

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE  
MEMPHIS DIVISION

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UNITED STATES OF AMERICA  
and STATE OF TENNESSEE,

Plaintiffs,

Civil Action No. \_\_\_\_\_

v.

SECURITY SIGNALS, INC.

Defendant.

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**PROPOSED CONSENT DECREE FOR REMEDIAL DESIGN AND REMEDIAL  
ACTION AT OPERABLE UNIT TWO OF THE CORDOVA, TENNESSEE NATIONAL  
FIREWORKS SUPERFUND ALTERNATIVE SITE**

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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”), and the State of Tennessee (“Tennessee” or “the State”), at the request of the Tennessee Department of Environment and Conservation (“TDEC”), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (“CERCLA”), 42 U.S.C. §§ 9606 and 9607.

B. The United States and Tennessee in their complaint seek, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (“DOJ”) for response actions at Operable Unit Two (“OU2”) of the National Fireworks Superfund Alternative Site (the “Site”) in Cordova, Tennessee, together with accrued interest; (2) reimbursement of costs incurred by TDEC for response actions at OU2 of the Site, together with accrued interest; and (3) performance of response actions by the defendant at OU2 of 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 Tennessee (the “State”) on August 31, 2015, of negotiations with potentially responsible parties (“PRPs”) regarding the implementation of the remedial design and remedial action (“RD/RA”) for OU2, and the State has participated in such negotiations and is 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 federal natural resource trustee with the Department of Interior, as well as the Tennessee Department of Environment and Conservation Commissioner, in October, 2015, 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(s) to participate in the negotiation of this CD.

E. Security Signals, Inc, the defendant that has entered into this CD (“SSI,” “Settling Defendant” or “SD”), does not admit any liability to Plaintiffs 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 OU2 constitutes an imminent and substantial endangerment to the public health or welfare or the environment. SFA does not admit any liability arising out of the transactions or occurrences alleged in any counterclaim asserted by SD or any claim by the State.

F. In response to a release or a substantial threat of a release of a hazardous substances at or from OU2, Settling Defendant commenced on January 14, 2008, a Remedial Investigation and Feasibility Study (“RI/FS”) for OU2 of the Site pursuant to 40 C.F.R. § 300.430.

G. SSI completed a Remedial Investigation (RI) Report on January 21, 2014, and SSI completed a Feasibility Study (FS) Report on July 29, 2014.

H. 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 interim remedial action on August 20, 2014, 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 the interim 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 Superfund Division Director, EPA Region 4, based the selection of the response action.

I. The decision by EPA on the remedial action to be implemented at OU2 of the Site is embodied in an Interim Record of Decision (“IROD”), executed on September 30, 2014, on which the State has given its concurrence. The IROD 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).

J. Based on the information presently available to EPA and the State, EPA and the State believe that the Work will be properly and promptly conducted by SD if conducted in accordance with this CD and its appendices.

K. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the interim remedy set forth in the IROD 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.

L. OU2 is being addressed as a Superfund Alternative Site. This approach uses the same investigation and cleanup process and standards that are used for sites listed on the National Priorities List (“NPL”). At the time of this agreement, OU2 is not listed on the NPL. This CD is intended by the Parties to constitute a Superfund Alternative Site Agreement for OU2.

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, particularly OU2, 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, 1367, 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 the State and upon SD and its successors, and assigns. Any change in ownership or corporate or other legal status of SD including, but not limited to, any transfer of assets or 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 SD with respect to OU2 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 that portion of the Site currently owned by SSI that includes the north-central portion of the Site and consists of approximately 22 acres located south of Macon Road in Cordova, Tennessee, as set forth in the IROD, along with the full extent of downgradient contamination from Plumes C, D, and E from SSI's real property including soil, groundwater, and surface water on, around, and below the Site, and any other real property where EPA determines, at any time, that access, land, water, or other resource use restrictions, and/or ICs are needed to implement the OU2 Remedial Action, including, but not limited to, the property located at 9509 Macon Road in Cordova, Shelby County, Tennessee.

"Affiliated Contractor" means any business entity that serves as a contractor or subcontractor to SD on any of SD's Federal Contracts, or as a prime contractor for Federal Contractors under which SD serves as a subcontractor.

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

"Consent Decree" or "CD" shall mean this consent decree and all appendices attached hereto (listed in Section XXIII). 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.

“Double Recovery” shall mean: any compensation of any kind (including but not limited to, any direct payments, Federal Contract payments or credits, and the compromise of any claims, causes of action, suits, or demands of any kind whatsoever in law or equity for Resolved Costs asserted against the United States) for Resolved Costs provided by the United States to SD or its Affiliated Contractors, other than the payment by the United States, on behalf of the SFA, pursuant paragraph 36.a of this Consent Decree.

“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.

“Federal Contract” shall mean any prime contract, subcontract, or any other agreement transferring value between SD or an Affiliated Contractor and a department, agency, or instrumentality of the United States, including but not limited to, contracts for goods or services, grants, and cooperative agreements, regardless of whether the SD or its Affiliated Contractor is a prime contractor or subcontractor.

“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, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to ¶ 11 (Emergencies and Releases), ¶ 12 (Community Involvement) (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), ¶ 31 (Access to Financial Assurance), Section VII (Remedy Review), Section VIII (Property Requirements) (including the cost of attorney time and any monies paid to secure or enforce access or land, water, or other resource use restrictions and/or to secure, implement, monitor, maintain, or enforce Institutional Controls at OU2 including the amount of just compensation), and Section XIII (Dispute Resolution), and all litigation costs.

“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 OU2 RA; and/or (c) provide information intended to modify or guide human behavior at or in connection with the Site.

“Interim Record of Decision” or “IROD” shall mean the EPA Interim Record of Decision relating to OU2 of the Site signed on September 30, 2014, by the Superfund Division Director, EPA Region 4, or his/her delegate, and all attachments thereto. The IROD is attached as Appendix A.

“Interim Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the United States in connection with OU2 of the Site between April 18, 2018 and the Effective Date, or (b) incurred by the United States prior to the Effective Date but paid after that date.

“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://www.epa.gov/ocfopage/finstatement/superfund/int\\_rate.htm](http://www.epa.gov/ocfopage/finstatement/superfund/int_rate.htm).

“National Fireworks 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.

“Natural Resources” shall have the meaning provided in Section 101(16) of CERCLA, 42 U.S.C. § 9601(16).

“Natural Resource Damages” shall mean damages, including costs of damages assessment, recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607, for injury to, destruction of, or loss of any and all Natural Resources at the Site.

“Non-Settling Owner” shall mean any person, other than a SD, that owns or controls any Affected Property. The clause “Non-Settling Owner’s Affected Property” means Affected Property owned or controlled by Non-Settling Owner.

“Operable Unit One” or “OU1” shall mean that portion of the Site, as defined below, that is not included within the bounds of Operable Unit Two.

“Operable Unit Two” or “OU2” shall mean that portion of the Site currently owned by SSI that includes the north-central portion of the Site and consists of approximately 22 acres located south of Macon Road in Cordova, Tennessee, as set forth in the IROD, along with the full extent of downgradient contamination from SSI’s real property including soil, groundwater, and surface water on, around, and below the Site. *See* Appx. A & D.

“Operation and Maintenance” or “O&M” shall mean all activities required to operate, maintain, and monitor the effectiveness of the OU2 RA as specified in the Statement of Work or any EPA-approved O&M Plan.



“OU1 Expanded Site Inspection Report” or “OU1 ESI” shall mean the Final Expanded Site Inspection Report, Revision 1, relating to OU1 of the Site (formerly characterized as OU00), dated November 29, 2018. The OU1 ESI is attached as Appendix E.

“OU2 Remedial Action” or “OU2 RA” shall mean the interim remedial action selected in the IROD.

“OU2 Remedial Design” or “OU2 RD” shall mean those activities to be undertaken by SD to develop final plans and specifications for the OU2 RA as stated in the SOW.

“Paragraph” or “¶” 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, the State of Tennessee, 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 Site through April 17, 2018, plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

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

“Plaintiffs” shall mean the United States and the State of Tennessee.

“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, as amended, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).

