

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA

Plaintiff,

v.

Civil Action No. 1:98-CV-00054

AVX CORPORATION

Defendant.

----- x

**AMENDED
REMEDIAL DESIGN/REMEDIAL ACTION
CONSENT DECREE**

TABLE OF CONTENTS

| | | |
|---------|--|----|
| I. | BACKGROUND | 1 |
| II. | JURISDICTION | 2 |
| III. | PARTIES BOUND | 2 |
| IV. | DEFINITIONS | 3 |
| V. | GENERAL PROVISIONS | 6 |
| VI. | PERFORMANCE OF THE WORK | 7 |
| VII. | REMEDY REVIEW | 8 |
| VIII. | ACCESS AND INSTITUTIONAL CONTROLS | 9 |
| IX. | PROJECT COORDINATORS | 11 |
| X. | ASSURANCE OF ABILITY TO COMPLETE WORK | 11 |
| XI. | EMERGENCY RESPONSE..... | 15 |
| XII. | REIMBURSEMENT OF RESPONSE COSTS | 15 |
| XIII. | INDEMNIFICATION AND INSURANCE | 17 |
| XIV. | FORCE MAJEURE | 18 |
| XV. | DISPUTE RESOLUTION | 19 |
| XVI. | STIPULATED PENALTIES | 21 |
| XVII. | COVENANTS NOT TO SUE BY PLAINTIFF | 24 |
| XVIII. | COVENANTS BY SETTLING DEFENDANT | 26 |
| XIX. | EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION..... | 27 |
| XX. | ACCESS TO INFORMATION | 28 |
| XXI. | RETENTION OF RECORDS..... | 28 |
| XXII. | NOTICES AND SUBMISSIONS..... | 29 |
| XXIII. | EFFECTIVE DATE..... | 31 |
| XXIV. | RETENTION OF JURISDICTION | 31 |
| XXV. | APPENDICES | 31 |
| XXVI. | COMMUNITY RELATIONS | 31 |
| XXVII. | MODIFICATION | 32 |
| XXVIII. | LODGING AND OPPORTUNITY FOR PUBLIC COMMENT..... | 32 |
| XXIX. | SIGNATORIES/SERVICE..... | 32 |
| XXX. | FINAL JUDGMENT | 32 |

I. BACKGROUND

A. Pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9605, the U.S. Environmental Protection Agency (“EPA”) placed the Olean Well Field Superfund Site in Olean, New York (“Site”) on the National Priorities List (“NPL”), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 9, 1983.

B. In September 1996, EPA issued a “record of decision” (also known as the “Operable Unit 2 ROD” or “OU2 ROD”) in which it documented its selection of a remedy for the Site, including a portion of the Site designated in the OU2 ROD as the AVX Source Area.

C. The United States of America (“United States”), on behalf of the EPA, filed a complaint in this matter pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606, 9607 (the “Complaint”). On March 17, 1998, this Court entered a consent decree (“March 1998 Consent Decree”) in this matter which required AVX Corporation (“AVX”) to perform the remedy for the AVX Source Area in accordance with the OU2 ROD.

D. AVX commenced implementing the work as required by the March 1998 Consent Decree in 2000 with the excavation of approximately 5,000 tons of soil. The excavation was halted because the impacted soil extended beneath the southeast corner of AVX’s manufacturing building, which was fully occupied with AVX’s sensitive manufacturing operations and further excavation had the potential to impact the structural integrity of the occupied building. As a result, the excavation area was backfilled pending further study.

E. Multi-phase investigations were performed by AVX after the soil excavation was halted.

F. On June 15, 2015, pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of a January 29, 2013 Feasibility Study Investigation (“FSI”) Report and a February 4, 2015 Feasibility Study (“FS”) Report, and of a proposed plan to amend the OU2 ROD related to the AVX Property. The notice was published in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Director of the ERRD, EPA Region 2, based the selection of the response action.

G. On September 30, 2015, EPA issued a ROD amendment (“ROD Amendment”) which amended the OU2 ROD regarding the AVX Property, as this term is defined in Paragraph 4 below. The ROD Amendment documented EPA’s decision regarding the remedy (which is also referred to as the “remedial design and remedial action” or “RD/RA”) to be implemented at the AVX Property.

H. In accordance with the National Contingency Plan (“NCP”), 40 C.F.R. Part 300, and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New York (“State”) on April 8, 2016, of negotiations with a potentially responsible party (“PRP”) regarding the implementation of the remedy selected in the ROD Amendment, and provided the State with an opportunity to participate in such negotiations and to be a party to this Consent Decree.

I. Due to changed circumstances, specifically, that the ROD underlying the March 1998 Consent Decree has been amended, it is appropriate under Fed. R. Civ. P. 60(b) to also amend the March 1998 Consent Decree and replace it with a superseding consent decree.

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

K. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the remedies selected in the ROD Amendment and the work to be performed by Settling Defendant constitute response actions taken or ordered by the President for which judicial review shall be limited to the administrative record.

L. The Settling Defendant denies that it has any liability to the Plaintiff arising out of the transactions or occurrences alleged in the Complaint, denies it is responsible for any release or threatened release of hazardous substance(s) at or from the Site and does not acknowledge that any release or threatened release constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

M. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the AVX Property and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby 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. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant 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 applies to and is binding upon the United States and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate status of Settling Defendant, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing Settling Defendant with respect to the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent

Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the performance of the Work pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“AVX Property” shall mean the real property located at 1695 Seneca Avenue, Olean, New York, where AVX conducts manufacturing operations.

