

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and	)	
COMMONWEALTH OF PENNSYLVANIA,	)	
DEPARTMENT OF ENVIRONMENTAL	)	
PROTECTION,	)	
	)	Civil Action No. 3:19-cv-01620-UN4
Plaintiffs,	)	
	)	
v.	)	
	)	
FOSTER WHEELER ENERGY	)	
CORPORATION,	)	
	)	
Defendant.	)	

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**CONSENT DECREE FOR INTERIM REMEDIAL DESIGN/REMEDIAL ACTION**

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## I. BACKGROUND

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

B. The United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (“DOJ”) for response actions at the Foster Wheeler Energy Corporation/Church Road TCE Superfund Alternative Site in Mountain Top, Pennsylvania (“Site”), together with accrued interest; and (2) performance of response actions by the defendant at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (“NCP”).

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the Commonwealth of Pennsylvania, Department of Environmental Protection (the “State”) on March 6, 2018, of negotiations with the defendant, a potentially responsible party, regarding the implementation of the interim remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree (“CD”).

D. The State, a co-plaintiff in the complaint against the defendant, alleges that the defendant is liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and Section 507 of the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, 35 P.S. § 6020.507, for: (1) reimbursement of costs incurred by the State for response actions at the Site, together with accrued interest; and (2) performance of response actions by the defendant at the Site.

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior on March 1, 2018, of negotiations with the defendant 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.

F. FWEC operated a manufacturing facility at the Site from 1953 until 1984, where it made large pressure vessels utilized in oil refineries, electric utility plants, and the shipping industry (the “Former FWEC Facility”). The Former FWEC Facility occupied approximately 105 acres within the Site and was physically located within the Crestwood Industrial Park. FWEC ceased operations at the Former FWEC Facility in 1984.

G. From 1989 through 1997, Morrison-Knudsen Company and its successors owned the Former FWEC Facility and used it to manufacture and remanufacture locomotives, small power control units, and flat cars for rail transportation of tractor-trailers. Westinghouse Air Brake Technologies re-initiated operations at the Former FWEC Facility and used it for warehousing of products (primarily fiberglass insulation products) by third parties under a lease agreement. The Former FWEC Facility is currently used for tractor-trailer parking.

H. On August 29, 2005, FWEC and EPA executed an “Administrative Settlement Agreement and Order by Consent for Removal Response Action for the Church Road TCE Site, Docket No. CERC-03-2005-0349DC” (“2005 Order”). The 2005 Order required FWEC to perform quarterly sampling, connect affected properties to public water and abandon residential wells within the Affected Area, as defined in Section IV (Definitions). EPA and FWEC amended the 2005 Order on April 2, 2009, to connect four additional homes adjacent to the Affected Area to public water and to cover a groundwater seep with gravel. The State provided oversight for the defendant’s actions pursuant to the 2005 Order, as amended.

I. The defendant that has entered into this CD (hereinafter, “Settling Defendant”) does not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the complaint, nor does it acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment.

J. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, on April 9, 2009, Settling Defendant and EPA entered into an Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study (“RI/FS AOC”), Docket No. 03-CERC-2009-0061DC. Under the RI/FS AOC, Settling Defendant agreed to investigate and evaluate cleanup options for the Site following the Superfund Alternative Approach. On April 9, 2009, Settling Defendant commenced a Remedial Investigation (“RI”) and Feasibility Study (“FS”) for the Site pursuant to 40 C.F.R. § 300.430. The State provided oversight of the implementation of the RI and FS.

K. Settling Defendant completed the RI and FS, with EPA approving the Final Remedial Investigation Report on June 21, 2017, and the Final Feasibility Study Report on April 12, 2018.

L. 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 interim remedial action for the Site on May 9, 2018, 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 interim remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Director of the Hazardous Site Cleanup Division, EPA Region III, based the selection of the response action.

M. The decision by EPA on the interim remedial action (“Interim RA”) to be implemented at the Site is embodied in an Interim Record of Decision (“IROD”), executed on September 25, 2018, on which the State has given its concurrence. The IROD includes a responsiveness summary to the public comments. Notice of the IROD was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

N. The Interim Remedial Action selected in the IROD addresses contaminated sediment, soil, and groundwater at the former FWEC Facility and Site-wide vapor intrusion. It does not address groundwater in the Surrounding Industrial Properties, as defined in Section IV (Definitions) and the Affected Area. A final remedial action for the entire Site will be selected in a future decision document.

O. On May 22, 2019, EPA entered into an Administrative Settlement Agreement and Order on Consent for Interim Remedial Design, Docket No. CERC-03-2019-0051DC (“Interim RD Settlement Agreement”) with Settling Defendant to commence the Interim Remedial Design for the Site. The Interim RD Settlement Agreement provides for the recovery of EPA’s Interim Remedial Design oversight response costs. The Interim RD Settlement Agreement terminates upon the entry of this CD in the United States District Court for the Middle District of Pennsylvania, which is also the Effective Date of this CD.

P. Based on the information presently available to EPA and the State, EPA and the State believe that the Work required by this CD will be properly and promptly conducted by Settling Defendant if conducted in accordance with this CD and its appendices.

Q. For the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the Interim RA selected in the IROD and the Work to be performed by Settling Defendant shall constitute a response action taken or ordered by the President for which judicial review shall be limited to the administrative record. Further, pursuant to section 508 of the HSCA, Act of October 18, 1988, P.L. 756, 35 P.S. §§ 6020.101-6020.1305, the Interim RA selected in the IROD and the Work to be performed by Settling Defendant shall constitute a response action taken by the State for which judicial review shall be limited to the administrative record.

R. The Parties recognize, and the Court by entering this CD finds, that this CD has been negotiated by the Parties in good faith and implementation of this CD will expedite the cleanup of the Site 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, 1367, and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over Settling Defendant. Solely for the purposes of this CD and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this 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 the State and upon Settling Defendant and its 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 Settling Defendant’s responsibilities under this CD.

3. Settling Defendant shall provide a copy of this CD to each contractor hired to perform the Work and to each person representing Settling Defendant with respect to the Site or the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this CD. Settling Defendant or its contractors shall provide written notice of the CD to all subcontractors hired to perform any portion of the Work. Settling

Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work in accordance with the terms of this CD. Regarding the activities undertaken pursuant to this CD, each contractor and subcontractor shall be deemed to be in a contractual relationship with Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

4. Unless otherwise expressly provided in this CD, terms used in this CD that are defined in CERCLA and/or HSCA, or in regulations promulgated under CERCLA and/or HSCA, shall have the meaning assigned to them in CERCLA, HSCA or in such regulations. However, in the event of a conflict between terms defined in both CERCLA or in such regulations, CERCLA and its regulations shall govern. 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 Area” shall mean the area located south and southwest of the Former FWEC Facility, encompassing approximately 295 acres, extending from east to west along Church Road and Watering Run, as depicted generally on the map attached as Appendix C.

b. “Affected Property” shall mean all real property at the Site and any other real property where EPA determines, at any time, that access, land, water, or other resource use restrictions, and/or Institutional Controls are needed to implement the Interim Remedial Action.

c. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601-9675.

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

e. “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.

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

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

h. “Environmental Covenant” shall mean the covenant executed and recorded in compliance with ¶ 18 in substantially the same form as Appendix D, which shall run with the land.

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

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

k. “Former FWEC Facility,” shall mean the area located in the northeastern portion of the Site, encompassing approximately 105 acres, at and near 348 Crestwood Road, in the Crestwood Industrial Park, Mountain Top, Luzerne County, Pennsylvania, as depicted generally on the map attached as Appendix C.

l. “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 ¶ 11 (Emergencies and Releases), ¶ 12 (Community Involvement) (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), ¶ 26 (Access to Financial Assurance), Section VII (Remedy Review) (including EPA’s costs of performing such reviews), 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. Future Response Costs shall also include all Interim Response Costs, and all Interest on those Past Response Costs Settling Defendant has agreed to pay under this CD that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from February 27, 2018, to the Effective Date.

m. “FWEC/Church Road TCE Special Account” shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and established pursuant the 2009 Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study, Docket No. CERC-03-2009-0061DC.

n. “HSCA” shall mean the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, 35 P.S. §§ 6020.101–6020.1305.

o. “Institutional Controls” shall mean the Environmental Covenant, and any easements or other covenants running with the land, and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices or enforcement mechanisms that: (a) limit land, water, or other resource use to minimize the potential for human exposure to Waste Material at or in connection with the Site; (b) limit land, water, or other resource use to implement, ensure non-interference with, or ensure the protectiveness of the Interim RA; and/or (c) provide information intended to modify or guide human behavior at or in connection with the Site.

p. “Interim RD Settlement Agreement” shall mean the May 22, 2019 Administrative Settlement Agreement and Order on Consent for Interim Remedial Design, Docket No. CERC-03-2019-0051DC, entered between EPA and Settling Defendant for commencement of the Interim RD for the Site.

q. “Interim Remedial Action” or “Interim RA” shall mean the remedial action selected in the IROD.