“Resolved Costs” means the portion of the response costs at OU2 reflected by the payment by the United States, on behalf of the SFA, pursuant to Paragraph 36.a of this CD for past, present, or future costs, expenses, liabilities, or obligations of any kind incurred by any person or entity, including third persons and the State, to address “SD matters addressed” and “SFA matters addressed” in this Consent Decree, as defined in paragraphs 96 and 97, below.

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

“Settling Defendant,” “SD,” or “SSI” shall mean Security Signals, Inc.

“SD’s Future Response Costs” shall mean all response costs consistent with the NCP that Settling Defendant incurs in implementing this Consent Decree, including, but not limited to, the costs incurred pursuant to Section VI (Performance of the Work), Section VII (Remedy Review), Section VIII (Property Requirements) and Section IX (Financial Assurance).



“SD’s Past Response Costs” shall mean all response costs consistent with the NCP that Settling Defendant incurred in connection with OU2 through April 17, 2018.

“Settling Federal Agency” or “SFA” shall mean the United States Department of Defense, including without limitation the military departments. The Department of Defense (“DoD”) means the United States Department of Defense as described in 10 U.S.C. § 111, and its predecessor and successor departments, agencies, or instrumentalities.

“Site” shall mean the National Fireworks Superfund Alternative Site, which comprises an industrial park located off Macon Road in Cordova, Shelby County, Tennessee, which is approximately 260 acres in size and which formerly contained the National Fireworks, Inc. property, or the boundaries thereof as they exist at the time of lodging this Consent Decree, and the soil and groundwater contamination at or coming from this area, as generally depicted in Appendices C and D. As of the date of lodging this Consent Decree, there are two operable units (OUs) within the Site: OU2 (as defined above and as generally depicted in Appendix D); and OU1 (the remaining portion of the Site that is not included within the bounds of OU2).

“State” shall mean the State of Tennessee and each department, agency, and instrumentality of the State, including TDEC.

“State Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the State paid at or in connection with the Site through February 11, 2020, plus Interest on all such costs that has accrued through such date.

“State Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs that the State incurs after the Effective Date in reviewing or developing plans, reports, and other deliverables submitted pursuant to this CD, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this CD, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to ¶ 11 (Emergencies and Releases), Section VIII (Property Requirements) (including the cost of attorney time and any monies paid to secure or enforce access or land, water, or other resource use restrictions and/or to secure, implement, monitor, maintain, or enforce Institutional Controls at OU2 including the amount of just compensation), and Section XIII (Dispute Resolution), and all litigation costs. State Future Response Costs shall also include all State Interim Response Costs, and all Interest on those State Past Response Costs that Settling Defendant has agreed to pay under this Consent Decree that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from August 25, 2015 to the Effective Date.

“State Interim Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the State in connection with Operable Unit Two of the Site between February 12, 2020 and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

“Statement of Work” or “SOW” shall mean the document describing the activities SD must perform to implement the OU2 RD, the OU2 RA, and O&M regarding Plumes C, D, and E at OU2 of the Site, which is attached as Appendix B.

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

“TDEC” shall mean the Tennessee Department of Environment and Conservation, and its successor departments, agencies, or instrumentalities.

“Third-Party Reimbursement” shall mean any payment of, or consideration for Response Costs that SD or an Affiliated Contractor receives from any person or entity other than the United States, including but not limited to, direct payments, insurance or contract recoveries, the discharge of any debt or obligation, or the satisfaction of any claims, causes of action, suits, or demands of any kind whatsoever in law or in equity.

“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 and the SFA.

“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); and (4) any “hazardous substance” under Tennessee Code Annotated § 68-212-202(2).

“Work” shall mean all activities and obligations SD is required to perform to implement the SOW.

## V. GENERAL PROVISIONS

5. **Objectives of the Parties.** The objectives of the Parties in entering into this CD are to protect public health or welfare or the environment by the design and implementation of the Work by SD, to pay certain response costs of Plaintiffs, and to resolve certain claims of Plaintiffs against SD, and certain claims of the State and SD that have been or could have been asserted against the United States with regard to OU2 of this Site as provided in this CD.

6. **Commitments by SD and SFA.** 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 and the State for its response costs as provided in this CD. The United States, on behalf of the SFA, shall pay the SD for its response costs, which includes a portion of EPA and the State’s response costs, as provided in this CD.

7. **Compliance with Applicable Law.** Nothing in this CD limits SD’s obligations 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 IROD 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 XII (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 ¶ 8.a and required for the Work, provided that they have 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 any 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 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) The State shall designate and notify EPA and the SD of its Project Coordinator[s] and Alternate Project Coordinator[s]. The State may designate other representatives, including its employees, contractors and/or consultants to oversee the Work. For any meetings and inspections in which EPA's Project Coordinator

participates, the State's Project Coordinator also may participate. SD shall notify the State reasonably in advance of any such meetings or inspections.

(4) SD's Project Coordinators shall meet with the State's Project Coordinator[s] at least monthly and the EPA's Project Coordinator[s] as needed. Meetings may be held in person or remotely via telephone or web conference.

(5) **Oversight.** To the maximum extent practicable, oversight of the Work shall be conducted by the State.

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 10 days after the Effective Date, of the names, contact information, and qualifications of the SD's proposed Project Coordinator and Supervising Contractor, whose qualifications shall be subject to EPA's review for verification based on objective assessment criteria (*e.g.*, experience, capacity, technical expertise) and do not have a conflict of interest with respect to the project.

(2) EPA, after a reasonable opportunity for review and comment by the State, 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 ¶¶ 9.c(1) and 9.c(2).

10. **Performance of Work in Accordance with SOW.** SD shall: (a) develop the OU2 RD; (b) perform the OU2 RA; and (c) operate, maintain, and monitor the effectiveness of the OU2 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 ¶ 6.6 (Approval of Deliverables) of the SOW.

11. **Emergencies and Releases.** SD shall comply with the emergency and release response and reporting requirements under ¶ 4.3 (Emergency Response and Reporting) of the SOW. Subject to Section XV (Covenants by Plaintiffs), nothing in this CD, including ¶ 4.3 of the SOW, limits any authority of Plaintiffs: (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 OU2. If, due to SD's failure to take appropriate response action under ¶ 4.3 of the SOW, EPA or, as appropriate, the State takes such action instead, SD shall reimburse EPA and the State under Section X (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 as provided for in, and in accordance with, the SOW. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator and implementation of a technical assistance plan. Costs incurred by the United States under this Section constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

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 OU2 RA, and such modification is consistent with the scope of the interim remedy set forth in ¶ 1.3 of 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 XIII.

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 Plaintiffs 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 conduct, in accordance with ¶ 6.7(j) (Periodic Review Support Plan) of the SOW, studies and investigations to support EPA's reviews under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and applicable regulations, of whether the OU2 RA is protective of human health and the environment.

16. **EPA Selection of Further Response Actions.** If EPA determines, at any time, that the OU2 RA is not protective of human health and the environment with regards to Plumes C, D, and E, EPA may select further response actions for OU2 in accordance with the requirements of CERCLA and the NCP.

17. **Opportunity to Comment.** SD and, if required by Sections 113(k)(2) or 117 of CERCLA, 42 U.S.C. § 9613(k)(2) or 9617, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

18. **SD's Obligation to Perform Further Response Actions.** If EPA selects further response actions relating to OU2, EPA may require SD to perform such further response actions, but only to the extent that the reopener conditions in ¶¶ 68 or 69 (United States' Pre- and Post-Certification Reservations) are satisfied. SD may invoke the procedures set forth in Section XIII (Dispute Resolution) to dispute (a) EPA's determination that the reopener conditions of ¶¶ 68 or 69 are satisfied, (b) EPA's determination that the OU2 RA is not protective of human health and the environment, or (c) EPA's selection of the further response actions. Disputes regarding EPA's determination that the OU2 RA is not protective or EPA's selection of further response actions shall be resolved pursuant to ¶ 51 (Record Review).

19. **Submission of Plans.** If SD is required to perform further response actions pursuant to ¶ 18, it shall submit a plan for such response action to EPA for approval in accordance with the procedures of Section VI (Performance of the Work). SD shall implement the approved plan in accordance with this CD.

