

United States of America v. Magnesium Corp. of America, et al.

Case No. 2:01CV0040B

Consent Decree

Appendix No. 13

Financial Assurance

APPENDIX 13

FINANCIAL ASSURANCE

This Appendix sets forth the obligations of Defendant USM to secure and maintain Financial Assurance as required under Paragraph 47 of the Consent Decree. Submittals requiring EPA approval shall be submitted pursuant to Paragraph 16 (Section VI (RCRA Work Requirements)), Paragraph 47 (Section X (Financial Assurance)), and Section XX (Notices) of the Consent Decree.

Under this Appendix, when required to provide an originally signed certification by Defendant USM's Chief Financial Officer ("CFO"), Defendant USM shall use the form provided in Attachment A ("CFO Certification") of this Appendix.

I. Definitions

Terms used in this Appendix that are defined in Utah Admin. Code ("UAC") Rule 315-264-141 (2019), shall have the meanings assigned to them in such regulation, unless otherwise provided in this Appendix or Paragraph 8 (Section IV (Definitions)) of the Consent Decree. Whenever the terms set forth below are used in this Appendix, the following definitions shall apply:

"Anniversary Date" shall mean the annual anniversary of the date that Financial Assurance is provided unless otherwise stated in this Appendix.

"Current Dollars" shall mean U.S. dollars in the year received or paid, unadjusted for price changes or inflation.

"Financial Mechanism(s)" shall mean mechanism(s) or instrument(s) specified in this Appendix to secure funding for a Financial Assurance obligation under Paragraph 47 of the Consent Decree.

"Related Party" or "Related Parties" shall have the same meaning as set forth in the Statement of Financial Accounting Standards No. 57, Appendix B (Glossary) (Financial Accounting Standards Board - Original Pronouncements, as amended): "Affiliates of the enterprise; entities for which investments in their equity securities would, absent the election of the fair value option under FASB Statement No. 159, *The Fair Value Option for Financial Assets for Financial Assets and Financial Liabilities*, be required to be accounted for by the equity method by the enterprise; trusts for the benefit of employees, such as pension and profit-sharing trusts that are managed by or under the trusteeship of management; principal owners of the enterprise; its management; members of the immediate families of principal owners of the enterprise and its management; and other parties with which the enterprise may deal if one party controls or can significantly influence the management or operating policies of the other to an extent that one of the transacting parties might be prevented from fully pursuing its own separate interests. Another party also is a related party if it can significantly influence the management or operating policies of the transacting parties or if it has an ownership interest in one of the transacting parties and

can significantly influence the other to an extent that one or more of the transacting parties might be prevented from fully pursuing its own separate interests.”

“Self-assurance Mechanism” shall mean a corporate financial test or a corporate guarantee as set forth in this Appendix.

“Substantial Business Relationship” shall mean the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A “substantial business relationship” must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of EPA.

“Third-party Mechanism” shall mean a trust fund, surety bond guaranteeing payment or performance, letter of credit, or insurance as set forth in this Appendix.

II. Cost Estimate

1. This Section applies to Cost Estimates required under Paragraphs 16 and 47 of the Consent Decree and Section III of this Appendix for the cost of Closure and Post-Closure of the Retrofitted Waste Pond in accordance with Appendix 4 Part A or Part B, as applicable.
2. A Cost Estimate shall consist of a detailed written estimate and shall:
 - a. Be in Current Dollars.
 - b. Be calculated based on what it would cost to hire a third-party to complete the work required; a third-party is a party who is neither a parent, a subsidiary nor a Related Party of Defendant USM.
 - c. Not include any credit for salvage value that may be realized with the sale of the waste, structures and equipment, land or other assets.
 - d. Not include or a zero cost for handling any waste that might have economic value or potential future value.
 - e. Be calculated at that point in time when the extent and manner of operation would make the work required the most expensive.
3. Defendant USM shall submit annually to EPA an updated written Cost Estimate, including supporting documentation, to reflect inflationary adjustments by either:
 - a. Recalculating the cost based on updated unit costs in Current Dollars.
 - b. Using an inflationary factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its

Survey of Current Business (found in their National Income and Product Accounts (NIPA) Table 1.1.9), as specified in Paragraphs 3.b.i and 3.b.ii, below. The inflationary factor is the result of dividing the latest published annual Deflator by the Deflator of the previous year.

- i. The first adjustment is made by multiplying the Cost Estimate by the inflation factor. The result is the adjusted Cost Estimate.
 - ii. Subsequent adjustments are made by multiplying the latest adjusted Cost Estimate by the latest inflationary factor.
4. Every five (5) years Defendant USM shall submit to EPA for approval an updated RWP Closure and Post-Closure Plan (e.g., update schedule, material quantity, testing protocols), and associated updated Cost Estimate (e.g., updated unit costs) in accordance with Paragraph 2, above; such updated Cost Estimate shall satisfy the requirements of the annual update required under Paragraph 3.
5. Defendant USM shall submit each updated Cost Estimate sixty (60) Days prior to the Anniversary Date of the establishment of the Financial Mechanism(s). If more than one Financial Mechanism is being used to provide Financial Assurance, then the updated Cost Estimate shall be submitted sixty (60) Days prior to the earliest Anniversary Date, for a given calendar year, of the Financial Mechanisms.

