



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 1 – NEW ENGLAND**  
5 POST OFFICE SQUARE, SUITE 100  
BOSTON, MASSACHUSETTS 02109-3912

**URGENT LEGAL MATTER - PROMPT REPLY NECESSARY**  
**VIA ELECTRONIC MAIL**

See Digital Signature Date Stamp Below

Georgia-Pacific Consumer Products LP  
David A. Duncan  
Executive Vice President  
133 Peachtree Street, N.E.  
Atlanta, GA 30303-5605

Attn: J. Michael Davis, Esq., Assistant General Counsel, Georgia-Pacific LLC

Re: **Special Notice Letter for the Chlor-Alkali Facility (Former) Superfund Site  
Berlin, New Hampshire**

Dear Mr. Duncan:

This letter follows the general notice letter that the U.S. Environmental Protection Agency (“EPA”) sent to Georgia-Pacific Consumer Products LP on June 21, 2013, in connection with the Chlor-Alkali Facility (Former) Superfund Site (“Site”), located in Berlin, New Hampshire. In that letter, EPA notified you of your potential responsibility under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”), 42 U.S.C. § 9607(a), for the cleanup of the Site, including all costs incurred by EPA in responding to releases at the Site. EPA is now contacting you in an attempt to resolve Georgia-Pacific Consumer Products LP’s responsibility at the Site.

**Background**

Based on an extensive review of records related to the release and/or disposal of hazardous substances at the Site, EPA identified Georgia-Pacific Consumer Products LP as a potentially responsible party (“PRP”) that contributed hazardous substances to the Site. Under the federal Superfund law, Georgia-Pacific Consumer Products LP and the other PRPs at the Site are responsible for the costs of cleaning up the Site. EPA has selected a cleanup approach (formally known as a remedial action) for the Site, which is described in a document called a Record of Decision (“ROD”) issued by EPA on September 23, 2020.

## Special Notice and Negotiation Moratorium

EPA has determined that use of the special notice procedures set forth in Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), may facilitate a settlement between Georgia-Pacific Consumer Products LP, other PRPs, and EPA for implementation of the response action. Under Section 122(e), this letter triggers a 60-day moratorium on certain EPA response activities at the Site. During this 60-day moratorium, EPA will not begin response action at the Site. However, EPA reserves the right to take action at the Site at any time should a significant threat to the human health or the environment arise.

During this 60-day period, Georgia-Pacific Consumer Products LP and the other PRPs are invited to participate in formal negotiations with EPA in an effort to reach a settlement to conduct or finance the response action at the Site. The 60-day negotiation moratorium will be extended for an additional 60 days if PRPs provide EPA with a “good faith offer” to conduct or finance the response action and reimburse EPA for its costs incurred to date. If EPA determines that your proposal is not a “good faith offer,” you will be notified in writing of EPA’s decision to end the moratorium. If the moratorium is extended for an additional 60 days, negotiations will conclude at the end of that extended period. If settlement is reached between EPA and the PRPs within the 120-day negotiation moratorium, the settlement will be embodied in a Consent Decree for Remedial Design/Remedial Action (“RD/RA”). When approved by EPA and the U.S. Department of Justice (“DOJ”), the Consent Decree will then be lodged in federal court.

If a “good faith offer” is not received within 60 days, or a timely settlement cannot be reached, EPA may take appropriate action at the Site, which may include either of the following options: (1) EPA may fund the remedial action and pursue a cost recovery claim under Section 107 of CERCLA, 42 U.S.C. § 9607, against Georgia-Pacific Consumer Products LP and/or the other PRPs; or (2) EPA may issue a Unilateral Administrative Order (“UAO”) to Georgia-Pacific Consumer Products LP and/or the other PRPs under Section 106(a) of CERCLA, 42 U.S.C. § 9606, requiring Georgia-Pacific Consumer Products LP or them to perform the work described in the ROD. If the recipients of a UAO refuse to comply with the UAO, EPA may pursue civil litigation against the recipients to require compliance.

If you, either individually or with other PRPs, enter into an RD/RA settlement with EPA and provide sufficient information about the existence, liability, and relative shares of responsibility of insolvent and defunct PRPs, EPA will analyze the information and determine whether to consider the shares of these parties in the amount of EPA’s past costs and future oversight costs to recover in such settlement.

## Good Faith Offer

A proposed Consent Decree is enclosed to assist you in developing a “good faith offer.”<sup>1</sup> As indicated, the 60-day negotiation moratorium triggered by this letter is extended for 60 days if the PRPs submit a “good faith offer” to EPA. A “good faith offer” to conduct or finance the

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<sup>1</sup> This draft Consent Decree is not currently binding on EPA and is subject to revision and approval by EPA and DOJ. It is based on the model RD/RA Consent Decree, which is available at [https://cfpub.epa.gov/compliance/models/view.cfm?model\\_ID=81](https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81).

remedial action is a written proposal that demonstrates your qualifications and willingness to perform such work and includes the following elements:

- A statement of your willingness and financial ability to implement the requirements of the ROD and proposed Consent Decree and that provides a sufficient basis for further negotiation;
- A demonstration of your technical capability to carry out the remedial action, including identification of the firm(s) that may actually conduct the work or a description of the process that will be undertaken to select the firm(s);
- A detailed statement of work or work plan identifying how you intend to proceed with the remedial action;
- A statement of your willingness to reimburse EPA for costs EPA will incur in overseeing your implementation of the remedial action;
- A response to the proposed Consent Decree. If your offer contemplates modifications to the Consent Decree, please make revisions or edits to the Consent Decree and submit a version showing your proposed modifications to it;
- A list identifying each party on whose behalf the offer is being made, including name, address, and telephone number of each party;
- The name, address, and phone number of the party who will represent you in negotiations; and
- A redline/strikeout version of the draft CD in Microsoft Word.

### **Demand for Reimbursement of Costs**

With this letter, EPA demands that you reimburse EPA for its costs incurred to-date, and encourages you to voluntarily negotiate a consent decree in which you and other PRPs agree to perform the RD/RA.

In accordance with Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has already taken certain response actions and incurred certain costs in response to conditions at the Site. These response actions include: Site assessment and remedial investigation activities, enforcement activities related to the remedial action, and legal actions to obtain court ordered access to the Site property. EPA is seeking to recover from Georgia-Pacific Consumer Products LP and other PRPs at the Site its response costs and all the interest authorized to be recovered under Section 107(a) of CERCLA, 42 U.S.C. § 9607. To date, the approximate total response costs identified through January 15, 2021, for the Site are \$13,395,703.44. Under Section 107(a) of CERCLA, EPA hereby makes a demand for payment from Georgia-Pacific Consumer Products LP and other

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PRPs for the above amount plus all interest authorized to be recovered under Section 107(a). A summary of these costs is attached.

Some or all of the costs associated with this notice may be covered by current or past insurance policies. Most insurance policies will require that you timely notify your carrier(s) of a claim against you. Insurance coverage depends on many factors, such as the language of the particular policy and applicable state law. To evaluate whether you should notify your insurance carrier(s) of this demand, you may wish to review current and past policies.

In the event that you file for protection in a bankruptcy court, you must include EPA as creditor, because EPA has a potential claim against you. EPA reserves the right to file a proof of claim or application for reimbursement of administrative expenses.

To assist PRPs in negotiating with EPA concerning this matter, please be advised that EPA is sending also this Special Notice to Fort James LLC and North American Dismantling Corp. EPA has identified no other PRPs and EPA anticipates no other Special Notice letters will be issued at this time.

### **Administrative Record**

In accordance with Section 113 of CERCLA, 42 U.S.C. § 9613, EPA has established an Administrative Record containing the documents that serve as the basis for EPA's selection of the appropriate response action for the Site. The administrative record file is available for public viewing at the information repositories at the following locations:

SEMS Records & Information Center  
U.S. EPA Region 1 - New England  
5 Post Office Square, Suite 100 (mail code: 02-3)  
Boston, MA 02109-3912  
(617) 918-1440 (phone)  
R1.Records-SEMS@epa.gov (email)

Berlin Public Library  
270 Main Street  
Berlin, NH 03570  
(603) 752-5210 (phone)  
(603) 752-8568 (fax)  
<https://www.berlinnh.gov/library>

New Hampshire Department of Environmental Services  
29 Hazen Drive  
Concord, NH 03302  
(603) 271-3503 (phone)  
<https://www.des.nh.gov/index.htm>

Information is also available for review online at: <https://go.usa.gov/xwZTG>

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You may wish to review the Administrative Record to assist you in responding to this letter, but your review should not delay such response beyond the 60-day period provided by CERCLA.

### **PRP Response and EPA Contact Person**

You are encouraged to contact EPA by March 19, 2021, to indicate your willingness to participate in future negotiations concerning this Site. You may respond individually or through a steering committee if such a committee has been formed. If EPA does not receive a timely response, EPA will assume that you do not wish to negotiate a resolution of your liabilities in connection with the Site, and that you have declined any involvement in performing the response activities.

Your response to this Special Notice Letter and the demand for costs included herein, including written proposals to perform the remedial action selected for the Site, should be sent to:

Darryl Luce, Remedial Project Manager  
Superfund and Emergency Management Division  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (SEMD 07-1)  
Boston, MA 02109-3912  
(617) 918-1336  
[Luce.darryl@epa.gov](mailto:Luce.darryl@epa.gov)

The factual and legal discussions in this letter are intended solely to provide notice and information, and such discussions are not to be construed as a final EPA position on any matter set forth herein. Due to the seriousness of the environmental and legal problems posed by the conditions at the Site, EPA urges that you give immediate attention and prompt response to this letter.

In addition, EPA has notified the Federal Natural Resource Trustee<sup>2</sup> of its intention to perform or enter into negotiations for the performance of response actions at the Site.

If you have any questions regarding the technical aspects of this letter, please contact Darryl Luce, Remedial Project Manager, at (617) 918-1336 or [luce.darryl@epa.gov](mailto:luce.darryl@epa.gov). If you have an attorney handling your legal matters, please direct his or her questions to Ronald Gonzalez, Senior Enforcement Counsel, at (617) 918-1786 or [gonzalez.ronald@epa.gov](mailto:gonzalez.ronald@epa.gov).

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<sup>2</sup> The Natural Resource Trustees are government agencies that have been given the authority to assess the injury to natural resources caused by the release of hazardous substances and to seek the restoration, replacement, or acquisition of equivalent natural resources. The Federal Natural Resource Trustees include the Departments of Agriculture, Commerce, Defense, Energy, and Interior. In addition, states and tribes are Natural Resource Trustees.

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My staff and I look forward to working with you during the coming months.

Sincerely,

**BRYAN OLSON** Digitally signed by BRYAN  
OLSON  
Date: 2021.03.30 12:34:44 -04'00'

Bryan Olson, Director  
Superfund and Emergency Management Division

cc:

*(By Electronic Mail)*

Darryl Luce, Remedial Project Manager, USEPA  
Mark A. Gallagher, Senior Attorney, USDOJ  
Ronald A. Gonzalez, Senior Enforcement Counsel, USEPA  
RuthAnn Sherman, Senior Enforcement Counsel, USEPA  
Andrew Hoffman, New Hampshire Department of Environmental Services  
Joshua C. Harrison, Assistant Attorney General, NHDOJ  
Jack P. Crisp, Jr., Esq., Counsel for North American Dismantling Corp.  
Robert Scott, Commissioner, NHDES  
Andrew Raddant, U.S. Department of the Interior  
Kenneth Finkelstein, National Oceanic and Atmospheric Administration  
Molly Sperduto, U.S. Fish and Wildlife Service

**From:** [Gonzalez, Ronald](#)  
**To:** [Davis, Michael \(GP Law\)](#)  
**Cc:** [Jack Crisp](#); [Harrison, Joshua](#); [Sherman, RuthAnn](#); [Luce, Darryl](#); [Gallagher, Mark \(ENRD\)](#)  
**Subject:** Chlor-Alkali Facility (Former) Superfund Site, Berlin, New Hampshire - Special Notice - Remedial Design/Remedial Action Negotiations  
**Date:** Tuesday, March 30, 2021 5:01:02 PM  
**Attachments:** [Chlor-Alkali-Berlin-NH-SpecialNoticeLetter-FortJamesLLC-2021 BDO signed.pdf](#)  
[Chlor-Alkali-Berlin-NH-SpecialNoticeLetter-GPCP-LP-2021 BDO signed.pdf](#)  
[Chlor-Alkali-draft-RD-RA-ConsentDecree-03-30-21.docx](#)  
[Chlor-Alkali draft RDRA SOW-25March2021.docx](#)  
[Chlor-Alkali-CostSummary-ReconPending.pdf](#)  
[Chlor-Alkali-NADC-SpecialNoticeLetter-2021 BDO signed.pdf](#)

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J. Michael Davis, Esq.  
Assistant General Counsel  
Georgia-Pacific LLC  
133 Peachtree Street, N.E.  
Atlanta, GA 30303-5605

Dear Michael:

Attached please find Special Notice Letters issued by EPA Region 1 today to initiate negotiations with your clients to undertake the Remedial Design/Remedial Action ("RD/RA") at the above-referenced Site and toward a settlement of EPA's unrecovered response costs at the Site. Please note that on Page 5 of the letters we request an indication of your clients' willingness to participate in the RD/RA negotiations in advance (i.e., potentially prior to submission of a formal "good faith offer"). The March 19<sup>th</sup> date for that request is in error. We apologize for the error, but would appreciate the requested advance notice of intent by April 30, if possible.

Thank you for your attention. I look forward to working with you in the coming months on this matter.

Sincerely,

Ron Gonzalez

Ronald A. Gonzalez  
Senior Enforcement Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (ORC04-3)  
Boston, MA 02109-3912  
(617) 918-1786  
[gonzalez.ronald@epa.gov](mailto:gonzalez.ronald@epa.gov)

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. _____</b>
	)	
	)	
<b>GEORGIA-PACIFIC _____, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**REMEDIAL DESIGN/REMEDIAL ACTION  
CONSENT DECREE**



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## I. BACKGROUND

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

B. The United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (DOJ) for response actions at the Chlor-Alkali Facility (Former) Superfund Site in Berlin, New Hampshire (“Site”), together with accrued interest; and (2) performance of response actions by the defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (“NCP”).

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New Hampshire (the “State”) on March 30, 2021, of negotiations with potentially responsible parties (“PRPs”) regarding the implementation of the remedial design and remedial action (“RD/RA”) for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree (“Consent Decree” or “CD”).

D. **[Place saver for state participation and any state laws cited in the state’s complaint --To be determined.]**

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the U.S. Department of the Interior, the National Oceanic and Atmospheric Administration, the U.S. Fish and Wildlife Service as natural resource trustees on January 26, 2021, of negotiations with PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustees to participate in the negotiation of this CD.