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

s. “Interim Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the United States in connection with the Site between February 27, 2018, and the Effective Date, or (b) incurred by the United States prior to the Effective Date but paid after that date.

t. “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 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>.

u. “IROD” shall mean the (1) EPA Interim Record of Decision relating to the Site signed on September 25, 2018, by the Director of the Hazardous Site Cleanup Division, EPA Region III, and all attachments thereto, and (2) any Explanations of Significant Difference EPA subsequently issues in connection therewith. The IROD is attached as Appendix A.

v. “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.

w. “Non-Settling Owner” shall mean any person, other than the Settling Defendant, that (1) owns or controls any Affected Property that requires access pursuant to ¶ 17 (Agreements Regarding Access and Non-Interference), or (2) owns or controls the Former FWEC Facility which requires the recording of an environmental covenant pursuant to ¶ 18 (Environmental Covenant). The clause “Non-Settling Owner’s Affected Property” means Affected Property owned or controlled by a Non-Settling Owner.

x. “Operation and Maintenance” or “O&M” shall mean all activities required to operate, maintain, and monitor the effectiveness of the Interim RA as specified in the SOW or any EPA-approved O&M Plan.

y. “PADEP” shall mean the Pennsylvania Department of Environmental Protection and any successor departments or agencies of the State.

z. “Paragraph” or “¶” shall mean a portion of this CD identified by an Arabic numeral or an upper or lower case letter.

aa. “Parties” shall mean the United States, the Commonwealth of Pennsylvania, and Settling Defendant.

bb. “Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through February 27, 2018, plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a) through such date.



cc. “Performance Standards” or “PS” shall mean the cleanup levels and other measures of achievement of the Interim Remedial Action objectives, as set forth in the IROD.

dd. “Plaintiffs” shall mean the United States and the State.

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

ff. “Section” shall mean a portion of this CD identified by a Roman numeral.

gg. “Settling Defendant” shall mean Foster Wheeler Energy Corporation.

hh. “Site” shall mean the FWEC/Church Road TCE Superfund Alternative Site, which collectively includes the Former FWEC Facility, the Affected Area, and the Surrounding Industrial Properties, as depicted generally on the map attached as Appendix C.

ii. State” shall mean the Commonwealth of Pennsylvania.

jj. “State Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the State 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 ¶ 11 (Emergencies and Releases), ¶ 12 (Community Involvement) (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), ¶ 26 (Access to Financial Assurance), Section VII (Remedy Review) (the State’s costs of performing such reviews), 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. State Future Response Costs shall also include all State Interim Response Costs, and all Interest on those State Past Response Costs Settling Defendant has agreed to pay under this CD that has accrued pursuant to 35 P.S. § 6020.702 during the period from October 15, 2018, 2018, to the Effective Date.

kk. “State Interim Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the State in connection with the Site between October 15, 2018, and the Effective Date, or (b) incurred by the State prior to the Effective Date but paid after that date.

ll. “State Past Response Costs” Shall mean all costs, including, but not limited to, direct and indirect costs, that the State paid at or in connection with the Site through October 15, 2018, plus Interest on all such costs that has accrued pursuant to 35 P.S. § 6020.702 through such date.

mm. “Statement of Work” or “SOW” shall mean the document describing the activities Settling Defendant must perform to implement the Interim RD, the Interim RA, and O&M regarding the Site, which is attached as Appendix B.

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

oo. The “Surrounding Industrial Properties,” shall mean the eight separate properties located immediately south and west of the former FWEC Facility, as depicted generally on the map attached as Appendix C.

pp. “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.

qq. “United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA and any federal natural resource trustee.

rr. “Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) or under section 103 of HSCA, 35 P.S. § 6020.103; (2) any “pollutant” or “contaminant” under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33) or under section 103 of HSCA, 35 P.S. § 6020.103; (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous material” under Section 261a.3, Title 25 of the Pennsylvania Code, 25 Pa. Code § 261a.3.

ss. “Work” shall mean all activities and obligations Settling Defendant is required to perform under this CD, except the activities required under Section XX (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 or welfare or the environment by the design and implementation of response actions at the Site by Settling Defendant, to pay response costs of Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendant as provided in this CD.

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

7. **Compliance with Applicable Law.** Nothing in this CD limits Settling Defendant’s obligation to comply with the requirements of all applicable federal and state laws and regulations. Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the IROD 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), Section 300.400(e) of the NCP, and Section 504(g) of HSCA, 35 P.S. § 6020.504(g), no permit

shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. Settling Defendant 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 ¶ 8.a and required for the Work, provided that it has 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 Defendant's Project Coordinator must have sufficient technical expertise to coordinate the Work. Settling Defendant's Project Coordinator may not be an attorney representing any Settling Defendant in this matter and may not act as the Supervising Contractor. Settling Defendant's Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.

(2) EPA shall designate and notify Settling Defendant of EPA's Project Coordinator and Alternate Project Coordinator. EPA may designate other representatives, which may include its employees, contractors and/or consultants, to oversee the Work. EPA's Project Coordinator/Alternate 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 the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material.

(3) The State shall designate and notify EPA and the Settling Defendant of its Project Coordinator and Alternate Project Coordinator. The State may designate other representatives, including its employees, contractors and/or consultants to oversee the Work. For any meetings and inspections in which EPA's Project Coordinator participates, the State's Project Coordinator also may participate. Settling Defendant shall notify the State reasonably in advance of any such meetings or inspections.

(4) Settling Defendant's Project Coordinator shall meet in person or by phone with EPA's and the State's Project Coordinators at least monthly, unless the parties agree otherwise.

b. **Supervising Contractor.** Settling Defendant's 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 Defendant shall designate, and notify EPA and the State, within 10 days after the Effective Date, of the name, title, contact information, and qualifications of the Settling Defendant's 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 do not have a 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 Defendant 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 Defendant may select any coordinator/contractor covered by an authorization to proceed and shall, within 21 days, notify EPA and the State of Settling Defendant's selection. EPA may disapprove a previously approved Project Coordinator or Supervising Contractor at any time. In such event, Settling Defendant shall submit a list of proposed replacements in accordance with this Paragraph.

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

(4) Notwithstanding the procedures of ¶¶ 9.c(1) through 9.c(3), Settling Defendant has proposed, and EPA has authorized Settling Defendant to proceed, regarding the following Project Coordinator and Supervising Contractor: William L. Goldschmidt, Principal Scientist - Environmental, Wood Environment & Infrastructure Solutions, Inc., 751 Arbor Way, Hillcrest 1, Suite 180, Blue Bell, PA 19422-1060, bill.goldschmidt@woodplc.com, (610) 877-6137.

10. **Performance of Work in Accordance with SOW.** Settling Defendant shall: (a) develop the Interim RD; (b) perform the Interim RA; and (c) operate, maintain, and monitor the effectiveness of the Interim 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 ¶ 6.6 (Approval of Deliverables) of the SOW.

11. **Emergencies and Releases.** Settling Defendant shall comply with the emergency and release response and reporting requirements under ¶ 4.3 (Emergency Response and Reporting) of the SOW. Subject to Section XV (Covenants by Plaintiffs), nothing in this CD, including ¶ 4.3 of the SOW, limits any authority of Plaintiffs: (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site. If, due to Settling Defendant's failure to take appropriate response action under ¶ 4.3 of the SOW, EPA or, as appropriate, the State take such action instead, Settling Defendant shall reimburse EPA and the State under Section X (Payments for Response Costs) for all costs of the response action.