## **VIII. PROPERTY REQUIREMENTS**

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

a. 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 Plaintiffs, providing that such Non-Settling Owner, and SD shall, with respect to SD's Affected Property:

(1) Provide Plaintiffs and their 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 ¶ 20.b (Access Requirements); and

(2) Refrain from using such Affected Property in any manner that EPA determines will: (i) pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or (ii) interfere with or adversely affect the implementation, integrity, or protectiveness of the OU2 Remedial Action. The restrictions include those listed in ¶ 20.c (Land, Water, or Other Resource Use Restrictions). SDs shall provide a copy of such access and use restriction agreement(s) to EPA and the State.

b. **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 or the State;
- (3) Conducting investigations regarding contamination;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions;
- (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 ¶ 72 (Work Takeover);
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by SD or its agents, consistent with Section XXI (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.

c. **Land, Water, or Other Resource Use Restrictions.** The following is a list of land, water, or other resource use restrictions applicable to the Affected Property:

- (1) Prohibition of activities which could interfere with the OU2 RA;
- (2) Prohibition of use of contaminated groundwater;
- (3) Prohibition of activities which could result in exposure to contaminants in subsurface soils and groundwater, without prior EPA approval; and
- (4) Prohibition of construction of any new structures in a manner which could interfere with the OU2 RA.

21. **Proprietary Controls.** SD shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure Non-Settling Owner's cooperation in executing and recording; and SD shall, with respect to SD's Affected Property, execute and record, in accordance with the procedures of this ¶ 21, Proprietary Controls that: (i) grant a right of access to conduct any activity regarding the CD, including those activities listed in ¶ 20.b (Access Requirements); and (ii) grant the right to enforce the land, water, or other resource use restrictions set forth in ¶ 20.c (Land, Water, and Other Resources Use Restrictions).



a. **Grantees.** The Proprietary Controls must be granted to one or more of the following persons and their representatives, as determined by EPA: the United States, the State, SD, and other appropriate grantees. Proprietary Controls in the nature of a Uniform Environmental Covenants Act (UECA) document granted to persons other than the United States must include a designation that EPA and the State are third-party beneficiaries expressly granted the right of access and the right to enforce the covenants allowing EPA and/or the State to maintain the right to enforce the Proprietary Controls without acquiring an interest in real property.

b. **Initial Title Evidence.** SD, as applicable, shall, within 45 days after the Effective Date:

(1) **Record Title Evidence.** Submit to EPA a title insurance commitment or other title evidence acceptable to EPA that: (i) names the proposed insured or the party in whose favor the title evidence runs, or the party who will hold the real estate interest, or if that party is uncertain, names the United States, the State, SD, or “To Be Determined;” (ii) covers the Affected Property that is to be encumbered; (iii) demonstrates that the person or entity that will execute and record the Proprietary Controls is the owner of such Affected Property; (iv) identifies all record matters that affect title to the Affected Property, including all prior liens, claims, rights (such as easements), mortgages, and other encumbrances (collectively, “Prior Encumbrances”); and (v) includes complete, legible copies of such Prior Encumbrances; and

(2) **Non-Record Title Evidence.** Submit to EPA a report of the results of an investigation, including a physical inspection of the Affected Property, which identifies non-record matters that could affect the title, such as unrecorded leases or encroachments.

c. **Release or Subordination of Prior Liens, Claims, and Encumbrances.**

(1) SD shall secure the release, subordination, modification, or relocation of all Prior Encumbrances on the title to the Affected Property revealed by the title evidence or otherwise known to SD, unless EPA waives this requirement as provided under ¶¶ 21.c(2)-(4).

(2) SD may, by the deadline under ¶ 21.b (Initial Title Evidence), submit an initial request for waiver of the requirements of ¶ 21.c(1) regarding one or more Prior Encumbrances, on the grounds that such Prior Encumbrances cannot defeat or adversely affect the rights to be granted by the Proprietary Controls and cannot interfere with the interim remedy or result in unacceptable exposure to Waste Material.

(3) SD may, within 90 days after the Effective Date, or if an initial waiver request has been filed, within 45 days after EPA’s determination on the initial waiver request, submit a final request for a waiver of the requirements of ¶ 21.c(1) regarding any particular Prior Encumbrance on the grounds that SD could not obtain the release, subordination, modification, or relocation of such Prior Encumbrance despite best efforts.

(4) The initial and final waiver requests must include supporting evidence including descriptions of and copies of the Prior Encumbrances and maps showing areas affected by the Prior Encumbrances. The final waiver request also must include evidence of efforts made to secure release, subordination, modification, or relocation of the Prior Encumbrances.

**d. Update to Title Evidence and Recording of Proprietary Controls.**

(1) SDs shall submit all draft Proprietary Controls and draft instruments addressing Prior Encumbrances to EPA for review and approval within 180 days after the Effective Date; or if an initial waiver request has been filed, with 135 days after EPA's determination on the initial waiver request, or if a final waiver request has been filed, within 90 days after EPA's determination on the final waiver request..

(2) Upon EPA's approval of the proposed Proprietary Controls and instruments addressing Prior Encumbrances, SD shall, within 15 days, update the original title insurance commitment (or other evidence of title acceptable to EPA) under ¶ 21.b (Initial Title Evidence). If the updated title examination indicates that no liens, claims, rights, or encumbrances have been recorded since the effective date of the original commitment (or other title evidence), SD shall secure the immediate recordation of the Proprietary Controls and instruments addressing Prior Encumbrances in the appropriate land records. Otherwise, SD shall secure the release, subordination, modification, or relocation under ¶ 21.c(1), or the waiver under ¶¶ 21.c(2)-(4), regarding any newly-discovered liens, claims, rights, and encumbrances, prior to recording the Proprietary Controls and instruments addressing Prior Encumbrances.

(3) If SD submitted a title insurance commitment under ¶ 21.b(1) (Record Title Evidence), then upon the recording of the Proprietary Controls and instruments addressing Prior Encumbrances, SD shall obtain a title insurance policy that: (i) is consistent with the original title insurance commitment; (ii) is for \$100,000 or other amount approved by EPA; (iii) is issued to the United States, SD, or other person approved by EPA; and (iv) is issued on a current American Land Title Association (ALTA) form.

(4) SD shall, within 30 days after recording the Proprietary Controls and instruments addressing Prior Encumbrances, or such other deadline approved by EPA, provide to the United States and to all grantees of the Proprietary Controls: (i) certified copies of the recorded Proprietary Controls and instruments addressing Prior Encumbrances showing the clerk's recording stamps; and (ii) the title insurance policy(ies) or other approved form of updated title evidence dated as of the date of recording of the Proprietary Controls and instruments.

**e.** SD shall monitor, maintain, enforce, and annually report on all Proprietary Controls required under this CD.

**22. 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 Proprietary Controls, agreements, releases, subordinations, modifications, or relocations of Prior Encumbrances that affect the title to the Affected Property, as applicable. 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 Proprietary Controls, agreements, releases, subordinations, modifications, or relocations of Prior Encumbrances that affect the title to the Affected Property, as applicable. All costs incurred by the United States in providing such assistance or taking such action, including the cost of attorney time and the amount of monetary consideration or just compensation paid, constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

23. SD shall not Transfer its Affected Property unless it has (a) first secured EPA’s approval of, and transferee’s consent to, an agreement that: (i) is enforceable by SD and Plaintiffs; and (ii) requires the transferee to provide access to and to refrain from using the Affected Property to the same extent as is provided under ¶ 20.b (Access Requirements) and ¶ 20.c (Land, Water, or Other Resource Use Restrictions); and (b) executed and recorded all Proprietary Controls and instruments addressing Prior Encumbrances regarding such Affected Property in accordance with ¶ 21 (Proprietary Controls).

24. If EPA determines in a decision document prepared in accordance with the NCP that Institutional Controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices are needed at the Affected Property, SD shall cooperate with EPA’s and the State’s efforts to secure and ensure compliance with such Institutional Controls.

