



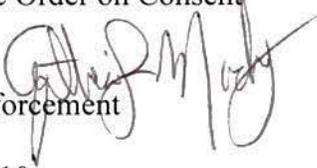
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

SEP 29 2016

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Issuance of Revised Model Resource Conservation and Recovery Act Section 3008(h) Administrative Order on Consent

**FROM:** Cynthia L. Mackey, Director  
Office of Site Remediation Enforcement 

**TO:** Regional Counsels, Regions 1-10  
RCRA Division Directors, Regions 1-10

**I. INTRODUCTION**

This memorandum transmits the 2016 Model Resource Conservation and Recovery Act (RCRA) Section 3008(h) Administrative Order on Consent ("2016 Model AOC"). The 2016 Model AOC was developed in collaboration with Headquarters, Regional, and Department of Justice (DOJ) staff and is intended to support Regions in implementing the National Enforcement Strategy for RCRA Corrective Action (NESCA). This model is now available on the Cleanup Enforcement Model Language and Sample Documents Database located at <https://cfpub.epa.gov/compliance/models/>.

The 2016 Model AOC is effective today and supersedes the Model RCRA § 3008(h) Consent Order (Dec. 15, 1993) and the *Model Provisions for Cost Estimates and Financial Responsibility for Use in RCRA § 3008(h) Administrative Order[s] on Consent* (Feb. 8, 2006).

**II. DESCRIPTION OF MODEL**

The last full RCRA § 3008(h) model AOC was issued by EPA more than twenty years ago. Since that time, EPA has issued the 2006 financial responsibility update referenced above and has made numerous additional language changes in actual practice. The 2016 Model AOC provides an up-to-date national model, which will assist the Regions in drafting speedy, nationally-consistent RCRA § 3008(h) AOCs.

Consistent with the 1993 model, the 2016 Model AOC provides optional language for settlements that address all phases of EPA's RCRA § 3008(h) corrective action program – from interim measures through corrective measures implementation (CMI). It is a comprehensive and detailed document, which the Regions may adapt to fit the needs of the facility at issue and to address variations in Regional practice and procedure.

The 2016 Model AOC contains many revisions, which are generally designed to bring the model into conformance with guidance and with models issued more recently with the Office of Site Remediation Enforcement (OSRE). It incorporates the model geospatial data and electronic submission of deliverables language announced in September 2014.<sup>1</sup> Further, the revised model contains updated language for: property requirements (covering site access and applicable use restrictions); contractor qualifications; access to information; confidential business information; record retention; force majeure; and stipulated penalties.

The 2016 Model AOC does not include language specifically addressing or incorporating: (1) green remediation; (2) climate change adaptation; or (3) EPA's Lean approach to corrective action, known as the RCRA FIRST approach.<sup>2</sup> Nor does this model address all aspects of EPA's Next Generation compliance<sup>3</sup> efforts. In addition, it is not a streamlined model. However, OSRE fully supports the Regions in modifying this model to incorporate such efforts and will update this document as new model language is developed.

### **III. CONSULTATION WITH OSRE**

Each Region should consult with Director, Policy and Program Evaluation Division, OSRE regarding the first RCRA § 3008(h) AOC negotiated after September 30, 2016. To accomplish the consultation, the draft AOC should be sent to Peter Neves of OSRE's Policy and Program Evaluation Division (PPED).

### **IV. CONTACTS**

Please direct any questions about this model to Anne Berube of OSRE's Regional Support Division (RSD) at 202-564-4795 (berube.anne@epa.gov) or Peter Neves at 202-564-6072 (neves.peter@epa.gov).

### **V. DISCLAIMER**

This memorandum and the documents referenced herein are intended as guidance for EPA employees. They are not rules and do not create any legal obligation. The extent to which EPA applies them in a particular case will depend on the facts of the case.

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<sup>1</sup> See *Transmittal of Model Geospatial Data and Electronic Submission of Deliverables Language for Inclusion in CERCLA Statements of Work* (Sept. 29, 2014), available at <https://www.epa.gov/enforcement/guidance-model-geospatial-data-language-use-cercla-sows>.

<sup>2</sup> Lean refers to a collection of principles and methods that focus on the systematic identification and elimination of non-value added activity involved in producing a product or delivering a service to customers. See <https://www.epa.gov/lean>. The RCRA FIRST approach is designed to improve the efficiency of RCRA Facility Investigations and remedy selections. See <https://www.epa.gov/hw/toolbox-corrective-action-resource-conservation-and-recovery-act-facilities-investigation-remedy>.

<sup>3</sup> More information about Next Generation compliance is available at <https://www.epa.gov/compliance/next-generation-compliance>.

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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION \_\_\_\_

_____ )	
IN THE MATTER OF: )	
)	RCRA Docket No.
[Facility Name and Location] )	
)	
[Names of Respondents (if many, reference )	
attached list)], )	
)	
Respondents )	
)	
Proceeding under Section 3008(h) )	<b>ADMINISTRATIVE ORDER</b>
of the Resource Conservation and )	<b>ON CONSENT</b>
Recovery Act, 42 U.S.C. § 6928(h) )	
)	
)	
_____ )	

**MODEL RESOURCE CONSERVATION AND RECOVERY ACT SECTION 3008(h)  
ADMINISTRATIVE ORDER ON CONSENT**

**September 2016**

This document contains automatic section and paragraph numbers and automatic section and paragraph cross references, and an automated Table of Contents. If you add or delete sections or paragraphs, please do not attempt to manually renumber any sections or paragraphs or cross references. Please see instructions at the end for more details.

This model RCRA § 3008(h) Administrative Order on Consent and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures. This model is a living document and may be revised periodically without public notice. It is not designed for use as a unilateral order or as an order for injunctive relief in a court action.

Transmission of this model order is not intended to modify EPA guidance with respect to streamlined orders. See, e.g., “National Enforcement Strategy for Corrective Action,” dated April 27, 2010, at 9-11, available at <https://www.epa.gov/enforcement/guidance-national-enforcement-strategy-rcra-corrective-action>.

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## I. JURISDICTION

1. This Administrative Order on Consent (“Order”) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and [**corporate/individual name**] (“Respondent”) regarding the [**name of facility/address**] (“the Facility”). This Order provides for the performance of corrective action activities at or in connection with the Facility. A map that generally depicts the Facility is attached hereto as Appendix [A].

2. This Order is issued under Section 3008(h) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6928(h). The Administrator of EPA has delegated the authority to issue orders under Section 3008(h) to the Regional Administrator of Region [**Number**] by EPA Delegation Nos. 8-31, dated March 12, 2014, and 8-32, dated May 11, 1994, [**if applicable**: and this authority has been further delegated by the Regional Administrator for Region [**Number**] to [**Title**]].

3. [**If applicable**: On [**date**], EPA granted the State of [**State**] (the State) authorization to operate a state Hazardous Waste program in lieu of the federal program, pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6928(b). EPA has also subsequently authorized additional revisions to the State’s authorized program.] [**If applicable**: The State, however, does not have authority to enforce Section 3008(h) of RCRA.] [**Optional but recommended**: The State has been given notice of the issuance of this Order.]

4. EPA and Respondent recognize that this Order has been negotiated in good faith. Respondent consents to, and agrees not to contest, EPA’s jurisdiction to issue this Order or to enforce its terms. Further, Respondent will not contest EPA’s jurisdiction to: compel compliance with this Order in any subsequent enforcement proceedings, either administrative or judicial; require Respondent’s full or interim compliance with the terms of this Order; or impose sanctions for violations of this Order. Respondent waives any right to request a hearing on this matter pursuant to Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), and 40 C.F.R. Part 24, and consents to the issuance of this Order without a hearing under Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), as an Administrative Order on Consent issued pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h).

5. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order, including any right of judicial review under Chapter 7 of the Administrative Procedures Act, 5 U.S.C. §§ 701-706, and 40 C.F.R. Part 24 providing for review of final agency action. [**NOTE: For an order involving a federal facility, the federal agency respondent must also waive its opportunity to confer with the Administrator.**]

## II. PARTIES BOUND

6. This Order is binding upon EPA and upon Respondent and its [heirs,] agents, successors, and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property, shall not alter Respondent’s

responsibilities under this Order. Any conveyance of title, easement, or other interest in the Facility shall not affect Respondent's obligations under this Order.

7. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement and to execute and legally bind Respondent to this Settlement.

8. Respondent shall provide a copy of this Order to each contractor hired to perform the Work and to each person representing Respondent with respect to the Facility or the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Order. Respondent or its contractors shall provide written notice of this Order to all subcontractors hired to perform any portion of the Work required by this Order. Respondent shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work in accordance with the terms of this Order.

### III. STATEMENT OF PURPOSE

**[NOTE: This Section should be modified if the Region adopts a "Lean" approach. The Lean approach encourages identifying and eliminating non-value added activity in any process. For more information regarding the Lean approach, please visit [https://www.epa.gov/epawaste/hazard/correctiveaction/lean\\_effort.htm](https://www.epa.gov/epawaste/hazard/correctiveaction/lean_effort.htm).]**

9. In entering into this Order, the mutual objectives of EPA and Respondent are:  
**[Insert all that apply:**

- a. to perform Interim Measures (IM) at the Facility to evaluate and mitigate threats to human health or the environment;
- b. to perform a RCRA Facility Investigation (RFI) to determine fully the nature and extent of any release of Hazardous Waste at or from the Facility;
- c. to perform a Corrective Measures Study (CMS) to identify and evaluate alternatives for the corrective measures necessary to prevent, mitigate, and remediate any releases of Hazardous Wastes at or from the Facility;
- d. to implement the corrective measures selected by EPA at the Facility; and
- e. to perform any other activities necessary to correct or evaluate actual or potential threats to human health or the environment resulting from the release or potential release of Hazardous Waste at or from the Facility.]

### IV. DEFINITIONS

10. Unless otherwise expressly provided in this Order, terms used in this Order that are defined in RCRA, 42 U.S.C. §§ 6901-6992k, shall have the meaning assigned to them in RCRA. Whenever terms listed below are used in this Order or its Appendices, the following definitions shall apply solely for purposes of this Order:

“Areas of Concern” shall mean any area of the Facility under the control or ownership of the owner or operator where a release to the environment of Hazardous Waste has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration of the release.

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

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

“Effective Date” shall mean the date EPA signs this Order.

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

“Facility” shall mean all contiguous property under the control of the owner and/or operator.

“Hazardous Constituents” shall mean those constituents listed in Appendix VIII to 40 C.F.R. Part 261 or any constituent identified in Appendix IX to 40 C.F.R. Part 264.

“Hazardous Waste(s)” shall mean any hazardous waste as defined in 1004(5) and 3001 of RCRA. This term includes Hazardous Constituents as defined above.

“Institutional Controls” or “ICs” shall mean Proprietary Controls and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices of contamination, notices of administrative action, or other notices that: limit land, water, or other resource use to minimize the potential for human exposure to contaminants at or in connection with the Facility; limit land, water, or other resource use to implement, ensure non-interference with, or ensure the protectiveness of the Work; or provide information intended to modify or guide human behavior at or in connection with the Facility.

**[(Optional: If there are properties beyond the Facility boundary where the Region has determined that corrective action is necessary to protect human health and the environment, this definition and the following definition of “Off-site Property Owner” should be included.)]**

[“Off-site Property” shall mean all real property beyond the Facility boundary.]

[“Off-site Property Owner shall mean any person, other than Respondent, who owns or controls any Off-site Property, including [names].]

“Order” shall mean this Administrative Order on Consent and any appendices attached hereto (listed in Section 76 (Integration/Appendices)). In the event of any conflict between this Order and any appendix, this Order shall control. Deliverables approved,

conditionally-approved, or modified by EPA also will be incorporated into and become enforceable parts of this Order.

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

“Parties” shall mean EPA and Respondent.

**[(Optional: Use if PCs have been selected as part of the corrective measures:)]**

[“Proprietary Controls” or “PCs” shall mean easements or covenants running with the land that: (i) limit land, water or other resource use and/or provide access rights; and (ii) are created pursuant to common law or statutory law by an instrument that is recorded by the owner in the appropriate land records office.]

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992, as amended by the Hazardous and Solid Waste Amendments of 1984 (also known as the Resource Conservation and Recovery Act).

“Respondent” shall mean **[name of Respondent]**.

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

“Solid Waste Management Unit(s)” or “SWMU(s)” shall mean any discernable unit(s) at which solid wastes have been placed at any time irrespective of whether the unit was intended for the management of solid waste or Hazardous Waste. Such units include any area at a Facility where solid wastes have been routinely or systematically released.

