

**BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION III**

**IN THE MATTER OF:**

<b>Browning Lumber Company</b>	:	
<b>Superfund Site</b>	:	
	:	
	:	
	:	
<b>JPMorgan Chase Bank, N.A., as</b>	:	
<b>Trustee of The Donald D. Shepard</b>	:	
<b>and Emily H. Shepard Trust</b>	:	
	:	<b>Docket No. CERC-03-2007-0028DC</b>
	:	
<b>Respondent</b>	:	
	:	
	:	
<b>Proceeding Under Sections 106(a),</b>	:	<b>Administrative Settlement Agreement</b>
<b>107, and 122 of the Comprehensive</b>	:	<b>and Order on Consent</b>
<b>Environmental Response, Compen-</b>	:	<b>for Removal Response Action</b>
<b>sation, and Liability Act of 1980,</b>	:	
<b>as amended by the Superfund</b>	:	
<b>Amendments and Reauthorization</b>	:	
<b>Act of 1986, 42 U.S.C. §§ 9606(a),</b>	:	
<b>9607, and 9622</b>	:	

**ADMINISTRATIVE SETTLEMENT AGREEMENT**  
**AND ORDER ON CONSENT**  
**FOR REMOVAL RESPONSE ACTION**

The parties to this Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") are JPMorgan Chase Bank, N.A. ("Trustee"), in its capacity as successor trustee under that certain indenture dated December 31, 1951, by and among Ailsa M. Bruce, *et al.*, and The Charleston National Bank, as trustee, which indenture is commonly known as The Donald D. Shepard and Emily H. Shepard Trust (the "Shepard Trust"), and the United States Environmental Protection Agency ("EPA"). The parties having agreed to entry of this Settlement Agreement, it is therefore ordered, that:

## **I. JURISDICTION AND GENERAL PROVISIONS**

- 1.1 This Settlement Agreement is issued pursuant to the authority vested in the President of the United States by Sections 106(a), 107, and 122(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. §§ 9606(a), 9607, and 9622(a); delegated to the Administrator of EPA by Executive Order No. 12580, 52 Fed. Reg. 2923 (January 29, 1987); re-delegated to EPA Regional Administrators by Delegation 14-14-C (1200-TN-349, 04/15/94); and further re-delegated to the Director of the Hazardous Site Cleanup Division, EPA Region III by Delegation 14-14-C (1200-TN-RIII-132, 04/27/99). This Settlement Agreement provides for the performance of a removal response action at the Browning Lumber Company Site ("Site"), which is located on Route 85, near its intersection with Rock Lick Creek, in Bald Knob, Boone County, West Virginia, 25010. The Site is described in more detail in paragraph 3.3 below.
- 1.2 All terms and conditions of this Settlement Agreement, including any modifications hereto, are required by this Settlement Agreement. The Trustee ("Respondent") agrees to undertake all actions required by the terms and conditions of this Settlement Agreement and to comply with all such terms and conditions. Hereinafter, all actions required by the terms and conditions of this Settlement Agreement shall be referred to as "the Work."
- 1.3 The Work shall be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan, as amended ("NCP"), 40 C.F.R. Part 300; and CERCLA.
- 1.4 Respondent consents to and will not contest EPA's authority or jurisdiction to issue or to enforce this Settlement Agreement.
- 1.5 EPA and Respondent recognize that this Settlement Agreement and the actions undertaken pursuant to this Settlement Agreement do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceeding, the validity of any findings of fact, conclusions of law or determinations of EPA set forth in this Settlement Agreement. However, Respondent specifically agrees not to contest the terms of this Settlement Agreement in any action to interpret or enforce its provisions.

## **II. STATEMENT OF PURPOSE**

- 2.1 The mutual objectives of EPA and Respondent are to enter into this Settlement Agreement to conduct a removal action, as defined in Section 101(23) of CERCLA, 42 U.S.C. § 9601(23), to abate, mitigate, and/or eliminate the release or threat of release of hazardous substances at the Site, as hereinafter described, by preventing the migration of

hazardous substances from the Site, by properly disposing of hazardous substances from the Site at an off-Site location, and by treating contaminated soils that are leaching hazardous substances into groundwater at the Site.

### **III. EPA'S FINDINGS OF FACT**

- 3.1 The Trustee is a national banking association. By virtue of various mergers, the Trustee is successor trustee of the Shepard Trust. In summary, those mergers were as follows: The Charleston National Bank merged into Bank One, West Virginia, N.A. ("Bank One, WV"), Bank One, WV merged into Bank One, N.A., and Bank One, N.A. merged into JPMorgan Chase Bank, N.A. (i.e., the Trustee).
- 3.2 On or around December 31, 1951, The Charleston National Bank acquired, as trustee, from Donald D. Shepard and Emily H. Shepard, a large tract of real estate (the "Shepard Property") situated in Boone County, West Virginia. This tract included, among other things, two parcels, consisting of approximately 16.43 acres of real property, which comprise a portion of the Site (the "Site Property"). In or around 1976, Lugar Lumber Company, Inc. assigned its interests under an agreement with The Charleston National Bank for the sale of certain timber rights on the Shepard Property to Rubal Browning (d/b/a Browning Lumber Company) ("Browning Lumber"). Browning Lumber and its apparent successor Browning Lumber Company, Inc. conducted timber harvesting and operated a sawmill and/or a pressurized wood treatment facility at the Site from approximately 1976 to 1998. Browning Lumber manufactured pressure-treated cribbing and supports, which it sold to the underground mining industry. Browning Lumber used chromated copper arsenate ("CCA"), including, but not limited to, a 50% CCA Type C solution, to treat and preserve cut lumber at its facility. CCA contains arsenic and other hazardous substances. As a result of Browning Lumber's operations at the Site, hazardous waste was generated when sludge and wood debris were cleaned from the vessel used to pressure-treat wood. This hazardous waste contained arsenic, chromium, and possibly other hazardous substances. On or around October 19, 1994, Bank One, WV, as trustee, conveyed the Site Property to Stephen C. Browning. EPA believes that Browning Lumber ceased operations and abandoned the facility in or around 1998.
- 3.3 Rebuild America, Inc. ("Rebuild America") is the current owner of the Site property. In or around October, 2004, the Site Property was acquired at tax sale by Magnolia Investors, LLC, who conveyed the Site Property to Rebuild America, a Florida corporation, on April 5, 2006. Rebuild America filed its deed of title with the Clerk of the County Commission, Boone County, West Virginia, on May 1, 2006.
- 3.4 The Site is located near the Town of Bald Knob, Boone County, West Virginia, at approximate geographic coordinates 37.8475 degrees north latitude and -81.6431 degrees west longitude. The Site is located on Route 85, approximately 1/5-mile north (downstream) of the confluence of Rock Lick Branch and Pond Fork, and approximately

1/2-mile south (upstream) of the Town of Greenwood. Coal mining operations are prevalent on adjacent properties. The Site is generally bordered to the east by Pond Fork, which flows in a south to north direction. The Site is bordered to the west by wooded areas and steep terrain. The Site is bordered to the south by coal mining operations and to the north by woods. An access road extends from Route 85 through the center of the site and into the wooded areas to the northwest. The access road crosses through Pond Fork. The Site terrain is mainly flat. However, the grade of the Site and designed drainage features allow run-off from the site to flow directly into Pond Fork. The Site has minimal vegetation and approximately 1/3 of the property is covered with treatment vessels, burn areas, trash, and debris from the former facility. The Site includes the 16.43 acres comprising the Site Property and anywhere else where hazardous substances released at the Site have migrated, including Pond Fork.