F. The defendants that have entered into this CD (“Settling Defendants” or “SDs”) do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaints, nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment.

G. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List (NPL), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 14, 2005, 70 Fed. Reg. 54286.

H. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, EPA commenced on September 21, 2006, a Remedial Investigation and Feasibility Study (“RI/FS”) for the Site pursuant to 40 C.F.R. § 300.430.

I. EPA completed a Remedial Investigation (“RI”) Report on March 1, 2014, and SDs completed a Supplemental Remedial Investigation (“SRI”) Report on October 19, 2018, and SDs completed a Feasibility Study (“FS”) Report on April 7, 2020.

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on May 28, 2020, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is

available to the public as part of the administrative record upon which the Director, Superfund and Emergency Management Division, EPA Region 1, based the selection of the response action.

K. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision (“ROD”), executed on September 23, 2020, on which the State has given its concurrence. The ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

L. Based on the information presently available, EPA believes that the Work will be properly and promptly conducted by SDs if conducted in accordance with this CD and its appendices.

M. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the remedy set forth in the ROD and the Work to be performed by SDs shall constitute a response action taken or ordered by the President for which judicial review shall be limited to the administrative record.

N. The Parties recognize, and the Court by entering this CD finds, that this CD has been negotiated by the Parties in good faith and implementation of this CD will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this CD is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over SDs. Solely for the purposes of this CD and the underlying complaints, SDs waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. SDs shall not challenge the terms of this CD or this Court’s jurisdiction to enter and enforce this CD.

## **III. PARTIES BOUND**

2. This CD is binding upon the United States and upon SDs and their successors and assigns. Any change in ownership or corporate or other legal status of a SD including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such SD’s responsibilities under this CD.

3. SDs shall provide a copy of this CD to each contractor hired to perform the Work and to each person representing any SD with respect to the Site or the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this CD. SDs or their contractors shall provide written notice of the CD to all subcontractors hired to perform any portion of the Work. SDs shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work in accordance with the terms of this CD. With regard to the activities undertaken pursuant to this CD, each contractor and subcontractor shall be deemed to be in a contractual relationship with SDs within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

## IV. DEFINITIONS

4. Unless otherwise expressly provided in this CD, terms used in this CD that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this CD or its appendices, the following definitions shall apply solely for purposes of this CD:

“Affected Property” shall mean all real property at the Site and any other real property where EPA determines, at any time, that access, land, water, or other resource use restrictions, and/or Institutional Controls are needed to implement the Remedial Action, including, but not limited to, (1) the Cell House Property (or “CHP”), which is approximately 4.6 acres, situated on the east bank of the Androscoggin River just downstream of the Sawmill Dam, and is identified on Berlin Tax Assessor’s Map No. 128 as Lot No. 262; and (2) approximately 38 acres of undeveloped and former industrial property, which is an undivided portion of a larger parcel that is identified on Berlin Tax Assessor’s Map No. 129 as a portion of Lot No. 54.

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

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

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

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

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

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

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

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing deliverables submitted pursuant to this CD, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this CD, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to ¶ 11 (Emergencies and Releases), ¶ 12 (Community Involvement) (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), ¶ 32 (Access to Financial Assurance), Section VII (Remedy Review), Section VIII (Property Requirements) (including the cost of attorney time and any monies paid to secure or enforce access or land, water, or other resource use restrictions and/or to secure, implement, monitor, maintain, or enforce Institutional Controls including the amount of just compensation), and Section XIII (Dispute Resolution), and all litigation costs. Future Response Costs shall also include all Interim Response Costs, and all Interest on those Past Response Costs

SDs have agreed to pay under this CD that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from **[same cutoff date as in PRC definition]**, to the Effective Date.

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

“Interim Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the United States in connection with the Site between **[same cutoff as in PRC definition]**, and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“NHDES” shall mean the New Hampshire Department of Environmental Services and any successor departments or agencies of the State.

“Non-Settling Owner” shall mean any person, other than a SD, that owns or controls any Affected Property. The clause “Non-Settling Owner’s Affected Property” means Affected Property owned or controlled by Non-Settling Owner.

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

“Owner SD” shall mean any SD that owns or controls any Affected Property. The clause “Owner SD’s Affected Property” means Affected Property owned or controlled by Owner SD.

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

“Parties” shall mean the United States and SDs.

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

“Performance Standards” or “PS” shall mean the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the ROD.

“Plaintiff” shall mean the United States.

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

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

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the Site signed on September 23, 2020, by the Superfund and Emergency Management Division, EPA Region 1, and all attachments thereto. The ROD is attached as Appendix A.

“Remedial Action” or “RA” shall mean the remedial action selected in the ROD.

“Remedial Design” or “RD” shall mean those activities to be undertaken by SDs to develop final plans and specifications for the RA as stated in the SOW.

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

“Settling Defendants” or “SDs” shall mean **[To Be Determined]**.

“Site” shall mean the Chlor-Alkali Facility (Former) Superfund Site, encompassing approximately 44 acres, located on the east bank of the Androscoggin River, in the City of Berlin, Coos County, New Hampshire, and depicted generally on the map attached as Appendix C.]

“Special Account” means the Chlor-Alkali Facility (Former) Special Account, within the Fund, established for the Site by EPA under section 122(b)(3) of CERCLA, and the Administrative Settlement Agreement and Order on Consent for Supplemental Remedial Investigation/ Feasibility Study *In re: Fort James LLC and Georgia-Pacific Consumer Products LP*, U.S. EPA Region 1, CERCLA Docket No. 01-2015-0043.

“State” shall mean the State of New Hampshire.

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

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

“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.

“Waste Materials” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (4) any “hazardous waste” or “hazardous materials” under New Hampshire Revised Statutes Annotated 147-B:2, VII or VIII; and (5) any “hazardous waste” under New Hampshire Revised Statutes Annotated 147-A:2, VII.

“Work” shall mean all activities and obligations SDs are required to perform under this CD, except the activities required under Section XIX (Retention of Records).

## **V. GENERAL PROVISIONS**

5. **Objectives of the Parties.** The objectives of the Parties in entering into this CD are to protect public health or welfare or the environment by the design and implementation of response actions at the Site by SDs, to pay response costs of Plaintiff, and to resolve the claims of Plaintiff against SDs as provided in this CD.

### **6. Commitments by SDs**

a. SDs shall finance and perform the Work in accordance with this CD and all deliverables developed by SDs and approved or modified by EPA pursuant to this CD. SDs shall pay the United States as provided in this CD.

b. SDs’ obligations to finance and perform the Work, including obligations to pay amounts due under this CD, are joint and several. In the event of the insolvency of any SD or the failure by any SD to implement any requirement of this CD, the remaining SDs shall complete all such requirements.

7. **Compliance with Applicable Law.** Nothing in this CD limits SDs’ obligations to comply with the requirements of all applicable federal and state laws and regulations. SDs must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this CD, if approved by EPA, shall be deemed to be consistent with the NCP as provided in Section 300.700(c)(3)(ii) of the NCP.

### **8. Permits**

a. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, SDs shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. SDs may seek relief under the provisions of Section XII (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in ¶ 8.a and required for the Work, provided that they have submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.

c. This CD is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

## **VI. PERFORMANCE OF THE WORK**

### **9. Coordination and Supervision**

#### **a. Project Coordinators**

(1) SDs’ Project Coordinator must have sufficient technical expertise to coordinate the Work. SDs’ Project Coordinator may not be an attorney representing

any SD in this matter and may not act as the Supervising Contractor. SDs' Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.

(2) EPA shall designate and notify the SDs of EPA's Project Coordinator. EPA may designate other representatives, which may include its employees, contractors and/or consultants, to oversee the Work. EPA's Project Coordinator/Alternate Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the NCP. This includes the authority to halt the Work and/or to conduct or direct any necessary response action when he or she determines that conditions at the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material.

(3) SDs' Project Coordinators shall meet with EPA's Project Coordinators at least monthly.

b. **Supervising Contractor.** SDs' proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system that complies with ANSI/ASQC E4-2004, Quality Systems for Environmental Data and Technology Programs: Requirements with Guidance for Use (American National Standard).

c. **Procedures for Disapproval/Notice to Proceed**

(1) SDs shall designate, and notify EPA, within ten days after the Effective Date, of the name[s], title[s], contact information, and qualifications of the SDs' proposed Project Coordinator and Supervising Contractor, whose qualifications shall be subject to EPA's review for verification based on objective assessment criteria (e.g., experience, capacity, technical expertise) and do not have a conflict of interest with respect to the project.

(2) EPA, after a reasonable opportunity for review and comment by the State, shall issue notices of disapproval and/or authorizations to proceed regarding the proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval, SDs shall, within 30 days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. EPA shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. SDs may select any coordinator/contractor covered by an authorization to proceed and shall, within 21 days, notify EPA of SDs' selection.

(3) SDs may change their Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of §§ 9.c(1) and 9.c(2).

(4) Notwithstanding the procedures of §§ 9.c(1) through 9.c(3), SDs have proposed, and EPA has authorized SDs to proceed, regarding the following Project Coordinator and Supervising Contractor: [Assuming this may be addressed during our discussions, we would include the **name and contact information** here].

10. **Performance of Work in Accordance with SOW.** SDs shall: (a) develop the RD; (b) perform the RA; and (c) operate, maintain, and monitor the effectiveness of the RA; all in



accordance with the SOW and all EPA-approved, conditionally-approved, or modified deliverables as required by the SOW. All deliverables required to be submitted for approval under the CD or SOW shall be subject to approval by EPA in accordance with ¶ 6.6 (Approval of Deliverables) of the SOW.

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

12. **Community Involvement.** If requested by EPA, SDs shall conduct community involvement activities under EPA's oversight as provided for in, and in accordance with, Section 2 (Community Involvement) of the SOW. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator. Costs incurred by the United States under this Section constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

13. **Modification of SOW or Related Deliverables**

a. If EPA determines that it is necessary to modify the work specified in the SOW and/or in deliverables developed under the SOW in order to achieve and/or maintain the Performance Standards or to carry out and maintain the effectiveness of the RA, and such modification is consistent with the Scope of the Remedy set forth in ¶ 1.3 of the SOW, then EPA may notify SDs of such modification. If SDs object to the modification they may, within 30 days after EPA's notification, seek dispute resolution under Section XIII.

b. The SOW and/or related work plans shall be modified: (1) in accordance with the modification issued by EPA; or (2) if SDs invoke dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this CD, and SDs shall implement all work required by such modification. SDs shall incorporate the modification into the deliverable required under the SOW, as appropriate.

c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this CD.

14. Nothing in this CD, the SOW, or any deliverable required under the SOW constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW or related deliverable will achieve the Performance Standards.

## **VII. REMEDY REVIEW**

15. **Periodic Review.** SDs shall conduct, in accordance with ¶ 4.7 (Periodic Review Support Plan) of the SOW, studies and investigations to support EPA's reviews under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and applicable regulations, of whether the RA is protective of human health and the environment.

16. **EPA Selection of Further Response Actions.** If EPA determines, at any time, that the RA is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

17. **Opportunity to Comment.** SDs and, if required by Sections 113(k)(2) or 117 of CERCLA, 42 U.S.C. § 9613(k)(2) or 9617, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

18. **SDs' Obligation to Perform Further Response Actions.** If EPA selects further response actions relating to the Site, EPA may require SDs to perform such further response actions, but only to the extent that the reopener conditions in ¶ 66 or 67 (United States' Pre- and Post-Certification Reservations) are satisfied. SDs may invoke the procedures set forth in Section XIII (Dispute Resolution) to dispute (a) EPA's determination that the reopener conditions of ¶ 66 or 67 are satisfied, (b) EPA's determination that the RA is not protective of human health and the environment, or (c) EPA's selection of the further response actions. Disputes regarding EPA's determination that the RA is not protective or EPA's selection of further response actions shall be resolved pursuant to ¶ 50 (Record Review).

19. **Submission of Plans.** If SDs are required to perform further response actions pursuant to ¶ 18, they shall submit a plan for such response action to EPA for approval in accordance with the procedures of Section VI (Performance of the Work by SDs). SDs shall implement the approved plan in accordance with this CD.

## **VIII. PROPERTY REQUIREMENTS**

**NOTE: Here and in other places in this Section, there is optional text to be used if there is an Owner SD.**

20. **Agreements Regarding Access and Non-Interference.** SDs shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by SDs and by Plaintiff, providing that such Non-Settling Owner (i) provide Plaintiff and the other SDs, and their representatives, contractors, and subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the CD, including those listed in ¶ 20.a (Access Requirements); and (ii) refrain from using such Affected Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action, including the restrictions listed in ¶ 20.b (Land, Water, or Other Resource Use Restrictions). SDs shall provide a copy of such access and use restriction agreement(s) to EPA.

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

**NOTE: Augment this list as appropriate.**

- (1) Conducting all activities to Perform and monitor the Work;
- (2) Verifying any data or information submitted to the United States or the State;
- (3) Conducting investigations regarding contamination at or near the Site;

(4) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the CD; and

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

b. **Land, Water, or Other Resource Use Restrictions.** The following is a list of land, water, or other resource use restrictions applicable to the Affected Property:

(1) Prohibiting the following activities that could interfere with the implementation, operation, or maintenance of the Selected Remedy;

(2) Prohibiting use of contaminated groundwater;

(3) Prohibiting the following activities that could result in exposure to contaminants in subsurface soils and groundwater;

(4) Ensuring that any new structures on the Site will not be constructed in the following manner that could interfere with the RA; and

(5) Ensuring that any new structures on the Site will be constructed only in a manner that ensures that building occupants will not be subjected to unacceptable risks due to vapor intrusion from contaminated groundwater.

