

Case 2:02-cv-03618-ML-DEK Document 256 Filed 05/28/2008 Page 2 of 3

Respectfully submitted,

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Date: 5/28/2008

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CERTIFICATE OF SERVICE

I hereby certify service of the Notice of Lodging of Consent Decree, unless otherwise noted, on this 28th day of May, 2008, upon:

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s/ Kenneth G. Long (DC Bar No. 414791)
Kenneth G. Long
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division

Date: May 28, 2008

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**CITY OF NEW ORLEANS; CFI INDUSTRIES, INC.,
formerly doing business as Letellier Phillips Paper
Company; DELTA BY-PRODUCTS, INC.;
EDWARD LEVY METALS, INC,**

Defendants.

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**Civil Action No. 02-3618
Section "E"
Magistrate 3**

CONSENT DECREE

TABLE OF CONTENTS

I.	<u>BACKGROUND</u>	3
II.	<u>JURISDICTION</u>	5
III.	<u>PARTIES BOUND</u>	5
IV.	<u>DEFINITIONS</u>	5
V.	<u>PERFORMANCE OF THE WORK BY SETTLING DEFENDANT</u>	8
VI.	<u>ACCESS AND INSTITUTIONAL CONTROLS</u>	10
VII.	<u>REPORTING REQUIREMENTS</u>	16
VIII.	<u>FORCE MAJEURE</u>	16
IX.	<u>DISPUTE RESOLUTION</u>	19
X.	<u>FAILURE TO COMPLY WITH CONSENT DECREE</u>	22
XI.	<u>COVENANT NOT TO SUE BY PLAINTIFF</u>	25
XII.	<u>RESERVATION OF RIGHTS BY UNITED STATES</u>	25
XIII.	<u>COVENANT NOT TO SUE BY SETTLING DEFENDANT</u>	27
XIV.	<u>EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION</u>	28
XV.	<u>ACCESS TO INFORMATION</u>	29
XVI.	<u>RETENTION OF RECORDS</u>	30
XVII.	<u>NOTICES AND SUBMISSIONS</u>	31
XVIII.	<u>RETENTION OF JURISDICTION</u>	32
XIX.	<u>INTEGRATION</u>	33
XX.	<u>LODGING AND OPPORTUNITY FOR PUBLIC COMMENT</u>	33
XXI.	<u>SIGNATORIES/SERVICE</u>	33
XXII.	<u>APPENDIX</u>	34
XXIII.	<u>FINAL JUDGMENT</u>	34

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 104 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604 and 9607, as amended ("CERCLA"), against, inter alia, the City of New Orleans ("City" or Settling Defendant"), seeking civil penalties for its failure to comply with an access order and reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Agriculture Street Landfill Superfund Site in New Orleans, LA ("the Site").

B. In entering into this Consent Decree, the City does not admit any liability to Plaintiff or any other party arising out of the transactions or occurrences alleged in the complaint.

C. On August 23, 1994, the Site was proposed for inclusion on the National Priorities List (NPL) as part of NPL update No. 17, and on December 16, 1994, EPA placed the site on the NPL.

D. EPA performed removal actions at the Site under a series of operable units. Operable Unit 1 ("OU1") addressed Undeveloped Property, Operable Unit 2 ("OU2") addressed Residential Properties, and Operable Unit 3 ("OU3") addressed the Shirley Jefferson Community Center. No actions by EPA were needed on Operable Unit 4 ("OU4") (Moton Elementary School) or Operable Unit 5 ("OU5") (Ground Water). The removal action on OUI consisted of clearing the 48-acre area, grading it to direct storm water runoff away from the residential area, laying a permeable geotextile mat followed with orange fencing, covering the

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mat/marker with twelve inches of clean fill, and re-establishing a vegetative layer on the clean fill. The removal actions on OU2 and OU3 consisted generally of preparing the property, removing driveways and sidewalks as needed, excavating 24 inches of soil, placing a permeable geotextile mat/marker on the subgrade, backfilling the excavated area with clean fill, covering the clean fill with grass sod, landscaping and yard restoration, driveway and sidewalk replacement, and final detailing. Because contaminants have been left in place beneath the geotextile mat, proper operation and maintenance practices and institutional controls are required to maintain the integrity of the cap.

F. Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly conducted by the Settling Defendant if conducted in accordance with the requirements of this Consent Decree and its appendices.