- 3.5 During Bank One, WV's ownership of the Site Property, hazardous substances, including, but not limited to, arsenic, were disposed of at the Site.
- 3.6 EPA and West Virginia Department of Environmental Protection ("WVDEP") have conducted various investigations of the Site.
- a. On April 29, 1987, WVDEP conducted a compliance evaluation inspection at the Site, pursuant to the West Virginia Hazardous Waste Management Act and Section 3007(e) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6927(e). During this inspection, WVDEP officials observed uncontained pools of waste CCA solution, some of which was flowing onto soils at the Site.
  - b. On September 3, 1987, WVDEP oversaw sampling conducted by Browning Lumber Company at the Site.
  - c. On November 19, 1987, WVDEP conducted a follow-up inspection of the Site.
  - d. On July 11, 1988, WVDEP conducted a compliance evaluation inspection at the Site, pursuant to the West Virginia Hazardous Management Act and Section 3007(e) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6927(e).
  - e. On May 7, 1990, WVDEP conducted a compliance evaluation inspection at the Site. During this inspection, WVDEP inspectors observed spillage of CCA solution at the Site and evidence that CCA solution flowed from the wood treatment facility into the lumber yard. In addition, Mr. Browning told WVDEP inspectors that a 100-150 gallon spill of CCA had occurred at the Site and that he used contaminated sawdust to help control and absorb the spill. The WVDEP inspectors also observed CCA solution dripping off finished lumber into several large puddles of water in a lumber storage area at the Site.

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- f. On August 26, 1991, WVDEP conducted a compliance evaluation inspection at the Site.
  - g. On July 25, 2002, WVDEP conducted a compliance evaluation inspection at the Site. During this inspection, WVDEP inspectors observed that the facility was abandoned and that a fire had damaged most of the buildings on-Site. The inspectors also observed several inches of green dust and debris in an 8,000-gallon tank structure that had previously been used as a vessel for pressure-treating wood. The inspectors found evidence that CCA had released under the tank structure and sampled the soils beneath the tank structure. These samples contained elevated levels of arsenic.
  - h. Based on some of the compliance evaluation inspections described above, WVDEP issued several administrative orders to Browning Lumber for violations of the West Virginia Hazardous Waste Management Act. These orders required Browning Lumber to take certain measures to correct areas of non-compliance and to pay administrative penalties.
  - i. On December 1, 2005, EPA conducted a preliminary assessment of the Site, during which EPA On-Scene Coordinator ("OSC") Bob Kelly and a Superfund Technical Assessment and Response Team ("START") observed a powdery green substance in an abandoned, open pressure treatment vessel. OSC Kelly and START also observed that human and animal access to the Site was unrestricted and noticed evidence of trespass. They also conducted photographic documentation of Site conditions and conducted a title search to identify the owner of the Site.
  - j. On or around February 3, 2006, START met with WVDEP and reviewed Site records. WVDEP and START conducted a Site visit and investigated for the presence of piping that would indicate whether Underground Storage Tanks (USTs) were still present at the Site. No such evidence was found.
  - k. On February 14, 2006, START conducted a sampling assessment at the Site. START collected eleven water and sediment samples from the Site Property and streams running through or near the Site, Pond Fork and Rock Lick Creek. These samples were collected from three locations upstream of the Site, at four locations adjacent to the Site Property, and two locations downstream of the Site. START also collected two background water and sediment samples located approximately one and two miles upstream from the site. START also collected a field blank sample. START photographed the sample locations and collected GPS data from each sample location. START completed the water and sediment portion of the sampling event with collection of the field blank sample.

- l. On February 16, 2006, START collected a total of 47 surface soil samples from the Site. These samples were located in areas surrounding the facility and in areas where START observed surface soils that appeared different than the background soil. START collected GPS data from all of these samples and conducted photographic documentation of their locations.
  - m. On June 20, 2006, EPA conducted a Site visit to further investigate conditions there in preparation for removal response activities. EPA's activities were limited to a Site walk-through, during which several photographs of Site conditions were taken.
  - n. On June 27, 2006, EPA returned to the Site and was accompanied by Stephen Browning, as well as representatives of WVDEP and the U.S. Army Corps of Engineers. Because of the depth of the water in Pond Fork, EPA had previously determined that a bridge may need to be built over Pond Fork to provide safe crossing of vehicles, equipment, and personnel to conduct the emergency removal action. Mr. Browning also provided location information for monitoring wells on the Site. He also explained his operations and time line. EPA collected approximately ten (10) soil samples at depths up to two feet to evaluate the migration of hazardous substances.
  - o. On July 10-12, 2006, EPA returned to the Site and constructed a chain-link fence to control unauthorized access to the Site. EPA also installed a silt fence as a temporary erosion control measure to prevent erosion of contaminated soils to Pond Fork. EPA located several on-Site monitoring wells and collected groundwater samples from these wells.
- 3.7 Analytical results from sampling conducted by EPA as described in paragraph 3.6 indicate that hazardous substances, most notably arsenic, are releasing from the facility's former treatment vessels, equipment, and process area into the environment. Arsenic was found within the residues of the treatment vessel at a concentration of 191,000 mg/kg; within nearby surface soils at concentrations up to 1500 mg/kg, and within sediment within a drainage pathway leading into Pond Fork at concentrations up to 213 mg/kg. Results for surface water samples collected indicated that one sample in a drainage pathway leading into Pond Fork had an estimated arsenic concentration of 6 ug/L. In addition, samples collected in the pressure vessel located on Site indicated elevated levels of chromium (96,600 mg/kg) and copper (60,900 mg/kg).

In addition, Toxicity Characteristic Leachate Procedure ("TCLP") sampling conducted by WVDEP as described in paragraph 3.5 has shown elevated TCLP values for arsenic in one of the pressure treatment vessels and in the soils below the vessel.

- 3.8 The setting of the Site presents several potential exposure pathways. The Site is located approximately one-half mile south of the Town of Greenwood, West Virginia. It is estimated that there are 20-25 residences with a total population of approximately sixty (60) people residing within a one-half mile radius of the Site. EPA and the Agency for Toxic Substances and Disease Registry ("ATSDR") have information that groundwater wells are utilized as the primary source of drinking water by local residents.

Pond Fork, which forms the eastern boundary of the Site Property, is a stream with potential recreational uses.

Based on observations made by EPA and WVDEP during Site investigations described in paragraph 3.5, trespassers have accessed the Site in the recent past.

- 3.9 CCA is an inorganic arsenic compound used to preserve wood that has various human health and ecological effects.
- 3.10 Arsenic is listed as a hazardous substance at 40 C.F.R. § 302.4.
- 3.11 Based on the information described above, on August 7, 2006, the Division Director, Hazardous Site Cleanup Division, EPA Region III, determined that a threat to public health, welfare and/or the environment exists due to the actual release of hazardous substances from the Site, and issued a Finding of Imminent or Substantial Endangerment, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), and the NCP. On September 13, 2006, the Division Director signed and approved a Request for Additional Funding and Exemption from the \$2 Million Statutory Limit for a Removal Action at the Browning Lumber Site ("Action Memo"), which selected a removal action for the Site.

#### **IV. EPA'S CONCLUSIONS OF LAW**

- 4.1 The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- 4.2 Bank One, WV, as trustee, was a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- 4.3 JPMorgan Chase Bank, as trustee, is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- 4.4 Arsenic is a "hazardous substance" within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), because it is listed at 40 C.F.R. § 302.4.

