UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
United States Department of the Army,	)	**Docket No. CERCLA-08-2020-0001**
	)	
Respondent.	)	

ORDER ON MOTIONS FOR ACCELERATED DECISION

This action was initiated on June 12, 2020, by Complainant Kenneth C. Schefski, Regional Counsel, United States Environmental Protection Agency, Region 8 ("EPA" or "the Agency"), filing an Administrative Complaint against Respondent, United States Department of the Army. The Complaint alleges that Respondent violated the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), codified as amended at 42 U.S.C. §§ 9601-9675, by failing or refusing to comply with the terms and conditions of an agreement entered into under the Act.

Respondent filed an Answer to the Complaint on August 6, 2020, denying the allegations, raising various defenses, and requesting a hearing.

The Agency filed its initial prehearing exchange and rebuttal prehearing exchange containing proposed exhibits ("CX") on October 1, 2020 and November 6, 2020, respectively. Respondent submitted its proposed exhibits ("RX") with a prehearing exchange filed October 23, 2020.

On December 7, 2020, the Agency filed a Motion for Partial Accelerated Decision and memorandum in support of its motion ("Agency's AD Motion") as to Respondent's liability.[1] Likewise, on that same day, Respondent filed a Motion for Accelerated Decision and memorandum in support of its motion ("Respondent's AD Motion") seeking dismissal of the Complaint.[2]

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[1] The Agency did not number the pages of its memorandum. Accordingly, page numbers cited in this Order will refer to the page number displayed when the electronic version of the filing is opened in Adobe Acrobat.

[2] Respondent requested oral argument on its motion. Oral argument is permitted at my discretion, and in this instance, I do not find it necessary. *See* 40 C.F.R. § 22.16(d).

On January 12, 2021, both parties filed response briefs to the opposing motions for accelerated decision ("Agency's Response" and "Respondent's Response").[3] On January 25, 2021, the Agency filed a reply brief ("Agency's Reply") in support of its AD Motion. Respondent filed a reply brief ("Respondent's Reply") in support of its AD Motion on January 29, 2021.[4]

I. Accelerated Decision Standard

Under the Rules of Practice that govern this proceeding, Administrative Law Judges are authorized to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). This standard is analogous to the summary judgment standard prescribed by Rule 56 of the Federal Rules of Civil Procedure. Although the Federal Rules do not directly apply here, the Environmental Appeals Board ("EAB") has consistently looked to Rule 56 and its jurisprudence when adjudicating motions for accelerated decision under Part 22. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999). Federal courts have endorsed this approach, describing Rule 56 as "the prototype for administrative summary judgment procedures" and its associated jurisprudence as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

Under the Federal Rules, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the

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[3] The same day, the Agency filed a Motion in Limine seeking to exclude from the record certain statements and documents it alleges contain confidential settlement communications. That motion is addressed in a separate Order. However, this Order did not rely on the statements or documents that are the subject of the motion in limine.

[4] Respondent initially filed a Reply Brief on January 25, 2021, but subsequently submitted a corrected filing to address formatting, citation, and grammatical errors. This Order will refer to and rely on the corrected document.

particular proceeding. *Id.* at 248, 250-52.

The party moving for summary judgment bears the burden of showing an absence of genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This includes an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). A party must support its assertion that a material fact cannot be or is genuinely disputed by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute exists by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

Evidentiary material and reasonable inferences drawn therefrom must be construed in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion permit denial of the motion for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

In applying these principles to motions for accelerated decision under Section 22.20(a) of the Rules of Practice, the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim.

Id. As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. The evidentiary standard that applies here is proof by a preponderance of the evidence. 40 C.F.R. § 22.24(b). The complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a).

II. Governing Substantive Law

Congress enacted CERCLA in 1980 "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (citing *United States v. Bestfoods*, 524 U.S. 51, 55 (1998)). "The Act was designed to promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Id.* (quoting *Consol. Edison Co. of N.Y. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005)). Through presidential delegation, CERCLA gives EPA "broad power to command government agencies and private parties to clean up hazardous waste sites" by initiating federal abatement and enforcement actions. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994); 42 U.S.C. §§ 9604, 9606. CERCLA also imposes liability on parties who contaminate sites for costs the federal government incurs in waste removal or remedial actions. Parties potentially responsible for contamination include the owners and operators of a facility where hazardous substances exist; any person who owned or operated the facility in the past when a hazardous substance was disposed of there; anyone who arranges for the disposal or treatment of hazardous substances at a facility; or any person who accepts such wastes for transport. *See Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 491-92 (S.D. Texas June 4, 2015); 42 U.S.C. §§ 9604, 9606, 9607. Like private entities, agencies of the federal government may be liable as potentially responsible parties. The provisions of CERCLA apply to departments, agencies, and instrumentalities of the federal government, and to the facilities[5] they own or operate,[6] in the same manner and to the same extent as they apply to nongovernmental entities. 42 U.S.C. § 9620(a).

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[5] A "facility" means not just a building, installation, or some other structure, but also includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9).

[6] The term "owner or operator" in this context means "any person owning or operating" the facility. 42 U.S.C. § 9601(20)(A). The term "person" includes the United States Government. 42 U.S.C. § 9601(2).

In administering cleanups under CERCLA, the Agency has created a list to prioritize sites ("National Priorities List") where releases of hazardous waste are known to have occurred or where there is the threat of such a release. 42 U.S.C. § 9605(a)(8)(B); 40 C.F.R. pt. 300; *United States v. Colorado*, 990 F.2d 1565, 1570 (10th Cir. 1993). These are sites across the United States "that are priorities for long-term remedial evaluation and response." 40 C.F.R. § 300.5. Where appropriate, EPA may add federal facilities to the National Priorities List. 42 U.S.C. § 9620(d). No more than six months after a federal facility is added to the National Priorities List, the agency that owns or operates the facility must, in consultation with EPA, commence a remedial investigation and feasibility study of the site. 42 U.S.C. § 9620(e)(1). Once EPA has reviewed the results of the investigation and study, the agency that owns the site must enter into an interagency agreement with EPA "for the expeditious completion . . . of all necessary remedial action at such facility." 42 U.S.C. § 9620(e)(2). Remedial actions at facilities subject to such interagency agreements—commonly known as Federal Facility Agreements—must be completed "as expeditiously as practicable." 42 U.S.C. § 9620(e)(3). Once a party enters into a Federal Facility Agreement with EPA, it is subject to civil penalties in accordance with 42 U.S.C. § 9609 if it "fails or refuses to comply with any term or condition" of the agreement. 42 U.S.C. § 9622(l). Pursuant to 42 U.S.C. § 9609(b)(5), the Agency may assess a civil administrative penalty of up to $59,017 per day for each day during which the party is in violation of the agreement.[7]

Congress has further provided for CERCLA remediation at property used or formerly used by the military through the Defense Environmental Restoration Program ("DERP"). *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 211, 100 Stat. 1613 (codified as amended at 10 U.S.C. §§ 2700-2711); *Warren Trust v. United States*, 107 Fed. Cl. 533, 540-41 (2012). Among other objectives, the goal of DERP is to clean up hazardous waste contamination at facilities under the jurisdiction of the Department of Defense ("DoD"). 10 U.S.C. § 2701(a)(1), (b)(1). Congress further mandated that the program "be carried out subject to, and in a manner consistent with" the federal facilities provisions of CERCLA and that the program be executed in consultation with EPA. 10 U.S.C. § 2701(a)(3), (a)(4). To pay for these efforts, Congress established "environmental restoration accounts" for each of the military service branches, including the Army. 10 U.S.C. § 2703(a)(2). The accounts are funded through the annual budget process, from funds recovered under CERCLA response actions, or reimbursements for the DoD's environmental response activities. 10 U.S.C. § 2703(d), (e). Funds that have been authorized for deposit in these accounts "may be obligated or expended from the account only to carry out the environmental restoration functions" of the DoD and "shall remain available until expended." 10 U.S.C. § 2703(c). The environmental restoration accounts are "the sole source of funds for all phases of an environmental remedy at a [DoD site]." 10 U.S.C. § 2703(g)(1). An "environmental remedy" under DERP is given the same

[7] The daily penalty was $25,000 at the time the statute was enacted. The penalty has been increased over time by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The inflated penalty amount set forth above applies to violations that occurred after November 2, 2015 and penalties assessed after December 23, 2020. *See* 28 U.S.C. § 2461 notes; 40 C.F.R. § 19.4.

definition as "remedy" or "remedial action" under CERCLA, and means "those actions consistent with permanent remedy taken instead of or in addition to removal actions" following the release of hazardous substances "so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 10 U.S.C. § 2703(g)(2); 42 U.S.C. § 9601(24).

The federal government's expenditures under CERCLA and DERP are generally subject to applicable appropriations law. The Appropriations Clause of the U.S. Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," i.e., "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting U.S. Const. Art. I, § 9, cl. 7) (quotation marks omitted) (citation omitted). Only when a law "specifically states that an appropriation is made" can it be construed to make an appropriation out of the Treasury. 31 U.S.C. § 1301(d). This does not mean a statute must use the word "appropriation." If it "contains a specific direction to pay and a designation of the funds to be used, . . . then this amounts to an appropriation." Government Accountability Office, Principles of Federal Appropriations Law at 2-23 (4th ed. 2016) ("GAO Red Book")[8] (citing 63 Comp. Gen. 331 (1984); 34 Comp. Gen. 590 (1955); 13 Comp. Gen. 77 (1933)). Similarly, "[w]henever 'the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure, that constitutes an appropriation, whether the language is found in an appropriation act or in other legislation.'" GAO Red Book at 1-7 (quoting *Saint Lawrence Seaway Dev. Corp.*, B-193573, 1979 WL 11668 (Comp. Gen. Dec. 19, 1979)). Thereafter, whether appropriated funds are legally available for expenditure generally depends on three things: 1) whether the purpose of the expenditure is authorized; 2) whether there are applicable time limits within which the obligation must occur; and 3) whether the expenditure is within the amount Congress has established. GAO Red Book at 3-9. Of interest to this proceeding is the purpose factor, which is primarily codified at 31 U.S.C. § 1301(a) and provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." Also pertinent is a statute known as the Anti-Deficiency Act, which states that a federal agency may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A).

III. Factual Background

Respondent is the United States Army, a department, agency, or instrumentality of the United States government. Compl., ¶ 7; Answer, ¶ 7. Respondent owns and operates the Rocky Mountain Arsenal ("the Arsenal"), a former chemical warfare agent and pesticide manufacturing facility outside of Denver, Colorado. Compl., ¶¶ 11-12; Answer, ¶¶ 11-12; CX 1 at 15.

[8] Although not binding, the GAO Red Book provides expert opinions on fundamental principles of appropriations law that courts "should prudently consider." *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1084 (Fed. Cir. 2003).

At various times since the federal government purchased property for the Arsenal in 1942, Respondent manufactured blister and nerve agents, incendiary chemicals, and intermediary chemical compounds there. It has also used the Arsenal to blend hydrazine, a rocket fuel, for the Air Force and the Apollo 11 flights in the 1960s. CX 1 at 15; Respondent's AD Mot. at 2. After the end of World War II, Shell Oil Company ("Shell") leased portions of the Arsenal for pesticide production for nearly 30 years. CX 1 at 16; RX 36 at 2. Together, Respondent and Shell released millions of gallons of hazardous substances at the Arsenal due to their waste handling and disposal practices. This "caused significant and widespread contamination in soil, surface water, sediment, groundwater and structures" at the Arsenal and surrounding properties, and over time, "[t]he combined activities of the Army and Shell on the Arsenal resulted in one of the worst hazardous waste pollution sites in the country[.]" CX 1 at 16, 19; RX 36 at 2; *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1531 (10th Cir. 1992).

a. Arsenal cleanup agreements and legislation

In 1983, the United States filed a complaint against Shell under CERCLA seeking payment for response costs and natural resource damages at the Arsenal. CX 1 at 16; *See also United States v. Shell Oil Co.*, Case No. 1:83cv02379 (D. Colo. filed Dec. 9, 1983). In 1985, during the course of that litigation, the parties stipulated that both Shell and the federal government were responsible for releases of hazardous material at the Arsenal. CX 1 at 16-17.

