

Appendix D

Performance Guarantee Forms



[CERCLA Financial Assurance Sample Letter of Credit - Draft of December 2004]

[Letterhead of Issuing Bank]

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER: [\_\_\_\_\_]

ISSUANCE DATE: [\_\_\_\_\_]

MAXIMUM AMOUNT: [U.S.\$ \_\_\_\_\_]

BENEFICIARY:

U.S. Environmental Protection Agency  
c/o [Name of Regional Superfund Director]  
Director, Superfund Division, EPA Region [\_\_]  
[Address]

APPLICANT:

[Name of Settling Defendant]  
[Title if applicable]  
[Address]

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. [\_\_\_\_\_] in your favor, at the request and for the account of the Applicant, [Insert name of Settling Defendant], in the amount of exactly [in words] U.S. dollars (\$XX.XX) (the "Maximum Amount"). We hereby authorize you, the U.S. Environmental Protection Agency (the "Beneficiary"), to draw at sight on us, [Insert name and address of issuing bank], an aggregate amount equal to the Maximum Amount upon presentation of:

(1) your sight draft, bearing reference to this Letter of Credit No. [\_\_\_\_\_] (which may, without limitation, be presented in the form attached hereto as Exhibit A); and

(2) your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to [that certain Consent Decree, dated \_\_\_\_\_, 20\_\_, by and among the United States and \_\_\_\_\_], entered into by the parties thereto in accordance with the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)."

This letter of credit is effective as of [insert issuance date] and shall expire on [a date at least 1 year later], but such expiration date shall be automatically extended for a period of [at least 1 year] on [the date which is at least 1 year later] and on each successive expiration date, unless, at least one hundred twenty (120) days before the current expiration date, we notify both you and [enter name of Settling Defendant posting the letter of credit] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are

so notified, any unused portion of the credit shall immediately thereupon be available to you upon presentation of your sight draft for a period of at least 120 days after the date of receipt by both you and [enter name of Settling Defendant posting the letter of credit] of such notification, as shown on signed return receipts.

Multiple and partial draws on this letter of credit are expressly permitted, up to an aggregate amount not to exceed the Maximum Amount. Whenever this letter of credit is drawn on, under, and in compliance with the terms hereof, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft in immediately available funds directly into such account or accounts as may be specified in accordance with your instructions.

All banking and other charges under this letter of credit are for the account of the Applicant.

This letter of credit is subject to the most recent edition of the Uniform Customs and Practice for Documentary Credits, published and copyrighted by the International Chamber of Commerce.

Very Truly Yours,

**[Name and address of issuing institution]**

**[Signature(s), name(s), and title(s) of official(s) of issuing institution]**

**[Date]**

**Exhibit A - Form of Sight Draft**

United States Environmental Protection Agency

Sight Draft

TO: [Insert name of Issuing Bank]  
[Insert address of Issuing Bank]  
\_\_\_\_\_  
\_\_\_\_\_

RE: Letter of Credit No. [\_\_\_\_\_]

DATE: [Insert date that draw is made]

TIME: [Insert time of day that draw is made]

This draft is drawn under your Irrevocable Letter of Credit No. [\_\_\_\_\_]. Pay to the order of the United States Environmental Protection Agency, in immediately available funds, the amount of [in words] U.S. Dollars (U.S.\$[\_\_\_\_\_]) or, if no amount certain is specified, the total balance remaining available under your Irrevocable Letter of Credit No. [\_\_\_\_\_].

Pay such amount as is specified in the immediately preceding paragraph by FedWire Electronic Funds Transfer ("EFT") to the [Site name] Special Account within the EPA Hazardous Substance Superfund in accordance with current EFT procedures, referencing File Number [\_\_\_\_\_], EPA Region and Site Spill ID Number [\_\_\_\_\_], and DOJ Case Number [\_\_\_\_\_], as follows:

[Insert specific Special Account wiring instructions and information].

This Sight Draft has been duly executed by the undersigned, an authorized representative or agent of the United States Environmental Protection Agency, whose signature hereupon constitutes an endorsement.

By: \_\_\_\_\_ [signature]

\_\_\_\_\_ [name]

\_\_\_\_\_ [title]



[CERCLA Financial Assurance Sample Payment Bond: Draft of July 2005]

[Letterhead of Bond Issuer]

**PAYMENT BOND**

Surety's Payment Bond Number: \_\_\_\_\_  
Date of Execution of Payment Bond: \_\_\_\_\_  
Effective Date of Payment Bond: \_\_\_\_\_  
Total Dollar Amount of Payment Bond: \_\_\_\_\_

Principal:

Legal Name and Address: [name and business address of PRP/Settling Defendant(s)]  
Type of Organization: [insert "individual," "partnership," "limited liability company,"  
"corporation," etc.]  
State of Organization:

Surety:

Legal Name and Address: [name and business address of surety providing the bond]  
Type of Organization: [insert "individual," "partnership," "limited liability  
company," "corporation," etc.]  
State of Organization:

Beneficiary:

Legal Name and Address: EPA Regional Administrator or Regional Superfund  
Director for EPA Region [ ] (or any of their designees)  
[insert address]

Site Information:

Name and Location of Site:  
EPA Identification Number: [Site or CERCLIS ID Number, if applicable]  
Agreement Governing Site Work: [That certain [Consent Decree] [Administrative  
Order on Consent] dated \_\_\_\_\_, 20xx, by  
and among the United States of America,  
\_\_\_\_\_, and \_\_\_\_\_ (the  
"Agreement")]

**KNOW ALL PERSONS BY THESE PRESENTS, THAT:**

**WHEREAS**, said Principal is required, under the above-described Agreement entered pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), to perform the "Work" as defined in such Agreement (hereinafter, the "Work") and to fulfill its other obligations as set forth therein; and

**WHEREAS**, said Principal is required by the Agreement to provide financial assurance securing its full and final completion of the Work.

**NOW, THEREFORE**, in consideration of the foregoing, and for other good and valuable consideration the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. The Principal and Surety hereto are firmly bound to the United States Environmental Protection Agency (hereinafter, "EPA"), in the above Total Dollar Amount, for the payment of which we, the Principal and Surety, bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, subject to and in accordance with the terms and conditions hereof. **[Add proviso if there are multiple sureties: ";provided that, where the Sureties are acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the Total Dollar Amount."]**

2. The conditions of the Surety's obligation hereunder are such that if the Principal shall promptly, faithfully, fully, and finally complete the Work in accordance with the terms of the Agreement, the Surety's obligation hereunder shall be null and void; otherwise it is to remain in full force and effect.