III. Financial Assurance for RWP Closure

6. In accordance with the dates and conditions specified in Paragraphs 47(a) and 49(a) of the Consent Decree, Defendant USM shall provide to EPA an originally signed CFO Certification, together with supporting documentation, confirming that it has secured Financial Assurance in an amount not less than the Cost Estimate.
7. Defendant USM shall choose from the Financial Mechanisms specified in UAC Rule R315-264-143(a)-(f) and UAC Rule 315-264-145(a)-(f), as applicable, to establish Financial Assurance as required by Paragraph 47.a-b of the Consent Decree. The trustee of any trust fund, or the provider of a letter of credit, surety bond or insurance, shall not be a Related Party of Defendant USM.
 - a. For a trust fund, Defendant USM shall comply with UAC Rule 315-264-143(a) and UAC Rule 315-264-145(a), as applicable, except as modified below:
 - i. In lieu of UAC Rule 315-264-143(a)(3)-(5) and UAC Rule 315-264-145(a)(3)-(5), Defendant USM shall fully fund the trust fund within thirty (30) Days following the entry of the Consent Decree, unless the trust fund is designated as a stand-by trust in accordance with UAC Rule 315-264-143(b), (c) or (d) and UAC Rule 315-264-145(b), (c) or (d).

- ii. In addition to the requirements of UAC Rule 315-264-143(a) and UAC Rule 315-264-145(a), Defendant USM shall separately pay all taxes or brokerage fees incurred by the trust fund as well as all expenses incurred by the trustee in connection with the administration of the trust fund, including fees for legal services rendered to the trustee and compensation of the trustee.
 - iii. In lieu of UAC Rule 315-264-151(a), as referenced in UAC Rule 315-264-143(a)(2) and UAC Rule 315-264-145(a)(2), Defendant USM shall use the exact wording as specified in Attachment B, Form 1 (“Trust Agreement”), of this Appendix, for the wording of the Trust Agreement. A Trust Agreement must be accompanied by a formal certification of acknowledgement (see example provided with Trust Agreement, Attachment B, Form 1, of this Appendix).
- b. For a surety bond guaranteeing payment or performance, Defendant USM shall comply with UAC Rule 315-264-143(b) and (c) and UAC Rule 315-264-145(b) and (c), as applicable, except as modified below:
 - i. In addition to the requirements of UAC Rule 315-264-143(b)(1) and (c)(1) and UAC Rule 315-264-145(b)(1) and (c)(1), Defendant USM shall provide an originally signed CFO Certification, or a certification from an officer of A.M. Best Rating Services, Inc. (“A.M. Best”), or another nationally recognized statistical rating organization (“NRSRO”), documenting that the Surety has at least a “secured” financial strength rating of “A” by A.M. Best or an equivalent rating by an NRSRO, and provide an originally signed certification by Defendant USM’s CFO documenting that the surety provider is listed by the Department of the Treasury in the Department Circular 570.
 - ii. In lieu of the requirements of UAC Rule 315-264-143(b)(4)(ii) and (c)(5) and UAC Rule 315-264-145(b)(4)(ii) and (c)(5), upon notice to Defendant USM and the Surety of a determination by EPA that Defendant USM has failed to perform work required by Paragraph 16 of the Consent Decree, and following the conclusion of any dispute resolution under Section XVI (Dispute Resolution) of the Consent Decree regarding the failure to perform such work, the Surety under the terms of the surety bond shall become liable on the bond obligation and shall deposit the amount of the penal sum into the stand-by trust fund. Such deposit of the penal sum into the stand-by trust shall not be subject to dispute resolution pursuant to Section XVI (Dispute Resolution) or judicial review.
 - iii. In lieu of UAC Rule 315-264-151(b), as referenced in UAC Rule 315-264-143(b)(2) and UAC Rule 315-264-145(b)(2), Defendant USM shall use the exact wording as specified in Attachment B, Form 2 (“Financial Guarantee Bond”), of this Appendix, for the wording of the surety bond guaranteeing payment. In lieu of UAC Rule 315-264-151(c), as referenced in UAC Rule 315-264-143(c)(2) and UAC Rule 315-264-145(c)(2), Defendant USM shall use the exact wording as specified in Attachment B, Form 3 (“Performance

Bond”), of this Appendix, for the wording of the surety bond guaranteeing performance.