In August 1987 and March 1989, EPA added the Arsenal to the National Priorities List. Compl., ¶ 14; Answer, ¶ 14; CX 1 at 17, 19; National Priorities List for Uncontrolled Hazardous Waste Sites, 52 Fed. Reg. 27620, 27641 (July 22, 1987) (Final rule). In February 1989, EPA entered into an interagency agreement under 42 U.S.C. § 9620(e)(2) ("Federal Facilities Agreement" or "FFA") with Respondent, Shell, the Agency for Toxic Substances and Disease Registry ("ATSDR"), and the Department of the Interior ("DOI") for the investigation and cleanup of the Arsenal. Compl., ¶ 15; Answer, ¶ 15; CX 1. The FFA states that its intent is to establish a procedure by which EPA, Respondent, and Shell would "cooperate in the assessment, selection and implementation" of response actions resulting from the release of hazardous waste at the Arsenal. CX 1 at 10. The FFA further asserts:

> Another important purpose of this Agreement is to ensure the performance of EPA's responsibilities at [the Arsenal] and under this Agreement in accordance with Section 120 of CERCLA, 42 U.S.C. 9620. To assist in the performance of this EPA responsibility, the Army and Shell agree to pay EPA Costs as defined in the Settlement Agreement payable and pursuant to Section XII of the Settlement Agreement.

CX 1 at 12, ¶ 2.5. The "Settlement Agreement" that the FFA (and this Order hereafter) refer to is the Settlement Agreement Between the United States and Shell Oil Company Concerning the Rocky Mountain Arsenal. CX 2 at 7-129. The Settlement Agreement became effective the same day as the FFA and was executed pursuant to 42 U.S.C. § 9622(d)(3) between Shell and the United States (on behalf of EPA, Respondent, ATSDR, and DOI). CX 2 at 10, 49-56.

One of the Settlement Agreement's purposes is to "provide[ ] for payment by the Army and Shell of certain costs incurred by other federal agencies at the Arsenal, [and] establish[ ] a process for allocation and payment of costs of Response Actions and residual Natural Resource Damages resulting from releases of hazardous substances at or from the Arsenal[.]" CX 2 at 10. Section XII of the Settlement Agreement provides that Respondent "shall provide annual payments to EPA for EPA Costs." CX 2 at 34, ¶ 12.1. "EPA Costs" are defined as "all costs incurred by EPA . . . in carrying out its responsibilities in providing technical assistance for any activity in connection with this Settlement Agreement or the Federal Facility Agreement." CX 2 at 14, ¶ 3.29. With respect to how much Respondent must pay for EPA Costs, the Settlement Agreement directs that starting on June 1, 1990, and on June 1 every three years thereafter, EPA, Respondent, and Shell "shall confer and attempt to reach consensus on the annual amount to be paid to EPA for EPA Costs over the following three-year period." CX 2 at 34, ¶ 12.3. The parties are to take into account EPA's actual expenditure of EPA Costs over the prior three years, and if they fail to reach consensus after five days of negotiations, "the annual payment for the following three-year period shall be equal to $550,000" plus adjustments for inflation. CX 2 at 34, ¶ 12.3. Respondent "shall continue to make annual payments to EPA" under these conditions until EPA certifies that all the response actions at the Arsenal have been completed. CX 2 at 34, ¶ 12.4. Respondent and EPA further agreed that execution of the Settlement Agreement constituted "an obligation of all appropriated funds designated by the Army for transfer to EPA" under the agreement. CX 2 at 35, ¶ 12.6.

On February 12, 1992, the district court entered a Consent Decree in *United States v. Shell Oil Co.* that expressly adopted and incorporated the Settlement Agreement. CX 2 at 1-6. In contrast, the Consent Decree expressly did *not* incorporate the FFA "except to the extent necessary to provide definition to the terms of the Settlement Agreement." CX 2 at 3. However, the Consent Decree states that the federal government and Shell "consider the Federal Facility Agreement to be binding upon each Party individually, and both of them together." CX 2 at 3-4. The Consent Decree further states that it applies to and is binding on agencies and political subdivisions of the United States government. CX 2 at 3.

On October 9, 1992, Congress enacted the Rocky Mountain Arsenal National Wildlife Refuge Act, which called for most of the land that comprised the Arsenal to be transferred from Respondent to DOI for conservation purposes and public use as a wildlife refuge once it is remediated. Pub. L. No. 102-402, 106 Stat. 1961. In 2003, 2004, 2006, and 2010, various parcels of the Arsenal were removed from the NPL, permitting their transfer to the U.S. Fish and Wildlife Service. RX 19; RX 20; RX 22; RX 25. Today, Respondent retains and manages about 1,000 acres of the original 20,000-acre site. RX 36 at 2. Respondent has spent nearly $2 billion on cleanup efforts at the Arsenal and currently spends about $10 million annually. Respondent's AD Mot., Affidavit of John Tesner (Dec. 7, 2020), ¶ 3 ("Tesner Affidavit").[9] The Army's response action at the Arsenal "now consists primarily of operation and maintenance of the

[9] Mr. Tesner is the Director for Environmental Restoration within the Office of the Deputy Assistant Secretary of the Army for Environment Safety and Occupational Health. He is responsible for policy implementation and oversight of Respondent's environmental cleanup efforts nationwide. Tesner Aff., ¶ 1.

various remedial components, such as groundwater treatment and monitoring and land use controls, and five-year reviews of the remedies." Tesner Aff., ¶ 4. Respondent anticipates submitting its final remedial action certification report to the Agency this year. Tesner Aff., ¶ 4.

b. Respondent's payment of EPA Costs

Following execution of the FFA and Settlement Agreement, Respondent paid EPA Costs for more than 25 years. Agency's AD Mot. at 11. Although the Settlement Agreement calls for negotiations every three years to determine the annual amount Respondent should pay for EPA Costs, in practice EPA frequently sought annual payment from the Army by sending a letter each year that specified an amount due. Compl., ¶ 30; Answer, ¶ 30; CX 4-CX 19; CX 21-CX 23. Between FY 1995 and FY 2010, payments appear to have been calculated following the parties' negotiations prior to that year to set EPA Costs at $800,000 plus an annual "cost of living increase" in subsequent years over the prior year's total.[10] *See* CX 3-CX 17; RX 12. Respondent made these payments from its environmental restoration account. Respondent's Response, Declaration of John Tesner (Jan. 12, 2021), ¶¶ 4, 5 ("Tesner Declaration"); Respondent's Response, Declaration of Charles Scharmann, ¶¶ 5, 9 ("Scharmann Declaration").[11] Until Fiscal Year 2015, Respondent always paid EPA Costs in the amount the Agency requested in its annual letter.

Despite this arrangement and Respondent's consistent payments during this time period, Respondent alleges there were "ongoing difficulties faced by [the Arsenal] with respect to the role of EPA" as the Army wound down its cleanup operations and transferred most of its jurisdiction over the Arsenal to the U.S. Fish and Wildlife Service. Tesner Decl., ¶¶ 1, 5. Mr. Scharmann declares that over the years he had "repeatedly raised concerns" about the scope of EPA's role and the costs associated with EPA's involvement in work at the Arsenal. Scharmann Decl., ¶ 4; *see, e.g.*, RX 16. At the same time, the Agency often admonished Respondent that the Agency's actual oversight costs at the Arsenal were consistently greater than the corresponding amounts it was asking Respondent to pay in annual EPA Costs. *See, e.g.*, RX 6; RX 9; RX 11; RX 17; RX 23.

In 2008, Respondent asked EPA "for an estimated time when the Army's reimbursement of EPA's costs would go to zero . . . ." RX 23 at 1. EPA responded that such an estimate would be "difficult to gauge" but that "it may take more than 30 years" before the Agency could certify that all of the Army's response obligations at the Arsenal were fulfilled. RX 23 at 1. EPA also asserted that under the FFA it could request "up to 100 percent of its actual costs" until then and that so far "the Army has reimbursed only a portion of these costs." RX 23 at 1-2. In reply, the Army questioned the time and cost estimates offered by the Agency based on progress already

[10] As provided for by the Settlement Agreement, this annual "cost of living increase" was calculated pursuant to the Gross National Product Implicit Price Deflator published by the United States Bureau of Economic Analysis. CX 2 at 15, 34; *See, e.g.*, CX 3 at 2.

[11] Mr. Scharmann is the Program Manager for the Arsenal. He manages all aspects of the environmental cleanup program there. Scharmann Decl., ¶ 1.

made and an expected "drop in remedy related activities . . . ." RX 24 at 1-2. Respondent argued that the next few years would see a significant work reduction at the Arsenal and "that it would be appropriate for the regulatory agencies" to reduce their role as well. RX 24 at 2.

By FY 2010, EPA Costs reached $1.1 million following the standard yearly increases that had taken place since 1995.[12] CX 17. In September 2011, in response to the Army's ongoing concerns over EPA Costs, the Agency wrote a letter ("2011 Letter") to Respondent in which it projected its "out-year oversight costs" for FY 2012 through FY 2017. CX 20. The letter states that it serves as "a follow up" to "recent discussion[s]" and Respondent's 2008 "request for an estimated time when the Army's reimbursement of EPA's costs would go to zero . . . ." CX 20 at 1; RX 23 at 1. In the letter, the Agency goes on to express its "belief" that operational and functional milestones would be reached in 2017 that would "significantly diminish" its annual payment request. CX 20 at 1. After that point, the Agency's costs would "consist only of oversight for the ongoing groundwater remediation and the five year reviews." CX 20 at 1. Based on those expectations, in the 2011 Letter EPA "anticipate[d]" FY 2012 costs ranging from $924,000 to $1.6 million; FY 2013 costs ranging from $340,000 to $604,000; and for FY 2014-2017, EPA estimated costs would range from $200,000 to $470,000 annually. CX 20 at 1. At the same time, the Agency stated that it would "continue to evaluate its oversight cost projections annually based on current conditions and provide the Army with its annual letter initiating the process for funding . . . Arsenal oversight costs." CX 20 at 1. "However," the letter continues, "if conditions change or if protectiveness issues arise on any component of the remedy, pursuant to paragraph 12.4 of the Settlement Agreement, the EPA will seek 100 percent of its costs regardless" of whether the issue arises before or after the caps and covers reach their functional milestone. CX 20 at 1-2.

Mr. Scharmann describes the 2011 Letter as following his negotiation of "projected EPA oversight costs with EPA and Shell as the Army's remedial actions at RMA had successfully been put in place and the Army was entering the Operation and Maintenance phase for the majority of the remedy." Scharmann Decl., ¶ 4. "Based on these negotiations, in [the 2011 Letter EPA] memorialized an agreement whereby EPA funding levels would gradually decline within an established range that allowed for adequate EPA review of primary cleanup documents but recognized the success of the Army's remedial actions and mature status of the cleanup program," Mr. Scharmann states. Scharmann Decl., ¶ 4. Mr. Scharmann further adds that "the 2011 letter agreement modified the Settlement Agreement by addressing two, three-year billing cycles to capture six years of funding for EPA's assistance to the Army." Scharmann Decl., ¶ 4. Mr. Tesner similarly describes the 2011 Letter as the "result of discussion between the Army, Shell Oil Company, and EPA on appropriate funding levels for the stage of Army cleanup and the recognition that EPA's costs should significantly decrease as the Army entered the Operations and Management phase for the remedies in place at [the Arsenal]" and that through that letter the Agency "memorialized a funding agreement . . . ." Tesner Decl., ¶ 5.

[12] The Agency asked for that same amount in FY 2011 and lowered its request to $1 million for FY 2012. CX 18; CX 19.

