"Parties" shall mean the United States, the State of Wisconsin, and Town of Onalaska;

"Plaintiffs" shall mean the United States and the State of Wisconsin;

"Record of Decision" or "ROD" shall mean the U.S. EPA Record of Decision relating to the Site signed on August 14, 1990, by

the Regional Administrator, EPA Region V, and all attachments thereto;

"Response Costs" shall mean all costs, including but not limited to, all pre-judgment interest and indirect costs, whether incurred prior to or subsequent to the entry of this Consent Decree, incurred by the United States or the State of Wisconsin with regard to the Site;

"Selected Remedy" shall mean that remedy to be implemented at the Site selected by U.S. EPA in the ROD, as more fully described in the Statement of Work, the Remedial Design Plan and the Remedial Action Plan for the Site;

"Settling Defendant" shall mean the Town of Onalaska;

Site shall mean the property located in the Town of Onalaska approximately ten miles north of the City of LaCrosse, Wisconsin, 400 feet east of the Black River, near the confluence of the Mississippi and Black Rivers, consisting of approximately eleven acres, as illustrated by Appendix A, which is attached hereto and incorporated in this Consent Decree;

"State" shall mean the State of Wisconsin;

"United States" shall mean the United States of America;

"U.S. EPA" shall mean the United States Environmental Protection Agency; and

"Work" shall mean all activities Settling Defendant is required to perform under this Consent Decree, including maintaining access to the Adjacent Properties.

IV. PARTIES BOUND

4. This Consent Decree shall apply to and be binding upon the Settling Defendant, and upon its elected and appointed officials, employees, successors, and assigns in their official capacities. This Consent Decree also applies to and is binding upon the United States and the State of Wisconsin. Each person who executes this Consent Decree on behalf of the Settling Defendant certifies that he or she is fully authorized to enter into this Consent Decree and to execute and to bind legally the Settling Defendant to this Consent Decree. Settling Defendant agrees not to oppose entry of this Decree by the Court and not to challenge any provision of this Decree. Settling Defendant further agrees not to contest the Decree's validity in any subsequent proceeding arising from this Decree.

V. REIMBURSEMENT OF RESPONSE COSTS

5. As reimbursement of response costs, within thirty (30) days following entry of this Consent Decree by the Court, Settling Defendant shall pay to the United States the sum of \$500,000. Settling Defendant shall receive a credit of \$17,450 toward the total reimbursement amount for certain work performed, as described in Appendix E, for a total payment of \$482,550 due and owing pursuant to the terms of the Consent Decree. The payment shall be transmitted by Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice lockbox bank, referencing CERCLA Site Identification number L5, DOJ number 90-

11-3-605A, and the U.S.A.O. file number 94V0425. Payment shall be made in accordance with instructions provided by the United States to the Settling Defendant after Settling Defendant's execution of the Consent Decree. Any EFTs received at the U.S. DOJ lockbox bank after 11:00 a.m. (Eastern Time) will be credited on the next business day.

6. On the same day that Settling Defendant makes its payment(s) pursuant to the above paragraphs, the Settling Defendant shall send written notice of its payment(s) to:

John H. Tielsch  
Assistant Regional Counsel  
U.S. Environmental Protection Agency Region V  
Mail Code C-29A  
77 W. Jackson Blvd.  
Chicago Illinois 60604-3590

William E. Muno  
Director, Waste Management Division  
U.S. Environmental Protection Agency  
Region V  
77 W. Jackson Blvd.  
Chicago, Illinois 60604-3590

Joel M. Gross  
Chief, Environmental Enforcement Section  
United States Department of Justice  
Environment and Natural Resources Division  
Ben Franklin Station  
P.O. Box 7611  
Washington, DC 20044

#### VI. PERFORMANCE OF WORK

7. As further consideration towards the settlement of this matter Settling Defendant has demolished and removed the shed formerly located on the landfill at the Site.

8. Settling Defendant shall construct a woven wire fence or three strand barbed wire fence around the perimeter of the

landfill within sixty (60) days of U.S. EPA's request to construct the fence. Settling Defendant shall also maintain the fence around the perimeter of the landfill. The design and specifications of the fence and its exact location shall be determined by U.S. EPA.

