

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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U.S. EPA REGION 8  
HEARING CLERK

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IN THE MATTER OF: ) )  
) )  
Smelertown Site ) )  
Chaffee County, Colorado ) )  
) )  
Butala Construction Co. ) )  
) )  
Respondent ) )  
) )  
Proceeding Under Sections 104, 107 ) )  
and 122 of the Comprehensive ) )  
Environmental Response, Compensation, ) )  
and Liability Act, 42 U.S.C. §§ 9604, ) )  
9607 and 9622. ) )  
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CERCLA Docket No. CERCLA-08-2024-0002

**ADMINISTRATIVE SETTLEMENT  
AGREEMENT AND ORDER ON  
CONSENT FOR REMEDIAL  
INVESTIGATION ADDENDUM/  
FOCUSED FEASIBILITY STUDY**

**ADMINISTRATIVE SETTLEMENT AGREEMENT  
AND ORDER ON CONSENT FOR  
REMEDIAL INVESTIGATION ADDENDUM / FOCUSED FEASIBILITY STUDY**

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

1. This Administrative Settlement Agreement and Order on Consent (Settlement) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and Butala Construction Co. (Respondent) concerning the Smelertown Site (Site) generally located near Salida, Chaffee County, Colorado and areas in close proximity to the Site. This Settlement provides for the performance of a remedial investigation addendum and focused feasibility study (RIA/FFS) for Operable Unit 2 (OU2). OU2 covers approximately 60 acres and addresses impacts from wood-treating chemicals used during creosote wood treating operations. The RIA/FFS will be an addendum to, but will not duplicate, the Remedial Investigation and Focused Feasibility Study, completed in 1996 and 1997 respectively, as described in Paragraph 14. The RIA/FFS will evaluate the possible impacts and potential remedies for the actual and/or threatened “release” of any hazardous substance resulting from Respondent’s activities as described in Section IV below. The RIA/FFS will also analyze the remedy selected in the OU2 Record of Decision issued by the EPA in 1998 as it relates to those activities. This Settlement separately contemplates the soil and groundwater sampling programs for the Vista Del Rio subdivision by Respondent. The Vista Del Rio Subdivision is the subdivision of the 18-acres along the western edge of the Site. The Settlement also provides for the payment of certain response costs incurred by the United States at or in connection with the Site and the Vista Del Rio Subdivision.

2. This Settlement is issued under the authority vested in the President of the United States by sections 104, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9607 and 9622 (CERCLA). This authority was delegated to the Administrator of the EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to Regional Administrators by EPA Delegation Nos. 14-14C (Administrative Actions Through Consent Orders, Jan. 18, 2017) and 14-14D (Cost Recovery Non-Judicial Agreements and Administrative Consent Orders, Jan. 18, 2017). These authorities were further redelegated by the Regional Administrator of EPA Region 8 to the below-signed officials.

3. The EPA and Respondent recognize that this Settlement has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Settlement do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement, the validity of the findings of facts, conclusions of law, and determinations in Section IV (Findings of Fact) and V (Conclusions of Law and Determinations) of this Settlement. Respondent agrees to comply with and be bound by the terms of this Settlement and further agrees that it will not contest the basis or validity of this Settlement or its terms.

## **II. PARTIES BOUND**

4. This Settlement is binding upon the EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent’s responsibilities under this Settlement.

5. This Settlement is limited to the Parties bound by this Settlement and does not impact the rights or obligations of Beazer East, Inc. (Beazer) or any prior agreements between any of the Parties or Beazer, unless expressly stated.

6. Respondent certifies that it is fully authorized to enter into the terms and conditions of this Settlement and to execute and legally bind Respondent to this Settlement.

7. Respondent shall be responsible for ensuring that its officers, directors, employees, agents, contractors, or any other person representing Respondent perform the Work in accordance with the terms of this Settlement. Respondent shall provide notice of this Settlement to each person representing Respondent with respect to the Site or the Work. Respondent shall provide notice of this Settlement to each contractor performing any Work and shall ensure that notice of the Settlement is provided to each subcontractor performing any Work.

### III. DEFINITIONS

8. Unless otherwise expressly provided in this Settlement, terms used in this Settlement 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 Settlement or its attached appendices, the following definitions shall apply:

“Agencies” means the EPA and CDPHE collectively.

“Affected Property” means all land within OU2, including any material excavated from the Mining Restricted Area and stockpiled elsewhere on the property owned by Respondent and any other real property where the EPA determines, at any time, that access, land, water, or other resource use restrictions are needed to implement the RIA/FFS.

“CDPHE” means the Colorado Department of Public Health and Environment and any successor departments or agencies of the State.

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

“Consent Decree” means the consent decree entered in the United States District Court for the District of Colorado, captioned *United States v. Beazer East, Inc. & Butala Construction Co.*, Civil Action No. 00-D-561 (Feb. 18, 2000), for OU2. The EPA, CDPHE, Beazer, and Respondent were parties.

“Day” or “day” means a calendar day. In computing any period of time under this Settlement, 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.

“Declaration” means the Declaration of Restrictive Covenants and Restrictions Against the Use of Real Property made and executed by Respondent on June 29, 2000, recorded in Chaffee County records on June 29, 2000 at reception number 311970. The Consent Decree calls the Declaration a “Restrictive Covenant,” but this Settlement will use Declaration.

“Effective Date” means the effective date of this Settlement as provided in Section XXXV.

“Engineering Controls” means constructed containment barriers or systems that control one or more of the following: downward migration, infiltration, or seepage of surface runoff or rain; or natural leaching migration of contaminants through the subsurface over time. Examples include caps, engineered bottom barriers, immobilization processes, and vertical barriers.

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

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

“Future Response Costs” means all costs incurred by the United States after April 30, 2023 in connection with the Work and any other obligations required pursuant to this Settlement. EPA Future Response Costs will include, but not be limited to, direct and indirect costs, that the United States incurs (a) in reviewing or developing deliverables submitted pursuant to this Settlement; (b) in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Settlement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs; (c) the costs incurred pursuant to Section XI (Property Requirements) including, but not limited to, (i) cost of attorney time, (ii) any monies paid to secure or enforce access, (iii) any monies paid for land, water, or other resource use restrictions, including the amount of just compensation, Section XV (Emergency Response and Notification of Releases), Paragraph 92 (Work Takeover), Paragraph 113 (Access to Financial Assurance), community involvement, and Section XVII (Dispute Resolution); (d) through any cooperative agreement to fund or reimburse costs incurred by the State that are associated with the Affected Property or the Vista Del Rio Subdivision; and (e) all litigation costs. Future Response Costs shall also include Agency for Toxic Substances and Disease Registry (ATSDR) costs regarding the Site, and all Interest on those Past Response Costs Respondent has agreed to pay under this Settlement that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from April 30, 2023 to the Effective Date.

“ICs” means Institutional 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 response action pursuant to this

Settlement; and/or (c) provide information intended to modify or guide human behavior at or in connection with the Site.

“Interest” means interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“NCP” means the National Oil and Hazardous Substances Pollution Contingency Plan (also called the National 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.

“OU2” means Operable Unit 2 of the Site. OU2 covers approximately 60 acres and addresses impacts from wood-treating chemicals used during creosote wood treating operations. Operations included a pressure treating retort, drip racks, storage tanks, pole plant, and lagoons. OU2 includes, but is not limited to, the Mining Restricted Area, the Mining Buffer Area, and the Groundwater Buffer Area, all defined in the Declaration. A general depiction of OU2 is included in Appendix A.

“OU2 Record of Decision” means the remedy decision document the EPA issued for OU2 at the Site on June 4, 1998.

“Paragraph” means a portion of this Settlement identified by an Arabic numeral or an upper or lower case letter.

“Parties” means the EPA and Respondent.

“Past Response Costs” means all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Affected Property or with the Vista Del Rio Subdivision through April 30, 2023.

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

“Respondent” means Butala Construction Co., a Colorado corporation, and its successors and assigns.

“Section” means a portion of this Settlement identified by a Roman numeral.

“Settlement” means this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXX (Integration/Appendices)). In the event of conflict between this Settlement and any appendix, this Settlement shall control.

“Site” means the Smelertown Site, currently comprised of OU1 and OU2, encompassing approximately 70 acres, located near Salida in Chaffee County, Colorado. Many industrial businesses operated at the Site over the past century, including lead-zinc smelting and wood-treating facilities. Contamination from wood-treating operations is being addressed under OU2. With regards to the Site, this Settlement contemplates only the Work to be performed in reevaluating the Affected Property, which Work is characterized in the SOW.

“Smelertown Special Account” means the special account within the EPA Hazardous Substance Superfund, established for the Site by the EPA pursuant to section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).

“State” means the State of Colorado.

“SOW” means the Statement of Work document describing the activities Respondent must perform to develop the RIA/FFS for the Affected Property, as set forth in Appendix B to this Settlement. The SOW also describes, or may be amended to describe, future activities required for the Vista Del Rio Subdivision. The SOW is incorporated into this Settlement and is an enforceable part of this Settlement as are any modifications made thereto in accordance with this Settlement.

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

“Waste Material” means (a) any “hazardous substance” under section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (b) any pollutant or contaminant under section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (c) any “solid waste” under section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

“Work” means all activities and obligations Respondent is required to perform under this Settlement, except those required by Section XIII (Record Retention).

“Vista Del Rio Subdivision” is the subdivision of the 18-acres along the western edge of the Site. The Vista Del Rio Subdivision consists of 5 parcels developed for residential development. The 5 parcels are all or partially covered by the Declaration. Those portions of the Vista Del Rio Subdivision that are subject to the Declaration are areas of interest. The Vista Del Rio Subdivision is also depicted generally on the map attached as Appendix A.

#### IV. FINDINGS OF FACT

9. The 70-acre Site is in Chaffee County, approximately one-mile northwest of Salida, Colorado. It is bounded on the north by Country Road 150, the east by State Highway 291, and the south and west by the Arkansas River. Many industrial businesses operated at the Site over the past century, including lead-zinc smelting and wood-treating facilities. Site activities associated with these operations included the dumping of molten slag along the Arkansas River and allowing creosote and other wood-treating chemicals to drip onto the ground. These activities contaminated soil, surface water, and groundwater with hazardous chemicals and heavy metals.

10. In 1992, the EPA proposed the Site for listing on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register, 57 Fed. Reg. 4827 (Feb. 7, 1992). The EPA has not taken action to finalize the listing.

11. This Settlement concerns OU2 and a portion of the Vista Del Rio Subdivision. OU2 covers approximately 60 acres and addresses impacts from wood-treating chemicals used during creosote wood treating operations. In 1926, Koppers Company Inc. (Koppers), or its predecessors, began operating railroad-tie treating within OU2. Operations included a pressure treating retort, drip racks, storage tanks, pole plant, and lagoons. Historical drawings indicate four storage tanks were located west of the retort building, and an additional three working tanks were located adjacent to the north side of the building. Historical aerial photographs also suggest the presence of two lagoons northeast of the retort building on the north side of the old Chaffee County Road 150. Wood treating operations ceased in 1953 when the wood treating plant was closed. The property changed hands several times. In 1962, Koppers sold the property to H.E. Lowdermilk Company. In 1965, Respondent purchased and redeveloped OU2 as a sand and gravel mine, which has remained in operation.

12. In 1995, a Baseline Risk Assessment performed for OU2 found unacceptable risks to future residents from ingestion and inhalation of surface soil, dermal contact with surface soil, and ingestion of groundwater. The Baseline Risk Assessment also identified a risk of elevated blood lead levels in children. The primary contaminants of concern for human health risks were arsenic and lead. With respect to ecological risk, the Baseline Risk Assessment determined that risk to aquatic organisms existed due to zinc in surface water. In addition, plant and invertebrate risk due to soil exposure was attributable to the presence of arsenic, lead, and zinc in soils; manganese, arsenic, copper, and zinc in riparian soils; and iron and zinc in downwind soils. Zinc in all soil areas was of concern to higher trophic organisms such as birds and mammals. Soils with elevated lead could also contribute to risk to birds and mammals.

13. In the early 1990s, the EPA authorized several time critical removal actions to address immediate risk posed by wastes associated with the former smelting and wood treating operations. As part of those removal actions, potentially responsible party Beazer, who purchased Koppers in 1988, removed approximately 5,000 tons of creosote impacted soils from the Site. Respondent excavated soils containing wood treating constituents and then buried them on-Site or removed them to the county landfill.



14. In 1995, the EPA and Beazer signed an Administrative Order on Consent, authorizing Beazer to conduct a Remedial Investigation/Feasibility Study (EPA Docket No.: CERCLA-VHI-96-11) for OU2. Beazer completed the Remedial Investigation Report for OU2 in 1996 and a Focused Feasibility Study Report in 1997.

15. In 1998, the EPA selected a remedy from six proposed alternatives derived from the Reports discussed in Paragraph 14 for OU2 in a Record of Decision. The major components of the selected remedy include: (a) institutional controls and engineering controls to ensure that the contaminated area remains undisturbed, to ensure the Site is not developed for residential use, and to prevent any mining from having subsurface impacts where contamination remains, including a mining restriction where subsurface impacts from wood-treating activities remained; and (b) groundwater monitoring to ensure no further migration of contamination and to measure the long-term effectiveness of the remedy.

16. On February 18, 2000, the United States District Court for the District of Colorado entered the Consent Decree for OU2. Under the Consent Decree, Beazer is responsible for implementing groundwater monitoring and engineering controls, and Respondent is responsible for implementation of and compliance with institutional controls.

17. Pursuant to the Consent Decree, on June 29, 2000, Respondent recorded the Declaration. The Declaration was recorded on all of the property that Respondent purchased from the previous owner, including land outside of OU2 which now is a portion of the Vista Del Rio Subdivision to the west of the Site. The Declaration prohibits residential development, and it restricts mining and excavation in certain areas.

18. In 2012, unknown to the Agencies, Respondent subdivided the 18-acres along the western edge of the Site into 5 parcels, called the Vista Del Rio Subdivision. From 2012 to 2016, Respondent sold 4 parcels for residential property development and kept one parcel. Single family residences were built on all five parcels between 2013 and 2017.

19. On February 28, 2018, Respondent emailed the EPA requesting permission to mine in the Mining Restricted Area (MRA), an area defined in the Declaration. On June 10, 2019, the EPA responded stating that, in order to allow mining in the MRA, it would be necessary to amend the OU2 Record of Decision and the Declaration, and that it may also be necessary to amend the Consent Decree or enter into a new agreement.

20. In April 2020, the Agencies learned of the Vista Del Rio Subdivision. Because the Declaration prohibits residential use for the Vista Del Rio Subdivision, the Agencies sent a "Notice of Violation of Consent Decree and of Declaration of Restrictive Covenants" to Respondent on September 21, 2020.

21. From approximately 2018 through 2021, unknown to the Agencies, Respondent mined and excavated approximately 84,600 cubic yards (yd<sup>3</sup>) of material out of the Buffer Area, an area defined in the Declaration.

22. In 2021, Respondent asserts that, for approximately two months, Respondent or its agents mined or excavated in, or allowed mining or excavation within the Mining Restricted Area, as defined in the Declaration. Respondent or its agents mined or excavated portions of the Mining Restricted Area approximately 15 feet below the previous surface, removing an estimated 25,000 yd<sup>3</sup> of material. Respondent asserts that approximately 1,650 yd<sup>3</sup> of the material consisted of overburden that Respondent stripped off and stockpiled on the floor of the north mining pit. Respondent stockpiled another 750 yd<sup>3</sup> of material within the MRA. Respondent also stockpiled several large boulders on the property between the Buffer Area and the Arkansas River. The remaining 22,600 yd<sup>3</sup> of material was crushed for use in asphalt production and removed from the Butala property by a subcontractor. During operations, Respondent observed a black material, at which time it stopped excavation work. At the time, these actions were unknown to the Agencies.

23. In January 2022, the EPA issued a CERCLA section 104(e) information request letter to Respondent, concerning activities at the Site and the Vista Del Rio Subdivision. Respondent submitted timely response in February 2022 and amended its responses in May and June 2022.

24. To assess the potential risk to human health, the Agencies required Respondent to prepare soil and groundwater sampling plans for the Vista Del Rio Subdivision in 2022. The Agencies approved Respondent's 2022 groundwater sampling and analysis plan; the results of which were provided to the Agencies in December 2022. The Agencies approved Respondent's soil sampling and analysis plan in January 2023, and soil sampling in the Vista Del Rio Subdivision was completed in May 2023. Respondent has submitted the data from the groundwater and the soil sampling programs to the Agencies. To be comprehensive, the constituents required in the sampling and analysis plans are broader than OU2 contaminants of concern. The sampling and analysis plans also include general industrial contaminants.