Following the 2011 Letter, EPA sent annual requests to Respondent of $604,000 for FY 2013 and $470,000 for FY 2014. CX 21; CX 22. Respondent paid the requested amounts for both years. CX 45.

In September 2014, the Agency requested from Respondent $1.2 million in EPA Costs for FY 2015, noting that the amount "reflects an increased level of effort to support the risk assessment for bison consumption and the initial phase of the supplemental soil sampling program." CX 23. Respondent objected to that amount a few weeks later. CX 24. Respondent first claimed that the parties had already negotiated oversight costs through the 2011 Letter and asserted that the letter's FY 2015 cost range "appear[s] to adequately address the current needs of the program and therefore the EPA's commitment in that letter should be honored." CX 24 at 1. Respondent additionally complained that $1.2 million represented 11 percent of what the Arsenal expected to receive from the Army's environmental restoration account, which was "clearly excessive and . . . 3.5-4 times higher" than other regulatory agencies overseeing work at the Arsenal. CX 24 at 1. Respondent suggested the Agency was reopening cost negotiations and that it should provide detailed records of its actual costs in FY 2013 and FY 2014 and a detailed breakdown of its projected costs for FY 2015. CX 24 at 1.

In response to the Army's objection and to support its FY 2015 request, EPA provided additional documentation of its costs and informed Respondent that it was "invoking the reopening clause" of the 2011 Letter to address an increased scope of work beyond what the Agency estimated in 2011. CX 25 at 1; RX 34 at 2. In particular, the Agency cited a 2012 request by the United States Fish and Wildlife Services for Respondent and EPA "to modify the restrictive land use controls" at the Arsenal and to more specifically define the risk to wildlife workers and site visitors so that the property could "operate more like a typical wildlife refuge." CX 25 at 1. "This increased the scope of work beyond the effort anticipated in the 2011 agreement," the Agency wrote, requiring development of a risk assessment to determine if bison consumption was appropriate; planning and developing a risk assessment to address human health exposures (which required a supplemental soil sampling program); and determination of how to implement changes resulting from these assessments. CX 25 at 2. As a result, the Agency's internal costs rose from nearly $190,000 in FY 2013 to more than $271,000 in FY 2014 "due to the increase in technical support personnel (toxicologist, wildlife expert, etc.)" and increased attorney hours. CX 25 at 2, 4. Additionally, the Agency's primary contractor expenses grew from $760,000 to $813,000 in those same years. CX 25 at 2, 4. The Agency observed that FY 2015 "needs are projected to remain at the same level of effort as in FY14," with a slight reduction based on activities completed in 2014. CX 25 at 2. In 2018, the Agency reported to Respondent that its total actual site costs in calendar years 2014 and 2015 were $1.45 million and $1.7 million respectively. CX 29; CX 30; CX 33.

Despite the Agency's request for $1.2 million in FY 2015, Respondent paid only $470,000. Compl., ¶ 34; Answer, ¶ 34. Mr. Scharmann now states that "because [EPA's requested] amount was not consistent with the range that had been agreed upon by the parties to the Settlement Agreement, the Army paid EPA the maximum amount authorized pursuant to the 2011 letter agreement[.]" Scharmann Decl., ¶ 5. Mr. Tesner also now observes that "when EPA suddenly requested funding well beyond the maximum amount agreed to in the 2011 agreement .

. . the Army paid EPA in accordance with the Settlement Agreement as modified by the 2011 agreement." Tesner Decl., ¶ 5.

EPA did not initially send funding requests to Respondent for FY 2016 or FY 2017. Compl., ¶ 31; Answer, ¶ 31. In April 2016, Mr. Scharmann prepared an internal memorandum noting that an EPA representative had told him the Agency had discovered additional funding "that alleviated their need for funding from the Army . . . ." RX 35; Scharmann Decl., ¶ 6.

In January 2018, EPA requested payment of $1.1 million for FY 2018 and noted its intent to pursue costs that Respondent had not reimbursed it for in the previous fiscal years.[13] CX 27. Respondent objected to that amount. It complained the Agency had not justified its request with evidence of its actual expenditures and that the request was nearly 12 percent of funding the Arsenal was set to receive from the Army's environmental restoration account. CX 28 at 1. Because the 2011 Letter did not address FY 2018, Respondent contended there existed no agreement as to the appropriate funding level. Accordingly, in April 2018 the Army paid $485,000[14] based on the 2011 Letter's maximum funding range for FY 2017 plus an additional amount for inflation. CX 28; CX 34; RX 37. Mr. Scharmann now contends that the Agency's FY 2018 "demand was again for a funding level consistent with the early stages of Army cleanup program and did not reflect the gradually decreasing funding levels within the 2011 letter agreement." Scharmann Decl., ¶ 7. According to Mr. Scharmann, Respondent decided that EPA's request "did not reflect an increased level of effort related to Army cleanup activities. Therefore, the Army paid EPA the maximum level within the range for FY 2017 as outlined in the 2011 letter agreement, plus inflation . . . to satisfy FY 2018 EPA costs." Scharmann Decl., ¶ 7. "This approach was consistent with the dispute resolution process outlined in the Settlement Agreement," Mr. Scharmann claims. Scharmann Decl., ¶ 7. Similarly, Mr. Tesner now states that for FY 2018, "EPA once again requested funding at a level consistent with the beginning rather than the completion of CERCLA cleanup," so "the Army paid EPA in accordance with the Settlement Agreement as modified by the [2011 Letter]." Tesner Decl., ¶ 5.

After the Army's FY 2018 payment, the parties met in June 2018. In advance of the meeting, the Agency provided Respondent with summaries of EPA's actual costs at the Arsenal for calendar years 2014, 2015, 2016, and 2017. CX 29-CX 32; CX 33 at 1. However, at the meeting, Respondent told the Agency it had recently discovered that its environmental restoration account was "an inappropriate source of funds" and that it could no longer legally pay EPA Costs from existing appropriations without specific congressional authorization. Compl., ¶¶ 32, 35; Answer, ¶¶ 32, 35; RX 39; Scharmann Decl., ¶ 9; Tesner Decl., ¶ 4. As to the timing of this discovery, Mr. Tesner contends the "oversight was likely due to the tremendous cleanup effort the Army has undertaken to put in place remedial actions since cleanup began at [the Arsenal] in the 1980s and costs associated with those efforts." Tesner Decl., ¶ 4. Respondent

[13] In June 2018, EPA provided Respondent with summaries of its annual actual costs for FY 2014 through FY 2017. CX 29-CX 33.

[14] The actual amount the Agency received was $482,131.84. CX 34. Although it is not immediately clear why a slightly lower amount was deposited, the difference is not relevant to disposition of the parties' motions. *See* Agency's AD Mot. at 16 n.2.

informed the Agency that its only options for reimbursing EPA were to attempt to access the Judgment Fund, which was controlled by the U.S. Department of Justice ("DOJ"), or to submit a legislative proposal through the Office of Management and Budget ("OMB") seeking congressional authorization to pay EPA Costs from the environmental restoration account. RX 49 at 4; Tesner Decl., ¶ 6; Scharmann Decl., ¶ 9.

In August 2018, EPA notified Respondent that because the parties were unable to reach a consensus on annual payment amounts for FY 2015 through FY 2017, Respondent was required to make the FFA's default payment of $550,000 plus inflation costs. CX 35; RX 38. Accordingly, EPA asserted Respondent should pay it $1.05 million each year for FY 2015 and FY 2016, and $1.087 million each year for FY 2017 and FY 2018. CX 35; RX 38. These default amounts were less than or roughly equal to what the Agency actually spent at the Arsenal in those years. *See* CX 29; CX 30 (showing that certified calendar year cost summaries for 2014 and 2015, which encompass FY 2015, were $1.45 million and $1.71 million, respectively); *see also* CX 32; CX 38 (showing that certified calendar year cost summaries for 2017 and 2018, which encompass FY 2018, were $1.25 million and just under $1 million, respectively).

In December 2018, EPA requested $1.48 million in annual funding for FY 2019 based on the Agency's actual expenditures over the prior three years. CX 36; RX 41.[15] Cost summaries show the Agency spent just under $1 million at the Arsenal in calendar year 2018 and just over $1 million in calendar year 2019. CX 38-CX 39. Respondent made no payments to EPA for FY 2019. Compl., ¶ 44; Answer, ¶ 44.

In the spring of 2019, the parties began a coordinated effort to obtain permission from the DOJ for Respondent to access the Judgement Fund to pay EPA Costs. RX 42-RX 44. That effort was unsuccessful, and in November 2019, the parties met with OMB to discuss options for seeking legislative authorization for Fiscal Year 2021 to resolve the payment impasse. RX 58; RX 62; Tesner Decl., ¶¶ 6-7. But the parties disagreed on the amount Respondent owed, so "the Army did not receive Congressional authorization for FY 2021, and the OMB deferred the legislative proposal to the FY 2022 legislative cycle." Tesner Decl., ¶ 8.

As of the filing of the Complaint, the Agency alleges Respondent has failed to pay $4,809,050.65 in EPA Costs from FY 2015 through FY 2019, as required by the terms and conditions of the FFA.[16] Compl., ¶¶ 45, 47-48.

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[15] At the same time, EPA notified the Army of its intent to initiate dispute resolution procedures called for under the FFA because it had received no response to its demand for payment of unpaid EPA Costs. CX 1 at 75-78; CX 36; RX 41.

[16] Respondent never made any payments to EPA for costs related to FY 2016 or FY 2017. Answer, ¶¶ 38, 40. However, the Agency now asserts that it is not seeking a penalty associated with FY 2016 and FY 2017 "in recognition that no formal funding requests were sent by Complainant during those years." Agency's Reply at 7 n.5, 15-16.

IV. Discussion of Liability

The Complaint in this proceeding is premised on Respondent's alleged violation of 42 U.S.C. § 9622(l) for its "failure or refusal to reimburse EPA's costs as required by the FFA and provided for in the Settlement Agreement." Compl., ¶ 49. As indicated above:

> A potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement under this section or section 9620 of this title (relating to Federal facilities) or which is a party to an agreement under section 9620 of this title and which fails or refuses to comply with any term or condition of the order, decree or agreement shall be subject to a civil penalty in accordance with section 9609 of this title.

42 U.S.C. § 9622(l). Consequently, with respect to the allegations in the Complaint, Respondent may be liable for the alleged violation if it is (1) party to an FFA; (2) fails *or* refuses to comply; (3) with any term or condition of the FFA.[17] *See* Respondent's AD Mot. at 9; Agency's AD Mot. at 17. It is undisputed that Respondent is party to the FFA and that the FFA is an agreement under 42 U.S.C. § 9620. *See* Compl., ¶ 15; Answer, ¶ 15; CX 1.

In Respondent's AD Motion, Respondent advances three broad arguments that it contends preclude its liability in this proceeding: First, Respondent asserts that the FFA does not itself require payment of oversight costs, so there is no basis for the Agency's Complaint for penalties under 42 U.S.C. § 9609. Respondent's AD Mot. at 10-16; Respondent's Reply at 5-10. Second, Respondent argues that even if the FFA requires it to pay EPA Costs, that requirement is suspended because there are no appropriated funds available to pay them, so Respondent has not "failed or refused" to pay. Respondent's AD Mot. at 16-22; Respondent's Reply at 10-24. Third, Respondent maintains that this administrative hearing is an improper forum because the parties have engaged OMB to resolve their funding dispute; Congress would have to approve funding to pay any penalty that might be assessed; and the federal court for the District of Colorado retains jurisdiction over this matter. Respondent's AD Mot. at 22-24; Respondent's Reply at 25-27.