VII. ACCESS

9. Commencing immediately upon entry of this Consent Decree the Settling Defendant agrees to provide the United States, the State, and their authorized representatives, including U.S. EPA's and the State's contractors upon presentation of credentials, access at all reasonable times to the Site, the Adjacent Properties and any other property owned or controlled by Settling Defendant to which access is required for the purpose of conducting any activity related to this Consent Decree or to the Selected Remedy including, but not limited to:

- a. Monitoring the Work;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Planning and implementing response actions at or near the Site; and
- f. Assessing Settling Defendant's compliance with the Decree.



VIII. ACCESS TO INFORMATION

10. Settling Defendant shall provide to the United States and the State, upon request, copies of all documents and information within their possession, custody, or control or that of Settling Defendant's contractors or agents, relating to activities at the Site, including, but not limited to, correspondence, deeds, agreements pertaining to the Adjacent Properties, information relevant to facts concerning performance of the Work, or other documents or information related to the Site.

IX. INSTITUTIONAL CONTROLS

11. Settling Defendant shall draft, execute, and record deed restrictions acceptable to the United States which will prohibit any future use of the Site which would be inconsistent with or detrimental to the selected remedy, including, but not limited to, prohibitions on the construction of structures on Site, prohibitions on locating drinking wells on Site, and prohibitions on the use of the Site for recreational purposes. Such deed restrictions shall be substantially similar in form and content to the deed restrictions attached hereto as Appendix F.

12. Upon notice to Settling Defendant from U.S. EPA that the Selected Remedy has been completed, Settling Defendant shall draft, execute, and record conservation easements, together with such other institutional controls, as may be required, to permanently preserve the Adjacent Properties as wildlife habitat

or other use compatible with the adjoining National Wildlife Refuge, as determined by U.S. EPA after consultation with the Parties and the U.S. Fish and Wildlife Service. In the alternative, Settling Defendant shall transfer control of the Adjacent Properties, upon the approval of the United States, in consultation with the State, to the United States Fish and Wildlife Service, the Wisconsin Department of Natural Resources, or such other entity which the United States, in consultation with the State, approves.

X. OPERATION AND MAINTENANCE

13. As set forth in this Section Settling Defendant shall perform all necessary maintenance of the landfill cap that is to be constructed as part of the Selected Remedy. This maintenance shall include inspection, monitoring, maintenance and repair of the landfill cap, vegetation, subdrainage system and landfill gas venting system, as set forth in U. S. EPA's Operation and Maintenance Plan for the Selected Remedy. The cap maintenance obligation shall begin immediately upon completion of cap construction and continue until Settling Defendant receives notification from U.S. EPA that Settling Defendant may terminate the cap maintenance required by this Consent Decree. Settling Defendant may under no circumstances cease the cap maintenance required by this Consent Decree absent written approval by U.S. EPA.

14. Settling Defendant shall visually inspect the landfill cap, vegetation, subdrainage system, and landfill gas venting system quarterly for the first five years after completion of cap construction and then as established by U.S. EPA and WDNR for the remaining years. An inspection report shall be filed with U.S. EPA and WDNR within thirty days after each inspection. Each inspection report shall contain the following information at a minimum:

- a. The date of inspection, names of inspectors, and name of person making the report;
- b. Two to four general site photographs;
- c. Weather conditions;
- d. Observation of general conditions including the following:
  - i. Any depression, subsidence, holes, or ponded water;
  - ii. Conditions of grass and vegetation;
  - iii. Erosion;
  - iv. Condition of the subdrainage system outlet pipes and drainage ditch; and
  - v. Condition of the gas vents, and collector and interceptor trenches.

15. Settling Defendant shall seed the cap with grasses approved by U.S. EPA and WDNR and shall mow the grass so as to maintain it so as to control weeds, prevent erosion, and prevent the establishment of trees.