12. **Community Involvement.** If requested by EPA, Settling Defendant 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, or costs incurred by the State under this Section, if applicable, constitute Future Response Costs and State Future Response Costs, respectively, 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 Interim RA, and such modification is consistent with the Scope of the Remedy set forth in ¶ 1.3 of the SOW, then EPA may notify Settling Defendant of such modification. If Settling Defendant objects to the modification it 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 Defendant invokes dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this CD, and Settling Defendant shall implement all work required by such modification. Settling Defendant 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 and/or the State'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 Plaintiffs 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 Defendant shall conduct, in accordance with ¶ 4.7 (Periodic Review Support Plan) of the SOW, studies and investigations to support EPA's reviews of whether the Interim RA is protective of human health and the environment (which reviews shall be included as part of overseeing implementation of the Work) under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and applicable regulations.

## VIII. PROPERTY REQUIREMENTS

16. **Current Access and Non-Interference at the Former FWEC Facility.** With respect to the Former FWEC Facility, on May 31, 2019, Settling Defendant entered into an amendment to an existing Environmental Agreement with Westinghouse Air Brake Technologies ("WABTEC"), the current owner of the Former FWEC Facility as of the Date of Lodging of this CD. Settling Defendant has provided Plaintiffs with a copy of the Environmental Agreement, which provides EPA, the State, Settling Defendant, and their representatives, contractors, and subcontractors with access to the Former FWEC Facility at all reasonable times to conduct any of the activities described in ¶ 17.a of this CD. In addition, the Environmental Agreement provides for non-interference with land, water, or other resource use restrictions, as selected in the IROD and described in ¶ 17.b of this CD, that are applicable to the Former FWEC Facility. Settling Defendant satisfies the requirements regarding access and non-interference as set forth below in ¶ 17 with respect to the Former FWEC Facility provided that (i) WABTEC or its successors and assigns continue to own the Former FWEC Facility, (ii) the Environmental Agreement remains valid and enforceable between Settling Defendant and WABTEC or its successors and assigns, and (3) the Environmental Agreement contains valid and enforceable access and non-interference requirements that are not modified or restricted during the effective period of this CD. In the event that WABTEC sells the Former FWEC Facility to a third party, or in the event that the Environmental Agreement is terminated, modified, or restricted during the effective period of this CD and the existing access and non-interference requirements are modified or become invalid or unenforceable, then Settling Defendant shall use best efforts to secure a new agreement(s) for the Former FWEC Facility that complies with the requirements set forth below in ¶ 17.

17. **Agreements Regarding Access and Non-Interference.** Settling Defendant shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by Settling Defendant and by Plaintiffs, providing that such Non-Settling Owner: (i) provide Plaintiffs and their representatives, contractors, and subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the CD, including those listed in ¶ 17.a (Access Requirements); and (ii) refrain from using such Affected Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or interfere with or adversely affect the implementation, integrity, or protectiveness of the Interim Remedial Action, including the restrictions listed in ¶ 17.b(Land, Water, or Other

Resource Use Restrictions). Settling Defendant shall provide a copy of such access and use restriction agreement(s) to EPA and the State.

a. **Access Requirements.** The following is a list of activities for which access is required regarding the Affected Property:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States or the State;
- (3) Conducting investigations regarding contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Site;
- (6) 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 ¶ 64 (Work Takeover);
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XVIII (Access to Information);
- (9) Assessing Settling Defendant's compliance with the CD;
- (10) 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
- (11) 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.** The following is a list of land, water, or other resource use restrictions, as selected in the IROD, applicable to the Affected Property:

- (1) Use and/or contact with groundwater at the Former FWEC Facility, via ingestion, dermal contact, or vapor inhalation, within the contaminated plume that would result in unacceptable risks to human health shall be prohibited until cleanup levels for groundwater contaminants of concern ("COCs") are achieved throughout the plume at the Former FWEC Facility.

(2) Activities that adversely impact the selected interim remedy, such as excavation or construction, shall be prohibited without prior EPA approval.

(3) Conduct vapor intrusion sampling at any new construction within 100 feet of the contaminant plume:

- (i) Vapor intrusion sampling shall consist of sub-slab, indoor air, and outdoor air sampling at each location, where practicable, in accordance with current EPA guidance;
- (ii) Vapor intrusion mitigation shall be conducted if multiple lines of evidence, such as sub-slab, indoor air, and/or outdoor air sampling results, indicate that actual or potential migration of Site-related compounds from contaminated groundwater to indoor air would result in a cumulative excess carcinogenic risk of greater than or equal to  $10^{-4}$  and/or a cumulative excess non-carcinogenic Hazard Index (“HI”) greater than 1; and
- (iii) Vapor intrusion mitigation shall continue until:
  - (a) Groundwater beneath or within 100 lateral or vertical feet of the mitigated structure meets cleanup levels for groundwater COCs, and
  - (b) Sub-slab concentrations are below the cleanup levels listed in Section 12.2.7.4 of the IROD and indoor air and/or outdoor air sampling results indicate that actual or potential migration of Site-related compounds from contaminated groundwater to indoor air would result in a cumulative excess carcinogenic risk of less than or equal to  $10^{-6}$  and a cumulative excess non-carcinogenic HI of less than or equal to 1.

18. **Environmental Covenant.** Settling Defendant shall, with respect to any Non-Settling Owner of the Former FWEC Facility, use best efforts to secure the Non-Settling Owner’s cooperation in executing and recording the Environmental Covenant for the area of the Affected Property that covers the Former FWEC Facility in the Office of the Recorder for Luzerne County, Pennsylvania, in accordance with the procedures of this ¶ 18 and pursuant to Sections 6501-6517 of the Pennsylvania Uniform Environmental Covenants Act, 27 Pa.C.S. §§ 6501-6517. The Environmental Covenant shall: (i) grant a right of access to conduct any activity regarding the CD, including those activities listed in ¶ 17.a (Access Requirements); and (ii) grant the right to enforce the land, water, or other resource use restrictions set forth in ¶ 17.b (Land, Water, or Other Resource Use Restrictions). The Environmental Covenant shall be in substantially the form set forth in Appendix D and enforceable under the laws of the Commonwealth of Pennsylvania.



a. **Grantees.** The Environmental Covenant shall identify Settling Defendant as the “Grantee” and a “Holder,” and shall specify EPA and the State as “Agencies,” as defined by 27 Pa.C.S. § 6502, which shall have the right to enforce the covenant, pursuant to 27 Pa.C.S. § 6511.

b. **Initial Title Evidence.** Settling Defendant shall, within 45 days after the Effective Date:

(1) **Record Title Evidence.** Submit to EPA a title insurance commitment or other title evidence acceptable to EPA that: (i) names the proposed insured or the party in whose favor the title evidence runs, or the party who will hold the real estate interest, or if that party is uncertain, names the United States, the State, the Settling Defendant, or “To Be Determined”; (ii) covers the Affected Property that is to be encumbered; (iii) demonstrates that the person or entity that will execute and record the Environmental Covenant is the owner of such Affected Property; (iv) identifies all record matters that affect title to the Affected Property, including all prior liens, claims, rights (such as easements), mortgages, and other encumbrances (collectively, “Prior Encumbrances”); and (v) includes complete, legible copies of such Prior Encumbrances; and

(2) **Non-Record Title Evidence.** Submit to EPA a report of the results of an investigation, including a physical inspection of the Affected Property, which identifies non-record matters that could affect the title, such as unrecorded leases or encroachments.

c. **Release or Subordination of Prior Liens, Claims, and Encumbrances**

(1) Settling Defendant shall secure the release, subordination, modification, or relocation of all Prior Encumbrances on the title to the Affected Property revealed by the title evidence or otherwise known to any Settling Defendant, unless EPA waives this requirement as provided under ¶¶ 18.c(2)-(4).

(2) Settling Defendant may, by the deadline under ¶ 18.b (Initial Title Evidence), submit an initial request for waiver of the requirements of ¶ 18.c(1) regarding one or more Prior Encumbrances, on the grounds that such Prior Encumbrances cannot defeat or adversely affect the rights to be granted by the Environmental Covenant and cannot interfere with the Interim RA or result in unacceptable exposure to Waste Material.