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- 4.5 “Hazardous substances,” as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), have been disposed of at the Site and are currently present there.
- 4.6 EPA has determined that the presence of hazardous substances at the Site and the past, present, and/or potential migration of hazardous substances from the Site constitute an actual and/or threatened “release” as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
- 4.7 EPA has determined that Bank One, WV, as trustee of the Shepard Trust, was a person who at the time of disposal of arsenic and other hazardous substances owned or operated the Site Property at which such hazardous substances were disposed of, within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).
- 4.8 EPA has determined that JPMorgan Chase Bank, as trustee of the Shepard Trust, is liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), because it is the successor by corporate merger of Bank One, WV, who held legal title to the Site Property when hazardous substances were disposed of at the Site.
- 4.9 Subject to Section 107(n) of CERCLA, 42 U.S.C. § 9607(n), JPMorgan Chase Bank, as trustee of the Shepard Trust, is liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to the extent of the assets of the Shepard Trust.

#### **V. EPA’S DETERMINATIONS**

Based on the Findings of Fact and Conclusions of Law set forth above, EPA has determined that:

- 5.1 The actual and/or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health or welfare or the environment.
- 5.2 The Work is necessary to protect the public health and welfare and the environment.
- 5.3 Because there is a threat to public health or welfare or the environment, a removal action is appropriate to abate, minimize, stabilize, mitigate or eliminate the release or threat of release of hazardous substances at or from the Site.

#### **VI. PARTIES BOUND**

- 6.1 This Settlement Agreement shall apply to and be binding upon EPA and its agents, and upon Respondent and its agents, successors, and assigns. Neither a change in ownership or corporate or partnership status of a Respondent, nor a change in ownership or control of

the Site, shall in any way alter Respondent's responsibilities under this Settlement Agreement.

- 6.2 In the event that Respondent files for or is placed into bankruptcy, that Respondent shall notify EPA in writing within three (3) days of such event. Respondent shall also notify EPA in writing of any changes in its ownership or corporate status, including, but not limited to, any corporate name change, corporate merger, or corporate dissolution, within seven (7) days of any such event.
- 6.3 Respondent shall provide a copy of this Settlement Agreement to all contractors, subcontractors, supervisory personnel, laboratories and consultants retained by Respondent to conduct any portion of the Work to be performed by Respondent pursuant to this Settlement Agreement. Respondent shall require in any and all contracts related to this Site that the Work that is the subject of such contract be performed within the time and in the manner set forth in this Settlement Agreement.
- 6.4 The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms of this Settlement Agreement and to execute and legally bind that Respondent to this Settlement Agreement.

#### **VII. NOTICE TO THE STATE**

- 7.1 Notice of issuance of this Settlement Agreement has been given to the State of West Virginia pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

#### **VIII. RESPONSE ACTION PLAN DEVELOPMENT AND IMPLEMENTATION**

- 8.1 Respondent shall commence and complete performance of the following response action within the time periods specified herein.
- 8.2 Within five (5) business days of the effective date of this Settlement Agreement, Respondent shall notify EPA in writing of the identity and qualifications of the contractor, subcontractor, supervisory personnel, and other persons who will be primarily responsible for developing the Response Action Plan ("RAP") required by this Section. Respondent shall further notify EPA in writing of the identity and qualifications of all contractors, subcontractors, supervisory personnel and other persons selected by Respondent who will conduct all or any portion of the response action no less than five (5) days prior to commencement of the response action to be performed by such persons. Respondent shall ensure that all contractors, subcontractors, supervisory personnel and/or other persons retained to perform the response action shall meet the applicable Occupational Safety and Health Administration ("OSHA") requirements as defined in 29 C.F.R. § 1910.120. Respondent's selection of all contractors, subcontractors, supervisory personnel and other

persons who will perform the response action; Respondent's Project Coordinator designated pursuant to Section IX; and any replacements to any such persons are subject to disapproval by EPA at any time, subject to Section XII. In the event of any such disapproval by EPA, Respondent shall notify EPA within five (5) calendar days of receipt of such EPA disapproval of the person(s) who will replace the one(s) disapproved by EPA. If a person's selection is disapproved by EPA, they shall not perform the specified response action.

8.3 Respondent shall accomplish the following tasks:

- a. During the term of the removal action, maintain previously installed chain-link fence at Site to provide security sufficient to preclude access to all areas containing hazardous substances at the Site by persons not conducting or overseeing the response action required by this Settlement Agreement, and to all areas which will be used to facilitate, access, or support the response action;
- b. During the term of the removal action, provide basic fire protection at the Site to minimize the potential for a release of hazardous substances during a fire;
- c. Install and maintain appropriate erosion and sedimentation control measures to prevent the migration of hazardous substances from the Site Property into Pond Fork at concentrations greater than the clean-up levels specified in paragraph 8.3(d) until replaced by the vegetative cover or other erosion controls pursuant to paragraph 8.3(i) or EPA approves completion of this removal action;
- d. The clean-up level for arsenic in soil and drinking water shall be within the EPA acceptable risk range and to at least 190 mg/kg in soil and 4.5 ug/L in drinking water at the point of compliance as determined in the EPA-approved RAP. These numbers are based on a cancer risk of  $10^{-4}$  and a hazard quotient greater than one. The clean-up level for other contaminants of concern found in soils shall also be below a cancer risk of  $10^{-4}$  and a hazard quotient greater than one as defined in EPA's Risk Based Concentration ("RBC") tables. The cleanup level for arsenic in sediment shall be 42 mg/kg. The clean-up levels for other contaminants of concern in sediments and in surface water shall be based on water quality standards that have been established under the Clean Water Act, 33 U.S.C. §§ 1251-1387, for the waterways at the Site;
- e. Excavate soils (within 2 feet of ground surface or below that to the extent practicable) and all sediments identified in the extent of contamination study conducted by EPA at the Site, pursuant to the September 13, 2006, Action Memo, that contain hazardous substances in excess of the clean-up levels specified in Paragraph 8.3(d). Soil remaining at depths of greater than two feet that contain

levels above 190 mg/kg of arsenic must not leach arsenic above 5.0 mg/L and will be treated, as appropriate, to achieve that standard;

- f. After completion of response activities described above, conduct post-excavation and/or treatment sampling to ensure that hazardous substance levels at the Site are below the clean-up levels specified in paragraphs 8.3(d) and (e);
- g. Fill all excavated areas with clean fill material using an approved compaction method. In areas where soil contamination above the specified clean-up levels remains in place at depths greater than two feet below the native ground surface, place an appropriate warning barrier and cover such areas with clean soil to prevent direct contact with contaminated soil;
- h. Properly dispose off-Site any soil, sediment, liquids, residues, debris, or contaminated water from the Work items described above (including, decontamination of equipment and sampling-related fluids) in accordance with applicable requirements of RCRA and in accordance with CERCLA 121(d)(3) and 40 CFR 300.440;
- i. Stabilize Site soils through installation of a vegetative cover and/or EPA-approved erosion and sedimentation controls over the areas disturbed by the excavation performed under paragraph 8.3(e) to ;
- j. Provide for Post-Removal Site Control activities consistent with Section 300.415(l) of the NCP, 40 C.F.R. § 300.415(l); and EPA's "Policy on Management of Post Removal Site Control", (OSWER Directive 9360.2-02 (December 3, 1990)). Such activities shall include, but not be limited to, arrangements with State or local governments for performance of actions that will ensure the integrity of the work performed at the Site pursuant to this Settlement Agreement through operation and maintenance, actions that will continuously restrict access to the Site, and measures that will ensure continuous review of monitoring data. For purposes of this paragraph, "arrangements with State or local governments for the performance of actions" shall mean submitting, by agreement or otherwise, to enforceable requirements determined by the State or local government to meet the criteria set forth in this paragraph, and shall include public participation and comment as required by the State or local government and the NCP;
- k. Coordinate with the owner of the Site Property to implement appropriate institutional controls to prevent future disturbance, such as excavation, of areas of Site where contamination remains above clean-up levels at depths greater than two feet below the native ground surface;