- c. For a letter of credit, Defendant USM shall comply with UAC Rule 315-264-143(d) and UAC Rule 315-264-145(d), as applicable, except as modified below:
 - i. In addition to the requirements of UAC Rule 315-264-143(d)(1) and UAC Rule 315-264-145(d)(1), Defendant USM shall provide an originally signed CFO Certification documenting that the provider of the letter of credit is a federally insured financial institution.
 - ii. In lieu of the requirements of UAC Rule 315-264-143(d)(8) and UAC Rule 315-264-145(d)(9), upon notice to Defendant USM of a determination by EPA that Defendant USM has failed to perform work required by Paragraph 16 of the Consent Decree, and following the conclusion of any dispute resolution under Section XVI (Dispute Resolution) of the Consent Decree, regarding the failure to perform such work, EPA may draw on the letter of credit. EPA’s drawing on the letter of credit shall not be subject to any dispute resolution pursuant to Section XVI (Dispute Resolution) of the Consent Decree or judicial review.
 - iii. In lieu of the requirements of UAC Rule 315-264-151(d), as referenced in UAC Rule 315-264-143(d)(2) and UAC Rule 315-264-145(d)(2), Defendant USM shall use the exact wording as specified in Attachment B, Form 4 (“Irrevocable Standby Letter of Credit”), of this Appendix, for the wording of the letter of credit.
- d. For insurance, Defendant USM shall comply with UAC Rule 315-264-143(e) and UAC Rule 315-264-145(e), as applicable, except as modified below:
 - i. In addition to the requirements of UAC Rule 315-264-143(e) and UAC Rule 315-264-145(e), Defendant USM shall provide an originally signed certification from either the Defendant (CFO Certification) or an officer of A.M. Best or another NRSRO, documenting that the insurer has at least a “secured” financial strength rating of “A” by A.M. Best or an equivalent rating by the NRSRO.
 - ii. Comply with UAC Rule 315-264-143(e)(8) and UAC Rule 315-264-145(e)(8), except that in lieu of the conditions set forth in UAC Rule 315-264-143(e)(8)(i)-(v) and UAC Rule 315-264-145(e)(8)(i)-(v) that specify when a policy will remain in full force and effect notwithstanding a failure to pay the premium, the following conditions are substituted: (a) EPA determines that the Facility has been abandoned; (b) the Work required under this Consent Decree is undertaken by EPA; (c) Closure and Post-Closure of the Retrofitted Waste Pond is ordered by EPA or by a U.S. District Court or other court of competent jurisdiction; (d) Defendant is named as debtor in a voluntary or

- involuntary proceeding under Title 11 (Bankruptcy) of the U.S. Code; or (e) the premium due is paid.
- iii. Notify EPA if it has cause to believe that it will not be able to make a premium payment.
 - iv. Ensure the assignment requirements of UAC Rule 315-264-143(e)(7) and UAC Rule 315-264-145(e)(7) are incorporated into the insurance policy exactly as written, with no additional qualifying conditions.
 - v. In lieu of the requirements of UAC Rule 315-264-151(e), as referenced in UAC Rule 315-264-143(e)(2) and UAC Rule 315-264-145(e)(2), Defendant USM shall use the exact wording as specified in Attachment B, Form 5 (“Certificate of Insurance for Stack System Closure and/or Post-Closure”), of this Appendix, for the wording of the Certificate of Insurance.
- e. For the corporate financial test, Defendant shall comply with UAC Rule 315-264-143(f) UAC Rule 315-264-145(f), as applicable, except that:
- i. In lieu of complying with UAC Rule 315-264-143(f)(3) and UAC Rule 315-264-145(f)(3), Defendant shall document its satisfaction of the corporate financial test by submitting to EPA within ninety (90) Days after the close of Defendant USM’s fiscal year, for each year Defendant USM is providing a Self-Assurance Mechanism:
 - (1) A letter signed by Defendant’s CFO worded exactly as specified in Attachment B, Form 6 (“CFO Letter”), of this Appendix.
 - (2) A copy of the independent CPA report on examination of Defendant’s audited financial statements for the latest completed fiscal year that Defendant is using for the basis of the financial test.
 - (3) A copy of the audited financial statements for the last completed year.
 - (4) A report of procedures and findings from Defendant’s independent CPA, resulting from an agreed-upon procedures engagement performed in accordance with the American Institute of CPAs (“AICPA”) Statements on Standards for Attestation Engagements, AT Section 201 – Agreed-Upon Procedures Engagements (including AICPA related attestation interpretations), as updated, that describes the procedures performed and related findings, including whether or not differences or discrepancies were found in the comparison of financial information set out in the letter (including attachments and exhibits) from Defendant USM’s CFO and Defendant USM’s Independently Audited, year-end financial statements for the last fiscal year, including all attachments. Where differences or discrepancies

exist between Defendant USM's CFO Letter and Defendant USM's Independently Audited year-end financial statements, the report of procedures and findings will reconcile any differences or discrepancies between the values or information represented in Defendant USM's CFO Letter and Defendant USM's Independently Audited financial statements. Procedures to be performed by the independent CPA shall be in accordance with AT Section 201.