“State” shall mean the State [or Commonwealth] of **[name of State or Commonwealth]**.

“Statement of Work” or “SOW” shall mean a document or documents prepared by EPA describing the activities Respondent must perform to implement the Work required by this Order.

“Transfer” shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.

“Work” shall mean all activities and obligations Respondent is required to perform under this Order, except those required by Section XII (Record Retention).

## V. FINDINGS OF FACT

**[NOTE: Findings of Facts should be presented concisely, accurately and logically. References to other documents (e.g., previous orders) may substitute for a recitation of the facts if included as Appendices.]**

11. EPA has made the following findings of fact:

a. Respondent is a person doing business in the State of **[State]**.

b. Respondent is [a generator of Hazardous Waste and] an owner and/or operator of a Hazardous Waste management facility located at [location]. Respondent engaged in [treatment, storage or disposal] of Hazardous Waste at the Facility subject to interim status requirements [40 C.F.R. Part 265] **[and cite appropriate state statute and regulation.]**  
**[NOTE: Specify type of operation(s) – landfill, incinerator, etc.]**

c. Respondent owned and/or operated the Facility as a Hazardous Waste management facility on or after November 19, 1980 (or the date of any statutory or regulatory change rendering the Facility subject to the requirements to obtain a RCRA permit), the date that renders facilities subject to interim status requirements or the requirement to have a permit under §§ 3004 or 3005 of RCRA, 42 U.S.C. §§ 6924 or 6925. **[NOTE: Include summary of Facility's history, including proof of operating status to support eligibility for interim status.]**

d. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, Respondent notified EPA of its Hazardous Waste activity. In its notification dated **[date]**, Respondent identified itself as a [generator of hazardous waste and/or an owner/operator of a treatment, storage and/or disposal facility for Hazardous Waste]. **[NOTE: When appropriate, include whether Respondent notified EPA/State of its Hazardous Waste activity; relevant enforcement history; and relevant past EPA and/or State activities and investigations.]**

e. In its **[name of Facility submission/notification of Part A permit application]** dated **[date]**, Respondent identified itself as handling the following Hazardous Wastes at the Facility: **[insert relevant facts here]**.

f. Respondent's Facility includes: **[insert description of Facility, including location, facility-wide characteristics and characteristics of SWMUs and Areas of Concern]**.

**[NOTE: Consider adding specifics here regarding the Facility location and address (e.g., boundaries, size and features) and include reference to map referenced in Paragraph 1 and attached as Appendix [A].]**

g. Documentation of Release: **[include list of conditions and data to show Hazardous Wastes are present and releases have occurred]**.

h. **[Optional]** Hazardous Wastes may further migrate into the environment by the following pathways: **[insert appropriate facts here]**.

i. **[Optional]** The Hazardous Wastes identified in Paragraph 11.g above (may) pose(s) a threat to human health or the environment.

j. The Facility is located **[describe residences, aquifers, domestic well supplies, surface water bodies (include river/lakes and types of use), wells (include number and type of use), and fragile environments.]**

k. Releases from the Facility (have/may/may have) migrate(d) toward **[describe present and future potential and actual receptors].**

**[NOTE: If the Region has identified any specific Off-site Property, the Region should consider adding facts here regarding such Property or Properties. Such Off-site Property generally should be only property where the Region has determined that corrective action is necessary to protect human health or the environment. This includes all real property beyond the Facility boundary where it is determined that access; land, water, or other resource use restrictions; or ICs are needed to implement the Work. It is generally sufficient to describe the property using the street address or the tax parcel ID number, but the Region also may use the legal property description. Legal property descriptions can be lengthy. It is common in conveyance documents to include the legal property description in an Appendix. If using a legal property description, it should be the kind found in a deed.]**

## **VI. CONCLUSIONS OF LAW AND DETERMINATIONS**

12. Based on the Findings of Fact set forth above, EPA has determined that:

a. Respondent is a “person” within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

b. Respondent is [was] the owner and/or operator of a facility that [has operated, is operating, should be or should have been operating] under interim status under Section 3005(e) of RCRA, 42 U.S.C. § 6925(e).

c. Certain wastes and constituents found at the Facility are Hazardous Wastes pursuant to Sections 1004(5) and 3001 of RCRA, 42 U.S.C. §§ 6903(5) and 6921.

d. There is or has been a release of Hazardous Wastes into the environment from the Facility.

e. The actions required by this Order are necessary to protect human health or the environment.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND EPA PROJECT COORDINATOR**

13. Within [14] days after the Effective Date, Respondent shall designate and notify EPA regarding its Project Coordinator. Respondent’s notice to EPA must include the Project Coordinator’s name, title, address, telephone number, email address, and qualifications. The Project Coordinator must have sufficient expertise to coordinate the Work and must be present at

the Facility or readily available during implementation of the Work. EPA is entitled to disapprove the designated Project Coordinator within \_\_ days of Respondent's notice. If EPA disapproves of the designated Project Coordinator, Respondent shall designate and notify EPA of an alternate within \_\_ days. **[NOTE: If Respondent's Project Coordinator has been selected prior to signature of the Order, replace the first sentence with the following and delete the third sentence:** Respondent has designated, and EPA has not disapproved, the following individual as Project Coordinator, who shall be responsible for administration of all actions by Respondent required by this Order: **[name, title, address, telephone number, and email address].**] EPA has designated \_\_\_\_\_ of the **[insert Regional Office, Region \_\_]** as EPA's Project Coordinator. EPA and Respondent shall have the right, subject to this Paragraph, to change their designated Project Coordinators. Respondent shall notify EPA \_\_ days before such a change is made. The initial notification by Respondent of a change in the Project Coordinator may be made orally, but shall be promptly followed by a written notice.

14. Respondent shall retain one or more contractors to perform the Work and shall, within 10 days after the Effective Date, notify EPA of the name(s), title(s), and qualifications of such contractor(s). Respondent shall also notify EPA of the name(s), title(s), and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least \_\_ days prior to commencement of such Work. EPA retains the right to disapprove any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves a selected contractor, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within \_\_ days after EPA's disapproval. With respect to any proposed contractor, Respondent shall demonstrate that the proposed contractor demonstrates compliance with ASQ/ANSI E4:2014 "Quality management systems for environmental information and technology programs – Requirements with guidance for use" (American Society for Quality, February 2014), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, Mar. 2001, reissued May 2006) or equivalent documentation as determined by EPA. The qualifications of the persons undertaking the Work for Respondent shall be subject to EPA review for verification that such persons meet objective assessment criteria (*e.g.*, experience, capacity, technical expertise) and do not have a conflict of interest with respect to the project. **[NOTE: Any decision not to require submission of the contractor's QMP should be documented in a memorandum from EPA's Project Coordinator and Regional QA personnel to the site file.]**

15. Except as otherwise provided in this Order, Respondent shall direct all submissions required by this Order to EPA's Project Coordinator in accordance with Section XIII (Reporting and Document Certification). EPA's Project Coordinator has the authority to oversee Respondent's implementation of this Order. The absence of EPA's Project Coordinator from the Facility shall not be cause for the stoppage of Work unless specifically directed by EPA's Project Coordinator.

## VIII. WORK TO BE PERFORMED

**[NOTE: Paragraphs 16 and 18 should always be used. For Paragraph 17, use subparagraphs appropriate to the Work being requested.]**

[NOTE: This Section may be modified if the Region adopts a Lean approach or incorporates use of a Conceptual Site Model. For example, if a Lean approach is taken, elements of the Corrective Action Framework document may be incorporated into the Order as enforceable conditions. For more information regarding the Lean approach, please visit <https://www.epa.gov/lean>.]

[NOTE: For complicated orders that include Corrective Measures Implementation (CMI), consider using a “Master Plan” scheme, whereby Respondent submits updated deadlines every quarter, which EPA may approve or disapprove, in accordance with Section XIV (Agency Approvals/Additional Work/Modifications). For more information regarding Master Plans, contact the Office of Site Remediation Enforcement (OSRE).]

## 16. General Work Requirements

a. Pursuant to Section 3008(h) of RCRA, Respondent agrees to and is hereby ordered to perform the Work in accordance with any Statement(s) of Work (SOW(s)), workplans or schedules developed pursuant to this Order [including **describe attached document(s)**], Appendix(ces) [\_\_\_]. Respondent shall perform all Work undertaken pursuant to this Order in a manner consistent with RCRA and other applicable federal and state laws and their implementing regulations; applicable EPA guidance documents; and [(if appropriate) Facility-specific documents, [such as (**specify other documents here**) OR which may be found at the following [link]]. [NOTE: Relevant guidances include, but are not limited to, “Documentation of Environmental Indicator Determination” (Feb. 5, 1999), and relevant portions of the “RCRA Corrective Action Plan” (May 1994). These documents are available at: <https://www.epa.gov/wastes/hazard/correctiveaction/index.htm>.]

b. For any regulation or guidance referenced in the Order, the reference will be read to include any subsequent modification, amendment, or replacement of such regulation or guidance. Such modifications, amendments, or replacements apply to the Work only after Respondent receives notification from EPA of the modification, amendment, or replacement.

c. [If appropriate, insert: Respondent shall develop a Conceptual Site Model (CSM) to organize and communicate technical data about Facility characteristics. As necessary, the CSM shall be modified and updated to reflect new data.] [NOTE: Regions may choose to incorporate CSM requirements throughout the Phases of Corrective Action set forth in Paragraph 17, below.]

d. [If appropriate, insert: EPA acknowledges that Respondent has completed some of the tasks required by this Order. Respondent also has made available some of the information and data required by this Order. This previous work may be used to meet the requirements of this Order upon submission to and formal approval by EPA.]

e. [Where appropriate, and particularly when there is significant public interest in the Facility, add the following: Respondent shall establish a publicly accessible repository or website for information regarding Facility activities and conduct public outreach and involvement activities as requested by EPA [if addressed in Paragraph 17: and in accordance with Paragraph 17 (Phases of Corrective Action)].] [NOTE: A Region may want to

**encourage Respondent to establish a website with key documents related to the corrective action, such as this Order, the CMS, and the Statement of Basis.]**

f. An initial schedule for the progress reports and other deliverables pursuant to this Order (including the reports and workplans described in Paragraph 17 below) is included as Appendix [B] (“Schedule”). All deliverables and tasks required under this Order must be submitted or completed by the deadlines or within the time durations listed in the Schedule. As set forth in Paragraph 17, Respondent shall submit revised schedules for EPA approval. Upon EPA’s approval, the revised Schedule(s) will supersede the attached schedule and any previously approved schedule and will be incorporated into and become an enforceable part of this Order.

g. **[(Optional:)** In accordance with Section XIII (Reporting and Document Certification), commencing with the [month] following the Effective Date and throughout the period that this Order is effective, Respondent shall submit progress reports to EPA on a [monthly/bi-monthly] basis, or as otherwise requested by EPA. The progress report must cover all activities that took place during the prior reporting period, including:

**[NOTE: Augment this list as necessary.]**

(1) The actions that have been taken toward achieving compliance with the Order.

(2) A summary of all results of sampling, tests, and all other data received or generated by Respondent. Respondent shall tabulate data chronologically by media. **[NOTE: Alternatively, Regions may decide to receive data upon request.]**

(3) A description of all deliverables that Respondent submitted to EPA.

(4) A description of all activities related to the Work scheduled for the next **[time period]**.

(5) A description of any modifications to the workplans or Schedule that Respondent has proposed or that have been approved by EPA.]

h. Respondent shall submit to EPA a Health and Safety Plan (HASP) that describes all activities to be performed to protect onsite personnel and area residents from physical, chemical, and all other hazards posed by the Work. Respondent shall develop the HASP in accordance with EPA’s Emergency Responder Health and Safety and Occupational Safety and Health Administration (OSHA) requirements under 29 C.F.R. §§ 1910 and 1926. The HASP should cover all Work and should be updated, as appropriate, to cover activities after Work completion. EPA does not approve the HASP but will review it to ensure that all necessary elements are included and that the plan provides for the protection of human health or the environment.

i. All written documents prepared by Respondent pursuant to this Order shall be submitted according to the procedures set forth in Section XIII (Reporting and

Document Certification). With the exception of progress reports and the HASP, all such submittals will be reviewed and approved by EPA in accordance with Section XIV (Agency Approvals/Additional Work/Modifications).

j. Respondent will communicate frequently and in good faith with EPA to assure successful completion of the requirements of this Order. In addition, Respondent shall schedule a meeting with EPA at least once a [month/quarter/year] to discuss the Work proposed and performed under this Order.

k. If, at any time while performing Work, Respondent identifies an immediate or potential threat to human health or the environment, discovers new releases of Hazardous Waste, or discovers new SWMUs or Areas of Concern not previously identified, Respondent shall notify EPA orally within 48 hours of such discovery, and in writing within 5 days after such discovery, summarizing the immediacy and magnitude of the potential threat(s) to human health or the environment. Upon written request of EPA, Respondent shall submit to EPA any relevant document (e.g., a revised workplan) that identifies necessary actions to mitigate the newly identified circumstances. If EPA determines that immediate action is required, EPA's Project Coordinator may orally agree to the proposed necessary actions prior to EPA's receipt of the documentation. In this situation, Respondent may have additional notification or other obligations under RCRA, CERCLA, or another legal authority.

