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04-2000-0940
NCD 003184710

IN THE MATTER OF: Carolina Creosoting Corp. Site Leland, Brunswick County, North Carolina Edward Theobald, SETTLING PARTY	AGREEMENT FOR RECOVERY OF PAST RESPONSE COSTS U.S. EPA Region 4 CERCLA Docket No. 00-13-C PROCEEDING UNDER SECTION 122(h)(1) of CERCLA 42 U.S.C. Section 9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 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. This authority has been further delegated through the Director, Waste Management Division, through the Associate Division Director, to the Chief, Waste Programs Branch by EPA Regional Delegation No. 14-14-D.

2. This Agreement is made and entered into by EPA and Edward Theobald ("Settling Party"). Settling Party consents to and will not contest EPA's jurisdiction to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the Carolina Creosoting Corporation Site ("Site") located in Leland, Brunswick County, North Carolina. 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.

a. The Site operated as a wood treating facility from 1974 until 1983, treating wood with creosote and pentachlorophenol ("PCP"). Wood treating operations were concentrated on a 10-acre portion of the 90.7-acre Site. During operations, the Site consisted of the following areas and/or structures: a main production area, which consisted of 12 aboveground storage tanks; a main processing area; diked confinement or containment areas; two lagoons; a landfarm area; burn pit areas; and treated wood storage areas.

b. As a result of wood preserving and treating operations at the Site, several hazardous substances were released into the environment, including, but not limited to, PCP and creosote. PCP and creosote are hazardous substances pursuant to Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. On September 23, 1992, an action memorandum was prepared by the On Scene Coordinator ("OSC"), Samantha Urquhart-Foster, requesting approval for a removal action at the Site. At the time the Site consisted of a main production area with ten storage tanks; at least one tank with an outer asbestos insulation. The tanks contained contaminated water, fuel oil, PCP, and creosote. The total volume of the tanks was estimated to be 60,000 gallons. The OSC noted that four of the tanks were in a concrete containment area which, at the time, had approximately 50,000 gallons of accumulated rainwater and raw product. A process building was adjacent to the containment area with raw product spilled throughout. Northeast of the facility, an area approximately 26,000 square feet in size was used to landfarm sludges from the previously existing waste pond. The landfarm was closed under an Order by the State of North Carolina, was not maintained, and had contaminated the area to a depth of 2-3 feet. The OSC also noted as many as four other areas of concern at the Site where waste chemicals may have been spilled or deliberately dumped.

d. From November 16, 1992, to November 10, 1995, physical removal activities were conducted at the Site. These activities included: 1) removal and disposal of waste water, creosote and PCP contaminated sludge, and accumulated rainwater from the diked area surrounding certain on-Site storage tanks; 2) removal and disposal of the on-Site storage tanks and their contents; 3) excavation and disposal of contaminated soils from the creosote contaminated landfarm area and beneath the diked area; 4) backfilling the former landfarm area with clean fill. Waste stream totals included the following: 1) 8100 tons of PAH and PCP contaminated soil and sludge and 60 cubic yards of PAH contaminated sludge was landfilled as F032/F034 hazardous waste; 2) 21,300 gallons of contaminated liquid waste from certain on-Site tanks was incinerated; and 3) 1245 gallons of waste oil was recycled.

e. On February 21, 1995, based on the Site Inspection Prioritization report prepared by the North Carolina Department of Environment, Health and Natural Resources on December 5, 1994, it was concluded that no further remedial site assessment under CERCLA was required.

5. In performing this response action, EPA incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred at or in connection with the Site.

7. EPA and Settling Party desire to resolve Settling Party's alleged civil liability for Past Response Costs without litigation and without the admission or adjudication of any issue of fact

or law.

III. PARTIES BOUND

8. This Agreement shall be binding upon EPA and upon Settling Party and his heirs, 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

9. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

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

b. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

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. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the current rate specified for interest on investments of the 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). For purposes of this Agreement, the applicable Interest rate for payments due by Settling Party will be 5.3%.

f. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and Settling Party.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in

connection with the Site through September 30, 1999, plus accrued Interest on all such costs through such date.

i. "Section" shall mean a portion of this Agreement identified by a roman numeral.

j. "Settling Party" shall mean Edward Theobald.

k. "Site" shall mean the Carolina Creosoting Company Superfund Site located at the end of Eastbrook Road in Leland, Brunswick County, North Carolina.

l. "United States" shall mean the United States of America, including it departments, agencies and instrumentalities.

V. CERTIFICATION OF FINANCIAL AND SITE INFORMATION

10. Settling Party has represented to EPA in submissions made under the penalty of perjury that he is unable to pay the total Past Response Costs incurred by EPA in connection with the Site, for which he is are potentially liable. Settling Party has provided EPA with financial and tax records, statements, and other information disclosing his assets and liabilities, on which statements and information EPA has relied in compromising its claim for Past Response Costs and agreeing to the settlement contained herein. The amounts to be paid by Settling Party pursuant to this Agreement are based upon EPA's evaluation of Settling Party's ability to pay EPA's Past Response Costs incurred with respect to the Site, and EPA has determined that Settling Party is unable to pay more than the amount specified in Section VI without undue financial hardship. By signing this Agreement, Settling Party certifies that, to the best of his knowledge and belief, he has submitted to EPA financial information that fairly, accurately, and materially sets forth his financial circumstances, and that those circumstances have not materially changed between the time the financial information was submitted to EPA and the time Settling Party executes this Agreement. EPA's agreement to the terms of this Agreement is expressly conditioned on the completeness, accuracy, and truth of Settling Party's financial and tax records, statements, and other information.