G. The United States has reviewed the Financial Information submitted by Settling Defendant, as well as publicly available information, to determine whether the Settling Defendant is financially able to pay Past Response Costs and civil penalties incurred in connection with the Site. Based upon this information and in light of the extraordinary financial difficulties of the Settling Defendant due to Hurricane Katrina, the United States has determined that Settling Defendant is unable to make a cash payment toward Past Response Costs or civil penalties incurred in connection with the Site.

H. The United States and Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement on the terms herein will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED,
ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, and upon Settling Defendants and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

- b. "Consent Decree" shall mean this Consent Decree.
- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.
- e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.
- g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.
- h. "Operable Unit 1" or "OU1" shall mean the approximately 48 acres of undeveloped property that was cleared, graded, overlaid with a geotextile mat and 12 inches of clean fill, replanted, and fenced by EPA during the first removal action in March 1994 and that was subsequently repaired in March 1996.
- i. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.
- j. "Parties" shall mean the United States and Settling Defendants.

k. "Past Response Costs" shall mean all costs, including, but not limited to direct and indirect costs that EPA or DOJ on behalf of EPA has paid at or in connection with response actions for the Site through the date of lodging of this Consent Decree, plus accrued Interest on all such costs.

l. "Plaintiff" shall mean the United States.

m. "Remedy" shall mean the placement of a permeable geotextile mat followed with orange fencing (to serve as a highly visible marker), covering the mat/marker with twelve inches of clean fill, and re-establishing a vegetative layer on the clean fill on OU1. For OU2 and OU3, the excavation of 24 inches of soil, placement of a permeable geotextile mat/marker on the subgrade, backfilling the excavated area with clean fill, covering the clean fill with grass sod, landscaping and yard restoration, driveway and sidewalk replacement, and final detailing.

n. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

o. "Settling Defendant" shall mean the City of New Orleans.

p. "Site" shall mean the Agriculture Street Landfill Site located in Orleans Parish, City of New Orleans. The approximately 95-acre Site is bordered by Higgins Boulevard on the north, the above-grade railroad rights-of-way on the south and west, and the cul-de-sac at the southern end of Clouet Street, near the railroad tracks, to Higgins Boulevard between Press and Montegut streets on the east.

q. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

r. "Work" shall mean the compliance requirements set forth in Section V of the

Decree.

4. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect the remedy on the Site and, thereby, the public health or welfare or the environment at the Site, by the implementation of the Work and institutional controls by Settling Defendant, and to resolve the claims of Plaintiff against Settling Defendant for Past Response Costs as provided in this Consent Decree.

V. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

5. The geotextile mat is covered by 12 inches of clean soil and a vegetative cover on the undeveloped properties (OU1), 18 inches of clean soil and a vegetative cover in the right of ways, and 24 inches of clean soil and a vegetative cover on residential properties and the community center. The vegetative cover is to prevent the erosion of the soil cap. The soil cap and geotextile mat covering the Site could be breached or degraded by excavation within the Site or by the failure to maintain the vegetative cover over the soil cap. Therefore, the City shall implement the following Work to maintain the cap and provide for appropriate restrictions on use and excavation of the property:

a. The Settling Defendant shall maintain and repair the security fence around the OU1 undeveloped property which is bordered by Higgins Boulevard to the north, Almonaster Boulevard to the west, by Industry Street to the north and above-grade railroad rights-of-way on the south, and by St. Ferdinand behind the homes located on Press Street and by the cul-de-sac at the southern end of Clouet Street, for a period of 10 years from the date of entry of the Decree, or until the Site is delisted from the NPL, or EPA otherwise approves the removal of the fence, whichever is sooner.

b. The Settling Defendant will mow vegetation at least twice per year, and otherwise maintain, its right of ways within OU1 in order to maintain a stable vegetative cover. Because lack of mowing/maintenance by private owners of land within the Site is likely to damage the subsurface geotextile mat, the City will use its available authorities to (a) require that landowners mow and otherwise maintain the grass vegetation on their properties, or (b) undertake the necessary maintenance directly.

c. Within 60 days from the date of entry of this Decree, the City will provide to all utilities operating within the Site area the Technical Abstract for Utilities Operating Within the Agriculture Street Landfill Superfund Site, attached as Appendix A.

d. Within 60 days from the date of entry of this Decree, the City will join and maintain its membership in the LAOne Call program and will designate an office within the City as the point of contact to provide the Technical Abstract for Utilities Operating Within the Agriculture Street Landfill Superfund Site, attached as Appendix A, to be followed when excavating beneath the geotextile mat at the Site.^{1/}

e. Within 60 days from the date of entry of this Decree, Settling Defendant will direct that all of its agencies and departments, including the Sewerage and Water Board of New Orleans ("SWB"), incorporate the Technical Abstract for Utilities Operating Within the Agriculture Street Landfill Superfund Site, attached as Exhibit A, as standard operating procedures when working within the Site.