#### 17. Phases of Corrective Action

**[NOTE: For each phase of corrective action covered by this Order, this model assumes a Region will draft and attach a relevant SOW(s). Alternatively, a Region could include technical requirements within the body of the Order. For more information see, "RCRA Corrective Action Plan," OSWER Directive 9902.3-2A (May 1994).]**

**[NOTE: The preferred approach is to include the CMI in the initial order so that a second order imposing the CMI does not need to be negotiated.]**

**[NOTE: This model includes provisions for public participation after approval of the CMS Report. Regions are encouraged to incorporate additional opportunities, as appropriate, for public participation throughout the phases of Corrective Action.]**

##### a. Interim Measures (IM)

(1) Within [thirty] days after [**either:** "the Effective Date" or "notice from EPA"], Respondent shall submit to EPA for review and approval an IM Workplan and project schedule in accordance with the IM SOW attached as Appendix [C] Once approved by EPA, Respondent shall implement the IM Workplan according to the approved project schedule.

(2) The IM Workplan shall address interim measures specified by EPA in the IM SOW, as well as any additional interim measures that Respondent determines, based on available data, are necessary to mitigate immediate or potential threats to human health or the environment. Interim measures shall be

consistent with the objectives of, and contribute to the performance of, any long-term corrective measures that may be required at the Facility.

**[NOTE: If IM may become components of the final corrective measures, consider adding a provision for public participation at this stage.]**

**b. RCRA Facility Investigation (RFI)**

**[NOTE: EPA is piloting use of the Lean approach for RCRA Facility Investigation (RFIs), which survey the nature and extent of contamination at a facility. For more information and sample documents, please visit [https://www.epa.gov/epawaste/hazard/correctiveaction/lean\\_effort.htm](https://www.epa.gov/epawaste/hazard/correctiveaction/lean_effort.htm).]**

(1) Within [60] days after the Effective Date, Respondent shall submit to EPA for review and approval a Current Conditions Report in accordance with the RFI SOW attached as Appendix [D].

(2) The Current Conditions Report shall include any recent sampling data from the Facility and a summary of the historic operations and physical setting of the Facility. The Current Conditions Report shall describe, at a minimum, conditions at all locations specified and any other past or present locations at the Facility for which Respondent knows of past treatment, storage, or disposal of Hazardous Waste.

(3) Within [90] days after the Effective Date, Respondent shall submit to EPA for review and approval an RFI Workplan and project schedule in accordance with the RFI SOW attached as Appendix [E]. Once approved by EPA, Respondent shall implement the RFI Workplan according to the approved project schedule.

(4) The RFI Workplan shall be designed to determine the presence, magnitude, extent, direction, and rate of movement of any Hazardous Wastes within and beyond the Facility boundary. The RFI Workplan shall document the procedures Respondent shall use to conduct activities necessary to: (i) collect data needed to make decisions on interim measures; (ii) characterize all sources of contamination; (iii) characterize the potential pathways of contaminant migration; (iv) define the degree and extent of contamination; (v) identify actual or potential human and ecological receptors; and (vi) support the development of alternatives from which corrective measures will be selected by EPA.

(5) In accordance with the RFI Workplan, Respondent shall submit an RFI Report to EPA for review and approval.

**c. Corrective Measures Study (CMS)**

**[NOTE: When preparing the CMS SOW, the Region should consider any possible property requirements as set forth in Section X (Property Requirements).]**

**[NOTE: For complex corrective actions where there is a need for expanded public participation, a Region should consider adding requirements to the CMS SOW for actions such as an assessment of community concerns, development of a fact sheet, and development of a mailing list.]**

(1) Within [60] days after EPA's approval of the RFI Report, Respondent shall submit to EPA for review and approval a CMS Workplan and project schedule in accordance with the CMS SOW attached as Appendix [F]. Once approved by EPA, Respondent shall implement the CMS Workplan according to the approved project schedule.

(2) **[Optional: augment list as appropriate:]** The CMS Workplan shall provide, at a minimum, the following information: (i) a Facility-specific description of the overall purpose of the CMS; (ii) the general approach to investigating and evaluating potential corrective measures; (iii) the corrective measure objectives, including proposed target Media Cleanup Standard(s) (MCS) and points of compliance or a description of how a risk assessment will be performed to develop MCS; (iv) the specific corrective measure technologies and/or corrective measure alternatives to be studied; (v) a description of any proposed pilot, laboratory or bench scale studies; and a (vi) a description of overall project management, including a proposed schedule for implementing the CMS Workplan and a proposed outline for the CMS Report.

(3) In accordance with the CMS Workplan, Respondent shall submit to EPA for review and approval a CMS Report.

(4) The CMS Report shall contain an estimate of the cost, including capital and annual operation and maintenance costs, and a recommendation as to which corrective measures, in Respondent's opinion, are the most appropriate, and the rationale for such recommendation. **[NOTE: For more information, see "Corrective Action for Releases of Solid Waste Management Units at Hazardous Waste Management Facilities, Advance Notice of Public Rulemaking," 61 Fed. Reg. 19449 (May 1, 1996).]** **[Optional; augment list as appropriate:** In addition, the CMS Report shall contain, at a minimum, information to show how each of the corrective measure alternatives studied will: (i) be protective of human health or the environment; (ii) attain the media cleanup standards set by **[specify EPA or state agency]**; (iii) control the source(s) of release(s) so as to reduce or eliminate, to the extent practicable, further releases of Hazardous Waste that might pose threats to human health or the environment; (iv) comply with applicable standards for waste management; (v) achieve long-term reliability and effectiveness; (vi) reduce toxicity, mobility, or volume of waste; and (vii) achieve short-term effectiveness.]

d. **Corrective Measures Implementation (CMI)**

**[NOTE: If CMI is not covered in this Order, the Region should use the language in Paragraph 17.d(1). If CMI is covered in this Order, Paragraphs 17.d(2) through 17.d(5)**

**should be used. The preferred approach is to include the CMI in the initial order so that a second order imposing the CMI does not need to be negotiated.]]**

(1) After EPA's selection of the corrective measures, EPA may provide Respondent with an opportunity to negotiate an Administrative Order on Consent for implementation of such corrective measures. Nothing in this provision shall limit EPA's authority to require that the selected corrective measures be implemented or to take any other appropriate action under RCRA, CERCLA, or any other legal authority, including issuance of a unilateral administrative order or the filing of a civil action seeking a judicial order directing Respondent to implement the selected corrective measures.

**OR**

(2) Within [60] days after EPA's selection of the corrective measures, Respondent shall submit to EPA for review and approval a CMI Workplan and project schedule in accordance with the CMI SOW attached as Appendix [G]. Once approved by EPA, Respondent shall implement the CMI Workplan according to the approved project schedule.

(3) The CMI Workplan shall be designed to facilitate the design, construction, operation, maintenance, and monitoring of corrective measures for the Facility. The project schedule will provide for Respondent to complete as much of the initial construction Work as practicable within one year after EPA selects the final corrective measures and for Respondent to complete all final corrective measures within a reasonable period of time to protect human health or the environment.

(4) Consistent with the CMI SOW and selected corrective measures, the CMI Workplan and project schedule may need to address the following information: (i) conceptual, intermediate, and final designs for construction and implementation of the selected corrective measures; (ii) criteria for construction completion; (iii) anticipated operation and maintenance; and (iv) outlines of anticipated reports, including a Construction Completion Report and a Corrective Measures Completion Report.

(5) The Corrective Measures Completion Report shall, at a minimum, include the following information: (i) purpose of the corrective measures; (ii) synopsis of the corrective measures; (iii) summary of corrective measures completion criteria (i.e., process and criteria for determining when corrective measures, maintenance and monitoring may cease); (iv) demonstration that the completion criteria have been met; (v) summary of work accomplishments; (vi) summary of significant activities that occurred during operations; (vii) summary of inspection findings; [(**optional**) summary of ICs;] and (viii) summary of total estimated operation and maintenance costs.

**[NOTE: The Region should contact OSRE and the Office of Resource Conservation and Recovery (ORCR) to discuss appropriate language for situations where additional assessments may be needed to evaluate the effectiveness of the implemented corrective measures or to determine whether any alternative or supplemental corrective measures may be necessary.]**

## 18. Public Comment And Participation

**[NOTE: For more information generally, see “Draft RCRA Public Participation Manual, 2016 Edition,” August 9, 2016, available at: [https://www.epa.gov/sites/production/files/2016-08/documents/v2\\_rcra\\_ppm\\_final\\_public\\_comment\\_period\\_8-4-16\\_0.pdf](https://www.epa.gov/sites/production/files/2016-08/documents/v2_rcra_ppm_final_public_comment_period_8-4-16_0.pdf); “Corrective Action for Releases of Solid Waste Management Units at Hazardous Waste Management Facilities, Advance Notice of Public Rulemaking,” 61 Fed. Reg. 19449 (May 1, 1996); and “Guidance on Corrective Action Decision Documents: The Statement of Basis Final Decision and Response to Comments,” OSWER Directive 9902.6 (Feb. 1991).]**

**[NOTE: In certain situations, EPA may encourage Respondent to establish a website to post key documents related to the Work such as this Order, the CMS Report, the Statement of Basis, and progress reports.]**

a. After approval of the CMS Report, EPA will provide the public with an opportunity to review and comment on the proposed corrective measures, including EPA’s justification for proposing such corrective measures (the “Statement of Basis”).

b. Following the public comment period, EPA will select the final corrective measures and will notify the public of the decision and rationale in a Final Decision and Response to Comments. If the corrective measures selected by EPA differ significantly from the corrective measures recommended in the Statement of Basis, EPA will explain in the Final Decision and Response to Comments the reason for such difference.

## IX. QUALITY ASSURANCE

19. As part of each **[or specify]** workplan, Respondent shall include a Quality Assurance Project Plan (QAPP) for EPA review and approval. The QAPP addresses sample analysis and data handling regarding the Work. The QAPP must include a detailed explanation of Respondent’s quality assurance, quality control, and chain of custody procedures for all sampling, monitoring, and analytical activities.

20. Respondent shall develop the QAPP in accordance with “EPA Requirements for Quality Assurance Project Plans,” QA/R-5, EPA/240/B-01/003 (Mar. 2001, reissued May 2006), “Guidance for Quality Assurance Project Plans,” QA/G-5, EPA/240/R 02/009, (Dec. 2002), and “Uniform Federal Policy for Quality Assurance Project Plans,” Parts 1-3, EPA/505/B-04/900A through 900C (Mar. 2005), or other applicable guidance as identified by EPA. **[NOTE: This list is up-to-date as of August 2016. Update as appropriate.]** The QAPP also must include procedures:

- a. To ensure that all analytical data used in decision making relevant to this Order are of known and documented quality;
- b. To ensure that EPA and its authorized representatives have reasonable access to laboratories used by Respondent (“Respondent’s Labs”) in implementing the Order;
- c. To ensure that Respondent’s Labs analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring;
- d. To ensure that Respondent’s Labs perform all analyses using EPA-accepted methods according to the latest approved edition of “Test Methods for Evaluating Solid Waste (SW-846)” or other methods approved by EPA.
- e. To ensure that Respondent’s Labs participate in an EPA-accepted quality assurance/quality control (QA/QC) program or other QA/QC program acceptable to EPA. **[NOTE: These are laboratories that have a documented quality system that complies with “EPA Requirements for Quality Management Plans,” QA/R-2, EPA/240/B-01/002 (Mar. 2001, revised May 2006) or equivalent documentation as determined by EPA. EPA may consider Environmental Response Laboratory Network (ERLN) laboratories, laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP), or laboratories that meet International Standardization Organization (ISO 17025) standards or other nationally recognized programs (<https://www.epa.gov/fem/accredit.htm>) as meeting the Quality System requirements.]**
- f. For Respondent to provide EPA with notice at least [28] days prior to any sample collection activity.
- g. For Respondent to provide split samples or duplicate samples to EPA upon request; any analysis of such samples shall be in accordance with the approved QAPP.
- h. For EPA to take any additional samples that it deems necessary.
- i. For EPA to provide to Respondent, upon request, split samples or duplicate samples in connection with EPA’s oversight sampling.
- j. For Respondent to submit to EPA all sampling and test results and other data in connection with the implementation of this Order.