**NOTE: Proprietary Controls are required for this Site under the RA. Implementation, maintenance, and enforcement of PCs here is likely to be complicated and time-consuming. Accordingly, EPA is amenable to a revised drafting of the CD and SOW so that PCs may be implemented pursuant to an “Institutional Controls Implementation and Assurance Plan” (“ICIAP”) as part of the SOW, rather than under this Section. In the event the parties agree on this as a way to proceed, ¶ 21 may then be modified or omitted. Some of ¶ 21’s provisions, including the requirement to use best efforts (as defined in ¶ 22) to secure Non-Settling Owner’s cooperation in executing and recording PCs will necessarily be retained either in the SOW, an approved final ICIAP, or here in the text of this CD.**

21. **Proprietary Controls.** SDs shall, with respect to any Non-Settling Owner’s Affected Property, use best efforts to secure Non-Settling Owner’s cooperation in executing and recording, in accordance with the procedures of this ¶ 21, Proprietary Controls that: (i) grant a right of access to conduct any activity regarding the CD, including those activities listed in ¶ 20.a (Access Requirements); and (ii) grant the right to enforce the land, water, or other resource use restrictions set forth in ¶ 20.b (Land, Water, or Other Resource Use Restrictions).

a. **Grantees.** The Proprietary Controls must be granted to one or more of the following persons and their representatives, as determined by EPA: the United States, the State, SDs, and other appropriate grantees. Proprietary Controls in the nature of a Uniform Environmental Covenants Act (“UECA”) document granted to persons other than the United States must include a designation that EPA, or the State as appropriate, is a “third-party beneficiary” expressly granted the right 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.

b. **Initial Title Evidence.** SDs 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 SD, or “To Be Determined;” (ii) covers the Affected Property that is to be encumbered; (iii) demonstrates that the person or entity that will execute and record the Proprietary Controls is the owner of such Affected Property; (iv) identifies all record matters that affect title to the Affected Property, including all prior liens, claims, rights (such as easements), mortgages, and other encumbrances (collectively, “Prior Encumbrances”); and (v) includes complete, legible copies of such Prior Encumbrances; and

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

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

(1) SDs shall secure the release, subordination, modification, or relocation of all Prior Encumbrances on the title to the Affected Property revealed by the title evidence or otherwise known to any SD, unless EPA waives this requirement as provided under ¶¶ 21.c(2)-(4).

(2) SDs may, by the deadline under ¶ 21.b (Initial Title Evidence), submit an initial request for waiver of the requirements of ¶ 21.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 remedy or result in unacceptable exposure to Waste Material.

(3) SDs 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 ¶ 21.c(1) regarding any particular Prior Encumbrance on the grounds that SDs could not obtain the release, subordination, modification, or relocation of such Prior Encumbrance despite best efforts.

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

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

(1) SDs shall submit all draft Proprietary Controls and draft instruments addressing Prior Encumbrances to EPA for review and approval within 180 days after the Effective Date; or if an initial waiver request has been filed, with 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.

(2) Upon EPA's approval of the proposed Proprietary Controls and instruments addressing Prior Encumbrances, SDs shall, within 15 days, update the original title insurance commitment (or other evidence of title acceptable to EPA) under ¶ 21.b (Initial Title Evidence). If the updated title examination indicates that no liens, claims, rights, or encumbrances have been recorded since the effective date of the original commitment (or other title evidence), SDs shall secure the immediate recordation of the Proprietary Controls and instruments addressing Prior Encumbrances in the appropriate land records. Otherwise, SDs shall secure the release, subordination, modification, or relocation under ¶ 21.c(1), or the waiver under ¶¶ 21.c(2)-(4), regarding any newly-discovered liens, claims, rights, and encumbrances, prior to recording the Proprietary Controls and instruments addressing Prior Encumbrances.

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

(4) SDs shall, within 30 days after recording the Proprietary Controls and instruments addressing Prior Encumbrances, or such other deadline approved by EPA, provide to the United States 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) or other approved form of updated title evidence dated as of the date of recording of the Proprietary Controls and instruments.

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

f. **[To be Included if there is an Owner SD:** Owner SD shall not Transfer its Affected Property unless it has executed and recorded all Proprietary Controls and instruments addressing Prior Encumbrances regarding such Affected Property in accordance with this Paragraph.]

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

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

**24. Notice to Successors-in-Title**

a. Owner SD shall, within 15 days after the Effective Date, submit for EPA approval a notice to be filed regarding Owner SD's Affected Property in the appropriate land records. The notice must: (1) include a proper legal description of the Affected Property; (2) provide notice to all successors-in-title: (i) that the Affected Property is part of, or related to, the Site; (ii) that EPA has selected a remedy for the Site; and (iii) that potentially responsible parties have entered into a CD requiring implementation of such remedy; and (3) identify the U.S. District Court in which the CD was filed, the name and civil action number of this case, and the date the CD was entered by the Court. Owner SD 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. Owner SD shall, prior to entering into a contract to Transfer Owner SD's Affected Property, or 60 days prior to Transferring Owner SD's Affected Property, whichever is earlier:

(1) Notify the proposed transferee that EPA has selected a remedy regarding the Site, that potentially responsible parties have entered into a Consent Decree requiring implementation of such remedy, and that the United States District Court has entered the CD (identifying the name and civil action number of this case and the date the CD was entered by the Court); and

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

25. In the event of any Transfer of the Affected Property, unless the United States otherwise consents in writing, SDs shall continue to comply with their obligations under the CD, including their obligation to secure access and ensure compliance with any land, water, or other resource use restrictions regarding the Affected Property, and to implement, maintain, monitor, and report on Institutional Controls.

26. Notwithstanding any provision of the CD, Plaintiff 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.

## **IX. FINANCIAL ASSURANCE**

27. In order to ensure completion of the Work, SDs shall secure financial assurance, initially in the amount of \$5,092,673 ("Estimated Cost of the Work"), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA or under the "Financial Assurance - Settlements" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. SDs may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

a. A surety bond guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;

e. A demonstration by a SD that it meets the relevant test criteria of ¶ 29, accompanied by a standby funding commitment, which obligates the affected SD to pay funds to or at the direction of EPA, up to the amount financially assured through the use of this demonstration in the event of a Work Takeover; or

f. A guarantee to fund or perform the Work executed in favor of EPA by a company: (1) that is a direct or indirect parent company of a SD or has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with a SD; and (2) can demonstrate to EPA’s satisfaction that it meets the financial test criteria of ¶ 29.

28. **[If the parties have pre-negotiated the form of the FA, we would use the following:]** SDs have selected, and EPA has found satisfactory, **[otherwise:** Settling Defendants shall, within 21 days after the Effective Date, seek EPA’s approval of the form of Settling Defendants’ financial assurance of]a **[To be Determined]** as an initial form of financial assurance. Within 30 days after the Effective Date, SDs shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the:

U.S. EPA - Region 1 SEMS Records & Information Center  
Financial Assurance Repository  
5 Post Office Square (02-3)  
Boston, MA 02109-3912

and to the United States, EPA specified in Section XX (Notices and Submissions).

29. SDs seeking to provide financial assurance by means of a demonstration or guarantee under ¶ 27.e or 27.f, must, within 30 days of the Effective Date:

a. Demonstrate that:

(1) the affected SD or guarantor has:

i. Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities

greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

- ii. Net working capital and tangible net worth each at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
- iii. Tangible net worth of at least \$10 million; and
- iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; or

(2) The affected SD or guarantor has:

- i. A current rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa as issued by Moody's; and
- ii. Tangible net worth at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
- iii. Tangible net worth of at least \$10 million; and
- iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and

b. Submit to EPA for the affected SD or guarantor: (1) a copy of an independent certified public accountant's report of the entity's financial statements for the latest completed fiscal year, which must not express an adverse opinion or disclaimer of opinion; and (2) a letter from its chief financial officer and a report from an independent certified public accountant substantially identical to the sample letter and reports available from EPA or under the "Financial Assurance - Settlements" subject list category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models>.

30. SDs providing financial assurance by means of a demonstration or guarantee under ¶ 27.e or 27.f must also:

a. Annually resubmit the documents described in ¶ 29.b within 90 days after the close of the affected Respondent's or guarantor's fiscal year;

b. Notify EPA within 30 days after the affected Respondent or guarantor determines that it no longer satisfies the relevant financial test criteria and requirements set forth in this Section; and



c. Provide to EPA, within 30 days of EPA's request, reports of the financial condition of the affected Respondent or guarantor in addition to those specified in ¶ 29.b; EPA may make such a request at any time based on a belief that the affected Respondent or guarantor may no longer meet the financial test requirements of this Section.

31. SDs shall diligently monitor the adequacy of the financial assurance. If any SD becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, such SD shall notify EPA of such information within seven days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the affected SD of such determination. SDs shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for the affected SD, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. SDs shall follow the procedures of ¶ 33 (Modification of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. SDs' inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this Settlement.

### **32. Access to Financial Assurance**

a. If EPA issues a notice of implementation of a Work Takeover under ¶ 70.b, then, in accordance with any applicable financial assurance mechanism or related standby funding commitment, EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with ¶ 32.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel the mechanism, and the affected SD fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 32.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 70.b, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism and related standby funding commitment, whether in cash or in kind, to continue and complete the Work; or (2) the financial assurance is a demonstration or guarantee under ¶ 27.e or 27.f, then EPA is entitled to demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. SDs shall, within 60 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this ¶ 32 shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA, or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Chlor-Alkali Facility (Former) Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this ¶ 32 must be reimbursed as Future Response Costs under Section X (Payments for Response Costs).

33. **Modification of Amount, Form, or Terms of Financial Assurance.** SDs may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with ¶ 28, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify SDs of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. SDs may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XIII (Dispute Resolution). SDs may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, SDs shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with ¶ 28.

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

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

### **35. Payment by SDs for United States Past Response Costs.**

a. Within 30 days after the Effective Date, SDs shall pay to EPA \$ [To be **determined**] in payment for Past Response Costs. The Financial Litigation Unit ("FLU") of the United States Attorney's Office for the District of New Hampshire shall provide to SDs, in accordance with ¶ 92, instructions for making this payment, including a Consolidated Debt Collection System ("CDCS") reference number. SDs shall make such payment at <https://www.pay.gov> in accordance with the FLU's instructions, including references to the CDCS Number and Site/Spill ID Number 01BQ. SDs shall send to DOJ and EPA, in accordance with ¶ 92, a notice of this payment including these references.

b. **Deposit of Past Response Costs Payment.** The total amount to be paid by Setting Defendants pursuant to ¶ 35.a shall be deposited by EPA in the Chlor-Alkali Facility (Former) Superfund Site Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

36. **Payments by SDs for Future Response Costs.** SDs shall pay to EPA all Future Response Costs not inconsistent with the NCP.

a. **Periodic Bills.** On a periodic basis, EPA will send SDs a bill requiring payment that includes a cost summary, which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and DOJ. SDs shall make all payments within 30 days after SDs' receipt of each bill requiring payment, except as otherwise provided in ¶ 37, at <https://www.pay.gov> using the "EPA Miscellaneous Payments Cincinnati Finance Center" link, and including references to the Site/Spill ID Number 01BQ, and the purpose of the payment. SDs shall send to DOJ and EPA, in accordance with ¶ 92, a notice of this payment including these references.

b. **Deposit of Future Response Costs Payments.** The total amount to be paid by SDs pursuant to ¶ 36.a (Periodic Bills) shall be deposited by EPA in the Chlor-Alkali Facility (Former) Superfund Site Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund, provided, however, that EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Chlor-Alkali Facility (Former) Superfund Site Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum.

37. **Contesting Future Response Costs.** SDs may submit a Notice of Dispute, initiating the procedures of Section XIII (Dispute Resolution), regarding any Future Response Costs billed under ¶ 36 (Payments by SDs for Future Response Costs) if they determine that EPA has made a mathematical error or included a cost item that is not within the definition of Future Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA or State action that was inconsistent with a specific provision or provisions of the NCP. Such Notice of Dispute shall be submitted in writing within 30 days after receipt of the bill and must be sent to the United States (if the United States' accounting is being disputed) pursuant to Section XX (Notices and Submissions). Such Notice of Dispute shall specifically identify the contested Future Response Costs and the basis for objection. If SDs submit a Notice of Dispute, SDs shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to the United States, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC), and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. SDs shall send to the United States, as provided in Section XX (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If the United States prevails in the dispute, SDs shall pay the sums due (with accrued interest) to the United States within seven days after the resolution of the dispute. If SDs prevail concerning any aspect of the contested costs, SDs shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States within seven days after the resolution of the dispute. SDs shall be disbursed any balance of the escrow account. All payments to the United States under this Paragraph shall be made in accordance with ¶ 35.a (instructions for past response cost payments). The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding SDs' obligation to reimburse the United States for its Future Response Costs.

38. **Interest.** In the event that any payment for Past Response Costs or for Future Response Costs required under this Section is not made by the date required, SDs shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall begin to accrue on the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of SDs' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of SDs' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Section XIV (Stipulated Penalties).

## **XI. INDEMNIFICATION AND INSURANCE**

### **39. SDs' Indemnification of the United States and the State**

a. The United States does not assume any liability by entering into this CD or by virtue of any designation of SDs as EPA's authorized representatives under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). SDs shall indemnify, save, and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of SDs, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on SDs' behalf or under their control, in carrying out activities pursuant to this CD, including, but not limited to, any claims arising from any designation of SDs as EPA's authorized representatives under Section 104(e) of CERCLA. Further, SDs agree to pay the United States all costs it incurs 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 on negligent or other wrongful acts or omissions of SDs, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this CD. The United States shall not be held out as a party to any contract entered into by or on behalf of SDs in carrying out activities pursuant to this CD. Neither SDs nor any such contractor shall be considered an agent of the United States.

b. The United States shall give SDs notice of any claim for which the United States plans to seek indemnification pursuant to this ¶ 39, and shall consult with SDs prior to settling such claim.

40. SDs covenant not to sue and agree 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 any one or more of SDs and any person for performance of work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, SDs shall indemnify, save 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 any one or more of SDs and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

41. **Insurance.** No later than 15 days before commencing any on-site Work, SDs shall secure, and shall maintain until the first anniversary after issuance of EPA's Certification of RA Completion pursuant to ¶ 4.6 (Certification of RA Completion) of the SOW, commercial general liability insurance with limits of liability of \$1 million per occurrence, automobile liability insurance with limits of liability of \$1 million per accident, and umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits, naming the United States as an additional insured with respect to all liability arising out of the

activities performed by or on behalf of SDs pursuant to this CD. In addition, for the duration of this CD, SDs shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of SDs in furtherance of this CD. Prior to commencement of the Work, SDs shall provide to EPA certificates of such insurance and a copy of each insurance policy. SDs shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If SDs demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, SDs need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. SDs shall ensure that all submittals to EPA under this Paragraph identify the Site name and Site/Spill ID Number 01BQ.

## **XII. FORCE MAJEURE**

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

43. If any event occurs or has occurred that may delay the performance of any obligation under this CD for which SDs intend or may intend to assert a claim of force majeure, SDs shall notify EPA's Project Coordinator orally or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund and Emergency Management Division, EPA Region 1, within seven days of when SDs first knew that the event might cause a delay. Within seven days thereafter, SDs shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; SDs' rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of SDs, such event may cause or contribute to an endangerment to public health or welfare, or the environment. SDs shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. SDs shall be deemed to know of any circumstance of which SDs, any entity controlled by SDs, or SDs' contractors or subcontractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude SDs 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 ¶ 42 and whether SDs have exercised their best efforts under ¶ 42, EPA may, in its unreviewable discretion, excuse in writing SDs' failure to submit timely or complete notices under this Paragraph.

44. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this CD that are affected by the force majeure will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to

complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify SDs in writing of its decision. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay is attributable to a force majeure, EPA will notify SDs in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

45. If SDs elect to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution) regarding EPA's decision, they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, SDs 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 SDs complied with the requirements of ¶¶ 42 and 43. If SDs carry this burden, the delay at issue shall be deemed not to be a violation by SDs of the affected obligation of this CD identified to EPA and the Court.

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

### **XIII. DISPUTE RESOLUTION**

47. Unless otherwise expressly provided for in this CD, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes under this CD. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of SDs that have not been disputed in accordance with this Section.

48. A dispute shall be considered to have arisen when one Party sends the other Parties a written Notice of Dispute. Any dispute regarding this CD shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the Parties to the dispute.

#### **49. Statements of Position**

a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within ten days after the conclusion of the informal negotiation period, SDs invoke the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by SDs. The Statement of Position shall specify SDs' position as to whether formal dispute resolution should proceed under ¶ 50 (Record Review) or 51.

b. Within 21 days after receipt of SDs' Statement of Position, EPA will serve on SDs its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under ¶ 50 (Record Review) or ¶ 51. Within seven days after receipt of EPA's Statement of Position, SDs may submit a Reply.

c. If there is disagreement between EPA and SDs as to whether dispute resolution should proceed under ¶ 50 (Record Review) or ¶ 51, the parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if SDs ultimately appeal to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in ¶¶ 50 and 51.

50. **Record Review.** Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this CD, and the adequacy of the performance of response actions taken pursuant to this CD. SDs shall not challenge, using the dispute resolution procedures under Section XIV, or judicially, EPA's remedial action selection embodied in the ROD.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Superfund and Emergency Management Division, EPA Region 1, will issue a final administrative decision resolving the dispute based on the administrative record described in ¶ 50.a. This decision shall be binding upon SDs, subject only to the right to seek judicial review pursuant to ¶¶ 50.c and 50.d.

c. Any administrative decision made by EPA pursuant to ¶ 50.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by SDs with the Court and served on all Parties within ten days after receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this CD. The United States may file a response to SDs' motion.

d. In proceedings on any dispute governed by this Paragraph, SDs shall have the burden of demonstrating that the decision of the Superfund and Emergency Management Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to ¶ 50.a.

51. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. The Director of the Superfund and Emergency Management Division, EPA Region 1, will issue a final decision resolving the dispute based on the statements of position and reply, if any, served under ¶ 49. The Superfund and Emergency Management Division Director's decision shall be binding on SDs unless, within 10 days after receipt of the decision, SDs file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the CD. The United States may file a response to SDs' motion.

b. Notwithstanding ¶ M of Section I (Background) above, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

52. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of SDs under this CD, except as provided in ¶ 37 (Contesting Future Response Costs), as agreed by EPA, or as determined by the Court. Stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute, as provided in ¶ 60. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this CD. In the event that SDs do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIV (Stipulated Penalties).

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

53. SDs shall be liable to the United States for stipulated penalties in the amounts set forth in ¶¶ 54.a and 55 for failure to comply with the obligations specified in ¶¶ 54.b and 55, unless excused under Section XII (Force Majeure). “Comply” as used in the previous sentence includes compliance by SDs with all applicable requirements of this CD, within the deadlines established under this CD. If an initially submitted or resubmitted deliverable contains a material defect, and the deliverable is disapproved or modified by EPA under ¶ 6.6(a) (Initial Submissions) or 6.6(b) (Resubmissions) of the SOW due to such material defect, then the material defect shall constitute a lack of compliance for purposes of this Paragraph.

##### **54. Stipulated Penalty Amounts - Payments, Financial Assurance, Major Deliverables, and Other Milestones**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in ¶ 54.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$1,500
15th through 30th day	\$3,000
31st day and beyond	\$5,000

##### **b. Obligations**

(1) Payment of any amount due under Section X (Payments for Response Costs).

(2) Establishment and maintenance of financial assurance in accordance with Section IX (Financial Assurance).

(3) Establishment of an escrow account to hold any disputed Future Response Costs under ¶ 37 (Contesting Future Response Costs).

(4) To be determined.

55. **Stipulated Penalty Amounts – Other Deliverables.** The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables pursuant to the CD other than those specified in Paragraph 54.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$1,000



15th through 30th day	\$1,500
31st day and beyond	\$2,250

56. In the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 70 (Work Takeover), SDs shall be liable for a stipulated penalty in the amount of \$500,000. Stipulated penalties under this Paragraph are in addition to the remedies available under ¶¶ 32 (Access to Financial Assurance) and 70 (Work Takeover).

57. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under ¶ 6.6 (Approval of Deliverables) of the SOW, during the period, if any, beginning on the 31st day after EPA’s receipt of such submission until the date that EPA notifies SDs of any deficiency; (b) with respect to a decision by the Director of the Superfund and Emergency Management Division, EPA Region 1, under ¶ 50.b or 51.a of Section XIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that SDs’ reply to EPA’s Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XIII (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court’s receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing in this CD shall prevent the simultaneous accrual of separate penalties for separate violations of this CD.

58. Following EPA’s determination that SDs have failed to comply with a requirement of this CD, EPA may give SDs written notification of the same and describe the noncompliance. EPA may send SDs a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified SDs of a violation.

59. All penalties accruing under this Section shall be due and payable to the United States within 30 days after SDs’ receipt from EPA of a demand for payment of the penalties, unless SDs invoke the Dispute Resolution procedures under Section XIII (Dispute Resolution) within the 30-day period. All payments to the United States under this Section shall be made at <https://www.pay.gov> using the link for “EPA Miscellaneous Payments Cincinnati Finance Center,” including references to the Site/Spill ID Number, and the purpose of the payment. SDs shall send to DOJ and EPA, in accordance with ¶ 92, a notice of this payment including these references.

60. Penalties shall continue to accrue as provided in ¶ 57 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement of the parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA within 15 days after the agreement or the receipt of EPA’s decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, SDs shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days after receipt of the Court’s decision or order, except as provided in ¶ 60.c;

c. If the District Court’s decision is appealed by any Party, SDs shall pay all accrued penalties determined by the District Court to be owed to the United States into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 60 days after receipt of the Court’s decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days after receipt of the final

appellate court decision, the escrow agent shall pay the balance of the account to EPA or to SDs to the extent that they prevail.

61. If SDs fail to pay stipulated penalties when due, SDs shall pay Interest on the unpaid stipulated penalties as follows: (a) if SDs have timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to ¶ 60 until the date of payment; and (b) if SDs fail to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 59 until the date of payment. If SDs fail to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

62. The payment of penalties and Interest, if any, shall not alter in any way SDs' obligation to complete the performance of the Work required under this CD.

63. Nothing in this CD shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of SDs' violation of this CD or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(I) of CERCLA, 42 U.S.C. § 9622(I), provided, however, that the United States shall not seek civil penalties pursuant to Section 122(I) of CERCLA for any violation for which a stipulated penalty is provided in this CD, except in the case of a willful violation of this CD.

64. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this CD.

## **XV. COVENANTS BY PLAINTIFF**

65. **Covenants for SDs by United States.** Except as provided in ¶¶ 66, 67 (United States' Pre- and Post-Certification Reservations), and 69 (General Reservations of Rights), the United States covenants not to sue or to take administrative action against SDs pursuant to Sections 106 and 107(a) of CERCLA, relating to the Site. Except with respect to future liability, these covenants shall take effect upon the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of RA Completion by EPA pursuant to ¶ 4.6 (Certification of RA Completion) of the SOW. These covenants are conditioned upon the satisfactory performance by SDs of their obligations under this CD. These covenants extend only to SDs and do not extend to any other person.

66. **United States' Pre-Certification Reservations.** Notwithstanding any other provision of this CD, the United States reserves, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel SDs to perform further response actions relating to the Site and/or to pay the United States for additional costs of response if, (a) prior to Certification of RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the RA is not protective of human health or the environment.

67. **United States' Post-Certification Reservations.** Notwithstanding any other provision of this CD, the United States reserves, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel SDs to perform further response actions relating to the Site and/or to pay the United States

for additional costs of response if, (a) subsequent to Certification of RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the RA is not protective of human health or the environment.

68. For purposes of ¶ 66 (United States' Pre-Certification Reservations), the information and the conditions known to EPA will include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the ROD for the Site and the administrative record supporting the ROD. For purposes of ¶ 67 (United States' Post-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of RA Completion and set forth in the ROD, the administrative record supporting the ROD, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this CD prior to Certification of RA Completion.

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

- a. liability for failure by SDs to meet a requirement of this CD;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based on the ownership of the Site by SDs when such ownership commences after signature of this CD by SDs;
- d. liability based on the operation of the Site by SDs when such operation commences after signature of this CD by SDs and does not arise solely from SDs' performance of the Work
- e. liability based on SDs' transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this CD by SDs;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- g. criminal liability;
- h. liability for violations of federal or state law that occur during or after implementation of the Work; and
- i. liability, prior to achievement of Performance Standards, for additional response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, but that cannot be required pursuant to ¶ 13 (Modification of SOW or Related Deliverables);]

70. **Work Takeover**

a. In the event EPA determines that SDs: (1) have ceased implementation of any portion of the Work; (2) are seriously or repeatedly deficient or late in their performance of the Work; or (3) are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to SDs. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide SDs a period of ten days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.

b. If, after expiration of the ten-day notice period specified in ¶ 70.a, SDs have not remedied to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary (“Work Takeover”). EPA will notify SDs in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this ¶ 70.b. Funding of Work Takeover costs is addressed under ¶ 32 (Access to Financial Assurance).

c. SDs may invoke the procedures set forth in ¶ 50 (Record Review), to dispute EPA’s implementation of a Work Takeover under ¶ 70.b. However, notwithstanding SDs’ invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under ¶ 70.b until the earlier of (1) the date that SDs remedy, to EPA’s satisfaction, the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, or (2) the date that a final decision is rendered in accordance with ¶ 50 (Record Review) requiring EPA to terminate such Work Takeover.

71. Notwithstanding any other provision of this CD, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XVI. COVENANTS BY SDs**

72. **Covenants by SDs.** Subject to the reservations in ¶ 74, SDs covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to the Site, Past Response Costs, Future Response Costs, and this CD, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112 or 113, or any other provision of law;

b. any claims under CERCLA §§ 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a), or state law regarding the Site, Past Response Costs, Future Response Costs, and this CD; or

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

73. Except as provided in ¶¶ 76 (Waiver of Claims by SDs) and 83 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States brings a cause of action or issues an order pursuant to any of the reservations in Section XV (Covenants by Plaintiff), other than in ¶¶ 69.a (claims for failure to meet a requirement of the CD), 69.g (criminal liability), and 69.h (violations of federal/state law during or after implementation of the Work), but only to the extent that SDs’ claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

74. SDs reserve, and this CD is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of SDs' deliverables or activities.

75. Nothing in this CD shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

76. **Waiver of Claims by SDs**

a. SDs agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have:

(1) **De Micromis Waiver.** For all matters relating to the Site against any person where the person's liability to SDs with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials;

(2) **De Minimis/Ability to Pay Waiver.** For response costs relating to the Site against any person that has entered or in the future enters into a final CERCLA § 122(g) *de minimis* settlement, or a final settlement based on limited ability to pay with EPA with respect to the Site.

b. **Exceptions to Waivers**

(1) The waivers under this ¶ 76 shall not apply with respect to any defense, claim, or cause of action that a SD may have against any person otherwise covered by such waivers if such person asserts a claim or cause of action relating to the Site against such SD.

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

**XVII. EFFECT OF SETTLEMENT; CONTRIBUTION**

78. Except as provided in ¶ 76 (Waiver of Claims by SDs), nothing in this CD shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this CD. Except as provided in Section XVI (Covenants by SDs), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter,

transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this CD diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

79. The Parties agree, and by entering this CD this Court finds, that this CD constitutes a judicially-approved settlement pursuant to which each SD has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this CD.

The “matters addressed” in this CD are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person; provided, however, that if the United States exercises rights under the reservations in Section XV (Covenants by Plaintiff), other than in ¶¶ 69.a (claims for failure to meet a requirement of the CD), 69.g (criminal liability), or 69.h (violations of federal/state law during or after implementation of the Work), the “matters addressed” in this CD will no longer include those response costs or response actions that are within the scope of the exercised reservation.

80. The Parties further agree, and by entering this CD this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this CD constitutes a judicially-approved settlement pursuant to which each Settling Defendant has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

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

82. Each SD shall, with respect to any suit or claim brought against it for matters related to this CD, notify in writing the United States within 10 days after service of the complaint on such SD. In addition, each SD shall notify the United States within ten days after service or receipt of any Motion for Summary Judgment and within ten days after receipt of any order from a court setting a case for trial.

83. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, SDs 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 brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XV (Covenants by Plaintiff).

## **XVIII. ACCESS TO INFORMATION**

84. SDs shall provide to EPA, upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within SDs’ possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this CD, including, but not limited

to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Work. SDs shall also make available to EPA for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

#### **85. Privileged and Protected Claims**

a. SDs may assert that all or part of a Record requested by Plaintiff is privileged or protected as provided under federal law, in lieu of providing the Record, provided SDs comply with ¶ 85.b, and except as provided in ¶ 85.c.

b. If SDs assert a claim of privilege or protection, they shall provide Plaintiff with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, SDs shall provide the Record to Plaintiff in redacted form to mask the privileged or protected portion only. SDs shall retain all Records that they claim to be privileged or protected until Plaintiff has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the SDs' favor.

c. SDs may make no claim of privilege or protection regarding: (1) any data regarding the Site, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or (2) the portion of any Record that SDs are required to create or generate pursuant to this CD.

**86. Business Confidential Claims.** SDs may assert that all or part of a Record provided to Plaintiff under this Section or Section XIX (Retention of Records) is business confidential to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). SDs shall segregate and clearly identify all Records or parts thereof submitted under this CD for which SDs assert business confidentiality claims. Records that SDs claim to be 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 SDs that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to SDs.

**87.** If relevant to the proceeding, the Parties agree that validated sampling or monitoring data generated in accordance with the SOW and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this CD.

**88.** Notwithstanding any provision of this CD, Plaintiff retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

### **XIX. RETENTION OF RECORDS**

**89.** Until ten years after EPA's Certification of Work Completion under ¶ 4.8 (Certification of Work Completion) of the SOW, each SD shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to its liability under CERCLA with

respect to the Site, provided, however, that SDs who are potentially liable as owners or operators of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each SD must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each SD (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.