In response to the first argument, the Agency states that paragraph 2.5 of the FFA constitutes a term or condition requiring payment of EPA Costs and that it incorporates the payment procedures outlined in Section XII of the Settlement Agreement. Agency's Response at 5-14. To Respondent's second argument, the Agency asserts that Respondent's defense with respect to funding is without merit because Respondent has miscast provisions of the FFA on which it relies. Agency's Response at 17-24. Addressing Respondent's third argument, the Agency contends this proceeding is proper because it concerns the administrative assessment of a civil penalty and is not an action to collect payment of EPA Costs. Agency Response at 24-27.

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[17] The Complaint does not allege a violation based on the first part of 42 U.S.C. § 9622(l), that is, the failure or refusal to comply with a term or condition of the Consent Decree in *United States v. Shell Oil Co.*

In the Agency's AD Motion, the Agency asserts that the record establishes all the prima facie elements of its case as to Respondent's liability. Agency's AD Mot. at 7-8; Agency's Reply at 2. Specifically, the Agency argues that Respondent is a party to the FFA and therefore a party to an interagency agreement under 42 U.S.C. § 9620; that the FFA contains a term or condition requiring Respondent to pay EPA Costs; and that Respondent has failed or refused to comply with the FFA's term or condition requiring these payments. Agency's AD Mot. at 17-20; Agency's Reply at 4-16.

In response, Respondent does not dispute that it is party to an interagency agreement under 42 U.S.C. § 9620. Respondent's Response at 4. But it contends that the terms of paragraph 2.5 are at least ambiguous and that the Settlement Agreement rather than the FFA obligates the Army to pay EPA Costs. Respondent's Response at 5-6. Respondent further claims the Agency has not demonstrated its failure or refusal to pay EPA Costs for several reasons: lack of congressional authorization excused or suspended its payment obligation, and Respondent is not required to obtain that authorization within a set timeframe; Respondent did not deliberately reinterpret its position on the need for congressional approval to avoid further payments; Respondent is not required to treat as binding law a DOJ opinion regarding a similar dispute at another Army site; the Settlement Agreement no longer governs payment amounts due because the 2011 Letter modified its terms; and Respondent is not obligated to make retroactive payments for fiscal years during which the Agency made no payment demand. Respondent's Response at 7-16.

For the reasons discussed below, I find that the undisputed material facts show that paragraph 2.5 of the FFA contains a term or condition requiring Respondent to pay EPA Costs, and Respondent failed or refused to pay EPA Costs for FY 2015, FY 2018, and FY 2019. Further, I find that Respondent has not demonstrated that any of its payment obligations should be excused or suspended based on the unavailability of appropriated funds. Additionally, I find this to be an appropriate forum in which to litigate the Agency's Complaint. Accordingly, the Agency is entitled to judgment as a matter of law as to Respondent's liability for noncompliance with the FFA in the aforementioned years, and the Agency's AD Motion is **GRANTED in part and DENIED in part**. Because the undisputed material facts fail to establish Respondent's stated defenses, Respondent's AD Motion is **DENIED**. Finally, because the Agency has abandoned its penalty assessment with respect to FY 2016 and FY 2017, claims for Respondent's liability associated with those years are **DISMISSED**.

a. Paragraph 2.5 of the FFA obligates Respondent to pay EPA Costs

The specific term or condition of the FFA that the Complaint and the parties focus on is paragraph 2.5, which appears under Section II, titled "Purpose," and states as follows:

> Another important purpose of this Agreement is to ensure the performance of EPA's responsibilities at [the Arsenal] and under this Agreement in accordance with Section 120 of CERCLA, 42 U.S.C. 9620. To assist in the performance of this EPA responsibility, the Army and Shell agree to pay EPA Costs as

> defined in the Settlement Agreement payable and pursuant to Section XII of the Settlement Agreement.

CX 1 at 10, 12, ¶ 2.5.

The Agency contends that paragraph 2.5 is a "term or condition" that "memorializes Respondent's commitment in the 1989 FFA to pay EPA Costs." Agency's AD Mot. at 18. According to the Agency, this is evident from the provision's plain language and use of the verb "agree" in the present tense. Agency's AD Mot. at 18; Agency's Reply at 4-5. Respondent urges a different interpretation: In its view, paragraph 2.5 of "the FFA does *not* require payment of EPA oversight costs, and it was never intended to require such payment. Rather, the FFA *refers* to a payment requirement relating to 'technical assistance' costs that is contained within the separate Settlement Agreement[.]" Respondent's AD Mot. at 10. And the Settlement Agreement is beyond the reach of this proceeding, Respondent continues, because it "was specifically adopted by and incorporated into the . . . Consent Decree, and is therefore independently enforceable in the Federal District Court." Respondent's AD Mot. at 10.

I find the Agency's argument more persuasive. Courts interpret settlement agreements involving the federal government according to the federal common law of contracts, which "largely dovetails with general principles of contract law." *Shoshone-Bannock Tribes of Fort Hall Reservation v. Bernhard*, --- F. Supp. 3d ---, 2020 WL 5440548, at * 2 (D.D.C. 2020) (quoting *Deutsche Bank Nat'l Tr. Co. v. Fed. Deposit Ins. Corp.*, 109 F. Supp. 3d 179, 197 (D.D.C. 2015)); *Gibson v. District of Columbia*, 270 F. Supp. 3d 241, 245-46 (D.D.C. 2017). The aim is to "give effect to the mutual intentions of the parties." *Gonzalez v. Dep't of Labor*, 609 F.3d 451, 457 (D.C. Cir. 2010) (quoting *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985)). "Where the language of a contract is clear and unambiguous on its face, a court will assume that the meaning ordinarily ascribed to those words reflects the intentions of the parties." *Shoshone-Bannock Tribes*, 2020 WL 5440548, at * 2 (quoting *Mesa Air Grp., Inc. v. Dep't of Transp.*, 87 F.3d 498, 503 (D.C. Cir. 1996)). "Only if the court determines as a matter of law that the agreement is ambiguous will it look to extrinsic evidence of intent to guide the interpretive process." *Id.* (quoting *NRM Corp.*, 758 F.2d at 682) (quotation marks omitted). "[A] contract does not become ambiguous merely because the parties disagree on its interpretation." *Id.* (quoting *Johnson v. Reno*, No. 93-cv-206, 1996 WL 33658687, at *6 (D.D.C. Apr. 17, 1996)).

Although the parties disagree on the interpretation of paragraph 2.5, the language is clear and unambiguous on its face: Under the FFA, Respondent and Shell "agree" to pay EPA Costs. The ordinary meaning of agree is "to accept or concede something (such as the views or wishes of another)." *Agree*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/agree (last visited June 29, 2021). Agree may also mean "[t]o unite in thought; to concur in opinion or purpose" or "[t]o exchange promises; to unite in an engagement to do or not do something." *Agree*, BLACK'S LAW DICTIONARY (11th ed. 2019). In this case, Respondent accepted the payment of EPA Costs as one of its responsibilities under the FFA. Use of the term "agree" demonstrates the parties were united in their understanding that Respondent would undertake this engagement. Notably, the verb "agree" in paragraph 2.5 "uses the present tense and the unqualified indicative mood. It does not state that [Respondent and

Shell] 'will agree' in the future upon fulfillment of any open conditions," nor does it state that they "*have* agreed" in a different document, i.e., the Settlement Agreement, to make payments to EPA. *See Targus Grp. Int'l, Inc. v. Sherman*, 76 Mass. App. Ct. 421, 433, 922 N.E.2d 841, 851 (2010). The term "agree," as used in the FFA, "embodies a current intent of all signatories." *Id.* Further, in agreeing to pay EPA Costs, Respondent (and Shell) obtained the benefit of EPA's performance of certain responsibilities at the Arsenal, thus providing consideration for Respondent's promise to pay. *See Shen v. CMFG Life Ins. Co.*, No. CV 15-11593-MLW, 2016 WL 1129308, at *5 (D. Mass. Mar. 4, 2016), *report and recommendation adopted*, No. CV 15-11593-MLW, 2016 WL 1189125 (D. Mass. Mar. 22, 2016). Respondent posits that use of the present tense simply reflects the fact that the Settlement Agreement was executed at the same time as the FFA. Respondent's Reply at 6. But I find that unlikely, for if that were true a more natural construction would have stated that the parties "agree *in the Settlement Agreement*" or "*in the Settlement Agreement* agree" to pay EPA Costs. Instead, paragraph 2.5 provides that Respondent and Shell agree therein to undertake a particular action – "to pay EPA Costs."

Respondent wishes to construe paragraph 2.5 of the FFA as a "recital," i.e., prefatory language that does not itself include an obligation but that "acts as an introduction to the operative portions of the document that contain the parties' rights and obligations." Respondent's AD Mot. at 11 (citing *Cain Rest. Co. v. Carrols Corp.*, 273 F. App'x 430, 434 (6th Cir. 2008)). According to Respondent, the entirety of Section II constitutes "a series of recitations" with provisions that are "almost entirely laudatory" or that only reference "goals," "intentions," or "hopes." Respondent's AD Mot. at 12; Respondent's Reply at 7. Provisions governing response activity do not appear until Section XXII, Respondent argues, as characterized by the repeated appearance there of the word "shall." Respondent's AD Mot. at 13. "The structure of the [FFA] strongly suggests that [paragraph] 2.5 is merely a reference to obligations undertaken in an accompanying document that is an integral part of the overall settlement meant to govern the [Arsenal] response action," Respondent asserts. Respondent's AD Mot. at 13.

As Respondent observes, many provisions in Section II are laudatory or address goals, intentions, and hopes. Several of these paragraphs may in fact be clauses "that do not make binding promises but merely recite background information about factual context or the parties' intention." *Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113, 127 (4th Cir. 2019). But not all are limited to this role. As discussed above, the plain language of paragraph 2.5 and its present tense use of "agree" belies a categorical application of Respondent's reading to all of Section II. And aside from the use of "agree" in paragraph 2.5, language in paragraph 2.1 mandates that the parties' roles in clean-up efforts "*shall* be in accordance with [the FFA]" starting on its effective date and will cease to be governed by certain previously proposed consent decrees. CX 1 at 10 (emphasis added). Similarly, language in paragraph 2.4 imposes binding obligations on Shell "*to ensure* [its] full participation" in the Arsenal cleanup, such that the parties "*agree* that Shell's obligations under this Agreement *shall* be enforceable directly against Shell to the same extent as under an administrative order entered pursuant to" various sections of CERCLA. CX 1 at 12 (emphasis added). Paragraph 2.10 provides that "*unless and until* [the FFA] is incorporated into a Consent Decree that has been entered by the Court, it *shall* be enforceable." CX 1 at 13 (emphasis added). And paragraph 2.11 provides that the State of Colorado "*shall* have an opportunity to participate in the assessment and selection of Response

Actions undertaken pursuant to CERCLA." CX 1 at 13 (emphasis added). Like paragraph 2.5, these provisions use language of promise or obligation that state as a contractual matter how the parties must operate, not language that merely sets forth as a factual matter what the parties' intent is. *See Sprint Nextel*, 938 F.3d at 127 (drawing a contrast between language of a recital clause that "states as a factual matter what the parties' intent is, not as a contractual matter what either party must do" and language of operative provisions that "impose obligations"). The parties cannot have intended to treat as a recital *every* provision appearing in Section II, or none of the provisions would use terms imposing obligation. Instead, as illustrated above, portions of Section II impose contractual requirements on its signatories.