## **X. PROPERTY REQUIREMENTS**

**[NOTE: Here and in other places in this Section, optional text to be used if Off-site Property (as defined in Paragraph 0) is owned by an Off-site Property Owner (as defined in Paragraph 0) is set off in brackets.]**

21. **Agreements Regarding Access and Non-Interference.** Respondent shall, with respect to the Facility: (i) provide EPA and its representatives, contractors, and subcontractors with access at all reasonable times to the Facility to conduct any activity regarding the Order, including those activities listed in Paragraph 21.a (Access Requirements); and (ii) refrain from

using the Facility in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Hazardous Waste, or interfere with or adversely affect the implementation, integrity, or protectiveness of the corrective action [**use if land, water, or other resource use restrictions have been selected:** , including the restrictions listed in Paragraph 21.b (Land, Water, or Other Resource Use Restrictions)]. [**(Optional: Use if any Off-site Property, owned or controlled by any Off-site Property Owner(s), has been identified as requiring corrective action, including all real property beyond the Facility boundary where EPA determines that access or resource use restrictions are needed.)**] In addition, Respondent shall, with respect to Off-site Property, use best efforts to secure from Off-site Property Owner, an agreement, enforceable by Respondent and by EPA, providing that such Off-site Property Owner: (i) provide EPA and its representatives, contractors, and subcontractors with access at all reasonable times to such Off-site Property to conduct any activity regarding the Order, including those activities listed in Paragraph 21.a (Access Requirements); and (ii) refrain from using such Off-site Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Hazardous Waste, or interfere with or adversely affect the implementation, integrity, or protectiveness of the corrective action [**use if land, water, or other resource use restrictions have been selected:** , including the restrictions listed in Paragraph 21.b (Land, Water, or Other Resource Use Restrictions)].

a. **Access Requirements.** The following is a list of activities for which access is required regarding the Facility [and Off-site Property]:

[NOTE: Augment this list as appropriate.]

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to EPA [or the State];
- (3) Conducting investigations regarding contamination at or near the Facility;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional corrective action activities at or near the Facility;
- (6) Assessing implementation of quality assurance and quality control practices [
- (7) as defined in the approved QAPP];
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Respondent or its agents, consistent with Section XI (Access to Information);
- (9) Assessing Respondent's compliance with the Order;

(10) Determining whether the Facility [and/or the Off-site Property] is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Order; and

(11) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions and Institutional Controls.

b. **[NOTE: Include Paragraph 21.b if land, water, or other resource use restrictions have been selected at the time of settlement negotiations: Land, Water, or Other Resource Use Restrictions.** The following is a list of land, water, or other resource use restrictions applicable to the Facility [and the Off-site Property]:

**[NOTE: Customize and augment this list as appropriate. Be as specific as possible.]**

(1) Prohibiting the following activities which could interfere with the Work: \_\_\_\_\_;

(2) Prohibiting use of contaminated groundwater;

(3) Prohibiting the following activities which could result in exposure to contaminants in subsurface soils and groundwater: \_\_\_\_\_;

(4) Ensuring that any new structures on the Facility will not be constructed in the following manner, which could interfere with the Work: \_\_\_\_\_; and

(5) Ensuring that any new structures on the Facility will be constructed in the following manner, which will minimize potential risk of inhalation of contaminants: \_\_\_\_\_.]

**[NOTE: Include Paragraph 22 if PCs have been selected at the time of settlement negotiations. If Paragraph 22 is not included in the Order and EPA subsequently determines that PCs are necessary and identifies PCs in a decision document, these provisions (and related wording from Paragraphs 24 and 25) can be adopted as Additional Work pursuant to Paragraph 37.]**

22. **Proprietary Controls.** Respondent shall, with respect to the Facility, execute and record, in accordance with the procedures of this Paragraph, Proprietary Controls that (i) grant a right of access to conduct any activity regarding this Order, including those activities listed in Paragraph 21.a; and (ii) grant the right to enforce the land, water, or other resource use restrictions set forth in Paragraph 21.b. **[(Optional: Use if any Off-site Property, owned or controlled by any Off-site Property Owner(s), has been identified as requiring corrective action, including all real property beyond the Facility boundary where EPA determines that access or resource use restrictions are needed.)** In addition, Respondent shall, with respect to any Off-site Property, use best efforts to secure the Off-site Property Owner's cooperation in executing and recording Proprietary Controls that (i) grant a right of access to conduct any activity regarding this Order, including those activities listed in Paragraph 21.a; and

(ii) grant the right to enforce the land, water, or other resource use restrictions set forth in Paragraph 21.b.]

a. **Grantees.** The Proprietary Controls must be granted to one or more of the following persons and their representatives, as determined by EPA: the State, Respondent, and other appropriate grantees. Proprietary Controls in the nature of a Uniform Environmental Covenants Act (UECA) document must include a designation that [**for UECA states:** EPA (and/or the State as appropriate) is either an “agency” or a party] [**for non-UECA states:** EPA (and/or the State as appropriate) is a “third-party beneficiary”] expressly granted the rights of access and the right to enforce the covenants allowing EPA [and/or the State] to maintain the right to enforce the Proprietary Controls without acquiring an interest in real property.]

**[NOTE: “Agency” is a defined term in the statutes of states that have adopted UECA. For UECA states that have defined “agency” to exclude EPA (such as Delaware) and non-UECA states, the case team can usually substitute the term “third-party beneficiary.” However, the case team should review state law to make sure that the term used will ensure that the United States will acquire the rights it needs, i.e., access and rights to enforce land use restrictions that are not real property interests, but that, similar to real property interests, run with the land and are enforceable against both present and future owners. For more specific information, see “Institutional Controls: Third Party Beneficiary Rights in Proprietary Controls” (Apr. 19, 2004) available at <https://www.epa.gov/enforcement/guidance-third-party-beneficiary-rights-proprietary-institutional-controls>.**

**NOTE: PCs must be prepared so that the United States does not acquire an interest in real property. PCs, however, may be prepared in a way that gives the United States, and perhaps others, rights, such as the right to enforce PCs that are defined as not being an interest in real property (as is often the structure found in state versions of UECA, and as may be the effect in non-UECA instruments designating the United States, and perhaps others, as “third-party beneficiaries”). For this reason EPA should conduct its own title review. The interest EPA acquires is not an interest in real property by definition in UECA, but it functions like an interest in real property, so it is essential that a title review be conducted to determine that the rights have been properly created so as to be enforceable under the applicable state UECA law, and so that liens and encumbrances that could defeat or interfere with the EPA interest are identified and released, subordinated, or otherwise addressed prior to EPA acquiring its interest.]**

b. **Initial Title Evidence.** Respondent shall, within [45] days after the Effective Date:

(1) **Record Title Evidence.** Submit to EPA a title insurance commitment or other title evidence acceptable to EPA that: (i) names the proposed insured or the party in whose favor the title evidence runs, or the party who will hold the real estate interest, or if that party is uncertain, names the United States, the State, the Respondent, or “To Be Determined;” (ii) covers the Facility or Off-site Property that is to be encumbered; (iii) demonstrates that the person or entity that will execute and record the Proprietary Controls is the owner

of Facility or Off-site Property; (iv) identifies all record matters that affect title to the Facility or Off-site Property including all prior liens, claims, rights (such as easements) and encumbrances (collectively, “Prior Encumbrances”); and (v) includes complete, legible copies of such Prior Encumbrances; and

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

**[NOTE: For general guidance on both record and non-record forms of title evidence acceptable to the United States see the U.S. Department of Justice Title Standards 2001, available at [https://www.justice.gov/enrd/Current\\_topics.html](https://www.justice.gov/enrd/Current_topics.html).]**

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

(1) Respondent shall secure the release, subordination, modification, or relocation of all Prior Encumbrances on the title to the Facility or Off-site Property revealed by the title evidence or otherwise known to the Respondent, unless EPA waives this requirement as provided under Paragraph 22.c(2) - 22.c(4).

(2) Respondent may, by the deadline under Paragraph 22.d, submit an initial request for waiver of the requirements of Paragraph 22.c(1) regarding one or more Prior Encumbrances, on the grounds that such Prior Encumbrances cannot defeat or adversely affect the rights to be granted by the Proprietary Controls and cannot interfere with the Work or result in unacceptable exposure to contaminants at or in connection with the Facility.

(3) Respondent may, within [90] days after the Effective Date, or if an initial waiver request has been filed, within [45] days after EPA’s determination on the initial waiver request, submit a final request for a waiver of the requirements of Paragraph 21.c(1) regarding any particular Prior Encumbrance on the grounds that Respondent could not obtain the release, subordination, modification, or relocation of such Prior Encumbrance despite best efforts.

**[NOTE: Paragraph 22.c provides for an “initial” waiver request that addresses the issue of whether the Prior Encumbrance can adversely affect the PC, and then a “final” waiver request that addresses the issue of whether Respondent used best efforts. This is intentional and is for the purpose of streamlining and expediting the process. If the Respondent demonstrates to EPA that a particular Prior Encumbrance will not adversely affect the PC, then Respondent does not need to expend further time and effort to secure the release of such Prior Encumbrance.]**

(4) The initial and final waiver requests must include supporting evidence including descriptions of and copies of the Prior Encumbrances and maps showing areas affected by the Prior Encumbrances. The final waiver request

also must include evidence of efforts made to secure release, subordination, modification, or relocation of the Prior Encumbrances.

(5) Respondent shall complete its obligations under Paragraph 22.c(1) regarding all Prior Encumbrances: within [180] days after the Effective Date; or if an initial waiver request has been filed, within [135] days after EPA's determination on the initial waiver request; or if a final waiver request has been filed, within [90] days after EPA's determination on the final waiver request.

**d. Update to Title Evidence and Recording of Proprietary Controls**

(1) Respondent shall submit to EPA for review and approval, by the deadline specified in Paragraph 22.c(5), all draft Proprietary Controls and draft instruments addressing Prior Encumbrances.

(2) Upon EPA's approval of the proposed Proprietary Controls and instruments addressing Prior Encumbrances, Respondent shall, within [15] days, update the original title insurance commitment (or other evidence of title acceptable to EPA) under Paragraph 22.b. If the updated title examination indicates that no liens, claims, rights, or encumbrances have been recorded since the effective date of the original commitment (or other title evidence), Respondent shall secure the immediate recordation of the Proprietary Controls and instruments addressing Prior Encumbrances in the appropriate land records. Otherwise, Respondent shall secure the release, subordination, modification, or relocation under Paragraph 22.c(1), or the waiver under Paragraph 22.c(2) – 22.c(4), regarding any newly-discovered liens, claims, rights, or encumbrances, prior to recording the Proprietary Controls and instruments addressing Prior Encumbrances.

**[NOTE: The appropriate land records are most commonly in the county(ies) where the Facility or Off-site Property is located.]**

(3) If Respondent submitted a title insurance commitment under Paragraph 21.b(1), then upon the recording of the Proprietary Controls and instruments addressing Prior Encumbrances, Respondent shall obtain a title insurance policy that: (i) is consistent with the original title insurance commitment; (ii) is for \$100,000 or other amount approved by EPA; (iii) is issued to the Respondent or other person approved by EPA; and (iv) is issued on a current American Land Title Association (ALTA) form [**in Texas:** "Texas Land Title Association (TLTA) form"] or other form approved by EPA.

**[NOTE: The \$100,000 amount of the title insurance coverage in the policy was selected by EPA as appropriate and adequate. If there are questions or concerns, the case team may consult with the Claims, Property and Appropriations Law practice group within Office of EPA's Office of General Counsel, 202-564-5434, concerning this issue.]**

(4) Respondent shall, within [30] days after recording the Proprietary Controls and instruments addressing Prior Encumbrances, or such other deadline

approved by EPA, provide to EPA and to all grantees of the Proprietary Controls: (i) certified copies of the recorded Proprietary Controls and instruments addressing Prior Encumbrances showing the clerk's recording stamps; and (ii) the title insurance policy(ies), if any or other approved form of updated title evidence as of the date of recording of the Proprietary Controls and instruments.

e. Respondent shall monitor, maintain, enforce, and [annually] report on all Proprietary Controls required under this Order.

