

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiffs,

Civil Action No. 17-1165

v.

BEAZER EAST, INC., CBS CORPORATION,
CHEMUNG COUNTY, THE CITY OF ELMIRA,
THE ELMIRA WATER BOARD, HARDINGE
INC., TOSHIBA AMERICA INC., THE TOWN
OF HORSEHEADS AND THE VILLAGE
OF HORSEHEADS,

Defendants.

**REMEDIAL DESIGN/REMEDIAL ACTION
CONSENT DECREE**

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I. BACKGROUND

A. The United States of America (“United States”), on behalf of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9606 and 9607.

B. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, the United States Environmental Protection Agency (“EPA”) placed the Kentucky Avenue Wellfield Site (“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 8, 1983.

C. EPA and Settling Defendant CBS Corporation (as successor to Westinghouse Electric Corporation) have each conducted a number of response actions at the Site since its listing on the NPL, including providing alternate water supplies to impacted residences, performing three remedial investigations and feasibility studies (“RI/FSs”), and implementing three remedies selected as a result of those RI/FSs. The most recent remedy, selected in the 1996 Record of Decision (“1996 ROD”), called for a response action to address the former industrial drainageway that received regulated discharges from the former Westinghouse facility in Horseheads, New York (“Facility”) and ran into Koppers Pond. The 1996 ROD recognized the need for further evaluation of contamination in Koppers Pond, which EPA has designated as Operable Unit 4 (“OU4”) of the Site.

D. On September 29, 2006, pursuant to an Administrative Order on Consent, Index No. CERCLA-02-2006-2025, Settling Defendants Beazer East, Inc., CBS Corporation, Chemung County, Hardinge Inc., Toshiba America Inc., the Town of Horseheads, and the Village of Horseheads agreed to perform an RI/FS for OU4.

E. Settling Defendants Beazer East, Inc., CBS Corporation, Chemung County, Hardinge Inc., Toshiba America Inc., the Town of Horseheads, and the Village of Horseheads completed an OU4 RI Report in March 2012 and an FS Report in January 2013.

F. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on July 23, 2016, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which EPA based the selection of the response action.

G. Following the public comment period, EPA selected a remedial action to be implemented at OU4 in a Record of Decision (“2016 ROD”), issued on September 30, 2016. The State had a reasonable opportunity to review and comment and concurred with the selected remedy. The 2016 ROD includes a responsiveness summary addressing the comments received during the public comment period.

H. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New York (the “State”) of the initiation of negotiations with potentially responsible parties (“PRPs”) regarding the implementation of the remedial design and remedial action (“RD/RA”) for OU4, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree (“CD”).

I. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Department of Interior and the National Oceanic and Atmospheric Administration of negotiations with PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this CD.

J. The United States in its complaint seeks, *inter alia*: (1) performance of response actions by the Settling Defendants at OU4 consistent with the National Contingency Plan (“NCP”), 40 C.F.R. Part 300, and (2) reimbursement of costs to be incurred by EPA and the Department of Justice (“DOJ”) for response actions at OU4, together with accrued interest.

K. The Settling Defendants that have entered into this CD do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

L. Based on the information presently available, EPA believes that the Work will be properly and promptly conducted by Settling Defendants if conducted in accordance with this CD and its appendices.

M. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the remedy set forth in the 2016 ROD and the Work to be performed by Settling Defendants shall constitute a response action taken or ordered by the President for which judicial review shall be limited to the administrative record.

N. The Parties recognize, and the Court by entering this CD finds, that this CD has been negotiated by the Parties in good faith, that implementation of this CD will expedite the cleanup of OU4 and will avoid prolonged and complicated litigation between the Parties, and that this CD 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 Settling Defendants. Solely for the purposes of this CD and the underlying complaint, Settling Defendants waive all objections and defenses that they may have

to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this CD or this Court's jurisdiction to enter and enforce this CD.

III. PARTIES BOUND

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

3. Settling Defendants shall provide a copy of this CD to each contractor hired to perform the Work and to each person representing any Settling Defendant with respect to OU4 or the Work, and each shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this CD. Settling Defendants or their contractors shall provide written notice of the CD to all subcontractors hired to perform any portion of the Work. Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work in accordance with the terms of this CD. With regard to the activities undertaken pursuant to this CD, each contractor and subcontractor shall be deemed to be in a contractual relationship with Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided in this CD, terms used in this CD that 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 CD or its appendices, the following definitions shall apply solely for purposes of this CD:

a. "Affected Property" shall mean all real property related to the implementation of the OU4 remedy at which EPA determines, at any time, that access or land, water, or other resource use restrictions, and/or Institutional Controls, are needed to implement the remedy set forth in the 2016 ROD.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

c. "Consent Decree" or "CD" shall mean this consent decree and all appendices attached hereto. In the event of conflict between this CD and any appendix, this CD shall control.

d. "Day" or "day" shall mean a calendar day. In computing any period of time under this CD, where the last day would fall on a Saturday, Sunday, or federal or State holiday, the period shall run until the close of business of the next working day.

e. “DOJ” shall mean the United States Department of Justice and its successor departments, agencies, or instrumentalities.

f. “Effective Date” shall mean the date upon which the approval of this CD is recorded on the Court’s docket.

g. “EPA” shall mean the United States Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

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

i. “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 CD, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this CD, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 11 (Emergencies and Releases), Paragraph 12 (Community Involvement) (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), Paragraph 28 (Access to Financial Assurance), Section VII (Remedy Review), Section VIII (Property Requirements) (including the cost of attorney time and any monies paid to secure or enforce access or land, water, or other resource use restrictions and/or to secure, implement, monitor, maintain, or enforce Institutional Controls including the amount of just compensation), and Section XIII (Dispute Resolution), and all litigation costs.

j. “Institutional Controls” or “ICs” shall mean Proprietary Controls and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that limit land, water, or other resource use to implement, ensure non-interference with, or ensure the protectiveness of the 2016 remedial action and minimize the potential for human exposure to hazardous substances.

k. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund, compounded annually on October 1 of each year, in accordance with Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

l. “Koppers Pond” shall mean the approximately 12-acre area that is or was ponded, defined by a corresponding pond water elevation of approximately 887 to 888 feet above mean sea level, which is generally bounded by the Old Horseheads Landfill to the north and northeast, the Norfolk Southern Corporation railroad tracks to the west, and property owned by the City of Elmira to the south.

- m. "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.
- n. "NYSDEC" shall mean the New York State Department of Environmental Conservation and any successor departments or agencies of the State.
- o. "Operation and Maintenance" or "O&M" shall mean all activities required to operate, maintain, and monitor the effectiveness of the RA as specified in the SOW or any EPA-approved O&M Plan.
- p. "Owner Settling Defendants" shall mean the City of Elmira, Hardinge Inc. and the Village of Horseheads.
- q. "Paragraph" shall mean a portion of this CD identified by an Arabic numeral or an upper or lower case letter.
- r. "Party" or "Parties" shall mean the United States or Settling Defendants or the United States and Settling Defendants, respectively.
- s. "Plaintiff" shall mean the United States.
- t. "Proprietary Controls" shall mean easements or covenants running with the land that (a) limit land, water, or other resource use and/or provide access rights and (b) are created pursuant to common law or statutory law by an instrument that is recorded in the appropriate land records office.
- u. "RCRA" shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).
- v. "RI/FS Future Response Costs" shall mean those response costs that EPA has incurred through the Effective Date in overseeing the performance of the remedial investigation and feasibility study for OU4. Pursuant to Paragraph 77 of Administrative Order on Consent, Index No. CERCLA-02-2006-2025, dated September 29, 2006, certain Settling Defendants consented to reimburse EPA for the RI/FS Future response Costs.
- w. "Record of Decision" or "ROD" shall mean an EPA Record of Decision relating to the selection of a remedy under CERCLA. The "2016 ROD" shall mean the EPA Record of Decision setting forth the remedy selected for OU4, signed on September 30, 2016, by the Director of the Emergency and Remedial Response Division, EPA Region 2. The 2016 ROD is attached as Appendix A.
- x. "Remedial Action" or "RA" shall mean the remedial action selected in the 2016 ROD.

- y. “Remedial Design” or “RD” shall mean those activities to be undertaken by Settling Defendants to develop final plans and specifications for the RA as stated in the SOW.
- z. “Section” shall mean a portion of this CD identified by a Roman numeral.
- aa. “Settling Defendants” or “Settling Defendants” shall mean Beazer East, Inc., CBS Corporation, Chemung County, the City of Elmira, the Elmira Water Board, Hardinge Inc., Toshiba America Inc., the Town of Horseheads and the Village of Horseheads.
- bb. “Site” shall mean the Kentucky Avenue Wellfield Superfund Site in Horseheads, New York.
- cc. “State” shall mean the State of New York.
- dd. “Statement of Work” or “SOW” shall mean the document describing the activities Settling Defendants agree to perform to implement the RD, the RA, and O&M regarding OU4, which is attached as Appendix B.
- ee. “Supervising Contractor” shall mean the principal contractor retained by Settling Defendants to supervise and direct the implementation of the Work under this CD.
- ff. “Transfer” shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.
- gg. “United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.
- hh. “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).
- ii. “Work” shall mean all activities and obligations Settling Defendants are required to perform under this CD, except the activities required under Section XIX (Retention of Records).

V. GENERAL PROVISIONS

5. **Objectives of the Parties.** The objectives of the Parties in entering into this CD are to protect public health and welfare and the environment by the design and implementation of response activities at OU4 by Settling Defendants, to pay response costs of Plaintiff, and to resolve the claims of Plaintiff against Settling Defendants as provided in this CD.

6. Commitments by Settling Defendants.

a. Settling Defendants shall finance and perform the Work in accordance with this CD and all deliverables developed by Settling Defendants and approved or modified by EPA pursuant to this CD. Settling Defendants shall pay the United States for its response costs as provided in this CD.

b. Settling Defendants' obligations to finance and perform the Work, including obligations to pay amounts due under this CD, are joint and several. In the event of the insolvency of any Settling Defendant or the failure by any Settling Defendant to implement any requirement of this CD, the remaining Settling Defendants shall complete all such requirements.

7. Compliance with Applicable Law. Nothing in this CD limits Settling Defendants' obligations to comply with the requirements of all applicable federal and state laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the 2016 ROD and the SOW. The activities conducted pursuant to this CD, if approved by EPA, shall be deemed to be consistent with the NCP as provided in Section 300.700(c)(3)(ii) of 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, 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 Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. Settling Defendants may seek relief under the provisions of Section XII (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in Paragraph 8.a. and required for the Work, provided that they have submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.

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

VI. PERFORMANCE OF THE WORK

9. Coordination and Supervision.

a. Project Coordinators.

(1) Settling Defendants' Project Coordinator must have sufficient technical expertise to coordinate the Work. Settling Defendants' Project Coordinator may not be an attorney representing any Settling Defendant in this matter and may not act as the Supervising Contractor. Settling Defendants' Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.

(2) EPA shall designate and notify the Settling Defendants of EPA's Project Coordinator. EPA may designate other representatives, which may include its employees, contractors, and/or consultants, to oversee the Work. EPA's Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the NCP. This includes the authority to halt the Work and/or to conduct or direct any necessary response action when he or she determines that conditions at OU4 constitute an emergency or may present an immediate threat to public health or welfare or the environment because of a potential release or threatened release of Waste Material.

(3) Settling Defendants' Project Coordinators shall meet with EPA's Project Coordinator at least monthly via in-person meeting or teleconference.

b. **Supervising Contractor.** Settling Defendants' proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system that complies with ANSI/ASQC E4-2004, Quality Systems for Environmental Data and Technology Programs: Requirements with Guidance for Use (American National Standard).

c. **Procedures for Disapproval/Notice to Proceed.**

(1) Settling Defendants shall designate and notify EPA within 30 days after the Effective Date of the names, titles, contact information, and qualifications of their proposed Project Coordinator and Supervising Contractor, whose qualifications shall be subject to EPA's review for verification based on objective assessment criteria (e.g., experience, capacity, technical expertise, and no conflict of interest with respect to the project).

(2) EPA, after a reasonable opportunity for review and comment by the State, shall issue notices of disapproval and/or authorizations to proceed regarding the proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval, Settling Defendants shall, within 30 days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. EPA shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. Settling Defendants may select any coordinator/contractor

covered by an authorization to proceed and shall, within 21 days, notify EPA of their selection.

(3) Settling Defendants may change their Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of subparagraphs 9.c.1 and 9.c.2.

