

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA)
)
Plaintiff,) Civil Action No. _____
)
v.)
)
MISSOURI DEPARTMENT OF NATURAL)
RESOURCES, DIVISION OF STATE)
PARKS,)
and)
BEN ELLIS, DIRECTOR, MISSOURI)
DEPARTMENT OF NATURAL)
RESOURCES, DIVISION OF STATE)
PARKS, IN HIS OFFICIAL CAPACITY)
)
Defendants.)
_____)

**REMEDIAL ACTION
CONSENT DECREE**

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I. BACKGROUND

- A. The United States of America (United States), on behalf of the Administrator of the United States Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9606 and 9607.
- B. The United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (DOJ) for response actions at the Big River Mine Tailings Superfund Site, St. Francois County, Missouri (Site), together with accrued interest; and (2) performance of response actions by the defendant at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (NCP).
- C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Missouri (the State) on October 31, 2011, of negotiations with potentially responsible parties (PRPs) regarding the implementation of the remedial design and remedial action (RD/RA) for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree (CD).
- D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior on October 31, 2011, of negotiations with PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee to participate in the negotiation of this CD.
- E. The defendants that have entered into this CD (collectively, the “Settling Defendant” or “SD”) does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor does it acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment.
- F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List (NPL), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on October 14, 1992, 57 Fed. Reg. 47180.
- G. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, other PRPs at the Site commenced on January 29, 1997, a Remedial Investigation and Feasibility Study (RI/FS) for the Site pursuant to 40 C.F.R. § 300.430.
- H. Another PRP at the Site completed a Remedial Investigation (RI) Report on March 3, 2006, and another PRP at the Site completed a Feasibility Study (FS) Report on July 6, 2011.
- I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on July 22, 2011, in a major local newspaper of general circulation. EPA provided an opportunity for written

and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Director of the Superfund Division, EPA Region 7, based the selection of the response action for Operable Unit 01.

- J. The decision by EPA on the remedial action for Operable Unit 01 to be implemented at the Site is embodied in a final Record of Decision (ROD), executed on September 30, 2011, on which the State has given its concurrence. The ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).
- K. Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly conducted by the SD if conducted in accordance with this CD and its appendices.
- L. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the remedy set forth in the ROD and the Work to be performed by SD shall constitute a response action taken or ordered by the President for which judicial review shall be limited to the administrative record.
- M. The Parties recognize, and the Court by entering this CD finds, that this CD has been negotiated by the Parties in good faith and implementation of this CD will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this CD is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

- 1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over SD. Solely for the purposes of this CD and the underlying complaint, SD waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. SD shall not challenge the terms of this CD or this Court's jurisdiction to enter and enforce this CD.

III. PARTIES BOUND

- 2. This CD is binding upon the United States and upon SD and its successors, and assigns. Any change in ownership or any transfer of real or personal property, shall in no way alter SD's responsibilities under this CD.
- 3. SD shall provide a copy of this CD to each contractor hired to perform the Work and to each person representing the SD with respect to the Site or the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this CD. SD or its contractors shall provide written notice of the CD to all subcontractors hired to perform any portion of the Work. SD shall nonetheless be

responsible for ensuring that its contractors and subcontractors perform the Work in accordance with the terms of this CD. With regard to the activities undertaken pursuant to this CD, each contractor and subcontractor shall be deemed to be in a contractual relationship with SD within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided in this CD, terms used in this CD that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this CD or its appendices, the following definitions shall apply solely for purposes of this CD:

“Affected Property” shall mean all real property at the Site and any other real property where EPA determines, at any time, that access, land, water, or other resource use restrictions, and/or Institutional Controls are needed to implement the Remedial Action, including, but not limited to, the Subject Properties listed in Appendix A.

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

“Consent Decree” or “CD” shall mean this consent decree and all appendices attached hereto (listed in Section XXI). In the event of conflict between this CD and any appendix, this CD shall control.

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

“DOJ” shall mean the United States Department of Justice and its successor departments, agencies, or instrumentalities.

“Effective Date” shall mean the date upon which the approval of this CD is recorded on the Court’s docket.

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

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

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing deliverables submitted pursuant to this CD, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this CD, or otherwise in connection with Operable Unit 01, after the Effective Date.

“Institutional Controls” or “ICs” shall mean Proprietary Controls and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that: (a) limit land, water, or other resource use to minimize the potential for human exposure to Waste Material at or in connection with the Site; (b) limit land, water, or other resource use to implement, ensure non-interference with, or ensure the protectiveness of the RA; and/or (c) provide information intended to modify or guide human behavior at or in connection with the Site.

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at <http://www2.epa.gov/superfund/superfund-interest-rates>.

“The Big River Mine Tailings Special Account” shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Non-Settling Owner” shall mean any person, other than SD, that owns or controls any Affected Property, including the Subject Properties listed in Appendix A. The clause “Non-Settling Owner’s Affected Property” means Affected Property owned or controlled by a Non-Settling Owner.

