



November 27, 2006



U.S. ENVIRONMENTAL PROTECTION AGENCY

U.S. DEPARTMENT OF JUSTICE

MEMORANDUM

SUBJECT: Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser

FROM: Susan E. Bromm, Director /s/
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency

Bruce S. Gelber, Chief /s/
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Office of Environmental Cleanup, Region X
Director, Office of Environmental Stewardship, Region I
Director, Environmental Accountability Division, Region IV
Regional Counsel, Regions II, III, V, VI, VII, IX, and X
Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Region VIII
Deputy and Assistant Chiefs, Environmental Enforcement Section, U.S. Department of Justice
Chief, Deputy Chief, and Assistant Chiefs, Environmental Defense Section, U.S. Department of Justice

We are pleased to issue the CERCLA Model Agreement and Order on Consent for Removal Action by a *bona fide* prospective purchaser (“BFPP”) (BFPP Removal Model Agreement). This model is part of EPA’s continuing effort to promote land reuse and revitalization by addressing potential liability concerns associated with acquiring contaminated

properties. This model responds to requests from parties who enjoy liability protections provided for *bona fide* prospective purchasers by Sections 101(40) and 107(r) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9601, *et seq.* as amended by the Brownfields Amendments, who will perform removal work at sites of federal interest that they own or intend to acquire, where EPA may advise on the extent of cleanup required and oversee the work, and where the removal work will exceed the “reasonable steps to prevent releases” obligation upon which their BFPP status depends.

In May 2002, EPA issued a policy stating that, in most cases, the Brownfields Amendments make agreements that provide a covenant not to sue (prospective purchaser agreements or PPAs) from the federal government unnecessary. *Bona Fide Prospective Purchasers and the New Amendments to CERCLA*, May 31, 2002 (BFPP Policy). EPA continues to believe that PPAs are no longer necessary in the vast majority of cases, because BFPPs may now purchase property with knowledge of contamination and not acquire CERCLA liability as long as they meet certain BFPP criteria. In the May 2002 BFPP Policy, the Agency recognized that, in limited instances, the public interest would be served by entering into PPAs or some other form of agreement with purchasers of contaminated property. One of the instances identified in the BFPP Policy as justifying a federal covenant not to sue was where a significant environmental benefit will be derived from the project in terms of cleanup. This model is intended to serve as the vehicle for providing a federal covenant not to sue and contribution protection for BFPPs who will perform removal work exceeding reasonable steps at a site of federal interest. The model offers an “existing contamination” covenant like that offered in the 1999 Model PPA, and includes appropriate provisions associated with the performance of removal work. In addition, it provides a release and waiver of any windfall lien. The model conforms to other recently issued models insofar as certain provisions have been standardized from model to model. It is unique, however, in that the settling party already has statutorily conferred liability protection as a BFPP.

The attached BFPP Removal Model Agreement is intended for removal sites where there is a federal interest and the work required is complex or significant in extent. For this reason, this Model includes provisions relating to, *e.g.*, reimbursement of oversight costs, work takeover, and financial responsibility, designed to ensure that the work is completed in a timely and proper manner by the BFPP. Any determination to omit one or more of these provisions should be based on consideration of specific factors, including the nature and extent of the work, the risks presented by not including a specific provision in the agreement, the benefits of having the removal performed by the BFPP, and the benefits to the BFPP of cleaning up the site with EPA’s direct oversight and involvement, including, *e.g.*, any enhancement to the value or marketability of the site or property that would flow from a cleanup performed with EPA’s oversight and involvement. Omissions from the model, other than designated optional provisions, should be discussed with Headquarters and Department of Justice prior to that omission being offered or agreed to.

For federal interest sites where BFPPs wish to satisfy their reasonable steps requirements but do not intend to undertake a removal action with EPA oversight, EPA may continue to provide comfort/status letters suggesting site-specific reasonable steps where appropriate. *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (“Common Elements”)*, March 6, 2003. As stated in the Common Elements Guidance, such comfort/status letters are limited to sites with significant federal involvement such that the Agency has sufficient information to form a basis for suggesting reasonable steps.

In implementing this new model for removal work by BFPPs, Regions are asked to coordinate with EPA Headquarters and with the Department of Justice early in the process. Any Region settling with a BFPP for removal work at a property owned by that BFPP will be expected to consult with Headquarters on the settlement being proposed. In addition, any Region significantly deviating from this model for settlement with a BFPP, other than using the previously published Model for Waiver of the Windfall Lien, will be required to seek Headquarters’ concurrence from the Director of Regional Support Division. The Department of Justice must approve and sign each of these settlements.

Please address any questions on this model to Helen Keplinger of the Regional Support Division at (202) 564-4221 or Tom Carroll of the Environmental Enforcement Section at (202) 514-4051. This model is available on EPA’s Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-ra-mem.pdf>.

Attachments

cc: Earl Salo, Acting Associate General Counsel for Solid Waste and Emergency Response
Juliette McNeil, Director, Financial Management Division
Office of Regional Counsel Branch Chiefs, Regions I-X
CERCLA Settlement Lead Region Workgroup
David Lloyd, Director, Office of Brownfields Cleanup and Redevelopment

U.S. Environmental Protection Agency and
U.S. Department of Justice

**AGREEMENT AND ORDER ON CONSENT FOR REMOVAL ACTION BY
BONA FIDE PROSPECTIVE PURCHASER**

Issued & Effective
November 27, 2006

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA or DOJ applies them to a particular case will depend upon the facts of the case.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: [Site Name])
)
) [Docket No.]
)
 PURSUANT TO THE COMPREHENSIVE)
 ENVIRONMENTAL RESPONSE,)
 COMPENSATION, AND LIABILITY ACT)
 42 U.S.C. §§ 9604, 9606, 9607, 9622)
)
 AGREEMENT AND ORDER ON) [Purchaser's Name]
 CONSENT FOR REMOVAL ACTION BY)
 BONA FIDE PROSPECTIVE PURCHASER)

I. INTRODUCTION

1. This Agreement and Order on Consent for Removal Action by Bona Fide Prospective Purchaser (“Agreement”) is voluntarily entered into by and between the United States on behalf of the Environmental Protection Agency (“EPA”) and [insert name of purchaser] (“Purchaser”) (collectively, the “Parties”) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9601, *et seq.* Under this Agreement, Purchaser agrees to perform a removal action at or in connection with the property located at [insert address or descriptive location of Site] in [City or Town, County, State] (the “Property”), [known as/part of] the “[insert name] Site” or the “Site.”