10. **Performance of Work in Accordance with SOW.** Settling Defendants shall (a) develop the RD, (b) perform the RA, and (c) operate, maintain, and monitor the effectiveness of the RA 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 CD or SOW shall be subject to approval by EPA in accordance with Paragraph 6.6 (Approval of Deliverables) of the SOW.

11. **Emergencies and Releases.** Settling Defendants shall comply with the emergency and release response and reporting requirements under Paragraph 4.3 (Emergency Response and Reporting) of the SOW. Subject to Section XV (Covenants by Plaintiff), nothing in this CD, including Paragraph 4.3 of the SOW, limits any authority of Plaintiff (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 OU4, 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 OU4. If, because of Settling Defendants' failure to take an appropriate response action under Paragraph 4.3 of the SOW, EPA takes such action, Settling Defendants shall reimburse EPA under Section X (Payments for Response Costs) for all costs of the response action.

12. **Community Involvement.** If requested by EPA, Settling Defendants shall conduct community involvement activities under EPA's oversight as provided for in, and in accordance with, Section 2 (Community Involvement) of the SOW. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator. Costs incurred by the United States under this Section constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

13. **Modification of SOW or Related Deliverables.**

a. If EPA determines that it is necessary to modify the Work specified in the SOW and/or in deliverables developed under the SOW in order to achieve and/or maintain the Performance Standards or to carry out and maintain the effectiveness of the RA, and such modification is consistent with the Scope of the Remedy set forth in Paragraph 1.2 of the SOW, then EPA may notify Settling Defendants of such modification. If Settling Defendants object to the modification they may, within 30 days after EPA's notification, seek dispute resolution under Section XIII.

b. The SOW and/or related work plans shall be modified (1) in accordance with the modification issued by EPA or (2) if Settling Defendants invoke dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this CD, and Settling Defendants shall implement all Work required by such modification. Settling Defendants shall incorporate the modification into the deliverable required under the SOW, as appropriate.

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

14. Nothing in this CD, 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

15. **Periodic Review.** Settling Defendants shall conduct, in accordance with Paragraph 6.7(f)(5) (Periodic Review Support Plan) of the SOW, studies and investigations to support EPA's reviews under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and applicable regulations, of whether the RA is protective of human health and the environment.

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

17. **Opportunity to Comment.** Settling Defendants 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.

18. **Settling Defendants' Obligation to Perform Further Response Actions.** If EPA selects further response actions relating to OU4, EPA may require Settling Defendants to perform such further response actions, but only to the extent that the reopener conditions in Paragraph 63 or 64 (United States' Pre- and Post-Certification Reservations) are satisfied. Settling Defendants may invoke the procedures set forth in Section XIII (Dispute Resolution) to dispute (a) EPA's determination that the reopener conditions of Paragraph 63 or 64 are satisfied, (b) EPA's determination that the RA is not protective of human health and the environment, or (c) EPA's selection of the further response actions. Disputes regarding EPA's determination that the RA is not protective or EPA's selection of further response actions shall be resolved pursuant to Paragraph 47 (Record Review).

19. **Submission of Plans.** If Settling Defendants are required to perform further response actions pursuant to Paragraph 18, they shall submit a plan for such response action to

EPA for approval in accordance with the procedures of Section VI (Performance of the Work). Settling Defendants shall implement the approved plan in accordance with this CD.

VIII. PROPERTY REQUIREMENTS

20. **Agreements Regarding Access and Non-Interference.** Owner Settling Defendants shall (i) provide Plaintiff and the other Settling Defendants and their representatives, contractors, and subcontractors with access at all reasonable times to the Affected Property to conduct any activity regarding the Work under the CD, including those listed below in subsection a (Access Requirements); and (ii) refrain from using the Affected Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment as a result of exposure to Waste Material, or interfere with or adversely affect the implementation, integrity, or protectiveness of the 2016 Remedial Action.

a. **Access Requirements.** The following is a list of activities for which access is required on Settling Defendants' properties:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States;
- (3) Conducting investigations regarding contamination at or near OU4;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near OU4;
- (6) 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;
- (7) Implementing the Work pursuant to the conditions set forth in Paragraph 67 (Work Takeover);
- (8) Assessing Settling Defendants' compliance with the CD;
- (9) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the CD; and
- (10) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions and Institutional Controls.

b. **Land, Water, or Other Resource Use Restrictions.** Settling Defendants shall prohibit activities that could interfere with the RA, disturb the pond cover system, or otherwise cause or contribute to the spread of contaminants.

21. In the event of any transfer of the Affected Property, unless the United States otherwise consents in writing, Settling Defendants shall continue to comply with their

obligations under the CD, including their obligation to secure access and ensure compliance with any land, water, or other resource use restrictions regarding the Affected Property, and to implement, maintain, monitor, and report on Institutional Controls.

22. Notwithstanding any provision of the CD, Plaintiff retains all of its access authorities and rights, as well as all of its rights to require land, water, or other resource use restrictions and Institutional Controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

23. Owner Settling Defendant(s) shall, within 60 days after the Effective Date, submit for EPA approval a notice to be filed regarding each Owner Settling Defendant's Affected Property in the appropriate land records. The notice must: (1) include a proper legal description of the Affected Property; (2) provide notice to all successors-in-title of the following: (i) that the Affected Property is part of, or related to, the Site; (ii) that EPA has selected a remedy for the Site; and (iii) that potentially responsible parties have entered into a CD requiring implementation of such remedy; and (3) identify the U.S. District Court in which the CD was filed, the name and civil action number of this case, and the date the CD was entered by the Court. Owner Settling Defendant shall record the notice within 10 days after EPA's approval of the notice and submit to EPA, within 10 days thereafter, a certified copy of the recorded notice.

a. Owner Settling Defendant(s) shall, prior to entering into a contract to Transfer Owner Settling Defendant(s)' Affected Property, or 60 days prior to Transferring Owner Settling Defendant(s)' Affected Property, whichever is earlier:

(1) Notify the proposed transferee that EPA has selected a remedy regarding the Site, that potentially responsible parties have entered into a Consent Decree requiring implementation of such remedy, and that the United States District Court has entered the CD (identifying the name and civil action number of this case and the date the CD was entered by the Court); and

(2) Notify EPA of the name and address of the proposed transferee and provide EPA with a copy of the notice that it provided to the proposed transferee.

IX. FINANCIAL ASSURANCE

24. In order to ensure completion of the Work, Settling Defendants shall secure financial assurance, initially in the amount of \$1,921,000 ("Estimated Cost of the Work"), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA or under the "Financial Assurance - Settlements" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. Settling Defendants may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies. The following are methods of assuring adequate financing:

- 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 and whose insurance operations are regulated and examined by a federal or state agency;
- e. A demonstration by a Settling Defendant that it meets the relevant test criteria of Paragraph 25; or
- f. A guarantee to fund or perform the Work executed in favor of EPA by a company (1) that is a direct or indirect parent company of a Settling Defendants or has a "substantial business relationship" (as defined in 40 C.F.R. § 264.141(h)) with a Settling Defendant and (2) can demonstrate to EPA's satisfaction that it meets the financial test criteria of Paragraph 25.

25. Within 30 days after the Effective Date, or 60 days after EPA's approval of the form and substance of Settling Defendants' financial assurance, whichever is later, Settling Defendants shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the Regional financial assurance specialist, to the United States, and to EPA as specified in Section XX (Notices and Submissions). Settling Defendants seeking to provide financial assurance by means of a demonstration or guarantee under subparagraphs 24.e. or f., must, within 60 days of the Effective Date, demonstrate the following:

- a. That at least one Settling Defendant or guarantor has:
 - i. Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
 - ii. Net working capital and tangible net worth each at least six times 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; and

- iii. Tangible net worth of at least \$10 million; and
- iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times 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; or

b. That at least one Settling Defendant or guarantor has:

- i. A current rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa as issued by Moody's; and
- ii. Tangible net worth at least six times 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; and
- iii. Tangible net worth of at least \$10 million; and
- iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times 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; and

c. Submit to EPA for the affected Settling Defendant or guarantor: (1) a copy of an independent certified public accountant's report of the entity's financial statements for the latest completed fiscal year, which must not express an adverse opinion or disclaimer of opinion; and (2) a letter from its chief financial officer and a report from an independent certified public accountant substantially identical to the sample letter and reports available from EPA or under the "Financial Assurance - Settlements" subject list category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>.

26. Settling Defendants providing financial assurance by means of a demonstration or guarantee under Paragraph 24.e. or f. must also:

a. Annually resubmit the documents described in Paragraph 25.b. within 90 days after the close of the affected Settling Defendant's or guarantor's fiscal year;

b. Notify EPA within 30 days after the affected Settling Defendant or guarantor determines that it no longer satisfies the relevant financial test criteria and requirements set forth in this Section; and

c. Provide to EPA, within 30 days of EPA's request, reports of the financial condition of the affected Settling Defendant or guarantor in addition to those specified in Paragraph 28.b; EPA may make such a request at any time based on a belief that the affected Settling Defendant or guarantor may no longer meet the financial test requirements of this Section.

27. Settling Defendants shall diligently monitor the adequacy of the financial assurance. If any 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, such Settling Defendant shall notify EPA of such information within 7 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 the affected Settling Defendant(s) of such determination. Settling Defendants 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 the affected Settling Defendant(s), 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 Defendants shall follow the procedures of Paragraph 29 (Modification of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Settling Defendants' inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this Settlement.

28. Access to Financial Assurance.

a. If EPA issues a notice of implementation of a Work Takeover under Paragraph 67, then, in accordance with any applicable financial assurance mechanism, EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with subparagraph 28.d., below.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel the mechanism, and the affected Settling Defendants 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 subparagraph 28.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under Paragraph 67, (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism, whether in cash or in kind, to continue and complete the Work, or if (2) the financial assurance is a demonstration or guarantee under Paragraph 24.e. or f., then EPA is entitled to demand an amount, as determined by EPA,

sufficient to cover the cost of performing the remaining Work. Settling Defendants shall, within 14 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this Paragraph 28 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 Kentucky Avenue Wellfield Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with OU4, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this Paragraph 28 must be reimbursed as Future Response Costs under Section X (Payments for Response Costs).

29. **Modification of Amount, Form, or Terms of Financial Assurance.** Settling Defendants 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 25, 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 Defendants of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Settling Defendants may reduce the amount of the financial assurance mechanism only in accordance with EPA's approval. Settling Defendants may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by Settling Defendants pursuant to the dispute resolution provisions of this CD or in any other forum. Within 30 days after receipt of EPA's approval of the requested modifications pursuant to this Paragraph, Settling Defendants shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with Paragraph 25.

30. **Release, Cancellation, or Discontinuation of Financial Assurance.** Settling Defendants may release, cancel, or discontinue any financial assurance provided under this Section only (a) if EPA issues a Certification of Work Completion under Paragraph 4.6 (Certification of Work Completion) of the SOW, (b) in accordance with EPA's approval of such release, cancellation, or discontinuation.

X. PAYMENTS FOR RESPONSE COSTS

31. EPA agrees to waive any obligation on the part of any Settling Defendant to reimburse the RI/FS Future Response Costs, as defined herein. The RI/FS Future Response Costs have ceased to accrue, and the amount that is waived is calculated to be \$333,181.43.

32. **Payments by Settling Defendants for Future Response Costs.** Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the NCP.

a. **Periodic Bills.** On a periodic basis, EPA will send Settling Defendants a bill requiring payment that includes a SCORPIOS Report, which includes direct and indirect costs incurred by EPA, its contractors, and subcontractors. Settling Defendants shall make all payments within 30 days after Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 34, in accordance with Paragraph 33.b. (instructions for Future Response Cost payments).

b. **Deposit of Future Response Costs Payments.** The total amount to be paid by Settling Defendants pursuant to subparagraph a. (Periodic Bills) shall be deposited by EPA into the Kentucky Avenue Wellfield Superfund Site Special Account of the EPA Hazardous Substance Superfund. 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 SDs pursuant to the dispute resolution provisions of this CD or in any other forum.

33. **Payment Instructions for Settling Defendants for Future Response Costs Payments and Stipulated Penalties.**

a. For all payments subject to this subparagraph, Settling Defendants shall make such payment by Fedwire EFT, referencing OU4/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"

b. For all payments made under this Paragraph, Settling Defendants must include references to Kentucky Avenue Superfund Site OU4/Spill ID and DJ numbers. At the time of any payment required to be made in accordance with this Paragraph, Settling Defendants shall send notices that payment has been made to the United States, EPA, and the EPA

Cincinnati Finance Center, all in accordance with Paragraph 88. All notices must include references to OU4/Spill ID and DJ numbers.

