

UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION III
 Four Penn Center
 1600 John F. Kennedy Boulevard
 Philadelphia, PA 19103

IN THE MATTER OF:)
)
 Mountain State Carbon Coke Plant)
 1851 Main Street)
 Follansbee, WV 26037)
)
 EPA I.D. No. WVD004319539)
)
 Mountain State Carbon, LLC)
)
 Respondent)
)
)
 Proceeding under Section 3008(h))
 of the Resource Conservation and)
 Recovery Act, 42 U.S.C. § 6928(h))
)
)

RCRA Docket No. 03-2023-0112CA

**ADMINISTRATIVE ORDER
ON CONSENT**

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I. JURISDICTION

1. This Administrative Order on Consent (“Order”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and Mountain State Carbon, LLC (“Mountain State” or “Respondent”) regarding an approximately 88.46-acre parcel (“MSC Parcel”) which is part of the former Mountain State Carbon Coke Plant, located at 1851 Main Street Follansbee, West Virginia (“the Facility”). This Order provides for the performance of corrective action activities at or in connection with the MSC Parcel. A map that generally depicts the MSC Parcel is attached hereto as Appendix A.

2. This Order is issued under Section 3008(h) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976 (“RCRA”), as amended by the Hazardous and Solid Waste Amendments of 1984, as amended 42 U.S.C. § 6928(h). The Administrator of EPA has delegated the authority to issue orders under Section 3008(h) to the Regional Administrator of Region III by EPA Delegation Nos. 8-31, dated Jan. 17, 2017, and 8-32, dated May 11, 1994, and this authority has been further delegated by the Regional Administrator for Region III to the Director of the Land, Chemical and Redevelopment Division (“LCRD”) by EPA Delegations Nos. 8-31 and 8-32, both dated April 15, 2019.

3. EPA granted the State of West Virginia (“the State”) authorization to operate a state hazardous waste program in lieu of the federal program, pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), effective May 29, 1986. Subsequent to the May 29, 1986 authorization, EPA granted authorization for revisions to the State’s authorized hazardous waste program since that time. The State, however, does not have authority to enforce Section 3008(h) of RCRA. The State has been given notice of the issuance of this Order.

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

5. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order, including any right of judicial review under Chapter 7 of the Administrative Procedures Act, 5 U.S.C. §§ 701-706, and 40 C.F.R. Part 24 providing for review of final agency action.

II. PARTIES BOUND

6. This Order is binding upon EPA and upon Respondent and its agents, successors, and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property, shall not alter Respondent's responsibilities under this Order. Any conveyance of title, easement, or other interest in the MSC Parcel shall not affect Respondent's obligations under this Order.

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

8. Respondent shall provide a copy of this Order to each contractor hired to perform the Work and to each person representing Respondent with respect to the MSC Parcel or the Work. Respondent shall ensure that written notice of the Order is provided to all subcontractors hired to perform any portion of the Work required by this Order. Respondent shall be responsible for ensuring that its contractors and subcontractors perform the Work in accordance with the terms of this Order.

III. STATEMENT OF PURPOSE

9. In entering into this Order, the mutual objectives of EPA and Respondent are:

a. to perform Interim Measures ("IM") at the MSC Parcel to evaluate and mitigate threats to human health or the environment;

b. to implement a West Virginia Voluntary Remediation Program ("VRP") Site Assessment Work Plan ("SAWP"), in accordance with the RCRA Facility Investigation ("RFI") Statement of Work ("SOW"), to determine fully the nature and extent of any release of Hazardous Waste at or from the MSC Parcel;

c. to implement a VRP Remedial Action Workplan ("RAWP"), in accordance with:

1) the Corrective Measures Study ("CMS") SOW to identify and evaluate alternatives for the corrective measures necessary to prevent, mitigate, and remediate any releases of Hazardous Wastes at or from the MSC Parcel and

2) the Corrective Measures Implementation ("CMI") SOW, to perform the corrective measures selected by EPA in a Final Decision and Response to Comments ("FDRTC") for the MSC Parcel ("Final Remedy"); and

d. to perform any other activities necessary to correct or evaluate actual or potential threats to human health or the environment resulting from the release or potential release of Hazardous Waste at or from the MSC Parcel.

IV. DEFINITIONS

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

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

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

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

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

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

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

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

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

“Order” shall mean this Administrative Order on Consent and any appendices attached hereto (listed in Section XXIII (Integration/Appendices)) and all modifications made thereto in accordance with Paragraph 39 (Modifications) of this Order. Deliverables approved, conditionally-approved, or modified by EPA will be incorporated into and become enforceable parts of this Order.

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

“Parties” shall mean EPA and Respondent.

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

“Respondent” shall mean Mountain State Carbon, LLC.

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

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

“State” shall mean the State of West Virginia.

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

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

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

“VRP” shall mean the West Virginia Voluntary Remediation Program.

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

V. FINDINGS OF FACT

11. Respondent neither admits nor denies the following Findings of Fact:

a. Respondent is a corporation and is a person as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

b. Respondent is the owner and operator of the MSC Parcel, an approximately 88.46-acre parcel located along State Route 2 in Follansbee, Brooke County, West Virginia. The MSC Parcel includes a former coke plant, and a wastewater treatment plant.

c. The MSC Parcel is part of a larger parcel that was subject to a Final Administrative Order (FAO) issued by EPA to Wheeling Pittsburgh Steel Corporation (WPSC) on June 23, 1998 (U.S. EPA Docket No. RCRA-III-080-CA).

c. Respondent intends to decommission and demolish the former coke plant with work that began in 2022 and is currently ongoing. Following decommissioning, the MSC Parcel will be marketed for commercial and/or industrial use.

d. The MSC Parcel is part of a facility authorized to operate under Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), for purposes of Section 3008(h) of RCRA, 42 U.S.C. § 6928(h).

e. WPSC or its successors have completed a series of investigations and submitted several reports to EPA under the FAO, including but not limited to:

- Interim Measures– Byproducts Area Free Product Removal and Coal Tar Pipeline Release Area Product Removal.
- Description of Current Conditions Report submitted to EPA on August 31, 1998, approved via letter dated June 29, 1999.
- RFI Work Plan submitted to EPA on November 5, 1999, conditionally approved via letter dated August 14, 2003. Final Work Plan submitted September 17, 2003.
- RFI Report submitted to EPA on September 30, 2005.
- Phase II RFI Work Plan submitted to EPA on September 4, 2009, approved via letter dated March 30, 2012.

f. Semi-volatile organic compounds (“SVOCs”), metals, and cyanide have been detected in sediments on the MSC Parcel.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

12. EPA hereby determines that there is or has been a release of Hazardous Waste within the meaning of 3008(h) of RCRA, 42 U.S.C. § 6928(h), into the environment from the MSC Parcel and that the corrective action and/or other response measures required by this Order are necessary to protect human health or the environment.