3. The Surety shall become liable on the obligation evidenced hereby only upon the commencement of any Work Takeover (as such term is defined in the Agreement) pursuant to and in accordance with the terms of the Agreement. At any time and from time to time upon notification by the EPA Regional Administrator or Regional Superfund Director for EPA Region [ ] (or any of their designees) that a Work Takeover has commenced, the Surety shall promptly (and in any event within fifteen (15) days after receiving such notification) pay funds up to the Total Dollar Amount in such amounts and to such person(s), account(s), or otherwise as the EPA Regional Administrator or Regional Superfund Direction (or their designee) may direct. If the Surety does not render such payment within the specified 15-day period, the Surety shall be deemed to be in default of this Payment Bond and EPA shall be entitled to enforce any remedy available to it at law, in equity, or otherwise.

4. The liability of the Surety shall not be discharged by any payment or succession



of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the Total Dollar Amount of this Payment Bond, but in no event shall the aggregate obligation of the Surety hereunder exceed the amount of said sum.

5. The Surety may cancel this Payment Bond only by sending notice of cancellation to the Principal and to the EPA Regional Administrator for EPA Region [ ], provided, however, that no such cancellation shall be effective during the 120-day period beginning on the date of receipt of the notice of cancellation by both the Principal and the EPA Regional Administrator. If after ninety (90) days of such 120-day period, the Principal has not established a replacement financial assurance mechanism pursuant to and in accordance with the terms of the Agreement, EPA shall have the right to draw upon the full amount of this Payment Bond.

6. The Principal may terminate this Payment Bond only by sending written notice of termination to the Surety and to the EPA Regional Administrator for EPA Region [ ], provided, however, that no such termination shall become effective unless and until the Surety receives written authorization for termination of this Payment Bond by the EPA Regional Administrator (or his or her designee).

7. Any modification, revision, or amendment which may be made in the terms of the Agreement or in the Work to be done thereunder, or any extension of the Agreement, or other forbearance on the part of either the Principal or EPA to the other, shall not in any way release the Principal and the Surety, or either of them, or their heirs, executors, administrators, successors or assigns from liability hereunder. The Surety hereby expressly waives notice of any change, revision, or amendment to the Agreement or to any related obligations between the Principal and EPA.

8. The Surety will immediately notify EPA of any of the following events: (a) the filing by the Surety of a petition seeking to take advantage of any laws relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts; (b) the Surety's consent to (or failure to contest in a timely manner) any petition filed against it in an involuntary case under such bankruptcy or other laws; (c) the Surety's application for (or consent to or failure to contest in a timely manner) the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator, or the like of itself or of all or a substantial part of its assets; (d) the Surety's making a general assignment for the benefit of creditors; or (e) the Surety's taking any corporate action for the purpose of effecting any of the foregoing.

9. Any provision in this Payment Bond that conflicts with CERCLA or any other applicable statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or legal requirement shall be deemed incorporated herein.

10. All notices, consents, approvals and requests required or permitted hereunder shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof

of attempted delivery, to the address shown on this first page of this Payment Bond.

All notices, elections, requests and demands under this Payment Bond shall be effective and deemed received upon the earliest of (a) the actual receipt of the same by personal delivery or otherwise, (b) one (1) business day after being deposited with a nationally recognized overnight courier service as required above, or (c) three (3) business days after being deposited in the United States mail as required above. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given as herein required shall be deemed to be receipt of the notice, election, request, or demand sent.

11. The Surety hereby agrees that the obligations of the Surety under this Payment Bond shall be in no way impaired or affected by any winding up, insolvency, bankruptcy or reorganization of the Principal or by any other arrangement or rearrangement of the Principal for the benefit of creditors.

12. No right of action shall accrue on this Payment Bond to or for the use of any person other than EPA or the executors, administrators, successors or assigns of EPA.

**[SIGNATURES ON FOLLOWING PAGE]**

**IN WITNESS WHEREOF**, the Principal and Surety have executed this Payment Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby represent, warrant, and certify that they are authorized to execute this Payment Bond on behalf of the Principal and Surety, respectively.

**PRINCIPAL:**

[\_\_\_\_\_] ,  
a [corporation/partnership/limited liability  
company] organized and in good standing in  
the State of [\_\_\_\_\_]

Attest: \_\_\_\_\_  
Name: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**SURETY:**

[\_\_\_\_\_] ,  
a [corporation/partnership/limited liability  
company] organized and in good standing in  
the State of [\_\_\_\_\_]

Attest: \_\_\_\_\_  
Name: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_



## TRUST AGREEMENT

[ ] Site

Dated: \_\_\_\_\_, \_\_\_\_\_

This Trust Agreement (this "Agreement") is entered into as of [date] by and between [name of entity funding the trust], a [insert "corporation," "limited liability company," "partnership," etc.] organized and existing under the laws of the State of [ ] (the "Grantor"), and [name of trustee], a [insert "corporation," "banking organization," "association," etc.] organized and existing under the laws of the State of [ ] (the "Trustee").

**Whereas**, the United States Environmental Protection Agency ("EPA"), an agency of the United States federal government, and the Grantor have entered into a Consent Decree, United States of America v. [ ], Civil Action No. [ ], for the [ ] Site (hereinafter the "Consent Decree");

**Whereas**, the Consent Decree provides that the Grantor shall provide assurance that funds will be available as and when needed for performance of the Work required by the Consent Decree;

**Whereas**, in order to provide such financial assurance, Grantor has agreed to establish and fund the trust created by this Agreement; and

**Whereas**, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this Agreement, and the Trustee has agreed to act as trustee hereunder.

**Now, therefore**, the Grantor and the Trustee agree as follows:

***Section 1. Definitions. As used in this Agreement:***

(a) The term "Beneficiary" shall have the meaning assigned thereto in Section 3 of this Agreement.

(b) The term "Business Day" means any day, other than a Saturday or a Sunday, that banks are open for business in [ ], USA.

(c) The term "Claim Certificate" shall have the meaning assigned thereto in Section 4(a) of this Agreement.

(d) The term "Fund" shall have the meaning assigned thereto in Section 3 of this Agreement.

(e) The term "Grantor" shall have the meaning assigned thereto in the first paragraph of this Agreement.

(f) The term "Objection Notice" shall have the meaning assigned thereto

in Section 4(b) of this Agreement.

(g) The term "Site" shall have the meaning assigned thereto in Section 2 of this Agreement.

(h) The term "Trust" shall have the meaning assigned thereto in Section 3 of this Agreement.