^{1/}Ms. Thelma Latham (the General Manager of the Louisiana and Texas divisions of One Call Concepts, Inc. – 222-275-3700, ext 409). Louisiana's One Call website: http://www.laonecall.com/for_best_results_frame_page.htm
LAOne Call's membership list includes Bell South, Entergy, and Cox Communications. The Sewerage and Water Board of New Orleans and the City of New Orleans are not members.

f. Annual Notice to Property Owners Within the Site. The Settling Defendant will ensure that, within 60 days of entry of this Decree and on an annual basis thereafter, the SWB includes in bills to customers owning or renting property at the Site the protocol for Post-Removal Maintenance for Property Owners, attached as Appendix B to this Decree.

Alternatively, within 60 days of entry of this Decree and on an annual basis thereafter, the Settling Defendant will mail the Protocol to property owners and renters at the Site.

g. Designation of Disposal Facility: Within 45 days from the date of entry of this Decree, the Settling Defendant will designate an appropriate landfill facility for the disposal of soils excavated and removed from beneath the geotextile mat. This disposal facility shall be identified in the Technical Abstract for Utilities Operating Within the Agriculture Street Landfill Superfund Site and in the Protocol for Post-Removal Maintenance for Property Owners.

6. Within 30 days of entry of this Decree, the Settling Defendant will designate an official of the City as the Project Coordinator who will be responsible for ensuring the City's compliance with the requirements of the Decree. The Settling Defendant's performance of the Work obligations under Section V and obligations under Section VI of this Consent Decree shall be under the direction and supervision of the Project Coordinator, and that person shall be the lead point of contact for EPA with the City. If at any time thereafter, Settling Defendant proposes to change the Project Coordinator, Settling Defendant shall give notice to EPA before the new designee performs, directs, or supervises any Work under this Consent Decree.

VI. ACCESS AND INSTITUTIONAL CONTROLS

7. If the Site, or any other property where access and/or use restrictions are needed to implement this Consent Decree, is owned or controlled by the Settling Defendant, then the

Settling Defendant shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States and its representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

(1) Monitoring, investigation, removal, remedial or other activities at the Site, including 5-year reviews;

(2) Verifying any data or information submitted to the United States;

(3) Conducting investigations relating to contamination at or near the Site;

(4) Obtaining samples;

(5) Assessing the need for, planning, or implementing additional response actions at or near the Site;

(6) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XV (Access to Information);

(7) Assessing Settling Defendant's compliance with this Consent Decree; and

(8) Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. commencing on the date of lodging of this Consent Decree, refrain from

using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedy completed for the Site. Such restrictions include, but are not limited to disturbances to the surface or subsurface of the Site, including filling, drilling, excavation or construction on the Site, that is unrelated to the remedy measures implemented at the Site, unless such excavation is consistent with the Technical Abstract for Utilities attached hereto as Appendix A.

and

c. execute and record in the Recorder's Office [or Registry of Deeds or other appropriate land records office] of Orleans Parish, State of Louisiana, an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 7(a) of this Consent Decree, and (ii) grants the right to enforce the land use restrictions listed in Paragraph 7(b) of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedy completed for the Site. Settling Defendant shall grant the access rights and the rights to enforce the land use restrictions to the United States, on behalf of EPA, and its representatives, and (ii) the State and its representatives.

8. Settling Defendant shall, within 45 days of entry of this Consent Decree, submit to EPA for review and approval with respect to such property:

a. a draft easement, in substantially the form attached hereto as Appendix C, that is enforceable under the laws of the State of Louisiana, and

b. a current title insurance commitment or some other evidence of

title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendant is unable to obtain release or subordination of such prior liens or encumbrances). Within 15 days of EPA's approval and acceptance of the easement and the title evidence, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, record the easement with the Recorder's Office [or Registry of Deeds or other appropriate office] of Orleans Parish. Within 30 days of recording the easement, Settling Defendant shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded easement showing the clerk's recording stamps. If the easement is to be conveyed to the United States, the easement and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 255.