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

a. SD shall, within 15 days after the Effective Date, submit for EPA approval a notice to be filed regarding SD’s Affected Property in the appropriate land records. The notice must: (1) include a proper legal description of the SD’s Affected Property; (2) provide notice to all successors-in-title of the SD’s Affected Property: (i) that SD’s Affected Property is part of, or related to, the Site; (ii) that EPA has selected an interim remedy for OU2 of the Site; and (iii) that potentially responsible parties have entered into a CD requiring implementation of such interim remedy; and (3) identify the U.S. District Court in which the CD was filed, the name and civil action number of this case, and the date the CD was entered by the Court. SD shall record the notice within 20 days after EPA’s approval of the notice and submit to EPA, within 10 days thereafter, a certified copy of the recorded notice.

b. SD shall, prior to entering into a contract to Transfer SD’s Affected Property, or 60 days prior to Transferring SD’s Affected Property, whichever is earlier:

(1) Notify the proposed transferee that EPA has selected an interim remedy regarding OU2 of the Site, that potentially responsible parties have entered into a Consent Decree requiring implementation of such interim remedy, and that the United

States District Court has entered the CD (identifying the name and civil action number of this case and the date the CD was entered by the Court); and

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

26. In the event of any Transfer of the Affected Property, unless the United States otherwise consents in writing, SD shall continue to comply with its obligations under the CD, including its obligation to provide and/or secure access, and ensure compliance with any land, water, or other resource use restriction regarding the Affected Property, and to implement, maintain, monitor, and report on Institutional Controls, and to abide by such Institutional Controls.

27. Notwithstanding any provision of the CD, Plaintiffs retain all of their access authorities and rights, as well as all their rights to require land, water, or other resource use restrictions and Institutional Controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

## **IX. FINANCIAL ASSURANCE**

28. In order to ensure completion of the Work, SD shall secure financial assurance, initially in the amount of \$1,800,000 (“Estimated Cost of Preliminary/Phase I Work”), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from the “Financial Assurance” category on the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. SD may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

a. A surety bond guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated;

29. SD has selected, and EPA has found satisfactory, as an initial financial assurance a an irrevocable letter of credit prepared in accordance with ¶ 28.b. Within 30 days after the

Effective Date, or 30 days after EPA's approval of the form and substance of SD's financial assurance, whichever is later, SD shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the Regional Financial Management Officer, to the United States, to EPA, and to the State as specified in Section XXI (Notices and Submissions).

30. SD shall diligently monitor the adequacy of the financial assurance. If SD becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, SD shall notify EPA of such information within 14 days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify SD of such determination. SD shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for SD, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. SD shall follow the procedures of ¶ 32 (Modification of Amount, Form, or Terms of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. SD's inability to secure and submit to EPA financial assurance in accordance with this Section shall in no way excuse performance of any other requirements of this CD, including, without limitation, the obligation of SD to complete the Work in accordance with the terms of this CD.

**31. Access to Financial Assurance.**

a. If EPA issues a notice of implementation of a Work Takeover under ¶ 72.b, then, in accordance with any applicable financial assurance mechanism, EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with ¶ 31.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel such mechanism, and SD fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 31.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 72.b, EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism, whether in cash or in kind, to continue and complete the Work; then EPA may demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. SD shall, within 10 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this ¶ 31 shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA, the State, or by

another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the National Fireworks Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this ¶ 31 must be reimbursed as Future Response Costs under Section X (Payments for Response Costs).

32. **Modification of Amount, Form, or Terms of Financial Assurance.** SD may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA and the State in accordance with ¶ 29, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. It is the intention of the parties that the amount of financial assurance shall be reduced as appropriate on an annual basis as money is spent. EPA will notify SD of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. SD may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XIII (Dispute Resolution). SD may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by SD pursuant to the dispute resolution provisions of this CD or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, SD shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with ¶ 29.

33. **Release, Cancellation, or Discontinuation of Financial Assurance.** SD may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA issues a Certification of Work Completion under ¶ 4.7 (Certification of Work Completion) of the SOW; (b) in accordance with EPA's approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation or discontinuance of any financial assurance, in accordance with the agreement, final administrative decision, or final judicial decision resolving such dispute under to Section XIII (Dispute Resolution).

## **X. PAYMENTS FOR RESPONSE COSTS**

### **34. Payment by SD for United States' and State Past and Interim Response Costs.**

a. Within 30 days after receipt of payment from the United States pursuant to paragraph 36, SD shall pay to EPA \$677,715.00 in payment for Past Response Costs and Interim Response Costs. Payment shall be made in accordance with ¶ 37.a (instructions for past response cost payments).



b. **Deposit of Past and Interim Response Costs Payment.** The total amount to be paid by SD pursuant to ¶ 34.a shall be deposited by EPA in the National Fireworks 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.

c. Within 30 days after the Effective Date, SDs shall pay to the State \$3,827.26 by official bank check(s) made payable to “The State of Tennessee” and bearing the notation “Site No. 79514” on the memo line, in payment of State Past Response Costs and State Interim Response Costs. SDs shall send the bank check(s) to:

Attn: Steve Sanders, Director  
 Division of Remediation  
 Tennessee Department of Environment and Conservation  
 William R. Snodgrass TN Tower, 14<sup>th</sup> Floor  
 312 Rosa L. Parks Avenue  
 Nashville, TN 37243

35. **Payments by SD for Future Response Costs.** SD shall pay to EPA all Future Response Costs not inconsistent with the NCP.

a. **Periodic Bills.** On an annual basis, EPA will send SD a bill requiring payment that includes a Superfund Cost Recovery Package Imaging and On-line System (SCORPIOS), which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and DOJ in connection with OU2. SD shall make all payments within 30 days after SD’s receipt of each bill requiring payment, except as otherwise provided in ¶ 38, in accordance with ¶ 37.b (instructions for future response cost payments).

b. **Deposit of Future Response Costs Payments.** The total amount to be paid by SD pursuant to ¶ 35.a (Periodic Bills) shall be deposited by EPA in the National Fireworks 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 National Fireworks 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. Any decision by EPA to deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by SD pursuant to the dispute resolution provisions of this CD or in any other forum.

c. **Payments by SD to State.** SD shall pay to the State all State Future Response Costs not inconsistent with the NCP. The State will send SD a bill requiring payment that includes a standard State-prepared cost summary, which includes direct and indirect costs incurred by the State and its contractors and subcontractors on a periodic basis. SD shall make all payments within 30 days after SD’s receipt of each bill requiring payment, except as otherwise provided in ¶ 38 (Contesting Future Response Costs). SD shall make all payments to the State required by this Paragraph in accordance with ¶ 37.d.



36. **Payments by SFA.**

a. **Payment to SD.** Within 120 days after the Effective Date, the United States, on behalf of SFA, shall pay to SD \$1,304,985.50 in payment of SD's Past Response Costs and SD's Future Response Costs and a portion of Past Response Costs, Future Response Costs, State Past Response Costs, and State Future Response Costs by Automated Clearing House (ACH) Electronic Funds Transfer in accordance with instructions provided by SD.

b. **Interest.** In the event that any payment required by ¶ 36.a is not made within 120 days after the Effective Date, the United States, on behalf of SFA, shall pay Interest on the unpaid balance, with such Interest commencing on the 121st day after the Effective Date and accruing through the date of the payment.

c. The Parties to this CD recognize and acknowledge that the payment obligations of the SFA under this CD can only be paid from appropriated funds legally available for such purpose. Nothing in this CD shall be interpreted or construed as a commitment or requirement that the Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

37. **Payment Instructions for SD.**

a. **Past Response Costs Payments to the United States**

(1) The Financial Litigation Unit (FLU) of the United States Attorney's Office for the Western District of Tennessee shall provide SD, in accordance with ¶ 111, with instructions regarding making payments to DOJ on behalf of EPA after the Effective Date. 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 ¶ 37.a, SD shall make such payment by Fedwire Electronic Funds Transfer (EFT) to the U.S. DOJ account, in accordance with the instructions provided under ¶ 37.a(1), and including references to the CDCS Number, Site/Spill ID Number A4EQ, and DJ Number 90-11-3-11315.