23. **Best Efforts.** As used in this Section, "best efforts" means the efforts that a reasonable person in the position of Respondent would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restrictions [**include if PCs have been selected at the time of settlement negotiations:** , Proprietary Controls, releases, subordinations, modifications, or relocations of Prior Encumbrances that affect the title to the Facility or Off-site Property, as applicable]. If Respondent is unable to accomplish what is required through "best efforts" in a timely manner, Respondent shall notify EPA, and include a description of the steps taken to comply with the requirements. If EPA deems it appropriate, it may assist Respondent, or take independent action, in obtaining such access and/or use restrictions [**include if PCs have been selected at the time of settlement negotiations:** , Proprietary Controls, releases, subordinations, modifications, or relocations of Prior Encumbrances that affect the title to the Facility or Off-site Property, as applicable].

24. If EPA determines that Institutional Controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls, or notices of contamination, notices of administrative action, or other notices are needed, Respondent shall cooperate with EPA's [and the State's] efforts to record, secure, and ensure compliance with such Institutional Controls.

**[NOTE: Include Paragraph 25 if PCs for the Facility or Off-site Property have been selected but have not yet been recorded, the case team believes that the selected PCs will not be recorded on the Facility or Off-site Property within a year after the Effective Date, and it is determined that a deed notice, or notice of contamination, regarding the Facility is necessary to protect human health or the environment. These requirements will put potential buyers on notice that the property is part of the Facility and that corrective action activities are needed or being undertaken at the Facility.]**

25. **[Notice to Successors-in-Title**

a. Respondent shall, within 15 days after the Effective Date, submit for EPA approval a notice about the Facility in the appropriate land records. The notice must: (1) include a proper legal description of the Facility; (2) provide notice to all successors-in-title: (i) that EPA has determined that corrective action activities are needed at the Facility; and (ii) that Respondent has entered into an Order requiring implementation of such selected corrective action activities; and (3) identify the EPA docket number and/or Effective Date. Respondent shall record the notice within 10 days after EPA's approval of the notice and submit to EPA, within 10 days thereafter, a certified copy of the recorded notice.

b. Respondent shall, prior to entering into a contract to Transfer its the Facility, or 60 days prior to Transferring the Facility, whichever is earlier:

(1) Notify the proposed transferee that EPA has determined that corrective action activities are needed at the Facility and that Respondent has entered into an Order requiring implementation of such corrective action activities; and

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

26. In the event of any Transfer of the Facility, unless EPA otherwise consents in writing, Respondent shall continue to comply with its obligations under the Order, including its obligation to secure access and ensure compliance with any use restrictions regarding the Facility **[include if PCs have been selected at the time of settlement negotiations:** and to implement, maintain, monitor, and report on Institutional Controls].

27. Notwithstanding any provision of the Order, EPA retains all of its access authorities and rights, as well as all of its rights to require land, water, or other resource use restrictions and institutional controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

## **XI. ACCESS TO INFORMATION**

28. Respondent shall provide to EPA, upon request, copies of all records, reports, documents, and other information (including in electronic form) (hereinafter referred to as “Records”) within Respondent’s possession or control or that of its contractors or agents relating to activities at the Facility or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also, upon request, make available to EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

### **29. Privileged and Protected Claims**

a. Respondent may assert all or part of a Record requested by EPA is privileged or protected as provided under federal law, in lieu of providing the Record, provided Respondent complies with Paragraph 29.b and except as provided in Paragraph 29.c.

b. If Respondent asserts such a privilege or protection, Respondent shall provide EPA with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, each addressee, and each recipient; a description of the Record’s contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Respondent shall provide the Record to EPA in redacted form to mask the privileged or protected portion only. Respondent shall retain all Records that Respondent claims privileged or protected until EPA has had a

reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Respondent's favor.

c. Respondent may make no claim of privilege or protection regarding:

(1) Any data regarding the Facility, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Facility; or

(2) The portion of any Record that Respondent is required to create or generate pursuant to this Order.

30. **Business Confidential Claims.** Respondent may assert that all or part of a Record provided to EPA under this Section or Section XII (Record Retention) is business confidential to the extent permitted by and in accordance with 40 C.F.R. §§ 2.203 and 270.12(a). Respondent shall segregate and clearly identify all Records or parts thereof submitted under this Order for which Respondent asserts business confidentiality claims. Records claimed as confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA, or if EPA has notified Respondent that the Records are not confidential under the standards of 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to Respondent.

31. Notwithstanding any provision on this Order, EPA retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under RCRA and any other applicable statutes or regulations.

## **XII. RECORD RETENTION**

### **32. Record Retention**

a. Until 10 years after EPA issues the Acknowledgement of Termination pursuant to Paragraph 75, Respondent shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control, that relate in any manner to this Order or to Hazardous Waste management and/or disposal at the Facility. Respondent must also retain, and instruct its contractors and agents to preserve, for the same time period specified above, all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to performance of the Work, provided, however, that Respondent (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

b. At the conclusion of this record retention period, Respondent shall notify EPA at least 90 days prior to the destruction of any such Records, and, upon request by EPA and

except as provided in Paragraph 29 (Privileged and Protected Claims), Respondent shall deliver any such records to EPA.

c. Respondent certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Facility since notification of potential liability by EPA or the State and that it has fully complied with any and all EPA and State requests for information regarding the Facility pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, [(if applicable:) Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B),] and state law.

### **XIII. REPORTING AND DOCUMENT CERTIFICATION**

33. **General Requirements for Deliverables.** Respondent shall submit all deliverables in electronic form. Technical specifications for sampling and monitoring data and spatial data are addressed in Paragraph 34. All other deliverables shall be submitted to EPA in the electronic form specified by EPA's Project Coordinator. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5" by 11", Respondent shall also provide EPA with paper copies of such exhibits. [NOTE: If paper copies of specific deliverables (in addition to large exhibits) are needed, this paragraph should be edited accordingly.] All documents submitted pursuant to this Order shall be sent to:

EPA Project Coordinator  
US EPA  
Region [ ]  
[Address]  
[Email]

[(Optional:) EPA ORC Contact]

Documents to be submitted to Respondent shall be sent to:  
Project Coordinator  
[Name]  
[Address]  
[Email]

In addition, documents pursuant to Section XV (Financial Assurance) and any notice of destruction of documents pursuant to Section XII (Record Retention) shall be submitted to [appropriate recipient (such as the Regional Financial Management Officer)] at [mailing address and any Region-specific delivery instructions] [, with a copy to [name, title, and address of Regional financial assurance specialist (if one exists in the relevant Region)].

34. **Technical Specifications.** [NOTE: The information in this paragraph is consistent with the EPA National Geospatial Data Policy 2008, which is under review and may be revised at any time. The case team should check <https://www.epa.gov/geospatial/geospatial-policies-and-standards> for the latest guidance on the policy and associated EPA procedures and technical

specifications, including standards and quality assurance for geographic information systems (GIS) deliverables.]

a. Sampling and monitoring data should be submitted in standard Electronic Data Deliverable (EDD) format. [**Specify the EDD format that the Region uses.**] Other delivery methods may be allowed upon EPA approval if electronic direct submission presents a significant burden or as technology changes.

b. Spatial data, including spatially-referenced data and geospatial data, should be submitted:

(1) in the ESRI File Geodatabase format [**or insert Regionally-preferred spatial file format**]; and

(2) as unprojected geographic coordinates in decimal degree format using North American Datum 1983 (NAD83) or World Geodetic System 1984 (WGS84) as the datum. If applicable, submissions should include the collection method(s). Projected coordinates may optionally be included but must be documented. Spatial data should be accompanied by metadata, and such metadata should be compliant with the Federal Geographic Data Committee (FGDC) Content Standard for Digital Geospatial Metadata and its EPA profile, the EPA Geospatial Metadata Technical Specification. An add-on metadata editor for ESRI software, the EPA Metadata Editor (EME), complies with these FGDC and EPA metadata requirements and is available at <https://edg.epa.gov/EME/>.

c. Each file must include an attribute name for each unit or sub-unit submitted. Consult <https://www.epa.gov/geospatial/geospatial-policies-and-standards> for any further available guidance on attribute identification and naming.

d. Spatial data submitted by Respondent does not, and is not intended to, define the boundaries of the Facility.

35. All deliverables that are submitted pursuant to Section VIII (Work to be Performed) must be signed by Respondent's Project Coordinator, or other responsible official of Respondent, and must contain the following statement:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than 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.

Signature: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

#### **XIV. AGENCY APPROVALS/ADDITIONAL WORK/MODIFICATIONS**

##### **36. EPA Approvals**

###### **a. Initial Submissions**

(1) After review of any deliverable that is required to be submitted for EPA approval under this Order, EPA will: (i) approve, in whole or in part, the submission; (ii) approve the submission upon specified conditions; (iii) disapprove, in whole or in part, the submission; or (iv) any combination of the foregoing.

(2) EPA also may modify the initial submission to cure deficiencies in the submission if: (i) EPA determines that disapproving the submission and awaiting a resubmission would cause disruption to the Work; or (ii) previous submission(s) have been disapproved due to material defects and the deficiencies in the initial submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

**b. Resubmission.** Upon receipt of a notice of disapproval under Paragraph 36.a (Initial Submissions), or if required by a notice of approval upon specified conditions under Paragraph 36.a(1), Respondent shall, within \_\_ days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the deliverable for approval. After review of the resubmitted deliverable, EPA may:

- (1) Approve, in whole or in part, the resubmission;
- (2) Approve the resubmission upon specified conditions;
- (3) Modify the resubmission;
- (4) Disapprove, in whole or in part, the resubmission, requiring Respondent to correct the deficiencies; or
- (5) Any combination of the foregoing.

**c. Implementation.** Upon approval, approval upon conditions, or modification by EPA under Paragraph 36.a or 36.b, of any such deliverable, or portion thereof: (1) such deliverable, or portion thereof, will be incorporated into and become an enforceable part of this Order; and (2) Respondent shall take any action required by the deliverable, or portion thereof. The implementation of any non-deficient portion of a deliverable submitted or resubmitted under Paragraph 36.a or resubmitted under Paragraph 36.b does not relieve

Respondent of any liability for stipulated penalties under Section XVI (Delay in Performance/Stipulated Penalties).

### **37. Additional Work**

a. EPA may determine that certain tasks, including investigatory work, engineering evaluation, procedure/methodology modifications, or land, water, or other resource use restrictions or Institutional Controls, are necessary in addition to or in lieu of the tasks included in any EPA-approved workplan to meet the purposes set forth in Section III (Statement of Purpose). If EPA makes such a determination, EPA will notify Respondent in writing. Unless otherwise stated by EPA, within 30 days after the receipt of such determination, Respondent shall submit for EPA approval a workplan for the Additional Work. The plan shall conform to the applicable requirements of Section VIII (Work to Be Performed). Upon approval of the workplan by EPA, Respondent shall implement it in accordance with the schedule and provisions contained therein. This Section does not alter or diminish EPA's Project Coordinator's authority to make oral modifications to any plan or schedule pursuant to Paragraph 38.a.

### **38. Modifications**

a. EPA's Project Coordinator may modify any workplan, schedule, or 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 EPA's Project Coordinator's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

b. If Respondent seeks permission to deviate from any approved workplan, schedule, or SOW, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from EPA's Project Coordinator pursuant to Paragraph 38.a.

c. No informal advice, guidance, suggestion or comment by EPA's Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Order, or to comply with all requirement of this Order, unless it is modified in writing pursuant to Paragraph 38.a.

## **XV. FINANCIAL ASSURANCE**

**[NOTE: The financial assurance language herein is not written for use in RCRA permits.]**

### **39. Estimated Cost of the Work**

a. Respondent shall submit to EPA detailed written estimates, in current dollars, of the cost of hiring a third party to perform the Work to be Performed under this Order (hereafter "Estimated Cost of the Work"). The Estimated Cost of the Work shall account for the total costs of the work activities that they cover, as described in Section VIII and the SOW(s), and any EPA-approved work plan(s), including any necessary long term costs, such as operation

and maintenance costs and monitoring costs. A third party is a party who (i) is neither a parent nor a subsidiary of Respondent and (ii) does not share a common parent or subsidiary with Respondent. The cost estimates shall not incorporate any salvage value that may be realized from the sale of wastes, facility structures or equipment, land or other assets associated with the facility.