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

“Certification of RA Completion” shall mean EPA’s certification of completion for the ROD Amendment pursuant to Paragraph 4.6 of the SOW.

“Consent Decree” shall mean this Decree and all appendices attached hereto (listed in Section XXV). In the event of conflict between this Decree and any appendix, this Decree shall control.

“Day” shall mean a calendar day unless expressly stated to be a working day. “Working day” shall mean a day other than a Saturday, Sunday, or Federal holiday. 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.

“Effective Date” shall mean the effective date of this Consent Decree as provided in Paragraph 90.

“ERRD” shall mean the Emergency and Remedial Response Division, EPA Region II.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“First Operable Unit Record of Decision” or “OU1 ROD” shall mean the EPA Record of Decision relating to the first operable unit at the Olean Well Field Superfund Site signed on September 24, 1985 by the Regional Administrator, EPA Region II, or his delegate, and all attachments thereto.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing deliverables submitted pursuant to this Consent Decree, in overseeing implementation of the Work, or otherwise

implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 33 (Emergency Response), Paragraph 93 (Community Relations) (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), Section VII (Remedy Review), Paragraph 30 (Access to Financial Assurance), and Section XV (Dispute Resolution), the cost of attorney time and any monies paid to secure access, and/or to secure, implement, monitor, maintain, or enforce institutional controls including the amount of just compensation, and all litigation costs. Future Response Costs shall also include all Interim Response Costs.

“Interim Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs incurred by the United States in connection with the Site between June 23, 2016 and the Effective Date.

“Interest” shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

“March 1998 Consent Decree” shall have the meaning set forth in Section I.C.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“O&M” shall mean all activities required to operate, maintain, and monitor the effectiveness of the Remedial Action as specified in the SOW or any EPA-approved deliverable under the SOW.

“Olean Well Field Special Account” shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. §9622(b)(3).

“Operable Unit 2 Source Areas” shall mean the Alcas Cutlery, McGraw-Edison, Loohn’s Dry Cleaner and Launderer, and the AVX properties identified as source areas in the September 1996 Second Operable Unit Record of Decision for the Site.

“Operable Unit 4” shall mean the area of contamination downgradient of the AVX Property for which an investigation was commenced by EPA in 2014.

“OU2 ROD” shall mean the EPA Record of Decision relating to the Second Operable Unit at the Olean Well Field Superfund Site signed on September 30, 1996, by the Regional Administrator, EPA Region II, or her delegate, and all attachments thereto.

“Paragraph” shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

“Parties” shall mean the United States and the Settling Defendant.

“Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site from September 1,

2003 through June 22, 2016, plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a).

“Performance Standards” shall mean the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the ROD Amendment.

“Plaintiff” shall mean the United States.

“RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901-6992k (also known as the Resource Conservation and Recovery Act).

“Remedial Action” shall mean the remedial action selected in the ROD Amendment.

“Remedial Design” shall mean those activities to be undertaken by the Settling Defendant to develop the final plans and specifications for the Remedial Action as stated in the SOW.

“ROD Amendment” shall mean the record of decision issued by EPA on September 30, 2015, which amended the AVX Property portion of the OU2 ROD, attached as Appendix A.

“Section” shall mean a portion of this Consent Decree identified by a roman numeral.

“Settling Defendant” shall mean AVX Corporation.

“Site” shall mean the Olean Well Field Superfund Site, located in Cattaraugus County, New York. The boundaries of the Site are generally defined by the extent of contaminated groundwater underlying the City of Olean, the Town of Olean and the Town of Portville, and by contaminated soil at certain locations in the City of Olean and Town of Olean and are depicted generally on the map attached as Appendix C.

“State” shall mean the State of New York.

“Statement of Work” or “SOW” shall mean the document describing the activities Settling Defendant must perform to implement the remedy set forth in the ROD Amendment, which is attached as Appendix B.

“Supervising Contractor” shall mean the principal contractor retained by Settling Defendant to supervise and direct the implementation of the Work under this Consent Decree.

“United States” shall mean the United States of America.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

“Work” shall mean all activities Settling Defendant is required to perform under this Consent Decree. Work does not include those activities required by Section XXI (Retention of Records).

V. GENERAL PROVISIONS

5. **Objectives of the Parties.** The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at or related to the AVX Property by the Settling Defendant, to reimburse response costs of the Plaintiff, and to resolve the claims of Plaintiff against Settling Defendant as provided in this Consent Decree.

6. **Commitments by Settling Defendant.** Settling Defendant shall finance and perform the Work in accordance with this Consent Decree, the ROD Amendment, the SOW, and all deliverables developed by Settling Defendant and approved by EPA pursuant to this Consent Decree. Settling Defendant shall also reimburse the United States for Past Response Costs and Future Response Costs as provided in this Consent Decree.