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

25. Based on the Findings of Fact set forth above, and the administrative record, the EPA has determined that:

- a. The Site is a "facility" as defined by section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b. The contamination found at the Site, as identified in Section IV (Findings of Fact), includes "hazardous substances" as defined by section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
- c. Respondent is a "person" as defined by section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- d. Respondent is a responsible party under section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

(1) Respondent is the “owner” and/or “operator” of the facility, as defined by section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

(2) Respondent was the “owner” and/or “operator” of the facility at the time of disposal of hazardous substances at the facility, as defined by section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

e. The conditions described in Section IV (Findings of Fact) constitute an actual and/or threatened “release” of a hazardous substance from the facility as defined by section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The actions required by this Settlement are necessary to protect the public health, welfare, or the environment, are in the public interest, 42 U.S.C. § 9622(a), are consistent with CERCLA and the NCP, 42 U.S.C. §§ 9604(a)(1), 9622(a), and will expedite effective remedial action and minimize litigation, 42 U.S.C. § 9622(a).

g. The EPA has determined that Respondent is qualified to conduct the RIA/FFS within the meaning of section 104(a) of CERCLA, 42 U.S.C. § 9604(a), and will carry out the Work properly and promptly, in accordance with sections 104(a) and 122(a) of CERCLA, 42 U.S.C. §§ 9604(a) and 9622(a), if Respondent complies with the terms of this Settlement.

## **VI. SETTLEMENT AGREEMENT AND ORDER**

26. Based upon Section IV (Findings of Fact) and V (Conclusions of Law and Determinations) set forth above, and the administrative record, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Settlement, including, but not limited to, all appendices to this Settlement and all documents incorporated by reference into this Settlement.

## **VII. DESIGNATION OF CONTRACTORS AND PROJECT COORDINATORS**

27. **Selection of Contractors, Personnel.** All Work performed under this Settlement shall be under the direction and supervision of qualified personnel. Within 30 days after the Effective Date, and before the Work outlined below begins, Respondent shall notify the Agencies in writing of the names, titles, addresses, telephone numbers, email addresses, and qualifications of the personnel, including contractors, subcontractors, consultants, and laboratories to be used in carrying out the Work. If, after the commencement of Work, Respondent retains additional contractors or subcontractors, Respondent shall notify the Agencies of the names, titles, contact information, and qualifications of such contractors or subcontractors retained to perform the Work at least 30 days prior to commencement of Work by such additional contractors or subcontractors. The EPA retains the right, at any time, to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If the EPA disapproves of a selected contractor or subcontractor, Respondent shall retain a different contractor or subcontractor and shall notify the Agencies of that contractor’s or subcontractor’s

name, title, contact information, and qualifications within 14 days after EPA's disapproval. With respect to any proposed contractor, Respondent shall demonstrate that the proposed contractor demonstrates compliance with ASQ/ANSI E4:2014 "Quality management systems for environmental information and technology programs – Requirements with guidance for use" (American Society for Quality, February 2014), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)," EPA/240/B-01/002 (Reissued May 2006) or equivalent documentation as determined by the EPA. The qualifications of the persons undertaking the Work for Respondent shall be subject to EPA's review for verification based on objective assessment criteria (e.g., experience, capacity, technical expertise) and that they do not have a conflict of interest with respect to the project.

28. Respondent has designated, and the EPA has not disapproved, the following individual as Project Coordinator, who shall be responsible for administration of all actions by Respondent required by this Settlement: Charles Kellerman, Vice President, Butala Construction Company, 9000 Co Rd 152, Salida, CO 81201, chuck@butala.net. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during the Work. The EPA retains the right to disapprove of a designated Project Coordinator who does not meet the requirements of Paragraph 27 (Selection of Contractors, Personnel). If the EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify the Agencies of that person's name, title, contact information, and qualifications within 14 days following EPA's disapproval. Notice or communication relating to this Settlement from the EPA to Respondent's Project Coordinator shall constitute notice or communication to Respondent.

29. The EPA has designated Tabetha Lynch of the Superfund Remedial Branch, Superfund and Emergency Management Division, Region 8 as its Remedial Project Manager (RPM). The EPA will notify the Parties of a change of its designated RPM.

30. The RPM shall have the authority lawfully vested in an RPM and On-Scene Coordinator by the NCP. In addition, the RPM shall have the authority, consistent with the NCP, to halt, conduct, or direct any Work required by this Settlement, or to direct any other response action when s/he determines that conditions at the Site constitute an emergency situation or may present a threat to public health or welfare or the environment. Absence of the RPM from the area under study pursuant to this Settlement shall not be cause for stoppage or delay of Work.

31. CDPHE has designated Alex Hedgepath of the Hazardous Materials and Waste Management Division, CDPHE as its State Project Manager. CDPHE will notify the Parties of a change of its designated State Project Coordinator.

32. Communications between Respondent and the Agencies, and all documents concerning the activities performed pursuant to this Settlement, shall be directed to the RPM and State Project Manager in accordance with Paragraph 122. All deliverables, notices, notifications, proposals, reports, and requests specified in this Settlement must be in writing, unless otherwise specified, and be submitted by email as identified in Section XXXI (Notices and Submissions).

## VIII. WORK TO BE PERFORMED

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

### 34. **Activities and Deliverables**

a. Concerning the Vista Del Rio Subdivision, the EPA, in consultation with CDPHE, shall prepare a risk assessment report addressing the residential use of the Vista Del Rio Subdivision, based on results from the groundwater sampling and analysis plan, soil sampling and analysis plan, and any further investigation SAPs that are required by the Agencies. The Agencies will determine whether to consent to release all or portions of the Vista Del Rio Subdivision from the residential restriction of the Declaration, whether alternative or additional action is required with respect to the Vista Del Rio Subdivision, the Declaration, the Consent Decree, or this Settlement. Under the Declaration, Beazer has its own ability to release all or portions of the Vista Del Rio Subdivision from the residential restriction of the Declaration. Respondent shall prepare a separate Site Characterization Report for the Vista Del Rio Subdivision (Vista Del Rio Subdivision Site Characterization Report). Nothing herein shall be construed to affect the rights and obligations of Beazer or the rights of the residents of the Vista Del Rio Subdivision.

b. Concerning the Affected Property, Respondent shall conduct activities and submit deliverables as provided by the SOW for the development of the RIA/FFS. All such Work shall be conducted in accordance with the provisions of this Settlement, the attached SOW, CERCLA, the NCP, and EPA guidance, including, but not limited to, the “Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA” (RIA/FFS Guidance) (OSWER Directive # 9355.3-01, October 1988), available at <http://semspub.epa.gov/src/document/11/128301>, “Guidance for Data Useability in Risk Assessment (Part A), Final” (OSWER Directive #9285.7-09A, PB 92-963356 (April 1992), available at <http://semspub.epa.gov/src/document/11/156756>, and guidance referenced therein, and guidance referenced in the SOW. The RIA shall consist of collecting data to characterize Affected Property conditions, determining the nature and extent of the contamination at or from the Affected Property, assessing risk to human health and the environment at the Affected Property, and conducting treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered. The FFS shall determine and evaluate (based on treatability testing, where appropriate) alternatives for remedial action to prevent, mitigate, remove through excavation, or otherwise respond to or remedy the release or threatened release of hazardous substances, pollutants, or contaminants at or from the Affected Property. The general activities that Respondent is required to perform are identified below, followed by a list of deliverables. The tasks that Respondent must perform are described more fully in the SOW and guidance. The activities and deliverables identified below shall be developed as provided in the RIA/FFS Work Plan and Sampling and Analysis Plan and shall be submitted to the Agencies as provided therein. All Work performed under this Settlement shall

be in accordance with the schedules in this Settlement or established in the SOW, and in full accordance with the standards, specifications, and other requirements of the RIA/FFS Work Plan and Sampling and Analysis Plan, as initially approved or modified by the EPA, and as may be amended or modified by the EPA from time to time.

c. All written documents prepared by Respondent pursuant to this Settlement shall be submitted by Respondent in accordance with Section IX (Submission and Approval of Deliverables). Except for progress reports and the Health and Safety Plan, all such submittals will be reviewed and approved by the EPA in accordance with Section IX (Submission and Approval of Deliverables). Respondent shall implement all EPA approved, conditionally-approved, or modified deliverables.

d. **Scoping.** The EPA has determined the Site-specific objectives of the RIA/FFS and devised a general management approach for the Affected Property, as stated in the SOW. Respondent shall conduct the remainder of scoping activities as described in the SOW and referenced guidance. At the conclusion of the project planning phase, as referenced in Chapter 2.2 of the RI/FS Guidance, Respondent shall provide the Agencies with the following deliverables. The SOW articulates additional deliverables needed.

e. **RIA/FFS Work Plan.** Respondent shall submit an RIA/FFS Work Plan to the EPA for review and approval. Upon its approval by the EPA pursuant to Section IX (Submission and Approval of Deliverables), the RIA/FFS Work Plan shall be incorporated into and become enforceable under this Settlement. Respondent shall submit the following deliverables to the Agencies for review and EPA approval unless the EPA decides that one or more provisions is not necessary:

(1) **Sampling and Analysis Plan, including an attached Quality Assurance Project Plan and Health and Safety Plan.** Respondent shall submit a Sampling and Analysis Plan to the Agencies for review and EPA approval pursuant to Section IX (Submission and Approval of Deliverables). This plan shall consist of a Field Sampling Plan (FSP) and a Quality Assurance Project Plan (QAPP), as described in the SOW, that is consistent with the NCP, “Guidance for Quality Assurance Project Plans (QA/G-5),” EPA/240/R-02/009 (December 2002), including, but not limited to, “Guidance for Quality Assurance Project Plans (QA/G-5)” EPA/240/R-02/009 (December 2002), “EPA Requirements for Quality Assurance Project Plans (QA/R-5)” EPA/240/B-01/003 (March 2001, reissued May 2006), and “Uniform Federal Policy for Quality Assurance Project Plans,” Parts 1-3, EPA/505/B-04/900A-900C (March 2005). Upon its approval by the EPA pursuant to Section IX (Submission and Approval of Deliverables), the Sampling and Analysis Plan shall be incorporated into and become enforceable under this Settlement. Respondent shall develop the Health and Safety Plan to ensure the protection of on-Site workers and the public during performance of on-Site Work under this Settlement. Respondent shall prepare the Health and Safety Plan in accordance with “OSWER Integrated Health and Safety Program Operating Practices for OSWER Field Activities,” Pub. 9285.0-01C (November 2002), available on the NSCEP database at <https://www.epa.gov/nscep/index.html>, and “EPA’s Emergency Responder Health and Safety Manual,” OSWER Directive 9285.3-12 (July 2005 and updates), available at [https://www.epaosc.org/\\_HealthSafetyManual/manual-index.htm](https://www.epaosc.org/_HealthSafetyManual/manual-index.htm). In addition, the Health and Safety Plan shall comply with all currently applicable

Occupational Safety and Health Administration (OSHA) regulations found at 29 C.F.R. Part 1910. If the EPA determines that it is appropriate, the Health and Safety Plan shall also include contingency planning. Respondent shall incorporate all changes to the plan provided by the EPA and shall implement the plan during the pendency of the RIA/FFS.

f. **Site Characterization.** Respondent shall implement the provisions of the RIA/FFS Work Plan and Sampling and Analysis Plan to characterize the Affected Property. Respondent shall complete Affected Property characterization and submit all deliverables in accordance with the schedules and deadlines established in this Settlement, the attached SOW, and/or the EPA-approved RIA/FFS Work Plan and Sampling and Analysis Plan.

g. **Human Health Risk Assessment Addendum and Ecological Risk Assessment Addendum.** If the EPA determines that a Human Health Risk Assessment Addendum or Ecological Risk Assessment Addendum (Risk Assessments) are necessary at the Affected Property, Respondent will perform the Risk Assessments in accordance with the SOW, RIA/FFS Work Plan, and applicable EPA guidance, including but not limited to: “Interim Final Risk Assessment Guidance for Superfund, Volume I – Human Health Evaluation Manual (Part A),” RAGS, EPA-540-1-89-002, OSWER Directive 9285.7-01A (December 1989); “Interim Final Risk Assessment Guidance for Superfund, Volume I – Human Health Evaluation Manual (Part D, Standardized Planning, Reporting, and Review of Superfund Risk Assessments),” RAGS, EPA-540-R-97-033, OSWER Directive 9285.7-01D (January 1998); and “Ecological Risk Assessment Guidance for Superfund: Process for Designing and Conducting Ecological Risk Assessments,” ERAGS, EPA-540-R-97-006, OSWER Directive 9285.7-25 (June 1997).

h. **Draft RIA Report.** Respondent shall submit to the EPA for review and approval pursuant to Section IX (Submission and Approval of Deliverables), a draft Remedial Investigation Addendum Report (RIA Report) consistent with the SOW, RIA/FFS Work Plan, and Sampling and Analysis Plan. The draft RIA Report shall also contain the Risk Assessments if the EPA determined the Risk Assessments were necessary.

i. **Final RIA Report.** After the draft RIA Report has been reviewed by the Agencies, the Agencies will provide comments on the draft RIA Report to the Respondent for review and resolution. Following comments by the Agencies, Respondent shall prepare a final RIA report which satisfactorily addresses these comments.

j. **Draft FFS Report.** Respondent shall submit to the EPA a draft FFS Report for review and approval pursuant to Section IX (Submission and Approval of Deliverables). Respondent shall refer to Table 6-5 of the RIA/FFS Guidance for report content and format. The draft FFS Report as amended, and the administrative record, shall provide the basis for the proposed plan under sections 113(k) and 117(a) of CERCLA, 42 U.S.C. §§ 9613(k) and 9617(a), by the EPA, and shall document the development and analysis of remedial alternatives.

k. Upon receipt of the draft FFS Report, the EPA will evaluate, as necessary, the estimates of the risk to the public and environment that are expected to remain after a particular remedial alternative has been completed and will evaluate the cost, implementability,

and long-term effectiveness of any proposed ICs for that alternative. Following comments by the Agencies, Respondent shall prepare a final FFS report which satisfactorily addresses these comments, for final EPA approval. Respondent shall submit the following deliverables for the Agencies review and EPA approval unless the EPA decides that one or more provisions is not necessary:

(1) **Memorandum on Remedial Action Objectives.** The Memorandum on Remedial Action Objectives shall identify remedial action objectives for each contaminated medium, as well as Engineering Controls and ICs as described in Paragraph 4.2(b) of the SOW.

(2) **Memorandum on Development and Screening of Alternatives.** The Memorandum on Development and Screening of Alternatives shall summarize the development and screening of remedial alternatives as described in Paragraph 4.2(c) of the SOW.

(3) **Detailed Analysis of Alternatives.** Respondent shall conduct a detailed analysis of remedial alternatives, as described in Paragraph 4.2(d) of the SOW. Respondent shall prepare a summary report of the findings of the FFS, including the above analyses, and present the results to the EPA for approval.

(4) **Alternatives Analysis for ICs and Screening.** OU2 is currently subject to ICs established by the OU2 Record of Decision and the Declaration. Respondent shall submit a memorandum on the ICs identified in the Memorandum on Development and Screening of Alternatives as potential remedial actions. The Alternatives Analysis for ICs and Screening shall (i) describe the restrictions needed on land, water, or other resources and their relationship to the remedial action objectives; (ii) determine the specific types of ICs that can be used to address and implement the land, water, or other resource use restrictions; (iii) investigate when the ICs need to be implemented and how long they must remain in place; (iv) research, discuss, and document any agreement or other arrangements with the appropriate entities (e.g., state, local government, neighboring and nearby landowners, conservation organizations, Respondent) on exactly who will be responsible for implementing, maintaining, and enforcing the ICs.<sup>1</sup> The Alternatives Analysis for ICs and Screening shall also evaluate the ICs identified in the Memorandum on Development and Screening of Alternatives against the nine evaluation criteria outlined in the NCP (40 C.F.R. § 300.430(e)(9)(iii)) for CERCLA cleanups, including but not limited to costs to implement, maintain, and/or enforce the ICs.<sup>2</sup> The Alternatives Analysis for ICs and Screening shall be submitted as an appendix to the draft FFS Report.

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<sup>1</sup> See “Institutional Controls: A Site Manager’s Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups” (A Site Manager’s Guide to ICs), OSWER Directive 9355.0-74FS-P (September 2000) and “Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites” (PIME IC Guide), OSWER Directive 9355.0-89 (November 2010) for guidance on these considerations.

<sup>2</sup> See A Site Manager’s Guide to ICs, *id.*, for discussion of what factors to consider with respect to evaluation of ICs under the nine criteria. It is not necessary to evaluate “reduction of toxicity, mobility or volume through treatment” in the context of ICs. See the PIME IC Guide, *id.*, for further discussion of ICs lifecycle considerations.