(3) Settling Defendant may, within 90 days after the Effective Date, or if an initial waiver request has been filed, within 45 days after EPA’s determination on the initial waiver request, submit a final request for a waiver of the requirements of ¶ 18.c(1) regarding any particular Prior Encumbrance on the grounds that Settling Defendant could not obtain the release, subordination, modification, or relocation of such Prior Encumbrance despite best efforts.

(4) The initial and final waiver requests must include supporting evidence including descriptions of and copies of the Prior Encumbrances and maps showing areas affected by the Prior Encumbrances. The final waiver request also must include evidence of efforts made to secure release, subordination, modification, or relocation of the Prior Encumbrances.

(5) Settling Defendant shall complete its obligations under ¶ 18.c(1) regarding all Prior Encumbrances: within 180 days after the Effective Date; or if an initial waiver request has been filed, within 135 days after EPA's determination on the initial waiver request; or if a final waiver request has been filed, within 90 days after EPA's determination on the final waiver request.

**d. Update to Title Evidence and Recording of Environmental Covenant**

(1) Settling Defendant shall submit to EPA for review and approval, by the deadline specified in ¶ 18.c(5), the draft Environmental Covenant, in substantially the form attached hereto as Appendix D, and draft instruments addressing Prior Encumbrances, enforceable under the laws of the Commonwealth of Pennsylvania.

(2) Upon EPA's approval of the proposed Environmental Covenant and instruments addressing Prior Encumbrances, Settling Defendant shall, within 15 days, update the original title insurance commitment (or other evidence of title acceptable to EPA) under ¶ 18.b17.b(3)(i) (Initial Title Evidence). If the updated title examination indicates that no liens, claims, rights, or encumbrances have been recorded since the effective date of the original commitment (or other title evidence), Settling Defendant shall record the Environmental Covenant and instruments addressing Prior Encumbrances in the Office of the Recorder for Luzerne County, Pennsylvania in accordance with the terms of ¶ 9 (Recording and Notification of Recording) of the Environmental Covenant. Otherwise, Settling Defendant shall secure the release, subordination, modification, or relocation under ¶ 18.c(1), or the waiver under ¶¶ 18.c(2)-(4), regarding any newly-discovered liens, claims, rights, and encumbrances, prior to recording the Environmental Covenant and instruments addressing Prior Encumbrances.

(3) If Settling Defendant submitted a title insurance commitment under ¶ 18.b(1) (Record Title Evidence), then upon the recording of the Environmental Covenant and instruments addressing Prior Encumbrances, Settling Defendant shall obtain a title insurance policy that: (i) is consistent with the original title insurance commitment; (ii) is for \$100,000 or other amount approved by EPA; (iii) is issued to the United States, Settling Defendant, or other person approved by EPA; and (iv) is issued on a current American Land Title Association ("ALTA") form or other form approved by EPA.

(4) Settling Defendant shall, within 90 days after recording the Environmental Covenant and instruments addressing Prior Encumbrances, or such other deadline approved by EPA, provide to the United States and to all grantees

of the Environmental Covenant: (i) certified copies of the recorded Environmental Covenant and instruments addressing Prior Encumbrances showing the clerk's recording stamps; and (ii) the title insurance policy(ies) or other approved form of updated title evidence dated as of the date of recording of the Environmental Covenant and instruments.

e. Settling Defendant shall monitor, maintain, and enforce, the Environmental Covenant and shall report on the Environmental Covenant as required under this CD.

19. **Best Efforts.** As used in this Section, "best efforts" means the efforts that a reasonable person in the position of Settling Defendant would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restriction agreements, the Environmental Covenant, releases, subordinations, modifications, or relocations of Prior Encumbrances that affect the title to the Affected Property, as applicable. If Settling Defendant is unable to accomplish what is required through "best efforts" in a timely manner, it shall notify EPA, and include a description of the steps taken to comply with the requirements. If the United States deems it appropriate, it may assist Settling Defendant, or take independent action, in obtaining such access and/or use restrictions, the Environmental Covenant, releases, subordinations, modifications, or relocations of Prior Encumbrances that affect the title to the Affected Property, as applicable. All costs incurred by the United States in providing such assistance or taking such action, including the cost of attorney time and the amount of monetary consideration or just compensation paid, constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

20. If EPA determines in a decision document prepared in accordance with the NCP that Institutional Controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices or enforcement mechanisms are needed, Settling Defendant shall cooperate with EPA's and the State's efforts to secure and ensure compliance with such Institutional Controls.

21. In the event of any Transfer of the Affected Property, unless the United States, after consultation with the State, otherwise consents in writing, Settling Defendant shall continue to comply with its obligations under the CD, including its 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, Plaintiffs retain all of their access authorities and rights, as well as all of their rights to require land, water, or other resource use restrictions and Institutional Controls, including enforcement authorities related thereto, under CERCLA, RCRA, HSCA, and any other applicable statute or regulations.

## IX. FINANCIAL ASSURANCE

23. In order to ensure completion of the Work, Settling Defendant shall secure financial assurance, initially in the amount of \$4,150,000 ("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 Defendant may use multiple mechanisms.

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; or

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.

24. Settling Defendant has selected, and EPA has found satisfactory, an irrevocable letter of credit as an initial form of financial assurance. Within 30 days after the Effective Date, Settling Defendant 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 following person:

Director, Superfund Emergency and Management Division (3SD00)  
EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103

and provide copies to the United States, EPA, and the State as specified in Section XXI (Notices and Submissions).

25. Settling Defendant shall diligently monitor the adequacy of the financial assurance. If Settling Defendant becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, Settling Defendant shall notify EPA of such information within 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 Settling Defendant of such determination. Settling Defendant shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for Settling Defendant, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. Settling Defendant shall follow the procedures of ¶ 27 (Modification of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Settling Defendant’s inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this Settlement.

Settling defendant shall provide copies of all documents submitted to the United States pursuant to this section to the State simultaneously with its submission to the United States as specified in Section XXI (Notices and Submissions).

**26. Access to Financial Assurance**

a. If EPA issues a notice of implementation of a Work Takeover under ¶ 64.b, 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 ¶ 26.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel the mechanism, and Settling Defendant fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 26.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 64.b, 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, then EPA is entitled to demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. Settling Defendant shall, within 30 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this ¶ 26 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 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 FWEC/Church Road TCE Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this ¶ 26 must be reimbursed as Future Response Costs under Section X (Payments for Response Costs).

**27. Modification of Amount, Form, or Terms of Financial Assurance.** Settling Defendant may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with ¶ 24, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify Settling Defendant of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Settling Defendant may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XIII (Dispute Resolution). Settling Defendant 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 Defendant pursuant to the dispute resolution provisions of this CD or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, Settling Defendant shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with ¶ 24.

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

## **X. PAYMENTS FOR RESPONSE COSTS**

29. **Payment by Settling Defendant for Past Response Costs and State Past Response Costs.**

a. Within 30 days after the Effective Date, Settling Defendant shall pay to EPA \$950,000.00 in payment for Past Response Costs. Payment shall be made in accordance with ¶ 31.a (instructions for past response cost payments).

b. **Deposit of Past Response Costs Payment.** The total amount to be paid by Settling Defendants pursuant to ¶ 29.a shall be deposited by EPA in the FWEC/Church Road TCE Site Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

c. Within 30 days after the Effective Date, Settling Defendant shall pay to the State \$56,051.21 by official bank check(s) made payable to the Commonwealth of Pennsylvania in payment of State Past Response Costs. Settling Defendant shall send the bank check(s) to Pennsylvania Department of Environmental Protection, EC&B Program Manager Eric Supey, 2 Public Square, Wilkes-Barre PA 18701-1915.