II. JURISDICTION AND GENERAL PROVISIONS

2. This Agreement is issued pursuant to the authority vested in the President of the United States by Sections 104, 106, 107 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9606, 9607 and 9622, and delegated to the Administrator of EPA by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, and further delegated to the undersigned Regional official, and the authority of the Attorney General to compromise and settle claims of the United States.
3. The Parties agree that the United States District Court for the _____ District of _____ will have jurisdiction pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), for any enforcement action brought with respect to this Agreement.
4. EPA has notified the State [Commonwealth] of _____ (the “State”) of this

action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

5. The Purchaser represents that it is a bona fide prospective purchaser (“BFPP”) as defined by Section 101(40) of CERCLA, 42 U.S.C. § 9601(40), that it has and will continue to comply with Section 101(40) during its ownership of the Property, and thus qualifies for the protection from liability under CERCLA set forth in Section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to the Property. In view, however, of the complex nature and significant extent of the Work to be performed in connection with the removal action at the Site, and the risk of claims under CERCLA being asserted against Purchaser notwithstanding Section 107(r)(1) as a consequence of Purchaser’s activities at the Site pursuant to this Agreement, one of the purposes of this Agreement is to resolve, subject to the reservations and limitations contained in Section XVIII (Reservations of Rights by United States), any potential liability of Purchaser under CERCLA for the Existing Contamination as defined by Paragraph 10(g) below.
6. The resolution of this potential liability, in exchange for Purchaser’s performance of the Work [insert, if applicable, “and reimbursement of certain response costs”] is in the public interest.
7. EPA and Purchaser recognize that this Agreement has been negotiated in good faith. Purchaser agrees to comply with and be bound by the terms of this Agreement and further agrees that it will not contest the basis or validity of this Agreement or its terms.

III. PARTIES BOUND

8. This Agreement applies to and is binding upon EPA and upon Purchaser and its [heirs,] successors and assigns. Any change in ownership or corporate status of Purchaser including, but not limited to, any transfer of assets or real or personal property shall not alter Purchaser’s responsibilities under this Agreement.
9. Purchaser shall ensure that its contractors, subcontractors, and representatives comply with this Agreement, and, where appropriate, receive a copy of this Agreement. Purchaser shall be responsible for any noncompliance with this Agreement.

IV. DEFINITIONS

10. 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, including any amendments thereto.
 - a. “Agreement” shall mean this Agreement and Order on Consent for Removal Action by Bona Fide Prospective Purchaser and all appendices attached hereto (listed in Section XXIV). In the event of conflict between this Agreement and any appendix, this Agreement shall control.

- b. “BFPP” shall mean a bona fide prospective purchaser as described in Section 101(40) of CERCLA, 42 U.S.C. § 9601(40).
- c. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq.*
- d. “Day” shall mean a calendar day unless expressly stated to be a working day. “Working day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this 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.
- e. “Effective Date” shall be the effective date of this Agreement as provided in Section XXVI.
- f. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
- g. “Existing Contamination” shall mean:
 - i. any hazardous substances, pollutants or contaminants present or existing on or under the Property as of the Effective Date;
 - ii. any hazardous substances, pollutants or contaminants that migrated from the Property prior to the Effective Date; and
 - iii. any hazardous substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the Effective Date.
- h. “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.
- i. “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.
- j. “OSC” shall mean the On-Scene Coordinator as defined in 40 C.F.R. § 300.5.

- k. “Oversight Costs” shall mean all direct and indirect costs incurred by EPA or the United States after the Effective Date in monitoring and supervising Purchaser’s performance of the Work to determine whether such performance is consistent with the requirements of this Agreement, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Agreement, as well as costs incurred in overseeing implementation of the Work.
- l. “Paragraph” shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.
- m. “Parties” shall mean EPA and Purchaser.
- n. “Property” shall mean that portion of the Site, encompassing approximately __ acres, which is described in Appendix _____ of this Agreement.
- o. “Section” shall mean a portion of this Agreement identified by a Roman numeral.
- p. “Purchaser” shall mean _____.
- q. “RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).
- r. “Site” shall mean the [Site Name] encompassing approximately ____ acres, located at [address or description of location] in [name of city, county, and State], and depicted generally on the map attached as Appendix _____. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants have been deposited, stored, disposed of, placed, or otherwise come to be located [provide a more specific definition of the Site where possible; may also wish to include structures, USTs, etc., within Site description].
- s. “SOW” shall mean the statement of work for implementation of the removal action as set forth in Appendix_____ to this Agreement and any modifications made in accordance with this Agreement.
- t. “Supervising Contractor” shall mean the principal contractor retained by Purchaser to supervise and direct the implementation of the Work agreed to in this Agreement and to sign and approve the Final Report submitted concerning such Work.
- u. “United States” shall mean the United States of America, its departments, agencies, and instrumentalities.
- v. “Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section

1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous material” under [insert appropriate State statutory citation.]

- w. “Work” shall mean all removal activities Purchaser is required to perform under this Agreement.