90. At the conclusion of this record retention period, SDs shall notify the United States at least 90 days prior to the destruction of any such Records, and, upon request by the United States, and except as provided in ¶ 85 (Privileged and Protected Claims), SDs shall deliver any such Records to EPA.

91. Each SD certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States and that it has fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XX. NOTICES AND SUBMISSIONS**

92. All approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, and requests specified in this CD must be in writing unless otherwise specified. Whenever, under this CD, notice is required to be given, or a report or other document is required to be sent, by one Party to another, it must be directed to the person(s) specified below at the address(es) specified below. Any Party may change the person and/or address applicable to it by providing notice of such change to all Parties. All notices under this Section are effective upon receipt, unless otherwise specified. Notices required to be sent to EPA, and not to the United States, should not be sent to the DOJ. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the CD regarding such Party.

### **As to the United States:**

EES Case Management Unit  
eescdcopy.enrd@usdoj.gov  
DJ No. 90-11-3-09455/3

### **As to EPA:**

Director, Superfund and Emergency Management  
Division  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (SEMD 07-1)  
Boston, MA 02109-3912



**and:**

Darryl Luce  
EPA Project Coordinator  
U.S. Environmental Protection Agency  
Region 1  
5 Post Office Square, Suite 100 (SEMD 07-1)  
Boston, MA 02109-3912  
Luce.darryl@epa.gov  
(617) 918-1336

**As to the Regional Financial  
Management Officer:**

[To be Determined]  
[address]  
[email]

**As to the State:**

Andrew Hoffman  
State Project Coordinator  
New Hampshire Department of Environmental  
Services  
P.O. Box 95,  
29 Hazen Drive  
Concord, NH 03302-0095  
Andrew.J.Hoffman@des.nh.gov

**As to SDs:**

To Be Determined]  
SDs' Project Coordinator  
[address]  
[email]  
[phone]

## **XXI. RETENTION OF JURISDICTION**

93. This Court retains jurisdiction over both the subject matter of this CD and SDs for the duration of the performance of the terms and provisions of this CD for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this CD, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIII (Dispute Resolution).

## **XXII. APPENDICES**

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

“Appendix A” is the ROD.

“Appendix B” is the SOW.

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

## **XXIII. MODIFICATION**

95. Except as provided in ¶ 13 (Modification of SOW or Related Deliverables), material modifications to this CD, including the SOW, shall be in writing, signed by the United States and SDs, and shall be effective upon approval by the Court. Except as provided in ¶ 13, non-material

modifications to this CD, including the SOW, shall be in writing and shall be effective when signed by duly authorized representatives of the United States and SDs. A modification to the SOW shall be considered material if it implements a ROD amendment that fundamentally alters the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(ii). Before providing its approval to any modification to the SOW, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification.

96. Nothing in this CD shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this CD.

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

97. This CD shall be lodged with the Court for at least 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the CD disclose facts or considerations that indicate that the CD is inappropriate, improper, or inadequate. SDs consent to the entry of this CD without further notice.

98. If for any reason the Court should decline to approve this CD in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

#### **XXV. SIGNATORIES/SERVICE**

99. Each undersigned representative of a SD to this CD and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this CD and to execute and legally bind such Party to this document.

100. Each SD agrees not to oppose entry of this CD by this Court or to challenge any provision of this CD unless the United States has notified SDs in writing that it no longer supports entry of the CD.

101. Each SD shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this CD. SDs agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. SDs need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this CD.

#### **XXVI. FINAL JUDGMENT**

102. This CD and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the CD. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this CD.

103. Upon entry of this CD by the Court, this CD shall constitute a final judgment between and among the United States, and SDs. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

**SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 2021.**

---

United States District Judge

**FOR THE UNITED STATES OF AMERICA:**

\_\_\_\_\_  
Dated

\_\_\_\_\_  
[Name]  
Assistant Attorney General  
U.S. Department of Justice  
Environment and Natural Resources Division  
Washington, D.C. 20530

\_\_\_\_\_  
Mark A. Gallagher  
Senior Attorney  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
P.O. Box 7611  
Washington, D.C. 20044-7611  
[mark.gallagher@usdoj.gov](mailto:mark.gallagher@usdoj.gov)  
202-514-5405

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Bryan Olson  
Director, Superfund and Emergency Management Division  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (SEMD 07-1)  
Boston, MA 02109-3912

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Ronald A. González  
Senior Enforcement Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (ORC 04-3)  
Boston, MA 02109-3912

Signature Page for CD regarding the Chlor-Alkali Facility (Former) Superfund Site

**FOR** \_\_\_\_\_ :  
[Print name of Settling Defendant]

\_\_\_\_\_  
Dated

\_\_\_\_\_  
Name (print):  
Title:  
Address:

Agent Authorized to Accept Service on Behalf of Above-signed Party: Name (print): \_\_\_\_\_  
Title: \_\_\_\_\_  
Company: \_\_\_\_\_  
Address: \_\_\_\_\_  
Phone: \_\_\_\_\_  
email: \_\_\_\_\_

**NOTE: A separate signature page must be signed by each settlor.**

**MODEL REMEDIAL DESIGN/REMEDIAL ACTION**  
**STATEMENT OF WORK**  
**OPERABLE UNITS 1, 2 and 3**  
**CHLOR-ALKALI FACILITY (FORMER) SUPERFUND SITE**  
**Berlin, Coos County, State of New Hampshire**  
**EPA Region 1**

**[Date: March 25, 2021]**

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## **1. INTRODUCTION**

**1.1 Purpose of the SOW.** This Statement of Work (SOW) sets forth the procedures and requirements for implementing the Work set forth as the selected remedy in Section L of the September 23, 2020 Record of Decision (ROD).

### **1.2 Structure of the SOW**

- Section 2 (Community Involvement) sets forth EPA's and Settling Defendants' (SDs') responsibilities for community involvement.
- Section 3 (Remedial Design) sets forth the process for developing the RD, which includes the submission of specified primary deliverables.
- Section 4 (Remedial Action) sets forth requirements regarding the completion of the RA, including primary deliverables related to completion of the RA.
- Section 5 (Reporting) sets forth SDs' reporting obligations.
- Section 6 (Deliverables) describes the content of the supporting deliverables and the general requirements regarding SDs' submission of, and EPA's review of, approval of, comment on, and/or modification of, the deliverables.
- Section 7 (Schedules) sets forth the schedule for submitting the primary deliverables, specifies the supporting deliverables that must accompany each primary deliverable, and sets forth the schedule of milestones regarding the completion of the RA.
- Section 8 (State Participation) addresses State participation.
- Section 9 (References) provides a list of references, including URLs.

**1.3** The Scope of the Remedy, the "Work" to be performed under this SOW, includes the actions described in Sections D and L of the ROD. Within the ROD EPA defined three Operable Units (OUs) and the general actions to respond to contamination in those areas. Those OUs and actions include:

#### **OU-1: Cell House Parcel Landfill (CHP Landfill)**

The existing CHP Landfill contains debris from the former chemical plant. It is capped and contained by a retaining wall and slurry wall. The major components of the remedy for this OU are to monitor and maintain the CHP Landfill containment system. The containment system consists of the landfill cover system, the slurry wall that prevents groundwater from entering the landfill, and the retaining wall that prevents groundwater from leaving the landfill. This remedy includes:

- Monitoring and maintenance of the existing CHP Landfill containment system (the CHP Landfill cap, monitoring wells, the retaining wall, and the slurry wall) that includes:
  - Annual inspections and maintenance of the CHP landfill engineered cover system. Maintenance will consist of removing woody vegetation on the cap, inspections, and repairs to the infrastructure, as needed.
  - Periodic groundwater and surface water monitoring to assess the effectiveness of the CHP Landfill containment system.

- On-going monitoring of the foundation/retaining wall to determine if stability of the foundation/retaining wall may be compromised.
- Pre-Design activities to determine the types and frequency of monitoring of the foundation/retaining wall, slurry wall, and groundwater monitoring wells, and monitoring points in, and on the banks of, the Androscoggin River adjacent to the CHP Landfill under different conditions to include the 500-year flood and potential seismic loading scenarios.
- Institutional Controls (ICs): To prevent exposure to contaminated groundwater and groundwater vapor, and to protect the components of the remedy, ICs (which are legally-enforceable restrictions), will be placed on the property. These ICs shall be established pursuant to CERCLA and applicable state requirements, and will prohibit the construction of buildings on the CHP Landfill, disturbance of the existing landfill cap and other remedial infrastructure (including monitoring wells, the retaining wall and slurry wall), use of the property for residential and other unrestricted uses, and will prohibit the use of groundwater for anything other than monitoring.
- Engineering Controls (ECs): Construct additional ECs to augment existing access restrictions (*i.e.* fencing and signage) to deter trespassing. Monitoring and maintaining the fence and the containment system.
- If contaminated soil from the contaminated soil remedy component (OU-2 and the uncapped portion of the CHP Landfill) is disposed of on-site, the cap will need to be opened, the new material regraded into the landfill, the cap reconfigured over the added material, and the opening in the cap resealed.

#### **Contaminated Soil in the Southern Facility Study Area (SFSA), Eastern Facility Study Area (EFSA) and the Uncapped Areas of the CHP Property**

The SFSA and EFSA contain isolated areas of contaminated soil that will be excavated and disposed at a permitted off-site facility or, if necessary, beneath the CHP Landfill cover system. The selected remedy for contaminated soils in the SFSA, EFSA and the 0.6-acre area southwest of the CHP Landfill that is uncapped, consists of the following:

- Additional testing to refine the extent of contamination in those areas identified by the Human Health Risk Assessment in the EFSA, SFSA and the uncapped portion of the CHP Landfill.
- Excavation of soils that exceed cleanup levels to address unacceptable risks from commercial/industrial exposure.
- Disposal of excavated soils, at a permitted off-site facility or the contaminated soils will be placed inside the CHP Landfill containment system, if that option is more practicable.
- The excavated areas will be backfilled with clean soils and restored with native vegetation to resemble the surrounding habitat.
- Establish ICs, pursuant to CERCLA and applicable state requirements, that will prohibit residential and other unrestricted uses.

### **OU-3, Contaminated Groundwater Remedy and the Androscoggin River**

OU-3 consists of three areas of remediation: contaminated groundwater beneath the existing CHP Landfill, contaminated groundwater outside the footprint of the CHP Landfill, and the monitoring and recovery of elemental mercury and mercury amalgams found in reach AR-3 of the Androscoggin River. Reach AR-3 is that portion of the River between Sawmill Dam and Riverside Dam. Details of the remedy for each of these areas follow.

#### **Contaminated Groundwater beneath the CHP Landfill.**

Although this groundwater is contaminated, it is within the limits of the CHP Landfill and under federal guidance standards, contaminated groundwater beneath a waste management (i.e., landfill) unit does not require active cleanup if migration of the contaminated groundwater is controlled. EPA has determined that presently migration is prevented by the landfill containment system. The components of this remedy are:

- Groundwater will be monitored to ensure that contaminated groundwater remains within a “compliance boundary,” which would be established around the footprint of the CHP Landfill. Monitoring would confirm that contaminated groundwater is neither migrating into the River nor contaminating adjacent aquifers. A pre-design investigation will determine the monitoring analytes, locations, methods and sampling frequencies.
- The River will also be monitored to ensure no groundwater contamination is migrating into the River.
- If groundwater or surface water monitoring finds that contaminant migration may be occurring, additional monitoring may be required to determine the source and a risk assessment conducted to determine if an unacceptable risk is present.
- If the river or groundwater outside the compliance boundary becomes impacted from the CHP Landfill and the remedy is deemed to no longer be protective of human health or the environment, EPA will make a determination regarding a modification of the groundwater and CHP Landfill components of the remedy, as applicable, to address the remedy protectiveness.
- ICs will consist of legally enforceable restrictions to protect the containment system and other remedial infrastructures, prohibit the use of groundwater for drinking water, prohibit the building of structures on the landfill and prohibit any residential or other unrestricted uses.

***In-situ* treatment of Contaminated Groundwater outside the CHP Landfill:** Contaminated groundwater in this area will be treated *in situ* to destroy or immobilize the contaminants and restore the groundwater to its beneficial use as a potential source of drinking water. The components of this remedy are:

- A pre-design study will determine the type of oxidation compound and its application. *In Situ* Chemical Oxidation (ISCO) will be designed and implemented to destroy VOC groundwater contaminants and immobilize metals, in-place.
- Conducting the ISCO treatment with treatments that destroy or immobilize groundwater contaminants.
- Monitoring will follow the treatment to assess the effectiveness of the treatment and to determine if additional treatments are required or if natural attenuation processes may

address any remnant contamination above groundwater cleanup levels left after the implementation of the ISCO remedy.

- ICs will consist of legally enforceable restrictions to prohibit the use of groundwater as drinking water or any uses that may influence groundwater migration. ICs will also prohibit the building of structures without mitigation to prevent potential intrusion by groundwater vapors.

**Liquid elemental mercury, mercury amalgams, and mercury-contaminated debris in the Androscoggin River:** Liquid, elemental mercury and solid mercury amalgams periodically appear in the riverbed, in river debris, and on the banks. The remedy will include periodic inspections and removals of mercury, mercury amalgams, and mercury-contaminated debris that appears. The selected remedy for this OU involves continued, periodic inspections for, and removal of, liquid elemental mercury, hardened metal amalgams and mercury-containing debris from Reach AR-3 in the River adjacent to the CHP. Inspections and removals shall continue for as long as mercury can be visually located in the River, or on its banks, and contamination remains in the CHP Landfill that may migrate outside of the compliance boundary. The inspections shall record, describe and evaluate the locations, amounts and forms of mercury present.

- 1.4** Inspections and recoveries will occur when River conditions are safe for access during the period from May to September. The area to inspect is approximately 150-feet downstream of Sawmill Dam sluice gates and extends for approximately 370-feet. For the first five years of remedy implementation at least three inspections and one removal will be performed annually, as safety permits. The experience of past collection activities and an analysis of inspections and removals up to the first Five-Year Review will be used to adjust and target future collection actions. Coordination with the operators of Sawmill Dam will be necessary to ensure notification if there is a need for a release of water from the dam sluice gates. The terms used in this SOW that are defined in CERCLA, in regulations promulgated under CERCLA, or in the Consent Decree (CD), have the meanings assigned to them in CERCLA, in such regulations, or in the CD, except that the term “Paragraph” or “¶” means a paragraph of the SOW, and the term “Section” means a section of the SOW, unless otherwise stated.