(i) The term "Trustee" shall mean the trustee identified in the first paragraph of this Agreement, along with any successor trustee appointed pursuant to the terms of this Agreement.

(j) The term "Work" shall have the meaning assigned thereto in the Consent Decree.

**Section 2. Identification of Facilities and Costs.** This Agreement pertains to costs for Work required at the [ ] site in [ ] County, [ ] (the "Site"), pursuant to the above referenced Consent Decree.

**Section 3. Establishment of Trust Fund.** The Grantor and the Trustee hereby establish a trust (the "Trust"), for the benefit of EPA (the "Beneficiary"), to assure that funds are available to pay for performance of the Work in the event that Grantor fails to conduct or complete the Work required by, and in accordance with the terms of, the Consent Decree. The Grantor and the Trustee intend that no third party shall have access to monies or other property in the Trust except as expressly provided herein. The Trust is established initially as consisting of funds in the amount of [ ] U.S. Dollars (\$ ). Such funds, along with any other monies and/or other property hereafter deposited into the Trust, and together with all earnings and profits thereon, are referred to herein collectively as the "Fund." The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor owed to the United States.

**Section 4. Payment for Work Required Under the Consent Decree.** The Trustee shall make payments from the Fund in accordance with the following procedures.

(a) From time to time, the Grantor and/or its representatives or contractors may request that the Trustee make payment from the Fund for Work performed under the Consent Decree by delivering to the Trustee and EPA a written invoice and certificate (together, a "Claim Certificate") signed by an officer of the Grantor (or the relevant representative or contractor) and certifying:

(i) that the invoice is for Work performed at the Site in accordance with the Consent Decree;

(ii) a description of the Work that has been performed, the amount of the claim, and the identity of the payee(s); and

(iii) that the Grantor has sent a copy of such Claim Certificate to EPA, both to the EPA attorney and the EPA RPM at their respective addresses shown in this Agreement, the date on which such copy was sent, and the date on which such copy was received by EPA as evidenced by a return receipt (which return receipt may be written, as in the case of overnight delivery, certified mail, or other similar delivery methods, or electronic, as in the case of e-mail, facsimile, or other similar delivery methods).

(b) EPA may object to any payment requested in a Claim Certificate submitted by the Grantor (or its representatives or contractors), in whole or in part, by delivering to the Trustee a written notice (an "Objection Notice") within thirty (30) days after the date of EPA's receipt of the Claim Certificate as shown on the relevant return receipt. An Objection Notice sent by EPA shall state (i) whether EPA objects to all or only part of the payment requested in the relevant Claim Certificate; (ii) the basis for such objection, (iii) that EPA has sent a copy of such Objection Notice to the Grantor and the date on which such copy was sent; and (iv) the portion of the payment requested in the Claim Certificate, if any, which is not objected to by EPA, which undisputed portion the Trustee shall proceed to distribute in accordance with Section 4(d) below. EPA may object to a request for payment contained in a Claim Certificate only on the grounds that the requested payment is either (x) not for the costs of Work under the Consent Decree or (y) otherwise inconsistent with the terms and conditions of the Consent Decree.

(c) If the Trustee receives a Claim Certificate and does not receive an Objection Notice from EPA within the time period specified in Section 4(b) above, the Trustee shall, after the expiration of such time period, promptly make the payment from the Fund requested in such Claim Certificate.

(d) If the Trustee receives a Claim Certificate and also receives an Objection Notice from EPA within the time period specified in Section 4(b) above, but which Objection Notice objects to only a portion of the requested payment, the Trustee shall, after the expiration of such time period, promptly make payment from the Fund of the uncontested amount as requested in the Claim Certificate. The Trustee shall not make any payment from the Fund for the portion of the requested payment to which EPA has objected in its Objection Notice.

(e) If the Trustee receives a Claim Certificate and also receives an Objection Notice from EPA within the time period specified in Section 4(b) above, which Objection Notice objects to all of the requested payment, the Trustee shall not make any payment from the Fund for amounts requested in such Claim Certificate.

(f) If, at any time during the term of this Agreement, EPA implements a "Work Takeover" pursuant to the terms of the Consent Decree and intends to direct payment of monies from the Fund to pay for performance of Work during the period of such Work Takeover, EPA shall notify the Trustee in writing of EPA's commencement of such Work Takeover. Upon receiving such written notice from EPA, the disbursement procedures set forth in Sections 4(a)-(e) above shall immediately be suspended, and the Trustee shall thereafter make payments from the Fund only to such person or persons as

the EPA may direct in writing from time to time for the sole purpose of providing payment for performance of Work required by the Consent Decree. Further, after receiving such written notice from EPA, the Trustee shall not make any disbursements from the Fund at the request of the Grantor, including its representatives and/or contractors, or of any other person except at the express written direction of EPA. If EPA ceases such a Work Takeover in accordance with the terms of the Consent Decree, EPA shall so notify the Trustee in writing and, upon the Trustee's receipt of such notice, the disbursement procedures specified in Sections 4(a)-(e) above shall be reinstated.

(g) While this Agreement is in effect, disbursements from the Fund are governed exclusively by the express terms of this Agreement.

**Section 5. Trust Management.** The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with directions which the Grantor may communicate in writing to the Trustee from time to time, except that:

(a) securities, notes, and other obligations of any person or entity shall not be acquired or held by the Trustee with monies comprising the Fund, unless they are securities, notes, or other obligations of the U.S. federal government or any U.S. state government or as otherwise permitted in writing by the EPA;

(b) the Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent such deposits are insured by an agency of the U.S. federal or any U.S. state government; and

(c) the Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

**Section 6. Commingling and Investment.** The Trustee is expressly authorized in its discretion to transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions hereof and thereof, to be commingled with the assets of other trusts participating therein.

**Section 7. Express Powers of Trustee.** Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) to make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(b) to register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of



such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the U.S. federal government or any U.S. state government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund; and

(c) to deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the U.S. federal government.

***Section 8. Taxes and Expenses.*** All taxes of any kind that may be assessed or levied against or in respect of the Fund shall be paid from the Fund. All other expenses and charges incurred by the Trustee in connection with the administration of the Fund and this Trust shall be paid by the Grantor.

***Section 9. Annual Valuation.*** The Trustee shall annually, no more than thirty (30) days after the anniversary date of establishment of the Fund, furnish to the Grantor and to the Beneficiary a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The annual valuation shall include an accounting of any fees or expenses levied against the Fund. The Trustee shall also provide such information concerning the Fund and this Trust as EPA may request from time to time.