7. **Compliance with Applicable Law.** All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the ROD Amendment and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(e) of the NCP, 40 C.F.R. § 300.400(e), no permit shall be required for any portion of the Work conducted entirely on-Site. Where any portion of the Work that is not on-Site requires a federal or state permit or approval, Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendant may seek relief under the provisions of Section XIV (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice of Obligations to Successors-in-Title.

a. Within 10 days of the Effective Date of this Consent Decree, Settling Defendant shall record a notice of Amended Consent Decree in the appropriate land records. The Settling Defendant shall provide EPA with a certified copy of the recorded Notice within 45 days of recording such Notice.

b. At least 15 days prior to the conveyance of any interest in the AVX Property, including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Settling Defendant conveying the interest shall give the proposed grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the AVX Property (hereinafter referred to as "Access

Easements”) pursuant to Section VIII (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as “Restrictive Easements”) pursuant to Section VIII (Access and Institutional Controls). At least 15 days prior to such conveyance, the Settling Defendant conveying the interest shall also give written notice to EPA of the proposed conveyance, including the name and address of the proposed grantee, and the date on which notice of the Consent Decree and any Access Easements and/or Restrictive Easements was given to the proposed grantee.

c. In the event of any such conveyance, Settling Defendant’s obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to this Consent Decree, shall continue to be met by the Settling Defendant. In no event shall the conveyance release or otherwise affect the liability of the Settling Defendant to comply with all provisions of this Consent Decree, absent the prior written consent of EPA. If the United States approves, the grantee may perform some or all of the Work under this Consent Decree.

VI. PERFORMANCE OF THE WORK

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VI (Performance of the Work), VII (Remedy Review), and XI (Emergency Response) of this Consent Decree shall be under the direction and supervision of a Supervising Contractor, the selection of which shall be subject to disapproval by EPA. Within 25 days after the lodging of this Consent Decree, Settling Defendant shall notify EPA in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendant proposes to change a Supervising Contractor, Settling Defendant shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. The Supervising Contractor, as well as all other contractors and subcontractors who engage in the “practice of engineering” at the Site on behalf of Settling Defendant, as the “practice of engineering” is defined at Section 7201 of the New York State Education Law, must comply with all applicable New York State legal requirements regarding the practice of professional engineering within the State of New York, including, but not limited to, all applicable requirements of the New York State Education Law and Articles 15 and 15-A of the Business Corporation Law.

c. If EPA disapproves a proposed Supervising Contractor, EPA will notify Settling Defendant in writing. Settling Defendant shall submit to EPA a list of contractors (not including the contractor previously disapproved by EPA), including the qualifications of each contractor, that would be acceptable to them within 35 days of receipt of EPA’s disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendant may select any contractor from that list that is not disapproved

and shall notify EPA of the name of the contractor selected within 30 days of EPA's authorization to proceed.

d. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendant from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendant may seek relief under the provisions of Section XIV (Force Majeure) hereof.

11. **Performance of Work in Accordance with SOW.** Settling Defendant shall: (a) develop the Remedial Design; (b) perform the Remedial Action; (c) operate, maintain, and monitor the effectiveness of the Remedial Action; and, if necessary, (d) develop and implement a Feasibility Study Work Plan; all in accordance with the SOW and all EPA-approved, conditionally-approved, or modified deliverables as required by the SOW. All deliverables required to be submitted for approval under the Consent Decree or SOW shall be subject to approval by EPA in accordance with Paragraph 6.6 (Approval of Deliverables) of the SOW.

12. **Modification of the SOW or Related Deliverables.**

a. If EPA determines that modification to the work specified in the SOW and/or in deliverables developed under the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy for the AVX Property as set forth in the ROD Amendment, EPA may require that such modification be incorporated in the SOW and/or deliverable; provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy set forth in Paragraph 1.2 of the SOW.

b. If Settling Defendant objects to any modification determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XV (Dispute Resolution), Paragraph 52 (record review). The SOW and/or related deliverables shall be modified in accordance with final resolution of the dispute.

c. Settling Defendant shall implement any work required by any modifications incorporated in the SOW and/or in deliverables developed pursuant to the SOW in accordance with this Paragraph.

d. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

13. Settling Defendant acknowledges and agrees that nothing in this Consent Decree, the SOW, or any deliverable required under the SOW constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW or related deliverable will achieve the Performance Standards.

VII. REMEDY REVIEW

14. **Periodic Review.** At least every five years, as required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c) and any applicable regulations, Settling Defendant shall conduct any studies and investigations requested by EPA which are consistent with the Remedial Action and necessary to determine whether the Remedial Action is protective of human health and the environment.

15. **EPA Selection of Further Response Actions.** If EPA determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select further response actions for the AVX Property in accordance with the requirements of CERCLA and the NCP.

16. **Opportunity to Comment.** Settling Defendant and, if required by Sections 113(k)(2) or 117 of CERCLA, 42 U.S.C. §§ 9613(k)(2) or 9617, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

17. **Settling Defendant's Obligation to Perform Further Response Actions.** If EPA selects further response actions for the AVX Property, EPA may require Settling Defendant to perform such further response actions, but only to the extent that the reopener conditions in Paragraphs 68 and 69 (United States' Pre- and Post-Certification Reservations are satisfied. Settling Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (a) EPA's determination that the reopener conditions of Paragraph 68 and 69 are satisfied, (b) EPA's determination that the Remedial Action is not protective of human health and the environment, or (c) EPA's selection of the further response actions. Disputes pertaining to whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 52 (record review).

18. **Submissions of Plans.** If Settling Defendant is required to perform further response actions pursuant to Paragraph 17, it shall submit a plan for such response action to EPA for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendant). Settling Defendant shall implement the plan approved by EPA in accordance with the provisions of this Decree.