16. Settling Defendant shall repair any breaches in the landfill cap which do not extend below the bottom of the cover soil layer by filling the breach with cover soil, topped with six inches of topsoil, and reseed. For any breach which extends

below the bottom of the cover soil layer, Settling Defendant shall make such repairs as instructed by U.S. EPA and WDNR.

17. Settling Defendants shall repair erosion gullies by filling as described in paragraph 16, and/or by installing erosion control measures.

18. Settling Defendant shall take explosimeter and oxygen readings at all landfill gas monitoring wells on a monthly basis, according to procedures to be established by U.S. EPA and WDNR, unless approval is obtained from the U.S. EPA in consultation with WDNR to perform such readings on a less frequent basis.

19. Settling Defendant shall repair or replace soil, clay, meters, vents, pipes, trenches, and other equipment installed as part of the cap as required by U.S. EPA and WDNR.

20. Settling Defendant shall inspect the pump house to be constructed as part of the ground water extraction and treatment system operable unit of the Selected Remedy on a quarterly basis. The results of these inspections shall be included in the quarterly reports. Such inspections shall begin immediately upon completion of construction of the pump house and the commencement of pumping, and shall continue for as long as the ground water extraction and treatment system is required to operate under the terms of the ROD and the Statement of Work for the ground water operable unit. Settling Defendant may not cease conducting pump house inspections absent written approval by U.S. EPA.

XI. DISPUTE RESOLUTION

21. The dispute resolution procedures of this section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this section shall not apply to actions by the United States to enforce obligations of the Settling Defendant that have not been disputed in accordance with this section

22. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed ten (10) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

23. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding paragraph, then the position advanced by EPA shall be considered binding unless:

a. Within ten (10) days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this section by serving on the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendant. The Statement of Position shall specify the Settling

Defendant's position as to whether formal dispute resolution should proceed under paragraph 24 or 25.

b. Within ten (10) days after receipt of Settling Defendant's Statement of Position, EPA will serve on Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under paragraph 24 or 25.

c. If there is disagreement between EPA and the Settling Defendant as to whether dispute resolution should proceed under paragraph 24 or 25, the Parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in paragraphs 24 and 25.

24. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this paragraph. For purposes of this paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any

other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this paragraph. Where appropriate, EPA may allow submission of supplemental statements of position by the Parties to the dispute.

b. The Director of the Waste Management Division, EPA Region 5, will issue a final administrative decision resolving the dispute based on the administrative record described in paragraph 24.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to paragraph 24.c. and d.

c. Any administrative decision made by EPA pursuant to paragraph 24.b. shall be reviewable by this Court, provided that a notice of judicial appeal is filed by the Settling Defendant with the Court and served on all Parties within ten (10) days of receipt of EPA's decision. The notice of judicial appeal shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United

States may file a response to Settling Defendant's notice of judicial appeal.

d. In proceedings on any dispute governed by this paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Waste Management Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to paragraph 24.a.

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

a. Following receipt of Settling Defendant's Statement of Position submitted pursuant to paragraph 23, the Director of the Waste Management Division, EPA Region 5, will issue a final decision resolving the dispute. The Waste Management Division Director's decision shall be binding on the Settling Defendants unless, within 10 days of receipt of the decision, the Settling Defendant files with the Court and serves on the parties a notice of judicial appeal setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendant's notice of judicial appeal.



b. Judicial review of any dispute governed by this paragraph shall be governed by applicable provisions of law.

26. The invocation of formal dispute resolution procedures under this section shall not extend, postpone or affect in any way any obligation of the Settling Defendant under this Consent Decree not directly in dispute, unless EPA agrees or the Court orders otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in paragraph 32. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XII (Stipulated Penalties).

XII. STIPULATED PENALTIES

27. If the Settling Defendant fails to comply fully and timely with any requirement of this Consent Decree, the Settling Defendant shall pay stipulated penalties to the United States in the amounts specified below.