***Section 10. Advice of Counsel.*** The Trustee may from time to time consult with counsel with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder; provided, however, that any counsel retained by the Trustee for such purposes may not, during the period of its representation of the Trustee, serve as counsel to the Grantor.

***Section 11. Trustee Compensation.*** The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing with the Grantor and as notified in writing to the Beneficiary.

***Section 12. Trustee and Successor Trustee.*** The Trustee and any replacement Trustee must be approved in writing by EPA and must not be affiliated with the Grantor. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee approved in writing by EPA and this successor accepts such appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to EPA

or a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the Fund and the Trust in a writing sent to the Grantor, the Beneficiary, and the present Trustee by certified mail no less than 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 8.

**Section 13. Instructions to the Trustee.** All instructions to the Trustee shall be in writing, signed by such persons as are empowered to act on behalf of the entity giving such instructions. The Trustee shall be fully protected in acting without inquiry on such written instructions given in accordance with the terms of this Agreement. The Trustee shall have no duty to act in the absence of such written instructions, except as expressly provided for herein.

**Section 14. Amendment of Agreement.** This Agreement may be amended only by an instrument in writing executed by the Grantor and the Trustee, and with the prior written consent of EPA.

**Section 15. Irrevocability and Termination.** This Trust shall be irrevocable and shall continue until terminated upon the earlier to occur of (a) the written direction of EPA to terminate, consistent with the terms of the Consent Decree and (b) the complete exhaustion of the Fund comprising the Trust as certified in writing by the Trustee to EPA and the Grantor. Upon termination of the Trust pursuant to Section 15(a), all remaining trust property (if any), less final trust administration expenses, shall be delivered to the Grantor.

**Section 16. Immunity and Indemnification.** The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct made by the Trustee in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

**Section 17. Choice of Law.** This Agreement shall be administered, construed, and enforced according to the laws of the State of [\_\_\_\_\_].

**Section 18. Interpretation.** As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

**Section 19. Notices.** All notices and other communications given under this agreement shall be in writing and shall be addressed to the parties as follows or to such other address as the parties shall by written notice designate:

(a) If to the Grantor, to [\_\_\_\_\_].

(b) If to the Trustee, to [\_\_\_\_\_].

(c) If to EPA, to [EPA Region \_\_\_\_, Remedial Project Manger for the Site] and [EPA Region \_\_\_\_, Office of Regional Counsel contact for the Site], at [\_\_\_\_\_].

[Remainder of page left blank intentionally.]

**In Witness Whereof**, the parties hereto have caused this Agreement to be executed by their respective officers duly authorized and attested as of the date first above written:

GRANTOR

[Signature of Grantor]  
[Name and Title]

State of \_\_\_\_\_  
County of \_\_\_\_\_

On this [date], before me personally came [name of Grantor official], to me known, who, being by me duly sworn, did depose and say that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

TRUSTEE

[Signature of Trustee]  
[Name and Title]

State of \_\_\_\_\_  
County of \_\_\_\_\_

On this [date], before me personally came [name of Trustee official], to me known, who, being by me duly sworn, did depose and say that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

## GUARANTEE AGREEMENT

This GUARANTEE AGREEMENT, dated as of [\_\_\_\_], 200 (this “Guarantee”), is made by [\_\_\_\_], a [\_\_\_\_] organized and existing under the laws of the State of [\_\_\_\_] (“Guarantor”), to and for the benefit of the United States Environmental Protection Agency, an agency of the federal government of the United States of America (“EPA”). This Guarantee is made on behalf of [\_\_\_\_] (“Settling Defendant”), which is an [affiliate] of Guarantor.

### RECITALS

WHEREAS, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9607 et seq. (“CERCLA”), Settling Defendant has entered into a Consent Decree with EPA, dated [\_\_\_\_], 2006, Docket No. \_\_\_\_\_ (the “Consent Decree”), for certain environmental remediation work to be performed at the \_\_\_\_\_ site (the “Site”) near [City], [State];

WHEREAS, Section [XIII] of the Consent Decree requires that Settling Defendant provide financial assurance to EPA that funds or other resources will be available as and when needed to ensure completion of the work required to be conducted by Settling Defendant under the Consent Decree;

WHEREAS, in order to provide part of such financial assurance required by the Consent Decree, Settling Defendant has agreed to provide EPA with a guarantee, issued by Guarantor, of Settling Defendant’s obligations arising under the Consent Decree, all as set forth more fully in this Guarantee;

WHEREAS, Settling Defendant is a [wholly-owned direct subsidiary] of Guarantor, and the Guarantor will receive substantial benefits from the agreements made by and between EPA and Settling Defendant as set forth in the Consent Decree; and

WHEREAS, Guarantor has agreed to, among other things, guarantee payment and performance in full of the Guaranteed Obligations (as hereinafter defined) and undertake such other commitments to EPA or for EPA’s benefit as set forth in this Guarantee.

### AGREEMENT

NOW, THEREFORE, in consideration of the promises contained herein, and to induce EPA to enter into the Consent Decree and to settle with Settling Defendant under CERCLA as contemplated thereby, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Guarantor hereby agrees with EPA as follows:

ARTICLE I.  
DEFINITIONS

1.1 Defined Terms. The following terms (whether or not underscored) when used in this Guarantee, including its preamble and recitals, shall have the following meanings:

“Affiliate” means, when used with respect to a specified entity, another entity that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the entity specified.

“Annual Audited Financial Statements” means an entity’s annual audited financial statements prepared in accordance with U.S. Generally Accepted Accounting Procedures.

“Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an entity, whether through the ownership or control of voting securities, partnership interests or other equity interests, by contract, or otherwise, and “Controlling” and “Controlled” shall have meanings correlative thereto.

“EPA” has the meaning given in the preamble to this Guarantee.

“Guaranteed Obligations” means and includes all obligations and liabilities, howsoever arising, owed by Settling Defendant to EPA of every kind and description (whether or not for the payment of money), direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising, pursuant to the terms of the Consent Decree.

“Guarantor” has the meaning given in the preamble to this Guarantee.

“Guarantee” has the meaning given in the preamble to this Guarantee.

“Site” has the meaning given in the preamble to this Guarantee.

1.2 General Definitions. Unless otherwise defined herein or unless the context otherwise requires, capitalized terms used in this Guarantee, including its preamble and recitals, have the meanings provided in the Consent Decree.

ARTICLE II.  
GUARANTEE

2.1 Guarantee.

(a) Guarantor, as primary obligor and not merely as surety, hereby unconditionally and irrevocably guarantees to EPA the prompt payment in full and the prompt performance in full of the Guaranteed Obligations.