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- l. Obtain a Hazardous Waste Generator Identification Number, as necessary. A Hazardous Waste Generator Identification Number previously assigned by WVDEP to the Browning Lumber Company facility shall meet the requirements of this sub-paragraph 8.3(l); and
  - m. Provide Site-specific health and safety measures, including preparation and implementation of a Health and Safety Plan ("HASP") for actions to be performed at the Site, to protect the health and safety of workers, other personnel and the public from the hazardous substances and work-related health and safety hazards during performance of the response action specified herein. The HASP shall, as appropriate, provide for proper decontamination of personnel and equipment, monitoring and control of off-Site migration of hazardous substances (inclusive of dust control measures) during the performance of activities at the Site and protection of public health from exposure to hazardous substances during the conduct of activities at the Site pursuant to this Settlement Agreement. Health and safety requirements in the HASP shall be at least as stringent as those set forth in Occupational Safety and Health Administration and EPA requirements, including but not limited to, requirements contained in 29 C.F.R. § 1910.120 and/or EPA Standard Operating Safety Guides (July 5, 1988).
- 8.4 Within fifteen (15) business days of the effective date of this Settlement Agreement, Respondent shall submit to EPA for approval a RAP detailing the response actions to be implemented pursuant to paragraph 8.3. To the extent that information concerning the details of a particular item does not yet exist so that it can be described in the RAP, the RAP shall set forth an expeditious schedule and plan for submittal of RAP supplement(s) to EPA for approval, which supplement(s) shall fully detail such items. All references to the review, approval and enforcement of the RAP shall also be applicable to any RAP supplement(s). The RAP shall include, among other things, a schedule for expeditious performance of the response actions required by this Settlement Agreement. The RAP shall be consistent with the NCP and shall be subject to approval by EPA according to the provisions of paragraphs 8.5 and 8.9 below.
- 8.5 EPA will review the RAP and notify Respondent of EPA's approval or disapproval of the RAP. In the event of disapproval, EPA will specify the deficiencies in writing. Respondent shall respond to and correct the deficiencies identified by EPA and resubmit the RAP to EPA within ten (10) business days of receipt of EPA disapproval or such longer time as may be specified by EPA in its discretion. Exercise of EPA's discretion with respect to such period shall not be subject to the dispute resolution procedures set forth in Section XII of this Settlement Agreement. Approval, disapproval and/or modification by EPA of the subsequent RAP submission shall be according to the provisions of paragraph 8.9 below.

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- 8.6 Within ten (10) business days of receipt from EPA of written approval to proceed with implementation of the EPA-approved RAP ("written approval to proceed"), Respondent shall commence implementation of such RAP and complete it in accordance with the RAP and the schedule therein. In the event EPA determines that any portion of the response action performed is deficient, and EPA requires Respondent to correct or re-perform such portion of the response action pursuant to this Settlement Agreement, Respondent shall correct or re-perform such response action or portion of the response action in accordance with a schedule provided by EPA.
- 8.7 Beginning seven (7) calendar days subsequent to the date of receipt of EPA approval of the RAP and every seven (7) calendar days thereafter, or such longer interval as may be determined in writing by the EPA Project Coordinator designated pursuant to Section IX, and until Respondent has completed the items specified in paragraphs 8.3(e)-(h), Respondent shall provide EPA with a progress report for each preceding 7-day period or if applicable, the period specified in writing by the EPA Project Coordinator. The progress reports shall include, at a minimum, 1) a description of the response action completed and the actions that have been taken toward achieving compliance with this Settlement Agreement, including measures to prevent pollution as described in paragraph 8.3(c) above; 2) a description of all data anticipated and activities scheduled for the next 7 calendar days or, if applicable, the period specified in writing by the EPA Project Coordinator; 3) a description of any problems encountered or anticipated; 4) any actions taken to prevent or mitigate such problems; 5) a schedule for completion of such actions; 6) copies of all analytical data received during the reporting period; and 7) all modifications to the response action, RAP, and schedule made in accordance with Section XIV of this Settlement Agreement during the reporting period. Following the completion of the items specified in paragraphs 8.3(e)-(h), Respondent shall provide EPA with a progress report for each calendar month by the 10<sup>th</sup> business day of the following month.
- 8.8 Documents, including plans, reports, sampling results and other correspondence to be submitted pursuant to this Settlement Agreement, shall be sent by certified or overnight mail to the EPA Project Coordinator designated pursuant to Section IX.
- 8.9 All reports, plans, approval letters, specifications, schedules, and attachments required by this Settlement Agreement are subject to EPA approval and shall be deemed incorporated into this Settlement Agreement upon approval by EPA. In the event that EPA approves a portion of the RAP, report, or other item required to be submitted under this Settlement Agreement, the approved portion shall be enforceable under this Settlement Agreement. In the event of a conflict between this Settlement Agreement and any document attached hereto, incorporated in or enforceable hereunder, the provisions of this Settlement Agreement shall control. In the event that EPA disapproves any required submission, EPA will (1) specify the deficiencies in writing and/or (2) submit its own modifications to Respondent to accomplish the Work outlined in paragraph 8.3 above. Respondent shall amend and submit to EPA a revised submission that responds to and corrects the specified

deficiencies within ten (10) business days of receipt of EPA disapproval or such longer time as may be specified by EPA in its discretion. Exercise of EPA's discretion with respect to such period shall not be subject to the dispute resolution procedures set forth in Section XII of this Settlement Agreement. In the event that EPA submits its own modifications to Respondent, Respondent is hereby required to incorporate such modifications, subject to the dispute resolution procedures set forth in Section XII of this Settlement Agreement. Any non-compliance with EPA-approved reports, plans, specifications, schedules, attachments, or submission of deficient revisions following EPA disapproval, or non-compliance with an EPA-required modification shall be considered a failure to comply with a requirement of this Settlement Agreement. Determination(s) of non-compliance will be made by EPA.

- 8.10 In addition to the information and documents otherwise required by this Settlement Agreement, Respondent shall provide to EPA, upon written request, any and all information and non-privileged documents in Respondent's possession, custody or control related to the Site including, but not limited to, Site analytical data (including raw data); Site safety data; Site monitoring data; operational logs; copies of all hazardous waste manifests (including copies of all hazardous waste manifests signed upon receipt of the hazardous wastes by a licensed treatment, storage, or disposal facility); the identity of treatment, storage and/or disposal facilities used; the identity of transporters used; the identity of any contractors, subcontractors and supervisory personnel used; information and documents concerning Respondent's compliance with Quality Assurance and Quality Control requirements of this Settlement Agreement; information and documents relating to Respondent's efforts to secure access; and information and documents relating to any project delays. Nothing herein shall be interpreted as limiting the inspection and information-gathering authority of EPA under Federal law.
- 8.11 Within thirty (30) calendar days of the date Respondent concludes Respondent has completed implementation of the RAP and the items identified in paragraph 8.3, Respondent shall submit a written Final Report to EPA, subject to EPA approval described in paragraph 8.9 above. The written report shall detail the work undertaken to implement the RAP and the items identified in paragraph 8.3, including a description of measures undertaken to prevent pollution in accordance with paragraph 8.3(c) of this Settlement Agreement, and shall be certified by Respondent in accordance with the terms of Section XXII of this Settlement Agreement. EPA will review the adequacy of Respondent's implementation of the RAP and accomplishment of items specified in paragraph 8.3 above. EPA will notify Respondent, in writing, of any discrepancies in the Final Report or deficiencies in the execution of the RAP and the items identified in paragraph 8.3 and the actions required to correct such discrepancies or deficiencies. Within ten (10) business days of receipt of notification by EPA, or as otherwise specified by EPA, Respondent shall, as directed by EPA, amend the Final Report, develop an additional plan or amend the existing RAP to address such discrepancies or deficiencies. Any additional plan or amendment to the RAP will be subject to the approval procedures outlined in paragraphs