9. Conveyance Notice. If the Site, or any other property where access and or land use restrictions are needed to implement this Consent Decree, is owned or controlled by persons other than the Settling Defendant, then Settling Defendant shall, within 60 days of the entry of this Decree, make best efforts to execute and record in the Recorder's Office [or Registry of Deeds or other appropriate land records office] of Orleans Parish, State of Louisiana, an EPA approved conveyance notice, running with the land, to alert future transferees of the response action and waste in place, and to explain maintenance and excavation guidelines for the property. The conveyance notice will be substantially in the form of the Conveyance Notice set forth in

Appendix D.

10. Within 30 days of the recording of the Conveyance Notice, Settling Defendant shall provide EPA with a certified copy of the original recorded Conveyance Notice showing the clerk's recording stamps. If any access easement or conveyance notice required by Paragraph 9 of this Consent Decree is not recorded within 60 days of the date of entry of this Consent Decree, Settling Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendant have taken to attempt to comply with Paragraphs 8 and 9 of this Consent Decree. The United States may, as it deems appropriate, assist Settling Defendant in obtaining access or land/water use restrictions, either in the form of contractual agreements or in the form of easements running with the land, or in obtaining the release or subordination of a prior lien or encumbrance. Settling Defendant shall reimburse the United States for all costs incurred, direct or indirect, by the United States in obtaining such access, land/water use restrictions, and/or the release/subordination of prior liens or encumbrances including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation, in accordance with the payment procedures in Paragraph 28.

11. EPA has determined that additional restrictions on excavation within the Site in the form of a zoning ordinance and/or excavation permit requirement are needed to protect and ensure the integrity and protectiveness thereof, or ensure non-interference therewith, the remedy at the Site.

a. Therefore, within 60 days of the entry of this Decree, Settling Defendant shall submit to EPA for approval a proposed zoning ordinance and/or permit requirement that will

meet in substance the following objectives: (a) require that owners or lessees of land within the Site (b) who seek to excavate soil to a depth of greater than 18 inches (c) provide notice to the appropriate City department of their intent to excavate and to comply with the Protocol on Post-Removal Maintenance for Property Owners for the handling of contaminated soils and repair of the soil/geotextile mat (d) no less than 3 days prior to the proposed excavation, and (e) make available to those persons in a timely and readily accessible fashion the Protocol on Post-Removal Maintenance for Property Owners which is attached as Appendix B.

b. The Settling Defendant will make best efforts to submit the proposed ordinance/requirement to the appropriate City authority for approval and adoption within 60 days of EPA's approval of the proposal. If the proposed ordinance/requirement is rejected by the appropriate City authority, then the Settling Defendant will submit a revised proposal to EPA within 45 days for approval and, upon approval, resubmit to the appropriate City authority for approval and adoption. This process shall be followed by the Settling Defendant until such time as an EPA approved ordinance/requirement is adopted by the City. The schedule for review, approval, and resubmission to EPA and/or the City authority may be modified for cause upon written request to, and agreement by, EPA. The Settling Defendant will notify EPA within 30 days after the proposed ordinance/requirement becomes effective in accordance with Section XVII (Notice and Submissions).

12. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with EPA's efforts to secure such

governmental controls.

13. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

VII. REPORTING REQUIREMENTS

14. In addition to any other requirement of this Consent Decree, Settling Defendant shall submit to EPA on an annual basis beginning one year from the effective date of the Decree a written progress report that describes the actions which have been taken to achieve compliance and the status of compliance with Section V of this Consent Decree during the previous year.

15. All reports and other documents submitted by Settling Defendant to EPA which purport to document Settling Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendant.

VIII. FORCE MAJEURE

16. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendant, of any entity controlled by Settling Defendant, or of Settling Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the obligation. The requirement that the Settling Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the

greatest extent possible. "Force Majeure" does not include financial inability to complete the Work.

17. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendant shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 6, within 24 hours of when Settling Defendant first knew that the event might cause a delay. Within five (5) days thereafter, Settling Defendant shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendant's rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors, knew or should have known.

18. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendant in writing of its decision. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay is attributable to a force majeure event, EPA will notify the Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

19. If Settling Defendant elects to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraph 17, above. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to

EPA and the Court.

IX. DISPUTE RESOLUTION

20. Unless otherwise expressly provided for in this Consent Decree, 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.

21. 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 20 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.

22. **Statements of Position.**

a. 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, within 14 days after the conclusion of the informal negotiation period, Settling Defendant invoke 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 23 or Paragraph 24.

b. Within 30 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 23 or 24. Within 7 days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendant as to whether dispute resolution should proceed under Paragraph 23 or 24, 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 23 and 24, respectively.