(b) Guarantor agrees that if for any reason Settling Defendant shall fail to pay or perform, as the case may be, when due any of the Guaranteed Obligations, Guarantor

shall promptly pay or perform, as the case may be, the same forthwith on the date such payment or performance of such Guaranteed Obligation is due or required, without regard to any exercise or non-exercise by Guarantor, Settling Defendant, or EPA of any right, remedy, power or privilege under or in respect of the Consent Decree, and that in the case of any extension of time of the payment, performance, or renewal of any of the Guaranteed Obligations, the same will be promptly paid or performed, as the case may be, in full when due in accordance with the terms of such extension or renewal.

(c) Without limiting the foregoing, Guarantor acknowledges and agrees that, upon the occurrence and during the continuance of a "Work Takeover" as specified in Section [ ] of the Consent Decree, at the election of EPA, Guarantor shall immediately upon written demand from EPA deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed as of such date, as determined by EPA..

## 2.2 Obligations Absolute and Unconditional.

(a) The obligations of Guarantor hereunder are primary obligations of Guarantor and constitute an absolute, unconditional, continuing and irrevocable guarantee of payment and performance of the Guaranteed Obligations and the other obligations of Guarantor hereunder and not of collectibility, and are in no way conditioned on or contingent upon any attempt to enforce in whole or in part Settling Defendant's liabilities and obligations to EPA. Each failure by Guarantor to pay or perform, as the case may be, a Guaranteed Obligation or any other obligation hereunder shall give rise to a separate cause of action hereunder, and separate suits may be brought hereunder as each cause of action arises.

(b) EPA may, at any time and from time to time (whether or not after revocation or termination of this Guarantee) without the consent of or notice to Guarantor, except such notice as may be required by the Consent Decree or applicable law which cannot be waived, without incurring responsibility to Guarantor, without impairing or releasing the obligations of Guarantor hereunder, upon or without any terms or conditions and in whole or in part:

(i) change the manner, place and terms of payment or performance of, or renew or alter, any Guaranteed Obligation or any obligations and liabilities (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, or in any manner modify, amend or supplement the terms of the Consent Decree or any documents, instruments or agreements executed in connection therewith, in each case with the consent of Settling Defendant (in each case, as and to the extent required by the Consent Decree), and the agreements and guarantees herein made shall apply to the Guaranteed Obligations or such other obligations as changed, extended, renewed, modified, amended, supplemented or altered in any manner;

(ii) exercise or refrain from exercising any rights against Settling Defendant or others (including Guarantor) or otherwise act or refrain from acting;

(iii) add or release any other guarantor from its obligations without affecting or impairing the obligations of Guarantor hereunder;

(iv) settle or compromise any Guaranteed Obligations or any obligations and liabilities incurred directly or indirectly in respect thereof;

(v) consent to or waive any breach of, or any act, omission or default under, the Consent Decree or otherwise amend, modify or supplement (with the consent of Settling Defendant, as and to the extent required by the Consent Decree) the Consent Decree or any of such other instruments or agreements; and/or

(viii) act or fail to act in any manner referred to in this Guarantee which may deprive Guarantor of its right to subrogation against Settling Defendant to recover full indemnity for any payments or performances made pursuant to this Guarantee or of its right of contribution against any other party.

(c) No invalidity, irregularity or unenforceability of the Guaranteed Obligations or invalidity, irregularity, unenforceability or non-perfection of any collateral therefor, shall affect, impair or be a defense to this Guarantee, which is a primary obligation of Guarantor.

(d) This is a continuing Guarantee and all obligations to which it applies or may apply under the terms hereof shall be conclusively presumed to have been created in reliance hereon. In the event that, notwithstanding the provisions of Section 2.2(a) above, this Guarantee shall be deemed revocable in accordance with applicable law, then any such revocation shall become effective only upon receipt by EPA of written notice of revocation signed by Guarantor. To the extent permitted by applicable law, no revocation or termination hereof shall affect, in any manner, rights arising under this Guarantee with respect to Guaranteed Obligations arising prior to receipt by EPA of written notice of such revocation or termination. Any such revocation or termination without EPA's prior written consent shall be deemed to be a violation of the Consent Decree.

### ARTICLE III. REPRESENTATIONS AND WARRANTIES

3.1 Guarantor Representations and Warranties. Guarantor represents and warrants to and in favor of EPA, as of the date of this Guarantee, that:

3.1.1 Existence. Guarantor is duly organized and validly existing under the laws of the jurisdiction of its incorporation and is qualified to do business in such jurisdiction and in each other jurisdiction in which the conduct of its business requires such qualification.

3.1.2 Power and Authorization. Guarantor has full power and authority to enter into and execute this Guarantee. This Guarantee has been duly authorized, executed and delivered by Guarantor.



3.1.3 No Conflict. The execution, delivery and performance by Guarantor of this Guarantee and the execution, delivery, and performance by Settling Defendant of the Consent Decree do not and will not (a) violate any provision of (i) any legal requirement applicable to Guarantor, (ii) the organizational and other corporate governance documents of Guarantor or (iii) any order, judgment or decree of any court or agency or governmental instrumentality binding on Guarantor, (b) conflict with, result in a breach of, or constitute a default under any material contractual obligation of Guarantor, (c) result in or require the creation or imposition of any lien upon any of the properties or assets of Guarantor, or (d) require any approval or consent of any person or entity, except for such approvals or consents which will be obtained on or before the date of this Guarantee and which have been disclosed in writing to EPA.

3.1.4 Enforceable Obligations. This Guarantee constitutes a legal, valid and binding obligation of Guarantor, enforceable in accordance with its terms, except to the extent that enforceability may be limited by applicable bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting the enforcement of creditors' rights generally.

3.1.5 Compliance with Law: Fraud.

(a) Guarantor (i) is not in violation of any applicable legal requirements in any material respect and (ii) is not subject to or in default in any material respect with respect to any final judgments, writs, injunctions, decrees, rules or regulations of any court or any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, in the case of either (i) or (ii) which would have a material adverse effect on the ability of Guarantor to perform its obligations under this Guarantee.

(b) Guarantor is not executing this Guarantee with any intention to hinder, delay or defraud any present or future creditor or creditors of Guarantor.

3.1.6 Relationship To Settling Defendant. Guarantor [is the owner of a direct or indirect interest in] [has a "substantial business relationship" (as defined in 40 C.F.R. § 264.141(h)) with] Settling Defendant.