VIII. ACCESS AND INSTITUTIONAL CONTROLS

19. Settling Defendant shall, commencing on the date of lodging of this Consent Decree, and terminating upon the issuance of the Certification of Work Completion pursuant to Paragraph 4.8 of the SOW, provide the United States, the State, and their representatives, including EPA and its contractors, with access at all reasonable times to the AVX Property for the purpose of conducting any activity related to this Consent Decree, including, but not limited to, the following activities:

- 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 AVX Property;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing additional response actions at or near the Site, including the AVX Property;

f. Assessing implementation of quality assurance and quality control practices as defined in the approved construction quality assurance quality control plan as provided in the SOW;

g. Implementing the Work pursuant to the conditions set forth in Paragraph 72 (Work Takeover);

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

i. Assessing Settling Defendant's compliance with this Consent Decree;

j. Determining whether the Site, including the AVX 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; and

k. Implementing, monitoring, maintaining, reporting on, and enforcing any Institutional Controls.

20. Settling Defendant shall, commencing on the date of lodging of this Consent Decree and terminating upon issuance of the Certificate of Work Completion as provided under the SOW, refrain from using the AVX Property in any manner that would interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree or which were, are or will be implemented pursuant to the ROD Amendment, as follows:

a. Refrain from extracting groundwater with the exception of (i) extraction for purposes of implementing or monitoring the RA, (ii) extraction of groundwater from the existing production well at the AVX Property (or any replacement well) for manufacturing uses (including fire protection, cooling, or other facility-related uses), or (iii) as may otherwise be approved by EPA;

b. Refrain from disturbing the soil unless such disturbance is performed in accordance with an approved Site Management Plan prepared in accordance with Paragraph 6.7(g) of the SOW; and

c. Ensure that any new structures will be constructed in a manner consistent with an approved Site Management Plan prepared in accordance with Paragraph 6.7(g) of the SOW.

21. If EPA determines that access and/or 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 OU1 ROD or the ROD Amendment, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with EPA's efforts to secure such governmental controls.

22. 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.

IX. PROJECT COORDINATORS

23. Within 45 days of lodging this Consent Decree, Settling Defendant and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Party at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Settling Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendant's Project Coordinator shall not be an attorney for the Settling Defendant in this matter. Such Project Coordinator may assign other representatives, including other contractors, to serve as AVX Property representatives for oversight of performance of daily operations during remedial activities.

24. Plaintiff may designate other representatives, including, but not limited to, EPA and State employees, and federal and State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

25. Settling Defendant's Project Coordinator or Alternative Project Coordinator shall be available to meet with EPA at EPA's request.

X. ASSURANCE OF ABILITY TO COMPLETE WORK

26. In order to ensure completion of the Work, Settling Defendant shall secure financial assurance, initially in the amount of \$3,827,000 ("Estimated Cost of the Work"), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed in subsections a – f, below, in a form substantially identical to the relevant sample documents available from the "Financial Assurance" category in the Cleanup Enforcement Model Language and Sample Documents Database located at <http://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. Settling Defendant may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

a. A surety bond guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;

e. A demonstration by Settling Defendant that Settling Defendant meets the relevant financial test criteria of 40 C.F.R. § 264.143(f) and reporting requirements of this Section for the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee, accompanied by a standby funding commitment, which obligates Settling Defendant to pay funds to or at the direction of EPA, up to the amount financially assured through the use of this demonstration in the event of a Work Takeover; or

f. A guarantee to fund or perform the Work executed in favor of EPA by one of the following: (1) a direct or indirect parent company of Settling Defendant; or (2) a company that has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to EPA’s satisfaction that it meets the relevant financial test criteria of 40 C.F.R. § 264.143(f) and reporting requirements of this Section for the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee.

27. Settling Defendant has selected, and EPA has found satisfactory, as an initial financial assurance a demonstration pursuant to Paragraph 22.e. Within 30 days after the Effective Date, Settling Defendant shall execute and/or otherwise finalize all mechanisms or other documents consistent with the form of financial assurance selected by Settling Defendant pursuant to this Paragraph and shall submit such mechanisms and documents to the EPA personnel specified in Section XXII (Notices and Submissions).

28. If Settling Defendant provides financial assurance by means of a demonstration or guarantee under Paragraph 26.e or 26.f, Settling Defendant shall also comply and shall ensure that its guarantor complies with the other relevant criteria and requirements of 40 C.F.R. § 264.143(f) and this Section, including, but not limited to: (a) the initial submission to EPA of required documents from the affected entity’s chief financial officer and independent certified public accountant no later than 30 days after the Effective Date; (b) the annual resubmission of such documents within 90 days after the close of each such entity’s fiscal year; and (c) the notification of EPA no later than 30 days, in accordance with Paragraph 29, after any such entity determines that it no longer satisfies the relevant financial test criteria and requirements set forth at 40 C.F.R. § 264.143(f)(1). Settling Defendant agrees that EPA may also, based on a belief that an affected entity may no longer meet the financial test requirements of Paragraph 26.e or 26.f, require reports of financial condition at any time from such entity in addition to those specified

in this Paragraph. For purposes of this Section, references in 40 C.F.R. Part 264, Subpart H, to: (1) the terms “current closure cost estimate,” “current post-closure cost estimate,” and “current plugging and abandonment cost estimate” include the Estimated Cost of the Work; (2) the phrase “the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates” includes the sum of all environmental obligations (including obligations under CERCLA, RCRA, and any other federal, state, or tribal environmental obligation) guaranteed by such company or for which such company is otherwise financially obligated in addition to the Estimated Cost of the Work under this CD; (3) the terms “owner” and “operator” include Settling Defendant making a demonstration or obtaining a guarantee under Paragraph 26.e or 26.f; and (4) the terms “facility” and “hazardous waste management facility” mean the AVX Property at the Site.