<u>Period of Noncompliance</u>	<u>Penalty Per Day for Each Violation</u>
1-7 days	\$250/day
8-15 days	\$500/day
more than 15 days	\$1000/day

28. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs,

and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

29. Following U.S. EPA's determination that Settling Defendant has failed to comply with a requirement of this Consent Decree, U.S. EPA may give Settling Defendant written notification of the same and describe the noncompliance. U.S. EPA may send the Settling Defendant a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding paragraph regardless of whether U.S. EPA has notified the Settling Defendant of a violation.

30. All penalties owed to the United States hereunder shall be due and payable within 30 days of the Settling Defendant's receipt from U.S. EPA of a demand for payment of the penalties. All payments under this section shall be paid by certified check made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. EPA Superfund Accounting, P.O. Box 70753, Chicago, Illinois, 60673, and shall reference CERCLA Number Site/Spill ID Number L5 and DOJ Case Number 90-11-3-605A. Copies of check(s) paid pursuant to this section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in section XIX (Notice) of this Consent Decree.

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

32. Penalties shall continue to accrue as provided in paragraph 28 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA and the State within 30 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA and the State within 60 days of receipt of the court's decision or order, except as provided in subparagraph c below;

c. If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States or the State into an interest bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA and the State or to Settling Defendant to the extent that they prevail.

33. If Settling Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, plus interest as defined in paragraph 3. Settling

Defendant shall pay interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to paragraph 29, at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607.

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

35. No penalties paid under this section shall be tax deductible for Federal or State tax purposes.

#### XII. LATE PAYMENT CHARGE

36. If Settling Defendant fails to make complete and timely payment of any amounts owed pursuant to paragraph 5, Settling Defendant shall pay interest, as defined in paragraph 3, on the overdue amount from the due date given in this Consent Decree through the date of payment.

XIII. COVENANT-NOT TO SUE AND RESERVATION OF RIGHTS

37. In consideration of the Work that has been, and will be performed, and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in paragraphs 38, 39, 41 and 44, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA relating to the Site, and the State covenants not to sue or to take administrative action against Settling Defendant pursuant to Section 107(a) of CERCLA relating to the Site. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by U.S. EPA of the payment required by paragraph 5. (Reimbursement of Response Costs). With respect to future liability, these covenants not to sue shall take effect upon notice to Settling Defendant of completion of the Selected Remedy by U.S. EPA. These covenants not to sue are conditioned upon the complete and satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendant and do not extend to any other person.

38. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right of either plaintiff to institute proceedings in this action or in a new action, or the right of the U.S. EPA to issue an administrative order seeking to compel Settling Defendant (1) to perform further response actions

relating to the Site or (2) to reimburse the United States for additional costs of response, if, prior to notice of completion of the Selected Remedy: (i) conditions at the Site, previously unknown to U.S. EPA, are discovered, or (ii) information, previously unknown to U.S. EPA, is received, in whole or in part, and these previously unknown conditions or information together with any other relevant information indicates that the Selected Remedy is not protective of human health or the environment.

39. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right of either plaintiff to institute proceedings in this action or in a new action, or the right of U.S. EPA to issue an administrative order seeking to compel Settling Defendant (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs or response, if, subsequent to notice to Settling Defendant of completion of the Selected Remedy:

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

(ii) information, previously unknown to U.S. EPA, is received, in whole or in part, after the notice of completion, and these previously unknown conditions or this information together with other relevant information indicate that the Selected Remedy is not protective of human health or the environment.

40. For purposes of paragraphs 38 and 39, the information and the conditions known to U.S. EPA shall include only that information and those conditions set forth in the Record of Decision, the administrative record supporting the Record of Decision, any information received by U.S. EPA pursuant to the requirements of this Consent Decree prior to notice of completion of the Selected Remedy, and any information or data generated by U.S. EPA during implementation of the Selected Remedy.