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

13. Respondent has designated, and EPA has not disapproved, the following individual as Project Coordinator, who shall be responsible for administration of all actions by Respondent required by this Order: Keith Nagel, Director, Environmental Land & Real Estate, Cleveland Cliffs, Inc., 200 Public Square, Suite 3400, Cleveland, OH 44114, 216-694-5700, keith.nagel1@clevelandcliffs.com. The Project Coordinator must have sufficient expertise to

coordinate the Work and must be present at the MSC Parcel or readily available during implementation of the Work. If EPA disapproves of the designated Project Coordinator, Respondent shall designate and notify EPA of an alternate within 14 days. EPA has designated Caitlin Elverson of the Land, Chemicals and Redevelopment Division, Region III as EPA's Project Coordinator. EPA and Respondent shall have the right, subject to this Paragraph, to change their designated Project Coordinators. Respondent shall notify EPA 14 days before such a change is made. The initial notification by Respondent of a change in the Project Coordinator may be made orally, but shall be promptly followed by a written notice.

14. Respondent has retained David Olson, Vice President, Civil & Environmental Consultants, Inc., 4350 Northern Pike, Suite 141 Monroeville, PA, 15146, 724-327-5200, dolson@cecinc.com to perform the Work. EPA retains the right to disapprove any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves a selected contractor, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within 60 days after EPA's disapproval. With respect to any proposed contractor, Respondent shall demonstrate that the proposed contractor demonstrates compliance with ASQ/ANSI E4:2014 "Quality management systems for environmental information and technology programs – Requirements with guidance for use" (American Society for Quality, February 2014), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans ("QA/R-2")" (EPA/240/B-01/002, Mar. 2001, reissued May 2006) or equivalent documentation as determined by EPA. The qualifications of the persons undertaking the Work for Respondent shall be subject to EPA review for verification that such persons meet objective assessment criteria (*e.g.*, experience, capacity, technical expertise) and do not have a conflict of interest with respect to the project.

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

VIII. WORK TO BE PERFORMED

16. General Work Requirements

EPA and Respondent acknowledge that the work Respondent performs under the VRP may be used to meet the requirements this Order upon submission to and written approval by EPA. Specifically, the Site Assessment Report ("SAR") and SAWP shall be used to meet the requirements in Section 17.B of this Order for a RFI, a RAWP shall be used to meet the requirements in Section 17.C of this Order for the Corrective Measures Study Work Plan and Corrective Measures Study Report; and shall be used to meet the requirements in Section 17.D of this Order for the Corrective Measures Implementation Workplan.

a. Pursuant to Section 3008(h) of RCRA, Respondent agrees to and is hereby ordered to perform the Work in accordance with any SOW, workplan, or schedule developed

pursuant to this Order. Respondent shall perform all Work undertaken pursuant to this Order in a manner consistent with RCRA and other applicable federal and state laws and their implementing regulations; applicable EPA guidance documents, including but not limited to those available at: <https://www.epa.gov/hwcorrectiveactioncleanups/corrective-action-resources-specific-epas-region-3> For any regulation or guidance referenced in the Order, the reference will be read to include any subsequent modification, amendment, or replacement of such regulation or guidance. Such modifications, amendments, or replacements apply to the Work only after Respondent receives notification from EPA of the modification, amendment, or replacement.

b. EPA acknowledges that Respondent may have completed some of the tasks required by this Order. Respondent may also have made available some of the information and data required by this Order. This previous work may be used to meet the requirements of this Order upon submission to and written approval by EPA.

c. Within 120 days after the Effective Date, Respondent shall submit to EPA a Health and Safety Plan (“HASP”) that describes all activities to be performed to protect all persons on and off site from physical, chemical, and all other hazards posed by the Work. Respondent shall develop the HASP in accordance with EPA’s Emergency Responder Health and Safety and Occupational Safety and Health Administration (“OSHA”) requirements under 29 C.F.R. §§ 1910 and 1926. The HASP should cover all Work and should be updated, as appropriate, to cover activities after Work completion. EPA does not approve the HASP but will review it to ensure that all necessary elements are included and that the HASP provides for the protection of human health or the environment.

d. All written documents prepared by Respondent pursuant to this Order shall be submitted according to the procedures set forth in Section XIII (Reporting and Document Certification). With the exception of progress reports and the HASP, all such submittals will be reviewed and approved by EPA in accordance with Section XIV (Agency Approvals/Additional Work/Modifications).

e. Respondent will communicate frequently and in good faith with EPA to assure successful completion of the requirements of this Order. At a minimum, Respondent shall provide EPA with annual progress reports commencing on the last day of the month that is one year after the Effective Date and annually thereafter throughout the period that this Order is effective.

f. If, at any time while performing Work, Respondent identifies an immediate or potential threat to human health or the environment, discovers new releases of Hazardous Waste, or discovers new solid waste management units (“SWMUs”) or Areas of Concern not previously identified, Respondent shall notify EPA orally within 48 hours of such discovery, and in writing within five days after such discovery, summarizing the immediacy and magnitude of the potential threat(s) to human health or the environment. Upon written request of EPA, Respondent shall submit to EPA any relevant document (e.g., a revised workplan) that identifies necessary actions to mitigate the newly identified circumstances. If EPA determines that immediate action is required, EPA’s Project Coordinator may orally agree to the proposed necessary actions prior to EPA’s receipt of the documentation. In this situation, Respondent may

have additional notification or other obligations under RCRA, CERCLA, or another legal authority.

17. Phases of Corrective Action

a. Interim Measures (“IM”)

(1) Commencing on the Effective Date of this Order and continuing thereafter, in the event Respondent identifies an immediate or potential threat to human health and/or the environment at or from the MSC Parcel, or discovers new releases of Hazardous Waste and/or Hazardous Constituents at or from the MSC Parcel not previously identified, Respondent shall notify the EPA Project Coordinator orally within 48 hours of discovery and notify EPA in writing within five (5) calendar days of such discovery summarizing the immediacy and magnitude of the potential threat(s) to human health or the environment. Upon written request of EPA, Respondent shall submit to EPA for approval an IM Work Plan in accordance with the IM SOW. If EPA determines that immediate action is required, the EPA Project Coordinator may orally authorize Respondent to act prior to EPA’s receipt of the IM Work Plan.

(2) Commencing on the Effective Date of this Order and continuing thereafter, if EPA identifies an immediate or potential threat to human health and/or the environment at the MSC Parcel, or discovers new releases of Hazardous Waste and/or Hazardous Constituents at or from the MSC Parcel not previously identified, EPA will notify Respondent in writing. Within ten (10) days of receiving EPA's written notification, Respondent shall submit to EPA for approval an IM Work Plan in accordance with the IM Scope of Work that identifies interim measures which will mitigate the threat. If EPA determines that immediate action is required, the EPA Project Coordinator may orally require Respondent to act prior to Respondent's receipt of EPA's written notification.