**[NOTE: Choose between Alternative 1 and 2. Alternative 1 is appropriate when some or all of the Work to be performed under Section VIII is already well defined at the time the Order is negotiated.]**

b. **[Alternative 1]** Respondent has submitted and EPA has approved, an initial Estimated Cost of the Work to be Performed under Section VIII, which covers **[specify the Work covered by the initial cost estimate, by referencing the paragraph, e.g. “Interim Measures/Stabilization under Section VIII,” “RCRA Facility Investigation under Section VIII,” “Corrective Measures Study under Section VIII,” and/or “Corrective Measures Implementation under Section VIII.”]** and described in **[identify the relevant SOWs]**, Appendix(ces) [\_\_\_].

**[Alternative 2 is appropriate when the Work to be performed will not be defined until after some initial phase of the Order, such as after EPA has selected the Interim Measures, approved the RFI, or selected the corrective measures to be implemented.]**

**[Alternative 2]** Within 30 days after EPA has **[identify triggering event, e.g., “approved the RFI Workplan under Section VIII”]**, Respondent shall submit to EPA for review and approval an initial Estimated Cost of the Work which covers **[specify the Work covered by the initial cost estimate e.g. “Interim Measures/Stabilization under Section VIII,” and/or “RCRA Facility Investigation under Section VIII,” “Corrective Measures Study under Section VIII,” and/or Corrective Measures Implementation under Section VIII”]** described in **[identify the relevant SOWs and any EPA-approved work plan(s)]**, Appendix(ces) [\_\_\_].

**[NOTE: When the Order covers several phases of Work, and the total extent of needed corrective action cannot be known until investigation phases are complete, EPA may require cost estimates to be done in phases. Where several different costs estimates will be required at different stages of the work, add additional paragraphs. EPA’s goal should be to require cost estimates and financial assurance as early as possible for each stage in the process.]**

c. Concurrent with the submission of additional EPA-approved work plan(s) required under Section VIII (Work To Be Performed), Respondent shall submit a revised Estimated Cost of the Work.

d. Respondent shall annually adjust the Estimated Cost of the Work for inflation within 30 days after the close of Respondent’s fiscal year until the Work required by this Order is completed. In addition, Respondent shall adjust the Estimated Cost of the Work if EPA determines that any Additional Work is required, pursuant to Paragraph 37, or if any other condition increases the cost of the Work to be performed under this this Order.

**[NOTE: In the alternative, you may require Respondent to annually adjust the cost estimate within 60 days prior to the anniversary date of the establishment of the financial assurance instrument(s).]**

e. Respondent shall submit each Estimated Cost of the Work to EPA for review. EPA will review each cost estimate and notify Respondent in writing of EPA's approval, disapproval, or modification of the cost estimate.

**40. Assurances of Financial Responsibility for Completing the Work**

a. In order to secure the full and final completion of the Work in accordance with this Order, Respondent shall establish and maintain financial assurance for the benefit of the EPA in the amount of the most recent Estimated Cost of the Work. Respondent may use one or more of the financial assurance forms generally described in Paragraphs 40.a(1) through 40.a(6) below. Any and all financial assurance instruments provided pursuant to this Order shall be satisfactory in form and substance as determined by EPA.

**[NOTE: EPA may limit Respondent to one or more of the instruments on this list, based on the specific facts and circumstances of the case, in order to "secure the completion of the corrective action."]**

(1) A trust fund established for the benefit of EPA, administered by a trustee who has the authority to act as a trustee under Federal and State law and whose trust operations are regulated and examined by a Federal or State agency and that is acceptable in all respects to the EPA. The trust agreement shall provide that the trustee shall make payments from the fund as the **[insert appropriate Regional manager title]** shall direct in writing (1) to reimburse Respondent from the fund for expenditures made by Respondent for Work performed in accordance with this Order, or (2) to pay any other person whom the **[insert appropriate Regional manager title]** determines has performed or will perform the Work in accordance with this Order. The trust agreement shall further provide that the trustee shall not refund to the grantor any amounts from the fund unless and until EPA has advised the trustee that the Work under this Order has been successfully completed;

(2) A surety bond unconditionally guaranteeing performance of the Work in accordance with this Order, or guaranteeing payment at the direction of EPA into a standby trust fund that meets the requirements of the trust fund in Paragraph 40.a(1) above. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on Federal Bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

(3) An irrevocable letter of credit, payable at the direction of **[insert appropriate Regional manager title]**, into a standby trust fund that meets the requirements of the trust fund in Paragraph 40.a(1) above. The letter of credit shall be issued by a financial institution (i) that has the authority to issue letters of

credit and (ii) whose letter-of-credit operations are regulated and examined by a Federal or State agency;

(4) A policy of insurance that (i) provides EPA with rights as a beneficiary which are acceptable to EPA; and (ii) is issued by an insurance carrier that (a) has the authority to issue insurance policies in the applicable jurisdiction(s), and (b) whose insurance operations are regulated and examined by a Federal or State agency. The insurance policy shall be issued for a face amount at least equal to the current Estimated Cost of the Work to be performed under this Order, except where costs not covered by the insurance policy are covered by another financial assurance instrument, as permitted in Paragraph 40.f. The policy shall provide that the insurer shall make payments as the **[insert appropriate Regional manager title]** shall direct in writing (i) to reimburse Respondent for expenditures made by Respondent for Work performed in accordance with this Order, or (ii) to pay any other person whom the **[insert appropriate Regional manager title]** determines has performed or will perform the Work in accordance with this Order, up to an amount equal to the face amount of the policy. The policy shall also provide that it may not be canceled, terminated or non-renewed and the policy shall remain in full force and effect in the event that (i) the Respondent is named as a debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or (ii) EPA notifies the insurer of Respondent's failure to perform, under Paragraph 41 of this Order;

(5) A corporate guarantee, executed in favor of the EPA by one or more of the following: (i) a direct or indirect parent company; or (ii) a company that has a "substantial business relationship" with Respondent (as defined in 40 C.F.R. § 264.141(h)), to perform the Work in accordance with this Order or to establish a trust fund as permitted by Paragraph 40.a(1); provided, however, that any company providing such a guarantee shall demonstrate to the satisfaction of the 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; or

(6) A demonstration by Respondent that Respondent 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.

**[NOTE: (1) In situations where some or all of the Work to be performed has already been well defined by EPA or the Respondent prior to the negotiation of the Order, EPA should negotiate and finalize the form and substance, including value, of the Respondent's financial assurance well in advance of the Effective Date of the Order, so that the final financial assurance mechanism can actually take effect within 10 days after the Effective Date of the Order.**

**(2) Case Teams should also ensure that entities providing a corporate guarantee or demonstration of satisfaction of the financial test pursuant to Paragraph 40.a(5) or (6) above have submitted all documentation required under 40 C.F.R. § 264.143(f) well in**

**advance of the Effective Date of the Order in order that EPA can determine that such financial assurance is sufficient and that corporations providing a corporate guarantee or demonstration of satisfaction of the financial test have fully and accurately reflected in their financial statements all of their environmental obligations to the United States, i.e., that all RCRA, UIC, TSCA and CERCLA obligations guaranteed by such entity as “financial assurance” and/or as a Performance Guarantee have been properly accounted for in determining whether such entity passes the financial test referenced in 40 C.F.R. § 264.143(f).**

**(3) Respondent must submit original executed /or otherwise finalized financial assurance instruments or documents. Facsimiles or photocopies are not acceptable.]**

**[Alternative 1 (Paragraphs b and c below), for situations where some or all of the Work to be performed has already been well defined, and the initial financial assurance has been negotiated prior to executing the Order.]**

**b. [For initial financial assurance under Paragraph 40.a(1) – (5)]**

Respondent has selected, and EPA has approved, as initial financial assurance [insert type(s)] pursuant to Paragraph 40.a in the form attached hereto as Appendix [H]. Within 10 days after the Effective Date, Respondent shall execute or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding in a form substantially identical to the documents attached hereto as Appendix [H], and such financial assurance shall be fully effective. Respondent shall submit all executed and/or otherwise finalized instruments or other documents to EPA within 30 days after the Effective Date.

**c. [For initial financial assurance under Paragraph 40.a(6)]** Respondent

has provided initial assurance by demonstrating to EPA’s satisfaction that Respondent satisfies the financial test requirements of 40 C.F.R. § 264.143(f).

**Alternative 2 (two paragraphs immediately below), for situations where the Work to be performed will not be defined until after some initial phase of the Order, such as after EPA has selected Interim Measures to be performed, approved the RCRA Facility Investigation, or selected Corrective Measures to be implemented.]**

**[For initial financial assurance under Paragraph 40.a(1) – (5)]** Within 30 days after EPA has [identify triggering event (such as “selected Interim Measures which Respondent shall perform under Section [ ]” and/or “approved the RFI Workplan under Section [ ],” and/or “selected the Corrective Measures to be Implemented under Section [ ],”], Respondent shall submit draft financial assurance instruments and related documents to EPA, concurrently with Respondent’s submission of the initial Estimated Cost of the Work, for EPA’s review and approval. Within 10 days after EPA’s approval of both the initial Estimated Cost of the Work, and the draft financial assurance instruments, whichever date is later, Respondent shall execute or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding in a form substantially identical to the financial assurance documents reviewed and approved by EPA. Respondent shall submit all executed and/or otherwise finalized instruments or other documents to EPA within 30 days after EPA’s

approval of the initial Estimated Cost of the Work and the draft financial assurance instruments, whichever date is later.

**[For initial financial assurance under Paragraph 40.a(6)]** Within 30 days after EPA has **[identify triggering event (see note above)]**, Respondent shall submit to EPA all documentation necessary to demonstrate that Respondent satisfies the financial test criteria pursuant to Paragraph 40.a(6), concurrently with Respondent's submission of the initial Estimated Cost of the Work. Respondent's financial assurance shall be effective immediately upon EPA's approval of the initial Estimated Cost of the Work and Respondent's demonstration that Respondent satisfies the financial test criteria pursuant to Paragraph 40.a(6), whichever date is later.

d. If Respondent seeks to establish financial assurance by using a letter of credit, surety bond, or a corporate guarantee, Respondent shall at the same time establish, and thereafter maintain, a standby trust fund, which meets the requirements of Paragraph 40.a(1) above, into which funds from other financial assurance instrument can be deposited, if the financial assurance provider is directed to do so by EPA pursuant to Paragraph 41.b.

e. Respondent shall submit all financial assurance instruments and related required documents by certified mail to the EPA Regional Financial Management Officer, with copies to **[the Regional financial assurance specialist, if one exists in the relevant Region and ]** at the address[es] listed below. Copies shall also be sent to the EPA Project Officer [and the State].

**[Name,]** EPA Regional Financial Management Officer  
US EPA  
Region [ ]  
**[Address]**  
**[Email]**

**[(If appropriate) Name,]** EPA Regional Financial Specialist  
US EPA  
Region [ ]  
**[Address]**  
**[Email]**

f. If at any time during the effective period of this Order the Respondent provides financial assurance for completion of the Work by means of a corporate guarantee or financial test pursuant to Paragraph 40.a(5) or 40.a(6), Respondent shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these methods, unless otherwise provided in this Order, including but not limited to, (i) initial submission of required financial reports and statements from the guarantors' chief financial officer and independent certified public accountant; (ii) annual re-submission of such reports and statements within 90 days after the close of each of the guarantors' fiscal years; and (iii) notification of EPA within 90 days after the close of any of the guarantors' fiscal years in which any such guarantor no longer satisfies the financial test requirements set forth at 40 C.F.R. § 264.143(f)(1). Respondent further agrees that if Respondent

provides financial assurance by means of a corporate guarantee or financial test, EPA may request additional information (including financial statements and accountant's reports) from the Respondent or corporate guarantor at any time.

**[NOTE: EPA must be sure that the language of the corporate guarantee includes a provision whereby the guarantor agrees to provide such additional financial information to EPA at any time upon request.]**

g. For purposes of the corporate guarantee or the financial test described in Paragraphs 40.a(5) and 40.a(6), references to 40 C.F.R. § 264.143(f) to “the sum of current closure and post-closure costs and the current plugging and abandonment cost estimates” shall mean “the sum of all environmental remediation obligations” (including obligations under CERCLA, RCRA, UIC, TSCA, and any other state or tribal environmental obligations) guaranteed by such company or for which such company is otherwise financially obligated in addition to the cost of the Work to be performed in accordance with this Order.

h. Respondent may combine more than one mechanism to demonstrate financial assurance for the Work to be performed in accordance with this Order, except that mechanisms guaranteeing performance rather than payment may not be combined with other instruments.