## **2. COMMUNITY INVOLVEMENT**

### **2.1 Community Involvement Responsibilities**

- (a) EPA has the lead responsibility for developing and implementing community involvement activities at the Site. Pursuant to 40 C.F.R. § 300.435(c), EPA will review the existing Community Involvement Plan (CIP) and determine whether it should be updated and revised to describe further public involvement activities during the Work that are not already addressed or provided for in the existing CIP.
- (b) If requested by EPA, SDs shall participate in community involvement activities, including participation in (1) the preparation of information regarding the Work for dissemination to the public, with consideration given to including mass media

and/or Internet notification, and (2) public meetings that may be held or sponsored by EPA to explain activities at or relating to the Site. SDs' support of EPA's community involvement activities may include providing online access to initial submissions and updates of deliverables to (1) any Community Advisory Groups, (2) any Technical Assistance Grant recipients and their advisors, and (3) other entities to provide them with a reasonable opportunity for review and comment. EPA may describe in its CIP SDs' responsibilities for community involvement activities. All community involvement activities conducted by SDs at EPA's request are subject to EPA's oversight. Upon EPA's request, SDs shall establish a community information repository at or near the Site to house one copy of the administrative record.

- (c) **SDs' CI Coordinator.** If requested by EPA, SDs shall, within 30 days, designate and notify EPA of SDs' Community Involvement Coordinator (SDs' CI Coordinator). SDs may hire a contractor for this purpose. SDs' notice must include the name, title, and qualifications of the SDs' CI Coordinator. SDs' CI Coordinator is responsible for providing support regarding EPA's community involvement activities, including coordinating with EPA's CI Coordinator regarding responses to the public's inquiries about the Site.

### **3. REMEDIAL DESIGN**

**3.1 RD Work Plan.** SDs shall submit a Remedial Design (RD) Work Plan (RDWP) for EPA approval. The RDWP must include:

- (a) Plans for implementing all RD activities identified in this SOW, in the RDWP, or required by EPA to be conducted to develop the RD;
- (b) A description of the overall management strategy for performing the RD, including a proposal for phasing of design and construction, if applicable;
- (c) A description of the proposed general approach to contracting, construction, operation, maintenance, and monitoring of the Remedial Action (RA) as necessary to implement the Work;
- (d) A description of the responsibility and authority of all organizations and key personnel involved with the development of the RD;
- (e) Descriptions of any areas requiring clarification and anticipated problems (e.g., data needs);
- (f) A description of the pre-design investigation designed to determine the limits of soil contamination to address OU-2;
- (g) A description of the treatability study designed to determine the appropriate , to include treatment reagents as well as devices and methods to apply them, and actions to be taken to address groundwater contamination in OU-3;

- (h) Descriptions of any applicable permitting requirements and other regulatory requirements;
  - (i) Description of plans for obtaining access in connection with the Work, such as property acquisition, property leases, and/or easements; and
  - (j) The following supporting deliverables described in ¶ 6.7 (Supporting Deliverables): Health and Safety Plan; Emergency Response Plan; Field Sampling Plan and Quality Assurance Project Plan (QAPP) for the pre-design investigation; and the QAPP for the treatability study.
- 3.2** SDs shall meet regularly with EPA to discuss design issues as necessary, as directed or determined by EPA.
- 3.3 Pre-Design Investigation.** The purpose of the Pre-Design Investigation (PDI) is to address data needs by conducting additional field investigations.
- (a) **PDI Work Plan.** SDs shall submit a PDI Work Plan (PDIWP) for EPA approval. The PDIWP must include:
    - (1) Purpose and objectives of the PDI;
    - (2) An evaluation and summary of existing data and description of data needs;
    - (3) A sampling plan that includes, at a minimum, media to be sampled, contaminants or parameters for which sampling will be conducted, location (areal extent and depths) and number of samples, field measurements and observations; and
    - (4) Cross references to quality assurance/quality control (QA/QC) requirements set forth in the QAPP as described in ¶ 6.7(d).
- 3.4 Treatability Study**
- (a) SDs shall perform a Treatability Study (TS) for the purpose of determining the proper amendments and actions required to destroy or immobilize groundwater contaminants in groundwater outside of the CHP Landfill footprint.
  - (b) SDs shall submit a TS Work Plan (TSWP) for EPA approval. SDs shall prepare the TSWP in accordance with EPA's *Guide for Conducting Treatability Studies under CERCLA, Final* (Oct. 1992), as supplemented for RD by the *Remedial Design/Remedial Action Handbook*, EPA 540/R-95/059 (June 1995).
  - (c) Following completion of the TS, SDs shall submit a TS Evaluation Report for EPA comment.
  - (d) EPA may require SDs to supplement the TS Evaluation Report and/or to perform additional treatability studies.

**3.5 Preliminary (30%) RD.** SDs shall submit a Preliminary (30%) RD for EPA’s comment that describes the site-specific implementation to perform all elements of the remedy and required by this SOW. The Preliminary RD must include:

- (a) A design criteria report, as described in the *Remedial Design/Remedial Action Handbook*, EPA 540/R-95/059 (June 1995);
- (b) Preliminary drawings and specifications;
- (c) Descriptions of permit requirements, if applicable;
- (d) Preliminary Operation and Maintenance (O&M) Plan and O&M Manual;
- (e) A description of how the RA will be implemented in a manner that minimizes environmental impacts in accordance with EPA’s *Principles for Greener Cleanups* (Aug. 2009);
- (f) A description of monitoring and control measures to protect human health and the environment, such as air monitoring and dust suppression, during the RA;
- (g) Any proposed revisions to the RA Schedule that is set forth in ¶ 8.3 (RA Schedule); and
- (h) Updates of all supporting deliverables required to accompany the RDWP described in ¶ 3.1 (j).

**3.6 Pre-Final (95%) RD.** SDs shall submit the Pre-final (95%) RD for EPA’s comment. The Pre-final RD must be a continuation and expansion of the previous design submittal and must address EPA’s comments regarding the Intermediate RD. The Pre-final RD will serve as the approved Final (100%) RD if EPA approves the Pre-final RD without comments. The Pre-final RD must include:

- (a) A complete set of construction drawings and specifications that are: (1) certified by a registered professional engineer; (2) suitable for procurement; and (3) follow professional standards in the current edition of the Construction Specifications Institute’s Master Format at <https://www.csiresources.org/home>;
- (b) A survey and engineering drawings showing existing Site features, such as elements, property borders, easements, and Site conditions;
- (c) Pre-Final versions of the same elements and deliverables as are required for the Preliminary RD;
- (d) A specification for photographic documentation of the RA; and
- (e) Updates of all supporting deliverables required to accompany the Preliminary (30%) RD.

- 3.7 Final (100%) RD.** SDs shall submit the Final (100%) RD for EPA approval. The Final RD must address EPA's comments on the Pre-final RD and must include final versions of all Pre-final RD deliverables.

## **4. REMEDIAL ACTION**

- 4.1 RA Work Plan.** SDs shall submit a RA Work Plan (RAWP) for EPA approval that includes:

- (a) A proposed RA Construction Schedule;
- (b) An updated health and safety plan that covers activities during the RA; and
- (c) Plans for satisfying permitting requirements, including obtaining permits for off-site activity and for satisfying substantive requirements of permits for on-site activity.

### **4.2 Meetings and Inspections**

- (a) **Preconstruction Conference.** SDs shall hold a preconstruction conference with EPA and others as directed or approved by EPA and as described in the *Remedial Design/Remedial Action Handbook*, EPA 540/R-95/059 (June 1995). SDs shall prepare minutes of the conference and shall distribute the minutes to all Parties.
- (b) **Periodic Meetings.** During the construction portion of the RA (RA Construction), SDs shall meet or confer monthly with EPA, and others as directed or determined by EPA, to discuss construction issues. SDs shall distribute an agenda and list of attendees to all Parties prior to each meeting. SDs shall prepare minutes of the meetings and shall distribute the minutes to all Parties.
- (c) **Inspections**
  - (1) EPA or its representative shall conduct periodic inspections of the Work. At EPA's request, the Supervising Contractor or other designee shall accompany EPA or its representative during inspections.
  - (2) Upon notification by EPA of any deficiencies in the RA Construction, SDs shall take all necessary steps to correct the deficiencies and/or bring the RA Construction into compliance with the approved Final RD, any approved design changes, and/or the approved RAWP. If applicable, SDs shall comply with any schedule provided by EPA in its notice of deficiency.

### **4.3 Emergency Response and Reporting**

- (a) **Emergency Response and Reporting.** If any event occurs during performance of the Work that causes or threatens to cause a release of Waste Material on, at, or from the Site and that either constitutes an emergency situation or that may



present an immediate threat to public health or welfare or the environment, SDs shall: (1) immediately take all appropriate action to prevent, abate, or minimize such release or threat of release; (2) immediately notify the authorized EPA officer (as specified in ¶ 4.4(c)) orally; and (3) take such actions in consultation with the authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plan, the Emergency Response Plan, and any other deliverable approved by EPA under the SOW.

- (b) **Release Reporting.** Upon the occurrence of any event during performance of the Work that SDs are required to report pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), 42 U.S.C. § 11004, SDs shall immediately notify the authorized EPA officer orally.
- (c) The “authorized EPA officer” for purposes of immediate oral notifications and consultations under ¶ 4.4(a) and ¶ 4.4(b) is the EPA Project Coordinator, the EPA Alternate Project Coordinator if the EPA Project Coordinator is unavailable, or the EPA Region 1 Emergency Response Center.
- (d) For any event covered by ¶ 4.4(a) and ¶ 4.4(b), SDs shall: (1) within 14 days after the onset of such event, submit a report to EPA describing the actions or events that occurred and the measures taken, and to be taken, in response thereto; and (2) within 30 days after the conclusion of such event, submit a report to EPA describing all actions taken in response to such event.
- (e) The reporting requirements under ¶ 4.4 are in addition to the reporting required by CERCLA § 103 or EPCRA § 304.

#### **4.4 Off-Site Shipments**

- (a) SDs may ship hazardous substances, pollutants, and contaminants from the Site to an off-Site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. SDs will be deemed to be in compliance with CERCLA § 121(d)(3) and 40 C.F.R. § 300.440 regarding a shipment if SDs obtain a prior determination from EPA that the proposed receiving facility for such shipment is acceptable under the criteria of 40 C.F.R. § 300.440(b).
- (b) SDs shall notify the City Manager and all appropriate Departments of the City of Berlin prior to the off-site shipment of any waste materials. The approximate date, time and expected traffic shall be included in the notice. As a courtesy notify the City Manager of any unusual traffic associated with Work at the Site.
- (c) SDs may ship Waste Material from the Site to an out-of-state waste management facility only if, prior to any shipment, they provide notice to the appropriate state environmental official in the receiving facility’s state and to the EPA Project Coordinator. This notice requirement will not apply to any off-Site shipments when the total quantity of all such shipments does not exceed 10 cubic yards. The

notice must include the following information, if available: (1) the name and location of the receiving facility; (2) the type and quantity of Waste Material to be shipped; (3) the schedule for the shipment; and (4) the method of transportation. SDs also shall notify the state environmental official referenced above and the EPA Project Coordinator of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. SDs shall provide the notice after the award of the contract for RA construction and before the Waste Material is shipped.

- (d) SDs may ship Investigation Derived Waste (IDW) from the Site to an off-Site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), 40 C.F.R. § 300.440, *EPA's Guide to Management of Investigation Derived Waste*, OSWER 9345.3-03FS (Jan. 1992), and any IDW-specific requirements contained in the ROD. Wastes shipped off-Site to a laboratory for characterization, and RCRA hazardous wastes that meet the requirements for an exemption from RCRA under 40 CFR § 261.4(e) shipped off-site for treatability studies, are not subject to 40 C.F.R. § 300.440.

#### 4.5 RA Construction Completion

- (a) For purposes of this ¶ 4.6, “RA Construction” comprises, for any RA that involves the construction and operation of a system to achieve Performance Standards, the construction of such system and the performance of all activities necessary for the system to function properly and as designed. For the Site, RA Construction includes the OU-1, CHP Landfill initial maintenance, the OU-2 contaminated soil excavation and disposal, and OU-3, the in situ groundwater treatment for outside of the CHP Landfill as well as the initial AR-3 mercury recovery.
- (b) **Inspection of Constructed Remedy.** SDs shall schedule an inspection to review the construction and operation of the system and to review whether the system is functioning properly and as designed. The inspection must be attended by SDs and EPA and/or their representatives. A re-inspection must be conducted if requested by EPA.
- (c) **Shakedown Period.** There shall be a shakedown period of up to two years for EPA to review whether the remedy is functioning properly and performing as designed. SDs shall provide such information as EPA requests for such review.
- (d) **RA Report.** Following the shakedown period, SDs shall submit an “RA Report” requesting EPA’s determination that RA Construction has been completed. The RA Report must: (1) include statements by a registered professional engineer and by SDs’ Project Coordinator that construction of the system is complete and that the system is functioning properly and as designed; (2) include a demonstration, and supporting documentation, that construction of the system is complete and that the system is functioning properly and as designed; (3) include as-built drawings signed and stamped by a registered professional engineer; (4) be

prepared in accordance with Chapter 2 (Remedial Action Completion) of EPA's *Close Out Procedures for NPL Sites* guidance (May 2011), as supplemented by *Guidance for Management of Superfund Remedies in Post Construction*, OLEM 9200.3-105 (Feb. 2017); and (5) be certified in accordance with ¶ 7.5 (Certification).

- (e) If EPA determines that RA Construction is not complete, EPA shall so notify SDs. EPA's notice must include a description of, and schedule for, the activities that SDs must perform to complete RA Construction. SDs shall perform all activities described in the EPA notice in accordance with the schedule.
- (f) If EPA determines, based on the initial or any subsequent RA Report, that RA Construction is complete, EPA shall so notify SDs.

#### 4.6 Certification of RA Completion

- (a) **Remedial Action Completion Inspection.** The Remedial Action is "Complete" for purposes of this ¶ 4.6 when it has been fully performed and the Performance Standards have been achieved. Settling Defendants shall schedule an inspection for the purpose of obtaining EPA's Certification of Remedial Action Completion. The inspection must be attended by Settling Defendants and EPA and/or their representatives.
- (b) **RA Report or Monitoring Report.** Following the inspection, SDs shall submit a RA Report or Monitoring Report, as appropriate to EPA. The report must:  
(1) include certifications by a registered professional engineer and by SD's Project Coordinator that the RA is complete; (2) include as-built drawings signed and stamped by a registered professional engineer; (3) be prepared in accordance with Chapter 2 (Remedial Action Completion) of EPA's *Close Out Procedures for NPL Sites* guidance (May 2011), as supplemented by *Guidance for Management of Superfund Remedies in Post Construction*, OLEM 9200.3-105 (Feb. 2017); (4) contain monitoring data to demonstrate that Performance Standards have been achieved; and (5) be certified in accordance with ¶ 7.5 (Certification).
- (c) If EPA concludes that the RA is not Complete, EPA shall so notify SDs. EPA's notice must include a description of any deficiencies. EPA's notice may include a schedule for addressing such deficiencies or may require SDs to submit a schedule for EPA approval. SDs shall perform all activities described in the notice in accordance with the schedule.
- (d) If EPA concludes, based on the initial or any subsequent RA Report or Monitoring Report requesting Certification of RA Completion, that the RA is Complete, EPA shall so certify to SDs. This certification will constitute the Certification of RA Completion for purposes of the CD, including Section XV of the CD (Covenants by Plaintiff). Certification of RA Completion will not affect SDs' remaining obligations under the CD.