29. Settling Defendant shall monitor the adequacy of the financial assurance. If Settling Defendant becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, Settling Defendant shall notify EPA of such information within 30 days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify Settling Defendant of such determination. Settling Defendant shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for Settling Defendant, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. Settling Defendant shall follow the procedures of Paragraph 31 (Modification of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Settling Defendant’s inability to secure and submit to EPA financial assurance in accordance with this Section shall in no way excuse performance of any other requirements of this CD, including, without limitation, the obligation of Settling Defendant to complete the Work in accordance with the terms of this CD.

30. Access to Financial Assurance.

a. If EPA issues a notice of implementation of a Work Takeover under Paragraph 72, then, in accordance with any applicable financial assurance mechanism and/or related standby funding commitment, EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with Paragraph 30.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel such mechanism, and Settling Defendant fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with Paragraph 30.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under Paragraph 65, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism and/or related standby funding commitment, whether in cash or in kind, to continue and complete the Work; or (2) the financial

assurance is provided under Paragraph 26.e or 26.f, then EPA may demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. Settling Defendant shall, within 30 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this Paragraph 30 shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the Federal Deposit Insurance Corporation (“FDIC”), in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Olean Well Field Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this Paragraph 30 must be reimbursed as Future Response Costs under Section XII (Payments for Response Costs).

31. Modification of Amount, Form, or Terms of Financial Assurance. Defendant may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with Paragraph 27, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify Settling Defendant of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Settling Defendant may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA’s approval; or (b) if there is a dispute, the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XV (Dispute Resolution). Any decision made by EPA on a request submitted under this Paragraph to change the form or terms (other than the amount) of a financial assurance mechanism shall be made in EPA’s sole and unreviewable discretion, and such decision shall not be subject to challenge by Settling Defendant pursuant to the dispute resolution provisions of this CD or in any other forum. Within 30 days after receipt of EPA’s approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, Settling Defendant shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with Paragraph 27.

32. Release, Cancellation, or Discontinuation of Financial Assurance. Settling Defendant may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA issues a Certification of Work Completion under Paragraph 4.8 (Certification of Work Completion) of the SOW; (b) in accordance with EPA’s approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation or discontinuance of any financial assurance, in accordance with the agreement, final administrative decision, or final judicial decision resolving such dispute under to Section XV (Dispute Resolution).

XI. EMERGENCY RESPONSE

33. Settling Defendant shall comply with the emergency and release response and reporting requirements under Paragraph 4.3 (Emergency Response and Reporting) of the SOW. Nothing in the preceding sentence or in this Consent Decree shall be deemed to limit any authority of the United States (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the AVX Property, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the AVX Property, subject to Section XVII (Covenants Not to Sue by Plaintiff).

XII. REIMBURSEMENT OF RESPONSE COSTS

34. Within 45 days of the Effective Date of this Consent Decree, Settling Defendant shall pay to the EPA Hazardous Substance Superfund \$162,738.99 in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 95V0865, EPA Region II and Site/Spill ID # 0216, and DOJ case number 90-11-2-181B. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the Western District of New York following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States and to EPA's Financial Management Branch as specified in Section XXII (Notices and Submissions).

35. The total amount to be paid by Settling Defendant pursuant to Paragraph 34 shall be deposited by EPA in the Olean Well Field Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

36. Settling Defendant shall reimburse the EPA Hazardous Substance Superfund for all Future Response Costs that are not inconsistent with the NCP. The United States will periodically send Settling Defendant billings for such costs. The billings will be accompanied by a printout of cost data in EPA's financial management system. Settling Defendant shall make all payments within 30 days of the date of each bill requiring payment, except as otherwise provided in Paragraph 34. All payments to the United States under this Section shall be paid by Settling Defendant via EFT, referencing the Site/Spill ID and DJ numbers. The Fedwire EFT payment must be sent as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read

“D 68010727 Environmental Protection Agency”

37. To ensure that Settling Defendant’s payment is properly recorded, Settling Defendant shall send a letter, within one week of the EFT, indicating that the payment is for Future Response Costs and which references the date of the EFT, the payment amount, the name of the site, the case number, and Settling Defendant’s name and address, to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with Paragraph 89.

38. The total amount to be paid by Settling Defendant pursuant to Paragraph 36 shall be deposited by EPA in the Olean Well Field Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund, provided, however, that EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Olean Well Field Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by Settling Defendant pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.

39. **Contesting Future Response Costs.** Settling Defendant may contest payment of any Future Response Costs under Paragraph 36 if it determines that the United States has made a mathematical error, if it alleges that a cost item that is included represents costs that are inconsistent with the NCP, or that the cost item was not incurred in connection with the AVX Property. Such objection shall be made in writing within 45 days of the date of the bill and must be sent to the United States pursuant to Section XXII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Settling Defendant shall within the 45 day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 36. Simultaneously, Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New York and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Settling Defendant shall send to the United States, as provided in Section XXII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Settling Defendant shall initiate the Dispute Resolution procedures in Section XV (Dispute Resolution). If the United States prevails in the dispute, within 25 days of the resolution of the dispute, Settling Defendant shall pay the sums due, with accrued interest (as shown by a bank statement from the bank at which the escrow account was established, a copy of which shall be submitted with the payment), to the United States in the manner described in Paragraph 36. If Settling Defendant prevails concerning any aspect of the contested costs, Settling Defendant shall pay that portion of the costs for which they did not prevail, plus associated accrued interest (as shown by a bank statement from the bank at which the escrow account was established, a copy of which shall be submitted with the payment), to the United States in the manner described in Paragraph 36; Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution

procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendant's obligation to reimburse the United States for its Future Response Costs.