**[NOTE: There may be circumstances where EPA would consider accepting a combination of a performance guarantee mechanism with a payment mechanism. If such a combination is accepted by EPA, EPA must be sure that special care is taken in drafting and/or reviewing the financial assurance instruments to be sure that EPA, the Respondent, and each financial assurance provider are clear about which instrument covers which work and/or costs.]**

i. If at any time EPA determines that a financial assurance instrument provided pursuant to this Section is inadequate or no longer satisfies the requirements set forth or incorporated by reference in the Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, EPA shall so notify Respondent in writing. If at any time Respondent becomes aware of information indicating that any financial assurance instrument provided pursuant to this Section is inadequate or no longer satisfies the requirements set forth or incorporated by reference in the Section, whether due to an increase in the estimated cost of completing the Work, or for any other reason, then Respondent shall notify EPA in writing of such information within 10 days. Within 30 days of receipt of notice of EPA's determination or within thirty days of Respondent's becoming aware of such information, as the case may be, Respondent shall obtain and present to EPA for approval a proposal for a revised or alternative form of financial assurance that satisfies all requirements set forth or incorporated by reference in this Section. In seeking approval for a revised or alternative form of financial assurance, Respondent shall follow the procedures set forth in Paragraph 42.b below.

j. Respondent's inability or failure to establish or maintain financial assurance for completion of the Work shall in no way excuse performance of any other requirements of this Order, including, without limitation, the obligation of Respondent to complete the Work in strict accordance with the terms of this Order.

k. Any and all financial assurance instruments provided pursuant to Paragraphs 40.a(2), 40.a(3), or 40.a(4) shall be automatically renewed at the time of their expiration unless the financial assurance provider has notified both the Respondent and the **[title of appropriate Regional staff person]** at least 120 days prior to expiration, cancellation, or termination of the instrument of a decision to cancel, terminate or not renew a financial assurance instrument. Under the terms of the financial assurance instrument, the 120 days will begin to run with the date of receipt of the notice by both the **[title of appropriate Regional staff person]** and the Respondent. Furthermore, if Respondent has failed to provide alternate financial assurance and obtain written approval for such alternate financial assurance within 90 days following receipt of such notice by both Respondent and the **[title of appropriate Regional staff person]**, then the **[title of appropriate Regional staff person]** will so notify the financial assurance provider in writing prior to the expiration of the instrument, and the financial assurance provider shall immediately deposit into the standby trust fund, or a newly created trust fund approved by EPA, the remaining funds obligated under the financial assurance instrument for the performance of the Work in accordance with this Order.

**[NOTE: Because the Order does not bind the financial assurance provider, EPA must carefully review each instrument to be sure that it obligates the financial assurance provider to perform the obligations of the provider which are prescribed in the Order and to do so in a timely manner. There are special considerations regarding cancellation, termination or failure to renew insurance policies that need to be addressed when reviewing insurance policies.]**

#### 41. Access to Financial Assurance

a. In the event that EPA determines that Respondent (i) has ceased implementation of any portion of the Work, (ii) is significantly or repeatedly deficient or late in its performance of the Work, or (iii) is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (“Performance Failure Notice”) to both the Respondent and the financial assurance provider of Respondent’s failure to perform. The notice issued by EPA will specify the grounds upon which such a notice was issued and will provide the Respondent with a period of 10 days within which to remedy the circumstances giving rise to the issuance of such notice.

b. Failure by the Respondent to remedy the relevant Performance Failure to EPA’s satisfaction before the expiration of the 10-day notice period specified in Paragraph 41.a, shall trigger EPA’s right to have immediate access to and benefit of the financial assurance provided pursuant to Paragraphs 40.a(1) – (5). EPA may at any time thereafter direct the financial assurance provider to immediately (i) deposit into the standby trust fund, or a newly created trust fund approved by EPA, the remaining funds obligated under the financial assurance instrument (ii) or arrange for performance of the Work in accordance with this Order.

**[NOTE: Because this Order does not directly bind the financial assurance provider, be sure that the financial assurance instrument obligates the provider to perform the Work or deposit funds into the standby trust fund as directed by EPA.]**

c. If EPA has determined that any of the circumstances described in clauses (i), (ii), or (iii) of Paragraph 41.a have occurred, and if EPA is nevertheless unable after reasonable efforts to secure the payment of funds or performance of the Work in accordance with this Order from the financial assurance provider pursuant to this Order, then, upon receiving written notice from EPA, Respondent shall within 10 days thereafter deposit into the standby trust fund, or a newly created trust fund approved by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount equal to the estimated cost of the remaining Work to be performed in accordance with this Order as of such date, as determined by EPA.

d. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel such mechanism, and Respondent fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation into the relevant standby trust fund or a newly created trust fund approved by EPA to facilitate performance of the Work in accordance with this Order.

e. Respondent may invoke the procedures set forth in Section XVII (Dispute Resolution) to dispute EPA's determination that any of the circumstances described in clauses (i), (ii), or (iii) of Paragraph 41.a. has occurred. Invoking the dispute resolution provisions shall not excuse, toll, or suspend the obligation of the financial assurance provider under Paragraph 41.b of this Section to fund the trust fund or perform the Work. Furthermore, notwithstanding Respondent's invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion direct the trustee of such trust fund to make payments from the trust fund to any person that has performed the Work in accordance with this Order until the earlier of (i) the date that Respondent remedies, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Performance Failure Notice; or (ii) the date that a final decision is rendered in accordance with Section XVII (Dispute Resolution), that Respondent has not failed to perform the Work in accordance with this Order.

#### 42. **Modification of Amount, Form, or Terms of Financial Assurance**

a. **Reduction of Amount of Financial Assurance.** If Respondent believes that the estimated cost to complete the remaining Work has diminished below the amount covered by the existing financial assurance provided under this Order, Respondent may, at the same time that Respondent submits the annual cost adjustment, pursuant to Paragraph 39.d of this Section, or at any other time agreed to by EPA, submit a written proposal to EPA to reduce the amount of the financial assurance provided under this Section so that the amount of the financial assurance is equal to the estimated cost of the remaining Work to be performed. The written proposal shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval of a revised financial assurance amount, Respondent shall follow the procedures set forth in Paragraph 42.b(2) of this Section. If EPA decides to accept such a proposal, EPA shall notify Respondent of its decision in writing. After receiving EPA's written decision, Respondent may reduce the amount of the financial assurance only in accordance with and to the extent permitted by such written decision. In the event of a dispute, Respondent may reduce the amount of the financial assurance required hereunder only in accordance with the final EPA Dispute Decision resolving such dispute. No

change to the form or terms of any financial assurance provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraph 42.b below.

**b. Change of Form of Financial Assurance**

(1) If Respondent desires to change the form or terms of financial assurance, Respondent may, at the same time that Respondent submits the annual cost adjustment, pursuant to Paragraph 39.d of this Section, or at any other time agreed to by EPA, submit a written proposal to EPA to change the form of financial assurance. The submission of such proposed revised or alternative form of financial assurance shall be as provided in Paragraph (2) below. The decision whether to approve a proposal submitted under this Paragraph 42 shall be made in EPA's sole and unreviewable discretion and such decision shall not be subject to challenge by Respondent pursuant to the dispute resolution provisions of this Order or in any other forum.

(2) A written proposal for a revised or alternative form of financial assurance shall specify, at a minimum, the cost of the remaining Work to be performed, the basis upon which such cost was calculated, and the proposed revised form of financial assurance, including all proposed instruments or other documents required in order to make the proposed financial assurance legally binding. The proposed revised or alternative form of financial assurance shall satisfy all requirements set forth or incorporated by reference in this Section. EPA shall notify Respondent in writing of its decision to accept or reject a revised or alternative form of financial assurance submitted pursuant to this Paragraph. Within 10 days after receiving a written decision approving the proposed revised or alternative financial assurance, Respondent shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding in a form substantially identical to the documents submitted to EPA as part of the proposal and such financial assurance shall be fully effective. Respondent shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected financial assurance legally binding to the EPA Regional Financial Management Officer within 30 days of receiving a written decision approving the proposed revised or alternative financial assurance, with a copy to [the Regional financial assurance specialist], the EPA Project Officer [and the State]. EPA shall release, cancel, or terminate the prior existing financial assurance instruments only after Respondent has submitted all executed and/or otherwise finalized new financial assurance instruments or other required documents to EPA.

**[NOTE: Respondent must submit original executed or otherwise finalized instruments or documents. Facsimiles or photocopies are not acceptable.]**

**c. Release of Financial Assurance.** Respondent may submit a written request to the [**insert appropriate Regional manager title**] that EPA release the Respondent from the requirement to maintain financial assurance under this Section at such time as EPA and Respondent have both executed an "Acknowledgment of Termination and Agreement to Record

Preservation and Reservation of Right” pursuant to Paragraph 75 of this Order. The **[insert appropriate Regional manager title]** shall notify both the Respondent and the provider(s) of the financial assurance that Respondent is released from all financial assurance obligations under this Order. Respondent shall not release, cancel, or terminate any financial assurance provided pursuant to this Section except as provided in this Paragraph or Paragraph 42.b(2). In the event of a dispute, Respondent may release, cancel, or terminate the financial assurance required hereunder only in accordance with a final administrative or judicial decision resolving such dispute.

**XVI. DELAY IN PERFORMANCE/STIPULATED PENALTIES**

43. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 44 and 45 for failure to comply with the requirements of this Order specified below, unless excused under Section XVIII (Force Majeure and Excusable Delay). “Comply” as used in the previous sentence, includes compliance by Respondent with all applicable requirements of this Order, within the deadlines established under this Order. If (i) an initially submitted or resubmitted deliverable contains a material defect and the conditions are met for modifying the deliverable under Section XIV (Agency Approvals/Additional Work/Modifications); or (ii) a resubmitted deliverable contains a material defect; then the material defect constitutes a lack of compliance for purposes of this Paragraph.

**44. Stipulated Penalty Amounts – Work to be Performed (Excluding Deliverables)**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 44.b:

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

**[NOTE: Penalty amounts should be high enough to ensure deterrent effect and remove the economic benefit of noncompliance.]**

**b. Obligations**

**[NOTE: List compliance milestones, such as approved schedules.]**

(1) Failure to commence, perform, and/or complete Work or major deliverables in a manner acceptable to EPA or at the time required pursuant to this Order.

(2) Establishment and maintenance of financial assurance in compliance with the timelines and other substantive and procedural requirements of Section XV (Financial Assurance).

(3) [Continue list of major deliverables and other milestones.]

45. **Stipulated Penalty Amounts – Deliverables.** The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables pursuant to this Order:

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

46. 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. Penalties shall continue to accrue during any dispute resolution period, and shall be paid within 15 days after the agreement or the receipt of EPA’s decision or order. However, stipulated penalties shall not accrue: (i) with respect to a deficient submission under Section XIV (Agency Approvals/Additional Work/Modifications), during the period, if any, beginning on the 31st day after EPA’s receipt of such submission until the date that EPA notifies Respondent of any deficiency, or (ii) with respect to a decision under Section XVII (Dispute Resolution), during the period, if any, beginning the 21st day after the Negotiation Period begins until the date that EPA issues a final decision regarding such dispute. Nothing in this Order shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

47. Following EPA’s determination that Respondent has failed to comply with a requirement of this Order, EPA may give Respondent written notification of such noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in this Paragraph 46 regardless of whether EPA has notified Respondent of a violation.

48. All penalties accruing under this Section shall be due and payable to EPA within 30 days after Respondent’s receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVII (Dispute Resolution) within the thirty-day period.

49. If Respondent fails to pay stipulated penalties when due, Respondent shall pay Interest on the unpaid stipulated penalties as follows: Interest shall begin to accrue on any unpaid stipulated penalty balance beginning on the 31<sup>st</sup> day after Respondent’s receipt of EPA’s demand. Interest shall accrue at the Current Value of Funds Rate established by the Secretary of the Treasury. Pursuant to 31 U.S.C. § 3717, an additional penalty of 6% per annum on any unpaid principal shall be assessed for any stipulated penalty payment which is overdue for 90 or more days. In addition, a handling fee of [\$15] per month shall be assessed beginning on the thirty-first day after Respondent’s receipt of EPA’s demand. **[NOTE: The handling fee may be increased to \$30 per month. Please check with the Cincinnati Finance Center when drafting.]**

50. All payments to EPA under this Section shall indicate that the payment is for stipulated penalties and shall be paid to “Treasurer, United States” by Automated Clearinghouse (ACH) to:

US Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077  
St. Louis, MO 63197-9000

Payments shall include a reference to the name of the Facility, Respondent’s name and address, and the EPA docket number of this action. A copy of the transmittal request shall be sent simultaneously to EPA’s Project Coordinator and to the EPA Cincinnati Finance Office by email at [cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov), or by mail to:

EPA Cincinnati Finance Office  
26 W. Martin Luther King Drive  
Cincinnati, Ohio 45268

51. The payment of penalties and interest, if any, shall not alter in any way Respondent’s obligation to complete the performance of Work required under this Order.