V. FINDINGS OF FACT

[NOTE: Because Findings of Fact are site-specific, no model language is provided. Facts should be presented concisely, accurately, and logically, and should be limited to those relevant to the performance of the removal action by Purchaser. Regions should include a discussion of the following points: identification of Purchaser; Purchaser’s ownership status (*i.e.*, whether Purchaser has already acquired the Property or intends to do so in the future), site location and description; relevant site history and operations; any relevant past EPA and/or State activities and investigations; and conditions and data showing hazardous substances are present and releases or threats of releases exist. Regions may want to note any instance where the property that is the subject of this Agreement is part of an effort to reuse or revitalize an area that has been underutilized due to contamination. The Agreement need not contain a finding of endangerment if such a finding has been properly made and documented in an Action Memorandum (or Action Memorandum/Enforcement) (hereinafter referred to as an “Action Memorandum/ Enforcement”) in accordance with the “Superfund Removal Procedures Action Memorandum Guidance” (OSWER Directive No. 9360.3-01, December 1990). If such a finding has not been made in an Action Memorandum/Enforcement, this Section should include a statement consistent with the administrative record that releases or threats of releases at the Site may present an imminent and substantial endangerment. If such a finding has been made in an Action Memorandum/Enforcement (and is not being made in the Agreement as well), the date of the signing of the Action Memorandum/Enforcement should be included as a finding.]

VI. DETERMINATIONS

- 11. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:
 - a. The [insert name] Site is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
 - b. The contamination found at the Site, as identified in the Findings of Fact above, include(s) [a] “hazardous substance(s)” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
 - c. Purchaser is a “person” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

- d. The conditions described in [Paragraphs ___ of] the Findings of Fact above constitute an actual or threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
- e. The Work is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Agreement, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VII. AGREEMENT

- 12. In consideration of and in exchange for the United States' Covenant Not to Sue in Section XVII [and the Release and Waiver of Lien(s) in Section XXI,] Purchaser agrees to comply with all provisions of this Agreement, including, but not limited to, all attachments to this Agreement and all documents incorporated by reference into this Agreement.

VIII. WORK TO BE PERFORMED

- 13. Purchaser shall perform, at a minimum, all actions necessary to implement the SOW. The actions to be implemented generally include, but are not limited to, the following:

[NOTE: This Section should provide a brief description consistent with the [Action Memorandum/Enforcement] [SOW] and should provide sufficient detail to permit Purchaser to draft a Work Plan. Regions should ensure that the description is sufficiently broad and does not unintentionally limit removal actions in terms of hazardous substances to be addressed or to site boundaries if hazardous substances are present or migrate beyond boundaries to be addressed.]

Purchaser shall perform all actions required by this Agreement in accordance with all applicable local, state, and federal laws and regulations, except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (“ARARs”) under federal environmental or state environmental or facility siting laws. [Purchaser shall identify ARARs in the Work Plan subject to EPA approval.]

- 14. Work Plan and Implementation.

- a. Within ___ days after the Effective Date, Purchaser shall submit to EPA for approval a draft Work Plan for performing the removal action generally described in Paragraph 13 above. The

draft Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Agreement.¹

b. EPA may approve, disapprove, require revisions to, or modify the draft Work Plan in whole or in part. If EPA requires revisions, Purchaser shall submit a revised draft Work Plan within ___ days of receipt of EPA's notification of the required revisions. Purchaser shall implement the Work Plan as approved or modified in writing by EPA in accordance with the schedule approved by EPA. Once approved, approved with modifications, or modified by EPA, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Agreement.

c. Purchaser shall not commence any Work except in conformance with the terms of this Agreement. Purchaser shall not commence implementation of the Work Plan developed hereunder until receiving written EPA approval or modification pursuant to Paragraph 14.b.

15. Health and Safety Plan. Within ___ days after the Effective Date, Purchaser shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning.² Purchaser shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

16. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Purchaser shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Purchaser shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for

¹ Regions should require preparation of a Quality Assurance Project Plan ("QAPP") as part of the Work Plan except in circumstances involving emergency or non-complex removal work. The QAPP should be prepared in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R-5)" (EPA/240/B-01/003, March 2001), and "EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998).

² Regions may provide more detail, *e.g.*, SPCC, evacuation plans, etc.

QA/QC and sampling.³ Purchaser shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, “Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs” (American National Standard, January 5, 1995), and “EPA Requirements for Quality Management Plans” (QA/R-2) (EPA/240/B-01/002, March 2001), or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (“NELAP”) as meeting the Quality System requirements.

b. Upon request by EPA, Purchaser shall have a laboratory that meets the requirements of Paragraph 16.a above analyze samples submitted by EPA for QA monitoring. Purchaser shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Purchaser shall allow EPA or its authorized representatives to take split and/or duplicate samples. Purchaser shall notify EPA not less than ___ days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Purchaser to take split or duplicate samples of any samples it takes as part of its oversight of Purchaser’s implementation of the Work.

17. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Purchaser shall submit a proposal for post-removal site control consistent with Section 300.415(l) of the NCP and considering OSWER Directive No. 9360.2-02. Upon EPA approval, Purchaser shall implement such controls and shall provide EPA with documentation of all post-removal site control arrangements.

18. Reporting.

a. Purchaser shall submit a written progress report to EPA concerning actions undertaken pursuant to this Agreement every ___th day after the date of receipt of EPA’s approval of the Work Plan until completion of the Work, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.⁴

³ Regions should also check with Regional QA officers for standard operating procedures for QA/QC and sampling of soil, air, ecology, waste and water.

⁴ Regions should determine the frequency and content of these reports on a site-specific basis.

b. Purchaser shall submit __ copies of all plans, reports or other submissions required by this Agreement, [the SOW], or any approved work plan. Upon request by EPA, Purchaser shall submit such documents in electronic form to be specified by EPA.