3.1.7 No Bankruptcy Filing. Guarantor is not contemplating either the filing of a petition by it under any state or federal bankruptcy or insolvency laws or the liquidation of all or a major portion of its assets or property, and Guarantor has no knowledge of any person contemplating the filing of any such petition against it.

ARTICLE IV.  
COVENANTS

Guarantor hereby covenants and agrees for the benefit of EPA, until this Guarantee is terminated pursuant to Section 6.16, as follows:

4.1 Maintenance of Corporate Existence. Guarantor shall maintain and preserve its existence and all material rights, privileges and franchises necessary in the normal conduct of its business. Guarantor shall notify EPA in writing within 60 days after any change in its name or place of business or chief executive office, or change in its type of organization or jurisdiction of organization.

4.2 Compliance with Laws. Guarantor shall promptly comply, or cause compliance, in all material respects with all legal requirements to the extent any noncompliance with such legal requirements could have a material adverse effect on the ability of Guarantor to perform and discharge its obligations under this Guarantee.

4.3 Notice of Bankruptcy or Insolvency, Etc. Guarantor shall notify EPA within 10 days after the occurrence of any of the following: filing by the Guarantor of a petition seeking to take advantage of any laws relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts; Guarantor's consent to (or failure to contest in a timely manner) any petition filed against it in an involuntary case under such bankruptcy or other laws; Guarantor's application for (or consent to or failure to contest in a timely manner) the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator, or the like of itself or of all or a substantial part of its assets; Guarantor's making a general assignment for the benefit of creditors; or Guarantor's taking any corporate action for the purpose of effecting any of the foregoing

4.4 Further Assurances. Guarantor shall promptly provide EPA with such information and other documents related to this Guarantee and the Guaranteed Obligations that EPA may reasonably request.

4.5 Compliance with Financial Measures. Guarantor shall at all times during the term of this Guarantee comply with and satisfy the financial measures and conditions set forth in either Exhibit A or Exhibit B attached hereto. Guarantor shall also notify EPA immediately if, at any time during the term hereof, Guarantor fails or has reason to believe that it may fail any of the financial measures set forth in Exhibit A or Exhibit B, as the case may be.

4.6 Submission of Documents. For so long as this Guarantee is in effect, within 90 days after the close of each fiscal year of Guarantor, Guarantor shall submit to EPA:

(a) a letter signed by Guarantor's Chief Financial Officer certifying Guarantor's compliance with the financial conditions and measures set forth in either Exhibit A or Exhibit B, which letter shall be substantially in the form of Exhibit C attached hereto; and

(b) a copy of Guarantor's audited financial statements for its latest completed fiscal year, and a copy of the Guarantor's independent certified public accountant's

report on examination of such financial statements, which report on examination shall be unqualified or, if qualified, shall have been approved in writing by EPA; and

(c) a special report from Guarantor's independent certified public accountant to Guarantor attesting to Guarantor's compliance with the financial conditions and measures set forth in either Exhibit A or Exhibit B, which special report shall be substantially in the form of Exhibit D hereto.

ARTICLE V.  
SUBROGRATION; ETC.

5.1 Waiver. Guarantor hereby unconditionally and irrevocably waives and relinquishes, to the maximum extent permitted by applicable legal requirements, all rights and remedies accorded to sureties or guarantors and agrees not to assert or take advantage of any such rights or remedies, including:

(a) any right to require EPA to proceed against Settling Defendant or any other person or to pursue any other remedy in EPA's power before proceeding against Guarantor;

(b) any defense that may arise by reason of the incapacity, lack of power or authority, dissolution, merger, or termination of Guarantor, Settling Defendant, or any other person or the failure of EPA to file or enforce a claim against the estate (in administration, bankruptcy or any other proceeding) of Guarantor or Settling Defendant, or any other person;

(c) promptness, diligence, demand, presentment, protest and notice of any kind, including notice of the existence, creation or incurring of any new or additional indebtedness or obligation or of any action or non-action on the part of Settling Defendant or EPA;

(d) any defense based upon an election of remedies by EPA, which destroys or otherwise impairs the subrogation rights of Guarantor, the right of Guarantor to proceed against Settling Defendant or another person for reimbursement, or both;

(e) any defense based on any offset against any amounts which may be owed by any person to Guarantor for any reason whatsoever;

(f) any defense based on any act, failure to act, delay or omission whatsoever on the part of Settling Defendant or the failure by Settling Defendant to do any act or thing or to observe or perform any covenant, condition or agreement to be observed or performed by it under the Consent Decree;

(g) any defense based upon any statute or rule of law which provides that the obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal;

(h) any defense, setoff or counterclaim which may at any time be available to or asserted by Settling Defendant against EPA or any other person under the Consent Decree;

(i) any duty on the part of EPA to disclose to Guarantor any facts EPA may now or hereafter know about Settling Defendant or the Site, regardless of whether EPA has reason to believe that any such facts materially increase the risk beyond that which Guarantor intends to assume, or have reason to believe that such facts are unknown to Guarantor, or have a reasonable opportunity to communicate such facts to Guarantor, since Guarantor acknowledges that Guarantor is fully responsible for being and keeping informed of the financial condition of Settling Defendant and of all circumstances bearing on the risk of non-payment or non-performance of any Guaranteed Obligation;

(j) any defense based on any change in the time, manner or place of any payment or performance under, or in any other term of, the Consent Decree, or any other amendment, renewal, extension, acceleration, compromise or waiver of or any consent or departure from the terms of the Consent Decree;

(k) any right to assert the bankruptcy or insolvency of Settling Defendant or any other person as a defense hereunder or as the basis for rescission hereof and any defense arising because of EPA's institution of any proceeding under the Federal Bankruptcy Code; and

(l) any other circumstance (including any statute of limitations), any act or omission by Settling Defendant, or any existence of or reliance on any representation by Settling Defendant or EPA that might otherwise constitute a defense available to, or discharge of, any guarantor or surety.

5.2 Subrogation. Until this Guarantee is terminated in accordance with Section 6.16 below, neither Guarantor nor Settling Defendant shall exercise any right of subrogation or enforce any remedy which it now may have or may hereafter have against any person in respect of the Guaranteed Obligations, whether or not such claim, right or remedy arises in equity, under contract, by statute, under common law or otherwise.

### 5.3 Bankruptcy.

(a) The obligations of Guarantor under this Guarantee shall not be altered, limited or affected by any proceeding, voluntary or involuntary, involving the bankruptcy, reorganization, insolvency, receivership, liquidation or arrangement of Settling Defendant or any Affiliate thereof, or by any defense which Settling Defendant or any Affiliate thereof may have by reason of any order, decree or decision of any court or administrative body resulting from any such proceeding.