### **35. Modification of the RIA/FFS Work Plan**

a. If at any time during the RIA/FFS process, Respondent identifies a need for additional data, Respondent shall submit a memorandum documenting the need for additional data to the Agencies within 30 days after identification. The EPA, in its discretion, will determine whether the additional data will be collected by Respondent and whether it will be incorporated into deliverables.

b. In the event of unanticipated or changed circumstances at the Site, Respondent shall notify the RPM within 24 hours of discovery of the unanticipated or changed circumstances. If the EPA determines that the unanticipated or changed circumstances warrant changes in the RIA/FFS Work Plan, the EPA shall modify the RIA/FFS Work Plan in writing accordingly or direct Respondent to modify and submit the modified RIA/FFS Work Plan to the EPA for approval. Respondent shall perform the RIA/FFS Work Plan as modified.

c. The EPA may determine that, in addition to tasks defined in the initially approved RIA/FFS Work Plan, other additional work may be necessary to accomplish the objectives of the RIA/FFS. Respondent shall perform these response actions in addition to those required by the initially approved RIA/FFS Work Plan, including any approved modifications, if the EPA determines that such actions are necessary for a thorough RIA/FFS.

d. Respondent shall confirm its willingness to perform the additional work in writing to the EPA within 7 days after receipt of the EPA request. If Respondent objects to any modification determined by the EPA to be necessary pursuant to this Paragraph, Respondent may seek dispute resolution pursuant to Section XVII (Dispute Resolution). The SOW and/or RIA/FFS Work Plan shall be modified in accordance with the final resolution of the dispute.

e. Respondent shall complete the additional work according to the standards, specifications, and schedule set forth or approved by the EPA in a written modification to the RIA/FFS Work Plan or written RIA/FFS Work Plan supplement. The EPA reserves the right to conduct the work, to seek reimbursement from Respondent for the costs incurred in performing the work, and/or to seek any other appropriate relief.

f. Nothing in this Paragraph shall be construed to limit the EPA's authority to require performance of further response actions at the Site or the Vista Del Rio Subdivision.

### **36. Off-Site Shipments**

a. Respondent may ship hazardous substances, pollutants, and contaminants from the Affected Property and the Vista Del Rio Subdivision to an off-Site facility only if it complies with section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent will be deemed to be in compliance with CERCLA § 121(d)(3) and 40 C.F.R. § 300.440 regarding a shipment if Respondent obtains a prior determination from the EPA that the proposed receiving facility for such shipment is acceptable under the criteria of 40 C.F.R. § 300.440(b).

b. Respondent may ship Waste Material from the Affected Property to an out-of-state waste management facility only if, prior to any shipment, it provides written notice to the appropriate state environmental official in the receiving facility's state and to the Agencies. This notice requirement shall not apply to any off-Site shipments when the total quantity of all such shipments will not exceed ten cubic yards. The written notice must include the following information, if available: (i) the name and location of the receiving facility; (ii) the type and quantity of Waste Material to be shipped; (iii) the schedule for the shipment; and (iv) the method of transportation. Respondent shall also notify the state environmental official referenced above and the Agencies of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. Respondent shall provide the written notice after the award of the contract for the RIA/FFS and before the Waste Material is shipped.

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

37. **Meetings.** Respondent shall make presentations at, and participate in, meetings at the request of the EPA during the preparation of the RIA/FFS. In addition to discussion of the technical aspects of the RIA/FFS, topics will include anticipated problems or new issues. Meetings will be scheduled at the EPA's discretion.

## **IX. SUBMISSION AND APPROVAL OF DELIVERABLES**

### **38. Submission of Deliverables**

#### **a. General Requirements for Deliverables**

(1) Except as otherwise provided in this Settlement, Respondent shall direct all submissions required by this Settlement to the RPM and to the State Project Manager. Respondent shall submit all deliverables required by this Settlement, the attached SOW, or any approved work plan in accordance with the schedule set forth in such plan.

(2) Respondent shall submit all deliverables in electronic form. Technical specifications for sampling and monitoring data and spatial data are addressed in Paragraph 38.b. All other deliverables shall be submitted in the electronic form specified by the RPM.

**b. Technical Specifications for Deliverables**

(1) Sampling and monitoring data should be submitted in standard regional Electronic Data Deliverable (EDD) format. Other delivery methods may be allowed if electronic direct submission presents a significant burden or as technology changes.

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

(3) 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.

(4) Spatial data submitted by Respondent does not, and is not intended to, define the boundaries of the Site.

**39. Approval of Deliverables**

**a. Initial Submissions**

(1) After review of any deliverable that is required to be submitted for EPA approval under this Settlement or the attached SOW, the 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) The EPA also may modify the initial submission to cure deficiencies in the submission if: (i) the 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 Paragraph 39.a(1) (Initial Submissions), or if required by a notice of approval upon specified conditions under Paragraph 39.a(1), Respondent shall, within 30 days or such longer time as specified by the EPA in such notice, correct the deficiencies and resubmit the deliverable for approval. After review of the resubmitted deliverable, the EPA may: (i) approve, in whole or in

part, the resubmission; (ii) approve the resubmission upon specified conditions; (iii) modify the resubmission; (iv) disapprove, in whole or in part, the resubmission, requiring Respondent to correct the deficiencies; or (v) any combination of the foregoing.

c. **Implementation.** Upon approval, approval upon conditions, or modification by the EPA under Paragraph 39.a (Initial Submissions) or Paragraph 39.b (Resubmissions), of any deliverable, or any portion thereof: (i) such deliverable, or portion thereof, will be incorporated into and enforceable under the Settlement; and (ii) Respondent shall take any action required by such deliverable, or portion thereof. Implementation of any non-deficient portion of a submission shall not relieve Respondent of any liability for penalties under Section XIX (Stipulated Penalties) for violations of this Settlement.

40. Notwithstanding the receipt of a notice of disapproval, Respondent shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by the EPA.

41. In the event that the EPA takes over some of the tasks, but not the preparation of the RIA Report or the FFS Report, Respondent shall incorporate and integrate information supplied by the EPA into those reports.

42. Respondent shall not proceed with any activities or tasks dependent on the following deliverables until receiving EPA approval, approval on condition, or modification of such deliverables: RIA/FFS Work Plan; Sampling and Analysis Plan; draft RIA Report; Treatability Testing Work Plan; Treatability Testing Sampling and Analysis Plan; Treatability Testing; and draft FFS Report. Respondent shall not proceed with any activities or tasks dependent on the following deliverable until EPA has an opportunity for review and comment: Health and Safety Plan. While awaiting EPA approval, approval on condition, or modification of these deliverables, Respondent shall proceed with all other tasks and activities that may be conducted independently of these deliverables, in accordance with the schedule set forth under this Settlement.

43. For all remaining deliverables not listed in Paragraph 42, Respondent shall proceed with all subsequent tasks, activities, and deliverables without awaiting EPA approval of the submitted deliverable. The EPA reserves the right to stop Respondent from proceeding further, either temporarily or permanently, on any task, activity, or deliverable at any point during the Work.

44. **Material Defects.** If an initially submitted or resubmitted plan, report, or other deliverable contains a material defect, and the plan, report, or other deliverable is disapproved or modified by the EPA under Paragraph 39.a(1) (Initial Submissions) or 39.b (Resubmissions) due to such material defect, Respondent shall be deemed in violation of this Settlement for failure to submit such plan, report, or other deliverable timely and adequately. Respondent may be subject to penalties for such violation as provided in Section XIX (Stipulated Penalties).

45. Neither failure of the EPA to expressly approve or disapprove of Respondent's submissions within a specified time period, nor the absence of comments, shall be construed as approval by the EPA.

## **X. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS**

46. Respondent shall use quality assurance, quality control, and other technical activities and chain of custody procedures for all samples consistent with "EPA Requirements for Quality Assurance Project Plans (QA/R5)," EPA/240/B-01/003 (March 2001, reissued May 2006), "Guidance for Quality Assurance Project Plans (QA/G-5)," EPA/240/R-02/009 (December 2002), and "Uniform Federal Policy for Quality Assurance Project Plans, Parts 1-3, EPA/505/B-04/900A-900C (March 2005).

### **47. Laboratories**

a. Respondent shall ensure that the EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Respondent pursuant to this Settlement. In addition, Respondent shall ensure that such laboratories shall analyze all samples submitted by the EPA pursuant to the QAPP for quality assurance, quality control, and technical activities that will satisfy the stated performance criteria as specified in the QAPP and that sampling and field activities are conducted in accordance with the Agency's "EPA QA Field Activities Procedure" CIO 2105-P-02.1 (9/23/2014), available at <https://www.epa.gov/irmpoli8/epa-qa-field-activities-procedures>. Respondent shall ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Settlement meet the competency requirements set forth in EPA's "Policy to Assure Competency of Laboratories, Field Sampling, and Other Organizations Generating Environmental Measurement Data under Agency-Funded Acquisitions," available at <https://www.epa.gov/measurements/documents-about-measurement-competency-under-acquisition-agreements>, and that the laboratories perform all analyses using EPA-accepted methods. Accepted EPA methods consist of, but are not limited to, methods that are documented in the EPA's Contract Laboratory Program (<https://www.epa.gov/superfund/programs/clp/>), SW 846 "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (<https://www.epa.gov/hw-sw846>), "Standard Methods for the Examination of Water and Wastewater" (<http://www.standardmethods.org/>), and 40 C.F.R. Part 136, "Air Toxics - Monitoring Methods" (<https://www.epa.gov/amtic/air-toxics-ambient-monitoring#methods>).

b. Upon approval by the EPA, after a reasonable opportunity for review and comment by CDPHE, Respondent may use other appropriate analytical methods, as long as (i) quality assurance/quality control (QA/QC) criteria are contained in the methods and the methods are included in the QAPP, (ii) the analytical methods are at least as stringent as the methods listed above, and (iii) the methods have been approved for use by a nationally recognized organization responsible for verification and publication of analytical methods, e.g., EPA, ASTM, NIOSH, OSHA, etc.

c. Respondent shall ensure that all laboratories it uses for analysis of samples taken pursuant to this Settlement have a documented Quality System that complies with

ASQ/ANSI E4:2014 “Quality Management Systems for Environmental Information and Technology Programs – Requirements With Guidance for Use” (American Society for Quality, February 2014), and “EPA Requirements for Quality Management Plans (QA/R-2)” EPA/240/B-01/002 (March 2001, reissued May 2006), or equivalent documentation as determined by the EPA. The EPA may consider Environmental Response Laboratory Network (ERLN) laboratories, laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP), or laboratories that meet International Standardization Organization (ISO 17025) standards or other nationally recognized programs as meeting the Quality System requirements.

d. Respondent shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Settlement are conducted in accordance with the procedures set forth in the approved QAPP.

#### **48. Sampling**

a. Upon request, Respondent shall provide split or duplicate samples to the Agencies or their authorized representatives. Respondent shall notify the Agencies not less than 7 days in advance of any sample collection activity unless shorter notice is agreed to by the EPA. In addition, the Agencies shall have the right to take any additional samples that the EPA or CDPHE deems necessary. Upon request, the Agencies shall provide to Respondent split or duplicate samples of any samples they take as part of EPA’s oversight of Respondent’s implementation of the Work, and any such samples shall be analyzed in accordance with the approved QAPP.

b. Respondent shall submit to the Agencies, in the next monthly progress report as described in the SOW the results of all sampling and/or tests or other data obtained or generated by or on behalf of Respondent with respect to the Site and/or the implementation of this Settlement.

c. Respondent waives any objections to any data gathered, generated, or evaluated by the EPA, the State, or Respondent in the performance or oversight of the Work that has been verified according to the quality assurance/quality control (QA/QC) procedures required by the Settlement or any EPA-approved RIA/FFS work plans or sampling and analysis plans. If Respondent objects to any other data relating to the RIA/FFS, Respondent shall submit to the Agencies a report that specifically identifies and explains its objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. The report must be submitted to the Agencies within 15 days after the monthly progress report containing the data.

### **XI. PROPERTY REQUIREMENTS**

#### **49. Agreements Regarding Access and Non-Interference.**

a. With respect to property not owned by Respondent, Respondent shall use best efforts to secure from such an owner an agreement, enforceable by Respondent and the

United States, providing that such owner: (i) provide the EPA, the State, Respondent, and their representatives, contractors, and subcontractors with access at all reasonable times to the Affected Property and/or the Vista Del Rio Subdivision to conduct any activity regarding the Settlement, including those listed in Paragraph 49.c (Access Requirements); and (ii) refrain from using Affected Property and/or the Vista Del Rio Subdivision in any manner that the 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 or integrity of the Work, including the restrictions listed in Paragraph 49.d (Land, Water, or Other Resource Use Restrictions). Respondent shall provide a copy of such access and use restriction agreement(s) to the Agencies.

b. With respect to property owned by Respondent, Respondent shall: (i) provide the EPA, the State, and their representatives, contractors, and subcontractors with access at all reasonable times to the Affected Property and the Vista Del Rio Subdivision to conduct any activity regarding the Settlement, including those listed in Paragraph 49.c (Access Requirements); and (ii) refrain from using Affected Property and the Vista Del Rio Subdivision in any manner that the EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material; interfere with or adversely affect the implementation or integrity of the Work, including the restrictions listed in Paragraph 49.d (Land, Water, or Other Resource Use Restrictions), or exacerbate or disturb contamination at the Site, Affected Property, or the Vista Del Rio Subdivision.

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

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the EPA or the State;
- (3) Conducting investigations regarding contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, implementing, or monitoring response actions;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved QAPP;
- (7) Implementing the Work pursuant to the conditions set forth in Paragraph 92 (Work Takeover);

- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Respondent or its agents, consistent with Section XII (Access to Information);
- (9) Assessing Respondent's compliance with the Settlement;
- (10) Determining whether the Affected Property or the Vista Del Rio Subdivision is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Settlement; and
- (11) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions regarding the Affected Property or the Vista Del Rio Subdivision.

d. **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 Work: disturbing, adding to, or moving material in the Mining Restricted Area or product piles that may contain Mining Restricted Area wastes; heavy vehicle traffic within the Mining Restricted Area or Buffer Area unless approved by the EPA; no mining or excavation of the Mining Restricted Area/Buffer Area without express written approval of the Agencies, and as may be required from Beazer through the Declaration;

(2) Ensuring that any new structures will not be constructed in a manner that could interfere with the Work;

(3) Complying with any existing Institutional Controls, including the Declaration.

50. **Best Efforts.** As used in this Section, "best efforts" means the efforts that a reasonable person in the position of Respondent would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restriction agreements, as required by this Section. If Respondent is unable to accomplish what is required through "best efforts" in a timely manner, it shall notify the EPA and include a description of the steps taken to comply with the requirements. If the EPA deems it appropriate, it may assist Respondent, or take independent action, in obtaining such access and/or use restrictions. 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 XVI (Payment of Response Costs).

51. In the OU2 Record of Decision, the EPA determined certain ICs were necessary, and Butala implemented the Declaration, accordingly. The EPA may determine in a future decision document prepared in accordance with the NCP that additional or modified ICs in the



form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices are needed. Respondent shall record a Notice of Environmental Use Restriction pursuant to Colorado's Environmental Covenants Statute, C.R.S. § 25-15-317 et seq. upon EPA's request and shall cooperate with EPA's and the State's efforts to secure and ensure compliance with all such ICs.

52. In the event of any Transfer of the Affected Property, unless the EPA otherwise consents in writing, Respondent shall continue to comply with its obligations under the Settlement, including its obligation to secure access and ensure compliance with any land, water, or other resource use restrictions regarding the Affected Property. In the event of any Transfer of the Vista Del Rio Subdivision, Respondent shall continue to work with successor owners to ensure compliance with the terms of this Settlement.

53. Notwithstanding any provision of the Settlement, the EPA and the State retain all of their access authorities and rights, as well as all of their rights to require land, water, or other resource use restrictions, including enforcement authorities related thereto under CERCLA, RCRA, and any other applicable statute or regulations.

## **XII. ACCESS TO INFORMATION**

54. Respondent shall provide to the EPA and the State, 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 Respondent's possession or control or that of its contractors or agents relating to activities at the Site or the Affected Property or the Vista Del Rio Subdivision or to the implementation of this Settlement, 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. Respondent shall also make available to the EPA and the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

### **55. Privileged and Protected Claims**

a. Respondent may assert that all or part of a Record requested by the EPA or the State is privileged or protected as provided under federal law, in lieu of providing the Record, provided Respondent comply with Paragraph 55.b, and except as provided in Paragraph 55.c.

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

privileged or protected until the EPA and the State have had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Respondent's favor.

c. Respondent may make no claim of privilege or protection regarding:  
(i) 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 (ii) the portion of any Record that Respondent is required to create or generate pursuant to this Settlement.