23. 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 Action Memorandum'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 Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Superfund Division, EPA Region 6, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 23.a. This decision shall be binding upon Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 23c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 23.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendant with the Court and served on all Parties within 10 days of receipt of EPA's decision. The motion 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 motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Superfund 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 23.a.

24. 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 22, the Director of the Superfund Division, EPA Region 6, will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be binding on the Settling Defendant unless, within 10 days of receipt of the decision, the Settling Defendant files with the Court and serve on the parties a motion for judicial review of the decision 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 motion.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

25. 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 or the Court agrees 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 29. 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 X (Failure to Comply with Consent Decree).

X. FAILURE TO COMPLY WITH CONSENT DECREE

26. Stipulated Penalty. Settling Defendant shall be liable for stipulated penalties in the amounts set forth below to the United States for failure to comply with the requirements of this Consent Decree, unless excused under Section VIII (Force Majeure). "Compliance" by

Settling Defendant shall include completion of the activities under Sections V or VI of this Consent Decree in accordance with all applicable requirements of law, this Consent Decree, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

27. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph 27.b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$100	1st through 14th day
\$200	15th through 30th day
\$300	31st day and beyond

b. Compliance Milestones.

The compliance milestones include the deadlines for compliance set forth in Paragraph 5 (c)-(g) and Paragraphs 7-9 and 12.

c. Settling Defendant's failure to comply with the requirements of Paragraphs 5(a) -(b) and 6 shall result in a stipulated penalty of \$100 per violation per day of noncompliance after written notice by EPA and a grace period of 30 days to correct the noncompliance.

28. a. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA

Region and Site Spill ID Number 06D7, DOJ Case Number 90-11-3-1638/2, and the civil action number. Settling Defendant shall send the check (and any accompanying letter) to:

U.S. Environmental Protection Agency - Region VI
Attention: Superfund Accounting
P.O. Box 360582M
Pittsburgh, PA 15251

b. At the time of each payment, Settling Defendant shall also send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number 06D7, DOJ Case Number 90-11-3-1638/2, and the civil action number.

c. With the exception of penalties provided in Paragraph 15(c), penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

29. 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 15 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 Defendant shall pay all accrued penalties determined by the Court to be

owed to EPA 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 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 or to Settling Defendant to the extent that they prevail.

30. If the United States brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

31. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree.

32. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section V or from performance of any other requirements of this Consent Decree.

XI. COVENANT NOT TO SUE BY PLAINTIFF

33. Covenant Not to Sue Settling Defendant by United States. Except as specifically provided in Section VIII (Reservation of Rights by United States), the United States covenants

not to sue or to take administrative action against Settling Defendant pursuant to Sections 104(e), 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9604(e), 9606, and 9607(a), to recover Past Response Costs, civil penalties related to the Settling Defendant's prior failure to provide access, or the Work. This covenant not to sue shall take effect upon Settling Defendant's recording of Conveyance Notices upon all properties at the Site as required by Section V and payment of any amount due under Section VI (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

XII. RESERVATIONS OF RIGHTS BY UNITED STATES

34. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiff in Paragraph 33. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:

- a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for

the costs of any natural resource damage assessments.

XIII. COVENANT NOT TO SUE BY SETTLING DEFENDANT

35. Settling Defendant covenants not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs, access, the Work, or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States, including any department, agency or instrumentality of the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs, access, or the Work.

36. Nothing in this Consent Decree shall be deemed to constitute approval or 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).

37. Settling Defendant agrees not to assert any claims for Past Response Costs, access or the Work, and to waive and dismiss all claims or causes of action that it may have relating to Past Response Costs, access, or the Work, including for contribution, against any other person. This waiver shall not apply with respect to any defenses, claims or causes of action that Settling

Defendant may have against any person if such person asserts a claim or cause of action relating to Past Response Costs, access, or the Work against such Settling Defendant and that claim is not otherwise barred by the effect of this settlement.

XIV. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

38. Except as provided in Paragraph 33, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 37, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

39. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs and the Work.

40. In any subsequent administrative or judicial proceeding initiated by the United States 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 statute of limitations, 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 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 Covenant Not

to Sue by Plaintiff set forth in Section XI.

XV. ACCESS TO INFORMATION

41. Settling Defendant shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as "records") within its possession or control or that of its contractors or agents relating to activities at the Site, including, but not limited to, correspondence, or other documents or information related to the Site.