19. Final Report. Within __ days after completion of all Work required by this Agreement, Purchaser shall submit for EPA review and approval in accordance with Section XXV (Notice of Completion) a final report summarizing the actions taken to comply with this Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled “OSC Reports.”⁵ The final report shall include a statement of actual costs incurred in complying with the Agreement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by the Supervising Contractor who supervised or directed the preparation of said report:

“Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

20. Off-Site Shipments.

- a. Purchaser shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-State waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility’s state and to the OSC. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.
- i. Purchaser shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Purchaser shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to

⁵ For removals that are more extensive, Regions may require consideration of “Superfund Removal Procedures: Removal Response Reporting – POLREPS and OSC Reports” (OSWER Directive No. 9360.3-03, June 1, 1994). Regions should also insert an emergency response and notification of releases provision if not addressed by the Work Plan.

ship the Waste Material to another facility within the same state, or to a facility in another state.

- ii. The identity of the receiving facility and state will be determined by Purchaser following the award of the contract for the removal action. Purchaser shall provide the information required above as soon as practicable after the award of the contract and before the Waste Material is actually shipped.
- b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, Purchaser shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Purchaser shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

IX. AUTHORITY OF THE ON-SCENE COORDINATOR

- 21. The OSC shall be responsible for overseeing Purchaser's implementation of this Agreement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Agreement, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

X. PAYMENT OF OVERSIGHT COSTS

[NOTE: Use the following three paragraphs if the Agreement calls for periodic billing of Oversight Costs. The language may be amended to require Purchaser to establish and maintain a private escrow account into which Oversight Cost payments shall be made and from which Oversight Cost payments shall be disbursed to EPA.]

- 22. Payment of Oversight Costs Upon Receipt of Periodic Bills.
 - a. Purchaser shall pay EPA all Oversight Costs not inconsistent with the NCP [if appropriate, insert "in an amount not to exceed ["\$____" or "\$____ per year"] following the Effective Date."]. On a periodic basis, EPA will send Purchaser a bill requiring payment that includes a [insert name of standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors.] Purchaser shall make all payments required by this Paragraph by certified or cashier's check made payable to "EPA Hazardous Substance Superfund," referencing the name and address of Purchaser, the Site name, EPA Region and Site/Spill ID Number _____, and the EPA docket number for this action. Purchaser shall send each check to [insert appropriate Superfund lockbox number and address]. **[NOTE: Regions may substitute EFT payment instructions.]**

- b. In the event that a payment for Oversight Costs is not made within 30 days of Purchaser's receipt of a bill, Purchaser shall pay Interest on the unpaid balance. Interest shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment.
 - c. [The total amount to be paid by Purchaser pursuant to Paragraph 22 shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [The total amount to be paid by Purchaser pursuant to Paragraph 22 shall be deposited by EPA in the [Site Name] 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.]
23. At the time of each payment, Purchaser shall send notice that such payment has been made to [insert names and mailing addresses of Regional Financial Management Officer and any other receiving officials at EPA].
24. Pursuant to Section XIII (Dispute Resolution), Purchaser may dispute all or part of a bill for Oversight Costs if Purchaser determines that EPA has made a mathematical error or included a cost item that is outside the definition of Oversight Costs, or if Purchaser believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Purchaser shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 22.a on or before the due date. Within the same time period, Purchaser shall pay the full amount of the contested costs into an interest-bearing escrow account. Purchaser shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 23. Purchaser shall ensure that the prevailing party in the dispute receives the amount upon which it prevailed from the escrow funds plus any interest accrued within 20 calendar days after the dispute is resolved.

[NOTE: Use the following alternative Paragraphs 22-24 if the Agreement calls for a lump sum Oversight Cost payment. The language may be amended to require Purchaser to establish and maintain a private escrow account into which Oversight Cost payments shall be made and from which Oversight Cost payments shall be disbursed to EPA.]

22. Payment of Sum Certain for Oversight Costs.

- a. Within 30 days after the Effective Date, Purchaser shall pay to EPA \$ ____ for Oversight Costs. **[NOTE: The following language should be used if the payment amount is above \$25,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Purchaser by EPA Region ____, and shall be accompanied by

a statement identifying the name and address of Purchaser, the Site name, the EPA Region and Site/Spill ID Number ____, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below \$25,000.]** Payment shall be made by certified or cashiers check made payable to “EPA Hazardous Substance Superfund.” The check, or letter accompanying the check, shall identify the name and address of Purchaser, the Site name, the EPA Region and Site/Spill ID Number ____, and the EPA docket number for this action, and shall be sent to [insert appropriate Superfund lockbox number and address.]

- b. In the event that payment of Oversight Costs is not made within 30 days after the Effective Date, Purchaser shall pay Interest on the unpaid balance. The Interest on Oversight Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment.
23. [The total amount to be paid by Purchaser pursuant to Paragraph 22 shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [The total amount to be paid by Purchaser pursuant to Paragraph 22 shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to finance Oversight Costs.]
24. At the time of payment, Purchaser shall send notice that payment has been made to [insert names and mailing addresses of Regional Financial Officer and any other receiving officials at EPA.]

[NOTE: If the initial lump sum Oversight Cost payment is placed in a site-specific special account, the following language may be used to provide for return to Purchaser of any unused Oversight Costs. (Similar language may be used to provide for return of excess amounts from a private escrow account if one is used.)]

___. Return of Excess Sum Certain Oversight Cost Payment. After EPA issues its Notice of Completion pursuant to Section XXV and has performed a final accounting of Oversight Costs, EPA shall remit and return to Purchaser any unused amount of the funds paid by Purchaser pursuant to Paragraph 22 above.