- 8.5 and 8.9 above. Respondent shall perform all actions approved by EPA in a manner consistent with the NCP and all applicable Federal laws and regulations, as required by the NCP.
- 8.12 Respondent shall not handle or remove any hazardous substances from the Site except in conformance with the terms of this Settlement Agreement, including, without limitation, Section XXIII of this Settlement Agreement, and all applicable Federal, State, and local laws and regulations, as required by the NCP. Any transfer of hazardous substances, pollutant, and contaminants from the Site to an off-site facility required by this Settlement Agreement shall be performed in accordance with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3). In addition, any transfer of hazardous substances, pollutants, and contaminants from the Site to an off-site facility for treatment, storage, or disposal required by this Settlement Agreement shall be performed in accordance with 40 C.F.R. § 300.440.
- 8.13 Respondent shall not commence any Work except in conformance with the terms of this Settlement Agreement. Respondent shall not commence implementation of the RAP developed hereunder until receiving written EPA approval to proceed pursuant to paragraph 8.6.
- 8.14 Respondent shall immediately notify EPA's Project Coordinator and the National Response Center [(800) 424-8802] and any other party required by law in the event of any action or occurrence during the pendency of this Settlement Agreement which causes or threatens to cause an additional release of hazardous substances, pollutants, or contaminants on, at, or from the Site, or which may create a danger to public health, welfare, or the environment.
- 8.15 In the event that EPA believes that response actions or other activities at the Site by the Respondent are causing or may cause a release or potential release of hazardous substances, or are a threat to public health or welfare or to the environment, EPA may, in its discretion, immediately halt or modify such response actions or other activities to eliminate or mitigate such actual or potential releases or threats.

#### **IX. DESIGNATED PROJECT COORDINATORS**

- 9.1 Respondent hereby designates Michael Shannon of ENSR Corporation as its Project Coordinator under this Settlement Agreement, and EPA hereby accepts Respondent's designation. Designation of a Project Coordinator shall not relieve Respondent of its obligation to comply with the requirements of the Settlement Agreement. The Respondent's Project Coordinator shall be a technical and/or managerial representative of the Respondent and may be a contractor and/or consultant; provided, however, the Respondent's Project Coordinator shall not be the legal representative of Respondent in this matter. The Project Coordinator for EPA designated pursuant to this Section and the

Project Coordinator for the Respondent shall be responsible for overseeing the Work. To the maximum extent possible, communications between Respondent and EPA and all documents concerning the activities performed pursuant to the terms and conditions of this Settlement Agreement, including plans, reports, approvals, and other correspondence, shall be directed to the Project Coordinators.

9.2 The Project Coordinator for EPA is:

Robert F. Kelly, On-Scene Coordinator  
U.S. Environmental Protection Agency, Region III  
Removal Enforcement Section (3HW32)  
1650 Arch Street  
Philadelphia, PA 19103  
(215) 814-3268

- 9.3 Respondent shall have the right to change its Project Coordinator. Such a change shall be accomplished by notifying the EPA Project Coordinator in writing at least five (5) calendar days prior to the change.
- 9.4 EPA shall have the right to change its Project Coordinator at any time without prior notice to Respondent. EPA's intent is to notify Respondent as soon as practicable following any such change of its Project Coordinator.
- 9.5 The absence of the EPA Project Coordinator from the Site shall not be cause for the stoppage or delay of Work except when such stoppage or delay is specifically required by EPA.
- 9.6 The EPA Project Coordinator shall have the authority to halt or modify Work or other activities performed by Respondent at the Site in order to eliminate a release or threat of release of hazardous substances. Such direction by the EPA Project Coordinator may be given verbally or in writing. If such direction is given verbally, the EPA Project Coordinator will later memorialize such direction in writing.

## **X. QUALITY ASSURANCE**

- 10.1 Respondent shall use quality assurance, quality control, and chain of custody procedures in accordance with the following documents while conducting all sample collection and analysis activities required by this Settlement Agreement:
- (a) "EPA NEIC Policies and Procedures Manual" (EPA Document 330/9-78-001-R (revised August, 1991));

- (b) "Interim Guidelines and Specifications for Preparing Quality Assurance Project Plans," (QAMS-005/80 (December 1980)); and
  - (c) "QA/QC Guidance for Removal Activities," (EPA/540/G-90/004 (April, 1990)).
- 10.2 Respondent shall consult with EPA in planning for, and prior to, all sampling and analysis required by the approved RAP. Respondent shall use a laboratory(s) which has a documented Quality Assurance Program that complies with EPA guidance document QAMS-005/80.

## **XI. ACCESS**

- 11.1 The parties acknowledge that the Site Property is not owned by Respondent, that, at this time, EPA has obtained access from the owner of the Site Property sufficient for the implementation of this Settlement Agreement by Respondent, and that Respondent may access the Site Property pursuant to the access agreement between EPA and the Site owner. To the extent that any extension, continuation, or modification of the access agreement with the owner of the Site Property is needed or that access is needed to other property presently owned or controlled by parties other than Respondent to undertake the Work required hereunder, Respondent shall use best efforts to obtain Site access agreements from the present owner(s). Best efforts shall include, but not be limited to, agreement to reasonable conditions for access and/or the payment of reasonable fees. Such access agreements shall be finalized as soon as practicable but no later than ten (10) calendar days after receiving EPA's written approval to proceed. Such agreements shall provide reasonable access for Respondent and Respondent's employees, agents, consultants, contractors and other authorized and designated representatives to conduct the work, and for EPA and its designated representatives to conduct the activities outlined in paragraph 11.3 below. In the event that any property owner refuses to provide such access or access agreements are not obtained within the time designated above, whichever occurs sooner, Respondent shall notify EPA at that time, in writing, of all efforts to obtain access and the circumstances of the failure to obtain such access. EPA may then take steps to provide such access. Respondent shall reimburse the United States for all future costs incurred in obtaining access that are not inconsistent with the NCP.
- 11.2 In accordance with law and regulation, as appropriate, EPA and its employees, agents, contractors, consultants and other authorized and designated representatives shall have the authority to enter and freely move about the location where the response actions and/or Work is being performed at all reasonable times for the purposes of, inter alia, inspecting Work, records, operating logs, and contracts related to the Site; reviewing the progress of Respondent in carrying out the terms of this Settlement Agreement; conducting such tests as EPA deems necessary; using a camera, sound recording, or other documentary type equipment; and verifying the data submitted to EPA by Respondent. Respondent shall permit such persons to inspect and copy all non-privileged records, files, photographs,

documents, e-mails, and other writings, including, but not limited to, all sampling and monitoring data, in any way pertaining to the Work.