(3) All IM Work Plans shall ensure that the interim measures are designed to mitigate immediate or potential threats to human health and/or the environment and should be consistent with the objectives of, and contribute to the performance of the Final Remedy selected by EPA in a Final Decision and Response to Comments (“FDRTC”) and any amendment thereto.

(4) Each IM Work Plan shall include the following sections as appropriate and approved by EPA: Interim Measures Objectives, Public Involvement Plan, Data Collection Quality Assurance, Data Management, Design Plans and Specifications, Operation and Maintenance, Project Schedule, Interim Measures Construction Quality Assurance, and Reporting Requirements. Concurrent with submission of an IM Work Plan, Respondent shall submit to EPA an IM Health and Safety Plan.

b. RCRA Facility Investigation (“RFI”)

EPA and Respondent acknowledge that the work Respondent performs under the VRP, specifically under the SAWP, may be used to meet the requirements of an RFI SOW.

(1) Within 90 days after the Effective Date of this Order, Respondent shall submit to EPA for review and approval a SAWP and project schedule developed in accordance with the RFI SOW. Once the SAWP is approved by EPA, Respondent shall implement the SAWP according to the approved project schedule.

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

(3) In accordance with the SAWP, Respondent shall submit to EPA for review and approval a SAR.

c. Corrective Measures Study (“CMS”)

EPA and Respondent acknowledge that the work Respondent performs under the VRP, specifically under the RAWP, may be used to meet the requirements of the CMS SOW.

(1) Within 60 days after EPA’s approval of the SAR, Respondent shall submit to EPA for review and approval a RAWP for CMS and project schedule developed in accordance with the CMS SOW. Once approved by EPA, Respondent shall implement the RAWP for CMS according to the approved project schedule.

(2) The RAWP for CMS shall provide, at a minimum, the following information: (i) a description of the overall purpose of the RAWP; (ii) the general approach to investigating and evaluating potential corrective measures; (iii) the corrective measure objectives, including proposed target Media Cleanup Standard(s) (MCS) and points of compliance or a description of how a risk assessment will be performed to develop MCS; (iv) the specific corrective measure technologies and/or corrective measure alternatives to be studied; (v) a description of any proposed pilot, laboratory or bench scale

(3) studies; and a (vi) a description of overall project management, including a proposed schedule for implementing the RAWP and a proposed outline for RAWP.

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

(5) The RAWP Report for CMS shall contain an estimate of the cost, including capital and annual operation and maintenance costs, and a recommendation as to which corrective measures, in Respondent's opinion, are the most appropriate, and the rationale for such recommendation. In addition, the RAWP Report shall contain, at a minimum, information to show how each of the corrective measure alternatives studied will: (i) be protective of human health or the environment; (ii) attain the media cleanup standards set by the West Virginia Remediation Program; (iii) control the source(s) of release(s) so as to reduce or eliminate, to the extent practicable, further releases of Hazardous Waste that might pose threats to human health or the environment; (iv) comply with applicable standards for waste management; (v) achieve long-term reliability and effectiveness; (vi) reduce toxicity, mobility, or volume of waste; and (vii) achieve short-term effectiveness.

d. Corrective Measures Implementation ("CMI")

EPA and Respondent acknowledge that the work Respondent performs under the VRP, specifically under the RAWP, may be used to meet the requirements of a CMI SOW.

(1) Within 60 days after EPA's selection of the Final Remedy, Respondent shall submit to EPA for review and approval a RAWP for CMI and project schedule developed in accordance with the CMI SOW. Once approved by EPA, Respondent shall implement the EPA-approved RAWP for CMI in accordance with the requirements and schedules contained therein.

e. CMI Assessment Report Every five years from the Effective Date of this Order, Respondent shall submit to EPA for review and approval a CMI Assessment Report. The CMI Assessment Report shall include whether each component of the Order is being complied with, whether human health and the environment continue to be protected from unacceptable risk if any posed by exposure if any to release addressed by this Order, whether the Final Remedy or any amendment thereto is expected to achieve media cleanup objectives within a reasonable time frame given existing and reasonably anticipated future circumstances.

18. Public Comment and Participation

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

b. Following the public comment period, EPA will select the Final Remedy and will notify the public of the decision and rationale in a FDRTC. If the Final Remedy

by EPA differs significantly from the corrective measures recommended in the Statement of Basis, EPA will explain in the FDRTC the reason for such difference.

IX. QUALITY ASSURANCE

19. As part of the SAWP, the QAPP shall address all sampling, monitoring, and analyses activities to be performed pursuant to the SAWP and RAWP for CMI.

20. Commencing on the date of EPA approval of the initial QAPP and continuing thereafter, Respondent shall ensure all work performed pursuant to the SAWP and RAWP for CMI is conducted in accordance with the current EPA-approved QAPP.

21. The QAPP shall address quality assurance and quality control procedures for all sampling, monitoring and analyses activities performed pursuant to the SAWP and RAWP for CMI including but not limited to groundwater level monitoring, sample collection, sample analysis, sample management, chain of custody, data management, data validation, and data reporting.

22. Respondent shall develop the QAPP in accordance with “EPA Requirements for Quality Assurance Project Plans,” QA/R-5, EPA/240/B-01/003 (Mar. 2001, reissued May 2006), “Guidance for Quality Assurance Project Plans,” QA/G-5, EPA/240/R 02/009 (Dec. 2002), and other applicable guidance as identified by EPA. The QAPP also must include procedures:

- a. To ensure that all analytical data used in decision making relevant to this Order are of known and documented quality;
- b. To ensure that EPA and its authorized representatives have reasonable access to laboratories used by Respondent (“Respondent’s Labs”) in implementing the Order;
- c. To ensure that Respondent’s Labs analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring;
- d. To ensure that Respondent’s Labs perform all analyses using EPA-accepted methods according to the latest approved edition of “Test Methods for Evaluating Solid Waste (SW-846)” or other methods approved by EPA;
- e. To ensure that Respondent’s Labs participate in an EPA-accepted quality assurance/quality control (“QA/QC”) program or other QA/QC program acceptable to EPA.
- f. For Respondent to provide EPA with notice at least 28 days prior to any sample collection activity;
- g. For Respondent to provide split samples or duplicate samples to EPA upon request; any analysis of such samples shall be in accordance with the approved QAPP;

- h. For EPA to take any additional samples that it deems necessary;
- i. For EPA to provide to Respondent, upon request, split samples or duplicate samples in connection with EPA's oversight sampling; and
- j. For Respondent to submit to EPA all sampling and test results and other data in connection with the implementation of this Order.