“Operable Unit 01” shall mean residential properties located within the Site. The definition of residential properties includes single and multi-family dwellings, apartment complexes, vacant lots in residential areas, schools, daycare centers, playgrounds, parks, and green ways.

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

“Parties” shall mean the United States and the SD.

“Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Operable Unit 01 through the Effective Date.

“Performance Standards” or “PS” shall mean the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the ROD.

“Plaintiff” shall mean the United States.

“Proprietary Controls” shall mean easements or covenants running with the land that (a) limit land, water, or other resource use and/or provide access rights and (b) are created pursuant to common law or statutory law by an instrument that is recorded in the appropriate land records office.

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

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the Operable Unit 01, residential properties at the Site signed on September 30, 2011, by the Director of the Superfund Division, EPA Region 7, and all attachments thereto. The ROD is attached as Appendix B.

“Reimbursable Future Response Costs” shall mean those Future Response Costs that SD is required to reimburse to the United States pursuant to Paragraph 11 (Emergencies and Releases).

“Remedial Action” or “RA” shall mean the remedial action selected in the ROD.

“Remedial Design” or “RD” shall mean those activities undertaken by SD to develop final plans and specifications for the RA as stated in the Administrative Settlement Agreement and Order on Consent for Remedial Design Sampling and Analysis Implementation.

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

“Settling Defendant” or “SD” shall mean the Missouri Department of Natural Resources, Division of State Parks, and its successor departments, agencies, or instrumentalities together with Ben Ellis, Director, Missouri Department of Natural Resources, Division of State Parks in his official capacity, and any successors in that position.

“Site” shall mean the Big River Mine Tailings Superfund Site, located in St. Francois County, Missouri, and depicted generally on the map attached as Appendix C.

“State of Missouri” shall mean the State of Missouri, and each department, agency, and instrumentality of the State of Missouri, including the Missouri Department of Natural Resources, Division of State Parks.

“Statement of Work” or “SOW” shall mean the document describing the activities the SD must perform to implement the RA, regarding the Site, which is attached as Appendix D.

“Subject Properties” shall mean the residential properties listed in Appendix A and located within the Site.

“Supervising Contractor” shall mean the principal contractor retained by SD to supervise and direct the implementation of the Work under this CD.

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

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

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

“Work” shall mean all activities and obligations SD is required to perform under this CD and pursuant to Unilateral Administrative Order for Remedial Action, Docket Number CERCLA-07-2018-0171 (dated February 15, 2018) except the activities required under Section XVIII (Retention of Records).

V. GENERAL PROVISIONS

5. **Objectives of the Parties.** The objectives of the Parties in entering into this CD are to protect public health, welfare, and the environment by implementing the response actions for Operable Unit 01 at the Site by SD, to pay response costs of Plaintiff, and to resolve the claims of Plaintiff for Operable Unit 01 of the Site against SD and the claims of SD that have been or could have been asserted against the United States with regard to this Site as provided in this CD.
6. **Commitments by SD.** SD shall finance and perform the Work in accordance with this CD and all deliverables developed by SD and approved or modified by EPA pursuant to this CD. SD shall pay the United States for its response costs as provided in this CD.
7. **Compliance with Applicable Law.** Nothing in this CD limits SD’s obligation to comply with the requirements of all applicable federal and state laws and regulations. SD must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this CD, if approved by EPA, shall be deemed to be consistent with the NCP as provided in Section 300.700(c)(3)(ii) of the NCP.
8. **Permits.**
 - a. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, SD shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

- b. SD may seek relief under the provisions of Section XI (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in paragraph a and required for the Work, provided that it has submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.
- c. This CD is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

VI. PERFORMANCE OF THE WORK

9. Coordination and Supervision.

a. Project Coordinators.

- (1) SD's Project Coordinator must have sufficient technical expertise to coordinate the Work. SD's Project Coordinator may not be an attorney representing SD in this matter and may not act as the Supervising Contractor. SD's Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.
- (2) EPA shall designate and notify the SD of EPA's Project Coordinator and Alternate Project Coordinator. EPA may designate other representatives, which may include its employees, contractors and/or consultants, to oversee the Work. EPA's Project Coordinator/Alternate Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the NCP. This includes the authority to halt the Work and/or to conduct or direct any necessary response action when he or she determines that conditions at the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material.
- (3) SD's Project Coordinator shall meet or confer by telephone with EPA's Project Coordinator at least monthly, or as otherwise mutually agreed among the project coordinators.

b. **Supervising Contractor.** SD's proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system that complies with ANSI/ASQC E4-2004, Quality Systems for Environmental Data and Technology Programs: Requirements with Guidance for Use (American National Standard).

c. Procedures for Disapproval/Notice to Proceed.