[NOTE: The following paragraphs below may be used to supplement the amount received under the lump sum Oversight Cost payment method with additional Oversight Cost payments, if actual oversight costs exceed the EPA estimate upon which the sum certain payment was based. Two options are provided. Option 1 calls for payment of the actual amount of excess costs upon receipt of periodic bills. Option 2 calls for payment of pre-established additional amounts. Both options include the same dispute resolution provision.]

[Option 1:]

- ___ Payment of Additional Oversight Costs Upon Receipt of Periodic Bills. In the event that Oversight Costs exceed [\$____], Purchaser shall pay EPA additional Oversight Costs not inconsistent with the NCP [if appropriate, insert, “in an amount not to exceed [\$____ or ____%] [per year] following the Effective Date”] (hereinafter “Additional Oversight Costs”). If Additional Oversight Costs are incurred, EPA will send Purchaser one or more bills requiring payment [of the amount/percentage specified above], which includes a summary of the Additional Oversight Costs in the form of a [insert name of standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors]. Purchaser shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph ___ below (Resolution of Disputes Concerning Payment of Additional Oversight Costs). If payment is not made within 30 days of Purchaser’s receipt of a bill, Purchaser shall pay Interest on the unpaid balance, which shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payment(s) shall be made in accordance with Paragraphs 22.a, 23 and 24 above.

[Option 2:]

- ___ Payment of Additional Oversight Costs in Set Amounts. Purchaser shall pay EPA additional Oversight Costs [in an amount not to exceed a total of \$_____] (hereinafter “Additional Oversight Costs”) in the following increments: i. If total Oversight Costs reach [\$____,] Purchaser shall pay an additional [\$____]; ii. If total Oversight Costs reach [\$____,] Purchaser shall pay an additional [\$____].” Upon the occurrence one or both of these events, EPA shall send Purchaser a bill requiring payment, which shall include a summary of the Additional Oversight Costs in the form of a [insert name of standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors]. Purchaser shall make all payments within 30 days of receipt of a bill requiring payment, except as otherwise provided in Paragraph ___ below (Resolution of Disputes Concerning Payment of Additional Oversight Costs). If payment is not made within 30 days of Purchaser’s receipt of a bill, Purchaser shall pay Interest on the unpaid balance, which shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payment(s) shall be made in accordance with Paragraphs 22.a, 23, and 24 above.

[Dispute Resolution for use with either Option 1 or Option 2:]

- ___ Resolution of Disputes Concerning Payment of Additional Oversight Costs. Purchaser may dispute, pursuant to Section XIII (Dispute Resolution), all or part of a bill for Additional Oversight Costs if Purchaser determines that EPA has made a mathematical error or included a cost item that is outside the definition of Oversight Costs, or if Purchaser believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Purchaser shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 22.a (Payment of Sum Certain for Oversight Costs) on or before the due date. Within the same time period, Purchaser shall pay the full amount of the contested costs into an interest-bearing escrow account.

Purchaser shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 24. Purchaser shall ensure that the prevailing party in the dispute receives the amount upon which it prevailed from the escrow funds plus any interest accrued within 20 calendar days after the dispute is resolved.

XI. ACCESS/NOTICE TO SUCCESSORS/INSTITUTIONAL CONTROLS

25. Purchaser agrees to provide EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Property and to any other property owned or controlled by Purchaser to which access is required for the implementation of response actions at the Site. EPA agrees to provide reasonable notice to Purchaser of the timing of response actions to be undertaken at the Property and other areas owned or controlled by Purchaser. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and other authorities.
26. Purchaser shall submit to EPA for review and approval a notice to be filed with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State or Commonwealth of _____, which shall provide notice to all successors-in-title that the Property is part of the Site, [that EPA filed a lien under Section 107(r) of CERCLA, 42 U.S.C. § 9607(r), Instrument Number _____, on Date _____,] **[also insert reference to 107(I) lien if one has been filed]** [that EPA issued an Action Memorandum on _____ providing for the performance of a removal action at the Site that Purchaser will be performing,] and that EPA has released and waived its Section 107(r) lien on the Property in this Agreement in accordance with Section XXI (Release and Waiver of Lien). Purchaser shall record the notice(s) within _____ days of EPA's approval of the notice(s). Purchaser shall provide EPA with a certified copy of the recorded notice(s) within _____ days of recording such notices(s).
27. Purchaser shall implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action.⁶
28. For so long as Purchaser is an owner or operator of the Property, Purchaser shall require that assignees, successors in interest, and any lessees, sublessees and other parties with rights to use the Property shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Purchaser shall require that assignees, successors in interest, and any lessees, sublessees, and other parties with rights to use the Property implement and comply with any land use

⁶ As part of the negotiation of this Agreement, EPA should require that the issue of institutional controls be resolved with EPA as the third-party beneficiary, with recognition of EPA's authority to enforce institutional controls. The RD/RA model CD provides relevant language.

restrictions and institutional controls on the Property in connection with a response action, and not contest EPA's authority to enforce any land use restrictions and institutional controls on the Property.

29. **[NOTE: Any requirement concerning institutional controls must survive property transfer, unless the particular institutional control is for a specifically limited period of time.]** Upon sale or other conveyance of the Property or any part thereof, Purchaser shall require that each grantee, transferee or other holder of an interest in the Property or any part thereof shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Purchaser shall require that each grantee, transferee or other holder of an interest in the Property or any part thereof shall implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action and not contest EPA's authority to enforce any land use restrictions and institutional controls on the Property.
30. Purchaser shall provide a copy of this Agreement to any current lessee, sublessee, and other party with rights to use the Property as of the Effective Date.