**4.7 Periodic Review Support Plan (PRSP).** SDs shall submit the PRSP for EPA approval. The PRSP addresses the studies and investigations that SDs shall conduct to support EPA's reviews of whether the RA is protective of human health and the environment in accordance with Section 121(c) of CERCLA, 42 U.S.C. § 9621(c) (also known as "Five-year Reviews"). SDs shall develop the plan in accordance with *Comprehensive Five-year Review Guidance*, OSWER 9355.7-03B-P (June 2001), and any other relevant five-year review guidance.

#### **4.8 Certification of Work Completion**

- (a) **Work Completion Inspection.** SDs shall schedule an inspection for the purpose of obtaining EPA's Certification of Work Completion. The inspection must be attended by SDs and EPA and/or their representatives.
- (b) **Work Completion Report.** Following the inspection, SDs shall submit a report to EPA requesting EPA's Certification of Work Completion. The report must:  
(1) include certifications by a registered professional engineer and by SDs' Project Coordinator that the Work, including O&M activities for OU-2 and for groundwater outside the CHP Landfill, is complete; and (2) be certified in accordance with ¶ 7.5 (Certification). If the RA Report/Monitoring Report submitted under ¶ 4.6(a) includes all elements required under this ¶ 4.7(b), then the RA Report/Monitoring Report suffices to satisfy all requirements under this ¶ 4.7(b).
- (c) If EPA concludes that the Work is not complete, EPA shall so notify SDs. EPA's notice must include a description of the activities that SDs must perform to complete the Work. EPA's notice must include specifications and a schedule for such activities or must require SDs to submit specifications and a schedule for EPA approval. SDs shall perform all activities described in the notice or in the EPA-approved specifications and schedule.
- (d) If EPA concludes, based on the initial or any subsequent report requesting Certification of Work Completion, that the Work is complete, EPA shall so certify in writing to SDs. Issuance of the Certification of Work Completion does not affect the following continuing obligations: (1) activities under the Periodic Review Support Plan; (2) obligations under Sections VIII (Property Requirements), XIX (Retention of Records), and XVIII (Access to Information) of the CD; (3) Institutional Controls obligations as provided in the ICIAP; (4) monitoring and maintenance of the CHP Landfill; and (5) reimbursement of EPA's Future Response Costs under Section X (Payments for Response Costs) of the CD.

### **5. REPORTING**

**5.1 Progress Reports.** Commencing with the month Remedial Design begins and until EPA approves the RA Construction Completion, SDs shall submit progress reports to EPA on

a monthly basis, or as otherwise requested by EPA. The reports must cover all activities that took place during the prior reporting period, including:

- (a) The actions that have been taken toward achieving compliance with the CD;
- (b) A summary of all results of sampling, tests, and all other data received or generated by SDs;
- (c) A description of all deliverables that SDs submitted to EPA;
- (d) A description of all activities relating to RA Construction that are scheduled for the next eight weeks;
- (e) An updated RA Construction Schedule, together with information regarding percentage of completion, delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays;
- (f) A description of any modifications to the work plans or other schedules that SDs have proposed or that have been approved by EPA; and
- (g) A description of all activities undertaken in support of the Community Involvement Plan (CIP) during the reporting period and those to be undertaken in the next six weeks.

**5.2 Notice of Progress Report Schedule Changes.** If the schedule for any activity described in the Progress Reports, including activities required to be described under ¶ 6.1(d), changes, SDs shall notify EPA of such change at least 7 days before performance of the activity.

## **6. DELIVERABLES**

**6.1 Applicability.** SDs shall submit deliverables for EPA approval or for EPA comment as specified in the SOW. If neither is specified, the deliverable does not require EPA's approval or comment. Paragraphs 7.2 (In Writing) through 7.4 (Technical Specifications) apply to all deliverables. Paragraph 7.5 (Certification) applies to any deliverable that is required to be certified. Paragraph 7.6 (Approval of Deliverables) applies to any deliverable that is required to be submitted for EPA approval.

**6.2 In Writing.** All deliverables under this SOW must be in writing unless otherwise specified.

**6.3 General Requirements for Deliverables.** All deliverables must be submitted by the deadlines in the RD Schedule or RA Schedule, as applicable. SDs shall submit all deliverables to EPA in electronic form. Technical specifications for sampling and monitoring data and spatial data are addressed in ¶ 6.4 All other deliverables shall be submitted to EPA in the electronic form specified the EPA Project Coordinator. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5" by 11",

SDs shall also provide EPA with paper copies of such exhibits at the request of the EPA Project Coordinator.

#### **6.4 Technical Specifications**

- (a) All sampling, monitoring, and analytical data shall be provided as zipped, Access database files with truncated versions of data in Excel file formats or as agreed to with EPA. Other delivery methods may be allowed 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 specified by the Region 1 GIS Section; 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://www.epa.gov/geospatial/epa-metadata-editor>.
- (c) Each file must include an attribute name for each site 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 SDs does not, and is not intended to, define the boundaries of the Site.

#### **6.5 Certification.** All deliverables that require compliance with this ¶ 6.5 must be signed by the SDs' Project Coordinator, or other responsible official of SDs, and must contain the following statement:

I certify under penalty of perjury 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.

## 6.6 Approval of Deliverables

### (a) Initial Submissions

- (1) After review of any deliverable that is required to be submitted for EPA approval under the CD or the SOW, EPA shall: (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 substantial 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) **Resubmissions.** Upon receipt of a notice of disapproval under ¶ 6.6(a) (Initial Submissions), or if required by a notice of approval upon specified conditions under ¶ 6.6(a), SDs shall, within 30 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 SDs to correct the deficiencies; or (5) any combination of the foregoing.

- (c) **Implementation.** Upon approval, approval upon conditions, or modification by EPA under ¶ 6.6(a) (Initial Submissions) or ¶ 6.6(b) (Resubmissions), of any deliverable, or any portion thereof: (1) such deliverable, or portion thereof, will be incorporated into and enforceable under the CD; and (2) SDs shall take any action required by such deliverable, or portion thereof. The implementation of any non-deficient portion of a deliverable submitted or resubmitted under ¶ 6.6(a) or ¶ 6.6(b) does not relieve SDs of any liability for stipulated penalties under Section XIV (Stipulated Penalties) of the CD.

## 6.7 Supporting Deliverables. SDs shall submit each of the following supporting deliverables for EPA approval, except as specifically provided. SDs shall develop the deliverables in accordance with all applicable regulations, guidances, and policies (see Section 9 (References)). SDs shall update each of these supporting deliverables as necessary or appropriate during the course of the Work, or as requested by EPA.

- (a) **Health and Safety Plan.** The Health and Safety Plan (HASP) describes all activities to be performed to protect on-site personnel and area residents from physical, chemical, and all other hazards posed by the Work. SDs 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 RD activities and should be, as appropriate, updated to cover activities during the RA and updated to cover activities after RA 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 and the environment.

- (b) **Emergency Response Plan.** The Emergency Response Plan (ERP) must describe procedures to be used in the event of an accident or emergency at the Site (for example, power outages, water impoundment failure, treatment plant failure, slope failure, etc.). The ERP must include:
- (1) Name of the person or entity responsible for responding in the event of an emergency incident;
  - (2) Plan and date(s) for meeting(s) with the local community, including local, State, and federal agencies involved in the cleanup, as well as local emergency squads and hospitals;
  - (3) Spill Prevention, Control, and Countermeasures (SPCC) Plan (if applicable), consistent with the regulations under 40 C.F.R. Part 112, describing measures to prevent, and contingency plans for, spills and discharges;
  - (4) Notification activities in accordance with ¶ 4.4(b) (Release Reporting) in the event of a release of hazardous substances requiring reporting under Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), 42 U.S.C. § 11004; and
  - (5) A description of all necessary actions to ensure compliance with Paragraph 11 (Emergencies and Releases) of the CD in the event of an occurrence during the performance of the Work that causes or threatens a release of Waste Material from the Site that constitutes an emergency or may present an immediate threat to public health or welfare or the environment.
- (c) **Field Sampling Plan.** The Field Sampling Plan (FSP) addresses all sample collection activities. The FSP must be written so that a field sampling team unfamiliar with the project would be able to gather the samples and field information required. SDs shall develop the FSP in accordance with *Guidance for Conducting Remedial Investigations and Feasibility Studies*, EPA/540/G 89/004 (Oct. 1988).
- (d) **Quality Assurance Project Plan.** The Quality Assurance Project Plan (QAPP) augments the FSP and addresses sample analysis and data handling regarding the Work. The QAPP must include a detailed explanation of SDs' quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance, and monitoring samples. SDs 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). The QAPP also must include procedures:

- (1) To ensure that EPA and the State and their authorized representative have reasonable access to laboratories used by SDs in implementing the CD (SDs' Labs);
  - (2) To ensure that SDs' Labs analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring;
  - (3) To ensure that SDs' Labs perform all analyses using EPA's *Test Method for Evaluating Solid Waste: Physical/Chemical Methods Compendium* (SW846) or other methods provided on EPA's web site referenced in ¶ 9.2.
  - (4) To ensure that SDs' Labs participate in an EPA-accepted QA/QC program or other QA/QC program acceptable to EPA (i.e., National Environmental Laboratory Accreditation Program (NELAP));
  - (5) For SDs to provide EPA and the State with notice at least 28 days prior to any sample collection activity;
  - (6) For SDs to provide split samples and/or duplicate samples to EPA and the State upon request;
  - (7) For EPA and the State to take any additional samples that they deem necessary;
  - (8) For EPA and the State to provide to SDs, upon request, Performance Evaluation samples in connection with EPA's and the State's oversight sampling;
  - (9) To provide quality assurance for environmental data in accordance with: EPA's *Guidance on Environmental Data Verification and Data Validation*; EPA QA/G-8 (November 2002); applicable criteria from the *EPA National Functional Guidelines for Inorganic and Organic Superfund Methods Data Review* (January 2017), and *Region I-EPA New England Environmental Data Review Supplement* (June 2018) and
  - (10) For SDs to submit to EPA and the State all sampling and tests results and other data in connection with the implementation of the CD.
- (e) **Site Wide Monitoring Plan.** The purpose of the Site Wide Monitoring Plan (SWMP) is to obtain baseline information regarding the extent of contamination in affected media at the Site; to obtain information, through short- and long- term

monitoring, about the movement of and changes in contamination throughout the Site, before and during implementation of the RA; to obtain information regarding contamination levels to determine whether Performance Standards (PS) are achieved; and to obtain information to determine whether to perform additional actions, including further Site monitoring. The SWMP must include:

- (1) Description of the environmental media to be monitored;
  - (2) Parameters to be monitored and their purpose;
  - (3) Description of the data collection parameters, including existing and proposed monitoring devices and locations, schedule and frequency of monitoring, analytical parameters to be monitored, and analytical methods employed;
  - (4) Description of how performance data will be analyzed, interpreted, and reported, and/or other Site-related requirements;
  - (5) Description of verification sampling procedures;
  - (6) Description of deliverables that will be generated in connection with monitoring, including sampling schedules, laboratory records, monitoring reports, and monthly and annual reports to EPA and State agencies; and
  - (7) Description of proposed additional monitoring and data collection actions (such as increases in frequency of monitoring, and/or installation of additional monitoring devices in the affected areas) in the event that results from monitoring devices indicate changed conditions (such as higher than expected concentrations of the contaminants of concern or groundwater contaminant plume movement).
- (f) **O&M Plan.** The O&M Plan describes the requirements for inspecting, operating, and maintaining the RA. SDs shall develop the O&M Plan in accordance with *Guidance for Management of Superfund Remedies in Post Construction*, OLEM 9200.3-105 (Feb. 2017). The O&M Plan must include the following additional requirements:
- (1) Description of PS required to be met to implement the ROD;
  - (2) Description of activities to be performed: (i) to provide confidence that PS will be met; and (ii) to determine whether PS have been met;
  - (3) **O&M Reporting.** Description of records and reports that will be generated during O&M, such as daily operating logs, laboratory records, records of operating costs, reports regarding emergencies, personnel and maintenance records, monitoring reports, and monthly and annual reports to EPA and State agencies;

- (4) Description of corrective action in case of systems failure, including:
  - (i) alternative procedures to prevent the release or threatened release of Waste Material which may endanger public health and the environment or may cause a failure to achieve PS; (ii) analysis of vulnerability and additional resource requirements should a failure occur; (iii) notification and reporting requirements should O&M systems fail or be in danger of imminent failure; and (iv) community notification requirements; and
- (5) Description of corrective action to be implemented in the event that PS are not achieved; and a schedule for implementing these corrective actions.
- (g) **O&M Manual.** The O&M Manual serves as a guide to the purpose and function of the equipment and systems that make up the remedy. SDs shall develop the O&M Manual in accordance with *Guidance for Management of Superfund Remedies in Post Construction*, OLEM 9200.3-105 (Feb. 2017).
- (h) **Institutional Controls Implementation and Assurance Plan.** The Institutional Controls Implementation and Assurance Plan (ICIAP) describes plans to implement, maintain, and enforce the Institutional Controls (ICs) at the Site. SDs shall develop the ICIAP in accordance with *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites*, OSWER 9355.0-89, EPA/540/R-09/001 (Dec. 2012), and *Institutional Controls: A Guide to Preparing Institutional Controls Implementation and Assurance Plans at Contaminated Sites*, OSWER 9200.0-77, EPA/540/R-09/02 (Dec. 2012). The ICIAP must include the following additional requirements:
  - (1) Locations of recorded real property interests (e.g., easements, liens) and resource interests in the property that may affect ICs (e.g., surface, mineral, and water rights) including accurate mapping and geographic information system (GIS) coordinates of such interests; and
  - (2) Legal descriptions and survey maps that are prepared according to current American Land Title Association (ALTA) and certified by a licensed surveyor.

## 7. SCHEDULES

- 7.1 Applicability and Revisions.** All deliverables and tasks required under this SOW must be submitted or completed by the deadlines or within the time durations listed in the RD and RA Schedules set forth below. SDs may submit proposed revised RD Schedules or RA Schedules for EPA approval. Upon EPA's approval, the revised RD and/or RA Schedules supersede the RD and RA Schedules set forth below, as well as any previously approved RD and/or RA Schedules.