(3) For each payment made under this ¶ 37.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 ¶ 111.

b. **Future Response Costs Payments and Stipulated Penalties to the United States.**

(1) For all payments subject to this ¶ 37.b, SD shall make such payment by Fedwire EFT, referencing the Site/Spill ID Number A4EQ and DJ Number 90-11-3-11315. The Fedwire EFT payment must be sent as follows:

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

c. **Notice of Payment.** For all payments made under ¶ 37.b, SD shall send notices, including references to the Site/Spill ID and DJ numbers, to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with ¶ 111.

d. **Future Response Costs Payments to the State.** For all payments subject to this paragraph 37.d, SD shall may such payment by check made payable to “The State of Tennessee” and should include the Site number (“79514”) on the check. Payments to the State shall be mailed to:

Attn: Steve Sanders, Director  
Division of Remediation  
Tennessee Department of Environment and Conservation  
William R. Snodgrass TN Tower, 14<sup>th</sup> Floor  
312 Rosa L. Parks Avenue  
Nashville, TN 37243

38. **Contesting Future Response Costs.** SD may submit a Notice of Dispute, initiating the procedures of Section XIII (Dispute Resolution), regarding any Future Response Costs or any State Future Response Costs billed under ¶ 35 (Payments by SD for Future Response Costs) if it determines that EPA or the State has made a mathematical error or included a cost item that is not within the definition of Future Response Costs or State Future Response Costs, or if it believes EPA or the State incurred excess costs as a direct result of an EPA or State 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 (if the United States’ accounting is being disputed) or the State (if the State’s accounting is being disputed) pursuant to Section XXI (Notices and Submissions). Such Notice of Dispute shall specifically identify the contested Future Response Costs or State 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 Future Response Costs to the United States and all uncontested State Future Response Costs to the State, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC), and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs or State Future Response Costs. SD shall send to the United States or the State, as appropriate, as provided in Section XXI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs or State 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 or the State prevails in the dispute, SD shall pay the sums due (with accrued interest) to the United States or the State, if State costs are disputed 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 or the State, if State costs are disputed 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 ¶¶ 37.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 XIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding SD's obligation to reimburse the United States and the State for their Future Response Costs.

39. **Interest.** In the event that any payment for Past Response Costs, Interim Response Costs, Future Response Costs, State Past Response Costs, State Interim Response Costs, or State Future Response Costs required under this Section is not made by the date required, SD shall pay Interest on the unpaid balance. The Interest on Past Response Costs and State Past Response Costs shall begin to accrue on the Effective Date. The Interest on Future Response Costs and State Future Response Costs shall begin to accrue on the date of 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 Plaintiffs by virtue of SD's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Section XIV (Stipulated Penalties).

## **XI. INDEMNIFICATION AND INSURANCE**

### **40. SD's Indemnification of the United States and the State.**

a. The United States and the State do not assume any liability by entering into this CD or by virtue of any designation of SD as EPA's authorized representative under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). SD shall indemnify, save, and hold harmless the United States and the State and their officials, agents, employees, contractors, subcontractors, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of SD, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on SD's behalf or under its control, in carrying out activities pursuant to this CD, including, but not limited to, any claims arising from any designation of SD as EPA's authorized representative under Section 104(e) of CERCLA. Further, SD agrees to pay the United States and the State all costs they incur including, but not limited to, attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States and the State based on negligent or other wrongful acts or omissions of SD, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this CD. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of SD in carrying out activities pursuant to this CD. Neither SD nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State, respectively, shall give SD notice of any claim for which the United States or the State plans to seek indemnification pursuant to this ¶ 40, and shall consult with SD prior to settling such claim.

41. SD covenants not to sue and agrees not to assert any claims or causes of action against the United States and the State, respectively, for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between SD and any person for performance of work on or relating to OU2 of the Site, including, but not limited to, claims on account of construction delays. In addition, SD shall indemnify, save and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between SD and any person for performance of Work on or relating to OU2 of the Site, including, but not limited to, claims on account of construction delays.

42. **Insurance.** No later than 15 days before commencing any on-site Work, SD shall secure, and shall maintain until the first anniversary after issuance of EPA's Certification of OU2 RA Completion pursuant to ¶ 4.6 (Certification of OU2 RA Completion) of the SOW, commercial general liability insurance with limits of \$1 million, for any one occurrence, and automobile liability insurance with limits of \$1 million, combined single limit, naming the United States and the State as additional insureds 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 and the State 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 and the State 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 needs provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor.

## XII. FORCE MAJEURE

43. "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 delays or prevents the performance of any obligation under this CD despite SD's best efforts to fulfill the obligation. The requirement that SD's exercises "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.

44. 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 Superfund Division Director, EPA Region 4, within three days of when SD first knew that the event might cause a delay. Within ten days thereafter, SD shall provide in writing to EPA and the State 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 ¶ 43 and whether SD has exercised their best efforts under ¶ 43, EPA may, in its unreviewable discretion, excuse in writing SD's failure to submit timely or complete notices under this Paragraph.

45. If EPA, after a reasonable opportunity for review and comment by the State, 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, after a reasonable opportunity for review and comment by the State, 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, after a reasonable opportunity for review and comment by the State, 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 after a reasonable opportunity for review and comment by the State, 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.

46. If SD elects to invoke the dispute resolution procedures set forth in Section XIII (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 ¶¶ 43 and 44. 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.

47. 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.

### **XIII. DISPUTE RESOLUTION**

48. Unless otherwise expressly provided for in this CD, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes under 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.

49. 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.

#### **50. 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 and the State 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 ¶ 51 (Record Review) or 52.

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 ¶ 51 (Record Review) or 52. Within 20 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 ¶ 51 (Record Review) or 52, 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 ¶¶ 51 and 52.

51. **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. SDs shall not challenge, using the dispute resolution procedures under Section XIV, or judicially, EPA's remedial action selection embodied in the IROD.

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 Superfund Division Director, EPA Region 4, will issue a final administrative decision resolving the dispute based on the administrative record described in ¶ 51.a. This decision shall be binding upon SD, subject only to the right to seek judicial review pursuant to ¶¶ 51.c and 51.d.

c. Any administrative decision made by EPA pursuant to ¶ 51.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 20 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 ¶ 51.a.

52. 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 Superfund Division Director, EPA Region 4, will issue a final decision resolving the dispute based on the statements of position and reply, if any, served under ¶ 50. The Superfund Division Director's decision shall be binding on SD unless, within 20 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 ¶ K (CERCLA § 113(j) record review of IROD and Work) of Section I (Background), judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

53. 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 ¶ 38 (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 ¶ 61. 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 does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIV (Stipulated Penalties).

#### **XIV. STIPULATED PENALTIES**

54. SD shall be liable for stipulated penalties in the amounts set forth in ¶¶ 55 and 56 to the United States and the State (evenly split), except as specified in ¶¶ 55.b, 55.c, and 57, for failure to comply with the requirements of this CD specified below, unless excused under Section XII (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.

**55. 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 ¶¶ 55.b, 55.c, and 55.d:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$500
15th through 30th day	\$1,500
31st day and beyond	\$2,500

b. Compliance Milestones: Payment to the United States. SD shall be liable for stipulated penalties in the amounts set forth above, payable to the United States only.

- (1) Failure to pay Past Response Costs; and
- (2) Failure to pay Future Response Costs.

c. Compliance Milestones: Payment to the State. SD shall be liable for stipulated penalties in the amounts set forth above, payable to the State only.

- (1) Failure to pay State Past Response Costs; and
- (2) Failure to pay State Future Response Costs.

d. Compliance Milestones: Payment to the United States and the State. SD shall be liable for stipulated penalties in the amounts set forth above, payable to the United States and the State (evenly split).

- (1) Failure to submit the OU2 Remedial Design Work Plan;

- (2) Failure to submit the OU2 Remedial Design Report;
  - (3) Failure to submit the OU2 Remedial Action Work Plan;
  - (4) Failure to submit the OU2 Remedial Action Completion Report;
- and
- (5) Establishment and maintenance of financial assurance in compliance with the timelines and other substantive and procedural requirements of Section IX (Financial Assurance).

**56. 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 ¶ 6.6(a) (Initial Submissions) or 6.6(b) (Resubmissions) of the SOW due to such material defect, then the material defect shall constitute a lack of compliance for purposes of ¶ 54. The provisions of Section XIII (Dispute Resolution) and Section XIV (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	\$500
15th through 30th day	\$1,500
31st day and beyond	\$2,500

57. In the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 72 (Work Takeover), SD shall be liable for a stipulated penalty in the amount of \$500,000.00 to the United States. Stipulated penalties under this Paragraph are in addition to the remedies available under ¶¶ 31 (Access to Financial Assurance) and 72 (Work Takeover).