X. PROPERTY REQUIREMENTS

23. **Agreements Regarding Access and Non-Interference.** Respondent shall, with respect to the MSC Parcel: (i) provide EPA and its representatives, contractors, and subcontractors with access at all reasonable times to the MSC Parcel to conduct any activity regarding this Order, including those activities listed in Paragraph 23.a (Access Requirements); and (ii) refrain from using the MSC Parcel in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Hazardous Waste, or interfere with or adversely affect the implementation, integrity, or protectiveness of the Final Remedy. In addition, Respondent shall, with respect to real property ("other property") where EPA determines, at any time, that access and/or land, water, or other resource use restrictions are needed to perform the Work required by this Order, use "best efforts" to secure from the owner(s) of such other property, an agreement, enforceable by Respondent and by EPA, providing that such owner(s): (i) provide EPA and its representatives, contractors, and subcontractors with access at all reasonable times to such other property to conduct any activity regarding the Order, including those activities listed in Paragraph 23.a (Access Requirements); and (ii) refrain from using such other property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Hazardous Waste, or interfere with or adversely affect the implementation, integrity, or any amendment thereto. Respondent shall provide a copy of such access agreement(s) to EPA.

a. **Access Requirements.** The following is a list of activities for which access is required regarding the MSC Parcel and other property:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to EPA or the State;
- (3) Conducting investigations regarding contamination at or near the MSC Parcel;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional corrective action activities at or near the MSC Parcel;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved QAPP;

(7) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Respondent or its agents, consistent with Section XI (Access to Information);

(8) Assessing Respondent's compliance with the Order;

(9) Determining whether the MSC Parcel or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Order; and

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

24. **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 land, water, or other resource use restrictions. If Respondent is unable to accomplish what is required through "best efforts" in a timely manner, Respondent shall notify EPA, and include a description of the steps taken to comply with the requirements. If EPA deems it appropriate, it may assist Respondent, or take independent action, in obtaining such access and/or land, water, or other resource use restrictions.

25. If EPA determines that, land, water, or other resource use restrictions in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls, or notices of contamination, notices of administrative action, or other notices are needed, Respondent shall cooperate with EPA's and the State's efforts to record, secure, and ensure compliance with such ICs.

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

a. Within 45 days of the Effective Date of this Order, Respondent shall submit to EPA for review and approval a notice to be recorded in the MSC Parcel property records, which would notify successors in title that (1) EPA has determined that corrective action activities are needed at the MSC Parcel and (2) that Respondent has entered into an Order requiring implementation of such selected corrective action activities. Filing this notice does not prohibit the filing and recording of other notices required by the VRP.

b. Within thirty (30) days of EPA's approval of the notice in Paragraph 26.a., Respondent shall use best efforts, as defined in Paragraph 24, to execute and record the notice with the Recorder's Office in Hancock County, WV and submit to EPA a file-stamped copy of the recorded notice.

c. Respondent shall, prior to entering into a contract to Transfer the MSC Parcel, or 60 days prior to Transferring the MSC Parcel, whichever is earlier:

(1) Notify the proposed transferee that EPA has determined that corrective action activities are needed at the MSC Parcel and that Respondent has

entered into an Order requiring implementation of such corrective action activities; and

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

27. In the event of any Transfer of the MSC Parcel, unless EPA otherwise consents in writing, Respondent shall continue to comply with its obligations under the Order, including its obligation to secure access and ensure compliance with any use restrictions regarding the MSC Parcel and to implement, maintain, monitor, and report on ICs.

28. Notwithstanding any provision of the Order, EPA retains all of its access authorities and rights, as well as all of its rights to require land, water, or other resource use restrictions and ICs, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations. Respondent reserves all rights and defenses it may have with respect to any future actions by EPA except as otherwise stipulated in this Order.

XI. ACCESS TO INFORMATION

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

30. Privileged and Protected Claims

a. Respondent may assert all or part of a Record requested by EPA is privileged or protected as provided under federal law, in lieu of providing the Record, provided Respondent complies with Paragraph 30.b and except as provided in Paragraph 30.c.

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

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

(1) Any data regarding the MSC Parcel, 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 MSC Parcel; or

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

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

32. Notwithstanding any provision on this Order, EPA retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under RCRA and any other applicable statutes or regulations. Respondent reserves all rights and defenses it may have with respect to any future actions by EPA except as otherwise stipulated in this Order.

XII. RECORD RETENTION

33. Record Retention

a. Until ten years after EPA issues the Acknowledgement of Termination pursuant to Paragraph 76, Respondent shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control, that relate in any manner to this Order or to Hazardous Waste management and/or disposal at the MSC Parcel. Respondent must also retain, and instruct its contractors and agents to preserve, for the same time period specified above, all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to performance of the Work, provided, however, that Respondent (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

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

except as provided in Paragraph 30 (Privileged and Protected Claims), Respondent shall deliver any such records to EPA.

c. Respondent certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the MSC Parcel since notification of potential liability by EPA or the State and that it has fully complied with any and all EPA and State requests for information regarding the MSC Parcel pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

XIII. REPORTING AND DOCUMENT CERTIFICATION

34. **General Requirements for Deliverables.** Respondent shall submit all deliverables in electronic form. Technical specifications for sampling and monitoring data and spatial data are addressed in Paragraph 35. All other deliverables shall be submitted to EPA in the electronic form specified by EPA's Project Coordinator. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5" by 11," Respondent shall contact EPA for a mailing address to send paper copies of such exhibits. All documents submitted pursuant to this Order shall be sent to:

Caitlin Elverson
RCRA Corrective Action Program Project Manager
Telephone: 215-814-5455
E-mail: elverson.caitlin@epa.gov

Documents to be submitted to Respondent shall be sent to:

Keith Nagel, Director, Land & Remediation
Cleveland Cliffs, Inc.
200 Public Square, Suite 3400,
Cleveland, OH 44114,
Telephone: 216-694-5733
Email: keith.nagel@clevelandcliffs.com.

And

David Olson - Vice President
Civil & Environmental Consultants, Inc.
4350 Northern Pike, Suite 141
Monroeville, PA 15146
Telephone: 724-327-5200
Email: dolson@cecinc.com

In addition, documents pursuant to Section XV (Financial Assurance) and any notice of destruction of documents pursuant to Section XII (Record Retention) shall be submitted to EPA's Project Coordinator.

35. Technical Specifications.

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

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

(1) in the ESRI File Geodatabase format; and

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

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

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

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

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

Signature: _____
Name: _____
Title: _____
Date: _____

XIV. AGENCY APPROVALS/ADDITIONAL WORK/MODIFICATIONS

37. EPA Approvals

Respondent shall copy EPA on all submissions made to WVDEP as part of the VRP.

a. Initial Submissions

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

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

b. **Resubmission.** Upon receipt of a notice of disapproval under Paragraph 37.a (Initial Submissions), or if required by a notice of approval upon specified conditions under Paragraph 37.a(1), Respondent shall, within 30 days, or ten calendar days in the case of an IM Workplan, or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the deliverable for approval. After review of the resubmitted deliverable, EPA may:

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

c. **Implementation.** Upon approval, approval upon conditions, or modification by EPA under Paragraph 37.a or 37.b, of any such deliverable, or portion thereof: (1) such deliverable, or portion thereof, will be incorporated into and become an enforceable part of this Order; and (2) Respondent shall take any action required by the deliverable, or portion thereof. The implementation of any non-deficient portion of a deliverable submitted or resubmitted under Paragraph 37.a or resubmitted under Paragraph 37.b does not relieve Respondent of any liability for stipulated penalties under Section XVI (Delay in Performance/Stipulated Penalties).