- f. For the corporate guarantee, Defendant USM shall provide a corporate guarantee pursuant to and otherwise comply with UAC Rule 315-264-143(f)(10) and UAC Rule 315-264-145(f)(11), as modified by Paragraph 7.e., above, and shall meet the requirements specified below:

In lieu of the requirements of UAC Rule 315-264-151(f), as referenced in UAC Rule 315-264-143(f)(2) and UAC Rule 315-264-145(f)(2), Defendant USM shall use the exact wording as specified in Attachment B, Form 7 ("Corporate Guarantee"), of this Appendix, for the wording of the corporate guarantee.

8. Defendant USM shall comply with UAC Rule 315-264-143(g) and UAC Rule 315-264-145(g) when establishing more than one Financial Mechanism for the Closure and/or Post-Closure of the Retrofitted Waste Pond.
9. Defendant USM may satisfy the requirements for Financial Assurance for both Closure and Post-Closure by using the same Financial Mechanism (e.g., same Trust Fund Agreement can be used for both Closure and Post-Closure). The amount of the funds available through the Financial Mechanism shall be no less than the sum of funds that would be available if separate Financial Mechanisms had been established and maintained for Financial Assurance of Closure or Post-Closure.
10. Defendant US shall comply with UAC Rule 315-264-143(i) and UAC Rule 315-264-145(i) when seeking release from the Financial Assurance obligation for Closure and/or Post-Closure of the Retrofitted Waste Pond under Paragraph 47 of the Consent Decree.
11. If Defendant USM elects to provide more than one Third-party Mechanism to demonstrate Financial Assurance, then the combination of the Third-party Mechanisms shall provide Financial Assurance in an amount not less than the Cost Estimate. In addition, Defendant USM shall submit to EPA an originally signed CFO Certification verifying that the Third-party Mechanisms do not incorporate terms subrogating one Third-party Mechanism to another, i.e., designating a prioritization for the release of the funds or the payment of a claim. EPA, if the need arises, will determine the priority for the release of funds or payment from the Third-party Mechanisms. If Defendant USM uses a trust fund in combination with a letter of credit or surety bond, then the trust fund may be used as the standby trust fund for the letter of credit or surety bond.

IV. Financial Assurance for Third-Party Liability

12. Defendant USM shall provide Financial Assurance to compensate third-parties for bodily injury or property damage that might result from sudden accidental or non-sudden accidental occurrences associated with the operation and the Closure and Post-Closure of the Retrofitted Waste Pond, (“Financial Assurance for Third-party Liability”). The Financial Assurance for Third-Party Liability shall comply with UAC Rule 315-264-147(a)-(e), (h)- (j), except as provided below:
 - a. Defendant USM shall not provide Third-Party Liability pursuant to UAC Rule 315-264-147(a)(2) and (b)(2).
 - b. In addition to complying with UAC Rule 315-264-147(e), Defendant USM shall also maintain Financial Assurance for Third-Party Liability for the duration of the Facility operations and the Closure and Post-Closure of the Retrofitted Waste Pond.
 - c. If Defendant USM wishes to propose an adjustment to the amount of Financial Assurance pursuant to UAC Rule 315-264-147(c), Defendant USM shall submit such a request to EPA, as set forth in UAC Rule 315-264-147(c), explaining the basis for the proposed adjustment, together with supporting documentation. Such a request shall be accompanied by a CFO Certification. Until such time as EPA approves the adjusted Financial Assurance in writing, Defendant USM shall provide Financial Assurance for Third-Party Liability as required herein. Nothing in this Paragraph shall be construed to waive or limit EPA’s right, pursuant to UAC Rule 315-264-147(d), to adjust the level of Financial Assurance required in UAC Rule 315-264-147(a) and (b).
 - d. Defendant USM, in providing Financial Assurance for Third-party Liability, shall use the exact wording specified in UAC Rule 315-264-151(i)-(n)), except for minor revisions to the Financial Mechanisms so as to specify that the Financial Mechanism(s) is to provide Financial Assurance for Third-Party Liability for the RWP during operation and through the Post-Closure period. Defendant USM shall submit within five (5) Days of the lodging of the Consent Decree a draft of the Financial Mechanism that shall be submitted for Financial Assurance for Third-Party Liability for approval by EPA. Such approval shall be within the sole unreviewable discretion of EPA.