34. **Contesting Future Response Costs.** Settling Defendants may submit a Notice of Dispute, initiating the procedures of Section XIII (Dispute Resolution), regarding any Future Response Costs billed under Paragraph 32 (Payments by Settling Defendants for Future Response Costs) if they determine that EPA has made a mathematical error, included a cost item that is not within the definition of Future Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. Such Notice of Dispute shall be submitted in writing within 30 days after receipt of the bill and must be sent to the United States pursuant to Section XX (Notices and Submissions). Such Notice of Dispute shall specifically identify the contested Future Response Costs and the basis for objection. If Settling Defendants submit a Notice of Dispute, Settling Defendants shall, within the 30-day period and as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to the United States, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the FDIC, and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Settling Defendants shall send to the United States, as provided in Section XX (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. If the United States prevails in the dispute, Settling Defendants shall pay the sums due (with accrued interest) to the United States within 7 days after the resolution of the dispute. If Settling Defendants prevail concerning any aspect of the contested costs, Settling Defendants shall pay any portion of the costs (plus associated accrued interest) for which they did not prevail to the United States within 7 days after the resolution of the dispute. Settling Defendants are entitled to any balance of the escrow account. All payments to the United States under this Paragraph shall be made in accordance with subparagraph 33.a. (Future Response Cost payments). The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendants' obligation to reimburse the United States for its Future Response Costs.

35. **Interest.** In the event that any payment for Future Response Costs required under this Section is not made by the date required, Settling Defendants shall pay Interest on the unpaid balance. 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 Defendants' 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 Defendants' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Section XIV (Stipulated Penalties).

XI. INDEMNIFICATION AND INSURANCE

36. **Settling Defendants' Indemnification of the United States.**

a. The United States does not assume any liability by entering into this CD or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). Settling Defendants shall indemnify, save, and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, and 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 Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on Settling Defendants' behalf or under their control, in carrying out activities pursuant to this CD, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, Settling Defendants agree to pay the United States 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 Defendants, 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 CD. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this CD. Neither Settling Defendants nor any such contractor shall be considered an agent of the United States.

b. The United States shall give Settling Defendants notice of any claim for which the United States plans to seek indemnification pursuant to this Paragraph and shall consult with Settling Defendants prior to settling any such claim.

37. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action 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 any one or more of Settling Defendants and any person for performance of Work on or relating to OU4, including, but not limited to, claims on account of construction delays. In addition, Settling Defendants shall indemnify, save, 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 any one or more of Settling Defendants and any person for performance of Work on or relating to OU4, including, but not limited to, claims on account of construction delays.

38. **Insurance.** No later than 15 days before commencing any on-Site Work, Settling Defendants shall secure, and shall maintain until the first anniversary after issuance of EPA's Certification of RA Completion pursuant to Paragraph 4.5 (Certification of RA Completion) of the SOW, commercial general liability insurance with limits of liability of \$1 million per occurrence, automobile liability insurance with limits of liability of \$1 million per accident, and

umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits, naming the United States as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Settling Defendants pursuant to this CD. In addition, for the duration of this CD, Settling Defendants shall satisfy, or shall ensure that their 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 Defendants in furtherance of this CD. Prior to commencement of the Work, Settling Defendants shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendants demonstrate 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 Defendants need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Settling Defendants shall ensure that all submittals to EPA under this Paragraph identify the Kentucky Avenue Superfund Site OU4 in Horseheads, New York and the civil action number of this case.

XII. FORCE MAJEURE

39. "Force majeure," for purposes of this CD, is defined as any event arising from causes beyond the control of Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors that delays or prevents the performance of any obligation under this CD despite Settling Defendants' best efforts to fulfill the obligation. The requirement that Settling Defendants 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 (a) as it is occurring and (b) following the potential force majeure event such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. "Force majeure" does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

40. If any event occurs or has occurred that may delay the performance of any obligation under this CD for which Settling Defendants intend or may intend to assert a claim of force majeure, Settling Defendants shall notify EPA's Project Coordinator orally or, in his or her absence, the Chief of the New York Remediation Branch, EPA Region 2, within 24 hours of when Settling Defendants first knew that the event might cause a delay. Within 7 days thereafter, Settling Defendants shall provide in writing to EPA the following: an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Settling Defendants' rationale for attributing such delay to a force majeure event; and a statement as to whether, in the opinion of Settling Defendants, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure event.

Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or Settling Defendants' contractors or subcontractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Settling Defendants from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure event under Paragraph 39 and whether Settling Defendants have exercised their best efforts under Paragraph 39, EPA may, in its unreviewable discretion, excuse in writing Settling Defendants' failure to submit timely or complete notices under this Paragraph.

41. 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 CD 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 Settling Defendants in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

42. If Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution) regarding EPA's decision, they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendants 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 Defendants complied with the requirements of Paragraphs 39 and 40. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this CD identified to EPA and the Court.

43. The failure by EPA to timely complete any obligation under the CD or under the SOW is not a violation of the CD, provided, however, that if such failure prevents Settling Defendants from meeting one or more deadlines in the SOW, Settling Defendants may seek relief under this Section.

XIII. DISPUTE RESOLUTION

44. Unless otherwise expressly provided for in this CD, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this CD. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of Settling Defendants that have not been disputed in accordance with this Section.

45. A dispute shall be considered to have arisen when one Party or more sends the other Party or Parties a written Notice of Dispute. Any dispute regarding this CD 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.

46. **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 7 days after the conclusion of the informal negotiation period, Settling Defendants invoke 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 Defendants. The Statement of Position shall specify Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 47 (Record Review) or 48.

b. Within 14 days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 47 (Record Review) or 48. Within 7 days after receipt of EPA's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and Settling Defendants as to whether dispute resolution should proceed under Paragraph 47 (Record Review) or 48, the Parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if Settling Defendants ultimately appeal 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 47 and 48.

47. **Record Review.** 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, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this CD, and the adequacy of the performance of response actions taken pursuant to this CD. Nothing in this CD shall be construed to allow any dispute by Settling Defendants regarding the validity of the 2016 ROD's provisions.

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

b. The Director of the Emergency and Remedial Response Division, EPA Region 2, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 47.a. This decision shall be binding upon Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 47.c. and 47.d.

c. Any administrative decision made by EPA pursuant to Paragraph 47.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendants with the Court and served on all Parties within 10 days after 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 CD. The United States may file a response to Settling Defendants' motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Emergency and Remedial Response Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 47.a.

48. 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. The Director of the Emergency and Remedial Response Division, EPA Region 2, will issue a final decision resolving the dispute based on the statements of position and reply, if any, served under Paragraph 46. The Emergency and Remedial Response Division Director's decision shall be binding on Settling Defendants unless, within 10 days after receipt of the decision, Settling Defendants 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 CD. The United States may file a response to Settling Defendants' motion.

b. Consistent with Paragraph M of Section I (Background) regarding record review of 2016 ROD and Work under Section 113(j)) of CERCLA, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

49. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of Settling Defendants under this CD,

except as provided in Paragraph 34 (Contesting Future Response Costs), as agreed by EPA, or as determined by the Court. 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 57. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this CD. In the event that Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIV (Stipulated Penalties).

XIV. STIPULATED PENALTIES

50. Settling Defendants shall be liable to the United States for stipulated penalties in the amounts set forth in Paragraphs 51.a. and 52 for failure to comply with the obligations specified in Paragraphs 51.b. and 52, unless excused under Section XII (Force Majeure). “Comply” as used in the previous sentence includes compliance by Settling Defendants with all applicable requirements of this CD, within the deadlines established under this CD. If an initially submitted or resubmitted deliverable contains a material defect, and the deliverable is disapproved or modified by EPA under Paragraph 6.6 (a) (Initial Submissions) or 6.6(b) (Resubmissions) of the SOW because of such material defect, then the material defect shall constitute a lack of compliance for purposes of this Paragraph.

51. Stipulated Penalty Amounts - Payments, Financial Assurance, Major Deliverables, and Other Milestones.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 51.b:

| Period of Noncompliance | Penalty Per Violation Per Day |
|-------------------------|-------------------------------|
| 1st through 14th day | \$750 |
| 15th through 30th day | \$1,500 |
| 31st day and beyond | \$3,000 |

b. Obligations.

- (1) Submission and, if necessary, revision and resubmission of any plan, report, or other deliverable required by Section VI (Performance of the Work) or by the SOW or by any plan that is prepared pursuant to Section VI or the SOW and approved by EPA;
- (2) Any deadline imposed by the SOW or by any plan that is prepared pursuant to Section VI or the SOW and approved by EPA;
- (3) Obligations imposed by Paragraph 4.3 (Emergency Response) of the SOW;
- (4) Any obligations imposed by Section VIII (Property Requirements);
- (5) Performance of pre-remedial design activities and preparation of the Remedial Design in accordance with the 2016 ROD, the SOW, and this CD;

(6) Implementation of the 2016 Remedial Action in accordance with the 2016 ROD, the SOW, and this CD; and

(7) Modification of the SOW or related work plans pursuant to Paragraph 13, and implementation of the work called for by such modification in accordance with the modified SOW or work plan.

52. **Stipulated Penalty Amounts – Other Deliverables.** The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables pursuant to the CD other than those specified in Paragraph 51.b.:

| Period of Noncompliance | Penalty Per Violation Per Day |
|-------------------------|-------------------------------|
| 1st through 14th day | \$500 |
| 15th through 30th day | \$1,000 |
| 31st day and beyond | \$2,000 |

53. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 67 (Work Takeover), Settling Defendants shall be liable for a stipulated penalty in the amount of \$250,000. Stipulated penalties under this Paragraph are in addition to the remedies available under Paragraphs 28 (Access to Financial Assurance) and 67 (Work Takeover).

54. 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 as follows: (a) with respect to a deficient submission under Paragraph 6.6 (Approval of Deliverables) 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 Defendants of any deficiency; (b) with respect to a decision by the Director of the Emergency and Remedial Response Division, EPA Region 2, under Paragraph 47.b. or 48.a. of Section XIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XIII (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 in this CD shall prevent the simultaneous accrual of separate penalties for separate violations of this CD.

55. Following EPA's determination that Settling Defendants have failed to comply with a requirement of this CD, EPA may provide Settling Defendants written notification of the same and describe the noncompliance. EPA may send Settling Defendants a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Settling Defendants of a violation.

56. All penalties accruing under this Section shall be due and payable to the United States within 30 days after Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIII (Dispute Resolution) within the 30-day period. All payments to the United States under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with Paragraph 32.b. (future response cost payments).

57. Penalties shall continue to accrue as provided in Paragraph 54 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement of the Parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA within 15 days after the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days after receipt of the Court's decision or order, except as provided in subparagraph 57.c., below;

c. If the District Court's decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined by the District Court to be owed to the United States into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 60 days after 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 after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendants to the extent that they prevail.

58. If Settling Defendants fail to pay stipulated penalties when due, Settling Defendants shall pay Interest on the unpaid stipulated penalties as follows: (a) if Settling Defendants have timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to Paragraph 57 until the date of payment; and (b) if Settling Defendants fail to timely invoke dispute resolution, Interest shall accrue from the date of demand under Paragraph 56 until the date of payment. If Settling Defendants fail to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

59. The payment of penalties and Interest, if any, shall not alter in any way Settling Defendants' obligation to complete the performance of the Work required under this CD.

60. Nothing in this CD 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 Defendants' violation of this CD 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 in this CD, except in the case of a willful violation of this CD.

61. 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 CD.

XV. COVENANTS BY PLAINTIFF

62. **Covenants for Settling Defendants by United States.** Except as provided in Paragraphs 63 and 64 (United States' Pre- and Post-Certification Reservations), and 66 (General Reservations of Rights), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA relating to OU4. 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 4.5 (Certification of RA Completion) of the SOW. These covenants are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this CD. These covenants extend only to Settling Defendants and do not extend to any other person.

63. **United States' Pre-Certification Reservations.** Notwithstanding any other provision of this CD, the United States reserves, and this CD 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 Defendants to perform further response actions relating to OU4 and/or to pay the United States for additional costs of response relating to OU4 if, (a) prior to Certification of RA Completion, (1) conditions at OU4, 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 RA is not protective of human health or the environment.

64. **United States' Post-Certification Reservations.** Notwithstanding any other provision of this CD, the United States reserves, and this CD 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 Defendants to perform further response actions relating to OU4 and/or to pay the United States for additional costs of response relating to OU4 if, (a) subsequent to Certification of RA Completion, (1) conditions at OU4, 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 RA is not protective of human health or the environment.