- (1) SD shall designate, and notify EPA, within 120 days after the Effective Date, of the name, contact information, and qualifications of the SD's proposed Project Coordinator and Supervising Contractor.

- (2) EPA shall issue notices of disapproval and/or authorizations to proceed regarding the proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval, SD shall, within 30 days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. EPA shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. SD may select any coordinator/contractor covered by an authorization to proceed and shall, within 21 days, notify EPA of SD's selection.
 - (3) SD may change its Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of paragraph (1) and (2).
10. **Performance of Work in Accordance with SOW.** SD shall: (a) perform the RA and (b) operate, maintain, and monitor the effectiveness of the RA; all in accordance with the SOW and all EPA-approved, conditionally-approved, or modified deliverables as required by the SOW. All deliverables required to be submitted for approval under the CD or SOW shall be subject to approval by EPA in accordance with the SOW.
11. **Emergencies and Releases.** SD shall comply with the emergency and release response and reporting requirements of the SOW. Subject to Section XIV (Covenants by Plaintiff), nothing in this CD, limits any authority of Plaintiff: (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site. If, due to SD's failure to take appropriate response action under the SOW, EPA takes such action instead, SD shall reimburse EPA under Section IX (Payments for Response Costs) for all costs of the response action.
12. **Community Involvement.** If requested by EPA, SD shall conduct community involvement activities under EPA's oversight. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator.
13. **Modification of SOW or Related Deliverables.**
 - a. If EPA determines that it is necessary to modify the work specified in the SOW and/or in deliverables developed under the SOW in order to achieve and/or maintain the Performance Standards or to carry out and maintain the effectiveness of the RA, and such modification is consistent with the Scope of the Remedy set forth the SOW, then EPA may notify SD of such modification. If SD objects to the modification it may, within 30 days after EPA's notification, seek dispute resolution under Section XII.
 - b. The SOW and/or related work plans shall be modified: (1) in accordance with the modification issued by EPA; or (2) if SD invokes dispute resolution, in

accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this CD, and SD shall implement all work required by such modification. SD shall incorporate the modification into the deliverable required under the SOW, as appropriate.

- c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this CD.
14. Nothing in this CD, the SOW, or any deliverable required under the SOW constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW or related deliverable will achieve the Performance Standards.

VII. REMEDY REVIEW

15. **Periodic Review.** SD shall support EPA's reviews under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and applicable regulations, of whether the RA is protective of human health and the environment.

VIII. PROPERTY REQUIREMENTS

16. **Agreements Regarding Access and Non-Interference.** SD shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by SD and by Plaintiff, providing that such Non-Settling Owner: (i) provide Plaintiff, and its representatives, contractors, and subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the CD, including those listed in Paragraph 16.a (Access Requirements); and (ii) refrain from using such Affected Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action.
- a. **Access Requirements.** The following is a list of activities for which access is required regarding the Affected Property:
 - (1) Monitoring the Work;
 - (2) Verifying any data or information submitted to the United States;
 - (3) Conducting investigations regarding contamination at or near the Site;
 - (4) Obtaining samples;
 - (5) Assessing the need for, planning, or implementing additional response actions at or near the Site;

- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved construction quality assurance quality control plan as provided in the SOW;
 - (7) Implementing the Work pursuant to the conditions set forth in paragraph 52 (Work Takeover);
 - (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by SD or its agents, consistent with Section XVII (Access to Information);
 - (9) Assessing SD's compliance with the CD;
 - (10) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the CD; and
 - (11) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions and Institutional Controls.
17. **Best Efforts.** As used in this Section, "best efforts" means the efforts that a reasonable person in the position of SD would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restriction agreements. If SD is unable to accomplish what is required through "best efforts" in a timely manner, it shall notify the United States and include a description of the steps taken to comply with the requirements. If the United States deems it appropriate, it may assist SD, or take independent action, in obtaining such access and/or use restrictions. If access and/or use restrictions cannot be obtained, EPA will provide alternative Subject Properties to SD.

IX. PAYMENTS FOR RESPONSE COSTS

18. **Payment by SD for United States Past Response Costs.** Within 30 days after the Effective Date, SD shall pay to EPA \$40,000, in payment for Past Response Costs. Payment shall be made in accordance with paragraph 23.a (instructions for past response costs and future response costs payments).
19. **Deposit of Past Response Costs Payments.** The total amount to be paid by Settling Defendant pursuant to paragraph 18 shall be deposited by EPA in the Big River Mine Tailings Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.
20. **Payments by SD for Future Response Costs.** Within 30 days after the Effective Date, SD shall pay to EPA \$25,000, in payment for Future Response Costs. Payment shall be made in accordance with paragraph 23.a (instructions for past response costs and future response costs payments). In addition, SD shall pay all Reimbursable Future Response Costs not inconsistent with the NCP.