V. Incapacity of Defendant USM or Financial Institution

13. Defendant USM shall notify EPA by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming Defendant USM as debtor, or within ten (10) Days after the commencement of the proceeding.
14. Defendant USM shall be deemed without the required Financial Assurance under Section III of this Appendix and Paragraph 47 of the Consent Decree in the event of bankruptcy

of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond or letter of credit to issue such instruments. Defendant USM shall establish other Financial Assurance within sixty (60) Days after such an event.

VI. Information Gathering

15. Defendant USM shall provide to EPA, upon request, any information or reports regarding the financial status of Defendant USM, the Financial Mechanism(s) provided by Defendant USM to meet its obligations for Financial Assurance, and the financial institution(s) providing the Financial Mechanism(s) to secure Defendant USM's obligations under this Appendix to the Consent Decree. Such information shall be provided within twenty (20) Days of the request unless otherwise stipulated by EPA. Defendant USM may assert Confidential Business Information ("CBI") for such information pursuant to the procedures set forth in 40 C.F.R. Part 2.

VII. Facility Transfer

16. No transfer of ownership or operation of the Facility shall relieve Defendant USM of its Financial Assurance obligations under this Consent Decree, except as provided by this Section and Section III (Applicability) of the Consent Decree. Defendant USM shall comply with the notice requirements of Section III (Applicability) of the Consent Decree for transfer, including a clear statement as to whether Defendant USM requests the transfer of the Consent Decree and its Financial Assurance responsibilities to the Transferee. In the event of a transfer of the Facility's ownership or operation:
 - a. If Defendant USM is to retain its Consent Decree and Financial Assurance obligations upon the transfer of the Facility, Defendant USM shall establish a trust fund in accordance with this Appendix into which Defendant USM shall fully fund, in Current Dollars, the Financial Assurance. Defendant USM shall establish and fund the trust fund, as well as provide EPA the appropriate documentation evidencing the trust fund, by the date of the Facility transfer. The portion of funds vested in the trust fund that are not required to meet annual withdrawals shall be invested in U.S. Treasury Bills, or market-based notes and bills that achieve an investment goal or preservation of principle and guarantee an inflation-adjusted rate of return no less than the 30-Year Treasury Constant Maturity Rate average for the previous twelve (12) months from the date of the annual cost estimate.
 - b. If Transferee agrees to assume Defendant USM's Consent Decree and Financial Assurance obligations, Defendant USM shall submit to EPA for approval an originally signed certification by Transferee's CFO, together with supporting documentation, explaining in detail its ability to provide Financial Assurance pursuant to the requirements of this Appendix and agreeing to provide the Financial Assurance if approved by EPA pursuant to Section III (Applicability) of the Consent Decree. Defendant USM shall comply with all the requirements of

this Appendix until: (1) EPA has approved Transferee's proposed Financial Assurance; (2) the United States consents to the transfer of obligations pursuant to Section III (Applicability) of the Consent Decree; (3) Transferee has established the approved Financial Assurance; and (4) EPA has given its consent to terminate the existing Financial Assurance.

VIII. Reservation of Rights

17. EPA reserves the right to determine at any time that the Financial Assurance provided by Defendant USM no longer satisfies the requirements of this Consent Decree or this Appendix. EPA may base this determination on Defendant USM's failure to provide notices or documentation required by this Appendix as well as on a substantive evaluation of Defendant USM's Financial Assurance. Within thirty (30) Days of written notice from EPA that Defendant USM's Financial Assurance no longer satisfies the requirements of this Consent Decree or the referenced regulations, Defendant USM shall submit to EPA for approval revised or alternate Financial Assurance that satisfies the requirements of this Consent Decree. Defendant USM shall not terminate the existing Financial Assurance until the revised or alternate Financial Assurance has been approved by EPA and EPA has provided written consent permitting termination of the existing Financial Assurance.

Instructions: The following is the form of the Chief Financial Officer's ("CFO") certification that shall be used when required under Appendix 13 of the Consent Decree. The CFO Certification shall be worded as follows except that instructions in the brackets are to be replaced with the relevant information and the brackets deleted.

Chief Financial Officer Certification

I hereby certify as the Chief Financial Officer [*or insert, as appropriate, "a duly designated corporate officer"*] of [*insert Defendant's name, owner or operator of the Facility*] under penalty of law, in accordance with the requirements of [*insert the specific Section/Paragraph of Appendix 13*] of the Consent Decree U.S. v Magnesium Corporation of America, et al. (Case No. 2:01CV0040B, United States District Court of Utah, Central Division) that [*insert the substance of the certification being made and any additional information that is relevant for the certification*]. Based on my inquiry of persons directly responsible for gathering the information for this certification (and any attached documentation), the information submitted is, to the best of my knowledge and belief, true accurate and complete. I am aware that there are significant penalties for submitting false information, including possible fine and imprisonment for knowing violations.