30. **Payments by Settling Defendant for Future Response Costs and State Future Response Costs.**

a. **Payment to EPA.** Settling Defendant shall pay to EPA all Future Response Costs not inconsistent with the NCP.

b. **Periodic Bills from EPA.** On a periodic basis, EPA will send Settling Defendant a bill requiring payment of Future Response Costs that includes a summary of costs, which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and

DOJ. Settling Defendant shall make all payments within 30 days after Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in ¶ 32, in accordance with ¶ 31.b (instructions for future response cost payments).

c. **EPA Deposit of Future Response Costs Payments.** The total amount to be paid by Settling Defendant pursuant to ¶ 30.b (Periodic Bills) shall be deposited by EPA in the FWEC/Church Road TCE Site Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund, provided, however, that EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the FWEC/Church Road TCE Site Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by Settling Defendant pursuant to the dispute resolution provisions of this CD or in any other forum.

d. **Payments by to State.** Settling Defendant shall pay to the State all State Future Response Costs not inconsistent with HSCA.

e. **Periodic Bills from the State.** The State will send Settling Defendant a bill requiring payment that includes a cost package, which includes direct and indirect costs incurred by the State and its contractors and subcontractors on an annual basis. Settling Defendant shall make all payments within 30 days after Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in ¶ 32 (Contesting Future Response Costs). Settling Defendant shall make all payments to the State required by this Paragraph in accordance with ¶ 29.c.

### 31. **Payment Instructions for Settling Defendant**

#### a. **Past Response Costs Payments.**

(1) The Financial Litigation Unit ("FLU") of the United States Attorney's Office for the Middle District of Pennsylvania shall provide Settling Defendant, in accordance with ¶ 88, with instructions regarding making payments to DOJ on behalf of EPA. The instructions must include a Consolidated Debt Collection System ("CDCS") number to identify payments made under this CD.

(2) For all payments subject to this ¶ 31.a, Settling Defendant shall make such payment by Fedwire Electronic Funds Transfer ("EFT") to the U.S. DOJ account, in accordance with the instructions provided under ¶ 31.a(1), and including references to the CDCS Number, Site/Spill ID Number 03R6, and DJ Number 90-11-3-12044.

(3) For each payment made under this ¶ 31.a, Settling Defendant shall send notices, including references to the CDCS, Site/Spill ID, and DJ numbers, to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with ¶ 88.

b. **Future Response Costs Payments and Stipulated Penalties**

(1) For all payments subject to this ¶ 31.b, Settling Defendant shall make such payment by Fedwire EFT, referencing the Site/Spill ID and DJ numbers. The Fedwire EFT payment must be sent as follows:

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

(2) For all payments made under this ¶ 31.b, Settling Defendant must include references to the Site/Spill ID and DJ numbers. At the time of any payment required to be made in accordance with ¶ 31.b, Settling Defendant shall send notices that payment has been made to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with ¶ 88. All notices must include references to the Site/Spill ID and DJ numbers.

32. **Contesting Future Response Costs or State Future Response Costs.** Settling Defendant may submit a Notice of Dispute, initiating the procedures of Section XIII (Dispute Resolution), regarding any Future Response Costs or any State Future Response Costs billed under ¶ 30 (Payments by Settling Defendant for Future Response Costs and State Future Response Costs) if it determines that EPA or the State has made a mathematical error or included a cost item that is not within the definition of Future Response Costs or State Future Response Costs, or if it believes EPA or the State incurred excess costs as a direct result of an EPA or State 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 (if the United States’ accounting is being disputed), with a copy to the State, or the State (if the State’s accounting is being disputed), with a copy to the United States, pursuant to Section XXI (Notices and Submissions). Such Notice of Dispute shall specifically identify the contested Future Response Costs or State Future Response Costs and the basis for objection. If Settling Defendant submits a Notice of Dispute, Settling Defendant shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to the United States and all uncontested State Future Response Costs to the State, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC), and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs or State Future Response Costs, or, if both Future Response Costs and State Future Response Costs are contested, to the total amount of both. Settling Defendant shall send to the United States or the State, as appropriate, as provided in Section XXI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs or State 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 or the State prevails in the dispute, Settling Defendant shall pay the sums due (with accrued interest) to the United States or the State, if State costs are disputed within 7 days after the resolution of the dispute. If Settling Defendant prevails concerning any aspect of the contested costs, Settling Defendant shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to the United States or the State, if State costs are disputed, within 7 days after the resolution of the dispute. Settling Defendant shall be disbursed any balance of the escrow account. All payments to the United States under this Paragraph shall be made in accordance with ¶ 31.b (instructions for future response cost payments). All payments to the State under this Paragraph shall be made in accordance with ¶ 28.c. 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 Defendant's obligation to reimburse the United States for Future Response Costs and the State for State Future Response Costs.

33. **Interest.** In the event that any payment for Past Response Costs, State Past Response Costs, Future Response Costs, or State Future Response Costs required under this Section is not made by the date required, Settling Defendant shall pay Interest on the unpaid balance. The Interest on Past Response Costs and State Past Response Costs shall begin to accrue on the Effective Date. The Interest on Future Response Costs and State Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendant's 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**

### **34. Settling Defendant's Indemnification of the United States and the State**

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

control, in carrying out activities pursuant to this CD. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this CD. Neither Settling Defendant nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State, respectively, shall give Settling Defendant notice of any claim for which the United States or the State plans to seek indemnification pursuant to this ¶ 34, and shall consult with Settling Defendant prior to settling such claim.

35. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States and the State, respectively, for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall indemnify, save and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

36. **Insurance.** No later than 15 days before commencing any on-site Work, Settling Defendant shall secure, and shall maintain until the first anniversary after issuance of EPA's Certification of Interim RA Completion pursuant to ¶ 4.6 (Certification of Interim 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 and the State as additional insureds with respect to all liability arising out of the activities performed by or on behalf of Settling Defendant pursuant to this CD. In addition, for the duration of this CD, Settling Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendant in furtherance of this CD. Prior to commencement of the Work, Settling Defendant shall provide to EPA and the State certificates of such insurance and a copy of each insurance policy. Settling Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendant demonstrates by evidence satisfactory to EPA, after consultation with the State, that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendant need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Settling Defendant shall ensure that all submittals to EPA and the State under this Paragraph identify the FWEC/Church Road TCE Superfund Alternative Site, Mountain Top, Pennsylvania and the civil action number of this case.

## XII. FORCE MAJEURE

37. “Force majeure,” for purposes of this CD, is defined as any event arising from causes beyond the control of Settling Defendant, of any entity controlled by Settling Defendant, or of Settling Defendant’s contractors that delays or prevents the performance of any obligation under this CD despite Settling Defendant’s best efforts to fulfill the obligation. The requirement that Settling Defendant exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure 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.

38. If any event occurs or has occurred that may delay the performance of any obligation under this CD for which Settling Defendant intends or may intend to assert a claim of force majeure, Settling Defendant shall notify EPA’s Project Coordinator orally or, in his or her absence, EPA’s Alternate Project Coordinator or, in the event both of EPA’s designated representatives are unavailable, the Director of the Hazardous Site Cleanup Division, EPA Region III, within 48 hours of when Settling Defendant first knew that the event might cause a delay. Within 5 days thereafter, Settling Defendant shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Settling Defendant’s rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Settling Defendant, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant’s contractors or subcontractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Settling Defendant 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 under ¶ 37 and whether Settling Defendant has exercised its best efforts under ¶ 37, EPA may, in its unreviewable discretion, excuse in writing Settling Defendant’s failure to submit timely or complete notices under this Paragraph.

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

opportunity for review and comment by the State, agrees that the delay is attributable to a force majeure, EPA will notify Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

40. If Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution) regarding EPA's decision, it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of ¶¶ 37 and 38. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this CD identified to EPA and the Court.

41. The failure by EPA and/or the State 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 Defendant from meeting one or more deadlines in the SOW, Settling Defendant may seek relief under this Section.

### **XIII. DISPUTE RESOLUTION**

42. 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 and/or the State to enforce obligations of Settling Defendant that have not been disputed in accordance with this Section.

43. A dispute shall be considered to have arisen when either (a) one or both Plaintiffs, as applicable, send(s), the Settling Defendant a written Notice of Dispute or (b) the Settling Defendant sends one or both Plaintiffs, as applicable, 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 to the dispute.