Moreover, Respondent acknowledges that the FFA and Settlement Agreement are "meant to *collectively* govern the Army's efforts" at the Arsenal. Respondent's AD Mot. at 12 (emphasis added). Not only does paragraph 2.5 memorialize in the FFA Respondent's agreement to pay EPA Costs, it incorporates the terms and conditions of Section XII of the Settlement Agreement to describe how those payments must be made. "Basic contract principles instruct that '[w]here a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument.'" *Halbach v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872, 876 (8th Cir. 2009) (quoting 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 30:25 (4th ed. 1999)). Accordingly, "'[t]he incorporated matter is to be interpreted as part of the writing.'" *Id.* Here, the EPA Costs that Respondent agreed in the FFA to pay are "*defined in* the Settlement Agreement" and should be made "*payable and pursuant to* Section XII of the Settlement Agreement." CX 1 at 12, ¶ 2.5 (emphasis added). These are explicit references to portions of the Settlement Agreement that inform all parties that the FFA-imposed obligation to pay EPA Costs will be carried out "pursuant to" particular terms and conditions of the Settlement Agreement. So although paragraph 2.5 of the FFA does not itself contain the terms or conditions associated with Respondent's obligation to pay EPA Costs, there is a clear intent expressed to incorporate Section XII of the Settlement Agreement in which the terms and conditions of this obligation are found. *See In re Ginn-La St. Lucie Ltd., LLLP*, No. 08-29769-BKC-PGH, 2011 WL 13115553, at *4 (Bankr. S.D. Fla. Jan. 18, 2011) (concluding that where one document stated that it was "subject to the terms and conditions" of another document, it incorporated the terms and conditions of the second document). "'As numerous courts have acknowledged, . . . a requirement that the contract language be explicit or otherwise clear and precise does not amount to a rule that the parties must use a rote phrase or some other 'magic words' in order to effect an incorporation by reference.'" *Id.* (quoting *Microsoft Corp. v. Big Boy Dist. LLC*, 589 F.Supp. 2d 1308, 1319 (S.D. Fla. 2008)). Thus, it does not matter that the FFA does not state verbatim that it "hereby adopt[s] and incorporate[s] by reference" provisions of the Settlement Agreement, as Respondent asserts is necessary. *See* Respondent's AD Mot. at 13-14.

Respondent further objects that the structure of the FFA and Settlement Agreement demonstrate the documents "are meant to operate independently," and had the parties intended one to incorporate the other, "the simplest expedient would have been to execute a single instrument." Respondent's AD Mot. at 14-15. Respondent also suggests the Settlement Agreement's Statement of Purpose, in which paragraph 1.2 provides a general description of the Settlement Agreement and paragraph 1.3 gives a general description of the FFA, illustrates the "parties' mutual intention to separately maintain the requirements of both the FFA and the

Settlement Agreement . . . ." Respondent's AD Mot. at 14-15; CX 2 at 10. But in calling for a single written instrument, Respondent overlooks that the parties were driven by purposes that necessitated the creation of two documents: First, because the Army is a federal agency responsible for contamination at the Arsenal, a site on the National Priorities List, CERCLA *required* Respondent and EPA to enter into the FFA "for the expeditious completion . . . of all necessary remedial action" at the Arsenal. *See* 42 U.S.C. § 9620(e)(2). Second, preexisting litigation between the United States and Shell needed to be resolved, and the Settlement Agreement embodied a step toward that goal. The FFA could not have settled the judicial litigation, and the Settlement Agreement prompted by that litigation would not serve as an interagency agreement under 42 U.S.C. § 9620. But given their simultaneous execution and common nucleus of facts and parties, it is not surprising that the two agreements function interdependently and at times incorporate provisions from one another. As the Agency points out:

- Although the Consent Decree states that it and the Settlement Agreement do not broadly incorporate the FFA, they do expressly incorporate the FFA "to the extent necessary to provide definition to the terms of the Settlement Agreement." CX 2 at 3; Agency's Response at 12.

- The Settlement Agreement defines "EPA Costs" to include costs the Agency incurs carrying out its responsibilities and providing technical assistance as provided for under the FFA. CX 2 at 14; Agency's Response at 12.

- In provisions addressing the payment of EPA Costs, the Settlement Agreement relies on the EPA Certification process described in the FFA. CX 1 at 92; CX 2 at 14, 34-35; Agency's Response at 12-13.

- The dispute resolution provisions of the Settlement Agreement rely on a committee structure created in the FFA. CX 1 at 33-36; CX 2 at 15, 19, 20, 31-33; Agency's Response at 13.

- The FFA asserts that interest will accrue "in accordance with the terms of the Settlement Agreement" on any payments a federal agency is required to make under the FFA but cannot because appropriated funds are unavailable or payment would violate the Anti-Deficiency Act, 31 U.S.C. § 1341. CX 1 at 98-99; Agency's Response at 14.

- The FFA provides that force majeure may suspend Respondent's obligations under the Settlement Agreement, which itself contains no force majeure provision. CX 1 at 72; Agency's Response at 14.

Further, the broad overviews contained in paragraphs 1.2 and 1.3 of the Settlement Agreement appear to be just that – overviews. They outline distinct functions of each document, but they do not preclude one from incorporating or relying on provisions of the other.

Respondent additionally contends that the Agency's construction of paragraph 2.5 is contrary to the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661,

100 Stat. 3816 (1986) ("1987 NDAA"). Respondent's Reply at 6. The 1987 NDAA provides that "any" money received as the result of CERCLA litigation concerning the Arsenal "shall be available . . . to the Secretary of the Army only for purposes of correcting the effects of contamination at the [Arsenal]." 1987 NDAA § 1367. Respondent argues that "the parties could not have agreed for Shell to pay EPA Costs to the Agency without violating the statute" because the NDAA "expressly requires any payments made to the United States" for contribution claims at the Arsenal to "be remitted to the Secretary of the Army and used thereafter by the Army exclusively for the correction of environmental contamination at the [Arsenal]." Respondent's Reply at 6. But even assuming Respondent's interpretation of the 1987 NDAA is correct, the payment obligation in the FFA does not have the effect Respondent claims. While the FFA obligates Respondent *and* Shell to pay EPA Costs, it incorporates the terms and conditions of the Settlement Agreement to instruct how that obligation shall be fulfilled. And under Section XII of the Settlement Agreement, it is Respondent, not Shell, who "shall provide annual payments to EPA for EPA Costs." CX 2 at 34, ¶ 12.1. Shell fulfills its obligation to pay EPA Costs by reimbursing Respondent for a percentage of the amount Respondent actually pays to EPA. CX 2 at 24-30; CX 48 at 34-44; RX 50 at 1.

For the foregoing reasons, I find that as a matter of law, paragraph 2.5 of the FFA contains a term or condition that requires Respondent to pay EPA Costs.

b. Respondent has failed or refused to pay EPA Costs for FY 2015, FY 2018, and FY 2019

Given that paragraph 2.5 of the FFA is a term or condition that imposes an obligation on Respondent to pay EPA Costs, the next question is whether there are material facts in dispute as to whether Respondent has failed or refused to comply with that obligation. As outlined above, for fiscal years 2015 through 2019, Respondent paid only a portion of the money the Agency requested each year for EPA Costs. There is no dispute as to the amount EPA requested and the amount Respondent actually paid or declined to pay. Instead, the parties dispute the amount the FFA required Respondent to pay and whether Respondent is excused from payments it did not make.

Under the terms of Section XII of the Settlement Agreement incorporated by the FFA, Respondent "shall provide annual payments to EPA for EPA Costs." CX 2 at 34, ¶ 12.1. "EPA Costs" are "all costs incurred by EPA . . . in carrying out its responsibilities in providing technical assistance for any activity in connection with this Settlement Agreement or the Federal Facility Agreement." CX 2 at 14, ¶ 3.29. To determine how much Respondent should pay for EPA Costs, the Settlement Agreement instructs that every three years, the parties "shall confer and attempt to reach consensus on the annual amount to be paid to EPA for EPA Costs over the following three-year period." CX 2 at 34, ¶ 12.3. They are to consider EPA's actual expenditure of EPA Costs over the prior three years, and if they fail to reach consensus after five days of negotiations, "the annual payment for the following three-year period shall be equal to $550,000" plus adjustments for inflation. CX 2 at 34, ¶ 12.3. Respondent "shall continue to make annual payments to EPA" under these conditions until EPA certifies that all the response actions at the Arsenal have been completed. CX 2 at 34, ¶ 12.4.

i. EPA Costs for Fiscal Year 2015

For FY 2015, the Agency sought $1.2 million in EPA Costs, an increase over prior years that it asserted was based on changing activity at the Arsenal. CX 23, CX 25. Respondent declined to pay the requested amount and instead submitted $470,000, which it contended was the maximum amount provided for in the 2011 Letter. Compl., ¶ 34; Answer, ¶ 34; CX 24.

Respondent argues that the 2011 Letter modified the terms of Section XII of the Settlement Agreement and that the Agency "cannot simply ignore the modification it agreed to and return to the original provisions of the [Settlement Agreement] unilaterally . . . ." Respondent's Response at 14. Consequently, Respondent asserts that "there is a factual dispute regarding the negotiation of the 2011 letter agreement that requires resolution." Respondent's Response at 14. For its part, the Agency contends the 2011 Letter did not amend or modify the Settlement Agreement. Agency's Reply at 13. The letter on its face does not purport to be a modification; it is unsigned by Respondent; it is aspirational in its language rather than making any firm commitment; it does not address costs after FY 2017 so has no bearing on FY 2018 or FY 2019; it does not disavow the default payment terms of Section XII; and it states that EPA could seek all of its costs in the face of changed circumstances, the Agency accurately points out. Agency's Reply at 13.

As an initial matter, the 2011 Letter does not appear to modify the terms of Section XII. By its own terms, the letter is "a follow up" to "recent discussion[s]" and Respondent's 2008 "request for an *estimated* time when the Army's reimbursement of EPA's costs would go to zero . . . ." CX 20 at 1; RX 23 at 1 (emphasis added). To that extent, the letter outlines the Agency's response to Respondent's request and asserts a unilateral projection of what the Agency expected its costs to be in the forthcoming years based on then-existing conditions. The letter says nothing about the parties' intent to change the terms of the Settlement Agreement, and it contains no mutual assent to do so. Further, the 2011 Letter does not address the years beyond FY 2017, nor does it discuss the final certification process that the Settlement Agreement requires to end Respondent's payment obligations. Instead, the 2011 Letter appears to serve as a version of the discussions called for under paragraph 12.3 of the Settlement Agreement. This would not be unusual, for as the parties observe, it has not been their practice to follow the exact procedure described in paragraph 12.3 for determining EPA Costs. For example, although the Settlement Agreement calls for negotiations every three years, the parties adopted a course of dealing in which EPA sought annual payment from the Army by letter each year that specified an amount due. And until FY 2015, the Army always paid the requested amount. Compl., ¶ 30; Answer, ¶ 30; *see, e.g.*, CX 4-CX 19; CX 21-CX 23. At the time it was written, the 2011 Letter memorialized a negotiation with Respondent of what the Agency *anticipated* its costs would be in the future. In further noting the fluid nature of these predictions, the 2011 Letter refers to the Agency's *belief* about what will occur; it offers *projections* based on *assumptions* about future facts; and perhaps most critically, it expressly provides that the Agency may seek 100 percent of its actual costs if conditions change. *See* CX 20. This was apparently acceptable to Respondent, which paid EPA Costs through FY 2014 while the 2011 Letter was accurate in its predictions. When conditions changed at the Arsenal and the estimates were no longer reliable, the Agency was still operating under the terms of both the 2011 Letter and negotiating with Respondent

under paragraph 12.3 of the Settlement Agreement when it sought EPA Costs to cover those changing conditions.

In characterizing the 2011 Letter as a modification of the Settlement Agreement, Respondent also points to the Agency's written justification of its FY 2015 funding request, which refers to the 2011 Letter as a "letter agreement." Respondent's Response at 14; CX 25; RX 34. But even if the 2011 Letter constituted a mutual agreement between the parties, it still expresses no intent to modify the Settlement Agreement, and it still contemplates that changing conditions at the Arsenal will affect the accuracy of the Agency's projections. Moreover, the Agency's written justification responded to an objection from the Army that referred to the 2011 Letter as an "agreement." *See* CX 24. It is not inconceivable that the Agency was simply parroting that term back to Respondent. Additionally, Mr. Scharmann's declaration that the 2011 Letter "modified the Settlement Agreement" is his own legal conclusion. It does not create a triable fact. *See* Scharmann Decl., ¶ 4. Likewise, his current assessment that the 2011 Letter was "based on" negotiations he had with EPA and Shell does not change the nature or content of the letter, which speaks for itself as described above.