## 7.2 RD Schedule

	<b>Description of Deliverable, Task</b>	<b>¶ Ref.</b>	<b>Deadline</b>
1	RDWP	3.1	60 days after EPA's Authorization to Proceed regarding Supervising Contractor under CD ¶ 9.c
2	PDIWP	3.3(a)	90 days after EPA's Authorization to Proceed regarding Supervising Contractor under CD ¶ 9.c
3	TSWP	3.4(b)	90 days after EPA's Authorization to Proceed regarding Supervising Contractor under CD ¶ 9.c
4	Preliminary (30%) RD	3.5, 3.3(a)	90 days after EPA approval of Final RDWP
5	Pre-final (95%) RD	3.6	45 days after EPA comments on Preliminary RD
6	Final (100%) RD	3.7	30 days after EPA comments on Pre-final RD

## 7.3 RA Schedule

	<b>Description of Deliverable / Task</b>	<b>¶ Ref.</b>	<b>Deadline</b>
1	Award RA contract		90 days after EPA Notice of Authorization to Proceed with RA
2	RAWP	4.1	120 days after EPA Notice of Authorization to Proceed with RA
3	Commence Plan to Institute Institutional Controls		90 days after entry of the Consent Decree.
4	Pre-Construction Conference	4.2(a)	30 days after Approval of RAWP
5	Start of Construction		45 days after Approval of RAWP
6	Completion of Construction		
7	Pre-final Inspection	4.5(b)	60 days after completion of construction
8	Pre-final Inspection Report	4.5(d)	90 days after completion of Pre-final Inspection
9	Final Inspection		60 days after Completion of Work identified in Pre-final Inspection Report
10	RA Report	4.5(d)	90 days after Final Inspection
11	Monitoring Report	4.6(a)	90 days after Final Inspection
12	Work Completion Report	4.8(b)	
13	Periodic Review Support Plan	4.7	Three years after Start of RA Construction

## **8. STATE PARTICIPATION**

- 8.1 Copies.** SDs shall, at any time they send a deliverable to EPA, send a copy of such deliverable to the State. EPA shall, at any time it sends a notice, authorization, approval, disapproval, or certification to SDs, send a copy of such document to the State.
- 8.2 Review and Comment.** The State will have a reasonable opportunity for review and comment prior to:
- (a) Any EPA approval or disapproval under ¶ 7.6 (Approval of Deliverables) of any deliverables that are required to be submitted for EPA approval; and
  - (b) Any approval or disapproval of the Construction Phase under ¶ 4.6 (RA Construction Completion), any disapproval of, or Certification of RA Completion under ¶ 4.7 (Certification of RA Completion), and any disapproval of, or Certification of Work Completion under ¶ 4.9 (Certification of Work Completion).

## **9. REFERENCES**

- 9.1** The following regulations and guidance documents, among others, apply to the Work. Any item for which a specific URL is not provided below is available on one of the two EPA webpages listed in ¶ 10.2:
- (a) A Compendium of Superfund Field Operations Methods, OSWER 9355.0-14, EPA/540/P-87/001a (Aug. 1987).
  - (b) CERCLA Compliance with Other Laws Manual, Part I: Interim Final, OSWER 9234.1-01, EPA/540/G-89/006 (Aug. 1988).
  - (c) Guidance for Conducting Remedial Investigations and Feasibility Studies, OSWER 9355.3-01, EPA/540/G-89/004 (Oct. 1988).
  - (d) CERCLA Compliance with Other Laws Manual, Part II, OSWER 9234.1-02, EPA/540/G-89/009 (Aug. 1989).
  - (e) Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties, OSWER 9355.5-01, EPA/540/G-90/001 (Apr. 1990).
  - (f) Guidance on Expediting Remedial Design and Remedial Actions, OSWER 9355.5-02, EPA/540/G-90/006 (Aug. 1990).
  - (g) Guide to Management of Investigation-Derived Wastes, OSWER 9345.3-03FS (Jan. 1992).
  - (h) Permits and Permit Equivalency Processes for CERCLA On-Site Response Actions, OSWER 9355.7-03 (Feb. 1992).

- (i) Guidance for Conducting Treatability Studies under CERCLA, OSWER 9380.3-10, EPA/540/R-92/071A (Nov. 1992).
- (j) National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule, 40 C.F.R. Part 300 (Oct. 1994).
- (k) Guidance for Scoping the Remedial Design, OSWER 9355.0-43, EPA/540/R-95/025 (Mar. 1995).
- (l) Remedial Design/Remedial Action Handbook, OSWER 9355.0-04B, EPA/540/R-95/059 (June 1995).
- (m) EPA Guidance for Data Quality Assessment, Practical Methods for Data Analysis, QA/G-9, EPA/600/R-96/084 (July 2000).
- (n) Comprehensive Five-year Review Guidance, OSWER 9355.7-03B-P, 540-R-01-007 (June 2001).
- (o) Guidance for Quality Assurance Project Plans, QA/G-5, EPA/240/R-02/009 (Dec. 2002).
- (p) Institutional Controls: Third Party Beneficiary Rights in Proprietary Controls (Apr. 2004).
- (q) Uniform Federal Policy for Quality Assurance Project Plans, Parts 1-3, EPA/505/B-04/900A through 900C (Mar. 2005).
- (r) EPA National Geospatial Data Policy, CIO Policy Transmittal 05-002 (Aug. 2005), <https://www.epa.gov/geospatial/epa-national-geospatial-data-policy>.
- (s) EPA Guidance on Systematic Planning Using the Data Quality Objectives Process, QA/G-4, EPA/240/B-06/001 (Feb. 2006).
- (t) EPA Requirements for Quality Assurance Project Plans, QA/R-5, EPA/240/B-01/003 (Mar. 2001, reissued May 2006).
- (u) EPA Requirements for Quality Management Plans, QA/R-2, EPA/240/B-01/002 (Mar. 2001, reissued May 2006).
- (v) EPA Guidance on Environmental Data Verification and Data Validation; EPA QA/G-8 (Nov. 2002).
- (w) EPA National Functional Guidelines for Inorganic Superfund Methods Data Review (January 2017).
- (x) EPA National Functional Guidelines for Organic Superfund Methods Data Review (January 2017).

- (y) EPA Region 1-EPA New England Environmental Data Review Supplement, EQADR-Supplement1 (June 2018).
- (z) Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER 9283.1-33 (June 2009).
- (aa) Principles for Greener Cleanups (Aug. 2009), <https://www.epa.gov/greenercleanups/epa-principles-greener-cleanups>.
- (bb) Close Out Procedures for National Priorities List Sites, OSWER 9320.2-22 (May 2011).
- (cc) Groundwater Road Map: Recommended Process for Restoring Contaminated Groundwater at Superfund Sites, OSWER 9283.1-34 (July 2011).
- (dd) Recommended Evaluation of Institutional Controls: Supplement to the “Comprehensive Five-Year Review Guidance,” OSWER 9355.7-18 (Sep. 2011).
- (ee) Construction Specifications Institute’s MasterFormat (current edition, available from <https://www.csiresources.org/home>).
- (ff) Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach, OSWER 9200.2-125 (Sep. 2012)
- (gg) Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites, OSWER 9355.0-89, EPA/540/R-09/001 (Dec. 2012).
- (hh) Institutional Controls: A Guide to Preparing Institutional Controls Implementation and Assurance Plans at Contaminated Sites, OSWER 9200.0-77, EPA/540/R-09/02 (Dec. 2012).
- (ii) EPA’s Emergency Responder Health and Safety Manual, OSWER 9285.3-12 (July 2005 and updates), [https://www.epaossc.org/\\_HealthSafetyManual/manual-index.htm](https://www.epaossc.org/_HealthSafetyManual/manual-index.htm).
- (jj) Broader Application of Remedial Design and Remedial Action Pilot Project Lessons Learned, OSWER 9200.2-129 (Feb. 2013).
- (kk) Guidance for Evaluating Completion of Groundwater Restoration Remedial Actions, OSWER 9355.0-129 (Nov. 2013).
- (ll) Quality management systems for environmental information and technology programs -- Requirements with guidance for use, ASQ/ANSI E4:2014 (American Society for Quality, February 2014).
- (mm) Groundwater Remedy Completion Strategy: Moving Forward with the End in Mind, OSWER 9200.2-144 (May 2014).

- (nn) Superfund Community Involvement Handbook, OSRTI, SEMS 100000070, (Jan. 2016), <https://semspub.epa.gov/work/HQ/100000070.pdf>. More information on Superfund community involvement is available on the Agency's Superfund Community Involvement Tools and Resources webpage at <https://www.epa.gov/superfund/superfund-community-involvement-tools-and-resources>.
- (oo) USEPA Contract Laboratory Program Statement of Work for Organic Superfund Methods (Multi-Media, Multi-Concentration), SOM02.4 (Oct. 2016), <https://www.epa.gov/clp/epa-contract-laboratory-program-statement-work-organic-superfund-methods-multi-media-multi-1>.
- (pp) USEPA Contract Laboratory Program Statement of Work for Inorganic Superfund Methods (Multi-Media, Multi-Concentration), ISM02.4 (Oct. 2016), <https://www.epa.gov/clp/epa-contract-laboratory-program-statement-work-inorganic-superfund-methods-multi-media-multi-1>.
- (qq) Guidance for Management of Superfund Remedies in Post Construction, OLEM 9200.3-105 (Feb. 2017), <https://www.epa.gov/superfund/superfund-post-construction-completion>.

**9.2** A more complete list may be found on the following EPA webpages:

Laws, Policy, and Guidance: <https://www.epa.gov/superfund/superfund-policy-guidance-and-laws>

Test Methods Collections: <https://www.epa.gov/measurements/collection-methods>

**9.3** For any regulation or guidance referenced in the CD or SOW, 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 SDs receive notification from EPA of the modification, amendment, or replacement.



## Reconciliation Pending

## Itemized Cost Summary

CHLOR-ALKALI, BERLIN, NH SITE ID = 01 BQ

COSTS INCURRED FROM MARCH 25, 2004 THRU NOVEMBER 03, 2020

<b>REGIONAL PAYROLL COSTS .....</b>	<b>\$890,296.34</b>
<b>HEADQUARTERS PAYROLL COSTS .....</b>	<b>\$2,536.70</b>
<b>REGIONAL TRAVEL COSTS .....</b>	<b>\$12,772.81</b>
<b>HEADQUARTERS TRAVEL COSTS .....</b>	<b>\$1,352.25</b>
<b>ALLOCATION TRANSFER IAG COSTS</b>	
DEPARTMENT OF HEALTH & HUMAN SERVICES (ATSDR) .....	\$65,889.06
<b>ENVIRONMENTAL MONITORING SYSTEMS LABORATORY (EMSL) CONTRACT COSTS</b>	
LOCKHEED MARTIN (EPD05088) .....	\$37,527.74
<b>ENVIRONMENTAL SERVICES ASSISTANCE TEAMS (ESAT) CONTRACT COSTS</b>	
LOCKHEED MARTIN SERVICES, INC. (68-W0-1008) .....	\$17,143.45
TECHLAW, INC. (EPW06017) .....	\$1,108,493.71
TECHLAW, INC. (EPW13021) .....	\$13,217.80
<b>HAZARD RANKING SYSTEM CONTRACT COSTS</b>	
DYNACORP SYSTEMS & SOLUTIONS, LLC (68-W0-3016) .....	\$22,638.01
<b>INTERAGENCY AGREEMENT (IAG) COSTS</b>	
DEPARTMENT OF JUSTICE (DOJ) .....	\$70,965.48
DEPARTMENT OF INTERIOR (DW14897801) .....	\$2,643.67
DEPARTMENT OF INTERIOR (DW14922566) .....	\$19,002.16
DEPARTMENT OF INTERIOR (DW14957648) .....	\$717,450.00
<b>OTHER CONTRACT COSTS</b>	
COLUMBIA ANALYTICAL SVCS. (EP09W001485) .....	\$17,925.00
COLUMBIA ANALYTICAL SVCS. (EP09W001490) .....	\$46,215.00
SGS ENVIRONMENTAL SVCS. (EP09W001650) .....	\$34,440.00

Reconciliation Pending  
Itemized Cost Summary

CHLOR-ALKALI, BERLIN, NH SITE ID = 01 BQ

COSTS INCURRED FROM MARCH 25, 2004 THRU NOVEMBER 03, 2020

SGS ENVIRONMENTAL SVCS. (EP09W001655) .....	\$26,112.00
SGS ENVIRONMENTAL SVCS. (EP09W001907) .....	\$17,094.00
SGS ENVIRONMENTAL SVCS. (EP10W000098) .....	\$429.00
SGS (EP10W001704) .....	\$171,734.00
SOUTHWEST RESEARCH INSTITUTE (EPB11S00063) .....	\$67,959.00
ASRC MANAGEMENT CORP. (EPS10602) .....	\$342.92
ASRC MANAGEMENT SERVICES, INC. (EPW05052) .....	\$17,888.14

**RESPONSE ACTION (RAC) CONTRACT COSTS**

NOBIS, INC. (EPS10603) .....	\$5,222,095.21
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**STATE COOPERATIVE AGREEMENT (SCA)/GRANT COSTS**

NH DES (V96199601) .....	\$35,463.09
NEW HAMPSHIRE, DES (V97139301) .....	\$80,776.00
NEW HAMPSHIRE, DES (V99159001) .....	\$26,327.00

**SUPERFUND TECHNICAL ASSISTANCE AND RESPONSE TEAM (START)  
CONTRACT COSTS**

WESTON SOLUTIONS, INC. (68-W0-0097) .....	\$194,524.72
WESTON SOLUTIONS, INC. (EPW05042) .....	\$7,272.42

**TECHNICAL SERVICES AND SUPPORT (TSS) CONTRACT COSTS**

E2, INC. (EPW06015) .....	\$59,206.70
PRIMUS SOLUTIONS (EPW11024) .....	\$6,960.12
ARCTIC SLOPE MISSION SERVICES (EPW17011) .....	\$4,032.41

**CONTRACT LAB PROGRAM (CLP) COSTS**

FINANCIAL COST SUMMARY .....	\$354,652.55
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<b>MISCELLANEOUS COSTS (MIS) .....</b>	<b>\$1,973.35</b>
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Reconciliation Pending

Itemized Cost Summary

CHLOR-ALKALI, BERLIN, NH SITE ID = 01 BQ

COSTS INCURRED FROM MARCH 25, 2004 THRU NOVEMBER 03, 2020

EPA INDIRECT COSTS .....	\$4,020,351.63
Total Site Costs:	<u>\$13,395,703.44</u>