

Amend

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:

~~BAKER STREET DRUMS~~
SUPERFUND SITE
BAKER STREET, MOBILE, ALABAMA

Emerald Coast Utilities Authority,
Pensacola, Florida
SETTLING PARTY

AGREEMENT FOR RECOVERY
OF PAST COSTS

U.S. EPA Region 4
CERCLA Docket No-04-2006-3773

PROCEEDING UNDER
SECTION 122(h)(1) of the
Comprehensive
Environmental Response,
Compensation, and Liability Act,
as amended, 42 U.S.C. § 9622(h)(1)



10470579

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I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (CERCLA), 40 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated in Region 4 to the Director of the Waste Management Division, then to the Deputy Director of the Waste Management Division, and finally to the Superfund Enforcement and Information Management Branch Chief.
2. This Agreement is made and entered into by EPA and Emerald Coast Utilities Authority (Settling Party). Settling Party consents to, and will not contest, the authority of the United States to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the Baker Street Drums Superfund Site (Site) located at an abandoned industrial area off Baker Street, Mobile County, Alabama, and at Highway 31 South just west of Highway 59, Baldwin County, Alabama. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, as follows:
 - a. On or about October 2003, Settling Party entered into a waste disposal contract with Mr. Donald Milton White, a local hauler, for the disposal or transport of hazardous substances, including 38 drums and four (4) 5- gallon containers of waste oils, tar, paint residues, polymers, hydraulic fluid, and solvents.
 - b. On or about October 31, 2003, Mr. White collected the drums and containers which contained the hazardous substances from Settling Party and illegally dumped them at two (2) abandoned industrial sites, referred to by EPA as the Site. The Site was not a licensed disposal facility.
 - c. Several of the drums and containers breached as a result of the dumping activities and their contents were released upon the ground.
 - d. As a result, EPA's On-Scene-Coordinator, Dean Ullock, issued a Notice to Proceed to a local environmental clean-up contractor to stabilize, upright and overpack the leaking drums and containers and recover free product from the ground area surrounding the drums.

e. EPA performed an emergency removal action at the Site which consisted of "haz-cattng" the drums and containers at the Site. The removal action was completed on or about December 15, 2003.

5. EPA requested EPA's Criminal Investigation Division and the local Mobile, AL Federal Bureau of Investigation's assistance with this matter. As a result, Mr. White was charged with violations of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2)(A), which governs the generation, storage, transportation, and disposal of hazardous waste. On or about August 19, 2004, Mr. White entered into a criminal plea agreement with the United States pursuant to an order issued by the United States District Court, Southern District of Alabama, in the case of U.S. v. Donald Milton White (Case No. 04-00059-001). Under the terms of the plea agreement, Mr. White served six (6) months in federal prison and was ordered to pay EPA \$20,000.00 for restitution for removal costs for the cleanup and removal of the waste that Mr. White placed on the Site.

6. EPA alleges that Settling Party is a responsible party, based on the fact that Settling Party by contract, arranged for disposal or treatment of hazardous substances owned or possessed by Settling Party, with Mr. White for transport for disposal or treatment of hazardous substances at the facility, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

7. EPA alleges that Mr. White is a responsible party, based on the fact that Mr. White accepted hazardous substances for transport or disposal, from which there was a release which caused the incurrence of response costs, of a hazardous substance, within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).

8. As such, Settling Party and Mr. White are jointly and severally liable for response costs incurred at or in connection with the Site. However, based on the \$20,000.00 restitution judgment that Mr. White has been ordered to pay, Settling Party agrees to pay EPA \$18,428.84 for Past Response Costs, plus an accrued Interest on that amount calculated from the Effective Date of this Agreement through the date of payment. This amount represents the difference between the amount of restitution that the Court has ordered Mr. White to pay and the balance of the response costs that EPA incurred at the Site.

9. EPA has determined that the total past response costs of the United States at or in connection with the Site will not exceed \$500,000.00, excluding interest. Therefore, the concurrence of the United States Department of Justice is not required.

10. EPA and Settling Party recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

11. This Agreement shall be binding upon EPA and upon Settling Party and its successors and assigns. Any change in ownership or corporate or other legal status of Settling Party, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

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

- a. "Agreement" shall mean this Agreement.
- b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "Effective Date" shall mean the effective date of this Agreement as provided in Section XIV.
- e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- f. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.
- g. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.
- h. "Parties" shall mean EPA and Settling Party.

i. "Past Response Costs" shall mean all costs, including, but not limited to direct and indirect costs, that EPA has paid at or in connection with the Site through June 21, 2006, plus accrued Interest on all such costs through such date.

j. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

k. "Settling Party" shall mean the Emerald Coast Utilities Authority (formerly known as Escambia County Utilities Authority).

l. "Site" shall mean the Baker Street Drums Superfund Site, encompassing the property located at an abandoned industrial area off Baker Street, Mobile County, Alabama, and at Highway 31 South just west of Highway 59, Baldwin County, Alabama.

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

V. PAYMENT OF PAST RESPONSE COSTS

13. Within 30 days after the Effective Date as defined by Section XIV (Effective Date), Settling Party shall pay to EPA \$18,428.84 in a lump sum payment for Past Response Costs, plus an accrued Interest on that amount calculated from the Effective Date of this Agreement through the date of payment. This amount represents the difference between the amount of restitution that the Court has ordered Mr. Donald White, the other PRP for this Site, to pay and the balance of the response costs that EPA incurred at the Site.

14. Settling Party's lump sum payment shall be made to EPA by Electronic Funds Transfer (EFT) to the following address, in accordance with current EFT procedures:

Mellon Bank
SWIFT address = MELNUS3P
ABA 043000261
Account 9109125
22 Morrow Drive
Pittsburgh, PA 15235

The payment shall reference the following: (1) The name and address of the Settling Party; (2) The Site name: **Baker Street Drums Superfund Site**; (3) The EPA Region: **Region 4**; (4) The Site/Spill ID Number: **A4DA**; and (4) the EPA CERCLA Docket Number for this action.