But to determine Respondent's liability, I need not decide whether the 2011 Letter formally modified the Settlement Agreement, because that is not a material dispute. Assuming for the sake of argument that the 2011 Letter was a modification of Section XII, it is still a modification that stipulates that the Agency "will continue to evaluate its oversight cost projections *annually* based on current conditions and provide the Army with its *annual* letter" requesting payment of EPA Costs. CX 20 at 2 (emphasis added). Further, the purported modification then permits the Agency to "seek 100 percent of its costs" "if conditions change or if protectiveness issues arise on any component of the remedy[.]" CX 20 at 2. Although the Agency estimated costs six years out from 2011, these stipulations enable the Agency to reconsider its estimates each year and obtain from the Army a yearly amount that fully covers its actual costs. In this case, the Agency evaluated conditions at the Arsenal in advance of FY 2015 and concluded they had changed in a way that would increase the Agency's oversight expenses to $1.2 million. CX 23. Respondent has not cited to evidence that conditions at the Arsenal did not change in the way described by the Agency or that the Agency's actual costs are something other than what they are claimed to be. Rather, Respondent has framed its dispute in the context of its dissatisfaction with the Agency requesting for FY 2015 "a sum substantially exceeding the values predicted in the 2011 letter agreement, without explaining in any detail what additional costs had been incurred." Respondent's AD Mot. at 5. Similarly, Mr. Scharmann objected to the FY 2015 request at the time because it exceeded both what he contended EPA had committed to in 2011 and the funding allotment that Respondent would typically devote to the Arsenal from its environmental restoration account. CX 24 at 1. He suggested the Agency was reopening cost negotiations and that it should provide detailed records of its actual costs in FY 2013 and FY 2014 and a detailed breakdown of its projected costs for FY 2015. CX 24 at 1. In response, the Agency did just that, providing the justification cited above along with its actual costs from FY 2013 and FY 2014 and its projected FY 2015 costs. *See* CX 25. After that, the record does not suggest, and Respondent does not point to, any other evidence that the Agency's FY 2015 request for EPA Costs was unfounded or not a true statement of its actual oversight costs.

To that end, Respondent's payment of $470,000 for FY 2015 did not satisfy the modified or unmodified terms of the Settlement Agreement. If the 2011 Letter modified the Settlement Agreement, changing conditions at the Arsenal obligated Respondent to pay FY 2015 EPA Costs in an amount equal to the Agency's actual oversight costs for that year. Before Respondent's payment, the Agency provided evidence these costs would exceed $1 million. *See* CX 25. Subsequently, the Agency supplied Respondent with evidence that its actual FY 2015 costs ranged between $1.4 million and $1.7 million. Respondent has not rebutted these figures with evidence in this proceeding. *See* CX 29; CX 30; CX 33. If the terms of the Settlement Agreement applied without modification, then based on Respondent's objection and partial payment, the parties failed to reach a unanimous agreement in their negotiations. In that case, Respondent would owe the default amount of $550,000 plus inflation in accordance with paragraph 12.3. The Agency has calculated this to be $1,050,038 based on the consumer price index according to the Bureau of Labor Statistics. CX 2 at 34; CX 35. In either scenario, Respondent's payment of $470,000 does not sufficiently comply with its obligation under the FFA to pay FY 2015 EPA Costs.[18]

Accordingly, there is no genuine dispute that Respondent failed or refused to comply with paragraph 2.5 of the FFA when it paid only $470,000 in EPA Costs for FY 2015. Accelerated decision as to Respondent's liability for nonpayment of EPA Costs for FY 2015 is granted to the Agency.

ii. EPA Costs for Fiscal Years 2016 and 2017

For fiscal years 2016 and 2017, Respondent points out that it did not receive payment requests from the Agency, and it has submitted evidence that during those years EPA stated that no funding was needed. Respondent's AD Mot. at 5; RX 35; Scharmann Decl., ¶ 6. Additionally, the Agency now asserts that it is not seeking a penalty associated with FY 2016 and FY 2017, because it made no formal funding requests of Respondent during those years. Agency's Reply at 7 n.5, 15-16.

Accordingly, I will not find Respondent liable for noncompliance with the FFA requirement to pay EPA Costs in FY 2016 and FY 2017. The Agency's claims for liability associated with those years are dismissed.

iii. EPA Costs for Fiscal Years 2018 and 2019

For FY 2018, the Agency requested $1.1 million in EPA Costs. *See* CX 27. Respondent declined to pay that amount and instead transferred to the Agency roughly $485,000, a sum that Respondent tied to the 2011 Letter. *See* CX 28; CX 34; RX 37.

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[18] At times, Respondent seems to link its defense that it lacked appropriated funds to its failure to pay adequate EPA Costs for FY 2015. But Respondent did not raise that argument until mid-2018, well after it had failed to fully pay the FY 2015 request. Regardless, as discussed below, I reject Respondent's claim that there were no legally authorized funds from which it could pay EPA Costs.

As in FY 2015, at issue is whether Respondent's FY 2018 payment was sufficient to comply with the terms of the FFA and the Settlement Agreement. The 2011 Letter does not specifically impact EPA Costs for FY 2018 because, even if it modified the Settlement Agreement, its terms end at FY 2017. Consequently, I look to the terms of Section XII of the Settlement Agreement and the parties' performance thereunder. *See* 11 Williston on Contracts § 32:14 (4th ed.) ("[T]he parties' own practical interpretation of the contract—how they actually acted, thereby giving meaning to their contract during the course of performing it—can be an important aid to the court. Thus, courts give great weight to the parties' practical interpretation."). The terms of Section XII call for the parties to, every three years, "confer and attempt to reach consensus" on annual EPA Costs for the following three-year period. In practice, the evidence demonstrates that the parties "conferred" yearly when the Agency sent to Respondent its annual payment request for the upcoming fiscal year. In most years, the parties reached a consensus, as demonstrated by Respondent's repeated annual payments of the amounts the Agency asked for. The Agency and Respondent failed to reach a consensus in FY 2015 and then again in FY 2018. The Settlement Agreement provides a specific resolution to that scenario, requiring Respondent to pay a default cost of $550,000 plus inflation—nearly $1.08 million in FY 2018. Further, this amount happens to also be roughly equivalent to the Agency's actual site costs at the Arsenal in FY 2018. *See* CX 32; CX 37; CX 38 (showing calendar year costs for 2017 and 2018 were $1.25 million and just under $1 million, respectively). This is notable because the only factor the Settlement Agreement mandates that the parties consider in negotiating EPA Costs are "EPA's actual expenditures of EPA Costs over the prior three years . . . ." CX 2 at 34, ¶ 12.3. To this end, even if EPA Costs did not revert to the default calculation prescribed by paragraph 12.3, it would still be equitable and in keeping with Respondent's "agree[ment] to pay EPA Costs as defined in the Settlement Agreement" for Respondent to pay an amount that fully covered the Agency's actual FY 2018 costs at the Arsenal. *See* CX 1 at 12, ¶ 2.5. Respondent's payment of $485,000 is less than half the amount of either the default EPA Costs under paragraph 12.3 or the Agency's actual costs. This does not comply with Respondent's obligation under the FFA to pay FY 2018 EPA Costs.

For FY 2019, the Agency requested $1.48 million in EPA Costs. CX 36; RX 41. Respondent paid nothing. Compl., ¶ 44; Answer, ¶ 44. This too represents a failure to comply with the FFA for the same reasons that apply to FY 2018.

Respondent now claims it is excused—at least temporarily—from paying EPA Costs in FY 2018 and FY 2019. Although Respondent initially objected to the FY 2018 request on grounds that the Agency had not supported its request with prior year expenditures, it subsequently declared that it could not pay EPA Costs for FY 2018 or FY 2019 without securing additional appropriations from Congress. That is, Respondent decided that its environmental restoration account was "an inappropriate source of funds" absent specific congressional approval. Since reaching this conclusion in June 2018, Respondent states that it has sought new funding sources and additional congressional authorization to pay EPA Costs, but its efforts so far have not been successful. Respondent's AD Mot. at 6-7. As it continues to seek congressional authorization, Respondent argues it "is legally unable to pay for [EPA Costs] . . . until Congress has expressly authorized such payment." Respondent's AD Mot. at 16. Without congressional authorization, Respondent continues, its payment obligations are excused by two

separate clauses of the FFA: Section XL, "Funding," and Section XXVII, "Force Majeure." Respondent's AD Mot. at 17; Respondent's Response at 7; CX 1 at 72, 98-99.

The relevant portion of the FFA's Funding clause states as follows:

> Any requirement for the payment or obligation of funds by the United States or any agency thereof, established by the terms of this Agreement *shall be subject to availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.* It is the expectation of the Organizations that all obligations of the United States under this Agreement will be fully funded. The United States, or any agency thereof, shall take all necessary steps and make every effort within its authority to assure that timely funding is available to meet all obligations of the United States under this Agreement. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established for payment or obligation shall be appropriately adjusted. Notwithstanding any such adjustment of the date established for payment, interest shall continue to accrue from and after the original due date in accordance with the terms of the Settlement Agreement.

CX 1 at 98-99, ¶ 40.1 (emphasis added). Under the Anti-Deficiency Act, "except as specified in . . . any other provision of law," a federal agency "may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation[.]" 31 U.S.C. § 1341(a)(1)(A). Because Respondent's required payments are "subject to availability of appropriated funds, and no provision [of the FFA] shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act," Respondent's obligation to pay EPA Costs under paragraph 2.5 would be suspended during the period of time in which appropriated funds were unavailable.

However, I do not accept Respondent's contention that appropriated funds were unavailable to it because it lacked congressional authorization. In reaching this conclusion, I am persuaded by U.S. Department of Justice ("DOJ") reasoning in an opinion its Office of Legal Counsel issued to the EPA's General Counsel in August 2016 addressing a similar disagreement involving the cleanup of another Army facility.[19] *See* CX 26. EPA sought the DOJ opinion to

[19] "Whenever two or more Executive agencies are unable to resolve a legal dispute between them . . . each agency is encouraged to submit the dispute to the Attorney General." Management of Federal Legal Resources, 44 Fed. Reg. 42657, § 1-4 (July 18, 1979) (Executive Order). The "core function" of the Office of Legal Counsel "is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the function of the Federal Government." Memorandum from Acting Assistant Attorney Gen. David J. Barron for Attorneys of the Office 1 (July 16, 2010) (available online at https://www.justice.gov/olc/best-practices-olc-legal-advice-and-written-opinions).

resolve a dispute with the Department of Defense ("DoD") concerning DoD's "authority to comply with an interagency agreement governing the cleanup of the Twin Cities Army Ammunition Plant" in Arden Hills, Minnesota. CX 26 at 1. In that case, EPA and the DoD had entered into an FFA under which the parties agreed that DoD would reimburse the Superfund for EPA's oversight costs at the Twin Cities facility. CX 26 at 1. Subsequently, DoD argued that it could not reimburse EPA's oversight costs for various reasons, including that it could not do so without specific authorization from Congress.

The DOJ generally rejected the DoD's argument, concluding the DoD could lawfully expend funds from its environmental restoration accounts to reimburse the Superfund for EPA's oversight costs at Twin Cities. CX 26 at 13-17. As the DOJ observed, the DERP authorizing statutes appropriate funds based on the provision "that funds in an environmental restoration account 'may be obligated or expended from the account . . . to carry out the environmental restoration functions of the Secretary of Defense.'" CX 26 at 14 (quoting 10 U.S.C. § 2703(c)). The DOJ further determined that it did not matter that the authorization was made through permanent legislation rather than an annual appropriations act. CX 26 at 14. To that end, the DOJ found that DoD could expend funds in its environmental restoration accounts "for any 'necessary expense'" and remain in compliance with 31 U.S.C. § 1301(a).[20] CX 26 at 14. To determine whether DoD's use of environmental restoration account funds to reimburse the Superfund for EPA's oversight costs was a "necessary expense," DOJ applied a three part analysis that both it and the Comptroller General use to assess the purpose of an appropriation. CX 26 at 14; *see also* GAO Red Book at 3-14-17. Under this analysis, an expenditure must (1) "bear a logical relationship" and "make a direct contribution to" carrying out the appropriation; (2) not be prohibited by law; and (3) not otherwise be provided for in "some other appropriation or statutory funding scheme." CX 26 at 14 (citations omitted); GAO Red Book at 3-16-17 (citations omitted).