- 11.3 Respondent may make a claim of business confidentiality for information submitted pursuant to this Settlement Agreement in the manner described in 40 C.F.R. § 2.203(b). Such an assertion shall be adequately substantiated in accordance with 40 C.F.R. § 2.204(e)(4) at the time the assertion is made. Information subject to a confidentiality claim shall be made available to the public by EPA only in accordance with the procedures set forth in 40 C.F.R. Part 2, Subpart B. If no such claim of business confidentiality accompanies the information when it is submitted or made available to EPA, the submitted information may be made available to the public by EPA without further notice to Respondent.
- 11.4 Respondent may withhold those records and documents covered by any privilege or protection recognized under federal law and applied by federal courts in actions commenced by the United States. In the event that Respondent withholds a document as privileged, Respondent shall provide EPA with the title of the document, the date of the document, the name(s) of the author(s) and addressee(s)/recipient(s), a description of the nature of the document, and identification of the privilege asserted at the time such document is required to be provided to EPA.
- 11.5 No claim of confidentiality or privilege shall be made regarding any data required to be submitted pursuant to this Settlement Agreement including, but not limited to, sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or documents or information evidencing conditions at or around the Site. Nor shall such claims be made for analytical data; Site safety data; Site monitoring data; operational logs; hazardous waste manifests; identities of treatment, storage and/or storage facilities used; identities of transporters used; identities of any contractors or subcontractors used in performing work required by this Settlement Agreement.
- 11.6 Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access and information-gathering authorities and rights under CERCLA and any other applicable statute and regulation.

## **XII. DISPUTE RESOLUTION**

- 12.1 The parties to this Settlement Agreement shall attempt to resolve expeditiously and informally any disagreements concerning the Settlement Agreement or its implementation. Except as provided elsewhere in this Settlement Agreement, if Respondent objects to any EPA notification of deficiency, disapproval, or other EPA action taken pursuant to this Settlement Agreement, including billings for oversight costs, Respondent shall notify the Division Director of the Hazardous Site Cleanup Division, EPA Region III (the "Division Director"), or his designee, in writing of its objection(s) within fourteen (14) calendar days

of receipt of such notification or action, with a copy sent to EPA's Project Coordinator designated in Paragraph 9.2

- 12.2 EPA and Respondent shall have fourteen (14) calendar days from the receipt by the Division Director or his designee of the notification of objection to reach agreement. If agreement cannot be reached on any issue within this fourteen (14) day period, the Division Director or his designee will provide a written statement of his decision to Respondent. Respondent's obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section XII.
- 12.3 In order to prevail in any dispute regarding oversight costs, Respondent must demonstrate that the costs have been calculated incorrectly or have been incurred in a manner inconsistent with the NCP or directly relate to work performed at a different site.
- 12.4 Following resolution of the dispute, as provided by this Section XII, Respondent shall perform the Work that was the subject of the dispute in accordance with the agreement reached or the Division Director's or his designee's decision. To the extent that Respondent does not prevail upon resolution of any dispute involving any contested costs other than oversight costs, Respondent shall submit to EPA, within fourteen (14) calendar days of receipt of such resolution, all such costs determined to be owed to EPA, including any accrued interest, as specified in paragraph 13.1 below. Payment of oversight costs, including interest, following resolution of a dispute shall be governed by Paragraph 21.3 of this Settlement Agreement.
- 12.5 Notwithstanding any other provision of this Settlement Agreement, no action or decision by EPA or the Division Director or his designee pursuant to this Settlement Agreement shall give rise to any right to judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

### **XIII. DELAY IN PERFORMANCE AND STIPULATED PENALTIES**

- 13.1 For each day, or portion thereof, that Respondent fails to comply with any requirement of this Settlement Agreement at the time and in the manner set forth herein, Respondent shall be liable upon demand to EPA for the sums set forth below as stipulated penalties. Checks shall be made payable to the "Hazardous Substance Superfund" and shall be transmitted to the following address:

U.S. Environmental Protection Agency  
Cincinnati Finance Center  
Attn: Cindy Sanders  
26 W. MLK Drive  
Cincinnati, OH 45268

Payment shall be made by cashier's or certified check within thirty (30) calendar days of receipt of demand. Interest at the rate of the current annualized treasury bill rate shall begin to accrue on the unpaid balance at the end of the thirty-day period pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). A copy of the transmittal letter shall be sent simultaneously to the EPA Project Coordinator at the address identified in Section IX of this Settlement Agreement and to: Lydia Guy, EPA Region III Hearing Clerk (3RC00), 1650 Arch Street, Philadelphia, PA 19103.

- 13.2 Stipulated penalties shall accrue in the amount of \$1,000 per calendar day per violation. Neither the accrual of nor demand for stipulated penalties set forth in this Section XIII shall preclude EPA from pursuing other penalties or sanctions available to EPA for Respondent's failure to comply with the requirements of this Settlement Agreement.

#### **XIV. FORCE MAJEURE AND NOTIFICATION OF DELAY**

- 14.1 Respondent, through its Project Coordinator, shall notify EPA of any delay or anticipated delay in achieving compliance with any requirement of this Settlement Agreement. Such notification shall be made verbally as soon as possible, but not later than two (2) calendar days after Respondent becomes aware or should have become aware of any such delay or anticipated delay, and in writing no later than seven (7) calendar days after Respondent becomes aware, or should have become aware, of such delay or anticipated delay. Such written notification shall be certified by the Project Coordinator in accordance with Section XXII of this Settlement Agreement and shall fully describe the nature of the delay, including how it may affect the Work, RAP and schedule; the actions that will be or have been taken to mitigate, prevent, and/or minimize further delay; and the timetable according to which the future actions to mitigate, prevent, and/or minimize the delay will be taken. Respondent shall ensure that Respondent's Project Coordinator provides Respondent with immediate notification of any project delays. Respondent shall adopt all reasonable measures to avoid and minimize such delay.
- 14.2 To the extent Respondent intends to claim that any delay or anticipated delay described by Respondent in accordance with paragraph 14.1 was or will be caused by circumstances beyond Respondent's control, Respondent shall, within fourteen (14) calendar days after Respondent becomes aware, or should have become aware, of such delay or anticipated delay, submit to EPA a "Notice of Force Majeure" in which Respondent fully demonstrates that the delay was caused by circumstances beyond Respondent's control which could not have been overcome by due diligence, the necessity of the proposed length of the delay, and that Respondent took and is taking all reasonable measures to avoid and minimize delay. Respondent shall have the burden of proving these facts to EPA. Any "Notice of Force Majeure" shall be certified by a responsible official of Respondent pursuant to paragraph 22.1(b) of this Settlement Agreement.

- 14.3 Any such delay that EPA determines (1) has resulted or will result from circumstances beyond the control of Respondent, and (2) that could not and cannot be overcome by due diligence on Respondent's part, shall not be deemed to be a violation of Respondent's obligation(s) under this Settlement Agreement, and shall not subject Respondent to stipulated penalties under this Settlement Agreement for that particular delay. In such event, the schedule affected by the delay shall be extended for a period EPA deems necessary to complete the Work on an expedited basis, but no greater than a period equal to the delay directly resulting from such circumstances. Increased costs of performance of the requirements of this Settlement Agreement or changed economic circumstances shall not be considered circumstances beyond the control of Respondent. Delay in one item or component of Work or the RAP does not necessarily justify delay in timely achievement of other items or components. Each delay must be separately addressed and substantiated according to the provisions of paragraphs 14.1 and 14.2 above.
- 14.4 Failure of Respondent to comply with the notice requirements of paragraphs 14.1 and 14.2 above shall constitute a waiver of the Respondent's right to invoke the benefits of this Section with respect to that event.
- 14.5 In the event that EPA and Respondent cannot agree that any delay in compliance with the requirements of this Settlement Agreement has been or will be caused by circumstances beyond the control of Respondent that cannot be overcome by due diligence, the dispute shall be resolved in accordance with the provisions of Section XII (Dispute Resolution) of this Settlement Agreement.