65. For purposes of Paragraph 63 (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 was signed and set forth in the 2016 ROD for OU4 and the administrative record supporting the 2016 ROD. For purposes of Paragraph 64 (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 2016 ROD, the administrative record supporting the 2016 ROD, the post-2016 ROD administrative record, or in any information received by EPA pursuant to the requirements of this CD prior to Certification of RA Completion.

66. **General Reservations of Rights.** The United States reserves, and this CD is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within Plaintiff's covenants. Notwithstanding any other provision of this CD, the United States reserves all rights against Settling Defendants with respect to:

- a. liability for failure by Settling Defendants to meet a requirement of this CD;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material unrelated to OU4;
- c. liability for past response costs that do not fall within the definition of RI/FS Future Response Costs;
- d. liability based on the ownership of OU4 by Settling Defendants when such ownership commences after signature of this CD by Settling Defendants;
- e. liability based on the operation of OU4 by Settling Defendants when such operation commences after signature of this CD by Settling Defendants and does not arise solely from Settling Defendants' performance of the Work;
- f. liability based on Settling Defendants' transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material other than as provided in the 2016 ROD, the Work, or otherwise ordered by EPA, after signature of this CD by Settling Defendants;
- g. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- h. criminal liability;
- i. liability for violations of federal or state law that occur during or after implementation of the Work; and

j. liability, prior to achievement of Performance Standards, for response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the 2016 ROD, but that cannot be required pursuant to Paragraph 13 (Modification of SOW or Related Deliverables).

67. Work Takeover.

a. In the event EPA determines that Settling Defendants (1) have ceased implementation of any portion of the Work, (2) are seriously or repeatedly deficient or late in their performance of the Work, or (3) are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to Settling Defendants. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Settling Defendants a period of 10 days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.

b. If, after expiration of the 10-day notice period specified in Paragraph 67.a., Settling Defendants have not remedied to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary (“Work Takeover”). EPA will notify Settling Defendants in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this subparagraph. Funding of Work Takeover costs is addressed under Paragraph 28 (Access to Financial Assurance).

c. Settling Defendants may invoke the procedures set forth in Paragraph 47 (Record Review) to dispute EPA’s implementation of a Work Takeover under Paragraph 67.b. However, notwithstanding Settling Defendants’ invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 67b. until the earlier of (1) the date that Settling Defendants remedy, to EPA’s satisfaction, the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, or (2) the date that a final decision is rendered in accordance with Paragraph 47 (Record Review) requiring EPA to terminate such Work Takeover.

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

XVI. COVENANTS BY SETTLING DEFENDANTS

69. **Covenants by Settling Defendants.** Subject to the reservations in Paragraph 70, Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to OU4 and this CD, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112 or 113, or any other provision of law;
- b. any claims under CERCLA Section 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a), or state law regarding OU4 and this CD; or
- c. any claims arising out of response actions at or in connection with OU4, including any claim under the United States Constitution, the New York State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

70. Except as provided in Paragraphs 73 (Waiver of Claims by Settling Defendants) and 79 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States brings a cause of action or issues an order pursuant to any of the reservations in Section XV (Covenants by Plaintiff), other than in Paragraphs 66.a. (claims for failure to meet a requirement of the CD), 66.h. (criminal liability), and 66.i. (violations of federal/state law during or after implementation of the Work), but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

71. Settling Defendants reserve, and this CD is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, 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, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her 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, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Settling Defendants' deliverables or activities.

72. Nothing in this CD shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

73. Waiver of Claims by Settling Defendants.

a. Settling Defendants agree not to assert any claims and agree to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have as follows:

(1) **De Micromis Waiver.** For all matters relating to OU4 against any person where the person's liability to Settling Defendants with respect to OU4 is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at OU4, or having accepted for transport for disposal or treatment of hazardous substances at OU4, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to OU4 was less than 110 gallons of liquid materials or 200 pounds of solid materials;

(2) **De Minimis/Ability to Pay Waiver.** For response costs relating to OU4 against any person that has entered into a final CERCLA Section 122(g) *de minimis* settlement or a final settlement based on limited ability to pay with EPA with respect to OU4.

b. **Exceptions to Waivers.**

(1) The waivers under this Paragraph shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person otherwise covered by such waivers if such other person asserts a claim or cause of action relating to OU4 against such Settling Defendant.

(2) The waiver under Paragraph 73.a.1. (De Micromis Waiver) shall not apply to any claim or cause of action against any person otherwise covered by such waiver if EPA determines any of the following: (i) the materials containing hazardous substances contributed to OU4 by such person contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at OU4; (ii) such person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e)(3)(B) of CERCLA, 42 U.S.C. § 9604(e) or 9622(e)(3)(B), or Section 3007 of RCRA, 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to OU4; or (iii) if such person has been convicted of a criminal violation for the conduct to which the waiver would apply and that conviction has not been vitiated on appeal or otherwise.

XVII. EFFECT OF SETTLEMENT; CONTRIBUTION

74. Except as provided in Paragraph 73 (Waiver of Claims by Settling Defendants), nothing in this CD shall be construed to create any rights in any person not a Party to this CD, and nothing in this CD shall be construed to grant any cause of action to any person not a party to this CD. Except as provided in Section XVI (Covenants by Settling Defendants), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action

that each Party may have with respect to any matter, transaction, or occurrence relating in any way to OU4 against any person not a Party hereto. Nothing in this CD diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

75. The Parties agree, and by entering this CD this Court finds, that this CD constitutes a judicially-approved settlement pursuant to which each Settling Defendants has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this CD. The “matters addressed” in this CD are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with OU4, by the United States or any other person, except for the State; provided, however, that if the United States exercises rights under the reservations in Section XV (Covenants by Plaintiff), other than in Paragraphs 66.a. (claims for failure to meet a requirement of the CD), 66.h. (criminal liability), or 66.i. (violations of federal/state law during or after implementation of the Work), the “matters addressed” in this CD will no longer include those response costs or response actions that are within the scope of the exercised reservation.

76. The Parties further agree, and by entering this CD this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this CD constitutes a judicially-approved settlement pursuant to which each Settling Defendant has, as of the Effective Date, resolved liability to the United States for the matters addressed in this CD within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

77. Each Settling Defendants shall, with respect to any suit or claim brought by it for matters related to this CD, notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

78. Each Settling Defendants shall, with respect to any suit or claim brought against it for matters related to this CD, notify in writing the United States within 10 days after service of the complaint on such Settling Defendants. In addition, each Settling Defendant shall notify the United States within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial.

79. **Res Judicata and Other Defenses.** 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 OU4, Settling Defendants 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 XV (Covenants by Plaintiff).

XVIII. ACCESS TO INFORMATION

80. Settling Defendants shall provide to EPA, upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as "Records") within Settling Defendants' possession or control or that of their contractors or agents relating to activities at OU4 or to the implementation of this CD, 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 regarding the Work. Settling Defendants shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

81. Privileged and Protected Claims.

a. Settling Defendants may assert that all or part of a Record requested by Plaintiff is privileged or protected as provided under federal law, in lieu of providing the Record, provided Settling Defendants comply with subparagraph 81.b., and except as provided in subparagraph 81.c.

b. If Settling Defendants assert a claim of privilege or protection, they shall provide Plaintiff with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Settling Defendants shall provide the Record to Plaintiff in redacted form to mask the privileged or protected portion only. Settling Defendants shall retain all Records that they claim to be privileged or protected until Plaintiff has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the Settling Defendants' favor.

c. Settling Defendants may make no claim of privilege or protection regarding: (1) any data regarding OU4, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological or engineering data, or the portion of any other Record that evidences conditions at or around OU4; or (2) the portion of any Record that Settling Defendants are required to create or generate pursuant to this CD.

82. **Business Confidential Claims.** Settling Defendants may assert that all or part of a Record provided to Plaintiff under this Section or Section XIX (Retention of Records) is business confidential 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). Settling Defendants shall segregate and clearly identify all Records or parts thereof submitted under this CD for which Settling

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

83. If relevant to the proceeding, the Parties agree that validated sampling or monitoring data generated in accordance with the SOW and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this CD.

84. Notwithstanding any provision of this CD, Plaintiff retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XIX. RETENTION OF RECORDS

85. Until 10 years after EPA's Certification of Work Completion under Paragraph 4.6 (Certification of Work Completion) of the SOW, each Settling Defendants shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to its liability under CERCLA with respect to OU4, provided, however, that those Settling Defendants which are potentially liable as owners or operators of OU4 must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to OU4. Each Settling Defendants must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each Settling Defendants (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

86. At the conclusion of this record retention period, Settling Defendants shall notify the United States at least 90 days prior to the destruction of any such Records, and, upon request by the United States, and except as provided in Paragraph 81 (Privileged and Protected Claims), Settling Defendants shall deliver any such Records to EPA.

87. Each Settling Defendant certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding OU4 since notification of potential liability by the United States or the State and that it has fully complied with any and all EPA and State requests for information regarding OU4 pursuant to

Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

XX. NOTICES AND SUBMISSIONS

88. All approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, and requests specified in this CD must be in writing unless otherwise specified. Whenever, under this CD, notice is required to be given, or a report or other document is required to be sent, by one Party to another, it must be directed to the person(s) specified below at the address(es) specified below. Any Party may change the person and/or address applicable to it by providing notice of such change to all Parties. All notices under this Section are effective upon receipt, unless otherwise specified. Notices required to be sent to EPA, and not to the United States, should not be sent to the DOJ. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the CD regarding such Party.

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
eesdcopy.enrd@usdoj.gov
Re: DJ # 90-11-2-1224

As to EPA:

U.S. EPA Region 2
Emergency and Remedial Response Division
290 Broadway, 20th Floor
New York, NY 10007
Attn: Remedial Project Manager, Kentucky Avenue
Superfund Site
Rodrigues.isabel@epa.gov

At to EPA Cincinnati Finance Center:

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

As to Settling Defendants:

Until Settling Defendants' Project Coordinator is approved, notices shall be sent to:

Nelson D. Johnson, Partner
Arnold & Porter Kaye Scholer LLP
250 West 55 Street
New York, NY 10019-9710
Nelson.johnson@apks.com

XXI. RETENTION OF JURISDICTION

89. This Court retains jurisdiction over both the subject matter of this CD and Settling Defendants for the duration of the performance of the terms and provisions of this CD 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 CD, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIII (Dispute Resolution).

XXII. APPENDICES

90. The following appendices are attached to and incorporated into this CD:
- “Appendix A” is the 2016 ROD.
 - “Appendix B” is the SOW.
 - “Appendix C” is the description and/or map of OU4.
 - “Appendix D” is the financial assurance documentation.

XXIII. MODIFICATION

91. Except as provided in Paragraph 13 (Modification of SOW or Related Deliverables), material modifications to this CD, including the SOW, shall be in writing, signed by the United States and Settling Defendants, and shall be effective upon approval by the Court. Except as provided in Paragraph 13, non-material modifications to this CD, including the SOW, shall be in writing and shall be effective when signed by duly authorized representatives of the United States and Settling Defendants. A modification to the SOW shall be considered material if it implements a 2016 ROD amendment that fundamentally alters the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(ii). Before providing its approval to any modification to the SOW, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification.

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

XXIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

93. This CD shall be lodged with the Court for at least 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 CD disclose facts or considerations that indicate that the CD is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this CD without further notice.

94. If for any reason the Court should decline to approve this CD 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.

XXV. SIGNATORIES/SERVICE

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

96. Each Settling Defendant agrees not to oppose entry of this CD by this Court or to challenge any provision of this CD unless the United States has notified Settling Defendants in writing that it no longer supports entry of the CD.

97. Each Settling Defendant shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this CD. Settling Defendants agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this CD.

XXVI. FINAL JUDGMENT

98. This CD and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the CD. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this CD.

99. Upon entry of this CD by the Court, this CD shall constitute a final judgment between and among the United States and Settling Defendants. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS __ DAY OF _____, 20__.