38. **Additional Work**

a. EPA may determine that certain tasks, including investigatory work, engineering evaluation, procedure/methodology modifications, or land, water, or other resource use restrictions or ICs, are necessary in addition to or in lieu of the tasks included in any EPA-approved workplan to meet the purposes set forth in Section III (Statement of Purpose). If EPA makes such a determination, EPA will notify Respondent in writing. Unless otherwise stated by EPA, within 30 days after the receipt of such determination, Respondent shall submit for EPA approval a workplan for the Additional Work. The workplan shall conform to the applicable requirements of Section VIII (Work to Be Performed). Upon approval of the workplan by EPA, Respondent shall implement it in accordance with the schedule and provisions contained therein. This Section does not alter or diminish EPA's Project Coordinator's authority to make oral modifications to any plan or schedule pursuant to Paragraph 39.a.

39. **Modifications**

a. EPA's Project Coordinator may modify any workplan, schedule, or SOW, in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of EPA's Project Coordinator's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

b. If Respondent seeks permission to deviate from any approved workplan, schedule, or SOW, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from EPA's Project Coordinator pursuant to Paragraph 39.a.

c. No informal advice, guidance, suggestion or comment by EPA's Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any written approval required by this Order, or to comply with all requirement of this Order, unless it is modified in writing pursuant to Paragraph 39.a.

XV. FINANCIAL ASSURANCE

40. Commencing annually from the effective date of EPA approval of the initial financial assurance instrument under this Order, Respondent shall submit to EPA certification and supporting documentation that financial assurance to address work remaining in this Order

remains in place, and that such financial assurance is valid, accessible to EPA, and reasonably addresses the cost of work remaining in this Order.

41. Estimated Cost of the Work

a. Within 60 days of the Effective Date of this Order, Respondent shall submit to EPA for review and approval detailed written estimates, in current dollars, of the cost of hiring a third party to perform the Work to be Performed under this Order (hereafter “Estimated Cost of the Work”). The Estimated Cost of the Work shall account for the total costs of the work activities that they cover, as described in Section VIII and the SOW(s), and any EPA-approved work plan(s), including any necessary long term costs, such as operation and maintenance costs and monitoring costs. A third party is a party who (i) is neither a parent nor a subsidiary of Respondent and (ii) does not share a common parent or subsidiary with Respondent. The cost estimates shall not incorporate any salvage value that may be realized from the sale of wastes, facility structures or equipment, land or other assets associated with the MSC Parcel.

b. Respondent shall annually adjust the Estimated Cost of the Work for inflation within 30 days before the close of Respondent’s fiscal year until the Work required by this Order is completed. In addition, Respondent shall adjust the Estimated Cost of the Work if EPA determines that any Additional Work is required, pursuant to Paragraph 38, or if any other condition increases the cost of the Work to be performed under this this Order.

c. Respondent shall submit each Estimated Cost of the Work to EPA for review annually within 30 calendar days before the close of Respondent’s fiscal year. EPA will review each cost estimate and notify Respondent in writing of EPA’s approval, disapproval, or modification of the cost estimate.

42. Assurances of Financial Responsibility for Completing the Work

a. Within 60 days after EPA approves the initial Estimated Cost of the Work, Respondent shall establish financial assurance for the benefit of the EPA. In the event that EPA approval of Respondent’s initial Estimated Cost of the Work is not received within 30 days after close of Respondent’s fiscal year, Respondent shall establish and maintain the financial assurance in the amount of the Estimated Cost of the Work submitted pursuant to Paragraph 41.a within 90 days of the end of its fiscal year. Respondent shall maintain adequate financial assurance until EPA releases Respondent from this requirement pursuant to Section XXII (Termination). Respondent shall update the financial instrument or financial test demonstration to reflect changes to the Estimated Cost of the Work within 90 days after the close of the Respondent’s fiscal year. Respondent may use one or more of the financial assurance forms described in subparagraphs (1) – (6) immediately below. Any and all financial assurance documents shall be satisfactory in form and substance as determined by EPA.

(1) A trust fund established for the benefit of EPA, administered by a trustee;

(2) A surety bond unconditionally guaranteeing performance of the Work in accordance with this Order, or guaranteeing payment at the direction of

EPA into a standby trust fund that meets the requirements of the trust fund in subparagraph (1) above;

(3) An irrevocable letter of credit, payable at the direction of the Director, Land, Chemicals and Redevelopment Division, into a standby trust fund that meets the requirements of the trust fund in subparagraph (1) above;

(4) An insurance policy that provides EPA with rights as a beneficiary, issued for a face amount at least equal to the current Estimated Cost of the Work, except where costs not covered by the insurance policy are covered by another financial assurance instrument;

(5) A corporate guarantee, executed in favor of EPA by one or more of the following: (1) a direct or indirect parent company, or (2) a company that has a “substantial business relationship” with Respondent (as defined in 40 C.F.R. § 264.141(h)), to perform the Work to Be Performed under Section VIII of this Order or to establish a trust fund as permitted by subparagraph (1) above; provided, however, that any company providing such a guarantee shall demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the portion of the Estimated Cost of the Work that it proposes to guarantee; or

(6) A demonstration by Respondent that it meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied.

b. Respondent shall submit all original executed and/or otherwise finalized instruments to the EPA Region III RCRA Financial Assurance Administrator, Claudia Scott, Scott.Claudia@epa.gov, 215-814-3240, within thirty (30) days after date of execution or finalization as required to make the documents legally binding. The RCRA Financial Assurance Administrator will provide Respondent with a mailing address to send paper copies. Respondent shall also provide copies to the EPA Project Coordinator.

c. If at any time Respondent provides financial assurance for completion of the Work by means of a corporate guarantee or financial test, Respondent shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these methods, and will promptly provide any additional information requested by EPA from Respondent or corporate guarantor within seven calendar days of its receipt of such request from EPA or the corporate guarantor.

d. For purposes of the corporate guarantee or the financial test described above, references in 40 C.F.R. § 264.143(f) to “the sum of current closure and post-closure costs and the current plugging and abandonment Estimated Cost of the Works” shall mean “the sum of all environmental remediation obligations, including, but not limited to, obligations under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601 et seq., RCRA, the Underground Injection Control Program promulgated pursuant to the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq., and the Toxic Substances