[*If required under Appendix 13 as part of the CFO Certification.*] I have attached as supporting documentation: [*insert a description of information on the supporting documentation.*]

Date: _____

Signature: _____

Print Name: _____

Title: _____

Company: _____

Address: _____

Telephone Number: _____

E-mail: _____

Instructions: The trust agreement for a trust fund, as specified in Appendix 13 of the Consent Decree, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

TRUST AGREEMENT

Trust Agreement, the “Agreement,” entered into as of [date] by and between [insert Defendant’s name, owner or operator of the Facility], a [name of State] [insert “corporation,” “partnership,” “association,” or “proprietorship”], the “Grantor,” and [name of corporate trustee], [insert “incorporated in the State of ----” or “a national bank”], the “Trustee.”

Whereas, the United States Environmental Protection Agency (“EPA”), an agency of the United States Government, has entered into a Consent Decree with [insert Defendant’s name, owner or operator of the Facility] requiring [insert Defendant’s name, owner or operator of the Facility] to provide assurance that funds will be available when needed for Closure and/or Post-Closure of the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree) covered under the Consent Decree, U.S. v. Magnesium Corporation of America, et al. (Case No. 2:01CV0040B, United States District Court of Utah, Central Division);

Whereas, the Grantor has elected to establish a trust to provide all or part of such Financial Assurance for the Facility identified herein;

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, Therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term “Grantor” means [insert Defendant’s name, owner or operator of the Facility] who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term “Trustee” means the Trustee who enters into this Agreement and any Successor Trustee.

Section 2. Identification of Facility and Cost Estimates. This Agreement pertains to the Facility and Cost Estimate(s) identified on attached Schedule A for the Closure and/or Post-Closure of the Retrofitted Waste Pond [on newly-created Schedule A, list the EPA Identification Number, name, address, and Cost Estimate(s) for identified specific activities (e.g., Closure, Closure and Post-Closure or Post-Closure) of the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree)].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the “Fund,” for the benefit of EPA. The Grantor and the Trustee intend that no third

party has access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by EPA.

Section 4. Payment for Work. The Trustee shall make payments from the Fund only as directed in writing by the EPA Regional Administrator, Region 8, in accordance with Section 14, below. The Trustee shall provide for reimbursements to the Grantor or other persons from the Fund for the payment of the costs for Closure and/or Post-Closure of the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree) covered by this Agreement only as directed in writing by the EPA Regional Administrator, Region 8. In addition, the Trustee shall refund to the Grantor only such amounts as the EPA Regional Administrator, Region 8, specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his/her duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(a) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

(b) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

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

Section 7. Commingling and Investment. The Trustee is expressly authorized in its

discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

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

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained, or savings certificates issued by, the Trustee in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or a State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid by the Grantor. Additionally, all other expenses incurred by the Trustee in

connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee, and all other proper charges and disbursements of the Trustee shall also be paid by the Grantor. To the extent not paid directly by the Grantor, and after notice to EPA of taxes, fees and charges not paid by the Grantor as required, such taxes, fees and charges can be paid from the Fund.

Section 10. Annual Accounting. The Trustee shall annually, at least thirty (30) Days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the EPA Regional Administrator, Region 8 (or the designee), a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than sixty (60) Days prior to the Anniversary Date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within ninety (90) Days after the statement has been furnished to the Grantor and the Region 8 EPA Regional Administrator shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The Successor Trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the Successor Trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the Successor Trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, then the Trustee may apply to a court of competent jurisdiction for the appointment of a Successor Trustee or for instructions. The Successor Trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the EPA Regional Administrator, Region 8, and the present Trustee by certified mail ten (10) Days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9, above.

Section 14. Instructions to the Trustee.

(a) All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be

fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions.

(b) All orders, requests, and instructions by the EPA Regional Administrator, Region 8, to the Trustee shall be in writing, signed by the EPA Regional Administrator, Region 8, unless otherwise indicated in instructions to the Trustee as signed by the EPA Regional Administrator, Region 8. Initial instructions by the EPA Regional Administrator, Region 8, to the Trustee are attached hereto as Exhibit B. New, revised or amended instructions by the EPA Regional Administrator, Region 8, to the Trustee will be dated and appended hereto in this Exhibit and shall be designated Exhibit B followed by a numeric designation (e.g., Exhibit B-1, Exhibit B-2). The Trustee shall act and shall be fully protected in acting in accordance with the EPA Regional Administrator's (Region 8) orders, requests, and instructions.

(c) The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and EPA, except as provided for herein and found in Exhibit B.

Section 15. Notice of Nonpayment. The Trustee shall notify the Grantor and the Region 8 EPA Regional Administrator, by certified mail within ten (10) Days following the expiration of the thirty (30)-Day period after the anniversary of the establishment of the Trust, if no payment is received from the Grantor during that period. After the pay-in period is completed, the Trustee shall not be required to send a notice of nonpayment.