21. **Periodic Bills.** On a periodic basis, EPA will send SD a bill for Reimbursable Future Response Costs requiring payment that includes an itemized cost summary, which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and DOJ. SD shall make all payments within 30 days after SD's receipt of each bill requiring payment, except as otherwise provided in paragraph 24, in accordance with paragraph 23.b (instructions for reimbursable future response cost payments).
22. **Deposit of Future Response Costs Payments.** The total amount to be paid by SD pursuant to paragraphs 20 (Payments by SD for Future Response Costs) and 21 (Periodic Bills) shall be deposited by EPA in the Big River Mine Tailings Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund, provided, however, that EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Big River Mine Tailings Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site.
23. **Payment Instructions for SD.**
 - a. **Past Response Costs and Future Response Costs Payments.**
 - (1) The Financial Litigation Unit (FLU) of the United States Attorney's Office for the Eastern District of Missouri shall provide SD, in accordance with paragraph 72, with instructions regarding making payments to DOJ on behalf of EPA. The instructions must include a Consolidated Debt Collection System (CDCS) number to identify payments made under this CD.
 - (2) For all payments subject to this paragraph a, SD shall make such payment: by Fedwire Electronic Funds Transfer (EFT) / at <https://www.pay.gov>] to the U.S. DOJ account, in accordance with the instructions provided under paragraph (1), and including references to the CDCS Number, Site/Spill ID Number 07CR, and DJ Number 90-11-3-09306/6.
 - (3) For each payment made under this paragraph 23.a, SD shall send notices, including references to the CDCS, Site/Spill ID, and DJ numbers, to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with paragraph 72.
 - b. **Reimbursable Future Response Costs Payments and Stipulated Penalties.**
 - (1) For all payments subject to this paragraph b, SD shall make such payment by Fedwire EFT, referencing the Site/Spill ID and DJ numbers. The Fedwire EFT payment must be sent as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read
“D 68010727 Environmental Protection Agency”

- (2) For all payments made under this paragraph b, SD must include references to the Site/Spill ID and DJ numbers. At the time of any payment required to be made in accordance with paragraph 23.b, SD shall send notices that payment has been made to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with paragraph 72. All notices must include references to the Site/Spill ID and DJ numbers.

24. **Contesting Future Response Costs.** SD may submit a Notice of Dispute, initiating the procedures of Section XII (Dispute Resolution), regarding any Reimbursable Future Response Costs billed under paragraph 20 (Payments by SD for Future Response Costs) or 21 (Periodic Bills) if it determines that EPA has made a mathematical error or included a cost item that is not within the definition of Reimbursable Future Response Costs or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. Such Notice of Dispute shall be submitted in writing within 30 days after receipt of the bill and must be sent to the United States pursuant to Section XIX (Notices and Submissions). Such Notice of Dispute shall specifically identify the contested Reimbursable Future Response Costs and the basis for objection. If SD submits a Notice of Dispute, SD shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Reimbursable Future Response Costs to the United States and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC), and remit to that escrow account funds equivalent to the amount of the contested Reimbursable Future Response Costs. SD shall send to the United States as provided in Section XIX (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Reimbursable Future Response Costs and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If the United States prevails in the dispute, SD shall pay the sums due (with accrued interest) to the United States within 7 days after the resolution of the dispute. If SD prevails concerning any aspect of the contested costs, SD shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to the United States within 7 days after the resolution of the dispute. SD shall be disbursed any balance of the escrow account. All payments to the United States under this Paragraph shall be made in accordance with paragraph 23.b (instructions for future response cost payments). The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding

SD's obligation to reimburse the United States for its Reimbursable Future Response Costs.

25. **Interest.** In the event that any payment for Past Response Costs or for Future Response Costs required under this Section is not made by the date required, SD shall pay Interest on the unpaid balance. In order to allow sufficient time for SD to make appropriate budget requests, the Interest on Past Response Costs shall begin to accrue 120 days after the Effective Date. In order to allow sufficient time for SD to make appropriate budget requests, the Interest on all subsequent Future Response Costs shall begin to accrue 120 days after the due date identified on the bill. The Interest shall accrue through the date of SD's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of SD's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to paragraph 39 (Stipulated Penalty Amounts – Work).

X. INSURANCE

26. **Insurance.** No later than 15 days before commencing any on-site Work, all contractors and subcontractors for the SD shall secure, and shall maintain until the first anniversary after the RA has been performed in accordance with this CD and the Performance Standards have been achieved, commercial general liability insurance with limits of \$1 million, for any one occurrence, and automobile liability insurance with limits of \$3 million, combined single limit, naming the United States as an additional insured with respect to all liability arising out of the activities performed by or on behalf of SD pursuant to this CD. In addition, for the duration of this CD, SD shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of SD in furtherance of this CD. Prior to commencement of the Work, SD shall provide to EPA certificates of such insurance and a copy of each insurance policy. SD shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If SD demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, SD need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor.