40. **Interest.** In the event that the payments required by Paragraph 34 are not made within 45 days of the Effective Date of this Consent Decree or the payments required by Paragraph 36 are not made within 45 days of the date of each bill, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue 45 days after the Effective Date of this Consent Decree. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments under this Section. Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 36.

XIII. INDEMNIFICATION AND INSURANCE

41. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA, 42 U.S.C. §9604(e). Settling Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Further, the Settling Defendant agrees to reimburse the United States for 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 based on negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States shall not 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.

42. The United States shall give Settling Defendant notice of any claim for which the United States plans to seek indemnification pursuant to Paragraph 41, and shall consult with Settling Defendant prior to settling such claim.

43. Settling Defendant waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, 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 AVX Property, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement 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 AVX Property, including, but not limited to, claims on account of construction delays.

44. No later than 15 days before commencing any on-site work, Settling Defendant shall secure, and shall maintain until EPA issues a Certification of RA Completion, comprehensive general liability insurance with limits of ten million dollars, combined single limit, and automobile liability insurance with limits of ten million dollars, combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Decree, Settling Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendant shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date of this Consent Decree. If Settling Defendant demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XIV. FORCE MAJEURE

45. "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, which 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 (a) as it is occurring and (b) 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 or a failure to attain the Performance Standards.

46. 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 Chief of the New York Remediation Branch, ERRD, within 48 hours of when Settling Defendant first knew that the event might cause a delay. Within 10 days thereafter, Settling Defendant shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all obligations affected by 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; Settling Defendant's rationale for attributing such delay to a Force Majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. 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.

47. If EPA 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 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 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 agrees that the delay is attributable to a Force Majeure event, EPA will notify Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

48. If the Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XV (Dispute Resolution), it shall do so no later than 20 days after receipt of EPA's notice under the preceding paragraph. 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 Paragraphs 45 and 46, 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.

XV. DISPUTE RESOLUTION

49. 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.

50. 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.

51. 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 15 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 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 Settling Defendant. The Statement of Position shall specify Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraphs 52 or 53.

b. Within 14 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 Paragraphs 52 or 53. Within 14 days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and Settling Defendant as to whether dispute resolution should proceed under Paragraphs 52 or 53, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if 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 52 or 53.

52. 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 Amendment's provisions or the appropriateness of the remedy selected in the ROD Amendment.

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 Branch Chief of ERRD will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 52.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraphs 52.c and 52.d.

c. Any administrative decision made by EPA pursuant to Paragraph 52.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendant with the Court and served on all Parties within 14 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 ERRD Branch Chief 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 51.a.

53. 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 51.a, the ERRD Branch Chief will issue a final decision resolving the dispute. The ERRD Branch Chief's decision shall be binding on the Settling Defendant unless, within 14 days of receipt of the decision, the Settling Defendant file 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. Notwithstanding Paragraph K of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

54. 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 55. 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 XVI (Stipulated Penalties).

XVI. STIPULATED PENALTIES

55. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 56 and 57 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XIV (Force Majeure). "Compliance" by Settling Defendant shall include performance and completion of the activities under this Consent Decree or any deliverable approved under this Consent Decree identified below, in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any other deliverable approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree. If an initially submitted or resubmitted deliverable contains a material defect, and (i) the conditions are met for modifying an initial deliverable under Paragraph 6.6(a)(2)(ii) of the SOW; or (ii) the resubmitted deliverable contains a material defect, then the material defect shall constitute a lack of compliance for purposes of this Paragraph.

56. Stipulated Penalty Amounts – Work (Including Payments and Certain Deliverables).

a. The following stipulated penalties shall accrue per violation per day for any noncompliance with the requirements identified in Paragraph 56.b:

| Penalty Per Violation Per Day | Period of Noncompliance |
|-------------------------------|---|
| \$1,500 | 1 st through 14 th day |
| \$4,000 | 15 th through 30 th day |
| \$8,000 | 31 st day and beyond |

b. Compliance Requirements

- (1) Any deadline imposed by the SOW or by any plan which is prepared pursuant to the SOW and approved by EPA, subject to any extensions to such deadlines granted by EPA;
- (2) Obligations imposed by Paragraph **4.3** of the SOW (Emergency Response and Reporting);
- (3) Obligations imposed by Section VIII (Access and Institutional Controls);
- (4) Performance of the Remedial Design and Remedial Action in accordance with the ROD Amendment, the SOW (and any modifications thereof), and this Consent Decree;
- (5) Modification of the SOW or related deliverables pursuant to Paragraph 12, and implementation of the work called for by such modifications in accordance with the modified SOW or related deliverables;
- (6) Implementation of O&M, including post-remediation monitoring, in accordance with the ROD Amendment and this Consent Decree;
- (7) Performance of studies and investigations pursuant to Section VII (Remedy Review).
- (8) Establishment and maintenance of financial assurance in compliance with the timelines and other substantive and procedural requirements of Section X (Assurance of Ability to Complete Work).