The DOJ determined that under the first element, the DERP statutes authorize DoD to use environmental restoration account funds to "'to carry out the environmental restoration functions of the Secretary of Defense . . . under any . . . provision of law.'" CX 26 at 14 (quoting 10 U.S.C. § 2703(c)(1)). As DOJ further observed, CERCLA is a "provision of law" that compels DoD to engage in "the environmental restoration function of 'complet[ing] . . . all necessary remedial action'" at Twin Cities. CX 26 at 14-15 (quoting 42 U.S.C. § 9620(e)(2)). Consequently, "expending funds to support EPA's oversight activities at Twin Cities would 'bear a logical relationship' and 'make a direct contribution' to the environmental restoration accounts' stated purpose of enabling DoD to 'carry out [its] environmental restoration functions.'" CX 26 at 15.

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[20] As indicated above, 31 U.S.C. § 1301(a) requires that appropriations "be applied only to the objects for which the appropriations were made except as otherwise provided by law." "Simply stated, the [ ] statute says that public funds may be used only for the purpose or purposes for which they were appropriated." GAO Red Book at 3-10 (4th ed. 2017).

Turning to the second element, DOJ found no statutory provision that prohibited DoD from reimbursing the Superfund for EPA's oversight costs. CX 26 at 11-13, 15.

Finally, addressing the third element, DOJ concluded that the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 ("2011 NDAA") provided another appropriation or statutory funding scheme that affected what DoD could pay. CX 26 at 15. The 2011 NDAA specifically authorized Respondent to transfer $5.6 million from its environmental restoration account to the Superfund to reimburse EPA "for costs the Agency incurred relating to response actions . . . at . . . Twin Cities." 2011 NDAA § 311(a)(1), (a)(2). The reimbursement was "intended to satisfy certain terms" of the FFA providing for the Agency's recovery of expenses from the Army. 2011 NDAA § 311(a)(3). DoD argued to DOJ that this both absolved it of any further payments for oversight costs at Twin Cities incurred prior to enactment of the 2011 NDAA and also "demonstrate[d] 'the need . . . for DoD to obtain specific authorization for payment of EPA oversight costs.'" CX 26 at 15 (quoting DoD's argument). Looking to the 2011 NDAA's use of "incurred" in the past tense and its stated intent to "satisfy" certain terms of the FFA, the DOJ agreed that through the Act "Congress intended its authorization to pay for EPA oversight costs incurred *prior* to the 2011 NDAA to be exclusive" and that DoD "may not make additional payments for such *past* costs using an environmental restoration account" absent specific authorization from Congress. CX 26 at 16 (emphasis added).

However, DOJ rejected the argument that the 2011 NDAA precluded DoD from expending funds from its environmental restoration accounts to pay for oversight costs EPA incurred *after* the statute's enactment, because the 2011 NDAA did not address DoD's reimbursement obligation for subsequent costs incurred. CX 26 at 16. Moreover, the DOJ reasoned that "the fact that Congress expressly authorized DoD to expend funds for a given purpose does not necessarily imply that the agency otherwise lacked that authority." CX 26 at 16. For example, the DOJ noted, Congress may have enacted § 311 of the 2011 NDAA "simply to resolve uncertainty concerning DoD's authority to make past payments," and further, "appropriations measures often authorize or direct the expenditure of funds for specific purposes that would otherwise appear to constitute 'necessary expenses' payable under more general appropriations." CX 26 at 16 (citation omitted). "We do not think it plausible that each time Congress makes a specific appropriation, it implies that an agency is prohibited from using other appropriated funds for the same purpose in any subsequent fiscal year," the DOJ decided. CX 26 at 17. Therefore, DOJ concluded that although DoD could not use its environmental restoration account funds to pay for EPA oversight expenses prior to enactment of the 2011 NDAA, it could use those funds to pay for such expenses incurred after that date. CX 26 at 17.

As stated above, much of the DOJ's reasoning in the funding dispute involving Twin Cities is persuasive and applies with equal force to this matter. *Cf. U.S. Army, Fort Wainwright Central Heating & Power Plant*, 11 E.A.D. 126, 145, 2003 WL 21500416, at *15 (EAB, 2003) (Remand Order on Interlocutory Appeal) (EAB relying on logic of DOJ opinion addressing administrative assessment of civil penalties against federal agencies for Clean Air Act violations). Similar to Twin Cities, Respondent in this case entered into an FFA with the Agency under which Respondent agreed to provide annual payments to the Agency for costs EPA incurred "carrying out its responsibilities in providing technical assistance for any activity"

connected to the cleanup at the Arsenal. CX 1 at 12; CX 2 at 14, 34. Congress has already appropriated funds for costs such as these through DERP and creation of the environmental restoration accounts. *See* 10 U.S.C. §§ 2701, 2703. Indeed, Respondent's payment of EPA Costs are authorized expenditures because they are a "necessary expense" of the accounts.

First, CERCLA required Respondent to enter into an FFA with EPA and to "complet[e] . . . all necessary remedial action" at the Arsenal after it was added to the National Priorities List. 42 U.S.C. § 9620(e)(2). To accomplish this obligation, the FFA compels Respondent to pay EPA Costs, which is in turn necessary for the Agency to fulfill its CERCLA-mandated role at the Arsenal and to ensure completion of remedial actions there. Therefore, expending funds from the Army's environmental restoration account to support the Agency's responsibilities in providing technical assistance for clean-up activity at the Arsenal bears a logical relationship and makes a direct contribution to the purpose of the account, which is "to carry out the environmental and restoration functions" of Respondent. *See* 10 U.S.C. § 2703(c)(1). Indeed, "the sole source of funds for all phases of an environmental remedy at a site under the jurisdiction" of Respondent "shall be the applicable environmental restoration account . . . ." 10 U.S.C. § 2703(g)(1). Congress did not contemplate another appropriation or source of funding for Respondent's CERCLA obligations at the Arsenal, which could not be met without Respondent's payment of EPA Costs.

Second, there does not appear to be any statutory provision that specifically prohibits Respondent from making required payments to EPA. *See also* CX 26 at 17 (DOJ asserting that it is "aware of no legal restriction prohibiting DoD" from reimbursing EPA's oversight costs at Twin Cities). Respondent asserts the general claim that "a number of well-established fiscal law principles that govern and restrict Federal agencies' use of appropriations" legally preclude it from paying the Agency. Respondent's Response at 7 n.7. But although Respondent restates some of these principles, it does not explain how they apply in this particular matter. For example, Respondent cites the "purpose statute" codified at 31 U.S.C. § 1301, but as the DOJ clarified, expenditures from the environmental restoration accounts on any necessary expense comply with this statute. Respondent also quotes part of 31 U.S.C. § 1532, stating that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law." Respondent's Response at 7-8 n.7. But to the extent that Respondent's payment of EPA Costs in fulfillment of its FFA obligation constitutes a withdrawal from one appropriation account and credit to another, this payment is "authorized by law" – specifically 10 U.S.C. § 2703 and 42 U.S.C. § 9620. Respondent further refers to "a recurring general provision in the DoD Appropriations Act" that forbids the use of its funds to pay the salary of any employee "'who approves or implements the transfer of administrative responsibilities or budgetary resources of any program, project, or activity financed by this Act to the jurisdiction of another Federal agency not financed by this Act *without the express authorization of Congress*[.]'" Respondent's Response at 8 n.7 (emphasis added).[21] But again, Respondent has failed to show that its payment of EPA Costs under the

[21] Respondent appears to cite the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388, but actually quotes the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 8109, 134 Stat. 1182, 1330.

FFA constitutes a "transfer of administrative responsibilities or budgetary resources . . . without the express authorization of Congress" when Congress *has* expressly authorized the use of environmental restoration account funds to carry out Respondent's CERCLA-compelled environmental restoration functions. The payment of EPA Costs is a small but necessary component of this function. Finally, Respondent leans most heavily on the Anti-Deficiency Act. But the Anti-Deficiency Act does not bar Respondent from making annual payments of EPA Costs. Rather, the Anti-Deficiency Act prohibits payments in excess of available funds. Because Respondent is otherwise authorized to pay EPA Costs from its environmental restoration account, the Anti-Deficiency Act appears to apply only if Respondent owed EPA Costs that exceed the amount available in the account. But Respondent has not alleged or offered any evidence that this is the case.

Third, there does not appear to be any other appropriation or statutory funding scheme that provides for Respondent's payment of EPA Costs at the Arsenal. Whereas the 2011 NDAA specifically authorized Respondent to transfer a certain amount of money from its environmental restoration account to the Superfund to reimburse EPA for specific response costs at Twin Cities, Congress has enacted no such legislation with respect to payment of the disputed EPA Costs at the Arsenal.[22]

In sum, Respondent has not demonstrated that it was not authorized to use its environmental restoration accounts to pay EPA Costs for FY 2018 and FY 2019. To the extent the DoD has adopted a policy under which it will not use its environmental restoration accounts to pay EPA administrative or oversight costs, that is a decision of its own making that does not excuse it from complying with agreements like the FFA. *See* RX 40. Likewise, Respondent has presented no evidence that there are insufficient funds in the account such that paying EPA Costs would violate the Anti-Deficiency Act. Accordingly, the FFA's Funding clause does not excuse Respondent's nonpayment of these costs.

Beyond the excuse purportedly afforded by the FFA's Funding clause and the Anti-Deficiency Act, Respondent claims its inability to use environmental restoration account funds constitutes a "Force Majeure" under Section XXVII of the Settlement Agreement. Respondent's

[22] Respondent also points to the National Defense Authorization Act for Fiscal Year 2020 ("2020 NDAA"), Pub. L. No. 116-92, which authorized the use of environmental restoration account funds to pay EPA cleanup costs at Twin Cities through 2026, as evidence that it cannot pay Arsenal cleanup costs unless Congress passes similar legislation. Respondent's AD Mot. at 6; Respondent's Response at 11; RX 63. However, I again apply the DOJ's reasoning to this argument: passage of the 2020 NDAA does not necessarily imply Respondent lacked the authority to use environmental restoration account funds, and the 2020 NDAA may have been intended to resolve uncertainty over the amount Respondent should pay the Agency for costs incurred as well as resolve disputes over projected out-year costs. *See* CX 26 at 16. As the DOJ observed, "appropriations measures often authorize or direct the expenditure of funds for specific purposes that would otherwise appear to constitute 'necessary expenses' payable under more general appropriations." CX 26 at 16. Likewise, I also "do not think it plausible that each time Congress makes a specific appropriation, it implies that an agency is prohibited from using other appropriated funds for the same purpose in any subsequent fiscal year." CX 26 at 17.

AD Mot. at 20-22; CX 1 at 72. Under the FFA, "'Force Majeure' means any event arising from causes beyond the control of [Respondent] which causes a delay in or prevents the performance of any obligation under this agreement," including "insufficient availability of appropriated funds[.]" CX 1 at 27. However, for the reasons set forth above, Respondent has not shown it was unable to pay EPA Costs from its environmental restoration accounts due to causes beyond its control, and Respondent has not pointed to any evidence that appropriated funds were otherwise unavailable. Consequently, Respondent's failure to pay EPA Costs for FY 2018 and FY 2019 are not excused by the FFA's Force Majeure clause.