(b) Guarantor hereby irrevocably waives, to the extent it may do so under applicable legal requirements, any protection against enforcement of this Guarantee to which it may be entitled under the Federal Bankruptcy Code or equivalent provisions of the laws or regulations of any other jurisdiction with respect to any proceedings, or any successor provision of law of similar import, in the event of any bankruptcy event with respect to Settling

Defendant. Specifically, in the event that the trustee (or similar official) in a bankruptcy event with respect to Settling Defendant or the debtor-in-possession takes any action (including the institution of any action, suit or other proceeding for the purpose of enforcing the rights of Settling Defendant under this Guarantee), Guarantor shall not assert any defense, claim or counterclaim denying liability hereunder on the basis that this Guarantee or the Consent Decree is an executory contract or a "financial accommodation" that cannot be assumed, assigned or enforced or on any other theory directly or indirectly based on the Federal Bankruptcy Code, or equivalent provisions of the law or regulations of any other jurisdiction with respect to any proceedings or any successor provision of law of similar import. If a bankruptcy event with respect to Settling Defendant shall occur, Guarantor agrees, after the occurrence of such bankruptcy event, to reconfirm in writing, to the extent permitted by applicable legal requirements and at EPA's written request, its pre-petition waiver of any protection to which it may be entitled under the Federal Bankruptcy Code or equivalent provisions of the laws or regulations of any other jurisdiction with respect to proceedings and, to give effect to such waiver, Guarantor consents to the assumption and enforcement of each provision of this Guarantee by the debtor-in-possession or Settling Defendant's trustee in bankruptcy, as the case may be.

5.4 Reinstatement. This Guarantee and the obligations of Guarantor hereunder shall continue to be effective or be automatically reinstated, as the case may be, if and to the extent that for any reason any payment or performance by or on behalf of Guarantor in respect of the Guaranteed Obligations is rescinded or otherwise restored to Guarantor or Settling Defendant, whether as a result of any proceedings in bankruptcy or reorganization or otherwise, all as if such payment or performance had not been made, and Guarantor agrees that it will indemnify EPA on demand for all reasonable costs and expenses (including reasonable fees of counsel) incurred by EPA in connection with any such rescission or restoration.

## ARTICLE VI. MISCELLANEOUS

6.1 Obligations Secured. Without limiting the generality of the foregoing, this Guarantee secures the payment and performance when due of all Guaranteed Obligations. If, notwithstanding the representation and warranty set forth in Section 3.1.4 or anything to the contrary herein, enforcement of the liability of Guarantor under this Guarantee for the full amount of the Guaranteed Obligations would be an unlawful or voidable transfer under any applicable fraudulent conveyance or fraudulent transfer law or any comparable law, then the liability of Guarantor hereunder shall be reduced to the highest amount for which such liability may then be enforced without giving rise to an unlawful or voidable transfer under any such law.

6.2 Successions or Assignments. This Guarantee is binding upon Guarantor and its successors and permitted assigns. Guarantor may not assign any of its obligations hereunder without the prior written consent of EPA (and any purported assignment in violation of this Section shall be void).

6.3 Other Waivers. No delay or omission on the part of EPA in exercising any of its rights (including those hereunder) and no partial or single exercise thereof and no

action or non-action by EPA, with or without notice to Guarantor, Settling Defendant, or any other person, shall constitute a waiver of any rights or shall affect or impair this Guarantee.

6.4 Headings. The headings in this Guarantee are for convenience of reference only and shall not constitute a part of this Guarantee for any other purpose or be given any substantive effect.

6.5 Remedies Cumulative. Each and every right and remedy of EPA hereunder shall be cumulative and shall be in addition to any other right or remedy given hereunder or under the Consent Decree, or now or hereafter existing at law or in equity.

6.6 Severability. Any provision of this Guarantee that may be determined by competent authority to be prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

6.7 Amendments. This Guarantee may be amended, waived or otherwise modified only with the written consent of the parties hereto, the written consent of EPA and otherwise in accordance with the terms of the Consent Decree.

6.8 Jurisdiction. Guarantor agrees that any legal action or proceeding by or against Guarantor or with respect to or arising out of this Guarantee may be brought by the United States in or removed to [INSERT DISTRICT COURT ENTERING CONSENT DECREE.] By execution and delivery of this Guarantee, Guarantor accepts, for itself and in respect of its property, generally and unconditionally, the non-exclusive jurisdiction of the aforesaid court. Guarantor irrevocably consents to the service of process out of the aforementioned court in any manner permitted by law. Any such process or summons in connection with any such action or proceeding may also be served by mailing a copy thereof by certified or registered mail, or any substantially similar form of mail, addressed to Guarantor as provided for notices hereunder. Guarantor hereby waives any right to stay or dismiss any action or proceeding under or in connection with this Guarantee or the Consent Decree brought before the foregoing court on the basis of *forum non-conveniens*. Nothing herein shall affect the right of EPA to bring legal action or proceedings in any other competent jurisdiction.

6.9 Governing Law. This Guarantee and the rights and obligations of EPA and Guarantor shall be governed by, and construed in accordance with, the law of the State of [ ] without reference to principles of conflicts of law.

6.10 Integration of Terms. This Guarantee, together with the Consent Decree, is intended by the parties as a final expression of their agreement and is intended as a complete and exclusive statement of the terms and conditions thereof.

6.11 Notices. Any communications between the parties hereto or notices provided herein to be given may be given to the following addresses:

If to Guarantor:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Attention: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

If to EPA: EPA Regional Administrator or Regional Superfund Director for  
EPA Region [ ] (or any of their designees)

\_\_\_\_\_  
Attention: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

With a copy to: [ORC Contact; RPM]

\_\_\_\_\_  
Attention: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

All notices or other communications required or permitted to be given hereunder shall be in writing and shall be considered as properly given (a) if delivered in person, (b) if sent by overnight delivery service (including Federal Express, UPS and other similar overnight delivery services), (c) if mailed by first class United States Mail, postage prepaid, registered or certified with return receipt requested, (d) if sent by facsimile or (e) if sent via other electronic means (including electronic mail). Notice so given shall be effective upon receipt by the addressee, except that communication or notice so transmitted by facsimile or other direct written electronic means shall be deemed to have been validly and effectively given on the day on which it is transmitted if transmitted before 4:00 p.m., recipient's time, and if transmitted after that time, on the next following Banking Day; provided, however, that (i) if any notice is tendered to an addressee and the delivery thereof is refused by such addressee, such notice shall be effective upon such tender, and (ii) with respect to any notice given via facsimile or other electronic means, the sender of such message shall promptly provide the addressee with an original copy of such notice by any of the means specified in clauses (a), (b) or (c) above. Any party shall have the right to change its address for notice hereunder to any other location within the continental United States by giving five days' notice to the other parties in the manner set forth above.