Section 16. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the EPA Regional Administrator, Region 8, or by the Trustee and the EPA Regional Administrator, Region 8, if the Grantor ceases to exist.

Section 17. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, above, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the EPA Regional Administrator, Region 8, or by the Trustee and the EPA Regional Administrator, Region 8, if the Grantor ceases to exist. Upon termination of the Trust, all remaining Trust property, less final Trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor and the EPA Regional Administrator, Region 8, issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably

incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Utah.

Section 20. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. Whenever the term “EPA Regional Administrator, Region 8,” is used, it shall be construed to include the term “or his/her designee”. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized, and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in Appendix 13, Attachment B, Form 1, of the Consent Decree U.S. v Magnesium Corporation of America, et al. (Case No.2:01CV0040B, United States District Court of Utah, Central Division.

[Signature of Grantor]
[Title]

Attest:

[Title]

[Seal]

[Signature of Trustee]

Attest:

[Title]

[Seal]

The following is an example of the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified Appendix 13 of the Consent Decree.

State of _____

County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors

of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

Instructions: A surety bond guaranteeing payment into a trust fund, as specified in Appendix 13 of the Consent Decree, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

[Letterhead of Bond Issuer]

FINANCIAL GUARANTEE BOND

Date Bond Executed: _____

Effective Date: _____

Principal: [Legal name and business address of Defendant]

Type of organization: [Insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation: _____

Surety[ies]: [Name(s) and business address(es)]

EPA Identification Number: [Insert EPA Id. No.]

Facility: [Insert name and address]

The amount(s) guaranteed by this bond for the [insert the specific activity (e.g., Closure, Closure and Post-Closure, or Post-Closure)] for the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree) at the above referenced Facility: \$ _____

Total Penal Sum of Bond: \$ _____

Surety's Bond Number: _____

Know All Persons By These Presents, That we, the Principal and Surety[ies] hereto are firmly bound to the U.S. Environmental Protection Agency ("EPA"), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal, the named Defendant, entered into a Consent Decree, U.S. v. Magnesium Corporation of America, et al. (Case No. 2:01CV0040B, United States District Court of Utah, Central Division) with EPA, in part, pursuant to the Resource Conservation and Recovery Act ("RCRA"), as amended, to resolve civil claims by establishing injunctive relief under the Consent Decree;

Whereas said Principal is required to provide Financial Assurance pursuant to Paragraph 47 of the Consent Decree for [insert specific activities covered by Financial Assurance (e.g.,

Closure, or Closure and Post-Closure, or Post-Closure)] of the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree) at the above referenced Facility; and

Whereas said Principal shall establish a standby trust fund as is required when a financial guarantee bond (“surety bond” or “bond”) is used to provide such Financial Assurance:

Now, Therefore, the conditions of the obligation are such that if the Principal shall faithfully, before the beginning of [*insert specific activities covered by Financial Assurance (e.g., Closure, Closure and Post-Closure, or Post-Closure)*] of the Retrofitted Waste Pond, fund the standby trust fund in the amount(s) identified above for the Facility,

Or, if the Principal shall fund the standby trust fund in such amount(s) within fifteen (15) Days after a final order to begin [*insert specific activities covered by Financial Assurance (e.g., Closure, Closure and Post-Closure, or Post-Closure)*] of the Retrofitted Waste Pond is issued by EPA or a U.S. district court or other court of competent jurisdiction,

Or, if the Principal shall provide alternate Financial Assurance, as specified in Appendix 13 to the Consent Decree and obtain EPA’s written approval of such assurance, within ninety (90) Days after the date notice of cancellation is received by both the Principal and EPA from the Surety[ies],

then the obligation of the Surety or Sureties, as applicable, shall be null and void; otherwise it is to remain in full force and effect.

The Surety[ies] shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by EPA that the Principal has failed to perform as guaranteed by this bond, the Surety[ies] shall place funds in the amount guaranteed for the Facility into the standby trust fund as directed by EPA.

The liability of the Surety[ies] shall not be discharged by any payment or succession of payments hereunder, unless and until such payments or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety[ies] hereunder exceed the amount of said penal sum [*insert the following text if more than one Surety is covering the Financial Assurance obligation: “as specified below for each individual Surety”*].

The Surety[ies] may cancel the bond by sending notice of cancellation by certified mail to the Principal and EPA, provided, however, that cancellation shall not occur during the one-hundred twenty (120) Days beginning on the date of receipt of the notice of cancellation by the Principal and EPA, as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety[ies], provided, however, that no such notice shall become effective until the Surety[ies] receive[s] written authorization for termination of the bond by EPA.

In Witness Whereof, The Principal and Surety[ies] have executed this Financial Guarantee Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety[ies] and that the wording of this surety bond is identical to the wording specified in Appendix 13, Attachment B, Form 2, of the Consent Decree for a Financial Guarantee Bond.