11. In the event that Settling Party has made statements in his financial and tax records which are false in any material respect or omitted any material information which may have a bearing on EPA's analysis of Settling Party's ability to pay Past Response Costs:

a. EPA's covenant not to sue set forth in Section VIII (Covenant Not to Sue by EPA) shall be nullified, and EPA shall be free to pursue its claim against Settling Party;

b. All payments already paid under this Agreement shall be retained by EPA; and

c. EPA may pursue all remedies available to it under law, including criminal prosecution for perjury or false swearing.

12. By his signature to this Agreement, Settling Party certifies to the best of his knowledge and belief that he has provided or made available for review to EPA all information and documents (except for duplicates) in his possession, custody, or control relating to the transportation of hazardous substances to the Site or the placement, disposal or treatment of hazardous substances at the Site. The United States reserves all rights it may have to bring any action against Settling Party, and the covenant not to sue in Section VIII shall not be effective, if Settling Party has not provided or made for review all such information and documents to EPA.

VI. REIMBURSEMENT OF RESPONSE COSTS

13. Settling Party shall pay a total of $100,000.00 to the EPA Hazardous Substance Superfund in reimbursement of Past Response Costs pursuant to the following schedule:

a) Within 60 days of the effective date of this Agreement, Settling Party shall pay $25,000.

b) Within one year of the effective date of this Agreement, Settling Party shall pay $26,198.00. The principal amount of this payment is $22,604.00 plus $3,594.00 in Interest on the balance due calculated from the effective date of this Agreement.

c) Within two years of the effective date of this Agreement, Settling Party shall pay $25,000.00. The principal amount of this payment is $22,604.00 plus $2,396.00 in Interest on the balance due calculated from the effective date of this Agreement.

d) Within three years of the effective date of this Agreement, Settling Party shall pay $23,802.00. The principal amount of this payment in $22,604.00 plus $1,198.00 in Interest on the balance due calculated from the effective date of this Agreement.

14. Payment shall be made by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Settling Party by EPA Region 4, and shall be accompanied by a statement identifying the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID #044A, and the EPA docket number for this action.

A copy of the notice of payment should be sent to Ms. Paula V. Batchelor at:

U.S. Environmental Protection Agency, Region 4
Program Services Branch, 11th Floor
Waste Management Division
61 Forsyth Street S.W.
Atlanta, Georgia 30303

At the time of payment, Settling Party shall send notice that such payment has been made to:

Alyse Hakami Stoy
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

VII. FAILURE TO COMPLY WITH AGREEMENT

15. In the event that the payment required by Paragraph 13 is not made when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

16. If Settling Party does not comply with Paragraph 13, Settling Party shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 15, $1000 per violation per day that such payment is late.

17. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall made in accordance with Paragraph 14.

18. Penalties shall accrue as provided above 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 performance is due, or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

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 any term or condition 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).

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.

VIII. COVENANT NOT TO SUE BY EPA

21. Except as specifically provided in Paragraph 22 (Reservations of Rights by EPA), EPA covenants not to sue Settling Parties 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 the amount required by Settling Party in Section VI (Reimbursement of Response Costs) and

Section VII, Paragraphs 15 (Interest on Late Payments) and 16 (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of his obligations under this Agreement. This covenant not to sue extends only to Settling Party and does not extend to any other person.

IX. RESERVATIONS OF RIGHTS BY EPA

22. The covenant not to sue by EPA set forth in Paragraph 21 does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all other matters, including but not limited 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.

X. COVENANT NOT TO SUE BY SETTLING PARTY

24. Settling Party 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 established by 26 U.S.C. § 9507, 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 claims arising out of the response actions at the Site for which the Past Response Costs were incurred; 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).

XI. 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. EPA and Settling Party each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

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 him for matters related to this Agreement, he 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 him for matters related to this Agreement, he will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, 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 appropriate 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 Paragraph 21.

XII. RETENTION OF RECORDS

31. Until five (5) years after the effective date of this Agreement, Settling Party shall preserve and retain all records and documents now in his possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

32. After the conclusion of the 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 or documents to EPA. Settling Party may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege, he shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to EPA in redacted form to mask the privileged information only. Settling Party shall retain all records and documents that he claims 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.

33. By signing this Agreement, Settling Party certifies that, to the best of his knowledge and belief, he has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability or the filing of a suit against the Settling Parties regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

XIII. 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 Parties 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.

As to EPA:

Alyse Hakami Stoy
Assistant Regional Counsel
Environmental Protection Agency, Region 4
Environmental Accountability Division
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

As to Settling Party:

Mr. Edward Theobald
c/o Mr. Brian Weiss
Hawkins & Parnell
4000 Suntrust Plaza
303 Peachtree Street, N.E.
Atlanta, Georgia 30308-3243

XIV. INTEGRATION/APPENDICES

35. This Agreement and its appendices constitute 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. The following appendix is attached to and incorporated into this Agreement: Appendix A is a map of the Site.

XV. PUBLIC COMMENT

36. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XVI. ATTORNEY GENERAL APPROVAL

37. The Attorney General or her designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

XVII. EFFECTIVE DATE

38. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 36 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency
Region 4
61 Forsyth Street S. W.
Atlanta, Georgia 30303

By: _____ 3/8/00
Franklin Hill Date
Branch Chief
Waste Programs Branch

By: _____ 1/22/2000

Mr. Brian Weiss
2606 Woodridge Drive
Decatur, Georgia 30033

Date

THE UNDERSIGNED Settling Party enters into this Agreement in the matter relating to the Carolina Creosoting Corporation Superfund Site located in Leland, Brunswick County, North Carolina:

FOR Edward Theobald

By: _____ 1/28/00
Edward Theobald Date
20 Brackett Road
Rye, New Hampshire 03870

APPENDIX A

Carolina Creosoting Corporation Site Map