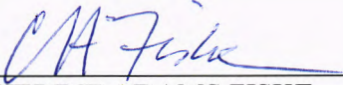
United States District Judge

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR THE UNITED STATES OF AMERICA:

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

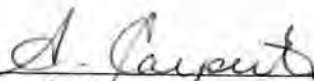
11/13/17
Dated


CATHERINE ADAMS FISKE
Senior Counsel
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
408 Atlantic Avenue, Second Floor
Boston, MA 02110

JAMES P. KENNEDY, JR.
United States Attorney
Western District of New York
138 Delaware Ave.
Buffalo, NY 14202

MARY ROACH
Assistant United States Attorney
Western District of New York
138 Delaware Ave.
Buffalo, NY 14202

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

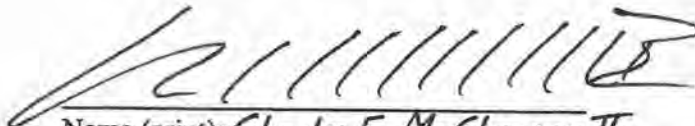
 9.29.17
Angela Carpenter, Acting Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR Beazer East, Inc. :
[Print name of Settling Defendant]

Sept. 29, 2017

Dated



Name (print): Charles E. McChesney II
Title: Vice President & Secretary, Beazer East, Inc.
Address: Manor Oak One, Suite 200, 1910 Cochran Rd.
Pittsburgh, PA 15220

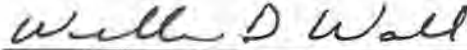
Agent Authorized to Accept Service
on Behalf of Above-signed Party:

Name (print): Charles E. McChesney II, Esq.
Title: Chief Legal Counsel
Company: Three Rivers Management, Inc., agent for Beazer East, Inc.
Address: Manor Oak One, Suite 200, 1910 Cochran Rd.
Pittsburgh, PA 15220
Phone: 412-208-8839
email: charles.mcchesney@trmi.biz

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR CBS CORPORATION:
[Print name of Settling Defendant]

09/29/17
Dated



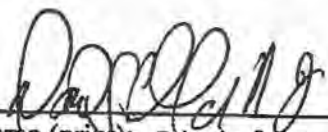
Name (print): William D. Wall
Title: Vice President, Senior Counsel
Address: 20 Stanwix Street
10th Floor
Pittsburgh, PA 15222

Agent Authorized to Accept Service on Behalf of Above-signed Party: Name (print): Mary A. Bishop
Title: Director Litigation Support & Administration
Company: CBS Corporation
Address: 20 Stanwix Street
10th Floor
Pittsburgh, PA 15222
Phone: 412-642-4644
email: Mary.Bishop@cbs.com

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR City of Elmira, NY :
[Print name of Settling Defendant]

Oct. 2, 2017
Dated


Name (print): Daniel J. Mandell, Jr.
Title: Mayor - Resolution No.: 2017-243
Address: 317 E. Church Street
Elmira, NY 14901

Agent Authorized to Accept Service on Behalf of Above-signed Party: Name (print): John J. Ryan, Jr., Esq. and his successor
Title: Corporation Counsel
Company: City of Elmira, NY
Address: 317 E. Church Street
Elmira, NY 14901
Phone: 607-737-5674
email: _____

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR Elmira Water Board :
[Print name of Settling Defendant]

Sept. 29 2017
Dated

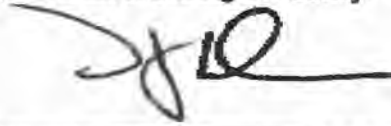
Martin D. Chalk
Name (print): Martin D. Chalk
Title: President
Address: 261 W. Water Street
Elmira, NY 14901

Agent Authorized to Accept Service
on Behalf of Above-signed Party:

Name (print): Mark LaDouce or Successor
Title: General Manager
Company: Elmira Water Board
Address: 261 W. Water Street
Elmira, NY 14901
Phone: 607-733-7169
email: _____

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR: HARDINGE, INC.
[Print name of Settling Defendant]



Dated: September 29, 2017

Name (print): Douglas J. Malone
Title: Vice President
Address: Hardinge, Inc.
One Hardinge Drive
Elmira, NY 14902-1507

Agent Authorized to Accept Service on Behalf of Above-signed Party: **Name (print): Craig A. Slater, Esq.**
Title: Attorney for Hardinge, Inc.
Company: The Slater Law Firm, PLLC
Address: 500 Seneca Street, Suite 504
Buffalo, NY 14204
Phone: 716-845-6760
Email: cslater@cslater law.com

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR Toshiba America, Inc.:
[Print name of Settling Defendant]

9/29/17
Dated

T. L. Q.

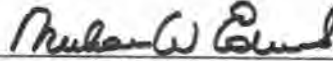
Name (print): Tsutomu Kagawa
Title: SUP, CFO
Address: 1251 Avenue of the Americas
New York, NY 10020

Agent Authorized to Accept Service on Behalf of Above-signed Party: Name (print): _____
Title: _____
Company: CT Corporation
Address: 111 Eighth Avenue - 13th Floor
New York, NY 10011
Phone: (212) 894-8940
email: _____

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR TOWN OF HORSEHEADS:

[Print name of Settling Defendant]



Dated: September 28, 2017

Name (print): Michael W. Edwards

Title: Supervisor

Address: 150 Wygant Rd., Horseheads, NY 14845

Agent Authorized to Accept Service
on Behalf of Above-signed Party:

Name (print): JOHN P. MUSTICO, ESQ.

Title: Attorney for Town of Horseheads

Company: John P Mustico Law Firm

Address: P. O. Box 1307, 221 W. Church St.
Elmira, NY 14902

Phone: 607-739-6702

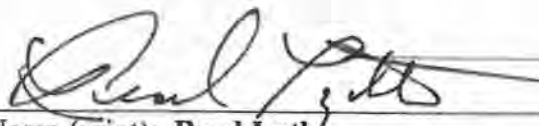
email: jpmustico@stny.rr.com

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR VILLAGE OF HORSEHEADS:

[Print name of Settling Defendant]

9-29-17
Dated

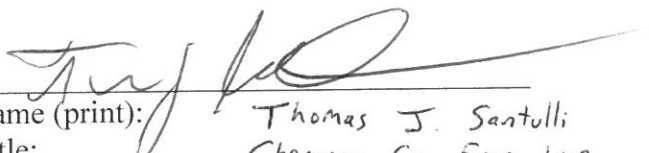

Name (print): **Brad Lytle**
Title: **Village Manager**
Address: **202 S. Main St., Horseheads, NY 14845**

Agent Authorized to Accept Service on Behalf of Above-signed Party: Name (print): JOHN G. GROFF, ESQ.
Title: Atty. for Village of Horseheads
Company: Groff Law Firm
Address: One Hanover Square
Horseheads, NY 14845
Phone: (607) 739-3601
email: jgroff@stny.rr.com

Signature Page for CD regarding the Kentucky Avenue Superfund Site, Operable Unit 4

FOR Chemung County :
[Print name of Settling Defendant]

Dated _____


Name (print): Thomas J. Santulli
Title: Chemung Co. Executive
Address: 203 Lake St.; Elmira, NY 14901

Agent Authorized to Accept Service
on Behalf of Above-signed Party:

Name (print): Bryan Maggs, Esq.
Title: County Attorney
Company: Chemung County
Address: 203 Lake St.
Elmira, NY 14901
Phone: 607-737-2982
email: bmaggs@co.chemung.ny.us

APPENDIX A

The Environmental Protection Agency's Record of Decision ("ROD") for OU4 at Koppers Pond for the Kentucky Avenue Well Field Site, dated September 30, 2016, is available at the following web address:

<https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.ars&id=0202142&doc=Y&colid=62929&requestTimeout=480>

Copies of the document are also available upon request to the undersigned counsel for the United States.

APPENDIX B

REMEDIAL DESIGN/REMEDIAL ACTION
STATEMENT OF WORK
OPERABLE UNIT 4
KENTUCKY AVENUE WELLFIELD SUPERFUND SITE
Horseheads, Chemung County, State of New York
EPA Region 2

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1. INTRODUCTION

- 1.1 Purpose of the SOW.** This Statement of Work (SOW) sets forth the procedures and requirements for implementing the Work.
- 1.2 The Remedy.** The Scope of the Remedy includes the actions described in Section 13.2 of the ROD, including the following:
- Placement of a geotextile membrane to serve as a demarcation barrier (such as polypropylene mesh) and six-inch thick soil and sand cap over the pond area to provide a uniform and continuous bottom surface, which will cover approximately nine acres of sediments and exposed soils;
 - Consolidation and/or grading of sediments/exposed soils within the historic footprint of Koppers Pond to accommodate the placement of capping material;
 - Development of a Site Management Plan to ensure proper management of the remedy post-construction. The Site Management Plan will include provisions for any maintenance and long-term monitoring required for the remedy, as well as periodic certifications; and
 - Implementation of institutional controls such as restrictions on activities at OU4 that could cause or contribute to the spread of contaminants.

The Remedy includes the following additional components as described in Section 13.2 of the ROD. If determined to be necessary during the remedial design, the Work will address the following:

- Installation of chain-link security fencing around the perimeter of the pond to supplement the existing fencing;
- Modification of the pond outlets structures; and
- Implementation of flood management mitigation measures;

The Remedy includes the following additional components as described in Section 13.2 of the ROD. These components are not anticipated to be necessary based on current conditions at OU4. However, changes in the conditions at OU4 may necessitate the implementation of the following:

- Development of a fishery management program; and
- Long-term monitoring of sediment¹ and fish, to confirm that a decrease in contaminant concentrations is occurring and that the reduction is achieving the remedial action objectives;

¹ Sediment refers to conditions whereby a pond is present and to the extent sediment has the potential to impact fish.

The terms used in this SOW that are defined in CERCLA, in regulations promulgated under CERCLA, or in the Consent Decree (CD), have the meanings assigned to them in CERCLA, in such regulations, or in the CD, except that the term “Paragraph” or “¶” means a paragraph of the SOW, and the term “Section” means a section of the SOW, unless otherwise stated.

2. COMMUNITY INVOLVEMENT

2.1 Community Involvement Responsibilities

- (a) EPA has the lead responsibility for developing and implementing community involvement activities at the Site, including OU4 – Koppers Pond. A community relations plan (known as a Community Involvement Plan (CIP) for the Kentucky Avenue Wellfield Site, including OU4, was written and may be updated by EPA.
- (b) If requested by EPA, Settling Defendants shall support EPA’s community involvement activities as they relate to OU4. This may include providing online access to initial submissions and updates of deliverables to (1) Community Advisory Groups, (2) Technical Assistance Grant recipients and their advisors, and (3) other entities to provide them with a reasonable opportunity for review and comment. EPA may describe in its CIP Settling Defendants’ responsibilities for community involvement activities. All community involvement activities conducted by Settling Defendants at EPA’s request are subject to EPA’s oversight.
- (c) **Settling Defendants’ CI Coordinator.** If requested by EPA, Settling Defendants shall, within 15 days, designate and notify EPA of Settling Defendants’ Community Involvement Coordinator (Settling Defendants’ CI Coordinator). Settling Defendants may hire a contractor for this purpose. Settling Defendants’ notice must include the name, title, and qualifications of the Settling Defendants’ CI Coordinator. Settling Defendants’ CI Coordinator is responsible for providing support regarding EPA’s community involvement activities, including coordinating with EPA’s CI Coordinator regarding responses to the public’s inquiries about OU4.

3. REMEDIAL DESIGN

3.1 **RD Technical Memorandum.** Settling Defendants shall submit a Remedial Design (RD) Technical Memorandum (RDTM) for EPA approval. The RDTM must include:

- (a) Plans for implementing all RD activities identified in this SOW, in the RDTM, or required by EPA to be conducted to develop the RD;
- (b) A description of the overall management strategy for performing the RD, including a proposal for phasing of design and construction, if applicable;

- (c) A description of any wetland delineation and surveying activities;
- (d) A description of any sampling activities, including sampling requirements for imported material; Cross references to quality assurance/quality control (QA/QC) requirements set forth in the Quality Assurance Project Plan (QAPP) as described in ¶ 6.7(d); and
- (e) The following supporting deliverables: Health and Safety Plan (HASP), Field Sampling Plan (FSP), and QAPP.

3.2 Settling Defendants shall meet regularly with EPA to discuss design issues as necessary, or as directed or determined by EPA.