XI. FORCE MAJEURE

27. "Force majeure," for purposes of this CD, is defined as any event arising from causes beyond the control of SD, of any entity controlled by SD, or of SD's contractors that delay or prevent the performance of any obligation under this CD despite SD's best efforts to fulfill the obligation. The requirement that SD exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. "Force majeure" does not include

financial inability to complete the Work or a failure to achieve the Performance Standards.

28. If any event occurs or has occurred that may delay the performance of any obligation under this CD for which SD intends or may intend to assert a claim of force majeure, SD shall notify EPA's Project Coordinator orally or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 7, within 10 days of when SD first knew that the event might cause a delay. Within 30 days thereafter, SD shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; SD's rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of SD, such event may cause or contribute to an endangerment to public health or welfare, or the environment. SD shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. SD shall be deemed to know of any circumstance of which SD, any entity controlled by SD, or SD's contractors or subcontractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude SD from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under paragraph 27 and whether SD has exercised its best efforts under paragraph 27, EPA may, in its unreviewable discretion, excuse in writing SD's failure to submit timely or complete notices under this Paragraph.
29. If EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this CD that are affected by the force majeure will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify SD in writing of its decision. If EPA agrees that the delay is attributable to a force majeure, EPA will notify SD in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.
30. If SD elects to invoke the dispute resolution procedures set forth in Section XII (Dispute Resolution) regarding EPA's decision, it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, SD shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that SD complied with the requirements of paragraph 27 and 28. If SD carries this burden, the delay at issue shall be deemed not to be a violation by SD of the affected obligation of this CD identified to EPA and the Court.

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

XII. DISPUTE RESOLUTION

32. Unless otherwise expressly provided for in this CD, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this CD. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of SD that have not been disputed in accordance with this Section.
33. A dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute. Any dispute regarding this CD shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute.
34. **Statements of Position.**
- a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, SD invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by SD. The Statement of Position shall specify SD's position as to whether formal dispute resolution should proceed under Paragraph 35 (Record Review) or 36.
 - b. Within 30 days after receipt of SD's Statement of Position, EPA will serve on SD its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under paragraph 35 (Record Review) or paragraph 36. Within 10 days after receipt of EPA's Statement of Position, SD may submit a Reply.
 - c. If there is disagreement between EPA and SD as to whether dispute resolution should proceed under paragraph 35 (Record Review) or 36, the parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if SD ultimately appeals to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in paragraphs 35 and 36.
35. **Record Review.** Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be

conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this CD, and the adequacy of the performance of response actions taken pursuant to this CD. Nothing in this CD shall be construed to allow any dispute by SD regarding the validity of the ROD's provisions.

- a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.
 - b. The Director of the Superfund Division, EPA Region 7, will issue a final administrative decision resolving the dispute based on the administrative record described in paragraph 35.a. This decision shall be binding upon SD, subject only to the right to seek judicial review pursuant to paragraphs 35.c and d.
 - c. Any administrative decision made by EPA pursuant to paragraph 35.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by SD with the Court and served on all Parties within 10 days after receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this CD. The United States may file a response to SD's motion.
 - d. In proceedings on any dispute governed by this Paragraph, SD shall have the burden of demonstrating that the decision of the Superfund Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to paragraph a.
36. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.
- a. The Director of the Superfund Division, EPA Region 7, will issue a final decision resolving the dispute based on the statements of position and reply, if any, served under paragraph 34. The Superfund Division Director's decision shall be binding on SD unless, within 10 days after receipt of the decision, SD files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the CD. The United States may file a response to SD's motion.

b. Notwithstanding paragraph L (CERCLA § 113(j) record review of ROD and Work) of Section I (Background), judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

37. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of SD under this CD, except as provided in paragraph 24 (Contesting Future Response Costs), as agreed by EPA, or as determined by the Court. Stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute, as provided in paragraph 45. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this CD. In the event that SD do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIII (Stipulated Penalties).

XIII. STIPULATED PENALTIES

38. SD shall be liable for stipulated penalties in the amounts set forth in paragraph 39 and 40 to the United States for failure to comply with the requirements of this CD specified below, unless excused under Section XI (Force Majeure). “Compliance” by SD shall include completion of all activities and obligations, including payments, required under this CD, or any deliverable approved under this CD, in accordance with all applicable requirements of law, this CD, the SOW, and any deliverables approved under this CD and within the specified time schedules established by and approved under this CD.

39. Stipulated Penalty Amounts - Work (Including Payments and Excluding Deliverables).

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in paragraph 39.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$50
15th through 30th day	\$100
31st day and beyond	\$150

b. Compliance Milestones.

(1) Work required by this Consent Decree and the SOW.