42. Confidential Business Information and Privileged Documents.

a. Settling Defendant may assert business confidentiality claims covering part or all of the records submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R.

2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Defendant that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such records without further notice to Settling Defendant.

b. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing records, it shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of

privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor.

However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

43. No claim of confidentiality shall be made with respect to any data, including but not limited to any other documents or information evidencing conditions at or around the Site.

XVI. RETENTION OF RECORDS

44. Until 10 years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

45. After the conclusion of the 10-year document retention period in the preceding paragraph, Settling Defendant shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendant shall deliver any such records to EPA. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the

author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

46. Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e)

XVII. NOTICES AND SUBMISSIONS

47. Whenever, under the terms of this Consent Decree, 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 Party 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, DOJ, and Settling Defendant, respectively.

As to the United States:

DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # 90-11-3-1638/2)
P.O. Box 7611
Washington, D.C. 20044-7611

EPA:

Ursula Lennox
Remedial Project Manager
U.S. EPA (6SF-LP)
U. S. Environmental Protection Agency Region VI
1445 Ross Avenue
Dallas, TX 75202-2733

Joseph E. Compton, III
Assistant Regional Counsel
Office of Regional Counsel
U. S. Environmental Protection Agency Region VI
1445 Ross Avenue
Dallas, TX 75202-2733

Settling Defendant:

Penya M. Moses-Fields
City Attorney
City of New Orleans Law Department
1300 Perdido Street, 5th Floor East
New Orleans, LA 70112

Wynecta Fisher
Director, Mayor's Office of Environmental Affairs
1350 Poydras Street, Suite 1000
New Orleans, LA 70112

XVIII. RETENTION OF JURISDICTION

48. This Court shall retain jurisdiction over this matter for the purpose of

interpreting and enforcing the terms of this Consent Decree.

XIX. INTEGRATION

49. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

50. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

51. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXI. SIGNATORIES/SERVICE

52. Each undersigned representative of Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

53. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by

this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

54. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

XXII. APPENDIX

55. The following appendices are attached to and incorporated into this Consent Decree:

“Attachment A” is the Technical Abstract for Utilities Operating Within the Agriculture Street Landfill Superfund Site;

“Attachment B” is the protocol for Post-Removal Maintenance for Property Owners;

“Attachment C” is the draft Environmental Protection Easement and Declaration of Restrictive Covenants;

“Attachment D” is the Conveyance Notice.

XXIII. FINAL JUDGMENT

56. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and the Settling

Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ____ DAY OF _____, 2008.

MARCEL LIVAUDAIS, JR.
Senior United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. City of New Orleans, et al*, Civil Action No. 02-3618, relating to the Agriculture Street Landfill Superfund Site.

FOR THE UNITED STATES OF AMERICA

UNITED STATES DEPARTMENT OF JUSTICE

Date: 4/3/08



RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: 3/2/2008

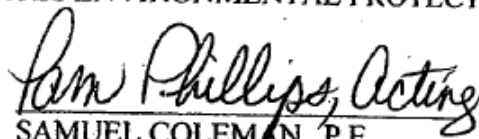


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Eastern District of Louisiana

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

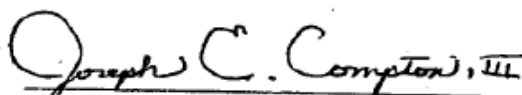
Date: 5/7/08



SAMUEL COLEMAN, P.E.

Director
Superfund Division

Date: 5/19/08

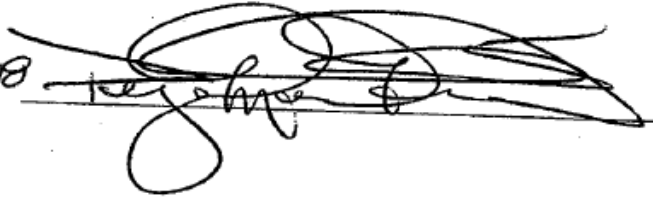


JOSEPH E. COMPTON, III

Assistant Regional Counsel
Office of Regional Counsel
U. S. Environmental Protection Agency Region VI
1445 Ross Avenue
Dallas, TX 75202-2733

THE UNDERSIGNED PARTY enter into this Consent Decree in the matter of *United States v. City of New Orleans, et al*; Civil Action No. 02-3618, relating to the Agriculture Street Landfill Superfund Site.

FOR DEFENDANT CITY OF NEW ORLENAS

Date: January 23, 2008 

PENYA MOSES-FIELDS
City Attorney
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