3.3 Preliminary (30%) RD. Settling Defendants shall submit a Preliminary (30%) RD for EPA's comment. The Preliminary RD must include:

- (a) A design criteria report, as described in the *Remedial Design/Remedial Action Handbook*, EPA 540/R-95/059 (June 1995);
- (b) A description of the proposed general approach to contracting, construction, maintenance, and monitoring of the Remedial Action (RA) as necessary to implement the Work;
- (c) A description of the responsibility and authority of all organizations and key personnel involved with the development of the RD;
- (d) Descriptions of any areas requiring clarification and/or anticipated problems (e.g., data gaps);
- (e) An evaluation of potential impacts to wetlands, if any, giving consideration to factors including, but not limited to the following: historic Pond conditions, construction activities during implementation of the remedy, resulting elevation changes from implementation of the remedy, adaptive management practices, and the anticipated commercial or industrial future use of the properties.
- (f) Descriptions of any applicable permitting requirements and other regulatory requirements;
- (g) Plans for satisfying permit requirements, if applicable;
- (h) Description of plans for obtaining access in connection with the Work, such as property acquisition, property leases, and/or easements;
- (i) Preliminary drawings and a list of anticipated specifications;
- (j) Preliminary monitoring and maintenance requirements;

- (k) A description of how the RA will be implemented in a manner that minimizes environmental impacts in accordance with EPA's *Principles for Greener Cleanups* (Aug. 2009) and EPA Region 2's Clean and Green Energy Policy (March 2009);
- (l) A description of monitoring and control measures to protect human health and the environment, such as air monitoring and dust suppression, during the RA;
- (m) A proposed RA Schedule that specifies critical path method, including Gantt chart for the RA as set forth in ¶ 7.3 (RA Schedule); and
- (n) Updates of all supporting deliverables required to accompany the RDTM and the following additional supporting deliverables described in ¶ 6.7 (Supporting Deliverables): Construction Quality Assurance/Quality Control Plan; Maintenance Plan; and Institutional Controls Implementation and Assurance Plan, as defined below.

3.4 Pre-Final (95%) RD. Settling Defendants shall submit the Pre-final (95%) RD for EPA's comment. The Pre-final RD must be a continuation and expansion of the previous design submittal and must address EPA's comments regarding the Preliminary RD. The Pre-final RD must include:

- (a) A complete set of construction drawings and specifications that follow the Construction Specifications Institute's MasterFormat 2012;
- (b) Survey and engineering drawings showing existing features at OU4, such as elements, property borders, easements, and Site conditions;
- (c) Pre-Final versions of the same elements and deliverables as are required for the Preliminary RD;
- (d) A specification for photographic documentation of the RA; and
- (e) Updates of all supporting deliverables required to accompany the Preliminary (30%) RD. If available, an updated HASP that covers activities during the RA (as required by 4.1(b)) shall be submitted by Settling Defendants.

3.5 Final (100%) RD. Settling Defendants shall submit the Final (100%) RD for EPA approval. The Final RD must address EPA's comments on the Pre-final RD and must include final versions of all Pre-final RD deliverables. The Final RD must (1) be certified by a registered professional engineer licensed in the State of New York; (2) be suitable for procurement; and (3) follow the Construction Specifications Institute's MasterFormat 2012.

4. REMEDIAL ACTION

4.1 RA Technical Memorandum. To the extent determined necessary by EPA, Settling Defendants shall submit an RA Technical Memorandum (RATM) for EPA approval that includes:

- (a) A proposed RA Construction Schedule that specifies critical path method, including Gantt chart for the RATM;
- (b) An updated HASP that covers activities during the RA; and
- (c) Plans for satisfying permitting requirements, including obtaining permits for off-site activity and for satisfying substantive requirements of permits for on-Site activity.

4.2 Meetings and Inspections

- (a) **Preconstruction Conference.** Settling Defendants shall hold a preconstruction conference with EPA and others as directed or approved by EPA and as described in the *Remedial Design/Remedial Action Handbook*, EPA 540/R-95/059 (June 1995). Settling Defendants shall prepare minutes of the conference and shall distribute the minutes to all Parties.
- (b) **Periodic Meetings.** During the construction portion of the RA (RA Construction), Settling Defendants shall have weekly meetings with EPA, and others as directed or determined by EPA, in person or via conference call, to discuss construction issues. Settling Defendants shall distribute an agenda and list of attendees to all Parties prior to each meeting. Settling Defendants shall prepare minutes of the calls and shall distribute the minutes to all Parties. Settling Defendants shall also provide written letter reports on a monthly basis summarizing construction issues.
- (c) **Inspections**
 - (1) EPA or its representative shall conduct periodic inspections of (or have an on-Site presence at OU4 during the Work. At EPA's request, the Supervising Contractor or other designee shall accompany EPA or its representative during inspections.
 - (2) Settling Defendants shall provide on-Site office space for EPA personnel to perform their oversight duties.
 - (3) Settling Defendants shall provide personal protective equipment needed for EPA personnel and any oversight officials to perform their oversight duties.
 - (4) Upon notification by EPA of any deficiencies in the RA Construction, Settling Defendants shall take all necessary steps to correct the deficiencies and/or bring the RA Construction into compliance with the

approved Final RD, any approved design changes, and/or the approved RAWP. If applicable, Settling Defendants shall comply with any schedule provided by EPA in its notice of deficiency.

4.3 Emergency Response and Reporting

- (a) **Emergency Response and Reporting.** If any event occurs during performance of the Work that causes or threatens to cause a release of Waste Material on, at, or from OU4 and that either constitutes an emergency situation or that may present an immediate threat to public health or welfare or the environment, Settling Defendants shall: (1) immediately take all appropriate action to prevent, abate, or minimize such release or threat of release; (2) immediately notify the authorized EPA officer (as specified in ¶ 4.3(c)) orally; and (3) take such actions in consultation with the authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plan, the Emergency Response Plan, and any other deliverable approved by EPA under the SOW.
- (b) **Release Reporting.** Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), 42 U.S.C. § 11004, Settling Defendants shall immediately notify the authorized EPA officer orally.
- (c) The “authorized EPA officer” for purposes of immediate oral notifications and consultations under ¶ 4.3(a) and ¶ 4.3(b) is the EPA Project Coordinator, Isabel Fredericks, at (212) 637-4248 or Rodrigues.isabel@epa.gov, the Chief, Western New York Remediation Section, Pietro Mannino, (if the EPA Project Coordinator is unavailable) at (212) 637-4287 or Mannino.pietro.@epa.gov, or the Chief, Removal Action Branch of the Emergency and Remedial Response Division, Joseph Rotola, EPA Region 2 at (732) 321-6658 or Rotola.joe@epa.gov (if neither the EPA Project Coordinator or Section Chief is available).
- (d) For any event covered by ¶ 4.3(a) and ¶ 4.3(b), Settling Defendants shall: (1) within 14 days after the onset of such event, submit a report to EPA describing the actions or events that occurred and the measures taken, and to be taken, in response thereto; and (2) within 30 days after the conclusion of such event, submit a report to EPA describing all actions taken in response to such event.
- (e) The reporting requirements under ¶ 4.3 are in addition to the reporting required by CERCLA § 103 or EPCRA § 304.

4.4 Off-Site Shipments

- (a) Settling Defendants may ship hazardous substances, pollutants, and contaminants related to the Work to an off-Site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Settling Defendants will be deemed to be in compliance with CERCLA § 121(d)(3) and 40 C.F.R. § 300.440 regarding a shipment if Settling Defendants obtain a prior

determination from EPA that the proposed receiving facility for such shipment is acceptable under the criteria of 40 C.F.R. § 300.440(b).

- (b) Settling Defendants may ship Waste Material related to the Work to an out-of-state waste management facility only if, prior to any shipment, they provide notice to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator. This notice requirement will not apply to any off-Site shipments when the total quantity of all such shipments does not exceed 10 cubic yards. The notice must include the following information, if available: (1) the name and location of the receiving facility; (2) the type and quantity of Waste Material to be shipped; (3) the schedule for the shipment; and (4) the method of transportation. Settling Defendants also shall notify the state environmental official referenced above and the EPA Project Coordinator of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. Settling Defendants shall provide the notice after the award of the contract for RA construction and before the Waste Material is shipped.
- (c) Settling Defendants may ship Investigation Derived Waste (IDW) from the Site to an off-Site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), 40 C.F.R. § 300.440, *EPA's Guide to Management of Investigation Derived Waste*, OSWER 9345.3-03FS (Jan. 1992), and any IDW-specific requirements contained in the ROD. Wastes shipped off-Site to a laboratory for characterization, and RCRA hazardous wastes that meet the requirements for an exemption from RCRA under 40 CFR § 261.4(e) shipped off-site for treatability studies, are not subject to 40 C.F.R. § 300.440.

4.5 Certification of RA Completion

- (a) **RA Completion Inspection.** The RA is "Complete" for purposes of this ¶ 4.5 when it has been fully performed and the Performance Standards (PS) have been achieved. Settling Defendants shall schedule an inspection for the purpose of obtaining EPA's Certification of RA Completion. The inspection must be attended by Settling Defendants and EPA and/or their representatives.
- (b) **RA Report.** Following the inspection, Settling Defendants shall submit an RA Report to EPA requesting EPA's Certification of RA Completion. The report must: (1) include certifications by a registered professional engineer licensed in the State of New York and by Settling Defendants' Project Coordinator that the RA is complete; (2) include as-built drawings signed and stamped by a registered professional engineer licensed in the State of New York; (3) be prepared in accordance with Chapter 2 (Remedial Action Completion) of EPA's *Close Out Procedures for NPL Sites* guidance (May 2011); (4) contain monitoring data to demonstrate that Performance Standards have been achieved; and (5) be certified in accordance with ¶ 6.5 (Certification).

- (c) If EPA concludes that the RA is not Complete, EPA shall so notify Settling Defendants. EPA's notice must include a description of any deficiencies. EPA's notice may include a schedule for addressing such deficiencies or may require Settling Defendants to submit a schedule for EPA approval. Settling Defendants shall perform all activities described in the notice in accordance with the schedule.
- (d) If EPA concludes, based on the initial or any subsequent RA Report requesting Certification of RA Completion, that the RA is Complete, EPA shall so certify to Settling Defendants. This certification will constitute the Certification of RA Completion for purposes of the CD, including Section XV of the CD (Covenants by Plaintiff). Certification of RA Completion will not affect Settling Defendants' remaining obligations under the CD.

4.6 Certification of Work Completion

- (a) **Work Completion Inspection.** Settling Defendants shall schedule an inspection for the purpose of obtaining EPA's Certification of Work Completion. The inspection must be attended by Settling Defendants and EPA and/or their representatives.
- (b) **Work Completion Report.** Following the inspection, Settling Defendants shall submit a report to EPA requesting EPA's Certification of Work Completion. The report must: (1) include certifications by a registered professional engineer licensed in the State of New York and by Settling Defendants' Project Coordinator that the Work, including all O&M activities, is complete; and (2) be certified in accordance with ¶ 6.5 (Certification). If the RA Report submitted under ¶ 4.5(b) includes all elements required under this ¶ 4.6(b), then the RA Report suffices to satisfy all requirements under this ¶ 4.6(b).
- (c) If EPA concludes that the Work is not complete, EPA shall so notify Settling Defendants. EPA's notice must include a description of the activities that Settling Defendants must perform to complete the Work. EPA's notice must include specifications and a schedule for such activities or must require Settling Defendants to submit specifications and a schedule for EPA approval. Settling Defendants shall perform all activities described in the notice or in the EPA-approved specifications and schedule.
- (d) If EPA concludes, based on the initial or any subsequent report requesting Certification of Work Completion, that the Work is complete, EPA shall so certify in writing to Settling Defendants. Issuance of the Certification of Work Completion does not affect the following continuing obligations: (1) activities under the Periodic Review Support Plan; (2) obligations under Sections **VIII** (Property Requirements), **XIX** (Retention of Records), and **XVIII** (Access to Information) of the CD; (3) Institutional Controls obligations as provided in the ICIAP; and (4) reimbursement of EPA's Future Response Costs under Section **X** (Payments for Response Costs) of the CD.

5. REPORTING

- 5.1 Progress Reports.** Commencing with the first month following lodging of the CD and until EPA approves the RA Completion, Settling Defendants shall submit progress reports to EPA on a monthly basis, or as otherwise requested by EPA. The reports must cover all activities that took place during the prior reporting period, including:
- (a) The actions that have been taken toward achieving compliance with the CD;
 - (b) A summary of all results of sampling, tests, and all other data received or generated by Settling Defendants;
 - (c) A description of all deliverables that Settling Defendants submitted to EPA;
 - (d) A description of all activities relating to RA Construction that are scheduled for the next six weeks;
 - (e) An updated RA Construction Schedule, together with information regarding percentage of completion, delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays;
 - (f) A description of any modifications to the work plans or other schedules that Settling Defendants have proposed or that have been approved by EPA; and
 - (g) A description of all activities undertaken in support of the Community Involvement Plan (CIP) during the reporting period and those to be undertaken in the next six weeks.
- 5.2 Notice of Progress Report Schedule Changes.** If the schedule changes for any activity described in the Progress Reports, including activities required to be described under ¶ 5.1(d), Settling Defendants shall notify EPA of such change at least 7 days before performance of the activity. Such notification does not relieve Settling Defendants of their obligation to comply with the approved schedules pursuant to Section 7, below.