58. 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 ¶ 6.6 (Approval of Deliverables) of 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 Superfund Division Director, EPA Region 4, under ¶ 51.b or 52.a of Section XIII (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 XIII (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.

59. 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 and the State 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.

60. All penalties accruing under this Section shall be due and payable to the United States and the State within 30 days after SD's receipt from EPA of a demand for payment of the penalties, unless SD invokes the Dispute Resolution procedures under Section XIII (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 ¶ 37.b (instructions for future response cost payments).

61. Penalties shall continue to accrue as provided in ¶ 58 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 and the State within 21 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 and the State within 60 days after receipt of the Court's decision or order, except as provided in ¶ 61.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 and the State into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 60 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 60 days. Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA and the State or to SD to the extent that they prevail.

62. 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 ¶ 61 until the date of payment; and (b) if SD fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 60 until the date of payment. If SD fails to pay stipulated penalties and Interest when due, the United States or the State may institute proceedings to collect the penalties and Interest.

63. 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.

64. Nothing in this CD shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State 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.

65. 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.

## **XV. COVENANTS BY PLAINTIFFS**

66. **Covenants for SD by United States.** Except as provided in ¶¶ 68, 69 (United States' Pre- and Post-Certification Reservations), and 71 (General Reservations of Rights), in consideration of the actions that will be performed and the payments that will be made by SD under the CD, the United States covenants not to sue or to take administrative action against SD pursuant to Sections 106 and 107(a) of CERCLA relating to the Site. Except with respect to future liability, these covenants shall take effect upon the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of OU2 RA Completion by EPA pursuant to ¶ 4.6 (Certification of OU2 RA Completion) of the SOW. 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.

67. **Covenant for SFA.** Except as provided in ¶¶ 68, 69 (United States' Pre- and Post-Certification Reservations), and 71 (General Reservations of Rights), in consideration of the payment made by the United States on behalf of the SFA under the CD, EPA covenants not to take administrative action against SFA pursuant to Sections 106 and 107(a) of CERCLA for OU2. EPA's covenant shall take effect upon the Effective Date. EPA's covenant is conditioned upon the satisfactory performance by SFA of its obligations under this CD. EPA's covenant extends only to SFA and does not extend to any other person.

68. **United States' Pre-Certification Reservations.** Notwithstanding any other provision of this CD, the United States reserves, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel SD, and EPA reserves the right to issue an administrative order seeking to compel SFA, to perform further response actions relating to OU2 and/or to pay the United States for additional costs of response if, (a) prior to Certification of OU2 RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the OU2 RA is not protective of human health or the environment with regards to Plumes C, D, and E, as identified in the IROD.

69. **United States' Post-Certification Reservations.** Notwithstanding any other provision of this CD, the United States reserves, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel SD, and EPA reserves the right to issue an administrative order seeking to

compel SFA, to perform further response actions relating to OU2 and/or to pay the United States for additional costs of response if, (a) subsequent to Certification of OU2 RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the OU2 RA is not protective of human health or the environment with regards to Plumes C, D, and E, as identified in the IROD.

70. For purposes of ¶ 68 (United States' Pre-Certification Reservations), the information and the conditions known to EPA will include only that information and those conditions known to EPA as of the date of the OU1 ESI and set forth in the administrative record for the Site, including OU1 and OU2. For purposes of ¶ 69 (United States' Post-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of OU2 RA Completion and set forth in the IROD, the administrative record for the Site, including OU1 and OU2, or in any information received by EPA pursuant to the requirements of this CD prior to Certification of OU2 RA Completion.

71. **General Reservations of Rights by the United States.** The United States reserves, and this CD is without prejudice to, all rights against SD, and EPA and the federal natural resource trustees reserve, and this CD is without prejudice to, all rights against SFA, with respect to all matters not expressly included within Plaintiffs' covenants. Notwithstanding any other provision of this CD, the United States reserves all rights against SD, and EPA and the federal natural resource trustees reserve, and this CD is without prejudice to, all rights against SFA, with respect to:

- a. liability for failure by SD or SFA to meet a requirement of this CD;
- b. SD's or SFA's liability arising from its past, present, or future disposal, release, or threat of release of Waste Material outside of OU2;
- c. liability based on the ownership of any portion of the Site by SD or SFA when such ownership commences after signature of this CD by SD or SFA;
- d. liability based on the operation of any portion 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 operation of any portion of the Site by SFA when such operation commences after signature of this CD by SFA;
- f. SD's or SFA's liability based on its 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 IROD, the Work, or otherwise ordered by EPA, after signature of this CD by SD or SFA;

g. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments in connection with the Site;

h. criminal liability;

i. liability for violations of federal or state law that occur during or after implementation of the Work;

j. 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 interim remedy set forth in the IROD, but that cannot be required pursuant to ¶ 13 (Modification of SOW or Related Deliverables); and

k. SFA's liability for additional operable units (outside of OU2) at the Site or the final response action.

**72. 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 their 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 15 days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 15-day notice period specified in ¶ 72.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 under this ¶ 72.b. Funding of Work Takeover costs is addressed under ¶ 31 (Access to Financial Assurance).

c. SD may invoke the procedures set forth in ¶ 51 (Record Review), to dispute EPA's implementation of a Work Takeover under ¶ 72.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 ¶ 72.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 ¶ 51 (Record Review) requiring EPA to terminate such Work Takeover.

73. Notwithstanding any other provision of this CD, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.



74. **Covenants for SD by the State.** Except as provided in Paragraphs 76, 77 (The State's Pre- and Post-Certification Reservations) and 79 (General Reservation of Rights by the State), in consideration of (1) the actions that will be performed by SD and (2) the payments that will be made by SD under this Consent Decree, the State covenants not to sue or to take administrative action against SD pursuant to CERCLA or Sections 68-212-206 and 207 of the Tennessee Hazardous Waste Management Act of 1983, T.C.A. §§68-212-206 and 207, for the Site. In addition, except as specifically reserved in Paragraph 80 (State's Reservations concerning Natural Resource Injury), the State covenants not to sue or to take administrative action against SD with respect to Natural Resource Damages in consideration of a separate settlement the State is entering into with SD for this purpose. Except with respect to future liability, these covenants shall take effect as to SD upon the Effective Date of this Consent Decree. With respect to future liability, these covenants shall take effect upon Certification of OU2 RA Completion by EPA pursuant to ¶ 4.6 (Certification of OU2 RA Completion) of the SOW. These covenants as to SD are conditioned upon the satisfactory performance by SD of its obligations under this Consent Decree. These covenants extend only to SD and do not extend to any other person.

75. **Covenants for SFA by the State.** Except as provided in Paragraphs 76, 77 (The State's Pre- and Post-Certification Reservations), and 79 (General Reservation of Rights by the State), in consideration of the payment made by the United States on behalf of the SFA under the CD, the State covenants not to sue or take administrative action against the SFA pursuant to CERCLA or Sections 68-212-206 and 207 of the Tennessee Hazardous Waste Management Act of 1983, T.C.A. §§68-212-206 and 207, for OU2. These covenants shall take effect as to the SFA upon the Effective Date of this Consent Decree. These covenants as to the SFA are conditioned upon the satisfactory performance by the SFA of its obligations under this CD. The State's covenants extend only to SFA and do not extend to any other person.

76. **The State's Pre-Certification Reservations.** Notwithstanding any other provision of this CD, the State reserves, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel SD or SFA to perform further response actions relating to OU2 and/or to pay the State for additional costs of response if, (a) prior to Certification of OU2 RA Completion, (1) conditions at the Site, previously unknown to the States, are discovered, or (2) information, previously unknown to the State, is received, in whole or in part, and (b) the State determines that these previously unknown conditions or information together with any other relevant information indicates that the OU2 RA is not protective of human health or the environment with regards to Plumes C, D, and E, as identified in the IROD.