41. The covenants not to sue by the United States set forth above pertain only to matters specified in paragraph 37. The United States expressly reserves, and this Decree shall be without prejudice to, all rights of the United States against the Settling Defendant with respect to all other matters, including, without limitation, any claims against the Settling Defendant under CERCLA for injunctive relief, for response costs, or for penalties or damages not covered by this Decree, including, without limitation, the following:

a. Claims of the United States for liability arising from the past, present or future disposal, release, or threat of release of hazardous substances outside of the Site;

b. Claims of the United States for liability for damages for injury to, destruction of, or loss of natural resources;

c. Claims for criminal liability;

d. Claims based on a failure by the Settling Defendant to meet any requirement of this Consent Decree;

e. Claims arising from claims against the United States by any person or entity for damages, reimbursement, or compensation arising from or relating to Settling Defendant's actions under this Decree; and

f. Claims of the United States for interest on the foregoing.

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

43. In the event EPA determines that the Settling Defendant has failed to implement any provisions of the Work in an adequate or timely manner, EPA may perform any and all portions of the Work as EPA determines necessary. Settling Defendant may invoke the procedures set forth in section XI (Dispute Resolution) to dispute EPA's determination that the Settling Defendant failed to implement a provision of the Work in an adequate or timely manner as arbitrary and capricious or



otherwise not in accordance with law. Such dispute shall be resolved on the administrative record. Settling Defendant shall be liable for all costs not inconsistent with the National Contingency Plan incurred by the United States in performing the Work pursuant to this paragraph. Settling Defendant may contest such costs by invoking the procedures set forth in section XI (Dispute Resolution).

44. Notwithstanding any other provision of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

45. The covenants not to sue by the State set forth above pertain only to matters specified in paragraph 37. The State expressly reserves, and this Decree shall be without prejudice to, all rights of the State against the Settling Defendant with respect to all other matters, including, without limitation, any claims against the Settling Defendant under CERCLA for response costs, or for penalties or damages not covered by this Decree, including, without limitation, the following:

- a. Claims of the State for liability for damages for injury to, destruction of, or loss of natural resources;
- b. Claims for criminal liability;
- c. Claims based on a failure by the Settling Defendant to meet any requirement of this Consent Decree;
- d. Claims arising from claims against the State by any person or entity for damages, reimbursement, or compensation

arising from or relating to Settling Defendant's actions under this Decree; and

e. Claims of the State for interest on the foregoing.

46. Nothing in this Consent Decree is intended as a covenant not to sue or a release from liability for any person or entity not a signatory to this Consent Decree. The United States and the State expressly reserve all claims, demands and causes of action, both judicial and administrative, present, past, and future, in law and equity, against any person or entity not a party to this Decree for any matter arising at, or relating in any manner to, the Site.

XV. COVENANTS BY SETTLING DEFENDANT

47. Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State with respect to the Site, the Adjacent Properties, or this Consent Decree, including, but not limited to, any claim for damages, reimbursement, or compensation arising from or on account of obtaining or maintaining access to or use of (by purchase, lease, condemnation, or otherwise) the Site or the Adjacent Properties, or any other property. Settling Defendant also covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State for any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA §§ 106(b)

(2), 111, 112, or 113, or any other provision of law, any claim against the United States or the State, pursuant to CERCLA Sections 107 and 113 related to the Response Costs, or any claims arising out of response activities at adjacent to the Site. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XVI. INDEMNIFICATION AND INSURANCE

48. Neither the United States nor the State assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as U.S. EPA's authorized representative under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless the United States, the State, and their officials, agents, employees, contractors, subcontractors, and representatives for or from any and all claims or causes of action arising from, or on account of, acts or omissions of Settling Defendant, its officials, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out all activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendant agrees to pay the United States and the State all costs it incurs including, but not limited to attorneys' fees and other expenses of

litigation and settlement arising from, or on account of, claims made against the United States or the State based on acts or omissions of Settling Defendant, its officials, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out all activities pursuant to this Consent Decree. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendant nor any such contractor shall be considered an agent of the United States or the State.

49. Settling Defendant waives all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site or the Adjacent Properties, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages, reimbursement, or compensation arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of work on, adjacent to, or relating to the Site, including, but not limited to, claims on account of construction delays or claims on account of acquiring or securing

access to or use of property (by purchase, lease, condemnation or otherwise) at the Site, the Adjacent Properties, or any other property.