40. **Stipulated Penalty Amounts - Deliverables.**

a. **Material Defects.** If an initially submitted or resubmitted deliverable contains a material defect, and the deliverable is disapproved or modified by EPA under the SOW due to such material defect, then the material defect shall constitute a lack of compliance for purposes of paragraph 38. The provisions of Section XII (Dispute Resolution) and Section XIII (Stipulated Penalties) shall govern the accrual and payment of any stipulated penalties regarding SD’s submissions under this CD.

- b. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables pursuant to the CD:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$50
15th through 30th day	\$100
31st day and beyond	\$150

41. In the event that EPA assumes performance of a portion or all of the Work pursuant to paragraph 52 (Work Takeover), SD shall be liable for a stipulated penalty in the amount of \$500,000. Stipulated penalties under this Paragraph are in addition to the remedies available under paragraph 52 (Work Takeover).
42. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under the SOW, during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies SD of any deficiency; (b) with respect to a decision by the Director of the Superfund Division, EPA Region 7, under paragraph 35.b or 36.a of Section XII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that SD's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XII (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing in this CD shall prevent the simultaneous accrual of separate penalties for separate violations of this CD.
43. Following EPA's determination that SD has failed to comply with a requirement of this CD, EPA may give SD written notification of the same and describe the noncompliance. EPA may send SD a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified SD of a violation.
44. All penalties accruing under this Section shall be due and payable to the United States within 120 days after SD's receipt from EPA of a demand for payment of the penalties, unless SD invokes the Dispute Resolution procedures under Section XII (Dispute Resolution) within the 30-day period. All payments to the United States under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with paragraph 23.b (instructions for future response cost payments).
45. Penalties shall continue to accrue as provided in paragraph 42 during any dispute resolution period, but need not be paid until the following:

- a. If the dispute is resolved by agreement of the parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA within 30 days after the agreement or the receipt of EPA's decision or order;
 - b. If the dispute is appealed to this Court and the United States prevails in whole or in part, SD shall pay all accrued penalties determined by the Court to be owed to EPA within 120 days after receipt of the Court's decision or order, except as provided in paragraph 45.c;
 - c. If the District Court's decision is appealed by any Party, SD shall pay all accrued penalties determined by the District Court to be owed to the United States into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 120 days after receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 120 days. Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to SD to the extent that it prevails.
46. If SD fails to pay stipulated penalties when due, SD shall pay Interest on the unpaid stipulated penalties as follows: (a) if SD have timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to paragraph 45.c until the date of payment; and (b) if SD fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under paragraph 44 until the date of payment. If SD fails to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.
 47. The payment of penalties and Interest, if any, shall not alter in any way SD's obligation to complete the performance of the Work required under this CD.
 48. Nothing in this CD shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of SD's violation of this CD or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided in this CD, except in the case of a willful violation of this CD.
 49. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this CD.

XIV. COVENANTS BY PLAINTIFF

50. **Covenants for SD by United States.** Except as provided in paragraph 51 (General Reservations of Rights), the United States covenants not to sue or to take administrative action against SD pursuant to Sections 106 and 107(a) of CERCLA for Operable Unit 01,

the Work, Past Response Costs, Future Response Costs, and all work performed and being performed by SD pursuant to two Unilateral Administrative Orders for Remedial Actions, Docket Numbers: CERCLA-07-2018-0171 (dated February 15, 2018) and CERCLA 07-2016-0013 (dated September 22, 2016). These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by SD of its obligations under this CD. These covenants extend only to SD and do not extend to any other person.

51. **General Reservations of Rights.** The United States reserves, and this CD is without prejudice to, all rights against SD with respect to all matters not expressly included within Plaintiff's covenants. Notwithstanding any other provision of this CD, the United States reserves all rights against SD with respect to:
- a. liability for failure by SD to meet a requirement of this CD;
 - b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
 - c. liability based on the ownership of the Site by SD when such ownership commences after signature of this CD by SD;
 - d. liability based on the operation of the Site by SD when such operation commences after signature of this CD by SD and does not arise solely from SD's performance of the Work;
 - e. liability based on SD's transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this CD by SD;
 - f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
 - g. criminal liability;
 - h. liability for violations of federal or state law that occur during or after implementation of the Work; and
 - i. liability, prior to achievement of Performance Standards, for additional response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, but that cannot be required pursuant to paragraph 13 (Modification of SOW or Related Deliverables);
 - j. liability for additional operable units at the Site or the final response action.
 - k. liability for costs that the United States will incur regarding the Site but that are not within the definition of Future Response Costs.