52. Nothing in this Order 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 Respondent’s violation of this Order or of the statutes and regulations upon which it is based, including but not limited to 42 U.S.C. § 6928(h)(2); however, EPA shall not seek civil penalties pursuant to 42 U.S.C. § 6928(h)(2) for any violation for which a stipulated penalty is provided in this Order, except in the case of a willful violation of this Order.

53. 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 Order.

## **XVII. DISPUTE RESOLUTION**

54. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this Order. The parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

55. **Informal Dispute Resolution.** If Respondent objects to any EPA action taken pursuant to this Order, it shall notify EPA in writing of its objection(s) within [ ] days after such action. EPA and Respondent shall have [ ] days from EPA’s receipt of Respondent’s written objection(s) to resolve the dispute through informal negotiations (the “Negotiation Period”). Upon request of Respondent, the Negotiation Period may be extended at the sole discretion of EPA. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Order.

56. **Formal Dispute Resolution.** If the Parties are unable to reach an agreement within the Negotiation Period, Respondent shall, within [20] days after the end of the Negotiation Period, submit a statement of position to EPA's Project Coordinator. EPA may, within [20] days thereafter, submit a statement of position. Thereafter, an EPA management official at [**insert Region-specific**] level or higher will issue a written decision on the dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Order. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

57. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Respondent under this Order not directly in dispute, unless EPA provides otherwise in writing. Except as provided in Paragraph 46, stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of the Order. In the event that Respondent does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVI (Delay in Performance/Stipulated Penalties).

## **XVIII. FORCE MAJEURE**

58. "Force majeure," for purposes of this Order, is defined as any event arising from causes beyond the control of Respondent, of any entity controlled by Respondent, or of Respondent's contractors that delays or prevents the performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. The requirement that Respondent exercise "best efforts to fulfill such obligation" includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. "Force majeure" does not include financial inability to complete the Work.

59. If any event occurs or has occurred that may delay the performance of any obligation under this Order for which Respondent intends or may intend to assert a claim of force majeure, Respondent shall notify EPA's Project Coordinator orally or, in his or her absence, the [**insert title of appropriate Regional manager (e.g., Director of Waste Management Division)**], EPA Region \_\_, within [**period of time**] of when Respondent first knew that the event might cause a delay. Within \_\_ days thereafter, Respondent shall provide in writing to EPA an explanation 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; Respondent's rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Respondent shall include with any notice available documentation supporting its claim that the delay was attributable to a force majeure. Respondent shall be deemed to know of any circumstance of which Respondent, any entity controlled by Respondent, or Respondent's contractors knew or should have known. Failure to

comply with the above requirements regarding an event shall preclude Respondent from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under Paragraph 58 and whether Respondent has exercised its best efforts under Paragraph 58, EPA may, in its unreviewable discretion, excuse in writing Respondent's failure to submit timely notices under this Paragraph.

60. If EPA agrees that the delay or anticipated delay is attributable to a force majeure, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify Respondent in writing of its decision.

61. If Respondent elects to invoke the dispute resolution procedures set forth in Section XVII (Dispute Resolution) regarding EPA's decision, Respondent shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondent shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of Paragraphs 59 and 60. If Respondent carries this burden, the delay at issue shall be deemed not to be a violation by Respondent of the affected obligation(s) of this Order identified to EPA.

62. The failure by EPA to timely complete any obligation under the Order is not a violation of the Order, provided, however, that if such failure prevents Respondent from meeting one or more deadlines, Respondent may seek relief under this Section.

## **XIX. RESERVATION OF RIGHTS**

63. Notwithstanding any other provisions of this Order, EPA retains all of its authority to take, direct, or order any and all actions necessary to protect public health 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 or constituents of such wastes, on, at, or from the Facility, including but not limited to the right to bring enforcement actions under RCRA, CERCLA, and any other applicable statutes or regulations.

64. EPA reserves all of its statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, that may pertain to Respondent's failure to comply with any of the requirements of this Order, including without limitation the assessment of penalties under Section 3008(h)(2) of RCRA, 42 U.S.C. § 6928(h)(2).

65. This Order shall not be construed as a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers, claims, and/or authorities, civil or criminal, which EPA has under RCRA, CERCLA, or any other statutory, regulatory, or common law authority of the United States.

66. This Order is not intended to be nor shall it be construed to be a permit. Respondent acknowledges and agrees that EPA's approval of the Work and/or workplan does not constitute a warranty or representation that the Work and/or workplans will achieve the corrective measures completion criteria. Compliance by Respondent with the terms of this Order shall not relieve Respondent of its obligations to comply with RCRA or any other applicable local, state, or federal laws and regulations.

67. Respondent agrees not to contest this Order or any action or decision by EPA pursuant to this Order, including without limitation, decisions of the Regional Administrator, **[add other titles as appropriate]**, or any authorized representative of EPA prior to EPA's initiation of a judicial action to enforce this Order, including an action for penalties or an action to compel Respondent's compliance with the terms and conditions of this Order. In any action brought by EPA for violation of this Order, Respondent shall bear the burden of proving that EPA's actions were arbitrary and capricious and not in accordance with law.

## **XX. OTHER CLAIMS**

68. By issuance of this Order, EPA assumes no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. EPA will not be deemed a party to any contract, agreement or other arrangement entered into by Respondent or its officers, directors, employees, agents, successors, assigns, heirs, trustees, receivers, contractors, or consultants in carrying out actions pursuant to this Order.

69. Respondent waives all claims against the United States relating to or arising out of this Order, including, but not limited to, contribution and counterclaims.

70. Each Party will bear its own litigation costs.

71. In any subsequent administrative or judicial proceeding initiated by EPA for injunctive or other appropriate relief relating to the Facility, Respondent shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been raised in the present matter.

## **XXI. INDEMNIFICATION**

72. Respondent 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 Respondent, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on Respondent's behalf or under their control, in carrying out actions pursuant to this Order. In addition, Respondent 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 and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party

to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Order. Neither Respondent nor any such contractor shall be considered an agent of the United States.

73. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

74. Respondent agrees not to assert any claims or causes of action against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Facility, including, but not limited to, claims on account of construction delays. In addition, Respondent 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 Respondent and any person for performance of Work on or relating to the Facility, including, but not limited to, claims on account of construction delays.

## XXII. TERMINATION

**[NOTE: When determining the appropriate scope and timing for an Acknowledgment of Termination, Regions should be guided by the “Final Guidance on Completion of Corrective Action Activities at RCRA Facilities,” 68 Fed. Reg. 8757 (Feb. 25, 2003). This guidance describes two types of completion of corrective action: Corrective Action Complete without Controls and Corrective Action Complete with Controls.]**

75. This Order shall be deemed satisfied upon Respondent’s and EPA’s execution of an “Acknowledgment of Termination and Agreement to Record Preservation and Reservation of Rights” (“Acknowledgment of Termination”). EPA will prepare the Acknowledgment of Termination for Respondent’s signature. The Acknowledgment of Termination will specify that Respondent has demonstrated to the satisfaction of EPA that the terms of this Order, including any additional tasks determined by EPA to be required pursuant to this Order, have been satisfactorily completed. Respondent’s execution of the Acknowledgement of Termination will affirm Respondent’s continuing obligation to preserve all records as required in Section XII (Record Retention), to maintain any necessary Property Requirements as required in Section X, and to recognize EPA’s Reservation of Rights as required in Section XIX [**Region also may include any other obligations that continue beyond the Acknowledgement of Termination**].

## XXIII. SURVIVABILITY/PERMIT INTEGRATION

**[NOTE: See the “Final Guidance on Completion of Corrective Action Activities at RCRA Facilities,” 68 Fed. Reg. 8757 (Feb. 25, 2003).]**

76. Except as otherwise expressly provided in this Section, this Order shall survive the issuance or denial of a RCRA permit for the Facility, and this Order shall continue in full force and effect after either the issuance or denial of such permit. Accordingly, Respondent shall continue to be liable for the performance of obligations under this Order notwithstanding the issuance or denial of such permit. If the Facility is issued a RCRA permit and that permit

expressly incorporates all or a part of the requirements of this Order, or expressly states that its requirements are intended to replace some or all of the requirements of this Order, Respondent may request a modification or termination of this Order and shall, with EPA approval, be relieved of liability under this Order for those specific obligations.

**XXIV. INTEGRATION/APPENDICES**

77. This Order and its Appendices constitute(s) the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order. The following Appendices are incorporated into this Order: **[Insert list of Appendices]**.

Agreed this \_\_ day of \_\_\_\_\_, 20\_\_.

For Respondent:  
[NAME]  
[TITLE]  
[RESPONDENT]

IT IS SO AGREED AND ORDERED:

**U.S. ENVIRONMENTAL PROTECTION AGENCY:**

\_\_\_\_\_  
Dated

\_\_\_\_\_  
[Name]  
Regional Administrator (or designee/delegatee), Region \_\_

Signature Page for Settlement Regarding \_\_\_\_\_ [Facility]

**FOR** \_\_\_\_\_ :  
[Print name of Respondent]

\_\_\_\_\_  
Dated

\_\_\_\_\_  
[Name]  
[Title]  
[Company]  
[Address]

## Instructions Regarding Automated Features

FEATURE	INSTRUCTIONS
<b>INSERTING TEXT COPIED FROM A DIFFERENT DOCUMENT</b>	Text copied from a different document will usually have embedded formatting codes. Pasting the text into your document will cause the formatting codes to be inserted as well, which will create unpredictable and frustrating formatting and numbering results. <b>Therefore, ALWAYS use the “Paste Special” function to insert text copied from another document.</b> Press Ctrl-Alt-V; in the pop-up menu, click “Unformatted Text” and OK. (You can also click the Home tab, Paste, Paste Special, Unformatted Text and OK.)
<b>INSERTING A NEW PARAGRAPH</b>	Click at the end of the ¶ immediately preceding the place where you wish to add the new <b>paragraph</b> , and press Enter. To change the new ¶'s outline level use (under the Home tab) the styles menu. For example, to change ¶12.b into ¶12.a(1), click in that ¶ and then (using the Home tab) click the "LVL 3" style. To change ¶13.a into ¶14, click in that ¶ and then (using the Home tab) click the “LVL 1” Style. Note that in consent decree models, the letters denoting each background paragraph must be manually updated.
<b>ADDING AN UPDATEABLE SECTION OR PARAGRAPH CROSS-REFERENCE</b>	(a) Click where you wish to insert a cross-reference; (b) Click the “References” tab, and, in the “Captions” box, click “Cross-reference;” (c) In the pop-up menu that appears, make sure the “Reference type” field contains “Numbered item” and the “Insert reference to” field contains “Paragraph Number (full context); (d) In the “For which numbered item” field” select the numbered item (section, paragraph, or subparagraph) you wish to cross-reference, and click Insert.
<b>UPDATING THE CROSS-REFERENCES</b>	Press Ctrl-A (to select entire document); right click; in the pop-up menu, click “Update Field;” click OK. Note: If a numbered paragraph that has been cross-referenced elsewhere in the document is deleted, remove the obsolete paragraph cross-reference. Otherwise, when you update the cross-references, the following message will appear: “Error! Reference source not found.”
<b>UPDATING THE TABLE OF CONTENTS</b>	Right-click in the TOC, and in the pop-up menu, left-click “Update Field.” Or click in the TOC, press F9, click Update Entire Table and OK. If you have just added a new section heading, click Update entire table before pressing Enter.
<b>INSERTING A NEW SECTION HEADING</b>	Click in the text of the new heading and assign the “SECTION” paragraph style to the text by clicking the “Home” tab, and in Styles box, clicking the “SECTION” style button.) That will add the section number, change the numbering of later sections, and ensure that the new section will be referenced in the table of contents.
<b>CHANGING THE FONT</b>	Press Ctrl-A (to select entire document); right click; in the pop-up menu, click “Font;” in the “font” field, select a new font; click OK.