Control Act, 42 U.S.C. §§ 2601, et seq., and any other federal or state environmental obligation guaranteed by such company or for which such company is otherwise financially obligated in addition to the Estimated Cost of the Work.

e. Respondent may combine more than one mechanism to demonstrate financial assurance for the Work to Be Performed under Section VIII of this Order.

f. Respondent may satisfy its obligation to provide financial assurance for the Work to be Performed under Section VIII herein by providing a third party who assumes full responsibility for said Work and otherwise satisfies the obligations of the financial assurance requirements of this Order; however, Respondent shall remain responsible for providing financial assurance in the event such third party fails to do so and any financial assurance from a third party shall be in one of the forms provided in subparagraphs 42.a (1) through (6) above.

g. If at any time EPA determines that a financial assurance mechanism provided pursuant to this Paragraph 42 is inadequate, EPA shall notify Respondent in writing. If at any time Respondent becomes aware of information indicating that any financial assurance mechanism(s) provided pursuant to this Paragraph 42 is inadequate, Respondent shall notify EPA in writing of such information within ten days of Respondent's becoming aware of such information. Within 90 days of receipt of notice of EPA's determination, or within 90 days of Respondent's becoming aware of such information, Respondent shall establish and maintain adequate financial assurance for the benefit of EPA which satisfies all requirements set forth in this Section. Every financial assurance document provided pursuant to this Order shall be submitted to EPA for review in draft form at least 45 days before they are due to be filed and shall be satisfactory in form and substance as determined by EPA.

h. Respondent's inability or failure to establish or maintain financial assurance for completion of the Work to be Performed under Section VIII of this Order shall in no way excuse performance of any other requirements of this Order.

i. Release of Financial Assurance. Respondent may submit a written request to the Director, Land, Chemicals and Redevelopment Division that EPA release Respondent from the requirement to maintain financial assurance under this Section XV upon receipt of written notice from EPA pursuant to Section XXII that, as set forth therein, the terms of this Order have been satisfactorily completed. If said request is granted, the Director, Land, Chemicals and Redevelopment Division shall notify both the Respondent and the provider(s) of the financial assurance that Respondent is released from all financial assurance obligations under this Order.

43. Access to Financial Assurance

a. In the event that EPA determines that Respondent (i) has ceased implementation of any portion of the Work, (ii) is significantly or repeatedly deficient or late in its performance of the Work, or (iii) is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice ("Performance Failure Notice") to both the Respondent and the financial assurance provider of Respondent's failure to perform. The notice issued by EPA will specify the grounds upon which

such a notice was issued and will provide the Respondent with a period of ten days within which to remedy the circumstances giving rise to the issuance of such notice.

b. Failure by the Respondent to remedy its failure to perform to EPA's satisfaction before the expiration of the ten-day notice period specified in Paragraph 43.a, shall trigger EPA's right to have immediate access to and benefit of the financial assurance provided pursuant to Paragraphs 42.a(1) – (6). EPA may at any time thereafter direct the financial assurance provider to immediately (i) deposit into the standby trust fund, or a newly created trust fund approved by EPA, the remaining funds obligated under the financial assurance instrument (ii) or arrange for performance of the Work in accordance with this Order.

c. If EPA has determined that any of the circumstances described in clauses (i), (ii), or (iii) of Paragraph 43.a have occurred, and if EPA is nevertheless unable after reasonable efforts to secure the payment of funds or performance of the Work in accordance with this Order from the financial assurance provider pursuant to this Order, then, upon receiving written notice from EPA, Respondent shall within ten days thereafter deposit into the standby trust fund, or a newly created trust fund approved by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount equal to the estimated cost of the remaining Work to be performed in accordance with this Order as of such date, as determined by EPA.

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

e. Respondent may invoke the procedures set forth in Section XVII (Dispute Resolution) to dispute EPA's determination that any of the circumstances described in clauses (i), (ii), or (iii) of Paragraph 43.a has occurred. Invoking the dispute resolution provisions shall not excuse, toll, or suspend the obligation of the financial assurance provider under Paragraph 43.b of this Section to fund the trust fund or perform the Work. Furthermore, notwithstanding Respondent's invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion direct the trustee of such trust fund to make payments from the trust fund to any person that has performed the Work in accordance with this Order until the earlier of (i) the date that Respondent remedies, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Performance Failure Notice; or (ii) the date that a final decision is rendered in accordance with Section XVII (Dispute Resolution), that Respondent has not failed to perform the Work in accordance with this Order.

44. Modification of Amount, Form, or Terms of Financial Assurance

a. **Reduction of Amount of Financial Assurance.** If Respondent believes that the estimated cost to complete the remaining Work has diminished below the amount covered by the existing financial assurance provided under this Order, Respondent may, at the same time that Respondent submits the annual cost adjustment, pursuant to Paragraph 41.c, or at

any other time agreed to by EPA, submit a written proposal to EPA to reduce the amount of the financial assurance provided under this Section so that the amount of the financial assurance is equal to the estimated cost of the remaining Work to be performed. The written proposal shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval of a revised financial assurance amount, Respondent shall follow the procedures set forth in Paragraph 44.b(2) of this Section. If EPA decides to accept such a proposal, EPA shall notify Respondent of its decision in writing. After receiving EPA's written decision, Respondent may reduce the amount of the financial assurance only in accordance with and to the extent permitted by such written decision. In the event of a dispute, Respondent may reduce the amount of the financial assurance required hereunder only in accordance with the final EPA Dispute Decision resolving such dispute. No change to the form or terms of any financial assurance provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraph 44.b below.

b. Change of Form of Financial Assurance

(1) If Respondent desires to change the form or terms of financial assurance, Respondent may, at the same time that Respondent submits the annual cost adjustment, pursuant to Paragraph 41.c of this Section, or at any other time agreed to by EPA, submit a written proposal to EPA to change the form of financial assurance. The submission of such proposed revised or alternative form of financial assurance shall be as provided in Paragraph (2) below. The decision whether to approve a proposal submitted under this Paragraph 44 shall be made in EPA's sole and unreviewable discretion and such decision shall not be subject to challenge by Respondent pursuant to the dispute resolution provisions of this Order or in any other forum.

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

existing financial assurance instruments only after Respondent has submitted all executed and/or otherwise finalized new financial assurance instruments or other required documents to EPA.

c. **Release of Financial Assurance.** Respondent may submit a written request to the Director, Land, Chemicals and Redevelopment Division that EPA release the Respondent from the requirement to maintain financial assurance under this Section at such time as EPA and Respondent have both executed an “Acknowledgment of Termination and Agreement to Record Preservation and Reservation of Right” pursuant to Paragraph 76 of this Order. The Region III Director of the Land, Chemicals and Redevelopment Division shall notify both the Respondent and the provider(s) of the financial assurance that Respondent is released from all financial assurance obligations under this Order. Respondent shall not release, cancel, or terminate any financial assurance provided pursuant to this Section except as provided in this Paragraph or Paragraph 44.b(2). In the event of a dispute, Respondent may release, cancel, or terminate the financial assurance required hereunder only in accordance with a final administrative or judicial decision resolving such dispute.