52. **Work Takeover.**

- a. In the event EPA determines that SD: (1) has ceased implementation of any portion of the Work; (2) is seriously or repeatedly deficient or late in its performance of the Work; or (3) is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to SD. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide SD a period of 14 days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.
- b. If, after expiration of the 14-day notice period specified in paragraph 52.a, SD has not remedied to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary (“Work Takeover”). EPA will notify SD in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted.
- c. SD may invoke the procedures set forth in paragraph 35 (Record Review), to dispute EPA’s implementation of a Work Takeover under paragraph 52.b. However, notwithstanding SD’s invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under paragraph 52.b until the earlier of (1) the date that SD remedies, to EPA’s satisfaction, the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, or (2) the date that a final decision is rendered in accordance with paragraph 35 (Record Review) requiring EPA to terminate such Work Takeover.

53. Notwithstanding any other provision of this CD, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

XV. COVENANTS BY SD

54. **Covenants by SD.** Subject to the reservations in paragraph 56, SD covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to: the Work, past response actions regarding the Site, Past Response Costs, Future Response Costs, and this CD, including, but not limited to:
- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112 or 113, or any other provision of law;
 - b. any claims under CERCLA §§ 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a), or state law regarding: the Work, past response actions regarding the Site, Past Response Costs, Future Response Costs, and this CD; or

- c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Missouri Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.
55. Except as provided in paragraph 58 (Waiver of Claims by SD) and 64 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States brings a cause of action or issues an order pursuant to any of the reservations in Section XIV (Covenants by Plaintiff), other than in paragraph 51.a (claims for failure to meet a requirement of the CD), 51.g (criminal liability), and 51.h (violations of federal/state law during or after implementation of the Work), but only to the extent that SD's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.
56. SD reserves, and this CD is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of SD's deliverables or activities.
57. Nothing in this CD shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).
58. **Waiver of Claims by SD.**
- a. **De Micromis Waiver.** SD agrees not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that it may have for all matters relating to the Site against any person where the person's liability to SD with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials;
 - b. **Exceptions to Waivers.** The waiver under this paragraph 58.a shall not apply with respect to any defense, claim, or cause of action that SD may have against

any person otherwise covered by such waiver if such person asserts a claim or cause of action relating to the Site against SD.

XVI. EFFECT OF SETTLEMENT; CONTRIBUTION

59. Except as provided in paragraph 58 (Waiver of Claims by SD), nothing in this CD shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this CD. Except as provided in Section XV (Covenants by SD), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this CD diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).
60. The Parties agree, and by entering this CD this Court finds, that this CD constitutes a judicially-approved settlement pursuant to which SD has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this CD. The “matters addressed” in this CD are Operable Unit O1, the Work, Past Response Costs, and Future Response Costs.
61. The Parties further agree, and by entering this CD this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this CD constitutes a judicially-approved settlement pursuant to which Settling Defendant has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).
62. SD shall, with respect to any suit or claim brought by it for matters related to this CD, notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.
63. SD shall, with respect to any suit or claim brought against it for matters related to this CD, notify in writing the United States within 10 days after service of the complaint on SD. In addition, SD shall notify the United States within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial.
64. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, SD shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the

claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XIV (Covenants by Plaintiff).

XVII. ACCESS TO INFORMATION

65. SD shall provide to EPA upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within SD’s possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this CD, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Work. SD shall also make available to EPA for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.
66. **Privileged and Protected Claims.**
- a. SD may assert that all or part of a Record requested by Plaintiff is privileged or protected as provided under federal law, in lieu of providing the Record, provided SD complies with paragraph 66.b, and except as provided in paragraph 66.c.
 - b. If SD asserts a claim of privilege or protection, it shall provide Plaintiff with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record’s contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, SD shall provide the Record to Plaintiff in redacted form to mask the privileged or protected portion only. SD shall retain all Records that it claims to be privileged or protected until Plaintiff has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the SD’s favor.
 - c. SD may make no claim of privilege or protection regarding: (1) any data regarding the Site, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or (2) the portion of any Record that SD is required to create or generate pursuant to this CD.
67. If relevant to the proceeding, the Parties agree that validated sampling or monitoring data generated in accordance with the SOW and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this CD.

68. Notwithstanding any provision of this CD, Plaintiff retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XVIII. RETENTION OF RECORDS

69. Until 10 years after EPA's Certification of Work Completion, SD shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site. In addition, SD must retain all Records that relate to the liability of any other person under CERCLA with respect to the Site. SD must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to the performance of the Work. SD (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.
70. At the conclusion of this record retention period, SD shall notify the United States at least 90 days prior to the destruction of any such Records, and, upon request by the United States and except as provided in paragraph 66 (Privileged and Protected Claims), SD shall deliver any such Records to EPA.
71. SD certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States and that it has fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

XIX. NOTICES AND SUBMISSIONS

72. All approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, and requests specified in this CD must be in writing unless otherwise specified. Whenever, under this CD, notice is required to be given, or a report or other document is required to be sent, by one Party to another, it must be directed to the person(s) specified below at the addresses specified below. Any Party may change the person and/or address applicable to it by providing notice of such change to all Parties. All notices under this Section are effective upon receipt, unless otherwise specified. Notices required to be sent to EPA, and not to the United States, should not be sent to the DOJ. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the CD regarding such Party.