77. **The State's Post-Certification Reservations.** Notwithstanding any other provision of this CD, the State reserves, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel SD or SFA to perform further response actions relating to OU2 and/or to pay the State for additional costs of response if, (a) subsequent to Certification of OU2 RA Completion, (1) conditions at the Site, previously unknown to the State, are discovered, or (2) information, previously unknown to the State, is received, in whole or in part, and (b) the State determines



that these previously unknown conditions or this information together with other relevant information indicate that the OU2 RA is not protective of human health or the environment with regards to Plumes C, D, and E, as identified in the IROD..

78. For purposes of ¶ 76 (The State's Pre-Certification Reservations), the information and the conditions known to the State will include only that information and those conditions known to the State as of the date of the OU1 ESI and set forth in the administrative record for the Site, including OU1 and OU2. For purposes of ¶ 77 (The State's Post-Certification Reservations), the information and the conditions known to the State shall include only that information and those conditions known to the State as of the date of Certification of OU2 RA Completion and set forth in the IROD, the administrative record for the Site, including OU1 and OU2, or in any information received by EPA pursuant to the requirements of this CD prior to Certification of OU2 RA Completion.

79. **General Reservations of Rights by the State.** The State reserves, and this Consent Decree is without prejudice to, all rights against SD and SFA with respect to all matters not expressly included within their covenants. Notwithstanding any other provision of this Consent Decree, the State reserves all rights against SD and SFA with respect to:

- a. liability for failure by SD or SFA to meet a requirement of this CD;
- b. SD's or SFA's liability arising from its past, present, or future disposal, release, or threat of release of Waste Material outside of OU2;
- c. liability based on the ownership of any portion of the Site by SD or SFA when such ownership or operation commences after signature of this CD by SD or SFA;
- d. liability based on the operation any portion 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 the operation of the Site by SFA when such operation commences after signature of this CD by SFA;
- f. SD's or SFA's liability based on its 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 IROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by SD or SFA;
- g. SFA's liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments in connection with the Site;
- h. criminal liability;
- i. liability for violations of federal or state law that occur during or after implementation of the Work; and
- j. liability, prior to achievement of Performance Standards, for additional response actions that EPA or the State determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the interim remedy set

forth in the IROD, but that cannot be required pursuant to Paragraph 13 (Modification of SOW or Related Deliverables); and

k. SFA's liability for additional operable units (outside of OU2) at the Site or the final response action.

80. **State's Reservations concerning Natural Resource Injury.** Notwithstanding any other provision of this CD, the State, on behalf of its natural resource trustees, reserves the right to institute proceedings against SD in this action or in a new action seeking recovery of Natural Resource Damages, based on (1) conditions with respect to the Site, unknown to the State at the date of lodging of this CD, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of natural resources, or (2) information received after the date of lodging of the CD which indicates that there is injury to, destruction of, or loss of natural resources of a type that was unknown, or of a magnitude greater than was known, to the State at the date of lodging of this CD.

## **XVI. COVENANTS BY SD AND SFA**

81. **Covenants by SD.** Subject to the reservations in ¶ 84, SD covenants not to sue and agree not to assert any claims or causes of action against the United States or the State with respect to the Site, 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 Site, 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 Tennessee Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

82. **Covenant by SFA.** SFA agrees not to assert 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 with respect to OU2, SD's Past Response Costs, SD's Future Response Costs, State Past Response Costs, State Future Response Costs, and this CD. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by SFA in the performance of its duties (other than pursuant to this CD) as lead or support agency under the NCP.

83. Except as provided in ¶¶ 86 (Waiver of Claims by SD) and 101 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States or the State brings a cause of action or issues an order pursuant to any of the reservations in Section XV (Covenants by Plaintiffs), other than in ¶¶ 71.a (claims for failure to meet a requirement of the CD), 71.h (criminal liability), and 71.i (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 or the State is seeking pursuant to the applicable reservation.

84. 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. SD also reserves, and this CD is without prejudice to, contribution claims against SFA in the event any claim is asserted by the United States or the State against SD pursuant to any of the reservations in Section XV (Covenants by Plaintiffs) other than in ¶¶ 71.a (claims for failure to meet a requirement of the CD), 71.h (criminal liability), and 71.i (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 or the State is seeking pursuant to the applicable reservation.

85. 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).

**86. Waiver of De Micromis Claims by SD.**

a. 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 they may have for all matters relating to OU2 of the Site against any person where the person's liability to SD with respect to OU2 of the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at OU2 of the Site, or having accepted for transport for disposal or treatment of hazardous substances at OU2 of 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 Waiver.**

(1) The waiver under this ¶ 86 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.

(2) The waiver under ¶ 86.a shall not apply to any claim or cause of action against any person otherwise covered by such waiver if EPA determines that: (i)

the materials containing hazardous substances contributed to the Site by such person contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; or (ii) such person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e)(3)(B) of CERCLA, 42 U.S.C. § 9604(e) or 9622(e)(3)(B), or Section 3007 of RCRA, 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site; or if (iii) such person has been convicted of a criminal violation for the conduct to which the waiver would apply and that conviction has not been vitiated on appeal or otherwise.

87. SD agrees not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.

## **XVII. SD'S WARRANTY AGAINST DOUBLE RECOVERY**

88. Based upon its knowledge and belief and subject to the penalties of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* and other applicable law, SD hereby warrants that it has not sought or received, and shall not in the future seek or receive, any Double Recovery.

89. SD shall not include in any claim, contract charge, reimbursement request, or invoice to the United States any costs that are Resolved Costs for which it has received payment either under this Consent Decree, whether such a claim or invoice is submitted pursuant to any Federal Contract, or any claim, cause of action, suit, or demand of any kind against the United States whatsoever in law or in equity. All such costs, whether direct or indirect, shall be deemed to be and shall be identified in SD's accounting system as "mutually agreed to be unallowable" costs subject to Federal Acquisition Regulation ("FAR") 31.201-6, Accounting for Unallowable Costs, including any subsequent amendments or modifications to FAR 31.201-6) and thus excluded from any billing, claim, or proposal applicable to any Federal Contracts, including, but not limited to, any final billing, final contract cost proposal, or final overhead rate proposal.

90. SD shall not claim or receive reimbursement for Resolved Costs covered by this Consent Decree pursuant to any indemnification, hold harmless or other provision in any Federal Contract.

91. Any costs rendered unallowable under the terms of this Consent Decree, if included by SD in any billing, claim, or proposal applicable to any Federal Contract and not returned in accordance with Paragraph 93 below, shall be deemed to be costs that have been "determined to be unallowable" and therefore subject to penalties within the meaning of FAR 42.709.1, clause 52.2242-3 (Penalties for Unallowable Costs), and related provisions.

92. SD shall provide a complete copy of this Consent Decree to the administrative contracting officials of the United States with cognizance over SD's Federal Contracts and to the responsible SD official or employee(s) with the responsibility for implementing the obligations or requirements of this Consent Decree. At present these include Susan Lee. Any changes to the titles, duties, or responsibilities of these SD positions will not relieve SD of the obligation to

provide a copy of this Consent Decree to any SD official or employee with the responsibility for implementing the obligations or requirements of this Consent Decree at any time.

93. In the event SD or an Affiliated Contractor has received or discovered to have already been received Double Recovery, SD shall (1) notify the cognizant Contracting Officer(s) and other responsible official(s) for the Federal Contract(s) in writing within thirty (30) days after discovery of such receipt, and (2) within ninety (90) days after such receipt or discovery of receipt, repay the United States, dollar-for-dollar, in the amount of the Double Recovery, plus interest from the date on which it was received, in accordance with 26 U.S.C. §§ 6621 and 6622, by transmitting a sum equal to the amount of the Double Recovery plus interest in accordance with written instructions provided by the cognizant Contracting Officer or other responsible official(s).

94. SD warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to Resolved Costs. For purposes of this section, “assignment or transfer” shall not be deemed to include any general corporate reorganizations, mergers, assignments, transfers or acquisitions that have occurred prior to or during the course of this litigation, provided however that SD has given the United States written notice of such assignment or transfer before the Effective Date, and that the parties to any such assignment or transfer have acknowledged or agreed, in writing, to be bound by the terms of this Consent Decree.