57. Stipulated Penalty Amounts – Other Deliverables. The following stipulated penalties shall accrue per violation per day for failure to submit all other deliverables in a timely or adequate manner pursuant to the Consent Decree:

| Penalty Per Violation Per Day | Period of Noncompliance |
|-------------------------------|-------------------------|
| \$750 | 1st through 14th day |
| \$1,250 | 15th through 30th day |
| \$2,000 | 31st day and beyond |

58. 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. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under Paragraph 6.6 of the SOW, during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendant of any deficiency; (b) with respect to a decision by the ERRD Branch Chief under Paragraph 52.a or 52.b of Section XV (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendant's reply to EPA's Statement of Position is received until the date that the Branch Chief issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XV (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

59. Following EPA's determination that Settling Defendant has failed to comply with a requirement of this Consent Decree, EPA shall give Settling Defendant written notification of the same and describe the noncompliance. 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 EPA has notified the Settling Defendant of a violation.

60. All penalties accruing under this Section shall be due and payable to the United States within 45 days of the date of EPA's demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section XV (Dispute Resolution). All payments to the United States under this Section shall be paid by Settling Defendant in accordance with the procedures under Paragraph 36.

61. To ensure that Settling Defendant's payment is properly recorded, Settling Defendant shall send a letter, within one week of the EFT, indicating that the payment is for stipulated penalties and which references the date of the EFT, the payment amount, the name of the site, the case number, and Settling Defendant's name and address, to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with Paragraph 89.

62. 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.

63. Penalties shall continue to accrue as provided in Paragraph 58 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 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 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 Paragraph 63.c.

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.

64. If Settling Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. Settling Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 60.

65. 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(l) of CERCLA, 42 U.S.C. § 9622(l). Provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

66. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XVII. COVENANTS NOT TO SUE BY PLAINTIFF

67. In consideration of the actions that 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 68, 69 (United States' Pre- and Post-Certification Reservations), and 71 (General Reservations of Rights) the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), or Section 7003 of RCRA, 42 U.S.C. § 6973, relating to the Site. Except with respect to future liability, these covenants shall take effect upon the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of RA Completion by EPA pursuant to Paragraph 4.6 (Certification of RA Completion) of the SOW. These covenants not to sue are conditioned upon the 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.

68. **United States' Pre-Certification Reservations.** Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel Settling Defendant to perform further response actions relating to the Site and/or to pay the United States for additional costs of response if, (a) prior to Certification of RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or information together with any

other relevant information indicates that the Remedial Action is not protective of human health or the environment.

69. **United States' Post-Certification Reservations.** Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel Settling Defendant to perform further response actions relating to the Site and/or to pay the United States for additional costs of response if, (a) subsequent to Certification of RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

70. For purposes of Paragraph 68 (United States' Pre-Certification Reservations), the information and the conditions known to EPA will include only that information and those conditions known to EPA as of the date the ROD Amendment was signed and set forth in the ROD Amendment and the administrative record supporting the ROD Amendment. For purposes of ¶ 69 (United States' Post-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of RA Completion and set forth in the ROD Amendment, the administrative record supporting the ROD Amendment, the post-ROD Amendment administrative record, or in any information received by EPA pursuant to the requirements of this CD prior to Certification of RA Completion.

71. **General Reservations of Rights.** The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraph 67. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;
- c. liability for future disposal of Waste Material at the Site, other than as provided in the ROD Amendment, the Work, or otherwise ordered by EPA;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. criminal liability;
- f. liability for violations of federal or state law which occur during or after implementation of the Remedial Action;
- g. liability, prior to Certification of RA Completion, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 12 (Modification of the SOW or Related Deliverables);

h. liability for performance of all remaining requirements of EPA's Administrative Order Index No. II CERCLA-60201 relating to the Site, issued on February 7, 1986; and

i. liability for additional response actions related to the AVX Property including the soil under and adjacent to the building, and additional operable units including Operable Unit 4 at the Site.

72. **Work Takeover.** In the event EPA determines that Settling Defendant has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work and has failed to cure such deficiency or delay in a reasonable time following notice from EPA, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendant may invoke the procedures set forth in Section XV (Dispute Resolution), Paragraph 52, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendant shall pay pursuant to Section XII (Reimbursement of Response Costs).

73. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

XVIII. COVENANTS BY SETTLING DEFENDANT

74. **Covenant Not to Sue.** Subject to the reservations in Paragraph 75, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Site and this Consent Decree, including, but not limited to:

a. 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 Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site; or

c. any claims arising out of response activities at the Site, including claims based on EPA's selection of response actions, oversight of response activities or approval of plans for such activities.

75. The Settling Defendant reserves, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall

any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendant's plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

76. 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).

XIX. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

77. 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. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

78. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendant is entitled, as of the Effective Date of this Consent Decree, 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 Consent Decree. The "matters addressed in this Consent Decree," for purposes of the preceding sentence, are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or any other person (apart from the State) with respect to the Site; except that the matters addressed in this Consent Decree do not include those response actions and those response costs as to which the United States has reserved its rights in paragraphs 68, 69, 71, and 72, in the event that the United States asserts rights against Settling Defendant coming within such reservations.

79. The Settling Defendant agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

80. The Settling Defendant also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree it will notify in writing the United States within 15 days of service of the complaint on it. In addition, Settling Defendant shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

81. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate 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 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 Section XVII (Covenants Not to Sue by Plaintiff).