#### **XV. RESERVATION OF RIGHTS**

- 15.1 The covenant not to sue set forth in Section XXVIII below does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:
- a. claims based on a failure by Respondent to meet a requirement of this Settlement Agreement;
  - b. liability for costs other than oversight costs recoverable under Section XXI of this Settlement Agreement;
  - c. liability for performance of response action other than the Work;
  - d. criminal liability;
  - e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

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- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
    - g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry ("ATSDR") related to the Site.
  - 15.2 Except as expressly provided in this Settlement Agreement, (1) each party reserves all rights, claims, interests and defenses it may otherwise have, and (2) nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, including the right to seek injunctive relief and/or the imposition of statutory penalties.
  - 15.3 As provided by this Settlement Agreement, EPA expressly reserves its right to disapprove of Work performed by Respondent; to halt Work being performed by Respondent if Respondent has not complied with an approved RAP or this Settlement Agreement, or at any time EPA deems necessary to protect public health, welfare, or the environment and to perform such Work; to request and require hereunder that Respondent correct and/or re-perform any and all Work disapproved by EPA; and/or to request or require that Respondent perform response actions in addition to those required by this Settlement Agreement. Further, EPA reserves the right to undertake response action at any time EPA deems appropriate. In the event EPA requires Respondent, and Respondent declines, to correct and/or re-perform work that has been disapproved by EPA and/or to perform response actions in addition to those required by this Settlement Agreement, EPA reserves the right to undertake such actions and seek reimbursement of the costs incurred and/or to seek any other appropriate relief. In addition, EPA reserves the right to undertake removal and/or remedial actions at any time that such actions are appropriate under the NCP and to seek reimbursement for any costs incurred and/or take any other action authorized by law.
  - 15.4 EPA reserves the right to bring an action against Respondent and any other potentially responsible parties under Section 107(a) of CERCLA , 42 U.S.C. § 9607(a), for recovery of all recoverable costs incurred by the United States related to this Settlement Agreement which are not reimbursed by Respondent, as well as any other costs incurred by the United States in connection with response actions conducted at or in connection with the Site.
  - 15.5 This Settlement Agreement concerns certain response actions (Work described in Section VIII, above) concerning the Site. Such response actions might not fully address all contamination at the Site. Subsequent response actions which may be deemed necessary by EPA are not addressed by this Settlement Agreement. EPA reserves all rights including, without limitation, the right to institute legal action against Respondent and/or any other parties in connection with the performance of any response actions not addressed by this Settlement Agreement.
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- 15.6 Nothing in this Settlement Agreement shall limit the authority of the EPA On-Scene Coordinator as outlined in the NCP and CERCLA.

#### **XVI. OTHER CLAIMS**

- 16.1 Nothing in this Settlement Agreement shall constitute or be construed as a release from any claim, cause of action, or demand in law or equity against any person, firm, partnership, or corporation not bound by this Settlement Agreement for any liability it may have relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, hazardous wastes, pollutants or contaminants found at, taken to, or taken from the Site.
- 16.2 This Settlement Agreement does not constitute any decision on preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).
- 16.3 By consenting to the issuance of this Settlement Agreement, the Respondent waives any claim to reimbursement they may have under Sections 106(b), 111 and 112 of CERCLA, 42 U.S.C. §§ 9606(b), 9611 and 9612.

#### **XVII. OTHER LAWS**

- 17.1 All Work shall be undertaken in accordance with the requirements of all applicable and/or relevant and appropriate local, State and Federal laws and regulations, as required by the NCP.

#### **XVIII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION**

- 18.1 The effective date of this Settlement Agreement shall be five (5) calendar days following the date on which EPA forwards a true and correct copy of the fully executed Settlement Agreement to counsel for Respondent.
- 18.2 This Settlement Agreement may be amended by mutual agreement of EPA and Respondent. Such amendments shall be in writing and shall have as their effective date the date on which such amendments are signed by EPA. Modifications to the EPA-approved RAP and its implementation may be made by mutual agreement of the Project Coordinators. Such modifications shall be memorialized in writing by the Project Coordinators.
- 18.3 Any reports, plans, specifications, schedules, or other submissions required by this Settlement Agreement are, upon approval by EPA, incorporated into this Settlement Agreement. Any non-compliance with such EPA-approved reports, plans, specifications, schedules, or other submissions shall be considered non-compliance with the requirements of this Settlement Agreement and will subject the Respondent to the requirements of

Section XIII (Delay in Performance and Stipulated Penalties), above. Determinations of non-compliance will be made by EPA and shall be subject to the Dispute Resolution provisions of Section XII.

- 18.4 No informal advice, guidance, suggestions or comments by EPA regarding reports, plans, specifications, schedules, or other submissions by the Respondent or the requirements of this Settlement Agreement will be construed as relieving the Respondent of its obligation to obtain formal approval when required by this Settlement Agreement, and to comply with the requirements of this Settlement Agreement unless formally modified.

#### **XIX. LIABILITY OF THE UNITED STATES GOVERNMENT**

- 19.1 Neither the United States Government nor any agency thereof shall be liable for any injuries or damages to persons or property resulting from acts or omissions of Respondent, or of its employees, agents, servants, receivers, successors or assigns, or of any persons including, but not limited to, firms, corporations, subsidiaries, contractors or consultants in carrying out the Work, nor shall the United States Government or any agency thereof be held out as a party to any contract entered into by Respondent in carrying out the Work.

#### **XX. INDEMNIFICATION AND HOLD HARMLESS**

- 20.1 Respondent agrees to indemnify and hold harmless the United States, its agencies, departments, agents, officers, employees, and representatives from any and all causes of action caused by any acts or omissions of Respondent or Respondent's contractors in carrying out the work required by this Settlement Agreement.

#### **XXI. REIMBURSEMENT OF OVERSIGHT COSTS**

- 21.1 EPA shall submit to Respondent periodic and/or a final accounting(s) of oversight costs incurred by the U.S. Government with respect to this Settlement Agreement. Oversight costs shall consist of all costs, including indirect costs, incurred after the effective date of this Settlement Agreement by EPA, its employees, agents, contractors, consultants, and other authorized and/or designated representatives in connection with EPA's oversight of the Work.
- 21.2 Respondent shall, within thirty (30) calendar days of receipt of the accounting, remit a check for the amount of those costs made payable to the "Hazardous Substance Superfund." Interest at a rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), shall begin to accrue on the unpaid balance from the day after the expiration of the thirty-day period notwithstanding any dispute or an objection to any portion of the costs. Checks shall specifically reference the Site and shall be transmitted as specified in Section XIII of this Settlement Agreement.

- 21.3 In the event Respondent initiates the Dispute Resolution procedures in Section XII of this Settlement Agreement, and EPA prevails in the dispute, within five (5) days of the resolution of the dispute, Respondent shall pay the sums due (with accrued interest) to EPA in the manner described in Section XIII of this Settlement Agreement. If Respondent prevails concerning any aspect of the contested costs, Respondent shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to EPA in the manner described in Section XIII of this Settlement Agreement.