As to the United States:

EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
eesdcopy.enrd@usdoj.gov
Re: DJ # 90-11-3-09306/6

As to EPA:

Director, Superfund Division
Superfund Division
United States Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and:

Jason Gunter
Special Emphasis and Remedial Branch
Superfund Division
United States Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
(913) 551.7358
gunter.jason@epa.gov.

**As to the Regional Financial
Management Officer:**

Financial Management Services Team
United States Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

**At to EPA Cincinnati Finance
Center:**

EPA Cincinnati Finance Center
26 W. Martin Luther King Drive
Cincinnati, Ohio 45268
cinwd_acctsreceivable@epa.gov

As to SD:

Ben Ellis
Director
Missouri Department of Natural Resources
Division of State Parks
P.O. Box 176
Jefferson City, MO 65102-0176
Phone: (573)522-6108 Fax: (573)526-7716
ben.ellis@dnr.mo.gov

XX. RETENTION OF JURISDICTION

73. This Court retains jurisdiction over both the subject matter of this CD and SD for the duration of the performance of the terms and provisions of this CD for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this CD, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XII (Dispute Resolution).

XXI. APPENDICES

74. The following appendices are attached to and incorporated into this CD:

“Appendix A” is the list of Subject Properties.

“Appendix B” is the ROD.

“Appendix C” is the description and/or map of the Site.

“Appendix D” is the SOW.

“Appendix E” is Unilateral Administrative Order for Remedial Action, Docket Number CERCLA-07-2018-0171 (dated February 15, 2018).

XXII. MODIFICATION

75. Except as provided in paragraph 13 (Modification of SOW or Related Deliverables), material modifications to this CD, including the SOW, shall be in writing, signed by the United States and SD, and shall be effective upon approval by the Court. Except as provided in paragraph 13, non-material modifications to this CD, including the SOW, shall be in writing and shall be effective when signed by duly authorized representatives of the United States and SD. A modification to the SOW shall be considered material if it implements a ROD amendment that fundamentally alters the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(ii). Before providing its approval to any modification to the SOW, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification.
76. Nothing in this CD shall be deemed to alter the Court’s power to enforce, supervise, or approve modifications to this CD.

XXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

77. This CD shall be lodged with the Court for at least 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the CD disclose facts or considerations that indicate that the CD is inappropriate, improper, or inadequate. SD consent to the entry of this CD without further notice.
78. If for any reason the Court should decline to approve this CD in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXIV. SIGNATORIES/SERVICE

79. The undersigned representative of SD and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this CD and to execute and legally bind such Party to this document.
80. SD agrees not to oppose entry of this CD by this Court or to challenge any provision of this CD unless the United States has notified SD in writing that it no longer supports entry of the CD.
81. SD shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of SD with respect to all matters arising under or relating to this CD. SD agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. SD need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this CD.

XXV. FINAL JUDGMENT

82. This CD and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the CD. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this CD.

83. Upon entry of this CD by the Court, this CD shall constitute a final judgment between and among the United States and SD. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS __ DAY OF _____, 2019.

United States District Judge

Signature Page for CD regarding the Big River Mine Tailings Superfund Site

FOR THE UNITED STATES OF AMERICA:

2/20/19
Dated



Jeffrey Bossert Clark
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
Washington, D.C. 20530

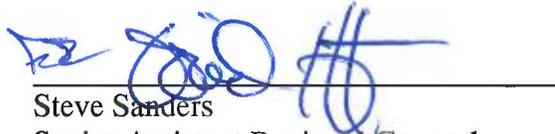


Eric D. Albert
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611

Signature Page for CD regarding the Big River Mine Tailings Superfund Site



Mary Peterson
Director, Superfund Division
United States Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219



Steve Sanders
Senior Assistant Regional Counsel
Office of Regional Counsel
United States Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

Signature Page for CD regarding the Big River Mine Tailings Superfund Site

**FOR THE MISSOURI DEPARTMENT OF NATURAL
RESOURCES, DIVISION OF STATE PARKS AND
BEN ELLIS, DIRECTOR, DIVISION OF STATE
PARKS, IN HIS OFFICIAL CAPACITY:**

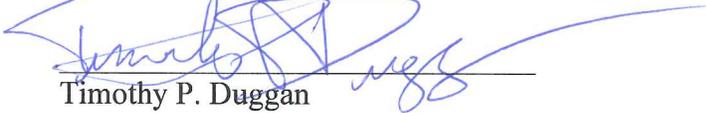
10/25/2018
Dated



Ben Ellis
Director, Division of State Parks of the Missouri
Department of Natural Resources

10/30/2018
Dated

JOSH HAWLEY
ATTORNEY GENERAL OF MISSOURI



Timothy P. Duggan
Assistant Attorney General