6. DELIVERABLES

- 6.1 Applicability.** Settling Defendants shall submit deliverables for EPA approval or for EPA comment as specified in this SOW. If this SOW does not specify whether a particular deliverable requires EPA approval or comment, then approval or comment is not required. Paragraphs 6.2 (In Writing) through 6.4 (Technical Specifications) apply to all deliverables. Paragraph 6.5 (Certification) applies to any deliverable that is required to be certified. Paragraph 6.6 (Approval of Deliverables) applies to any deliverable that is required to be submitted for EPA approval.

- 6.2 In Writing.** As provided in ¶ 88 of the CD, all deliverables under this SOW must be in writing unless otherwise specified.
- 6.3** All deliverables must be submitted by the deadlines in the RD Schedule or RA Schedule, as applicable. Settling Defendants shall submit all deliverables to EPA in electronic form unless directed by EPA. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5” by 11”, Settling Defendants shall also provide EPA with paper copies of such exhibits.
- 6.4 Technical Specifications**
- (a) Sampling, monitoring and well construction data should be submitted in standard regional Electronic Data Deliverable (EDD) format which can be found at <https://www.epa.gov/superfund/region-2-superfund-electronic-data-submission>. Other delivery methods may be allowed if electronic direct submission presents a significant burden or as technology changes.
 - (b) Spatial data, including spatially-referenced data and geospatial data, should be submitted: (1) in the ESRI File Geodatabase format; and (2) as unprojected geographic coordinates in decimal degree format using North American Datum 1983 (NAD83) or World Geodetic System 1984 (WGS84) as the datum. If applicable, submissions should include the collection method(s). Projected coordinates may optionally be included but must be documented. Spatial data should be accompanied by metadata, and such metadata should be compliant with the Federal Geographic Data Committee (FGDC) Content Standard for Digital Geospatial Metadata and its EPA profile, the EPA Geospatial Metadata Technical Specification. An add-on metadata editor for ESRI software, the EPA Metadata Editor (EME), complies with these FGDC and EPA metadata requirements.
 - (c) Each file must include an attribute name for each site unit or sub-unit submitted. Consult <http://www.epa.gov/geospatial/epa-geospatial-metadata-technical-specification> for any further available guidance on attribute identification and naming.
 - (d) Spatial data submitted by Settling Defendants does not, and is not intended to, define the boundaries of OU4.
- 6.5 Certification.** All deliverables that require compliance with this ¶ 6.5 must be signed by the Settling Defendants’ Project Coordinator, or other responsible official of Settling Defendants, and must contain the following statement: “I certified under penalty of law that this document all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. “

6.6 Approval of Deliverables

(a) Initial Submissions

- (1) After review of any deliverable that is required to be submitted for EPA approval under the CD or the SOW, EPA shall: (i) approve, in whole or in part, the submission; (ii) approve the submission upon specified conditions; (iii) disapprove, in whole or in part, the submission; or (iv) any combination of the foregoing.
- (2) EPA also may modify the initial submission to cure deficiencies in the submission if: (i) EPA determines that disapproving the submission and awaiting a resubmission would cause substantial disruption to the Work; or (ii) previous submission(s) have been disapproved due to material defects and the deficiencies in the initial submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

(b) **Resubmissions.** Upon receipt of a notice of disapproval under ¶ 6.6(a) (Initial Submissions), or if required by a notice of approval upon specified conditions under ¶ 6.6(a), Settling Defendants shall, within 21 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the deliverable for approval. After review of the resubmitted deliverable, EPA may: (1) approve, in whole or in part, the resubmission; (2) approve the resubmission upon specified conditions; (3) modify the resubmission; (4) disapprove, in whole or in part, the resubmission, requiring Settling Defendants to correct the deficiencies; or (5) any combination of the foregoing.

(c) **Implementation.** Upon approval, approval upon conditions, or modification by EPA under ¶ 6.6(a) (Initial Submissions) or ¶ 6.6(b) (Resubmissions), of any deliverable, or any portion thereof: (1) such deliverable, or portion thereof, will be incorporated into and enforceable under the CD; and (2) Settling Defendants shall take any action required by such deliverable, or portion thereof. The implementation of any non-deficient portion of a deliverable submitted or resubmitted under ¶ 6.6(a) or ¶ 6.6(b) does not relieve Settling Defendants of any liability for stipulated penalties under Section XV (Stipulated Penalties) of the CD.

6.7 Supporting Deliverables. As determined necessary by EPA, Settling Defendants shall submit each of the following supporting deliverables for EPA approval, except as specifically provided. The deliverables must be submitted, for the first time, by the deadlines in the RD Schedule or the RA Schedule, or any other EPA-approved schedule, as applicable. Settling Defendants shall develop the deliverables in accordance with all applicable regulations, guidances, and policies (see Section 9 (References)). Settling Defendants shall update each of these supporting deliverables as necessary or appropriate during the course of the Work, and/or as requested by EPA.

- (a) **Health and Safety Plan.** The Health and Safety Plan (HASP) describes all activities to be performed to protect on site personnel and area residents from physical, chemical, and all other hazards posed by the Work. Settling Defendants shall develop the HASP in accordance with EPA's Emergency Responder Health and Safety and Occupational Safety and Health Administration (OSHA) requirements under 29 C.F.R. §§ 1910 and 1926. The HASP should cover RD activities and should be, as appropriate, updated to cover activities during the RA and updated to cover activities after RA completion. EPA does not approve the HASP, but will review it to ensure that all necessary elements are included and that the plan provides for the protection of human health and the environment.
- (b) **Emergency Response Plan.** The Emergency Response Plan (ERP) must describe procedures to be used in the event of an accident or emergency at OU4. The ERP must include:
- (1) Name of the person or entity, on behalf of the Settling Defendants, responsible for responding in the event of an emergency incident;
 - (2) Plan and date(s) for meeting(s) with the local community, including local, State, and federal agencies involved in the cleanup, as well as local emergency squads and hospitals;
 - (3) Spill Prevention, Control, and Countermeasures (SPCC) Plan (if applicable), consistent with the regulations under 40 C.F.R. Part 112, describing measures to prevent, and contingency plans for, spills and discharges;
 - (4) Notification activities in accordance with ¶ 4.3(b) (Release Reporting) in the event of a release of hazardous substances requiring reporting under Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), 42 U.S.C. § 11004; and
 - (5) A description of all necessary actions to ensure compliance with Paragraph 11 (Emergencies and Releases) of the CD in the event of an occurrence during the performance of the Work that causes or threatens a release of Waste Material from OU4 that constitutes an emergency or may present an immediate threat to public health or welfare or the environment.
- (c) **Field Sampling Plan.** The Field Sampling Plan (FSP) supplements the QAPP and addresses all sample collection activities. The FSP must be written so that a field sampling team unfamiliar with the project would be able to gather the samples and field information required. Settling Defendants shall develop the FSP in accordance with *Guidance for Conducting Remedial Investigations and Feasibility Studies*, EPA/540/G 89/004 (Oct. 1988).

- (d) **Quality Assurance Project Plan.** The Quality Assurance Project Plan (QAPP) addresses sample analysis and data handling regarding the Work. The QAPP must include a detailed explanation of Settling Defendants' quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance, and monitoring samples. Settling Defendants shall develop the QAPP in accordance with *EPA Requirements for Quality Assurance Project Plans*, QA/R-5, EPA/240/B-01/003 (Mar. 2001, reissued May 2006); *Guidance for Quality Assurance Project Plans.*, QA/G-5, EPA/240/R 02/009 (Dec. 2002); and *Uniform Federal Policy for Quality Assurance Project Plans*, Parts 1-3, EPA/505/B-04/900A through 900C (Mar. 2005). The QAPP also must include procedures:
- (1) To ensure that EPA and their authorized representative have reasonable access to laboratories used by Settling Defendants in implementing the CD (Settling Defendants' Labs);
 - (2) To ensure that Settling Defendants' Labs analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring;
 - (3) To ensure that Settling Defendants' Labs perform all analyses using EPA-accepted methods (i.e., the methods documented in *USEPA Contract Laboratory Program Statement of Work for Inorganic Analysis*, ILM05.4 (Dec. 2006); *USEPA Contract Laboratory Program Statement of Work for Organic Analysis*, SOM01.2 (amended Apr. 2007); and *USEPA Contract Laboratory Program Statement of Work for Inorganic Superfund Methods (Multi-Media, Multi-Concentration)*, ISM01.2 (Jan. 2010)) or other methods acceptable to EPA;
 - (4) To ensure that Settling Defendants' Labs participate in an EPA-accepted QA/QC program or other program QA/QC acceptable to EPA;
 - (5) For Settling Defendants to provide EPA with notice at least 14 days prior to any sample collection activity;
 - (6) For Settling Defendants to provide split samples and/or duplicate samples to EPA upon request;
 - (7) For EPA to take any additional samples that it deems necessary;
 - (8) For EPA to provide to Settling Defendants, upon request, split samples and/or duplicate samples in connection with EPA's oversight sampling; and
 - (9) For Settling Defendants to submit to EPA all sampling and tests results and other data in connection with the implementation of the CD.
- (e) **Construction Quality Assurance/Quality Control Plan (CQA/QCP).** The purpose of the Construction Quality Assurance Plan (CQAP) is to describe planned and systemic activities that provide confidence that the RA construction will satisfy all plans, specifications, and related requirements, including quality objectives. The purpose of the Construction Quality Control Plan (CQCP) is to describe the activities to verify that RA construction has satisfied all plans,

specifications, and related requirements, including quality objectives. The CQA/QCP must:

- (1) Identify, and describe the responsibilities of, the organizations and personnel implementing the CQA/QCP;
 - (2) Describe the Performance Standards (PS) required to be met to achieve Completion of the RA;
 - (3) Describe the activities to be performed: (i) to provide confidence that PS will be met; and (ii) to determine whether PS have been met;
 - (4) Describe verification activities, such as inspections, sampling, testing, monitoring, and production controls, under the CQA/QCP;
 - (5) Describe industry standards and technical specifications used in implementing the CQA/QCP;
 - (6) Describe procedures for tracking construction deficiencies from identification through corrective action;
 - (7) Describe procedures for documenting all CQA/QCP activities; and
 - (8) Describe procedures for retention of documents and for final storage of documents.
- (f) **Site Management Plan.** The SMP for OU4 shall include the following components for the Work:
- (1) **Monitoring Plan.** If determined to be necessary by EPA in the event that conditions at OU4 change, the Settling Defendants shall submit a Monitoring Plan (MP), the purpose of which is to obtain baseline information regarding the extent of contamination in affected media at OU4; to obtain information, through short- and long- term monitoring, about the movement of and changes in contamination throughout OU4, before and during implementation of the RA; to obtain information regarding contamination levels to determine whether PSs are achieved; and to obtain information to determine whether to perform additional actions, including further monitoring. The MP must include:
 - (i) Description of the environmental media to be monitored;
 - (ii) Description of the visual monitoring activities associated with the cap and vegetative regrowth;
 - (iii) Description of the data collection parameters, including existing and proposed monitoring devices and locations, schedule and

- frequency of monitoring, analytical parameters to be monitored, and analytical methods employed;
- (iv) Description of how performance data will be analyzed, interpreted, and reported, and/or other OU4 related requirements;
 - (v) Description of verification sampling procedures;
 - (vi) Description of deliverables that will be generated in connection with monitoring, including sampling schedules, laboratory records, monitoring reports, and monthly and annual reports to EPA and State agencies; and
 - (vii) Description of proposed additional monitoring and data collection actions (such as increases in frequency of monitoring, and/or installation of additional monitoring devices in the affected areas) in the event that results from monitoring devices indicate changed conditions (such as higher than expected concentrations of the contaminants of concern or groundwater contaminant plume movement).
- (2) **Maintenance Plan.** The Maintenance Plan describes the requirements for inspecting and maintaining the RA. Settling Defendants shall develop the Maintenance Plan in accordance with *Operation and Maintenance in the Superfund Program*, OSWER 9200.1 37FS, EPA/540/F-01/004 (May 2001). The O&M Plan must include the following additional requirements:
- (i) Description of PSs required to be met to implement the ROD;
 - (ii) Description of activities to be performed: (i) to provide confidence that PSs will be met; and (ii) to determine whether PSs have been met;
 - (iii) Maintenance Reporting. Description of records and reports that will be generated, such as laboratory records, records of maintenance costs, reports regarding emergencies, personnel and maintenance records, monitoring reports, and monthly and annual reports to EPA and State agencies;
 - (iv) Description of corrective action in case of systems failure, including: (i) alternative procedures to prevent the release or threatened release of Waste Material which may endanger public health and the environment or may cause a failure to achieve PSs; (ii) analysis of vulnerability and additional resource requirements should a failure occur; (iii) notification and reporting requirements should maintenance systems fail or be in danger of failure; and (iv) community notification requirements; and