## **XXII. CERTIFICATION OF COMPLIANCE**

- 22.1 a. Unless otherwise required by the terms of this Settlement Agreement, any notice, report, certification, data presentation or other document submitted by Respondent under or pursuant to this Settlement Agreement which discusses, describes, demonstrates or supports any finding or makes any representation concerning Respondent's compliance or non-compliance with any requirement(s) of this Settlement Agreement shall be certified by a responsible official of each of the Respondent or by the Project Coordinator for Respondent. The term "responsible official" means a president, secretary, treasurer, or vice-president in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for a Respondent.
- b. The written Final Report required by paragraph 8.11 of this Settlement Agreement, any written notification described in paragraph 12.1 of this Settlement Agreement and any "Notice of Force Majeure" described in paragraph 14.2 of this Settlement Agreement shall be certified by a responsible official of Respondent.
- 22.2 The certification required by paragraph 22.1 of this Settlement Agreement shall be in the following form:

I certify that the information contained in or accompanying this (specify type of submission) is true, accurate and complete.

I am aware that there are significant penalties for submitting false information including the possibility of fines and imprisonment for knowing violations.

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

- 22.3 Submission of documents pursuant to this Settlement Agreement which are found by EPA to contain false information shall constitute a failure to comply with this Settlement Agreement and shall subject Respondent to, among other things, stipulated penalties whether or not a responsible official of Respondent has certified the document.

### **XXIII. SHIPMENT OF HAZARDOUS SUBSTANCES**

- 23.1 Prior to any off-site shipment of hazardous substances from the Site to an out-of-State waste management facility, Respondent shall provide written notification to the appropriate State environmental official in the receiving State and to EPA's Project Coordinator of such shipment of hazardous substances. However, the notification to EPA of shipments shall not apply to any such off-site shipments when the total volume of all such shipments will not exceed ten (10) cubic yards. Notifications to States in those circumstances shall be governed by applicable State law.
- 23.2 The notification required by paragraph 23.1 shall be in writing and shall include the following information, where available: (1) the name and location of the facility to which the hazardous substances are to be shipped; (2) the type and quantity of the hazardous substances to be shipped; (3) the expected schedule for the shipment of the hazardous substances; and (4) the method of transportation of the hazardous substances. Respondent shall notify the receiving State of major changes in the shipment plan, such as a decision to ship the hazardous substances to another facility within the same State or to a facility in another State.
- 23.3 The identity of the receiving facility and State will be determined by Respondent. Respondent shall provide all relevant information, including information required by paragraph 23.1, above, relating to the off-site shipments as soon as practicable but no later than one (1) business day before the hazardous substances are actually shipped.

### **XXIV. RECORD RETENTION**

- 24.1 Until six (6) years after Respondent's receipt of EPA's notification pursuant to paragraph 27.1 (Notice of Completion), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in Respondent's possession or control or which come into Respondent's possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until six (6) years after Respondent's receipt of EPA's notification pursuant to paragraph 27.1 (Notice of Completion), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

- 24.2 At the conclusion of this document retention period, Respondent shall notify EPA at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, Respondent shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Respondent. However, no documents, reports, or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

#### **XXV. POST-REMOVAL SITE CONTROL**

- 25.1 Respondent agrees to coordinate with the current owner of the Site Property and with EPA to maintain, as necessary, the integrity of the response action pursuant to the arrangement proposed in paragraph 8.3(j) and approved by EPA pursuant to paragraph 8.9, above.

#### **XXVI. DEFINITIONS**

- 26.1 "Business days" as used in this Settlement Agreement shall mean every day of the week except Saturdays, Sundays, and federal holidays.
- 26.2 "Calendar days" as used in this Settlement Agreement shall mean every day of the week, including Saturdays, Sundays, and federal holidays.
- 26.3 "Days" as used herein shall mean "calendar days" unless specified otherwise.
- 26.4 All terms not defined herein shall have the meanings set forth in CERCLA and the NCP.
- 26.5 "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent and all appendixes attached hereto. In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

#### **XXVII. NOTICE OF COMPLETION**

- 27.1 When EPA determines, after EPA's review and approval of the Final Report required pursuant to paragraph 8.11 of this Settlement Agreement, that all response action specified in Section VIII of this Settlement Agreement has been fully performed, and upon receipt of costs and penalties assessed by EPA, with the exception of any continuing obligations

required by this Settlement Agreement, including those requirements specified in Paragraph 8.3(k), and Sections XV ("Reservation of Rights"), XVI ("Other Claims"), XIX ("Liability of the United States"), XX ("Indemnification and Hold Harmless"), XXIV ("Record Retention") and XXV ("Post Removal Site Control"), EPA will provide a notice of completion to Respondent.

#### **XXVIII. COVENANT NOT TO SUE BY EPA**

- 28.1 From the effective date of this Settlement Agreement and for as long as EPA determines that the terms of this Settlement Agreement, including any modifications made hereto, are being fully complied with, and except for any proceeding to enforce its terms or collect any applicable costs or penalties, EPA agrees not to sue or take any administrative action against Respondent for the Work required by this Settlement Agreement, including for reimbursement of costs incurred in connection with this Settlement Agreement.
- 28.2 Nothing in this Settlement Agreement shall be construed to limit the rights EPA has reserved under Section XV of this Settlement Agreement.
- 28.3 Nothing in this Settlement Agreement shall be construed to grant any rights to persons not a party to this Settlement Agreement. Further, nothing in this Settlement Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands against any person not party to this Settlement Agreement for indemnification, contribution, or cost recovery. Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that provide contribution protection to such persons.

#### **XXIX. COVENANT NOT TO SUE BY RESPONDENT**

- 29.1 Except to the extent the United States may be liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, oversight costs paid under this Settlement Agreement, or this Settlement Agreement including, but not limited to:
  - a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law; or
  - b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the

State of West Virginia, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

Except as provided in Paragraph 29.3 (Waiver of Claims), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 15.1 (b), (c), and (e) - (g), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

- 29.2 Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).
- 29.3 Respondent agrees not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent 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
- a. the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of i) 0.002% of the total volume of waste at the Site, or ii) 110 gallons of liquid materials or 200 pounds of solid materials.
  - b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against Respondent.

### **XXX. CONTRIBUTION AND RIGHTS**

- 30.1 The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that the Respondent is entitled, as of the effective date of this Settlement Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work and payment of oversight costs under Section XXI of this Settlement Agreement.
- 30.2 The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to

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which Respondent has, as of the effective date of this Settlement Agreement, resolved its liability to the United States for the Work and payment of oversight costs under Section XXI of this Settlement Agreement.

- 30.3 Nothing in this Settlement Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any persons not parties to this Settlement Agreement. Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(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) of CERCLA, 42 U.S.C. § 9613(f)(2).

**FOR RESPONDENT JPMORGAN CHASE BANK, N.A., a national banking association, in its capacity as successor trustee under that certain indenture dated December 31, 1951, by and among Ailsa M. Bruce, *et al.*, and The Charleston National Bank:**

Carol H. Fletcher  
[Signature]

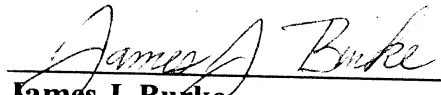
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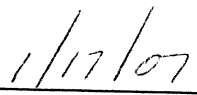
Name: Carol H. Fletcher

Title: Vice President

Address: P. O. Box 1113, Charleston, WV 25324

**FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

  
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**James J. Burke**  
Director, Hazardous Site Cleanup Division  
U.S. Environmental Protection Agency  
Region III

  
\_\_\_\_\_  
**Date**