#### 6.12 Collection Expenses.

(a) Without regard to any limitation set forth in this Guarantee, if EPA is required to pursue any remedy against Guarantor hereunder, Guarantor shall pay to EPA upon demand therefore, all reasonable attorneys' fees and all other costs and expenses incurred by

EPA in enforcing this Guarantee (and such fees, costs and expenses shall be deemed to be part of the Guaranteed Obligations).

6.13 Counterparts. This Guarantee and any amendments, waivers, consents or supplements hereto or in connection herewith may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed and delivered shall be deemed an original, but all such counterparts together shall constitute one and the same agreement.

6.14 Limitations on Liability. No claim shall be made by Guarantor against EPA or any of its employees, attorneys or agents for any loss of profits, business or anticipated savings, special or punitive damages or any indirect or consequential loss whatsoever in respect of any breach or wrongful conduct (whether or not the claim therefor is based on contract, tort or duty imposed by law), in connection with, arising out of or in any way related to the transactions contemplated by this Guarantee or the Consent Decree or any act or omission or event occurring in connection therewith; and Guarantor hereby waives, releases and agrees not to sue upon any such claim for any such damages, whether or not accrued and whether or not known or suspected to exist in their favor.

6.15 Time. Time is of the essence of this Guarantee.

6.16 Termination. Subject to Section 5.4, this Guarantee and all of the obligations of Guarantor hereunder shall terminate upon the earlier of (a) payment and performance in full of all Guaranteed Obligations in accordance with the Consent Decree and (b) the substitution of a different financial assurance mechanism in accordance with Section [ ] of the Consent Decree as consent to in writing by EPA. Unless earlier terminated pursuant to the foregoing sentence, this Guarantee shall survive any foreclosure proceedings instituted, commenced, or completed against Settling Defendant.

6.17 Consent Decree. Guarantor acknowledges that it has been provided with a copy of the Consent Decree and has read and is familiar with the provisions of the Consent Decree.

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IN WITNESS WHEREOF, the parties hereto, by their authorized representatives duly authorized, intending to be legally bound, have caused this Guarantee to be duly executed and delivered as of the date first above written.

[INSERT NAME OF GUARANTOR],  
a \_\_\_\_\_ corporation,  
as Guarantor

By: \_\_\_\_\_  
Name:  
Title:

[NOTARY BLOCK]

## EXHIBIT A

### Section 4.5(a) Financial Conditions

As calculated from the data contained in Guarantor's Annual Audited Financial Statement, the Guarantor must:

- (A) Satisfy two of the following three ratios: (1) a ratio of total liabilities to Net Worth less than 2.0; (2) a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and (3) a ratio of current assets to current liabilities greater than 1.5; and
- (B) Have a Net Working Capital and Tangible Net Worth each at least six times the Total Value of Environmental Obligations; and
- (C) Have a Tangible Net Worth of at least \$10 million; and
- (D) Have assets located in the United States amounting to at least 90 percent of total assets or at least six times the Total Value of Environmental Obligations.

#### Defined Terms for Exhibit A and Exhibit B

"Net Working Capital" means current assets minus current liabilities.

"Net Worth" means total assets minus total liabilities.

"Tangible Net Worth" means the value of tangible assets included in the calculation of Net Worth; this value would not include the value of intangibles such as goodwill and rights to patents or royalties.

"Total Value of Environmental Obligations" means the sum of:

(a) the dollar amount of financial assurance required by Paragraph [ ] of the Consent Decree [or the relevant portion if multiple financial assurance mechanisms are being used];

(b) the total dollar amount of financial assurance provided by the Guarantor to EPA through the use of a financial test and/or a guarantee for CERCLA settlements other than that embodied in the Consent Decree; and

(c) the total dollar amount of financial assurance provided by the Guarantor to EPA through the use of a financial test and/or a guarantee for purposes of any facility regulated under federal environmental programs other than CERCLA, including but not limited to hazardous waste Treatment, Storage, and Disposal ("TSD") facilities under 40 CFR parts 264 and 265, Municipal Solid Waste Landfill ("MSWLF") facilities under 40 CFR part 258, Underground Injection Control ("UIC") facilities under 40 CFR part 144, Underground Storage Tank ("UST") facilities under 40 CFR part 280, and Polychlorinated Biphenyl ("PCB") storage facilities under 40 CFR part 761.

## **EXHIBIT B**

### Section 4.5(b) Financial Conditions

The Guarantor must have:

- (A) A current rating for its most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and
- (B) Tangible Net Worth at least six times the Total Value of Environmental Obligations; and
- (C) Tangible Net Worth of at least \$10 million; and
- (D) Assets located in the United States amounting to at least 90 percent of total assets or at least six times the Total Value of Environmental Obligations.

### Defined Terms for Exhibit A and Exhibit B

"Net Working Capital" means current assets minus current liabilities.

"Net Worth" means total assets minus total liabilities.

"Tangible Net Worth" means the value of tangible assets included in the calculation of Net Worth; this value would not include the value of intangibles such as goodwill and rights to patents or royalties.

"Total Value of Environmental Obligations" means the sum of:

(a) the dollar amount of financial assurance required by Paragraph [ ] of the Consent Decree [or the relevant portion if multiple financial assurance mechanisms are being used];

(b) the total dollar amount of financial assurance provided by the Guarantor to EPA through the use of a financial test and/or a guarantee for CERCLA settlements other than that embodied in the Consent Decree; and

(c) the total dollar amount of financial assurance provided by the Guarantor to EPA through the use of a financial test and/or a guarantee for purposes of any facility regulated under federal environmental programs other than CERCLA, including but not limited to hazardous waste Treatment, Storage, and Disposal ("TSD") facilities under 40 CFR parts 264 and 265, Municipal Solid Waste Landfill ("MSWLF") facilities under 40 CFR part 258, Underground Injection Control ("UIC") facilities under 40 CFR part 144, Underground Storage Tank ("UST") facilities under 40 CFR part 280, and Polychlorinated Biphenyl ("PCB") storage facilities under 40 CFR part 761.

**EXHIBIT C**

Form CFO Letter

**EXHIBIT D**

Form Auditors' Letter