56. **Business Confidential Claims.** Respondent may assert that all or part of a Record provided to the EPA and the State under this Section or Section XIII (Record Retention) 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), or, when submitted to the State, subject to withholding in accordance with Section 24-72-204(2)(a), C.R.S. of the Colorado Open Records Act (CORA). Respondent shall segregate and clearly identify all Records or parts thereof submitted under this Settlement for which Respondent asserts business confidentiality claims or any grounds for withholding under CORA. Records claimed as confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. The State will assess records claimed as confidential for withholding under CORA in the event of a public records request. If no claim of confidentiality accompanies Records when they are submitted to the EPA and the State, or if the EPA has notified Respondent 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, or if the State has notified the Respondent that, in the event of a CORA request for public records, the records may not be withheld, the public may be given access to such Records without further notice to Respondent.

57. Notwithstanding any provision of this Settlement, the EPA and the State retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

### **XIII. RECORD RETENTION**

58. Until 10 years after the EPA provides Respondent with notice, pursuant to Section XXIX (Notice of Completion of Work), that all Work has been fully performed in accordance with this Settlement, Respondent shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control, or that come into its possession or control, that relate in any manner to its liability under CERCLA with regard to the Site. Respondent must preserve and retain all Records that relate to the liability of any other person under CERCLA with respect to the Site or the Vista Del Rio Subdivision. Respondent 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 Respondent (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned

Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

59. At the conclusion of the document retention period, Respondent shall notify the EPA and the State at least 90 days prior to the destruction of any such Records, and, upon request by the EPA or the State, and except as provided in Paragraph 55 (Privileged and Protected Claims), Respondent shall deliver any such Records to the EPA or the State.

60. Respondent 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 or the Vista Del Rio Subdivision since notification of potential liability by the EPA or the State and that it has fully complied with any and all EPA and State requests for information regarding the Site or the Vista Del Rio Subdivision pursuant to sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

#### **XIV. COMPLIANCE WITH OTHER LAWS**

61. Nothing in this Settlement limits Respondent's obligations to comply with the requirements of all applicable state and federal laws and regulations when performing the RIA/FFS. No local, state, or federal 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) (for purposes of this Settlement, on the Affected Property or the Vista Del Rio Subdivision), including studies, if the action is selected and carried out in compliance with section 121 of CERCLA, 42 U.S.C. § 9621. Where any portion of the Work that is not on-Site requires a federal or state permit or approval, Respondent shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. Respondent may seek relief under the provisions of Section XVIII (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 required for the Work, provided that it has submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals. This Settlement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation. Nothing in this Settlement limits Respondent's obligations to comply with other judicial or administrative agreements, including the Consent Decree.

#### **XV. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

62. **Emergency Response.** 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, the Affected Property, or the Vista Del Rio Subdivision that either constitutes an emergency situation or that may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release. Respondent shall take these actions in accordance with all applicable provisions of this Settlement, including, but not limited to, the Health and Safety Plan. Respondent shall also immediately notify the RPM and State Project Manager or, in the event of their unavailability,

the Regional Duty Officer at (303) 293-1788 of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and the EPA takes such action instead, Respondent shall reimburse the EPA for all costs of such response action not inconsistent with the NCP pursuant to Section XVI (Payment of Response Costs).

63. **Release Reporting.** Upon the occurrence of any event during performance of the Work that Respondent is 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, Respondent shall immediately orally notify the RPM and the State Project Manager or, in the event of their unavailability, the Regional Duty Officer at (303) 293-1788, and the National Response Center at (800) 424-8802. This reporting requirement is in addition to, and not in lieu of, reporting under section 103 of CERCLA, 42 U.S.C. § 9603, and section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004.

64. For any event covered under this Section, Respondent shall submit a written report to the EPA within 7 days after the onset of such event, setting forth the action or event that occurred and the measures taken, and to be taken, to mitigate any release or threat of release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release or threat of release.

## **XVI. PAYMENT OF RESPONSE COSTS**

### **65. Payment for Past Response Costs**

a. Respondent shall pay to the EPA a total of \$46,750 for Past Response Costs. Respondent shall make the payment at <https://www.epa.gov> in accordance with the following payment instructions: enter “sfo 1.1” in the search field to access EPA’s Miscellaneous Payment Form – Cincinnati Finance Center. Complete the form including the Site Name, docket number, and Site/Spill ID Number 08J6. Respondent shall send the RPM a notice of this payment including these references. The EPA and Respondent have agreed to the following payment schedule:

(1) Respondent will pay Past Response Costs in monthly installments of \$2,597.22 plus Interest for a period of 18 months, with the final payment being \$2,597.22 plus Interest. Payments will be made on or before the 15<sup>th</sup> day of the month, with payments starting on the 15<sup>th</sup> day of the month immediately following the Effective Date. Interest on the first payment shall be calculated from the Effective Date through and including the date on which the first payment is received in the Smelertown Special Account. Interest on all following payments shall be calculated from 15<sup>th</sup> of the month through and including the date on which the corresponding payment is received in the Smelertown Special Account.

b. **Deposit of Past Response Costs Payments.** The total amount to be paid by Respondent pursuant to Paragraph 65.a shall be deposited by the EPA in the Smelertown

Special Account to be retained and used to conduct or finance response actions at or in connection with the Site or the Vista Del Rio Subdivision, or to be transferred by the EPA to the EPA Hazardous Substance Superfund.

66. **Payments for Future Response Costs.** Respondent shall pay to EPA all Future Response Costs not inconsistent with the NCP.

a. **Periodic Bill.** On a periodic basis, the EPA will send Respondent a bill requiring payment that includes a Regionally prepared cost summary, which includes direct and indirect costs incurred by the EPA, its contractors, subcontractors, and the United States Department of Justice. Respondent shall make all payments within 30 days after Respondent's receipt of each bill requiring payment, except as otherwise provided in Paragraph 68 (Contesting Future Response Costs), and in accordance with Paragraph 65.a (Payments for Past Response Costs).

b. **Deposit of Future Response Costs Payments.** The total amount to be paid by Respondent pursuant to Paragraph 66.a (Periodic Bill) shall be deposited by the EPA in the Smelertown Special Account to be retained and used to conduct or finance response actions at or in connection with the Site or the Vista Del Rio Subdivision, or to be transferred by the EPA to the EPA Hazardous Substance Superfund, provided, however, that the EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, the EPA estimates that the Smelertown Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by the EPA at or in connection with the Site or the Vista Del Rio Subdivision. Any decision by the 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 Respondent pursuant to the dispute resolution provisions of this Settlement or in any other forum.

67. **Interest.** In the event that any payment for Past Response Costs or Future Response Costs is not made by the date required, Respondent 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 Respondent's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XIX (Stipulated Penalties).

68. **Contesting Future Response Costs.** Respondent may initiate the procedures of Section XVII (Dispute Resolution) regarding payment of any Future Response Costs billed under Paragraph 66 (Payments for Future Response Costs) if it determines that the EPA has made a mathematical error or included a cost item that is not within the definition of Future Response Costs, or if it believes the EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. To initiate such a dispute, Respondent shall submit a Notice of Dispute in writing to the RPM within 30 days after receipt of the bill. Any such Notice of Dispute shall specifically identify the contested Future Response Costs and the basis for objection. If Respondent submits a Notice of Dispute, Respondent shall

within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to the EPA in the manner described in Paragraph 66, 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. Respondent shall send to the RPM 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 EPA prevails in the dispute, within 5 days after the resolution of the dispute, Respondent shall pay the sums due (with accrued Interest) to the EPA in the manner described in Paragraph 66. 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 the EPA in the manner described in Paragraph 66. Respondent shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondent's obligation to reimburse the EPA for its Future Response Costs.

## **XVII. DISPUTE RESOLUTION**

69. Unless otherwise expressly provided for in this Settlement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement. The Parties shall attempt to resolve any disagreements concerning this Settlement expeditiously and informally.

70. **Informal Dispute Resolution.** If Respondent objects to any the EPA action taken pursuant to this Settlement, including billings for Future Response Costs, it shall send the Agencies a written Notice of Dispute describing the objection(s) within 30 days after such action. The EPA and Respondent shall have 30 days from EPA's receipt of Respondent's Notice of Dispute to resolve the dispute through informal negotiations (Negotiation Period). The Negotiation Period may be extended at the sole discretion of the EPA. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement. The EPA shall consult with CDPHE during informal dispute resolution.

71. **Formal Dispute Resolution.** If the Parties are unable to reach an agreement within the Negotiation Period, Respondent shall, within 20 days after the end of the Negotiation Period, submit a statement of position to the RPM. The EPA may, within 20 days thereafter, submit a statement of position. Thereafter, an EPA management official at the Division Director level or higher will issue a written decision on the dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Settlement. Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. The EPA shall consult with CDPHE during formal dispute resolution.

72. Except as provided in Paragraph 68 (Contesting Future Response Costs) or as agreed by the EPA, the invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of Respondent under this Settlement. Except as provided in Paragraph 82, stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Settlement. In the event that Respondent does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIX (Stipulated Penalties).

### **XVIII. FORCE MAJEURE**

73. “Force Majeure” for purposes of this Settlement, is defined as any event arising from causes beyond the control of Respondent, of any entity controlled by Respondent, or of Respondent’s contractors that delays or prevents the performance of any obligation under this Settlement despite Respondent’s best efforts to fulfill the obligation. The requirement that Respondent 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 increased cost of performance.

74. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement, Respondent shall notify the RPM orally or, the Director of the Superfund and Emergency Management Division, EPA Region 8, within 7 days of when Respondent first knew that the event might cause a delay. Within 7 days thereafter, Respondent shall provide in writing to the 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; Respondent’s rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Respondent shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Respondent shall be deemed to know of any circumstance of which Respondent, any entity controlled by Respondent, or Respondent’s contractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Respondent from asserting any claim of force majeure regarding that event, provided, however, that if the EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under Paragraph 73 and whether Respondent has exercised its best efforts under Paragraph 73, the EPA may, in its unreviewable discretion, excuse in writing Respondent’s failure to submit timely or complete notices under this Paragraph.

75. If the EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Settlement that are affected by the force majeure will be extended by the EPA for such time as is necessary to complete those

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

76. If Respondent elects to invoke the dispute resolution procedures set forth in Section XVII (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondent shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of Paragraphs 73 and 74. If Respondent carries this burden, the delay at issue shall be deemed not to be a violation by Respondent of the affected obligation of this Settlement identified to the EPA.

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

## **XIX. STIPULATED PENALTIES**

78. Respondent shall be liable to the EPA for stipulated penalties in the amounts set forth in Paragraphs 79.a and 80 for failure to comply with the obligations specified in Paragraphs 79.b and 80, unless excused under Section XVIII (Force Majeure). "Comply" as used in the previous sentence includes compliance by Respondent with all applicable requirements of this Settlement, within the deadlines established under this Settlement.

### **79. 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 with any obligation identified in Paragraph 79.b:

<b>Penalty Per Violation Per Day</b>	<b>Period of Noncompliance</b>
\$ 1,500	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 3,000	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 6,000	31 <sup>st</sup> day and beyond

#### **b. Obligations**

(1) Payment of any amount due under Section XVI (Payment of Response Costs), subject to the terms of Paragraph 65.a.



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

(3) Establishment of an escrow account to hold any disputed Future Response Costs under Paragraph 68 (Contesting Future Response Costs).

(4) Disturbance or exacerbation of contamination associated with the Site within the Site, the Affected Property, or the Vista Del Rio Subdivision without EPA approval.

80. **Stipulated Penalty Amounts: Other Deliverables.** The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables required by this Settlement.

<b>Penalty Per Violation Per Day</b>	<b>Period of Noncompliance</b>
\$ 1,000	1st through 14th day
\$ 2,000	15th through 30th day
\$ 4,000	31st day and beyond

81. In the event that the EPA assumes performance of a portion or all of the Work pursuant to Paragraph 92 (Work Takeover), Respondent shall be liable for a stipulated penalty in the amount of \$50,000. Stipulated penalties under this Paragraph are in addition to the remedies available to the EPA under Paragraphs 92 (Work Takeover) and 113 (Access to Financial Assurance).

82. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Penalties shall continue to accrue during any dispute resolution period and shall be paid within 15 days after the agreement or the receipt of EPA's decision. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under Section IX (Submission and Approval of Deliverables), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that the EPA notifies Respondent of any deficiency; and (b) with respect to a decision by the EPA Management Official at the Division Director level or higher, under Paragraph 71 (Formal Dispute Resolution), during the period, if any, beginning on the 21<sup>st</sup> day after the Negotiation Period begins until the date that the EPA Management Official issues a final decision regarding such dispute. Nothing in this Settlement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement.

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

84. All penalties accruing under this Section shall be due and payable to the EPA within 30 days after Respondent's receipt from the EPA of a demand for payment of the penalties, unless Respondent invokes the Dispute Resolution procedures under Section XVII (Dispute Resolution) within the 30-day period. Respondent shall make all payments at <https://www.pay.gov> using the link for "EPA Miscellaneous Payments Cincinnati Finance Center," including references to the Site Name, docket number, the Site/Spill ID Number, and the purpose of the payment. Respondent shall send to the RPM a notice of this payment including these references.

85. If Respondent fails to pay stipulated penalties when due, Respondent shall pay Interest on the unpaid stipulated penalties as follows: (a) if Respondent has 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 Paragraph 82 until the date of payment; and (b) if Respondent fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under Paragraph 84 until the date of payment. If Respondent fails to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

86. The payment of penalties and Interest, if any, shall not alter in any way Respondent's obligation to complete performance of the Work required under this Settlement.

87. Nothing in this Settlement shall be construed as prohibiting, altering, or in any way limiting the ability of the EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Settlement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to section 122(l) of CERCLA, 42 U.S.C. § 9622(l), and punitive damages pursuant to section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), provided, however, that the EPA shall not seek civil penalties pursuant to section 122(l) of CERCLA or punitive damages pursuant to section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is collected pursuant to this Settlement or in the event that the EPA assumes performance of a portion or all of the Work pursuant to Paragraph 92 (Work Takeover).

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

## **XX. COVENANTS BY THE EPA**

89. Except as provided in Section XXI (Reservations of Rights by the EPA), the EPA covenants not to sue or to take administrative action against Respondent pursuant to sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work, Past Response Costs, and Future Response Costs. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Settlement. These covenants extend only to Respondent and do not extend to any other person.

## XXI. RESERVATIONS OF RIGHTS BY THE EPA

90. Except as specifically provided in this Settlement, nothing in this Settlement shall limit the power and authority of the EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste on, at, or from the Site or the Vista Del Rio Subdivision. Further, nothing in this Settlement shall prevent the EPA from seeking legal or equitable relief to enforce the terms of this Settlement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

91. The covenant not to sue set forth in Section XX (Covenants by the EPA) above does not pertain to any matters other than those expressly identified therein. The EPA reserves, and this Settlement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- a. liability for failure by Respondent to meet a requirement of this Settlement;
- b. liability for costs not included within the definitions of Past Response Costs or Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for violations of federal or state law that occur during or after implementation of the Work;
- 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. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site;
- h. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site not paid as Future Response Costs under this Settlement; and
- i. liability arising from the Declaration or the Consent Decree.

## 92. **Work Takeover**

a. In the event the EPA determines that Respondent: (1) has ceased implementation of any portion of the Work; (2) is seriously or repeatedly deficient or late in its performance of the Work; or (3) is implementing the Work in a manner that may cause an endangerment to human health or the environment, the EPA may issue a written notice (Work Takeover Notice) to Respondent. Any Work Takeover Notice issued by the EPA (which writing may be electronic) will specify the grounds upon which such notice was issued and will provide Respondent a period of 10 days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 10-day notice period specified in Paragraph 92.a, Respondent has not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, the EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as the EPA deems necessary (Work Takeover). The EPA will notify Respondent in writing (which writing may be electronic) if the EPA determines that implementation of a Work Takeover is warranted under this Paragraph. Funding of Work Takeover costs is addressed under Paragraph 113 (Access to Financial Assurance).

c. Respondent may invoke the procedures set forth in Section XVII (Dispute Resolution) to dispute EPA's implementation of a Work Takeover under Paragraph 92.b. However, notwithstanding Respondent's invocation of such dispute resolution procedures, and during the pendency of any such dispute, the EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 92.b until the earlier of (i) the date that Respondent remedies, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, or (ii) the date that a written decision terminating such Work Takeover is rendered in accordance with Paragraph 71 (Formal Dispute Resolution).

d. Notwithstanding any other provision of this Settlement, the EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XXII. COVENANTS BY RESPONDENT**

93. 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, Past Response Costs, Future Response Costs, or this Settlement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

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

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

94. 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 Section XXI (Reservations of Rights by the EPA), other than in Paragraph 91.a (liability for failure to meet a requirement of the Settlement), 91.d (criminal liability), or 91.e (liability for violations of federal or state law), 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.

95. 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).

96. Respondent reserves, and this Settlement 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 Respondent's deliverables or activities.

### **XXIII. OTHER CLAIMS**

97. By issuance of this Settlement, the United States and the EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. Neither the United States nor the EPA shall be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement.