44. When the United States is a party to the dispute, or when both Plaintiffs are parties to the dispute, the dispute resolution procedures of this Section in ¶¶ 45-48 apply exactly as provided below. However, when the State is the only Plaintiff that is a party to the dispute, the dispute resolution procedures of this Section in ¶¶ 45-48 apply as provided below except that all references to "EPA" or the "United States" shall be replaced with the "State," and references to the Director of the Hazardous Site Cleanup Division, EPA Region III, in ¶¶ 46.b, 46.d, and 47.a shall be replaced with the Program Manager for the Environmental Cleanup and Brownfields Program, Northeast Regional Office.

#### **45. 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 10 days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by Settling Defendant. The Statement of Position shall specify Settling Defendant's position as to whether formal dispute resolution should proceed under ¶ 46 (Record Review) or 47.

b. Within 14 days after receipt of Settling Defendant's Statement of Position, EPA, will serve on Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under ¶ 46 (Record Review) or ¶ 47. Within 7 days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and Settling Defendant as to whether dispute resolution should proceed under ¶ 46 (Record Review) or ¶ 47, the parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in ¶¶ 46 and 47.

46. **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 Defendant regarding the validity of the IROD'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 Hazardous Site Cleanup Division, EPA Region III, will issue a final administrative decision resolving the dispute based on the administrative record described in ¶ 46.a. This decision shall be binding upon Settling Defendant, subject only to the right to seek judicial review pursuant to ¶¶ 46.c and 46.d.

c. Any administrative decision made by EPA pursuant to ¶ 46.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendant with the Court and served on all Parties within 10 days 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 Defendant's motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Hazardous Site Cleanup 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 ¶ 46.a.

47. 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 Hazardous Site Cleanup Division, EPA Region III, will issue a final decision resolving the dispute based on the statements of position and reply, if any, served under ¶ 45. The Hazardous Site Cleanup Division Director's decision shall be binding on Settling Defendant unless, within 10 days after receipt of the decision, Settling Defendant files with the Court and serves 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 Defendant's motion.

b. Notwithstanding ¶ L (CERCLA § 113(j) record review of IROD and Work) of Section I (Background), judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

48. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of Settling Defendant under this CD, except as provided in ¶ 32 (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 ¶ 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 Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIV (Stipulated Penalties).

#### **XIV. STIPULATED PENALTIES**

49. Settling Defendant shall be liable to the United States and the State for stipulated penalties in the amounts set forth in ¶¶ 50.a and 51 for failure to comply with the obligations specified in ¶¶ 50.b and 51, unless excused under Section XII (Force Majeure). "Comply" as used in the previous sentence includes compliance by Settling Defendant 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 ¶ 6.6(a) (Initial Submissions) or ¶ 6.6(b) (Resubmissions) of the SOW due to such material defect, then the material defect shall constitute a lack of compliance for purposes of this Paragraph.

**50. 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 ¶ 50.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$5,000
15th through 30th day	\$10,000
31st day and beyond	\$15,000

**b. Obligations**

- (1) Payment of any amount due under Section X (Payments for Response Costs);
- (2) Establishment and maintenance of financial assurance in accordance with Section IX (Financial Assurance);
- (3) Establishment of an escrow account to hold any disputed Future Response Costs under ¶ 32 (Contesting Future Response Costs);
- (4) Timely designation of a Project Coordinator and Supervising Contractor, including replacements thereof, under ¶ 9;
- (5) Emergency and release response and reporting requirements under ¶ 11 (Emergencies and Releases);
- (6) Community involvement activities required under ¶ 12;
- (7) Performance of studies and investigations to support EPA's reviews under ¶ 15;
- (8) Requirements regarding access and non-interference under ¶ 17;
- (9) Requirements regarding the Environmental Covenant under ¶ 18 and use of best efforts under ¶ 19;
- (10) Requirements to cooperate with efforts to secure and ensure compliance with Institutional Controls under ¶ 19;
- (11) Insurance requirements under ¶ 36;
- (12) Notification of delay requirements under ¶ 38;
- (13) Timely payment of stipulated penalties demanded under Section XIV (Stipulated Penalties);
- (14) Notification of suits or claims under ¶ 76 and ¶ 77;

- (15) Providing requested information and documents under ¶ 80;
- (16) Record retention and notice requirements under Section XX (Retention of Records); and
- (17) Timely submission of the following deliverables in accordance with the schedules and requirements of the SOW, including resubmission following disapproval by EPA:
  - (i) Interim Remedial Design Work Plan;
  - (ii) Pre-Design Investigation Work Plan;
  - (iii) Pre-Design Investigation Evaluation Report;
  - (iv) Treatability Study Work Plan;
  - (v) Treatability Study Evaluation Report;
  - (vi) Preliminary (30%) Interim Remedial Design;
  - (vii) Pre-Final (95%) Interim Remedial Design;
  - (viii) Final (100%) Interim Remedial Design;
  - (ix) Progress Reports; and
  - (x) Supporting Deliverables.
- (18) Timely implementation of actions in accordance with schedules set forth in EPA-approved deliverables described in ¶ 50.b(17), above; and
- (19) Interim Remedial Action deadlines set forth in ¶ 7.3 of the SOW.

51. **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 50.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$2,000
15th through 30th day	\$3,000
31st day and beyond	\$5,000

52. In the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 64 (Work Takeover), Settling Defendant shall be liable to EPA for a stipulated penalty in the amount of \$500,000.00. Stipulated penalties under this Paragraph are in addition to the remedies available under ¶¶ 26 (Access to Financial Assurance) and 64 (Work Takeover).

53. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties



shall not accrue: (a) with respect to a deficient submission under ¶ 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 Defendant of any deficiency; (b) with respect to a decision by the Director of the Hazardous Site Cleanup Division, EPA Region III, under ¶ 46.b or 47.a of Section XIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendant's reply to EPA's Statement of Position is received until the date that the 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.

54. Following EPA's, or the State's, if applicable, determination that Settling Defendant has failed to comply with a requirement of this CD, EPA, or the State, if applicable, may give Settling Defendant written notification of the same and describe the noncompliance. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA, or the State, if applicable, has notified Settling Defendant of a violation.

55. Either Plaintiff may send Settling Defendant a written demand for payment of the penalties upon notification pursuant to Paragraph 54. The Plaintiff making the demand shall simultaneously send a copy of the written demand to the other Plaintiff.

56. All penalties accruing under this Section shall be due and payable to the United States and the State, if applicable, within 30 days after Settling Defendant's receipt from EPA and/or the State of a demand for payment of the penalties, unless Settling Defendant invoke the Dispute Resolution procedures under Section XIII (Dispute Resolution) within the 30-day period. For penalties owed to both the United States and the State, Settling Defendant shall pay the EPA fifty percent (50%) of the total accrued penalties and shall pay the State the remaining 50%. All payments to the United States and the State, if applicable, under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with ¶ 31.b (instructions for future response cost payments to the United States) and/or ¶30.d (instructions for payment by Settling Defendant to State).

57. Penalties shall continue to accrue as provided in ¶ 53 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 the United States and the State, if applicable, 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 Defendant shall pay all accrued penalties determined by the Court to be owed to the United States and the State, as applicable, within 60 days after receipt of the Court's decision or order, except as provided in ¶ 57.c;

c. If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owed to the United States and the State, as applicable, 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 and the State, as applicable, or to Settling Defendant to the extent that they prevail.

58. If Settling Defendant fails to pay stipulated penalties when due, Settling Defendant shall pay Interest on the unpaid stipulated penalties as follows: (a) if Settling Defendant has 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 ¶ 57 until the date of payment; and (b) if Settling Defendant fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 56 until the date of payment. If Settling Defendant fails to pay stipulated penalties and Interest when due, the United States and/or the State 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 Defendant's 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 or the State to seek any other remedies or sanctions available by virtue of Settling Defendant's 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) or Section 1104 of HSCA, 35 P.S. § 6020.1104, provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA, and the State shall not seek civil penalties pursuant to Section 1104 of HSCA, 35 P.S. § 6020.1104, 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, either the United States or the State, or both, may, in the unreviewable exercise of each Plaintiff's own discretion, waive any portion of stipulated penalties due to them, respectively, that have accrued pursuant to this CD.