XII. RECORD RETENTION, DOCUMENTATION, AND AVAILABILITY OF INFORMATION

31. Purchaser shall preserve all documents and information relating to the Work, or relating to the hazardous substances, pollutants or contaminants found on or released from the Site, and shall submit them to EPA upon completion of the Work required by this Agreement, or earlier if requested by EPA.
32. Purchaser may assert a business confidentiality claim pursuant to 40 C.F.R. § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Agreement, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). Analytical and other data specified in Section 104(e)(7)(F) of CERCLA shall not be claimed as confidential by Purchaser. EPA shall disclose information covered by a business confidentiality claim only to the extent permitted by, and by means of the procedures set forth at, 40 C.F.R. Part 2 Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Purchaser.

XIII. DISPUTE RESOLUTION

33. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Agreement. EPA and Purchaser shall attempt to resolve any disagreements concerning this Agreement expeditiously and informally. If EPA contends that Purchaser is in violation of this Agreement, EPA shall notify Purchaser in writing, setting forth the basis for its position. Purchaser may dispute EPA's position pursuant to Paragraph 34.

34. If Purchaser disputes EPA's position with respect to Purchaser's compliance with this Agreement or objects to any EPA action taken pursuant to this Agreement, [if applicable, insert "including billings for Oversight Costs [or Additional Oversight Costs],"] Purchaser shall notify EPA in writing of its position unless the dispute has been resolved informally. EPA may reply, in writing, to Purchaser's position within ___ days of receipt of Purchaser's notice. EPA and Purchaser shall have ___ days from EPA's receipt of Purchaser's written statement of position to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Such extension may be granted orally but must be confirmed in writing.
35. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by both Parties, be incorporated into and become an enforceable part of this Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the [insert Region-specific] level or higher will review the dispute on the basis of the parties' written statements of position and issue a written decision on the dispute to Purchaser. EPA's decision shall be incorporated into and become an enforceable part of this Agreement. Purchaser's obligations under this Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Purchaser shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

[NOTE: For non-time-critical removal actions, the Region may consider including non-binding mediation, which would occur after the exchange of written information, but prior to the final review by the Regional official.]

XIV. FORCE MAJEURE

36. Purchaser agrees to perform all requirements of this Agreement within the time limits established under this Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Purchaser, or of any entity controlled by Purchaser, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Agreement despite Purchaser's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work[,] [or] increased cost of performance [insert, if applicable, “, or a failure to attain performance standards/action levels set forth in the Action Memorandum.”].
37. If any event occurs or has occurred that may delay the performance of any obligation under this Agreement, whether or not caused by a *force majeure* event, Purchaser shall notify EPA orally within [insert period of time] of when Purchaser first knew that the event might cause a delay. Within ___ days thereafter, Purchaser shall provide to EPA in writing 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; Purchaser's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Purchaser, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Purchaser from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.
38. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Purchaser in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Purchaser in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.
39. If Purchaser elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution), Purchaser shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Purchaser shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a *force majeure* event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Purchaser complied with the requirements of Paragraphs 37 and 38 above. If

Purchaser carries this burden, the delay at issue shall be deemed not to be a violation by Purchaser of the affected obligation of this Agreement.

[__. **STIPULATED PENALTIES**]

[NOTE: Use of this Section is optional and will be left to Regional enforcement discretion.]

[__. Purchaser shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs __ and __ for failure to comply with the requirements of this Agreement specified below, unless excused under Section XIV (*Force Majeure*). “Compliance” by Purchaser shall include completion of the activities under this Agreement or any work plan or other plan approved under this Agreement identified below in accordance with all applicable requirements of law, this Agreement, [the SOW,] and any plans or other documents approved by EPA pursuant to this Agreement and within the specified time schedules established by and approved under this Agreement.

__ Stipulated Penalty Amounts - Work.

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

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ _____	1st through 14th day
\$ _____	15th through 30th day
\$ _____	31st day and beyond

b. Compliance Milestones

[List violations or compliance milestones, including due dates for payments]

__ Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports [or other written documents] pursuant to Paragraphs 18 and 19:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ _____	1st through 14th day
\$ _____	15th through 30th day
\$ _____	31st day and beyond

__ In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 49 of Section XVIII (Reservation of Rights by United States), Purchaser shall be liable for a stipulated penalty in the amount of \$ _____.

__ 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: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Purchaser of any deficiency; and 2) with respect to a decision by the EPA Management Official at the [insert Region-specific] level or higher, under Paragraph 35 of Section XIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

- ___ Following EPA's determination that Purchaser has failed to comply with a requirement of this Agreement, EPA may give Purchaser written notification of the failure and describe the noncompliance. EPA may send Purchaser a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Purchaser of a violation.

- ___ All penalties accruing under this Section shall be due and payable to EPA within 30 days of Purchaser's receipt from EPA of a demand for payment of the penalties, unless Purchaser invokes the dispute resolution procedures under Section XIII (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to [insert Superfund Lockbox number and address], shall indicate that the payment is for stipulated penalties, and shall reference the name and address of Purchaser, the Site name, the EPA Region and Site/Spill ID Number ____, the EPA Docket Number_____. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 69, and to [insert the names and mailing addresses of any other receiving officials at EPA].

- ___ The payment of penalties shall not alter in any way Purchaser's obligation to complete performance of the Work required under this Agreement.

- ___ Penalties shall continue to accrue during any dispute resolution period, except as provided in Paragraph __ above, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

- ___ If Purchaser fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Purchaser shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph __. Nothing in this Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Purchaser's violation of this Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this

Agreement. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Agreement.]

XV. FINANCIAL RESPONSIBILITY

[NOTE: Regions may delete this section if the estimated cost of the Work is less than \$50,000.]