15. At the time of payment, Settling Party shall also send notice that such payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the following: (1) The name and address of the Settling Party; (2) The Site name: **Baker Street Drums Superfund Site**; (3) The EPA Region: **Region 4**; (4) The Site/Spill ID Number: **A4DA**; and (4) the EPA CERCLA Docket Number for this action.

16. The total amount to be paid pursuant to Section V (Payment of Response Costs) shall be deposited in the EPA Hazardous Substance Superfund account.

VI. FAILURE TO COMPLY WITH AGREEMENT

17. **Interest on Late Payments.** If Settling Party fails to make any payment required by Section V (Payment of Response Costs) by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

18. **Stipulated Penalty.**

a. If any amounts due to EPA under Section V (Payment of Response Costs) are not paid by the required date, Settling Party shall be in violation of this Agreement and shall pay to EPA as a stipulated penalty, in addition to the Interest required by Paragraph 17, \$500.00 per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made payable to "EPA Hazardous Substance Superfund." The check or money order, and any accompanying letter, shall reference the following: (1) The name and address of the Settling Party; (2) The Site name: **Baker Street Drums Superfund Site**; (3) The EPA Region: **Region 4**; (4) The Site/Spill ID Number: **A4DA**; and (4) The EPA CERCLA Docket Number for this action. Settling Party shall send the check or money order (and any accompanying letter) to:

United States Environmental Protection Agency
Cincinnati Accounting Operations
Mellon Lockbox 371099M
Pittsburgh, PA 15251-7099

c. At the time of each payment, Settling Party shall also send notice that such stipulated penalty payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the following: (1) The name and address of the Settling Party; (2) The Site name: **Baker Street Drums Superfund Site**; (3) The EPA Region: **Region 4**; (4) The Site/Spill ID Number: **A4DA**; and (4) The EPA CERCLA Docket Number for this action.

d. Stipulated Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment.

19. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Party's failure to comply with the requirements of this Agreement, if Settling Party fails or refuses to comply with the requirements of this Agreement, Settling Party shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Party shall reimburse the United States for all costs of such action, including, but not limited to costs of attorney time.

20. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Payment of stipulated penalties shall not excuse Settling Party from payment as required by Section V or from performance of any other requirements of this Agreement.

VII. COVENANT NOT TO SUE BY EPA

21. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with this Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Agreement. This covenant not to sue extends only to Settling Party and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

22. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within the Covenant Not To Sue by EPA in Section VII. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Party with respect to:

- a. liability for failure of Settling Party to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

23. Nothing in this Agreement is intended to be, nor shall it be construed as, a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

IX. COVENANT NOT TO SUE BY SETTLING PARTY

24. Settling Party covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

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

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

- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

25. Nothing in this Agreement 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).

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

26. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

27. EPA and Settling Party agree that the actions undertaken by Settling Party in accordance with this Agreement do not constitute an admission of any liability by Settling Party. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than

proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

28. The Parties agree that Settling Party is entitled, as of the Effective Date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

29. Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within ten (10) days of service of the complaint or claim upon it. In addition, Settling Party shall notify EPA within ten (10) days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

30. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party 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 in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII (Covenant Not To Sue by EPA).

XI. RETENTION OF RECORDS

31. Until five (5) years after the Effective Date of this Agreement, Settling Party shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that related in any matter to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any retention policy to the contrary.

32. At the conclusion of the five (5) year document retention period in the preceding paragraph, Settling Party shall notify EPA at least 90 days prior to the destruction of any such records or documents and, upon request by EPA, Settling Party shall deliver any such records to EPA. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege, it shall provide EPA with the following: (1) the title of the record; 2) the date of the record, 3) the name, title, affiliation (e.g. company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record,

the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Party shall retain all records they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

33. Settling Party hereby 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, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

34. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Party. Written notice to EPA shall be by certified mail, or by a nationally recognized delivery service offering confirmation of delivery, including Federal Express Delivery, to the addressees listed below:

As to EPA:

Gwendolen Bivins
Associate Regional Counsel
Office of Enforcement Accountability
U.S. EPA, Region 4
61 Forsyth St., S.W.
Atlanta, GA 30303

Paula V. Batchelor
Cost Recovery Specialist
SEIMB, Waste Management Division
U.S. EPA, Region 4
61 Forsyth St., S.W.
Atlanta, GA 30303

The UNDERSIGNED SETTLING PARTY enters into this Agreement in the matter of EPA
Docket No. _____ relating to the Baker Street Drum Superfund Site located in Mobile, AL.

-04-2006-3773

FOR SETTLING PARTY: STEPHEN E. SORRELL
Name

9255 STURDEVANT STREET PENSACOLA, FLORIDA 32514

Address

By: *Stephen E. Sorrell*
Name

6-29-06
Date

As to Settling Party:

Bradley Odom, Esq.
Kievit, Odom, and Barlow
635 West Garden Street
Pensacola, FL 32502

Stephen E Sorrell
Executive Director
Emerald Coast Utilities Authority
9255 Sturdevant Street
Pensacola, FL 32514-0311

XIII. INTEGRATION

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

XIV. EFFECTIVE DATE

36. The Effective Date of this Agreement shall be the date on which Settling Party receives a fully executed copy of this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: Rosalind Brown
Rosalind Brown
Chief, Superfund Enforcement and Information
Management Branch
Waste Management Division
Region 4
U.S. Environmental Protection Agency

7-11-06
Date

EFFECTIVE DATE: 7/13/06