## **XV. COVENANTS BY PLAINTIFFS**

62. **Covenants for Settling Defendant by United States.** Except as provided in ¶ 63 (General Reservations of Rights), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA for the Work, Past Response Costs, and Future Response Costs. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this CD. These covenants extend only to Settling Defendant and do not extend to any other person.

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

- a. liability for failure by Settling Defendant 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 outside of the Site;
- c. liability based on the ownership of the Site by Settling Defendant when such ownership commences after signature of this CD by Settling Defendant;
- d. liability based on the operation of the Site by Settling Defendant when such operation commences after signature of this CD by Settling Defendant and does not arise solely from Settling Defendant's performance of the Work;
- e. liability based on Settling Defendant's transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the IROD, the Work, or otherwise ordered by EPA, after signature of this CD by Settling Defendant;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- g. criminal liability;
- h. liability for violations of federal or state law that occur during or after implementation of the Work;
- i. liability, prior to achievement of Performance Standards, for additional 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 IROD, but that cannot be required pursuant to ¶ 13 (Modification of SOW or Related Deliverables);
- j. liability for additional operable units at the Site or the final response action; and
- k. liability for costs that the United States will incur regarding the Site but that are not within the definition of Future Response Costs.

64. **Work Takeover**

a. In the event EPA determines that Settling Defendant: (1) has ceased implementation of any portion of the Work; (2) is seriously or repeatedly deficient or late in its performance of the Work; or (3) is 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 Defendant. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Settling Defendant 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 ¶ 64.a, Settling Defendant has 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 Defendant in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this ¶ 64.b. Funding of Work Takeover costs is addressed under ¶ 26 (Access to Financial Assurance).

c. Settling Defendant may invoke the procedures set forth in ¶ 46 (Record Review), to dispute EPA's implementation of a Work Takeover under ¶ 64.b. However, notwithstanding Settling Defendant's 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 ¶ 64.b until the earlier of (1) the date that Settling Defendant 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 ¶ 46 (Record Review) requiring EPA to terminate such Work Takeover.

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

**66. State's Covenant Not to Sue and Reservations of Rights**

a. Subject to the reservations of rights provided in Paragraphs 66.b. (Reopeners) and 66.b(5). (Nonapplicability), and Settling Defendant's full compliance with this CD, the State covenants not to sue or to take administrative action against Settling Defendant pursuant to HSCA, 35 P.S. §§ 6020.101-6020.1305, and CERCLA, 42 U.S.C. §§ 9601-9675, for response costs, or response actions, and for injunctive relief arising from response actions at the Site, as identified and addressed in the IROD. Except with respect to future liability, these covenants not to sue shall become effective upon execution of this CD by all parties and receipt of the payment required in Section X (Payments for Response Costs), ¶ 29.c. With respect to future liability, these covenants not to sue by the State shall become effective upon the State's determination that the Site presents no currently foreseeable future significant risk and its certification that the remedial action has been completed in accordance with Section 706 of HSCA, and upon EPA's certification that the remedial action has attained the performance standards under the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, No. 1995-2, 35 P.S. §§ 6026.101-6026.909 ("Land Recycling Act"), Settling Defendant shall be granted the relief set forth in Chapter 5 of the Land Recycling Act, 35 P.S. § 6026.5.

b. **State's Reopeners/Reservations of Rights.** Notwithstanding any other provision of this CD, the covenants not to sue in Paragraph 66.a. above shall be voidable by the State, and the State reserves the right to sue Settling Defendant for additional response costs relating to the Site, or to issue an administrative order requiring Settling Defendant to perform additional work relating to the Site, if:

(1) Settling Defendant, its officers, directors, employees, contractors or agents, falsify information, reports or data, or make false representations or statements in a record, report or document submitted under this CD and such actions resulted in avoiding the need for further clean-up at the Site; or

(2) New information confirms the existence of an area of previously unknown contamination at the Site which contains regulated substances that have been shown to exceed the standards in Chapter 3 of the Land Recycling Act applied to previous remediation at the Site; or

(3) The remediation method for the Site fails to meet one or a combination of the three clean-up standards in Chapter 3 of the Land Recycling Act, as required under the IROD; or

(4) The level of risk is increased beyond the acceptable risk range at the Site, due to substantial changes in exposure conditions, such as a change in land use as provided in the Land Recycling Act, or new information is obtained about a regulated substance at the Site which revises exposure assumptions beyond the acceptable risk range established under Chapter 3 of the Land Recycling Act.

(5) The information received by and presently known to the State includes only that information set forth in the IROD and the administrative record related to the Site.

c. **Nonapplicability/Reservations of Rights.** The Department's covenant not to sue set forth in Paragraph 66.a. above also shall not apply to the following claims by the Department against Settling Defendant for:

(1) failure to comply with this CD;

(2) past, present or future releases or threatened releases of hazardous substances outside the boundaries of the Site;

(3) past, present or future violations of state or federal criminal law;  
and

(4) damages for injury to, destruction of, or loss of "natural resources" as that term is defined in Section 103 of HSCA, 35 P.S. § 6020.103.

## **XVI. COVENANTS BY SETTLING DEFENDANT**

67. **Covenants by Settling Defendant.** Subject to the reservations in ¶ 69, Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State with respect to the Work, past response actions regarding the Site, Past Response Costs, Future Response Costs, State Past Response Costs, State Future Response Costs, 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 §§ 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a), Sections 708, 709 and 1301 of HSCA, 35 P.S. §§ 6020.708, 6020.709 and 6020.1301 or any other state law regarding the Work, past response actions regarding the Site, Past Response Costs, Future Response Costs, State Past Response Costs, State Future Response Costs, and this CD; or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Pennsylvania Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

68. Except as provided in ¶¶ 71 (Waiver of Claims by Settling Defendant) and 78 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States or the State brings a cause of action or issues an order pursuant to any of the reservations in Section XV (Covenants by Plaintiffs), other than in ¶¶ 63.a (claims for failure to meet a requirement of the CD), 63.g (criminal liability), and 63.h (violations of federal/state law during or after implementation of the Work), but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

69. Settling Defendant reserves, 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 Defendant's deliverables or activities.

70. 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).

**71. Waiver of Claims by Settling Defendant**

a. Settling Defendant agrees not to assert any claims and 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 it may have:

(1) **De Micromis Waiver.** For all matters relating to the Site against any person where the person's liability to Settling Defendant with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, 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 the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

b. **Exceptions to Waiver**

(1) The waiver under this ¶ 71 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 waiver if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

72. Settling Defendant agrees not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.

**XVII. EFFECT OF SETTLEMENT; CONTRIBUTION**

73. Except as provided in ¶ 71 (Waiver of Claims by Settling Defendant), nothing in this CD shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this CD. Except as provided in Section XVI (Covenants by Settling Defendant), 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, and Section 705(c)(2) of HSCA, 35 P.S. § 6020.705(c)(2)), 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 the Site 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), or the State, pursuant to Section 705(c) of HSCA, 35 P.S. §§ 6020.705(c), 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) of CERCLA.

74. The Parties agree, and by entering this CD this Court finds, that this CD constitutes a judicially-approved settlement pursuant to which Settling Defendant 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 the Work, Past Response Costs, Future Response Costs, State Past Response Costs, and State Future Response Costs.

75. The Parties further agree, and by entering this CD this Court finds, that the complaint filed by the United States and the State 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 and the State within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

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

77. Settling Defendant shall, with respect to any suit or claim brought against it for matters related to this CD, notify in writing the United States and the State within 10 days after service of the complaint on such Settling Defendant. In addition, Settling Defendant shall notify the United States and the State 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.

78. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant and, with respect to a State action, shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XV (Covenants by Plaintiffs).

#### **XVIII. RELATIONSHIP BETWEEN INTERIM RD SETTLEMENT AGREEMENT AND CONSENT DECREE**

79. The United States and Settling Defendant agree that certain portions of the Work have commenced prior to the Effective Date, in accordance with the terms of the Interim RD Settlement Agreement. Upon the Effective Date of this CD, and as set forth in Section XXV of the Interim RD Settlement Agreement, the Interim RD Settlement Agreement shall terminate. The Parties agree that upon the Effective Date of this CD, performance of any Work commenced under and in accordance with the Interim RD Settlement Agreement shall continue under and in accordance with the provisions of this CD, and in accordance with the EPA-approved schedules and requirements developed under the Interim RD Settlement Agreement. To the extent that Settling Defendant has fulfilled obligations under the Interim RD Settlement Agreement that are also required by this CD, Settling Defendant shall also be deemed to have fulfilled such obligations under this CD.