40. The Parties agree and acknowledge that, in the event Purchaser ceases implementation of or otherwise fails to complete the Work in accordance with this Agreement, Purchaser shall ensure that EPA is held harmless from or reimbursed for all costs required for completion of the Work. For these purposes, Purchaser shall establish and maintain Financial Responsibility for the benefit of EPA in the amount of \$[insert estimated cost of Work] (hereinafter “Estimated Cost of the Work”) in one or more of the following forms, each of which must be satisfactory in form and substance to EPA:
- a. A surety bond unconditionally guaranteeing payment and/or performance of [Work];
 - b. One or more irrevocable letters of credit, payable to or at the direction of EPA;
 - c. A trust fund established for the benefit of EPA;
 - d. A policy of insurance that provides EPA with acceptable rights as a beneficiary;
 - e. A demonstration by Purchaser that it meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied;
 - f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (i) a direct or indirect parent company of Purchaser, or (ii) a company that has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with Purchaser; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work that it proposes to guarantee hereunder; or
 - g. [Insert any other method(s) appropriate to the particular case.]
41. [For subsections a, b, c, d, f, or g:] Purchaser has selected, and EPA has approved, as an initial Financial Responsibility mechanism a [insert type] pursuant to Paragraph 40() in the form attached hereto as Exhibit []. Prior to beginning Work under this Agreement, Purchaser shall submit all executed and/or otherwise finalized instruments and other documents required in order to make the selected Financial Responsibility mechanism legally binding, in a form substantially identical to the documents attached hereto as Exhibit [], to the EPA Regional

Financial Management Officer in accordance with Section XXIX (Notices and Submissions) of this Agreement, [with a copy to [insert name, title, and address of Regional financial assurance specialist, if one exists in the relevant Region]] and to EPA as specified in Section XXIX. [For subsection e:] Purchaser has selected, and EPA has approved, as an initial Financial Responsibility mechanism a demonstration of satisfaction of financial test criteria pursuant to Paragraph 40(e) with respect to Purchaser.

42. The commencement of any Work Takeover pursuant to Paragraph 49 of this Agreement (Work Takeover) shall trigger EPA's right to receive the benefit of any Financial Responsibility mechanism(s) provided pursuant to Paragraph 40(a), (b), (c), (d), (f), or (g), and at such time EPA shall have immediate access to resources guaranteed under any such Financial Responsibility mechanism(s), whether in cash or in kind, as needed to complete the Work. In the event that the Financial Responsibility mechanism involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 40(e), then, after the commencement by EPA of any Work Takeover pursuant to Paragraph 49 of this Agreement (Work Takeover), Purchaser shall immediately upon written demand from EPA deposit into an account specified by EPA a cash amount up to but not exceeding the Estimated Cost of the Work as of such date, as determined by EPA and notified to Purchaser.
43. If Purchaser desires to reduce the amount of any Financial Responsibility mechanism(s), change the form or terms of any Financial Responsibility mechanism(s), or release, cancel or discontinue any Financial Responsibility mechanism(s) because the Work has been fully and finally completed in accordance with this Agreement, Purchaser shall make this request to EPA in writing and EPA shall either approve or disapprove the request in writing.

XVI. CERTIFICATION

44. By entering into this agreement, Purchaser certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Purchaser and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. Purchaser also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States determines that information provided by Purchaser is not materially accurate and complete, the Agreement, within the sole discretion of EPA, shall be null and void and EPA reserves all rights it may have.

XVII. COVENANT NOT TO SUE BY UNITED STATES

[NOTE: Use Paragraph 45, Alternative 1, if the Agreement calls for periodic billing of Oversight Costs with no initial lump-sum payment.]

45. **[Alternative 1]** In consideration of the actions that will be performed and the payments that will be made by Purchaser under the terms of this Agreement, and except as otherwise specifically provided in this Agreement, the United States covenants not to sue or to take administrative action against Purchaser pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Purchaser of all obligations under this Agreement [, including, but not limited to, payment of Oversight Costs [and Additional Oversight Costs] pursuant to Section X]. This covenant not to sue extends only to Purchaser and does not extend to any other person.

[NOTE: Use Paragraph 45, Alternative 2, if the Agreement calls for an initial lump-sum payment for Oversight Costs.]

45. **[Alternative 2]** In consideration of the actions that will be performed and the payments that will be made by Purchaser under the terms of this Agreement, and except as otherwise specifically provided in this Agreement, the United States covenants not to sue or to take administrative action against Purchaser pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon receipt by EPA of Oversight Costs due under Paragraph 22 (Payment of Sum Certain for Oversight Costs). This covenant not to sue is conditioned upon the complete and satisfactory performance by Purchaser of all obligations under this Agreement [if Additional Oversight Cost payments are/may be due under Section X, insert “, including, but not limited to, payment of Additional Oversight Costs pursuant to Section X.”]. This covenant not to sue extends only to Purchaser and does not extend to any other person.

XVIII. RESERVATION OF RIGHTS BY UNITED STATES

46. Except as specifically provided in this Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA or the United States from seeking legal or equitable relief to enforce the terms of this Agreement, from taking other legal or equitable action as it deems appropriate and necessary.
47. The covenant not to sue set forth in Section XVII above does not pertain to any matters other than those expressly identified therein. The United States reserves, and this Agreement is without prejudice to, all rights against Purchaser with respect to all other matters, including, but not limited to:
- a. claims based on a failure by Purchaser to meet a requirement of this Agreement;
 - b. criminal liability;

- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
 - d. liability for violations of federal, state, or local law or regulations during or after implementation of the Work other than as provided in the Workplan, the Work, or otherwise ordered by EPA;
 - e. liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants at or in connection with the Site after the Effective Date, not within the definition of Existing Contamination;
 - f. liability resulting from exacerbation of Existing Contamination by Purchaser, its successors, assigns, lessees, or sublessees; and
 - g. liability arising from the disposal, release or threat of release of Waste Materials outside of the Site.
48. With respect to any claim or cause of action asserted by the United States, Purchaser shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination and that Purchaser has complied with all of the requirements of 42 U.S.C. § 9601(40).
49. Work Takeover. In the event EPA determines that Purchaser has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Prior to taking over the Work, EPA will issue written notice to Purchaser specifying the grounds upon which such notice was issued and providing Purchaser with ___ days within which to remedy the circumstances giving rise to EPA's issuance of the notice. Purchaser may invoke the procedures set forth in Section XIII (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. After commencement and for the duration of any Work Takeover, EPA shall have immediate access to and benefit of any Financial Responsibility mechanism provided pursuant to Section XV (Financial Responsibility) of this Agreement. Notwithstanding any other provision of this Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XIX. COVENANT NOT TO SUE BY PURCHASER

50. Purchaser 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 Existing Contamination, the Work, [Oversight Costs,] [Additional Oversight Costs] or this Agreement, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the 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 claim arising out of response actions, including any claim under the United States 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; or
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613.