XVI. DELAY IN PERFORMANCE/STIPULATED PENALTIES

45. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraph 46 for failure to comply with the requirements of this Order specified below, unless excused under Section XVIII (Force Majeure and Excusable Delay). “Comply” as used in the previous sentence, includes compliance by Respondent with all applicable requirements of this Order, within the deadlines established under this Order. If (i) an initially submitted or resubmitted deliverable contains a material defect and the conditions are met for modifying the deliverable under Section XIV (Agency Approvals/Additional Work/Modifications); or (ii) a resubmitted deliverable contains a material defect; then the material defect constitutes a lack of compliance for purposes of this Paragraph.

46. Stipulated Penalty Amounts

a. For failure to commence, perform or complete Work as prescribed in this Order: \$500 per day for one to seven days or part thereof of noncompliance, and \$1000 per day for each day of noncompliance, or part thereof, thereafter;

b. For failure to comply with the provisions of this Order after receipt of notice of noncompliance by EPA: \$500 per day for one to seven days or part thereof of noncompliance, and \$1000 per day for each day of noncompliance, or part thereof, thereafter; in addition to any stipulated penalties imposed for the underlying noncompliance;

c. For failure to submit deliverables as required by this Order, or for failure to comply with this Order not described in subparagraphs a. and b. immediately above: \$500 per day for one to seven days or part thereof of noncompliance, and \$1000 per day for each day of noncompliance, or part thereof, thereafter.

47. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Penalties shall continue to accrue

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

48. Following EPA's determination that Respondent has failed to comply with a requirement of this Order, EPA may give Respondent written notification of such noncompliance. EPA may send Respondent a written demand for payment of the penalties.

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

50. If Respondent fails to pay stipulated penalties when due, Respondent shall pay interest on the unpaid stipulated penalties as follows: interest shall begin to accrue on any unpaid stipulated penalty balance beginning on the 31st day after Respondent's receipt of EPA's demand. Interest shall accrue at the Current Value of Funds Rate established by the Secretary of the Treasury. Pursuant to 31 U.S.C. § 3717, an additional penalty of 6% per annum on any unpaid principal shall be assessed for any stipulated penalty payment which is overdue for 90 or more days. In addition, a handling fee of \$15 per month shall be assessed beginning on the 31st day after Respondent's receipt of EPA's demand.

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

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979078
St. Louis, MO 63197-9000

Payments shall include a reference to the name of the Facility, Respondent's name and address, email address and telephone number, the EPA docket number of this action, and the amount and method of payment. A copy of the transmittal request shall be sent simultaneously to EPA's Project Coordinator, the EPA Cincinnati Finance Office by email at cinwd_acctsreceivable@epa.gov, and the EPA Regional Hearing Clerk by email at R3_Hearing_Clerk@epa.gov.

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

53. Nothing in this Order shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including but not limited to 42 U.S.C. § 6928(h)(2); however, EPA shall not seek civil penalties pursuant to 42 U.S.C. § 6928(h)(2) for any violation for which a stipulated penalty is provided in this Order, except in the case of a willful violation of this Order.

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

XVII. DISPUTE RESOLUTION

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

56. **Informal Dispute Resolution.** If Respondent objects to any EPA action taken pursuant to this Order, it shall notify EPA in writing of its objection(s) within 14 days after such action. EPA and Respondent shall have 20 days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through informal negotiations (the "Negotiation Period"). Upon request of Respondent, the Negotiation Period may be extended at the sole discretion of EPA. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Order.

57. **Formal Dispute Resolution.** If the Parties are unable to reach an agreement within the Negotiation Period, Respondent shall, within 14 days after the end of the Negotiation Period, submit a statement of position to EPA's Project Coordinator. EPA may, within 20 days thereafter, submit a statement of position. Thereafter, an EPA management official at 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 Order. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

58. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Respondent under this Order not directly in dispute, unless EPA provides otherwise in writing. Except as provided in Paragraph 47, stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of the Order. In the event that Respondent does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVI (Delay in Performance/Stipulated Penalties).

XVIII. FORCE MAJEURE

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

60. If any event occurs or has occurred that may delay the performance of any obligation under this Order for which Respondent intends or may intend to assert a claim of force majeure, Respondent shall notify EPA’s Project Coordinator orally or, in her or his absence, the Director of the Land, Chemicals and Redevelopment Division, EPA Region III, within seven days of when Respondent first knew that the event might cause a delay. Within seven days thereafter, Respondent shall provide in writing to EPA an explanation of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent’s rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Respondent shall include with any notice available documentation supporting its claim that the delay was attributable to a force majeure. Respondent shall be deemed to know of any circumstance of which Respondent, any entity controlled by Respondent, or Respondent’s contractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Respondent from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under Paragraph 59 and whether Respondent has exercised its best efforts under Paragraph 59, EPA may, in its unreviewable discretion, excuse in writing Respondent’s failure to submit timely notices under this Paragraph.

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

62. If Respondent elects to invoke the dispute resolution procedures set forth in Section XVII (Dispute Resolution) regarding EPA’s decision, Respondent shall do so no later than 15 days after receipt of EPA’s notice. In any such proceeding, Respondent shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to

avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of Paragraph 60. If Respondent carries this burden, the delay at issue shall be deemed not to be a violation by Respondent of the affected obligation(s) of this Order identified to EPA.

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

XIX. RESERVATION OF RIGHTS

64. Notwithstanding any other provisions of this Order, EPA retains all of its authority to take, direct, or order any and all actions necessary to protect public health or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste or constituents of such wastes, on, at, or from the MSC Parcel, including but not limited to the right to bring enforcement actions under RCRA, CERCLA, and any other applicable statutes or regulations.

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

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

67. This Order is not intended to be nor shall it be construed to be a permit. Respondent acknowledges and agrees that EPA's approval of the Work and/or workplan does not constitute a warranty or representation that the Work and/or workplans will achieve the corrective measures completion criteria. Compliance by Respondent with the terms of this Order shall not relieve Respondent of its obligations to comply with RCRA or any other applicable local, state, or federal laws and regulations. Respondent reserves all rights and defenses it may have with respect to any future actions by EPA unless otherwise specified in this Order.

68. Respondent agrees not to contest this Order or any action or decision by EPA pursuant to this Order, including without limitation, decisions of the Regional Administrator, the Director, Land, Chemicals and Redevelopment Division, or any authorized representative of EPA prior to EPA's initiation of a judicial action to enforce this Order, including an action for penalties or an action to compel Respondent's compliance with the terms and conditions of this Order. In any action brought by EPA for violation of this Order, Respondent shall bear the burden of proving that EPA's actions were arbitrary and capricious and not in accordance with law.