- (v) Description of corrective action to be implemented in the event that PSs are not achieved; and a schedule for implementing such corrective action.
- (4) **Institutional Controls Implementation and Assurance Plan.** The ICIAP describes plans to implement, maintain, and enforce the Institutional Controls (ICs) at OU4. Settling Defendants shall develop the ICIAP in accordance with *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites*, OSWER 9355.0-89, EPA/540/R-09/001 (Dec. 2012), and *Institutional Controls: A Guide to Preparing Institutional Controls Implementation and Assurance Plans at Contaminated Sites*, OSWER 9200.0-77, EPA/540/R-09/02 (Dec. 2012). The ICIAP must include the following additional requirements:
- (i) Documentation of all recorded real property interests (e.g., easements, liens) and resource interests in the property that may affect ICs (e.g., surface, mineral, and water rights) including accurate mapping and geographic information system coordinates of such interests; and
 - (ii) Provision of title research, legal descriptions and survey maps that are prepared according to current American Land Title Association (ALTA) standards.
 - (iii) To the extent that proprietary controls are needed on property owned or controlled by third parties, a commitment by Settling Defendant to use best efforts to implement such proprietary controls, including the payment of reasonable sums of money in consideration of such proprietary controls.
- (5) **Periodic Review Support Plan.** The Periodic Review Support Plan (PRSP) addresses the studies and investigations that Settling Defendants shall conduct to support EPA's reviews of whether the RA is protective of human health and the environment in accordance with Section 121(c) of CERCLA, 42 U.S.C. § 9621(c) (also known as "Five-year Reviews"). Settling Defendants shall develop the plan in accordance with *Comprehensive Five-year Review Guidance*, OSWER 9355.7-03B-P (June 2001), and any other relevant five-year review guidance.
- (g) **Transportation and Off-Site Disposal Plan.** If determined necessary during the remedial design by EPA, Settling Defendants shall submit a Transportation and Off-Site Disposal Plan (TODP) which describes plans to ensure compliance with ¶ 4.4 (Off-Site Shipments). The TODP must include:
- (1) Proposed routes for off-site shipment of Waste Material;

- (2) Identification of communities affected by shipment of Waste Material; and
- (3) Description of plans to minimize impacts on affected communities.

7. SCHEDULES

7.1 Applicability and Revisions. All deliverables and tasks required under this SOW must be submitted or completed by the deadlines or within the time durations listed in the RD and RA Schedules set forth below. Settling Defendants may submit proposed revised RD Schedules or RA Schedules for EPA approval. Upon EPA's approval, the revised RD and/or RA Schedules supersede the RD and RA Schedules set forth below, and any previously-approved RD and/or RA Schedules.

7.2 RD Schedule

| | Description of Deliverable, Task | ¶ Ref. | Deadline |
|---|---|---|--|
| 1 | RDTM | 3.1 | 45 days after EPA's Authorization to Proceed regarding Supervising Contractor under CD ¶ 9.c |
| 2 | Preliminary (30%) RD | 3.3, Error! Reference source not found. | 120 days after EPA approval of Final RDTM |
| 3 | Pre-final (95%) RD | 3.4 | 120 days after EPA comments on Preliminary RD |
| 4 | Final (100%) RD | 3.5 | 30 days after EPA comments on Pre-final RD |

7.3 RA Schedule

| | Description of Deliverable / Task | ¶ Ref. | Deadline |
|---|-----------------------------------|-----------|---|
| 1 | Award RA contract | | 60 days after EPA Notice of Authorization to Proceed with RA |
| 2 | RATM | 4.1 | 30 days after EPA Notice of Authorization to Proceed with RA |
| 3 | Pre-Construction Conference | 4.2(a) | 21 days after RA contract award |
| 4 | Start of Construction | | As defined in the Final RD |
| 5 | Completion of Construction | | As defined in the Final RD |
| 6 | RA Completion Inspection | 4.5(a) | 14 days after Completion of Construction |
| 7 | RA Report | 4.5(b) | 30 days after RA Completion Inspection |
| 8 | Work Completion Report | 4.6(a) | Within 90 days after Settling Defendants concludes that Work has been completed |
| 9 | Periodic Review Support Plan | 6.7(g)(5) | 60 days after Completion of Construction |

8. STATE PARTICIPATION

8.1 Copies. Settling Defendants shall, at any time they send a deliverable to EPA, send a copy of such deliverable to the State. EPA shall, at any time it sends a notice, authorization, approval, disapproval, or certification to Settling Defendants, send a copy of such document to the State.

8.2 Review and Comment. The State will have a reasonable opportunity for review and comment prior to:

- (a) Any EPA approval or disapproval under (Approval of Deliverables) of any deliverables that are required to be submitted for EPA approval; and
- (b) Any approval or disapproval of the Construction Phase under ¶ 4.5 (RA Construction Completion), any disapproval of, or Certification of RA Completion under ¶ 4.5 (Certification of RA Completion), and any disapproval of, or Certification of Work Completion under ¶ 4.5 (Certification of Work Completion).

9. REFERENCES

9.1 The following regulations and guidance documents, among others, apply to the Work. Any item for which a specific URL is not provided below is available on one of the two EPA Web pages listed in ¶ 9.2:

- (a) A Compendium of Superfund Field Operations Methods, OSWER 9355.0-14, EPA/540/P-87/001a (Aug. 1987). CERCLA Compliance with Other Laws Manual, Part I: Interim Final, OSWER 9234.1-01, EPA/540/G-89/006 (Aug.

1988).

- (b) Guidance for Conducting Remedial Investigations and Feasibility Studies, OSWER 9355.3-01, EPA/540/G-89/004 (Oct. 1988).
- (c) CERCLA Compliance with Other Laws Manual, Part II, OSWER 9234.1-02, EPA/540/G-89/009 (Aug. 1989).
- (d) Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties, OSWER 9355.5-01, EPA/540/G- 90/001 (Apr.1990).
- (e) Guidance on Expediting Remedial Design and Remedial Actions, OSWER 9355.5-02, EPA/540/G-90/006 (Aug. 1990).
- (f) Guide to Management of Investigation-Derived Wastes, OSWER 9345.3-03FS (Jan. 1992).
- (g) Permits and Permit Equivalency Processes for CERCLA On-Site Response Actions, OSWER 9355.7-03 (Feb. 1992).
- (h) Guidance for Conducting Treatability Studies under CERCLA, OSWER 9380.3- 10, EPA/540/R-92/071A (Nov. 1992).
- (i) National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule, 40 C.F.R. Part 300 (Oct. 1994).
- (j) Guidance for Scoping the Remedial Design, OSWER 9355.0-43, EPA/540/R- 95/025 (Mar. 1995).
- (k) Remedial Design/Remedial Action Handbook, OSWER 9355.0-04B, EPA/540/R- 95/059 (June 1995).
- (l) EPA Guidance for Data Quality Assessment, Practical Methods for Data Analysis, QA/G-9, EPA/600/R-96/084 (July 2000).
- (m) Operation and Maintenance in the Superfund Program, OSWER 9200.1-37FS, EPA/540/F-01/004 (May 2001).
- (n) Comprehensive Five-year Review Guidance, OSWER 9355.7-03B-P, 540-R-01- 007 (June 2001).
- (o) Guidance for Quality Assurance Project Plans, QA/G-5, EPA/240/R-02/009 (Dec. 2002).

- (p) Institutional Controls: Third Party Beneficiary Rights in Proprietary Controls (Apr. 2004).
- (q) Quality Systems for Environmental Data and Technology Programs - Requirements with Guidance for Use, ANSI/ASQ E4-2004 (2004).
- (r) Uniform Federal Policy for Quality Assurance Project Plans, Parts 1-3, EPA/505/B-04/900A through 900C (Mar. 2005).
- (s) Superfund Community Involvement Handbook, EPA/540/K-05/003 (Apr. 2005).
- (t) EPA Guidance on Systematic Planning Using the Data Quality Objectives Process, QA/G-4, EPA/240/B-06/001 (Feb. 2006).
- (u) EPA Requirements for Quality Assurance Project Plans, QA/R-5, EPA/240/B-01/003 (Mar. 2001, reissued May 2006).
- (v) EPA Requirements for Quality Management Plans, QA/R-2, EPA/240/B-01/002 (Mar. 2001, reissued May 2006).
- (w) USEPA Contract Laboratory Program Statement of Work for Inorganic Analysis, ILM05.4 (Dec. 2006).
- (x) USEPA Contract Laboratory Program Statement of Work for Organic Analysis, SOM01.2 (amended Apr. 2007).
- (y) EPA National Geospatial Data Policy, CIO Policy Transmittal 05-002 (Aug. 2008), available at <http://www.epa.gov/geospatial/epa-national-geospatial-data-policy> and http://www.epa.gov/sites/production/files/2014-08/documents/national_geospatial_data_policy_0.pdf.
- (aa) Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER 9283.1-33 (June 2009).
- (bb) Principles for Greener Cleanups (Aug. 2009), available at <https://www.epa.gov/greenercleanups/epa-principles-greener-cleanups> <http://www.epa.gov/greenercleanups/epa-principles-greener-cleanups>, and Region 2's Clean and Green Energy Policy, available at <http://www.epa.gov/greenercleanups/epa-region-2-clean-and-green-policy>.
- (cc) USEPA Contract Laboratory Program Statement of Work for Inorganic Superfund Methods (Multi-Media, Multi-Concentration), ISM01.2 (Jan. 2010).
- (dd) Close Out Procedures for National Priorities List Sites, OSWER 9320.2-22 (May 2011).

- (ee) Groundwater Road Map: Recommended Process for Restoring Contaminated Groundwater at Superfund Sites, OSWER 9283.1-34 (July 2011).
- (ff) Recommended Evaluation of Institutional Controls: Supplement to the “Comprehensive Five-Year Review Guidance,” OSWER 9355.7-18 (Sep. 2011).
- (gg) Construction Specifications Institute's Master Format 2012, available from the Construction Specifications Institute.
- (hh) Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach, OSWER 9200.2-125 (Sep. 2012)
- (ii) Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites, OSWER 9355.0-89, EPA/540/R-09/001 (Dec. 2012).
- (jj) Institutional Controls: A Guide to Preparing Institutional Controls Implementation and Assurance Plans at Contaminated Sites, OSWER 9200.0-77, EPA/540/R-09/02 (Dec. 2012).
- (kk) EPA’s Emergency Responder Health and Safety Manual, OSWER 9285.3-12 (July 2005 and updates), <http://www.epaosc.org/HealthSafetyManual/manual-index.htm>
- (ll) Broader Application of Remedial Design and Remedial Action Pilot Project Lessons Learned, OSWER 9200.2-129 (Feb. 2013).
- (mm) Guidance for Evaluating Completion of Groundwater Restoration Remedial Actions, OSWER 9355.0-129 (Nov. 2013).
- (nn) Groundwater Remedy Completion Strategy: Moving Forward with the End in Mind, OSWER 9200.2-144 (May 2014).
- (oo) Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA,” U.S. EPA, Office of Emergency and Remedial Response, October 1988, OSWER Directive No. 9355.3-01.

9.2 A more complete list may be found on the following EPA Web pages:

Laws, Policy, and Guidance <http://www.epa.gov/superfund/superfund-policy-guidance-and-laws>.

Test Methods Collections <http://www.epa.gov/measurements/collection-methods>

For any regulation or guidance referenced in the CD or SOW, the reference will be read to include any subsequent modification, amendment, or

replacement of such regulation or guidance. Such modifications, amendments, or replacements apply to the Work only after Settling Defendants receive notification from EPA of the modification, amendment, or replacement.

APPENDIX C

OU4 is identified as a 12-acre area that is or was ponded, defined by a corresponding pond water elevation of approximately 887 to 888 feet above mean sea level (ft-amsl). The 12 acres are generally bounded by the Old Horseheads Landfill to the north and northeast, the Norfolk Southern Corporation railroad tracks to the west, and an area of the Elmira Water Board's Kentucky Avenue Wellfield property to the south.

APPENDIX D

The financial assurance documents will be provided in accordance with the Consent Decree provisions set forth in Section IX.