98. Except as expressly provided in Section XX (Covenants by the EPA), nothing in this Settlement constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Settlement, for any liability such person may have under CERCLA, other statutes, contracts, agreements, or common law, including but not limited to any claims of the United States for costs, damages, and interest under sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, or to any claims of the State under section 107 of CERCLA, 42 U.S.C. § and 9607.

99. No action or decision by the EPA pursuant to this Settlement 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).

#### **XXIV. EFFECT OF SETTLEMENT/CONTRIBUTION**

100. Nothing in this Settlement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement. Except as provided in Section XXII (Covenants by Respondent), 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 which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement 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).

101. The Parties agree that this Settlement constitutes an administrative settlement pursuant to which each Respondent has, as of the Effective Date, resolved liability to the United States within the meaning of sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by sections 113(f)(2) and 122(h)(4) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Settlement. The “matters addressed” in this Settlement are the Work, Past Response Costs, and Future Response Costs.

102. The Parties further agree that this Settlement constitutes an administrative settlement pursuant to which Respondent has, as of the Effective Date, resolved liability to the United States for the matters addressed in this Settlement within the meaning of section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

103. Respondent shall, with respect to any suit or claim brought by it for matters related to this Settlement, notify the EPA in writing no later than 60 days prior to the initiation of such suit or claim. Respondent also shall, with respect to any suit or claim brought against it for matters related to this Settlement, notify the EPA in writing within 10 days after service of the complaint or claim upon it. In addition, Respondent shall notify the EPA within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Settlement.

104. In any subsequent administrative or judicial proceeding initiated by the EPA, or by the United States on behalf of the EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondent shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant by the EPA set forth in Section XX (Covenants by the EPA).

105. Effective upon signature of this Settlement by Respondent, Respondent agrees that the time period commencing on the date of its signature and ending on the date the EPA receives from Respondent the payment required by Paragraphs 65 (Payment for Past Response Costs) and, if any, Section XIX (Stipulated Penalties) shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the United States related to the “matters addressed” as defined in Paragraph 101 and that, in any action brought by the United States related to the “matters addressed,” Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If the EPA gives notice to Respondent that it will not make this Settlement effective, the statute of limitations shall begin to run again commencing 90 days after the date such notice is sent by the EPA.

## **XXV. INDEMNIFICATION**

106. The United States does not assume any liability by entering into this Settlement or by virtue of any designation of Respondent as EPA’s authorized representatives under section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and 40 C.F.R. § 300.400(d)(3). Respondent shall indemnify, save, and hold harmless the United States, 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 Respondent, its officers, directors, employees, agents, contractors, or subcontractors, and any persons acting on Respondent’s behalf or under its control, in carrying out activities pursuant to this Settlement. Further, Respondent agrees 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 based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Settlement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Settlement. Neither Respondent nor any such contractor shall be considered an agent of the United States.

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

108. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

## XXVI. INSURANCE

109. No later than 30 days before commencing any on-site Work, Respondent shall secure, and shall maintain until the first anniversary after issuance of Notice of Completion of Work pursuant to Section XXIX (Notice of Completion of Work), 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 EPA as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Respondent pursuant to this Settlement. In addition, for the duration of the Settlement, Respondent shall provide the EPA with certificates of such insurance and a copy of each insurance policy. Respondent shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing Work on behalf of Respondent in furtherance of this Settlement. If Respondent demonstrates by evidence satisfactory to the EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in a lesser amount, then, with respect to the contractor or subcontractor, Respondent need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Respondent shall ensure that all submittals to the EPA under this Paragraph identify the Smelertown Site, Chaffee County, Colorado and the EPA docket number for this action.

## XXVII. FINANCIAL ASSURANCE

110. In order to ensure completion of the Work, Respondent shall secure financial assurance, initially in the amount of \$ 2,316,000 (Estimated Cost of the Work), for the benefit of the 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 the 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 the EPA. Respondent may use multiple mechanisms if it is 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 the 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 the 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; or



111. Respondent has selected, and the EPA has found satisfactory, a Letter of Credit as an initial form of financial assurance. Within 60 days after the Effective Date, Respondent 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 Regional Financial Management Officer.

112. Respondent shall diligently monitor the adequacy of the financial assurance. If Respondent 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, Respondent shall notify the Agencies of such information within 7 days. If the EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, the EPA will notify Respondent of such determination. Respondent shall, within 30 days after notifying the EPA or receiving notice from the EPA under this Paragraph, secure and submit to the EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. The EPA may extend this deadline for such time as is reasonably necessary for Respondent, in the exercise of due diligence, to secure and submit to the EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. Respondent shall follow the procedures of Paragraph 114 (Modification of Amount, Form, or Terms of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Respondent's inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this Settlement.

### 113. Access to Financial Assurance

a. If the EPA issues a notice of implementation of a Work Takeover under Paragraph 92.b, then, in accordance with any applicable financial assurance mechanism, the EPA is entitled to: (i) the performance of the Work; and/or (ii) require that any funds guaranteed be paid in accordance with Paragraph 113.d.

b. If the EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel the mechanism, and Respondent fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with Paragraph 113.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under Paragraph 92.b, the EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism, whether in cash or in kind, to continue and complete the Work, then the EPA is entitled to demand an amount, as determined by the EPA, sufficient to cover the cost of the remaining Work to be performed. Respondent shall, within 30 days of such demand, pay the amount demanded as directed by the EPA.

d. Any amounts required to be paid under this Paragraph shall be, as directed by the EPA: (i) paid to the EPA in order to facilitate the completion of the Work by the 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 the EPA, the EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Smelertown 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 the EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this Paragraph 113 must be reimbursed as Future Response Costs under Section XVI (Payment of Response Costs).

**114. Modification of Amount, Form, or Terms of Financial Assurance.** Respondent 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 the EPA in accordance with Paragraph 111, 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. The EPA will notify Respondent of EPA's decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Respondent 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 or written decision resolving such dispute under Section XVII (Dispute Resolution). Respondent may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by the 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 Respondent pursuant to the dispute resolution provisions of this Settlement 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, Respondent shall submit to the EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with Paragraph 111.

**115. Release, Cancellation, or Discontinuation of Financial Assurance.** Respondent may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if the EPA issues a Notice of Completion of Work under Section XXIX (Notice of Completion of Work); (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 or final decision resolving such dispute under Section XVII (Dispute Resolution).

## **XXVIII. MODIFICATION**

**116.** The RPM may modify any plan or schedule or the SOW in writing or by oral direction. Any oral modification will be memorialized in writing by the EPA promptly but shall have as its effective date the date of the RPM's oral direction. Any other requirements of this Settlement may be modified in writing by mutual agreement of the Parties. The RPM will

consult with the State Project Manager regarding any modification to any plan or schedule or to the SOW.

117. If Respondent seeks permission to deviate from any approved work plan or schedule or the SOW, Respondent's Project Coordinator shall submit a written request to the EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the RPM pursuant to Paragraph 116. The RPM will consult with the State Project Manager regarding any such request by Respondent.

118. No informal advice, guidance, suggestion, or comment by the RPM or other EPA representatives regarding any deliverable submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Settlement, or to comply with all requirements of this Settlement, unless it is formally modified.

### **XXIX. NOTICE OF COMPLETION OF WORK**

119. When the EPA determines, in consultation with CDPHE, that all Work has been fully performed in accordance with this Settlement, with the exception of any continuing obligations required by this Settlement, including payment of Future Response Costs, land, water, or other resource use restrictions, and Record Retention, the EPA will provide written notice to Respondent. If the EPA determines that any Work has not been completed in accordance with this Settlement, the EPA will notify Respondent, provide a list of the deficiencies, and require Respondent to modify the RIA/FFS Work Plan, if appropriate, in order to correct such deficiencies. Respondent shall implement the modified and approved RIA/FFS Work Plan and shall submit a modified draft RIA Report and/or FFS Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified RIA/FFS Work Plan shall be a violation of this Settlement.

### **XXX. STATE PARTICIPATION**

120. **Copies.** Respondent shall, at any time it sends a deliverable to the EPA, send a copy of such deliverable to CDPHE. The EPA shall, at any time it sends a notice, authorization, approval, disapproval, or certification to Respondent, send a copy of such document to CDPHE.

121. **Review and Comment.** CDPHE will have opportunity for review and comment prior to:

a. Any EPA approval or disapproval under of any deliverables that Respondent is required to submit for EPA approval; and

b. Any disapproval of, or approval of, completion of Work under Paragraph XXIX (Notice of Completion of Work).

## XXXI. NOTICES AND SUBMISSIONS

122. Any approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, waivers, and requests specified in this Settlement must be in writing, unless otherwise specified and conveyed electronically. Whenever a notice is required to be given or a report or other document is required to be sent by one Party to another under this Settlement, it must be sent as specified below. All notices Respondent sends to the EPA must copy CDPHE. All notices under this Section are effective upon receipt, unless otherwise specified. In the case of emailed notices, there is a rebuttable presumption that such notices are received on the same day that they are sent. Any Party may change the method, person, or address applicable to it by providing notice of such change to all Parties.

As to the EPA: Tabetha Lynch  
Remedial Project Manager  
[Lynch.Tabetha@epa.gov](mailto:Lynch.Tabetha@epa.gov)  
(720) 786-0003

Kayleen Castelli  
Senior Assistant Regional Counsel  
[Castelli.Kayleen@epa.gov](mailto:Castelli.Kayleen@epa.gov)  
(303) 312-6174

Re: Site/Spill ID # 08J6

As to the Regional Financial Management Officer: *via email to:*  
[Johnson.Karren@epa.gov](mailto:Johnson.Karren@epa.gov)  
Re: Site/Spill ID # 08J6

As to CDPHE: Alex Hedgepath  
Project Manager  
CDPHE – Hazardous Materials and Waste  
Management Division  
4300 Cherry Creek Drive South, Denver, Colorado  
80246  
[Alex.hedgepath@state.co.us](mailto:Alex.hedgepath@state.co.us)  
303-692-6390

Lukas Staks  
Senior Assistant Attorney General  
Colorado Attorney General's Office  
1300 Broadway, 10th Floor  
Denver, CO 80203  
[Lukas.Staks@coag.gov](mailto:Lukas.Staks@coag.gov)  
720-508-6251

As to  
Respondent:

Thomas Eve  
President  
Butala Construction Company  
9000 County Road 152  
Salida, CO 81201  
[tomeve@butala.net](mailto:tomeve@butala.net)  
719-539-2521

Charles Kellerman  
Vice President  
Butala Construction Company  
9000 County Road 152  
Salida, CO 81201  
[chuck@butala.net](mailto:chuck@butala.net)  
720646-7760

Scott Clark  
Burns, Figa & Will  
6400 S. Fiddlers Green Circle  
Suite 1000  
Greenwood Village, CO 80111  
[sclark@bfiwlaw.com](mailto:sclark@bfiwlaw.com)  
303-796-2626

## **XXXII. PUBLIC COMMENT**

123. Final acceptance by the EPA of Paragraph 65 (Payment for Past Response Costs) shall be subject to section 122(i) of CERCLA, 42 U.S.C. § 9622(i), which requires the EPA to publish notice of the proposed settlement in the Federal Register, to provide persons who are not parties to the proposed settlement an opportunity to comment, solely, on the cost recovery component of the settlement, and to consider comments filed in determining whether to consent to the proposed settlement. The EPA may withhold consent from, or seek to modify, all or part of Section XVI (Payment of Response Costs) of this Settlement if comments received disclose facts or considerations that indicate that Section XVI of this Settlement is inappropriate, improper, or inadequate. Otherwise, Section XVI shall become effective when the EPA issues notice to Respondent that public comments received, if any, do not require the EPA to modify or withdraw from Section XVI of this Settlement.

## **XXXIII. INTEGRATION/APPENDICES**

124. This Settlement and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement. The following appendices are attached to and incorporated into this Settlement:

a. “Appendix A” is the description and/or map of OU2 and the Vista Del Rio Subdivision.

b. “Appendix B” is the SOW.

#### **XXXIV. ADMINISTRATIVE RECORD**

125. The EPA will determine the contents of the administrative record file for selection of the remedial action, should the EPA determine additional remedial action is appropriate. Respondent shall submit to the EPA documents developed during the course of the RIA/FFS upon which selection of the remedial action may be based. Upon request of the EPA, Respondent shall provide copies of plans, task memoranda for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports, and other reports. Upon request of the EPA, Respondent shall additionally submit any previous studies conducted under state, local, or other federal authorities that may relate to selection of the remedial action, and all communications between Respondent and state, local, or other federal authorities concerning selection of the remedial action.

#### **XXXV. EFFECTIVE DATE**

126. This Settlement shall be effective 1 day after the Settlement is signed by the Regional Administrator or their delegatee, with the exception of the Past Response Cost compromise included in this Settlement, the Effective Date of which shall be the date when EPA issues notice to Respondent that public comments received, if any, do not require the EPA to modify or withdraw from Paragraph 65 (Payment for Past Response Costs) (the Past Response Cost compromise included in this Settlement).

IT IS SO AGREED AND ORDERED:

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

2/26/2024

Dated

**AARON  
URDIALES** Digitally signed by  
AARON URDIALES  
Date: 2024.02.26  
11:52:27 -07'00'

Aaron Urdiales  
Division Director  
Superfund and Emergency Management Division  
U.S. Environmental Protection Agency, Region 8

**CHRISTOPHE  
R THOMPSON** Digitally signed by  
CHRISTOPHER THOMPSON  
Date: 2024.03.01 08:43:41  
-07'00'


Dated

Christopher A. Thompson  
Associate Regional Counsel for Enforcement  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 8

Signature Page for Settlement Regarding Smelertown Site

**FOR BUTALA CONSTRUCTION CO.:**

2/6/2024  
Dated

Charles L.  Digitally signed by  
Charles L. Kellerman, Jr.  
Kellerman, Jr. Date: 2024.02.06  
15:03:20 -07'00'

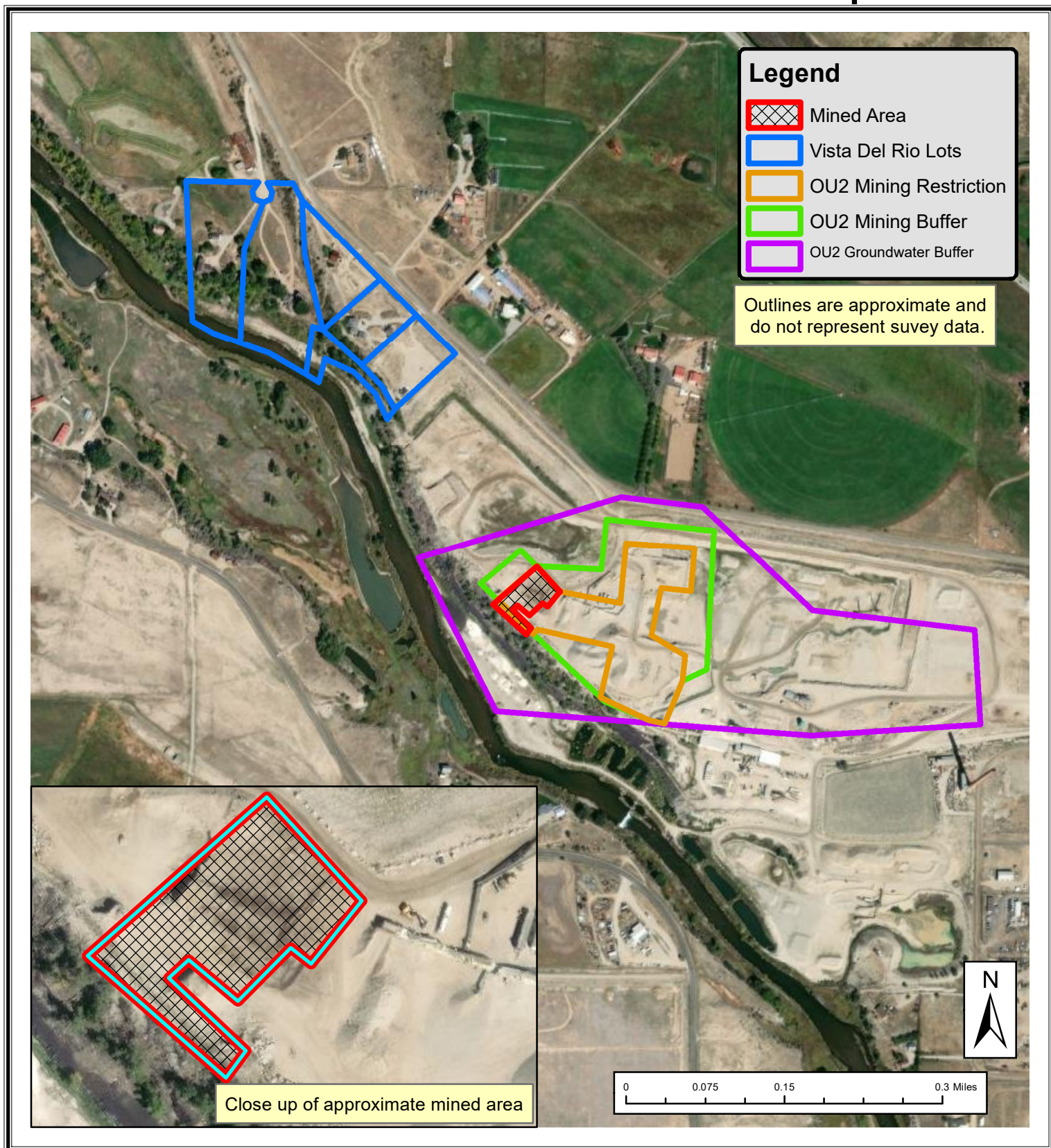
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Charles L. Kellerman, P.E.  
Vice President  
Butala Construction. Co.  
9000 Co. Rd. 152, P.O. Box 907  
Salida, CO 81201