51. 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).

XX. CONTRIBUTION

52. Nothing in this Agreement precludes the United States or Purchaser from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any person not a party to this Agreement, including any claim Purchaser may have pursuant to Section 107(a)(4)(B). Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response actions and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).
53. In the event of a suit or claim for contribution brought against Purchaser, notwithstanding the provisions of Section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to Existing Contamination (including any claim based on the contention that Purchaser is not a BFPP, or has lost its status as a BFPP as a result of response actions taken in compliance with this Agreement or at the direction of the OSC), the Parties agree that this Agreement shall then constitute an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Purchaser would be entitled, from the Effective Date, 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 all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or by any other person with respect to Existing Contamination.
54. In the event Purchaser were found, in connection with any action or claim it may assert to recover costs incurred or to be incurred with respect to Existing Contamination, not to be a BFPP, or to have lost its status as a BFPP as a result of response actions taken in compliance with this Agreement or at the direction of the OSC, the Parties agree that this Agreement shall then constitute an administrative settlement within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Purchaser has resolved its liability for

all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or by any other person with respect to Existing Contamination.

55. Purchaser agrees that with respect to any suit or claim brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.
56. Purchaser also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify the United States in writing within 10 days of service of the complaint on it.

XXI. RELEASE AND WAIVER OF LIEN(S)

57. Subject to the Reservation of Rights in Section XVIII of this Agreement, upon satisfactory completion of the Work specified in Section VIII (Work to be Performed) [and payment of Oversight Costs [or Additional Oversight Costs] due under Section X], EPA agrees to release and waive any lien it may have on the Property now and in the future under Section 107(r) of CERCLA, 42 U.S.C. § 9607(r), for costs incurred or to be incurred by EPA in responding to the release or threat of release of Existing Contamination.

XXII. INDEMNIFICATION

58. Purchaser shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Purchaser, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Agreement. In addition, Purchaser agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Purchaser, Purchaser's officers, directors, employees, agents, contractors, subcontractors and any persons acting on Purchaser's behalf or under Purchaser's control, in carrying out activities pursuant to this Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Purchaser in carrying out activities pursuant to this Agreement. Neither Purchaser nor any such contractor shall be considered an agent of the United States.
59. The United States shall give Purchaser notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Purchaser prior to settling such claim.
60. Purchaser waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Purchaser 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, Purchaser shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Purchaser and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXIII. MODIFICATION

61. The OSC may make minor modifications to any plan or schedule or the SOW in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Agreement may be modified in writing by mutual agreement of the Parties.
62. If Purchaser seeks permission to deviate from any approved work plan or schedule [or SOW], Purchaser's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Purchaser may not proceed with the requested deviation until receiving oral or written approval from the OSC.
63. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Purchaser shall relieve Purchaser of its obligation to obtain any formal approval required by this Agreement, or to comply with all requirements of this Agreement, unless it is formally modified.

XXIV. APPENDICES

64. The following appendices are attached to and incorporated into this Agreement.

[a. Appendix 1 shall mean ____]

XXV. NOTICE OF COMPLETION

65. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Agreement, with the exception of any continuing obligations required by this Agreement, including [insert list of such obligations, e.g., continued compliance with CERCLA Section 101(40) with respect to the Property in accordance with Paragraph 5 of this Agreement, post-removal site controls, record retention, compliance with institutional controls, etc.], EPA will provide written notice to Purchaser. If EPA determines that any such Work has not been completed in accordance with this Agreement, EPA will notify Purchaser, provide a list of the deficiencies, and require that Purchaser modify the Work Plan if appropriate in order to correct such deficiencies. Purchaser shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Purchaser to implement the approved modified Work Plan shall be a violation of this Agreement.

XXVI. EFFECTIVE DATE

66. The effective date of this Agreement shall be the date upon which EPA issues written notice to Purchaser that EPA has fully executed the Agreement after review of and response to any public comments received.

XXVII. DISCLAIMER

67. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA that the Property or the Site is fit for any particular purpose.

XXVIII. PAYMENT OF COSTS

68. If Purchaser fails to comply with the terms of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

XXIX. NOTICES AND SUBMISSIONS

69. Any notices, documents, information, reports, plans, approvals, disapprovals, or other correspondence required to be submitted from one party to another under this Agreement, shall be deemed submitted either when hand-delivered or as of the date of receipt by certified mail/return receipt requested, express mail, or facsimile.

Submissions to Purchaser shall be addressed to:

With copies to:

Submissions to U.S. EPA shall be addressed to:

With copies to:

XXX. PUBLIC COMMENT

70. This Agreement shall be subject to a thirty-day public comment period, after which 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.

The undersigned representative of Purchaser certifies that it is fully authorized to enter into the terms and conditions of this Agreement and to bind the party it represents to this document.

IT IS SO AGREED:

BY:

Name (Purchaser)

Date

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

Regional Administrator

Date

Region __

IT IS SO AGREED:

UNITED STATES DEPARTMENT OF JUSTICE

BY:

Assistant Attorney General

Date

Environment and Natural Resources Division

U.S. Department of Justice