XVII. CONTRIBUTION PROTECTION

50. With regard to claims for contribution against Settling Defendant for Response Costs, the Parties hereto agree that, upon receipt by U.S. EPA of the payments required by the Consent Decree, Settling Defendant is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for "matters addressed" in this settlement. "Matters addressed" shall mean all costs incurred and to be incurred by the United States, the State, or any other party in connection with the Site and all response actions taken or to be taken in connection with the Site.

XVIII. CERTIFICATION OF SETTLING DEFENDANT

51. Settling Defendant certifies that, to the best of its knowledge and belief, it has provided U.S. EPA all information currently in its possession, custody, or control, or in the possession, custody, or control of its officials, employees, contractors, or agents, which relates in any way to the ownership, operation, generation, treatment, composition, characteristics, transportation, or disposal of hazardous substances at or in connection with the Site, and that the information so provided accurately reflects Settling Defendant's

best information about the kind and quantity of hazardous substances delivered by it to the Site or to another for transport to the Site. The Settling Defendant further certifies that it has provided to U.S. EPA a full and complete response to any U.S. EPA request for information pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). If this certification is subsequently determined to be false, the Settling Defendant shall pay stipulated penalties as provided in section XIII (Stipulated Penalties) of this Decree. Such stipulated penalties shall not constitute liquidated damages and shall not in any way foreclose U.S. EPA from pursuing any other causes of action arising from Settling Defendant's false certification. If Settling Defendant discovers additional information or documents relating to the subjects identified above, Settling Defendant shall immediately notify U.S. EPA and the State, and shall provide the information or documents to U.S. EPA and the State.

XIX. NOTICE

52. Whenever, under the terms of this Consent Decree, written notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice

requirement of the Consent Decree with respect to the United States, EPA, the State, and the Settling Defendant, respectively.

As to the United States:

Joel M. Gross  
Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
Re: 90-11-3,-605A

John H. Tielsch  
Assistant Regional Counsel  
United States Environmental Protection Agency Region V  
Mail Code C-29A  
77 W. Jackson Blvd.  
Chicago, Illinois 60604-3590

Kevin Adler  
Remedial Project Manager  
United States Environmental Protection Agency Region V (CR-6J)  
77 W. Jackson Blvd.  
Chicago, Illinois 60604-3590

As to the State:

Mark Giesfeldt  
Staff Attorney  
Bureau of Legal Service  
Mail Code LC/5  
Wisconsin Department of Natural Resources  
P.O. Box 7921  
Madison, Wisconsin 53707

As to Settling Defendants:

Carl Pedretti  
Town Board Chairman  
Town Hall  
7052 Second Street  
Onalaska, WI 54650

Daniel E. Dunn  
Fitzpatrick, Smyth, Dunn & Fitzpatrick  
401 Main Street - Suite 400  
P.O. Box 1627  
La Crosse, WI 54602-1627

Roy M. Harsch  
Gardner, Carton & Douglas  
Suite 3400-Quaker Tower  
321 North Clark Street  
Chicago, IL 60610-3381

XX. RETENTION OF JURISDICTION

53. The Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

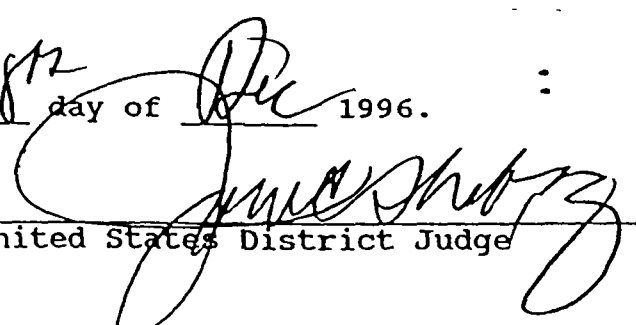
XXI. EFFECTIVE DATE

54. This Consent Decree shall become effective upon the date of its entry by this Court.

XXII. PUBLIC COMMENT

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

ENTERED this 18<sup>th</sup> day of Dec 1996.

  
United States District Judge