# Appendix A

## OU2 and Vista Del Rio Subdivision Description



December 2023

for Administrative Settlement Agreement and Order on Consent for Remedial Investigation  
Addendum/Focused Feasibility Study

Smelertown Site  
Salida, Colorado

**Appendix B**

**REMEDIAL INVESTIGATION ADDENDUM/FOCUSED FEASIBILITY STUDY  
STATEMENT OF WORK**

**SMELTERTOWN SITE**  
**Salida, Chaffee County, State of Colorado**  
**EPA Region 8**  
January 2024

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## 1. INTRODUCTION

- 1.1 This Statement of Work (SOW) sets forth the procedures, requirements, and recommendations for implementing the Work to develop and perform the remedial investigation addendum (RIA) and the focused feasibility study (FFS) for the Affected Property of the Smelertown Site (Site), located in Salida, Colorado, and the Vista Del Rio Subdivision. This SOW is a part of and incorporated into the Administrative Settlement Agreement and Order on Consent for Remedial Investigation Addendum/Focused Feasibility Study (Settlement). Butala Construction Company is the Respondent to the Settlement.
- 1.2 References in this SOW to the Settlement refer to the Settlement and its Appendices, including this SOW.
- 1.3 The terms used in this SOW that are defined in CERCLA, in regulations promulgated under CERCLA, or in the Settlement, have the meanings assigned to them in CERCLA, in such regulations, or in the Settlement, except that the term “Paragraph” or “¶” means a paragraph of the SOW and that the term “Section” means a Section of the SOW, unless otherwise stated. If there is a conflict between this SOW and the Settlement, the provisions of the Settlement control.
- 1.4 At the completion of the RIA/FFS, U.S. Environmental Protection Agency (EPA) will be responsible for identifying a preferred remedy, soliciting, and reviewing public comments on the proposed plan, and the selection of a site remedy, and will document this selection appropriately. The remedial action alternative selected by the EPA will endeavor to meet the cleanup standards specified in CERCLA § 121. As specified in CERCLA § 104(a)(1), as amended, the EPA or its representatives, as well as the Colorado Department of Public Health and the Environment (CDPHE) or its representatives (collectively, the Agencies), will provide oversight of Respondent’s activities throughout the RIA/FFS.
- 1.5 Modifications to the SOW will follow procedures described in Sections VIII (Performance of the Work) and XXI (Reservations of Rights by the EPA) in the Settlement. Respondent shall refer to the Guidance for Conducting Remedial Investigations and Feasibility Studies, OSWER 9355.3-01, EPA/540/G-89/004 (Oct. 1988) (RI/FS Guidance) in performing its responsibilities under this SOW.
- 1.6 This SOW is not intended to modify current EPA guidance or regulations, including but not limited to the guidance documents referenced in ¶ 8.1. Current EPA guidance and regulations shall control in the event of any conflict between the SOW and current EPA guidance and regulations.
- 1.7 **Purpose of the Statement of Work.** This SOW describes the Work, including the requirements for undertaking and completing an RIA and FFS for the Affected Property. The purpose of the remedial investigation/feasibility study process is to investigate the nature and extent of contamination at and from a site, to assess human health and ecological risks and to develop and evaluate potential remedial alternatives for a site. Respondent shall conduct the RIA/FFS in accordance with the requirements of the

Settlement and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (also called the National Contingency Plan or NCP), EPA's "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" (OSWER Directive 9355.3-01, October 1988), and other guidance documents relevant to conducting remedial investigations and feasibility studies. The EPA may identify such other guidance documents as part of the scoping process.

The RIA/FFS may be performed in multiple phases with the number of phases to be determined by the EPA, in consultation with CDPHE. The RIA will include an evaluation of existing data, which will be subject to data quality verification, identification of data gaps, and collection of additional data. Data used for the RIA will be sufficient to characterize the nature and extent of contamination at the Affected Property and the Vista Del Rio Subdivision, as required. After the RIA, the FFS will examine alternative remedial responses to mitigate or eliminate risks associated with the release or threat of release of hazardous substances at the Affected Property.

- 1.8** Work on any one phase of the RIA/FFS does not preclude work on any other phase. The requirements of this SOW apply to each phase, regardless of the order in which they are addressed. If collection of additional data is needed to complete the RIA/FFS for any phase, this SOW describes requirements for collecting and compiling such data.
- 1.9 General Requirements.** This SOW provides a framework for Respondent as it performs Work subject to oversight by the Agencies. Respondent shall provide all necessary and appropriate personnel, materials, and services needed for, or incidental to, performing and completing the RIA/FFS in accordance with the requirements of the Settlement, including this SOW, the NCP, and applicable guidance. Section 8 sets forth a partial list of guidance the EPA uses for an RIA/FFS.

Respondent will propose and implement appropriate technical procedures and methodologies, using accepted engineering practices and quality assurance controls, as well as applicable EPA guidance. A summary of the major deliverables is provided in Section 6 of this SOW.

During the RIA/FFS process, Respondent will meet at least quarterly with the designated EPA Remedial Project Manager (RPM) and the State Project Manager, either in person, by conference call, or by a method specified by the Agencies. Respondent will document all decisions made in meetings and conversations with the Agencies and forward this documentation to the Agencies within 10 days after the meeting or conversation.

- 1.10 Records Maintenance.** Respondent shall establish and maintain a SCRIBE project database for the RIA/FFS ([https://response.epa.gov/site/site\\_profile.aspx?site\\_id=ScribeGIS](https://response.epa.gov/site/site_profile.aspx?site_id=ScribeGIS)). Respondent shall ensure that the Agencies have unlimited access to the project database for the RIA/FFS throughout the RIA/FFS process. At the end of each phase of data collection or compilation, and after Respondent has completed all data validation, Respondent shall provide a complete copy of the project database to the Agencies.

## 2. COMMUNITY INVOLVEMENT

### 2.1 Community Involvement Responsibilities

The EPA and CDPHE have the responsibility for developing and implementing community involvement activities at sites. This includes compliance with 40 C.F.R. § 300.430(c)(2) (outlining the lead agency's community involvement responsibilities) and the preparation of a Community Involvement Plan that specifies community involvement activities expected to be undertaken during the remedy response.

Respondent will be indirectly involved with community relations activities and shall provide community relations support to the Agencies throughout the performance of the RIA/FFS in accordance with Community Relations in Superfund: A Handbook, June 1988. Community involvement tasks may include the following:

- (a) Public Hearing, Meetings, and Availability Support – Respondent may be required to participate in and support and assist the EPA in public hearings, meetings, and open houses. Respondent shall prepare presentation materials and provide support as needed for public meetings.
- (b) Technical Support – Respondent may be required to provide technical assistance support for communities or other technical support. This support may include preparing technical input to news releases, briefing materials, and other community relations vehicles, and helping the EPA RPM and State Project Manager to coordinate with local agencies.
- (c) Logistical and Presentation Support – Respondent may be required to assist the Agencies in preparing technical briefing materials and in arranging for the logistical details for the meeting(s).
- (d) Public Notice Support – Respondent may be required to assist the Agencies in drafting public notices, announcing public meetings, and placing the notice in a local paper of general circulation.
- (e) Proposed Plan Support – Respondent may be required to provide the Agencies with support and assistance during implementation of the proposed plan process.
- (f) Responsiveness Summary Support – Respondent may be required to provide the Agencies with support and assistance, as necessary, during preparation of the responsiveness summary.
- (g) As requested by the Agencies, Respondent shall participate in and/or conduct community involvement activities, including participation in (1) the preparation of information regarding the field sampling activities for dissemination to the public, with consideration given to including local and mass media and/or internet notification and (2) public meetings that may be held or sponsored by the Agencies to explain activities at or relating to the Affected Property. Respondent's support of the Agencies community involvement activities may include providing online access to initial submissions and updates of deliverables

to any community advisory groups and other entities to provide them with a reasonable opportunity for review and comment.

**2.2 Information for the Community.** As requested by the EPA or CDPHE, Respondent shall develop and provide to the Agencies information about the RIA/FFS including: (1) any validated data from field sampling activities as provided in ¶ 2.2 (a) below; (2) schedules prepared under Section 7; (3) dates that Respondent completed each task listed in the schedules; and (4) digital photographs of the Work being performed, together with descriptions of the Work depicted in each photograph, the purpose of the Work, the equipment being used, and the location of the Work. The EPA RPM may use this information for communication to the public via EPA’s website, social media, or local and mass media.

a. As requested by the Agencies, Respondent shall describe all community impact mitigation activities to be performed: (i) to reduce impacts (e.g., air emissions, dust, odor, traffic, noise, temporary relocation, negative economic effects) to residential areas, schools, playgrounds, healthcare facilities, or recreational public areas frequented by community members (Community Areas) during field sampling activities; (ii) to conduct monitoring in Community Areas of impacts from field sampling activities; (iii) to communicate validated sampling data; and (iv) to make adjustments during field sampling activities in order to further reduce negative impacts to affected Community Areas ;and (v) any additional activities as appropriate. Descriptions shall contain information about impacts to Community Areas that is sufficient to assist EPA’s Site team in performing the evaluations recommended under the *Superfund Community Involvement Handbook*, OLEM 9230.0-51(Mar. 2020). The EPA RPM and community involvement coordinator will review and approve all proposed activities.

### **3. REMEDIAL INVESTIGATION ADDENDUM**

**3.1 The investigation will comprise of the re-evaluation of Affected Property within OU2.** OU2 is defined in the Settlement and includes the Declaration’s Mining Restricted Area (MRA), Mining Buffer Area (MBA), and Groundwater Buffer Area within Butala property. Respondent will collect the samples necessary to complete the RIA/FFS. Respondent will also update the Site-wide human and ecological risk assessment previously prepared in April 1995. A separate Site Characterization Report will be prepared for the Vista Del Rio Subdivision.

**3.2 Previous Investigation Summary Report.** Respondent shall prepare a Previous Investigation Summary Report for the Agencies review and EPA approval. The report shall include available data relating to the varieties and quantities of hazardous substances, pollutants, or contaminants at the Affected Property. Available data may include results from any previous sampling or other investigations that have been conducted. Respondent will refer to Table 2-1 of the *Guidance for Conducting Remedial Investigations and Feasibility Studies*, OSWER 9355.3-01, EPA/540/G-89/004 (Oct. 1988) for a comprehensive list of data collection information sources. The report

shall also describe releases of hazardous substances, pollutants or contaminants into the environment.

**3.3 Conceptual Site Model Development and Report.** The Conceptual Site Model (CSM) is a representation of the Affected Property that summarizes and helps project teams visualize and understand available information, and which is updated as additional information becomes available. Respondent shall develop (or, as appropriate, update) the CSM for EPA review and approval, in consultation with CDPHE. The CSM shall be based upon all available Site-specific information. Respondent shall provide the CSM and an accompanying summary report that documents the information used in developing the CSM, why any available information was not used, and recommendations regarding data gaps. Respondent shall update the CSM, as requested by the EPA, to account for information obtained during the RIA.

**3.4 Identification of Preliminary RAOs, PRGs, and ARARs.** Respondent shall develop preliminary remedial action objectives (RAOs), which are medium-specific goals for protecting human health or the environment that specify the chemicals of concern, exposure route(s) and receptor(s), and preliminary remediation goals (PRGs). Respondent shall prepare a memo for EPA's review and approval, in consultation with CDPHE, providing preliminary identification of potential State and Federal chemical-specific, location-specific and action-specific applicable or relevant and appropriate requirements (ARARs) to assist in the refinement of RAOs, and the initial identification of remedial alternatives and ARARs associated with particular actions. ARARs identification will continue as Affected Property conditions, contamination, and remedial action alternatives are refined. Respondent shall also incorporate Federal and State potential ARARs and "to be considered" materials provided by the EPA before or with review comments on each deliverable.

**3.5 Remedial Investigation Addendum Work Plan.** Respondent shall submit an RIA/FFS sampling plan and quality assurance project plan (RIA/FFS Work Plan) for EPA approval. The RIA/FFS Work Plan shall include a detailed description of the technical approach for the RIA/FFS activities, specifying each proposed phase, the necessary procedures, deliverables, and schedules for completion of each major RIA/FFS activity and deliverable. The RIA/FFS Work Plan format shall follow Table 2-3, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" (OSWER Directive 9355.3-01, October 1988). Submission and approval of the RIA/FFS Work Plan shall proceed pursuant to Section IX of the Settlement. Respondent shall submit an RIA work plan (RIAWP) to the Agencies for review and EPA approval, consistent with OSWER 9835.1(c).

- (a) The RIA/FFS Work Plan shall include a comprehensive description of the RIA Work to be performed, including the scope, methodologies, and schedule for completion. The RIA/FFS Work Plan shall also include all requirements under ¶ 1.8 unless the EPA decides that one or more provisions is not necessary. The RIA/FFS Work Plan describes areas of the Affected Property that may pose potential current or future unacceptable risk to public health or welfare or the environment due to the release or threat of release of chemicals. The RIA/FFS



Work Plan will present a statement describing the release or threat of release of hazardous substances, pollutants or contaminants at or from the Affected Property. Respondent will develop a specific project scope based on EPA's remedial strategy for the Affected Property (Site Strategy). The RIA shall consist of collecting data to characterize Affected Property conditions (including meteorology affecting the Affected Property, 40 C.F.R. § 300.430(d)(2)(i)), determining the nature and extent of the contamination at or from the Affected Property, assessing risk to human health, sensitive populations (40 C.F.R. § 300.430(d)(2)(vii)) and the environment, and conducting treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered. Respondent shall identify which climate-related or environmental hazards (e.g., sea level changes, increased severity of wildfire, increased storm intensity, increased flood risk, etc.) may affect the potential remedies at the Affected Property. Respondent shall use forward-looking climate data to evaluate the current and potential chemical releases and unacceptable exposure pathways.

- (b) In its description of the methodologies to be used to perform any RIA Work, the RIA/FFS Work Plan shall consider the environmental footprint of all such activities and, to the extent practicable, take actions to minimize said footprint. The RIA/FFS Work Plan shall be consistent with the *Consideration of Greener Cleanup Activities in the Superfund Cleanup Process* (Aug. 2, 2016). These considerations for greener cleanups are not intended to allow cleanups that do not satisfy threshold requirements for protectiveness, or do not meet other Affected Property-specific cleanup objectives. Greener cleanup activities refer to strategies designed to help minimize the environmental footprint of cleaning up contaminated sites and ensure a protective remedy within the applicable CERCLA statutory and regulatory framework.

**3.6 RIA/FFS Work Plan Deliverables.** Respondent shall submit the following deliverables to the Agencies for review and EPA approval unless the EPA determines that one or more provisions is not necessary:

- (a) **Sampling and Analysis Plan.** Respondent shall prepare a Sampling and Analysis Plan (SAP), including an attached Quality Assurance Project Plan (QAPP) and Health and Safety Plan (HASP) and submit it to the Agencies in accordance with the schedule established in the Settlement. All sampling and field work shall be conducted in accordance with approved SAPs. Respondent shall submit a phased or project SAP to the Agencies. The phased, project, and any subsequent SAPs shall include a description of the goals for the specific phase, a list of key personnel and responsibilities, data quality objectives (DQOs), field sampling plans, QAPP requirements, data management requirements, and schedules. The SAPs shall additionally include the rationale, number, type, and locations of samples, the sample collection, handling and custody procedures, the required field documentation, and the required analytical methods. Quality assurance procedures in the SAPs shall describe the measures necessary to generate data of sufficient quality to achieve the DQOs. The SAPs will specify any special training

requirements, certifications, and quality control requirements for field activities, analytical processes, and data validation requirements, and include a HASP. Respondent is solely responsible for ensuring the health and safety of its employees and/or contractors performing any of the work described in this SOW. Submission and approval of the SAP shall proceed pursuant to Section IX of the Settlement.