XX. OTHER CLAIMS

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

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

71. Each Party will bear its own litigation costs.

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

XXI. INDEMNIFICATION

73. Respondent shall indemnify, save, and hold harmless the United States, its officials, agents, contractors, subcontractors, employees, and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on Respondent's behalf or under their control, in carrying out actions pursuant to this Order. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys' fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Order. Neither Respondent nor any such contractor shall be considered an agent of the United States.

74. 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.

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

XXII. TERMINATION

76. This Order shall be deemed satisfied upon Respondent's and EPA's execution of an "Acknowledgment of Termination and Agreement to Record Preservation and Reservation of Rights" ("Acknowledgment of Termination"). EPA will prepare the Acknowledgment of Termination for Respondent's signature. The Acknowledgment of Termination will specify that Respondent has demonstrated to the satisfaction of EPA that the terms of this Order, including any additional tasks determined by EPA to be required pursuant to this Order, have been satisfactorily completed. Respondent's execution of the Acknowledgment of Termination will affirm Respondent's continuing obligation to preserve all records as required in Section XII (Record Retention), to maintain any necessary Property Requirements as required in Section 18, to recognize EPA's Reservation of Rights as required in Section XIX, and to comply with Section XX (Other Claims) and Section XXI (Indemnification).

XXIII. INTEGRATION/APPENDICES

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

For Mountain State Carbon, LLC, Respondent:

 5/17/2023

Signed and Dated

Traci L. Forrester

Executive Vice President, Environmental & Sustainability

RESPONDENT Mountain State Carbon, LLC

IT IS SO AGREED AND ORDERED:

U.S. ENVIRONMENTAL PROTECTION AGENCY:

Digitally Signed and Dated

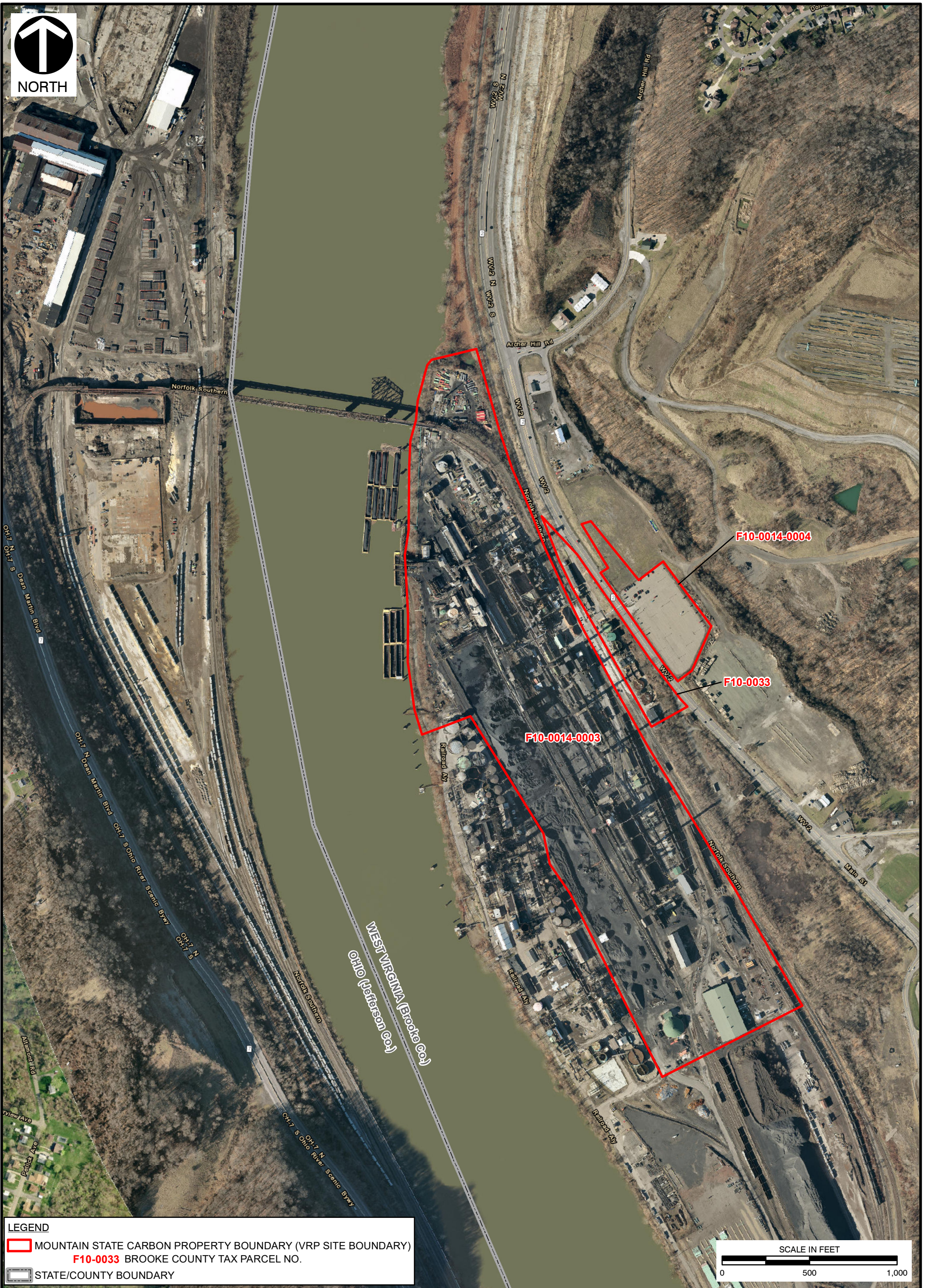
Dana Aunkst

Director

Land, Chemicals and Redevelopment Division

Region III

Exhibit A



LEGEND

- MOUNTAIN STATE CARBON PROPERTY BOUNDARY (VRP SITE BOUNDARY)
- F10-0033 BROOKE COUNTY TAX PARCEL NO.
- STATE/COUNTY BOUNDARY



REFERENCES
 STATE-WIDE PARCEL DATA FROM WEST VIRGINIA DEPT. OF REVENUE; DATE: 2021
 WEST VIRGINIA GIS TECHNICAL CENTER
 LEAF OFF MOSAIC IMAGERY FOR BROOKE COUNTY, 2020



Civil & Environmental Consultants, Inc.
 333 Baldwin Road - Pittsburgh, PA 15205-9072
 412-429-2324 • 800-365-2324
 www.cecinc.com

**MOUNTAIN STATE CARBON, LLC
 FOLLANSBEE, BROOKE COUNTY, WV**

VRP SITE BOUNDARY

DRAWN BY: JDM	CHECKED BY: DNO	APPROVED BY: * Hand signature on file	DRAFT
DATE: 06/15/2022	SCALE: 1" = 500'	PROJECT NO: 323-095	FIGURE NO: 1