XX. ACCESS TO INFORMATION

82. Subject to the limitations in Paragraph 84, Settling Defendant shall provide to EPA, upon request copies of all documents and information within its possession or control or that of their contractors or agents relating to the generation, handling, treatment, storage, disposal or release or threat of release of any Waste Material at the AVX Property, the nature and extent of contamination at the AVX Property, or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendant shall also make available to EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

83. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information 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). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendant.

84. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

85. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XXI. RETENTION OF RECORDS

86. Until 7 years after the Settling Defendant's receipt of EPA's Certification of Work Completion pursuant to Paragraph 4.8 of the SOW, Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work conducted at or in relation to the AVX Property under this or the March 1998 Consent Decree, regardless of any corporate retention policy to the contrary. Until 7 years after the Settling Defendant's receipt of EPA's Certification of Work Completion, Settling Defendant shall also instruct their contractors

and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

87. At the conclusion of this document retention period, Settling Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendant shall deliver any such records or documents to EPA. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, it shall provide the Plaintiff with the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of the author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

88. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not mutilated, discarded, destroyed, materially altered or otherwise disposed of any records, documents or other information not otherwise contained in retained records relating to its potential liability regarding the Site since the effective date of the March 1998 Consent Decree and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927. In addition, Settling Defendant hereby acknowledges that the certification provided by Settling Defendant in Paragraph 100 of the March 1998 Consent Decree remains enforceable against the Settling Defendant as though fully set forth herein.

XXII. NOTICES AND SUBMISSIONS

89. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other 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. All notices and submissions shall be considered effective upon receipt, unless otherwise provided herein. 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 and Settling Defendant, respectively

As to the United States:

EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
eescdcopy.enrd@usdoj.gov
Re: DJ # 90-11-3-181B

As to EPA:

Chief, New York Remediation Branch
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
290 Broadway, 20th Floor
New York, NY 10007-1866
Attention: Olean Well Field Superfund Site Remedial
Project Manager

and:

Chief, New York/Caribbean Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, NY 10007
Attention: Olean Well Field Site Attorney

The original of any financial
assurance document submitted
pursuant to Section X shall be sent to
the following address, with copies to
the EPA and United States
addressees above:

Chief, Resource Management/Cost Recovery Section
Program Support Branch
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
290 Broadway, 18th Floor
New York, NY 10007-1866

**As to EPA Cincinnati Finance
Center:**

EPA Cincinnati Finance Center
26 W. Martin Luther King Drive
Cincinnati, Ohio 45268
cinwd_acctsreceivable@epa.gov

As to the State:

Maurice F. Moore
Engineering Geologist
Division of Environmental Remediation
New York State Department of Environmental
Conservation
Buffalo, NY 14203-2915
maurice.moore@dec.ny.gov

As to Settling Defendant:

John Waites
Corporate Environmental Engineer
AVX Corporation
One AVX Blvd.
Fountain Inn, SC 29644

With a copy to:

Peter Trimarchi, Esq.
Nixon Peabody LLP
677 Broadway, 10th Floor
Albany, New York 12207
ptrimarchi@nixonpeabody.com

XXIII. EFFECTIVE DATE

90. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXIV. RETENTION OF JURISDICTION

91. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with their terms, or to resolve disputes in accordance with Section XV (Dispute Resolution) hereof.

XXV. APPENDICES

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

“Appendix A” is the OU2 ROD Amendment for the AVX Property.

“Appendix B” is the SOW.

“Appendix C” is the map of the Site.

XXVI. COMMUNITY RELATIONS

93. If requested by EPA, Settling Defendant shall conduct community involvement activities for the AVX Property under EPA’s oversight as provided for in, and in accordance with, the SOW. Costs incurred by the United States under this Section constitute Future Response Costs to be reimbursed under Section XII (Reimbursement of Response Costs).

XXVII. MODIFICATION

94. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendant. All such modifications shall be made in writing.

95. Except as provided in Paragraph 12 (“Modification of the SOW or Related Deliverables”), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendant, and the Court. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendant.

96. Nothing in this Decree shall be deemed to alter the Court’s power to enforce, supervise or approve modifications to this Consent Decree

XXVIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

97. 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 or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

98. If for any reason the 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.

XXIX. SIGNATORIES/SERVICE

99. The undersigned representative of Settling Defendant and the Deputy Section Chief of the U.S. Department of Justice, Environment and Natural Resources Division, Environmental Enforcement Section each certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

100. 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 the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

XXX. FINAL JUDGMENT

101. Upon the Effective Date, the Consent Decree entered by the Court in this matter on March 17, 1998, except as provided in Paragraph 88, is amended by, and superseded by this Consent Decree.

102. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a 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.

SO ORDERED THIS __ DAY OF _____, 20__.

United States District Judge

Signature Page for Amended CD regarding the Olean Well Field Superfund Site, AVX Property

FOR THE UNITED STATES OF AMERICA:

10/21/16
Dated

/s Ellen M. Mahan
ELLEN M. MAHAN
Deputy Section Chief
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section

Mark Gallagher
Senior Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
Washington, D.C. 20044-7611

/s Walter Mugdan
Walter Mugdan
Director, Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, NY 10007

Sharon E. Kivowitz
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, NY 10007

Signature Page for Amended CD regarding the Olean Well Field Superfund Site, AVX Property

FOR AVX Corporation:

September 27, 2016
Dated

/s Kurt Cummings
Kurt Cummings
Executive Vice President
Fountain Inn, SC 29644