- (1) **Quality Assurance Project Plan.** Respondent shall collect, produce, evaluate, or use environmental information under a QAPP reviewed and approved by EPA with CDPHE consultation. No environmental information, as defined by AQS/ANSI E-4, will be collected, produced, evaluated, or used without an EPA approved QAPP. The QAPP will be consistent with EPA Directive CIO 2105.1 (Environmental Information Quality Policy, 2021), consistent with the most recent version of ASQ/ANSI E-4 (Quality Management Systems for Environmental Information and Technology Programs Requirements with Guidance For Use) and consistent with EPA/G-5 (EPA requirements for QAPPs).
- (2) **Health and Safety Plan.** The HASP shall describe all activities to be performed to protect on-site personnel from physical, chemical, and all other hazards posed by the field sampling. The HASP shall: (1) be prepared in accordance with EPA's Emergency Responder Health and Safety Manual and Occupational Safety and Health Administration (OSHA) requirements under 29 C.F.R. §§ 1910 and 1926; and (2) shall address RI Work and include contingency planning. The 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.

**3.7 Site Characterization.** Characterization activities at the Affected Property will:

- (1) Collect surface soil samples within the portions of the MRA excavated by Butala (excavated area).
- (2) Collect surface soil samples extending 120 feet outward from the MRA excavated area.
- (3) Collect surface soil samples on roads that cross the MRA excavated area.
- (4) Collect pile sampling of materials excavated from the MRA following guidance on ASTM Standard D 6009, Guide for Sampling Waste Piles, or EPA standard operating procedure for waste pile sampling (EPA ERT SOP 2017 <https://response.epa.gov/sites/2107/files/2017-r10.pdf>). Also collect surface samples in an area that extends 120 feet from piles of excavated materials from the excavated MRA area.
- (5) Collect surface soil sampling in areas where materials excavated from the MRA were placed.

- (6) Collect surface soil samples that extend 120 feet from piles of excavated materials from the MRA excavated area.
  - (7) Collect groundwater samples within the MRA excavated area and potentially impacted areas.
  - (8) To the extent they are still necessary, restore the groundwater monitoring wells, or replace with an equivalent, and survey monuments that were made unusable due to mining within the MRA.
  - (9) Evaluate the sufficiency of the existing groundwater monitoring plan under the OU2 Record of Decision, and establish a groundwater monitoring plan to the extent additional monitoring is needed which may contemplate the installation of additional monitoring wells.
  - (10) Evaluate overland flow path.
  - (11) Collect surface water samples from potentially impacted water bodies.
  - (12) Evaluate the need to collect sediment samples. If needed, collect sediment samples from assessed surface water bodies.
  - (13) Complete a survey of the excavated area, excavated material piles, and any areas potentially impacted by excavations in the vicinity of the MRA.
  - (14) Complete any other sampling, investigation, or evaluation within the Affected Area necessary to complete the RIA/FFS.
- (b) **Field Summary Reports.** Respondent shall provide a report after the field activity demobilization that addresses the collection, processing, management, distribution, analysis, and archival of data and information. These reports will be reviewed and approved by the EPA, in consultation with CDPHE.
- (c) **Human Health Risk Assessment Addendum and Ecological Risk Addendum.** If the EPA determines it is necessary, Respondent shall update the Human Health Risk Assessment (Human Health Risk Assessment Addendum) and Ecological Risk Assessment (Ecological Risk Assessment Addendum) in accordance with the SOW and the NCP, including the 40 C.F.R. § 300.430(d)(2)(vii) provision on sensitive populations, RIAWP, and applicable EPA guidance. The evaluation of Affected Property-specific exposure assumptions shall be discussed in the risk assessment as appropriate. Respondent shall identify and document all sources of information reviewed to address the human health and ecological assessment endpoints.
- (d) **Preliminary IC Evaluation.** Respondent shall submit a preliminary institutional control (IC) evaluation for EPA review and approval, in consultation with CDPHE. The IC evaluation will describe potential land and/or resource use restrictions and their relationship to the preliminary RAOs. The IC evaluation will

also identify potential IC instruments (or layered instruments), including those who potentially are responsible for implementing, maintaining, and enforcing the ICs. The IC evaluation will include an estimate for how long IC instruments (or layered instruments) shall remain in place. The IC evaluation will inform development of the FFS (comparative analysis of alternatives) and Institutional Controls Implementation and Assurance Plan (ICIAP).

- (e) **Draft RIA Report.** Respondent shall submit to the EPA for review and approval, in consultation with CDPHE, pursuant to ¶ 7.5 (Approval of Deliverables), a draft RIA report consistent with the SOW, RIA/FFS Work Plan, and with EPA guidance and regulations. This report shall summarize results of field activities to characterize the Affected Property, including the sources of, nature and extent of, and fate and transport of contamination. Respondent shall evaluate existing data and perform field work approved in the RIA/FFS Work Plan to collect additional information/data that is necessary and sufficient to determine the key contaminants movement and extent of contamination. The draft RIA report will include the actual and potential magnitude of releases from the sources, and the horizontal and vertical spread of contamination as well as mobility and persistence of the contaminants.
- (f) **Final RIA Report.** After the draft RIA Report has been reviewed by the EPA and CDPHE, the Agencies will provide comments on the draft RIA Report to Respondent for review and resolution. The RIA Report will follow the format presented in Table 3-13 of the Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA (EPA/540/G-89/004, <https://semspub.epa.gov/work/HQ/100001529.pdf>). Following comments by the EPA and CDPHE, Respondent will prepare a final RIA report which satisfactorily addresses these comments and is approved by the EPA.

#### 4. FOCUSED FEASIBILITY STUDY

- 4.1 **Focused Feasibility Study.** The FFS shall identify and evaluate remedial alternatives to prevent, mitigate, or otherwise respond to or remediate the release or threatened release of hazardous substances, pollutants or contaminants at or from the Affected Property resulting from Respondent's actions described in Section IV of the Settlement. The remedial alternatives evaluated shall include, but shall not be limited to, the range of alternatives described in the NCP, 40 C.F.R. § 300.430(e), and shall include remedial actions that utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. Respondent shall also evaluate potential impacts that treatment technologies have on other hazardous substances, pollutants or contaminants at or from the Affected Property. Respondent may include evaluation of excavation and removal of materials within the Affected Property as a remedial alternative along with other remedial alternatives. In evaluating the alternatives, Respondent shall address the factors required by section 121 of CERCLA, and 40 C.F.R. § 300.430(e).

**4.2 FFS Deliverables.** Respondent shall develop an FFS report in accordance with 40 C.F.R. § 300.430(e). In accordance with the schedule developed in the RIA/FFS and Vista Del Rio Subdivision Work Plans, Respondent shall submit a draft FFS Report to the Agencies. Submission and approval of the RIA/FFS shall proceed pursuant to Section IX of the Settlement. Respondent shall submit the following deliverables for the Agencies review and approval unless the EPA decides that one or more provisions is not necessary:

- (a) **Draft FFS Report.** Following ¶ 3.7(g), Respondent shall submit to the Agencies a draft FFS report for review and EPA approval pursuant to ¶ 7.5 (Approval of Deliverables). Respondent shall refer to Table 6-5 of the RI/FS Guidance for report content and format. The FFS report and the administrative record shall provide sufficient information to support the remedial alternatives analysis and remedy selection under sections 113(k) and 117(a) of CERCLA. Respondent will prepare a final FFS report which satisfactorily addresses the Agencies comments for EPA approval.
- (b) **Refine RAOs, PRGs, and ARARs.** Respondent shall prepare a memorandum revising, to the extent necessary, the RAOs, PRGs and ARARs to include potential ARARs specific to actions and locations described in ¶ 3.7(g) with the findings of the RIA. Respondent will review and, if necessary, modify the Affected Property-specific RAOs, specifically the PRGs, that were established by the EPA prior to or during discussions between the EPA and Respondent. The revised RAOs and PRGs will be documented in this memorandum that will be reviewed and approved by the EPA. These modified PRGs will specify the contaminants and media of interest, exposure pathways and receptors, and an acceptable contaminant level or range of levels (at locations for each exposure route), basis for the value, and the associated residual risk. This memorandum will discuss the consideration of sensitive subgroups in determining the acceptable exposure levels for sites with systemic toxicants, in accordance with 40 C.F.R. § 300.430(e)(2)(i)(A)(1). In addition, the memorandum will discuss whether ARARs may not be sufficiently protective given the presence of multiple contaminants at the Affected Property or multiple pathways of exposure if the Affected Property has known or suspected carcinogens, in accordance with 40 C.F.R. § 300.430(e)(2)(i)(A)(2).
- (c) **Identify and Evaluate Remedial Technologies and Assemble Alternatives.** Concurrent with ¶ 4.2(b), Respondent shall assemble combinations of technologies, and the media to which they would be applied, into remedial alternatives that address contamination on a sitewide basis or for an identified operable unit. Deliverables will be reviewed and approved by the EPA with CDPHE consultation. Respondent shall: (i) develop general response actions for each medium of interest defining containment, treatment, excavation, pumping, or other actions, singly or in combination, that may be taken to satisfy the RAOs for the site; (ii) identify volumes or areas of media to which general response actions might be applied, taking into account the requirements for protectiveness as identified in the RAOs and the chemical and physical characterization of the site; and (iii) identify and screen the technologies applicable to each general response

action to eliminate those that cannot be implemented technically at the site. The general response actions are further refined to specify remedial technology types (e.g., the general response action of treatment can be further defined to include chemical or biological technology types). Respondent shall assemble the selected representative technologies into alternatives representing a range of treatment and containment combinations, as appropriate.

- (d) **Detailed Analysis of Alternatives.** Respondent shall conduct a detailed analysis of remedial alternatives. Respondent shall provide the EPA with the following deliverables for review and approval:
- (1) **Individual Analysis of Alternatives.** Respondent shall conduct an assessment of individual alternatives against each of the nine evaluation criteria, as described in the SOW, and prepare a summary report.
  - (2) **Comparative Analysis of Alternatives.** Respondent shall conduct a comparative analysis of alternatives to evaluate the relative performance of each alternative in relation to the nine evaluation criteria and prepare a summary report.

The range of alternatives shall include, as appropriate, options in which treatment is used to reduce the toxicity, mobility, or volume of wastes, but varying in the types of treatment, the amount treated, and long-term residuals or untreated wastes are managed. The analysis will include options involving removal, treatment, and/or containment; and a no-action alternative. The evaluation criteria include: (1) overall protection of human health and the environment; (2) compliance with ARARs; (3) long-term effectiveness and permanence; (4) reduction of toxicity, mobility, or volume through treatment; (5) short-term effectiveness; (6) implementability; (7) cost; (8) state (or support agency) acceptance; and (9) community acceptance. The analysis shall (consistent with 40 C.F.R. § 300.430(e)(9)(iii)(C) and *Consideration of Climate Resilience in the Superfund Cleanup Process for Non-Federal National Priorities List Sites* OLEM 9355.1-120, June 30, 2021) include an assessment of the vulnerability of the protectiveness of each alternative to the impacts of climate change and, for each alternative where appropriate, an evaluation of the possible addition of further measures to ensure the resilience a particular alternative's protectiveness to the impacts of climate change. In addition, where appropriate for particular evaluation criteria, Respondent shall also evaluate, to the extent practicable, opportunities to reduce the environmental footprint of each alternative. Such evaluation shall include the consideration of green remediation best management practices and/or application of the ASTM Standard for Greener Cleanups, consistent with *Consideration of Greener Activities in the Superfund Cleanup Process* (Aug. 6, 2016). These considerations for greener cleanups are not intended to allow cleanups that do not satisfy threshold requirements for protectiveness, or do not meet other site-specific cleanup objectives.

For each alternative, Respondent shall provide: (1) a description of the alternative that outlines the waste management strategy involved and identifies the key ARARs associated with each alternative, and (2) a discussion of the individual criterion assessment. If Respondent does not have direct input on criteria (8), state (or support agency) acceptance, and criteria (9), community acceptance, these will be addressed by the EPA. Note that criteria (8) and (9) are not addressed until after the Proposed Plan.

- (e) **Alternatives Analysis for ICs and Screening.** Concurrent with ¶ 4.2(d), Respondent shall prepare a memorandum revising the ICs with the findings of the RIA. Respondent will review and, if necessary, modify the site-specific interim and permanent ICs that were established by the EPA prior to or during discussions between the EPA and Respondent. ICs need to be enforceable under CERCLA, rather than relying on local controls, such as zoning. The ICs evaluation shall also identify how the ICs response actions components fit with the relevant criteria outlined in the NCP (40 C.F.R. § 300.430(e)(9)(iii)) such as: compliance with ARARs; long-term effectiveness and permanence; short-term effectiveness; implementability; cost; state acceptance; and community acceptance. The IC analysis shall be submitted for review and approval by the EPA and added as an appendix to the draft FFS Report.

## 5. VISTA DEL RIO SUBDIVISION REPORTS

- 5.1 Vista Del Rio Subdivision Characterization.** Complete any additional investigation that the EPA requires to characterize the Vista Del Rio Subdivision, including but not limited to: surface water, groundwater, indoor air, soil, sediment, or a background study. Respondent will provide a data validation report to the Agencies, and to the residential property owners, within 30-days of receiving analytical results or conducting field monitoring from within the Vista Del Rio Subdivision.
- 5.2 Vista Del Rio Subdivision Site Characterization Report.** Respondent will provide a Vista Del Rio Subdivision Site Characterization Report to the Agencies. The Vista Del Rio Subdivision Site Characterization Report shall be used by the Agencies to document all previous sampling completed at the Vista Del Rio Subdivision.

## 6. MEETINGS, PERMITS, and REPORTS

### 6.1 Meetings

- (a) **Kickoff meeting.** Within 30 days of the Effective Date of the Settlement, Respondent shall schedule a kickoff meeting with technical staff, the EPA, and CDPHE to discuss the SOW, an Affected Property visit, and document review needs. The EPA will determine the Affected Property-specific objectives of the RIA and will provide Respondent a strategic approach, per ¶ 3.6 of this SOW. The meeting will also be used to outline project-specific requirements including project objectives, data gaps, potential sampling and analysis methods, and performance goals. The deliverable after the kickoff meeting will be a project

schedule and RIA/FFS Work Plan under ¶ 3.6. The kickoff meeting and systematic planning meetings referenced in ¶ 6.1(b) will be documented in the QAPP.

- (b) **Systematic Project Planning Meetings.** Within the schedule set forth in the RIA Work Plan, Respondent shall schedule systematic project planning meetings with the Agencies. Systematic project planning is a process that requires Respondent, CDPHE, and the EPA to convene during key milestones in the RIA/FFS schedule in order to update the CSM, and to review the sequence and scope of upcoming RIA/FFS tasks to determine if they are still appropriate or need modification.
- (c) **Meetings.** Respondent shall participate in meetings and make presentations at the request of the EPA during the preparation of the RIA/FFS. Topics will include anticipated problems, RIA/FFS updates, or new issues. Meetings will be scheduled at the Agencies discretion.

**6.2 Progress Reports.** Respondent shall submit progress reports to the EPA on a monthly basis, or as otherwise requested by the EPA, commencing on the 2<sup>nd</sup> of the month following the Effective Date. Respondent is required to submit progress reports until the EPA approves the FFS report. The progress reports shall cover all activities that took place during the prior reporting period, including:

- (a) Description of actions that have been taken under this SOW;
- (b) All results of sampling and tests and all other data received by Respondent;
- (c) Description of Work planned for the next two months with schedules relating such Work to the overall project schedule for RIA/FFS completion;
- (d) Description of all problems encountered in complying with requirements of this SOW and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays;
- (e) Description of any modifications to work plans or other schedules Respondent has proposed or that have been approved by the EPA; and
- (f) Description of activities undertaken in support of the Community Involvement Plan during the reporting period and those to be undertaken in the next two months.

**6.3 Notice of Schedule Changes.** If the schedule for any activity described in the progress reports, including deliverables required under Section 6, changes, Respondent shall notify the EPA of such change at least seven days before it performs the activity.

## 7. DELIVERABLES

**7.1** General Requirements for Deliverables



- (a) Respondent 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. Paragraph 7.3 (Data Format Specifications) applies to all deliverables. Paragraph 7.4 (Certification) applies to any deliverable that is required to be certified. Paragraph 7.5 (Approval of Deliverables) applies to any deliverable that is required to be submitted for EPA approval. All deliverables shall be submitted by the deadlines in the RIA/FFS Schedule in ¶ 8.1.
- (b) Respondent shall submit all deliverables in electronic form. Data format specifications for sampling, analytical and monitoring data, and spatial data are addressed in ¶ 7.3. All other deliverables shall be submitted in the electronic form specified by the EPA RPM. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5 x 11 inches, Respondent shall provide the EPA and CDPHE paper copies of such exhibits upon request. Respondent shall not submit deliverables to the EPA that are marked as "copyright," "trademark," or confidential", as the deliverables are part of the administrative record for the Site and as such are available to the public.