### **XVIII. EFFECT OF SETTLEMENT; CONTRIBUTION**

95. Except as provided in ¶ 86 (Waiver of De Micromis 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 XVI (Covenants by SD and SFA), 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).

96. 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 “SD matters addressed” in this CD. The “SD matters addressed” in this CD are (1) all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person, and (2) for SD, any and all claims by the State against SD for damages for injury to, destruction of, or loss of natural resources, and for the costs of any related natural resource damage assessments; provided, however, that if the United States exercises rights against SDs (or if EPA or the federal natural

resource trustee or the State assert rights against SFA) under the reservations in Section XV (Covenants by Plaintiffs), other than in ¶¶ 71.a (claims for failure to meet a requirement of the CD), 71.h (criminal liability), or 71.i (violations of federal/state law during or after implementation of the Work), the “SD matters addressed” in this CD will no longer include those response costs or response actions that are within the scope of the exercised reservation.

97. The Parties agree, and by entering this CD this Court finds, that this CD constitutes a judicially-approved settlement pursuant to which SFA 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 “SFA matters addressed” in this CD. The “SFA matters addressed” in this CD are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with OU2, by the United States or any other person; provided, however, that if EPA or the federal natural resource trustee or the State assert rights against SFA) under the reservations in Section XV (Covenants by Plaintiffs), other than in ¶¶ 71.a (claims for failure to meet a requirement of the CD), 71.h (criminal liability), or 71.i (violations of federal/state law during or after implementation of the Work), the “SFA matters addressed” in this CD will no longer include those response costs or response actions that are within the scope of the exercised reservation.

98. 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 and SFA 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).

99. SD shall, with respect to any suit or claim brought by it for matters related to this CD, notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim.

100. SD shall, with respect to any suit or claim brought against it for matters related to this CD, notify in writing the United States and the State within 15 days after service of the complaint on SD. In addition, SD shall notify the United States and the State 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.

101. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, Natural Resource Damages, or other appropriate relief relating to the Site, SD (and, with respect to a State action, SFA) 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 or the State 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 XV (Covenants by Plaintiffs).

## **XIX. ACCESS TO INFORMATION**

102. SD shall provide to EPA and the State, upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within 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 and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

### **103. Privileged and Protected Claims.**

a. SD may assert that all or part of a Record requested by Plaintiffs is privileged or protected as provided under federal law, in lieu of providing the Record, provided SD complies with ¶ 103.b, and except as provided in ¶ 103.c.

b. If SD asserts a claim of privilege or protection, it shall provide Plaintiffs 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 brief description of the Record’s contents such that, without revealing information itself privileged or protected, will enable Plaintiffs to assess the claim of privilege; 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 Plaintiffs 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 Plaintiffs have had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in 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.

104. **Business Confidential Claims.** SD may assert that all or part of a Record provided to Plaintiffs under this Section or Section XX (Retention of Records) is business confidential to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). SD shall segregate and clearly identify all Records or parts thereof submitted under this CD for which SD asserts business confidentiality claims. Records that SDs claim to be confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA and the State, or if EPA has notified SD that the

Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to SD.

105. 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.

106. Notwithstanding any provision of this CD, Plaintiffs retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

## **XX. RETENTION OF RECORDS**

107. Until 10 years after EPA's Certification of Work Completion under ¶ 4.7 (Certification of Work Completion) of the SOW, 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, provided, however, that SD, which is potentially liable as an owner or operator of the Site, must retain, in addition, 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, provided, however, that 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.

108. The United States acknowledges that SFA (a) is subject to all applicable federal record retention laws, regulations, and policies; and (b) has certified 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.

109. At the conclusion of this record retention period, SD shall notify the United States and the State at least 90 days prior to the destruction of any such Records, and, upon request by the United States or the State, and except as provided in ¶ 103 (Privileged and Protected Claims), SD shall deliver any such Records to EPA or the State.

110. SD certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State and that it has fully complied with any and all EPA and State 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.

## **XXI. NOTICES AND SUBMISSIONS**

111. 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 addressees 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  
eescdcopy.enrd@usdoj.gov  
Re: DJ # 90-11-3-11315

**and:**

Chief  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
Washington, D.C. 20044-7611  
Re: DJ # 90-11-6-18282

**As to EPA:**

Carol Monell  
Director, Superfund & Emergency Management  
Division  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street  
Atlanta, GA 30303  
monell.carol@epa.gov

**and:**

Jennifer Tufts  
EPA Project Coordinator  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street  
Atlanta, GA 30303  
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(404) 562-8513

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

Paula Painter  
Regional Finance Officer  
EPA Region 4  
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Painter.paula@epa.gov

**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 the State:**

Donnie A. Sprinkle, P.G. - Project Manager  
Tennessee Department of Environment &  
Conservation  
Division of Remediation  
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Elizabeth P. McCarter  
Senior Assistant Attorney General  
Tennessee Attorney General's Office  
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**As to Security Signals, Inc.:**

Susan Lee, President  
9056 Macon Rd.  
Cordova, TN 38088  
slee@securitysignalsinc.com

and

Jessie Zeigler, Esq.  
Bass, Berry & Sims PLC  
150 3<sup>rd</sup> Ave. S. Ste. 2800  
Nashville, TN 37201  
jzeigler@bassberry.com

and

Phil Coop  
EnSafe, Inc.  
P.O. Box 341315  
Memphis, TN 38184-1315  
pcoop@ensafe.com

**XXII. RETENTION OF JURISDICTION**

112. 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 XIII (Dispute Resolution).

**XXIII. APPENDICES**

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

“Appendix A” is the IROD.

“Appendix B” is the SOW.

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

“Appendix D” is the description and/or map of SSI’s property.

“Appendix E” is the OU1 ESI.

#### **XXIV. MODIFICATION**

114. Except as provided in ¶ 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 ¶ 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. All modifications to the CD, other than the SOW, also shall be signed by the State, or a duly authorized representative of the State, as appropriate. A modification to the SOW shall be considered material if it implements an IROD amendment that fundamentally alters the basic features of the selected interim 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.

115. Nothing in this CD shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this CD.

#### **XXV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

116. 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 consents to the entry of this CD without further notice.

117. 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.

#### **XXVI. SIGNATORIES/SERVICE**

118. Each undersigned representative of SD to this CD and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice and the Senior Counsel for the State 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.

119. 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.

120. 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 that Party 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.



**XXVII. FINAL JUDGMENT**

121. 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.

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

SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 2020.

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United States District Judge

Signature Page for CD regarding Operable Unit Two of the National Fireworks Superfund  
Alternative Site

**FOR THE UNITED STATES OF AMERICA:**

**ELLEN MAHAN** Digitally signed by ELLEN MAHAN  
Date: 2020.09.10 17:27:54 -04'00'

\_\_\_\_\_  
Dated

\_\_\_\_\_  
Ellen M. Mahan  
Deputy Section Chief  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
Washington, D.C. 20530

\_\_\_\_\_  
/s/ Rachael Amy Kamons  
\_\_\_\_\_  
Rachael Amy Kamons  
Senior Counsel  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
P.O. Box 7611  
Washington, D.C. 20044-7611

\_\_\_\_\_  
Leslie Hill  
Trial Attorney  
U.S. Department of Justice  
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Alternative Site

**FOR THE UNITED STATES OF AMERICA:**

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A handwritten signature in black ink, appearing to read "Carol Monell", is written over a horizontal line.

Carol Monell

Director, Superfund & Emergency Management Division  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

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**FOR THE STATE OF TENNESSEE:**

6-29-2020

Dated




Elizabeth P. McCarter  
Senior Assistant Attorney General  
Tennessee Attorney General's Office  
P. O. Box 20207  
Nashville, TN 37202



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**FOR SECURITY SIGNALS, INC.**

May 11, 2020  
Dated

  
Name: Susan D. Lee  
Title: President  
Address: Security Signals, Inc.  
9509 Macon Road  
Cordova, TN 38016

Agent Authorized to Accept Service Name (print): Susan D. Lee  
on Behalf of Above-signed Party: Title: President  
Company: Security Signals, Inc.  
Address: 9509 Macon Road  
Cordova, TN 38016  
Phone: 901-754-7228  
email: slee@securitysignalsinc.com

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