## XIX. ACCESS TO INFORMATION

80. Settling Defendant shall provide to EPA and the State, 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 Defendant’s possession or control or that of its contractors or agents relating to activities at the Site 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 Defendant shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

### 81. **Privileged and Protected Claims**

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

b. If Settling Defendant asserts a claim of privilege or protection, it shall provide Plaintiffs 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 Defendant shall provide the Record to Plaintiffs in redacted form to mask the privileged or protected portion only. Settling Defendant shall retain all Records that it claims to be privileged or protected until Plaintiffs have had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the Settling Defendant’s favor.

c. Settling Defendant may make no claim of privilege or protection regarding: (1) any data regarding the Site, 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 the Site; or (2) the portion of any Record that Settling Defendant is required to create or generate pursuant to this CD.

82. **Business Confidential Claims.** Settling Defendant may assert that all or part of a Record provided to Plaintiffs under this Section or Section XX (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), 40 C.F.R. § 2.203(b), and Section 503(h) of HSCA, 35 P.S. § 6020.503(h), as applicable. Settling Defendant shall segregate and clearly identify all Records or parts thereof submitted under this CD for which Settling Defendant asserts business confidentiality claims. Records that Settling Defendant claims to be confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B and 35 P.S. § 6020.503(h), as applicable. If no claim of confidentiality accompanies Records when they are submitted to EPA and/or the State, or if EPA has notified Settling Defendant that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, or if the State has notified Settling Defendant that the Records are not confidential

under the standards of 35 P.S. § 6020.503(h) the public may be given access to such Records without further notice to Settling Defendant.

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, Plaintiffs retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

## **XX. RETENTION OF RECORDS**

85. Until 10 years after EPA's Certification of Work Completion under ¶ 4.8 (Certification of Work Completion) of the SOW, Settling Defendant 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 and/or HSCA with respect to the Site, and all Records that relate to the liability of any other person under CERCLA and/or HSCA with respect to the Site. Settling Defendant 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 Settling Defendant (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 Defendant shall notify the United States and the State at least 90 days prior to the destruction of any such Records, and, upon request by the United States or the State, and except as provided in ¶ 80 (Privileged and Protected Claims), Settling Defendant shall deliver any such Records to EPA or the State.

87. Settling Defendant certifies 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 the Site 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 the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), Section 3007 of RCRA, 42 U.S.C. § 6927, and section 503 of HSCA, 35 P.S. § 6020.503.

## **XXI. 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  
eescdcopy.enrd@usdoj.gov  
Re: DJ # 90-11-3-12044

**As to EPA:**

Director, Hazardous Site Cleanup Division (3SD00)  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103

**and:**

Will Geiger (3SD21)  
EPA Project Coordinator  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103  
geiger.william@epa.gov  
215-814-3413

**As to EPA Cincinnati Finance Center:**

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

**As to the State:**

Donald Rood  
Licensed Professional Geologist  
State Project Coordinator  
Pennsylvania Department of Environmental Protection  
2 Public Square  
Wilkes-Barre, PA 18701-1915  
dorood@pa.gov

**As to Settling Defendant:**

William L. Goldschmidt  
Principal Scientist - Environmental  
Wood Environment & Infrastructure Solutions, Inc.  
751 Arbor Way, Hillcrest 1, Suite 180  
Blue Bell, PA 19422-1060  
bill.goldschmidt@woodplc.com  
(610) 877-6137

**XXII. RETENTION OF JURISDICTION**

89. This Court retains jurisdiction over both the subject matter of this CD and Settling Defendant 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).

**XXIII. APPENDICES**

90. The following appendices are attached to and incorporated into this CD:

“Appendix A” is the IROD.

“Appendix B” is the SOW.

“Appendix C” is the description and/or map of the Site.

“Appendix D” is the draft Environmental Covenant for the Affected Property.

**XXIV. MODIFICATION**

91. Except as provided in ¶ 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 Defendant, and shall be effective upon approval by the Court. Except as provided in ¶ 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 Defendant. All modifications to the CD, other than the SOW, also shall be signed by the State, or a duly authorized representative of the State, as appropriate. A modification to the SOW shall be considered material if it implements an IROD 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.

## **XXV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

93. This CD shall be lodged with the Court for a period of not less than sixty (60) 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 (requiring public notice and comment for 30 days), and Section 1113 of HSCA, 35 P.S. § 6020.1113 (requiring public notice and comment for 60 Days). The United States and the State reserve the right to withdraw or withhold their consent if the comments regarding the CD disclose facts or considerations that indicate that the CD is inappropriate, improper, or inadequate. Settling Defendant consents 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.

## **XXVI. SIGNATORIES/SERVICE**

95. Each undersigned representative of Settling Defendant to this CD and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice and the Program Manager for the Environmental Cleanup and Brownfields Program, Northeast Regional Office for the State 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. 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 Defendant in writing that it no longer supports entry of the CD.

97. Settling Defendant shall identify, on the attached signature page, the name, address, telephone number, and email 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 Defendant agrees to accept service in that manner or by email 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 Defendant needs not file an answer to the complaint in this action unless or until the Court expressly declines to enter this CD.

## **XXVII. 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, the State, and Settling Defendant. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 20\_\_.


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United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Foster Wheeler Energy Corporation*, relating to the FWEC/Church Road TCE Superfund Alternative Site.

**FOR THE UNITED STATES OF AMERICA:**

5 Sep 19  
Dated



Eric Grant  
Deputy Assistant Attorney General  
U.S. Department of Justice  
Environment and Natural Resources Division  
Washington, D.C. 20530



Robyn E. Hanson  
Trial Attorney  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
999 18<sup>th</sup> St., South Terrace, Suite 370  
Denver, CO 80202

David J. Freed  
United States Attorney  
Middle District of Pennsylvania

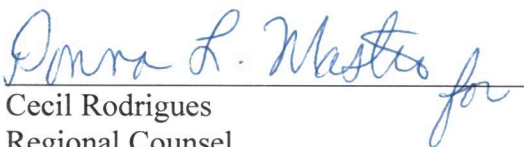


Samuel S. Dalke  
Assistant U.S. Attorney  
PA Bar No. 311803  
228 Walnut Street, 2nd Floor  
P.O. Box 11754  
Harrisburg, PA 17108-1754  
Tel: (717) 221-4482  
samuel.s.dalke@usdoj.gov

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Foster Wheeler Energy Corporation*, relating to the FWEC/Church Road TCE Superfund Alternative Site.



Cosmo Servidio  
Regional Administrator, Region III  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103



Cecil Rodrigues  
Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103



Robin E. Eiseman  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103



THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Foster Wheeler Energy Corporation*, relating to the FWEC/Church Road TCE Superfund Alternative Site.

**FOR THE COMMONWEALTH OF  
PENNSYLVANIA:**

8/5/19  
Dated



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Eric Supey  
Environmental Cleanup and Brownfields Program Manager  
Pennsylvania Department of Environmental Protection  
Northeast Regional Office  
2 Public Square  
Wilkes-Barre, PA 18701-1915



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Michael T. Ferrence  
Assistant Counsel  
Pennsylvania Department of Environmental Protection  
Office of Chief Counsel, Northeast Regional Office  
2 Public Square  
Wilkes-Barre, PA 18701-1915

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Foster Wheeler Energy Corporation*, relating to the FWEC/Church Road TCE Superfund Alternative Site.

**FOR FOSTER WHEELER ENERGY CORPORATION:**

8/1/19  
Dated



Name (print): Ramon U. Velez  
Title: President  
Address: 53 Frontage Road,  
Hampton, NJ 08827

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

Name (print): Bruce G. Thompson  
Title: Chief Legal Counsel, Investment Services  
Company: Wood PLC  
Address: 801 6th Ave SW, Ste. 900  
Calgary Alberta T2P 3W3 Canada  
Phone: 403 218 6330  
email: bruce.thompson@woodplc.com