**7.2 CDPHE Copies.** Respondent shall, at any time it sends a deliverable to the EPA, send a copy to CDPHE. The EPA shall, at any time it sends a notice, authorization, approval, disapproval, or certification to Respondent, send a copy to CDPHE.

### **7.3 Data Format Specifications**

- (a) Sampling, analytical and monitoring data shall be submitted in standard regional Electronic Data Deliverable format. Other delivery methods may be allowed if electronic direct submission presents a significant burden or as technology changes.
- (b) Respondent shall submit spatial data, including spatially-referenced data and geospatial data: (1) in the ESRI File Geodatabase format and (2) as unprojected geographic coordinates in decimal degree format using North American Datum 1983 (NAD83) or World Geodetic System 1984 (WGS84) as the datum. If applicable, submissions shall include the collection method(s). Projected coordinates may optionally be included but shall be documented. Spatial data shall be accompanied by metadata, and such metadata shall 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 complies with these FGDC and EPA metadata requirements and is available at <https://www.epa.gov/geospatial/epa-metadata-editor>.
- (c) Each file shall 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 Respondent does not, and is not intended to, define the boundaries of the Site or the Affected Property.

**7.4 Certification.** All deliverables that require compliance with this Section must be signed (which may include electronically signed) by Respondent's Project Coordinator, or other responsible official of Respondent, and shall 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.

## **7.5 Approval of Deliverables**

### **(a) Initial Submissions**

- (1) After review of any deliverable that is required to be submitted for the EPA approval under this SOW, the 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) The EPA also may modify the initial submission to cure deficiencies in the submission if: (i) the 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 ¶ 7.5(a) (Initial Submissions), or if required by a notice of approval upon specified conditions under ¶ 7.5(a), Respondent shall, within 30 days or such longer time as specified by the EPA in such notice, correct the deficiencies and resubmit the deliverable for approval. After review of the resubmitted deliverable, the EPA may:
  - (1) approve, in whole or in part, the resubmission;
  - (2) approve the resubmission upon specified conditions;
  - (3) modify the resubmission;
  - (4) disapprove, in whole or in part, the resubmission, requiring Respondent to correct the deficiencies; or
  - (5) any combination of the foregoing.

- (c) **Implementation.** Upon approval, approval upon conditions, or modification by the EPA under ¶ 6.5(a) (Initial Submissions) or ¶ 6.5(b) (Resubmissions), of any

deliverable, or any portion thereof: (1) such deliverable, or portion thereof, will be incorporated into and enforceable under the Settlement; and (2) Respondent 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 ¶ 6.5(a) or ¶ 6.5(b) does not relieve Respondent of any liability for stipulated penalties under Section XIX (Stipulated Penalties) of the Settlement.

- (d) Notwithstanding the receipt of a notice of disapproval, Respondent shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by the EPA.
- (e) In the event that the EPA takes over some of the tasks, Respondent shall incorporate and integrate information supplied by the EPA into those reports.
- (f) Respondent shall not proceed with any activities or tasks dependent on the following deliverables until receiving EPA approval, approval on condition, or modification of such deliverables: RIA/FFS Work Plan; Sampling and Analysis Plan; Human Health Risk Assessment Addendum; Ecological Risk Assessment Addendum, draft RIA Report; and draft FFS Report. While awaiting EPA approval, approval on condition, or modification of these deliverables, Respondent shall proceed with all other tasks and activities that may be conducted independently of these deliverables, in accordance with the schedule set forth under this Settlement.
- (g) For all remaining deliverables not listed in ¶ 6.5(f), Respondent shall proceed with all subsequent tasks, activities, and deliverables without awaiting EPA approval of the submitted deliverable. The EPA reserves the right to stop Respondent from proceeding further, either temporarily or permanently, on any task, activity, or deliverable at any point during the Work.
- (h) **Material Defects.** If an initially submitted or resubmitted plan, report, or other deliverable contains a material defect, and the plan, report, or other deliverable is disapproved or modified by the EPA under ¶ 6.5(a) (Initial Submissions) or (b) (Resubmissions) due to such material defect, Respondent shall be deemed in violation of this Settlement for failure to submit such plan, report, or other deliverable timely and adequately. Respondent may be subject to penalties for such violation as provided in Section XIX (Stipulated Penalties) of the Settlement.

**7.6 Notice of Completion of RIA/FFS Work.** When the EPA determines that all RIA/FFS Work has been fully performed in accordance with this Settlement, with the exception of any continuing obligations required by this Settlement, including any payment of Future Response Costs, required monitoring or inspections, continued administrative obligations, ICs, and Record Retention, the EPA will provide written notice to Respondent. If the EPA determines that any Work has not been completed in accordance with the Settlement, the EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the RIA/FFS Work Plan, if appropriate, in order to

correct such deficiencies. Respondent shall implement the modified and approved RIA Work Plan and shall submit a modified draft RIA Report and/or FFS Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified RIA/FFS Work Plan shall be a violation of this Settlement.

## 8. SCHEDULE

**8.1** All deliverables and tasks required under this SOW shall be submitted or completed by the deadlines or within the time durations listed in the RIA/FFS schedule set forth below. Respondent may submit proposed revised RI/FS schedules for the EPA approval. Upon EPA’s approval, the revised RIA/FFS schedule supersedes any prior RIA/FFS schedule.

Description	SOW Reference	Settlement Reference	Deadline
Previous Investigation Summary Report	¶ 3.2	--	Within 60 days after Effective Date
CSM Report	¶ 3.3	--	Within 60 days after Effective Date
Identification of Preliminary RAOs, PRGs, and ARARs	¶ 3.4	--	Within 60 days after EPA request
RIA/FFS Work Plan (including Sampling and Analysis Plan, Quality Assurance Project Plan, and Health and Safety Plan)	¶¶ 3.5, 3.6	¶ 30(d)	Within 60 days after Effective Date
Field Summary Reports	¶ 3.7(b)	¶ 30(e)	Within 60 days after field activity demobilization
Human Health Risk Assessment Addendum and Ecological Risk Addendum	¶ 3.7(c)	¶ 30(f)	If the EPA determines it is necessary, within 90 days of finishing Site Characterization activities
Vista Del Rio Subdivision Site Characterization Report	¶ 5.2	--	Within 90 days of completing Site Characterization at the Vista Del Rio Subdivision.
Preliminary IC Evaluation	¶ 3.7(d)	--	Within 60 days after EPA request
Draft RIA Report	¶ 3.7(e)	¶ 30(g)	Within 60 days of submitting the Human Health Risk Assessment Addendum and Ecological Risk Addendum
Final RIA Report	¶ 3.7(f)	¶ 30(h)	Within 30 days of receiving Agency comments
Draft FFS Report	¶ 4.2(a)	¶ 30(i)	Within 60 days of EPA’s approval of the Final RIA Report
Refine RAOs, PRGs, and ARARs	¶ 4.2(b)	¶ 30(i)(1)	Within 60 days after EPA request
Identify and Evaluate Remedial Technologies and Assemble Alternatives	¶ 4.2(c)	¶ 30(i)(2)	Concurrent with Refine RAOs, PRGs, and ARARs (¶ 4.2(b))

Detailed Analysis of Alternatives  Individual Analysis of Alternatives  Comparative Analysis of Alternatives	¶ 4.2(d)	¶ 30(i)(3)	60 days after EPA approval of Refine RAOs and ARARs (¶ 4.2(b)) and Identify and Evaluate Remedial Technologies (¶ 4.2(c))  Within 60 days of EPA's approval of the Individual Analysis of Alternatives deliverable (¶ 4.2(d)(1))
Alternatives Analysis for ICs and Screening	¶ 4.2(e)	¶ 30(i)(4)	Concurrent with Detailed Analysis of Alternatives required under ¶ 4.2(d)
Final FFS Report	¶ 4.2(a)	¶ 30(j)	Within 30 days of EPA's comments on the Draft FFS Report
Kickoff Meeting	¶ 5.1(a)	--	Within 30 days after Effective Date
Progress Reports	¶ 6.2	--	On a monthly basis, or as otherwise requested by the EPA, commencing on the 2 <sup>nd</sup> of the month following the Effective Date

## 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 web pages listed in ¶ 9.2:

- (a) A Compendium of Superfund Field Operations Methods, OSWER 9355.014, 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) Guide to Management of Investigation-Derived Wastes, OSWER 9345.303FS (Jan. 1992).
- (f) Permits and Permit Equivalency Processes for CERCLA On-Site Response Actions, OSWER 9355.703 (Feb. 1992).

- (g) Guidance for Conducting Treatability Studies under CERCLA, OSWER 9380.3-10, EPA/540/R-92/071A (Nov. 1992).
- (h) National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule, 40 C.F.R. part 300 (Oct. 1994).
- (i) EPA Guidance for Data Quality Assessment, Practical Methods for Data Analysis, QA/G-9, EPA/600/R-96/084 (July 2000).
- (j) Guidance for Quality Assurance Project Plans, QA/G-5, EPA/240/R-02/009 (Dec. 2002).
- (k) Institutional Controls: Third Party Beneficiary Rights in Proprietary Controls (Apr. 2004).
- (l) Quality management systems for environmental information and technology programs -- Requirements with guidance for use, ASQ/ANSI E4:2014 (American Society for Quality, Feb. 2014).
- (m) Uniform Federal Policy for Quality Assurance Project Plans, Parts 1-3, EPA/505/B-04/900A through 900C (Mar. 2005).
- (n) Superfund Community Involvement Handbook, OLEM 9230.0-51 (Mar. 2020). More information on Superfund community involvement is available on the Agency's Superfund Community Involvement Tools and Resources web page at <https://www.epa.gov/superfund/community-involvement-tools-and-resources>.
- (o) EPA Guidance on Systematic Planning Using the Data Quality Objectives Process, QA/G-4, EPA/240/B-06/001 (Feb. 2006).
- (p) EPA Requirements for Quality Assurance Project Plans, QA/R-5, EPA/240/B-01/003 (Mar. 2001, reissued May 2006).
- (q) EPA Requirements for Quality Management Plans, QA/R-2, EPA/240/B-01/002 (Mar. 2001, reissued May 2006).
- (r) EPA Directive CIO 2105.1 (Environmental Information Quality Policy (Mar. 31, 2021), [https://www.epa.gov/sites/production/files/2021-04/documents/environmental\\_information\\_quality\\_policy.pdf](https://www.epa.gov/sites/production/files/2021-04/documents/environmental_information_quality_policy.pdf)).
- (s) 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>.
- (t) EPA National Geospatial Data Policy, CIO Policy Transmittal 05-002 (Aug. 2008), <https://www.epa.gov/geospatial/geospatial-policies-and-standards> and <https://www.epa.gov/geospatial/epa-national-geospatial-data-policy>.

- (u) Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER 9283.1-33 (June 2009).
- (v) Principles for Greener Cleanups (Aug. 28, 2009), <https://www.epa.gov/greenercleanups/epa-principles-greener-cleanups>.
- (w) Consideration of Greener Cleanup Activities in the Superfund Cleanup Process (Aug. 2, 2016), <https://semspub.epa.gov/work/HQ/100000160.pdf>.
- (x) Close Out Procedures for National Priorities List Superfund Sites, OSWER 9320.2-22 (May 2011), <https://www.epa.gov/superfund/close-out-procedures-national-priorities-list-superfund-sites>.
- (y) Groundwater Road Map: Recommended Process for Restoring Contaminated Groundwater at Superfund Sites, OSWER 9283.1-34 (July 2011).
- (z) Recommended Evaluation of Institutional Controls: Supplement to the “Comprehensive Five-Year Review Guidance,” OSWER 9355.7-18 (Sept. 2011).
- (aa) 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).
- (bb) 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).
- (cc) EPA’s Emergency Responder Health and Safety Manual, OSWER 9285.3-12 (July 2005 and updates), [https://www.epaosc.org/\\_HealthSafetyManual/manual-index.htm](https://www.epaosc.org/_HealthSafetyManual/manual-index.htm).
- (dd) Guidance on Systematic Planning Using the Data Quality Objectives Process, EPA QA/G-4, EPA/240/B-06/001, Office of Environmental Information (Feb. 2006), <https://www.epa.gov/sites/production/files/2015-06/documents/g4-final.pdf>.
- (ee) Consideration of Tribal Treaty Rights and Traditional Ecological Knowledge in the Superfund Remedial Program, OLEM 9200.2-177 (Jan. 2017), <https://semspub.epa.gov/src/document/11/500024668>.
- (ff) Smart Scoping for Environmental Investigation Technical Guide, EPA/542/G-18/004 (Nov. 2018), <https://semspub.epa.gov/work/HQ/100001799.pdf>.
- (gg) Strategic Sampling Approaches Technical Guide, EPA/542/-F-18/005 (Nov. 2018), <https://semspub.epa.gov/work/HQ/100001800.pdf>.
- (hh) Best Practices for Data Management, EPA/542/F-18/003, (Nov. 2018), <https://semspub.epa.gov/work/HQ/100001798.pdf>.

- (ii) Smart Scoping of an EPA-Lead Remedial Investigation/Feasibility Study, EPA/542/F-19/0006 (Oct. 2020), <https://semspub.epa.gov/work/HQ/100002571.pdf>.
- (jj) Interim Final Risk Assessment Guidance for Superfund, Volume I - Human Health Evaluation Manual (Part A), RAGS, EPA/540/1-89/002, OSWER 9285.7-01A (Dec. 1989), <https://www.epa.gov/risk/risk-assessment-guidance-superfund-rags-part>.
- (kk) Interim Final Risk Assessment Guidance for Superfund, Volume I - Human Health Evaluation Manual (Part D, Standardized Planning, Reporting, and Review of Superfund Risk Assessments), OSWER 9285.7-47 (Dec. 2001), <https://www.epa.gov/risk/risk-assessment-guidance-superfund-rags-part-d>.
- (ll) Ecological Risk Assessment Guidance for Superfund: Process for Designing and Conducting Ecological Risk Assessments, (ERAGS), EPA/540/R-97/006, OSWER 9285.7-25 (June 1997).
- (mm) Reuse Assessments: A Tool to Implement the Superfund Land Use Directive. OSWER 9355.7-06P (June 4, 2001), <http://www.epa.gov/superfund/community/relocationireusefinal.pdf>.
- (nn) ECO Update: The Role of Screening-Level Risk Assessments and Refining Contaminants of Concern in Baseline Ecological Risk Assessments, EPA/540/F-01/014 (June 2001).
- (oo) EPA QA Field Activities Procedure CIO 2105-P-02.1 (Sept. 23, 2014)
- (pp) EPA Requirements for Quality Management Plans (QA/R-2) EPA/240/B-01/002 (Mar. 2001, reissued May 2006).
- (qq) Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER 9283.1-33 (June 2009).
- (rr) Considering Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-lead Superfund Remedial Sites. OSWER 9355.7-19 (Mar. 2010).
- (ss) Consideration of Climate Resilience in the Superfund Cleanup Process for Non-Federal National Priorities List Sites (June 30, 2021).

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

- (a) Superfund Laws, Policy, and Guidance: <https://www.epa.gov/superfund/superfund-policy-guidance-and-laws>.
- (b) Collection of Methods: <https://www.epa.gov/measurements/collection-methods>.
- (c) Quality Assurance:



- (1) EPA QA Field Activities Procedures: <https://www.epa.gov/irmpoli8/epa-qa-field-activities-procedures>.
  - (2) Policy to Assure Competency of Laboratories, Field Sampling, and Other Organizations Generating Environmental Measurement Data under Agency-Funded Acquisitions: [https://www.epa.gov/sites/default/files/2016-11/documents/fem-lab-competency-policy\\_policy\\_updated\\_nov2016.pdf](https://www.epa.gov/sites/default/files/2016-11/documents/fem-lab-competency-policy_policy_updated_nov2016.pdf).
  - (3) Superfund Contract Laboratory Program: <https://www.epa.gov/clp>.
  - (4) Test Methods for Evaluating Solid Waste: Physical/Chemical Methods (SW-846), Second edition (July 1982): <https://www.epa.gov/hw-sw846>.
  - (5) Standard Methods for the Examination of Water and Wastewater: <http://www.standardmethods.org/>.
  - (6) Air Toxics - Monitoring Methods: <https://www.epa.gov/amtic/compendium-methods-determination-toxic-organic-compounds-ambient-air.gov>.
- (d) Superfund Redevelopment Basics: Policy, Guidance, and Resources: <https://www.epa.gov/superfund-redevelopment-initiative/superfund-redevelopment-basics#policy>.
  - (e) Superfund Green Remediation: <https://www.epa.gov/superfund/superfund-green-remediation>.
  - (f) Superfund Climate Resilience: <https://www.epa.gov/superfund/superfund-climate-resilience>.
  - (g) Ecological Risk Assessment: <https://www.epa.gov/risk/ecological-risk-assessment>.

**9.3** For any regulation or guidance referenced in the Settlement 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 Respondent receives notification from EPA of the modification, amendment, or replacement.