Accordingly, there is no genuine dispute that Respondent failed or refused to comply with paragraph 2.5 of the FFA when it paid only $485,000 in EPA Costs for FY 2018 and made no payment for FY 2019. Accelerated decision as to Respondent's liability for nonpayment of EPA Costs for FY 2018 and FY 2019 is granted to the Agency.

c. This is a proper forum to determine Respondent's compliance with the FFA

Respondent contends that this administrative proceeding is an improper forum to adjudicate its noncompliance with the FFA. Respondent's AD Mot. at 22-24. I disagree.

CERCLA provides that a party to an FFA that fails or refuses to comply with any term or condition of the FFA "shall be subject to a civil penalty in accordance with section 9609 . . . ." 42 U.S.C. § 9622(l). Section 9609, in turn, provides that the Agency may seek an administrative penalty for the violation constituted by this failure or refusal to comply with an FFA term or condition. 42 U.S.C. § 9609(b). The Complaint in this matter seeks a civil penalty pursuant to 42 U.S.C. § 9609(b)(5) for Respondent's alleged violation of 42 U.S.C. § 9622(l) in failing or refusing "to reimburse EPA's costs as required by the FFA and provided for in the Settlement Agreement." Compl., ¶¶ 1, 49. Finally, I am authorized to conduct a fair and impartial administrative adjudicatory proceeding for the assessment of any administrative civil penalty under 42 U.S.C. § 9609. 40 C.F.R. §§ 22.1(a)(7), 22.4(c). Consequently, this proceeding is an appropriate forum to adjudicate the allegations against Respondent.

Respondent makes several arguments based on its general characterization of the issues before this Tribunal as "a dispute over federal interagency funding." Respondent's AD Mot. at 22. In Respondent's view, this funding dispute "must be resolved and mutually agreed to within OMB first, Congressional authorization must approve of this interagency transfer of funds, and this path forward must meet the terms of the Settlement Agreement/Consent Decree or it must be modified with the District Court." Respondent's AD Mot. at 22. This Tribunal cannot resolve these issues, according to Respondent, because it cannot "decide that the Army has the fiscal authority to make these payments at this point in time." Respondent's AD Mot. at 22. Respondent further asserts that if a penalty were assessed against it, it would be unable to pay the penalty without legislation from Congress. Respondent's AD Mot. at 23. Additionally, Respondent contends that through the Consent Decree, the U.S. District Court for the District of Colorado retains jurisdiction over the funding provisions of the Settlement Agreement and is the proper forum for enforcement of its terms. Respondent's AD Mot. at 23-24.

However, while Respondent frames this as an interagency funding dispute, it is in fact an action to assess a civil penalty for noncompliance with a CERCLA-mandated interagency agreement. That is, this is not a proceeding by which the Agency seeks to enforce the terms of the FFA or the Settlement Agreement. Rather, the Agency seeks to *penalize* Respondent because Respondent did not comply with a term or condition that it agreed to comply with in the FFA. In this case, the relevant terms or conditions obligate Respondent to pay EPA Costs. That the terms and conditions relate to payments due to the Agency rather than something such as Respondent's obligation to complete a particular remediation project do not negate the Agency's ability to proceed under 42 U.S.C. § 9609. Respondent makes the point that the value of the penalties the Agency seeks will inevitably be "based on the total amount of EPA Costs they believe they are entitled to collect." Respondent's Reply at 25. Nonetheless, any assessed penalty will be calculated based on a number of factors designed by statute, regulation, or Agency guidance to produce a penalty appropriate to this CERCLA violation.

Thus, Respondent's contention that a funding dispute must first be resolved through OMB and Congress is erroneous, because this is not an action by the Agency to collect money it is owed but rather an action to penalize Respondent for not paying in the first place. Additionally, Respondent's determinations to partially pay EPA Costs in FY 2015 and FY 2018 were made prior to its claim that it lacked legally appropriated funds to make the payments. Respondent did not submit full payments for those years simply because it objected to the amounts the Agency requested. Respondent later created an "interagency funding dispute" by declining to pay EPA Costs from its environmental restoration account. As to Respondent's determination that it lacks fiscal authority to continue paying EPA Costs, that determination, even if made in good faith, is a unilateral decision to not fulfill its obligations under the terms of the FFA. This Tribunal is perfectly capable of assessing whether Respondent's determination affords it a legal excuse for its noncompliance.

Further, Respondent's claim that it would be unable to pay any penalty resulting from this proceeding without the approval of Congress is not relevant to whether it violated the terms of the FFA. If a penalty is assessed, Respondent will be obligated to pay the penalty to the same extent as any other federal agency that is subject to EPA's enforcement authority, and EPA may pursue whatever means are available to it to collect that penalty. Additionally, Respondent's argument that the federal district court in Colorado maintains jurisdiction over the Consent Decree is also irrelevant to this proceeding. As stated above, this is a penalty proceeding based on Respondent's noncompliance with the FFA, an action that CERCLA specifically authorizes. This proceeding does not arise out of the Consent Decree. Further, the Consent Decree expressly states that it does "not incorporate the Federal Facility Agreement, by reference or otherwise[.]" CX 2 at 3. Even if the District Court retains exclusive jurisdiction over the Consent Decree, this jurisdiction would not extend to 42 U.S.C. § 9609 penalty proceedings arising out of the FFA.

Respondent further cites paragraph 28.6 of the FFA, which provides in pertinent part that the parties "may only enforce the terms and conditions of this Agreement by bringing an appropriate action before the Court . . . ." Respondent's Reply at 2 n.1, 25; CX 1 at 74, ¶ 28.6. But this clause does not apply here, because this is a penalty proceeding, not an action to enforce the terms and conditions of the FFA. The FFA recognizes this distinction as well: Paragraph 28.1(a) stipulates that the violation of "any standard, regulation, condition, requirement or order"

incorporated by the FFA "will be subject to civil penalties under [42 U.S.C. § 9609]." CX 1 at 73, ¶ 28.1(a). Paragraph 2.5 of the FFA, compelling Respondent to pay EPA Costs, is such a "condition" or "requirement." Similarly, paragraph 28.1(b) states that "any violation" of the terms and conditions of the FFA that relate to remedial actions or work associated with remedial actions "will be subject to civil penalties under [42 U.S.C. § 9609]." CX 1 at 73, ¶ 28.1(b). Given that EPA provides technical assistance necessary to completion of remedial actions and work associated with remedial actions at the Arsenal, this provision covers Respondent's violation of the FFA's terms and conditions related to payment of EPA Costs.

Therefore, I find this proceeding to be an appropriate forum in which to adjudicate the Agency's Complaint against Respondent.

d. Respondent has not substantiated its affirmative defenses

Respondent enumerated nine "affirmative defenses" in its Answer. Respondent has "the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief." 40 C.F.R. § 22.24(a). Additionally, "[t]he respondent has the burdens of presentation and persuasion for any affirmative defenses." *Id.* Respondent's affirmative defenses have largely been addressed in the discussion above, however, for the sake of clarity, I discuss them briefly here.

First, Respondent contends it "has not refused or failed to provide for payment of EPA's 'oversight' costs" because it submitted several legislative proposals seeking congressional authorization to pay EPA Costs starting in FY 2021. Answer at 12.[23] But as discussed above, congressional authorization was not an issue with respect to EPA Costs for FY 2015, and no further congressional appropriation was required to pay EPA Costs from the Army's environmental restoration account in FY 2018 or FY 2019. Accordingly, I reject Respondent's First Affirmative Defense as it pertains to liability.

Second, Respondent alleges the FFA does not provide for payment of EPA Costs. Answer at 12. But as discussed above, paragraph 2.5 of the FFA is a term or condition that obligates Respondent to pay EPA Costs. Accordingly, I reject Respondent's Second Affirmative Defense as it pertains to liability.

Third, Respondent argues that even if the FFA requires payment of EPA Costs, Section XXVIII of the agreement, Enforceability, does not permit the Agency to seek a penalty. Answer at 13. But as discussed above, Respondent misconstrues the nature of this proceeding and the ways in which Section XXVIII provides for civil penalties under 42 U.S.C. § 9609. Accordingly, I reject Respondent's Third Affirmative Defense as it pertains to liability.

[23] Respondent's Answer contains no page numbers. As with the brief supporting the Agency's AD Motion, page numbers cited in this Order refer to the page number displayed when the electronic version of the pleading is opened in Adobe Acrobat.

Fourth, Respondent argues this Tribunal lacks subject matter jurisdiction because "the subject of costs is not a requirement under the FFA or CERCLA." Answer at 13. But for the reasons stated above, the payment of EPA Costs *is* a requirement under the FFA, and the allegations of noncompliance with this FFA requirement are properly raised in this proceeding. Respondent has not otherwise supported or explained its claim that the subject of costs is "not a requirement under . . . CERCLA." Certainly, the payment of costs to EPA is necessary for the Agency to fulfill its obligations under CERCLA. Accordingly, I reject Respondent's Fourth Affirmative Defense as it pertains to liability.

Fifth, Respondent claims the Agency "has chosen an improper forum and must enforce the settlement agreement through the district court" of Colorado. Answer at 14. For the reasons set forth above, this is a proper forum to assess civil penalties for noncompliance with the FFA. Accordingly, I reject Respondent's Fifth Affirmative Defense as it pertains to liability.

Sixth, Respondent contends its payments to the Agency "were improper, and no further payments are due," because the parties did not specifically adhere to the procedures outlined in paragraph 12.3 of the Settlement Agreement. To the extent this argument has not been previously addressed, I find that it lacks merit. The parties followed a consistent course of performance for more than 20 years: The Agency requested payment of EPA Costs in amounts that were communicated annually to Respondent, and Respondent paid the amount requested. It was not until FY 2015 that Respondent objected and determined its own payment amount. Further, Respondent has not pointed to any provision of the FFA that negates its obligation to comply with paragraph 2.5 in the event the parties do not strictly follow the negotiation process in paragraph 12.3 of the Settlement Agreement. Accordingly, I reject Respondent's Sixth Affirmative Defense as it pertains to liability.

Seventh, Respondent argues the Agency "affirmatively alleges that EPA did not submit timely demands for payments for fiscal years 2016, 2017, 2018, and 2019, and no payments for those years are due." Answer at 14. As previously discussed, claims of Respondent's liability for FY 2016 and FY 2017 are dismissed. With respect to FY 2018 and FY 2019, Respondent has not presented evidence that the timing of the Agency's payment requests excused its payment obligation under the FFA. Accordingly, I reject Respondent's Seventh Affirmative Defense as it pertains to liability.

Eighth, Respondent asserts that "[t]he Settlement Agreement provides for payments only with regard to 'technical assistance,' which EPA does not allege it has rendered. Accordingly, payments made to date were improper, and no further payments are due absent the provision of such assistance." Answer at 14. This defense is without merit. The Complaint properly alleges that Respondent has failed to comply with the terms and conditions of the FFA by not paying EPA Costs. Accordingly, I reject Respondent's Eighth Affirmative Defense as it pertains to liability.

Ninth, Respondent alleges "on information and belief" that after September 2011, the Agency unilaterally altered its "method of determining oversight costs" and overbilled Respondent. Answer at 15. However, Respondent has not pointed to evidence to substantiate

this claim or explain how it excuses Respondent from complying with its obligation to pay EPA Costs. Accordingly, I reject Respondent's Ninth Affirmative Defense as it pertains to liability.

V. Conclusion

For the aforementioned reasons, the Agency's Motion for Partial Accelerated Decision as to liability is **GRANTED in part and DENIED in part**, and Respondent's Motion for Accelerated Decision is **DENIED**. Claims for Respondent's liability for nonpayment of EPA Costs in FY 2016 and FY 2017 are **DISMISSED**.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: July 14, 2021
Washington, D.C.

In the Matter of *United States Department of the Army*, Respondent.
Docket No. CERCLA-08-2020-0001

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Motions for Accelerated Decision**, dated July 14, 2021, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

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Dated: July 14, 2021
Washington, D.C.