FOR THE PRINCIPAL:

Date: _____ By [signature]: _____
Printed name: _____
Title: _____
Corporate seal: _____

FOR THE CORPORATE SURETY(IES):

[Name and Address]

State of incorporation: _____

Liability limit: \$ _____

Date: _____ By [signature]: _____
Printed name: _____
Title: _____
Corporate seal: _____

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for the Surety above.]

Bond premium: \$ _____

Instructions: A performance bond guaranteeing performance, as specified in Appendix 13 of the Consent Decree, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

[Letterhead of Bond Issuer]

PERFORMANCE BOND

Date Bond Executed: _____

Effective Date: _____

Principal: [Legal name and business address of Defendant]

Type of organization: [Insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation: _____

Surety[ies]: [Insert name(s) and business address(es)]

EPA Identification Number: [Insert EPA Id. No.]

Facility: [Insert name and address]

The amount(s) guaranteed by this performance bond for the [insert the specific activity (e.g., Closure, Closure and Post-Closure, or Post-Closure)] for the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree) at the above referenced Facility: _____

Total Penal Sum of Bond: \$ _____

Surety's Bond Number: _____

Know All Persons By These Presents, That we, the Principal and Surety[ies] hereto are firmly bound to the U.S. Environmental Protection Agency ("EPA"), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas, said Principal, the named Defendant, entered into a Consent Decree, U.S. v. Magnesium Corporation of America, et. al. (Case No. 2:01CV0040B, U.S. District Court of Utah, Central Division), with EPA pursuant to, in part, with the Resource Conservation and Recovery Act ("RCRA"), as amended, to resolve civil claims by establishing injunctive relief under the Consent Decree;

Whereas, said Principal is required to provide Financial Assurance pursuant to Paragraph 47 of the Consent Decree for [insert specific activities covered by Financial Assurance (e.g.,

Closure, or Closure and Post-Closure, or Post-Closure)] of the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree) at the above-referenced Facility; and

Whereas, said Principal shall establish a standby trust fund as is required when a performance bond (“surety bond” or “bond”) is used to provide such Financial Assurance:

Now, Therefore, the conditions of this obligation are such that if the Principal shall faithfully perform Closure, whenever required to do so, of the Retrofitted Waste Pond for which this bond guarantees Closure, in accordance with the *[insert specific plan as identified in Paragraph 16 of the Consent Decree]* and other requirements of the Consent Decree as such *[insert specific plan as identified in Paragraph 16 of the Consent Decree]*, and Consent Decree may be amended, pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended,

And if the Principal shall faithfully perform Post-Closure of the Retrofitted Waste Pond for which this bond guarantees Post-Closure, in accordance with the *[insert specific plan as identified in Paragraph 16 of the Consent Decree]* and other requirements of the Consent Decree as such *[insert specific plan as identified in Paragraph 16 of the Consent Decree]*, and Consent Decree may be amended, pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended,

Or, if the Principal shall provide alternate Financial Assurance as specified in Appendix 13 to the Consent Decree and obtain the EPA’s written approval of such assurance, within ninety (90) Days after the date notice of cancellation is received by both the Principal and EPA from the Surety*[ies]*,

then this obligation shall be null and void; otherwise it is to remain in full force and effect.

The Surety*[ies]* shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by EPA that the Principal has failed to perform Closure in accordance with the *[insert specific plan as identified in Paragraph 16 of the Consent Decree]* and Consent Decree for the Retrofitted Waste Pond for which this bond guarantees performance of Closure, the Surety*[ies]* shall either perform Closure in accordance with the *[insert specific plan as identified in Paragraph 16 of the Consent Decree]* and the Consent Decree or place the Closure amount guaranteed for the Facility into the standby trust fund as directed by EPA.

Upon notification by EPA that the Principal has failed to perform Post-Closure in accordance with the *[insert specific plan as identified in Paragraph 16 of the Consent Decree]* and Consent Decree for the Retrofitted Waste Pond for which this bond guarantees performance of Post-Closure, the Surety*[ies]* shall either perform Post-Closure in accordance with the *[insert specific plan as identified in Paragraph 16 of the Consent Decree]* or place the Post-Closure amount guaranteed for the Facility into the standby trust fund as directed by EPA.

Upon notification by EPA that the Principal has failed to provide alternate Financial Assurance as required by Paragraph 47 of the Consent Decree and Appendix 13 of the Consent Decree, and obtain written approval of such assurance from EPA during the ninety (90) Days following receipt by both the Principal and EPA of a notice of cancellation of the bond, the Surety[ies] shall place funds in the amount guaranteed for the Facility into the standby trust fund as directed by EPA.

The Surety[ies] hereby waive[s] notification of amendments to the [*insert specific plan as identified in Paragraph 16 of the Consent Decree*] and Consent Decree, permits, applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its [*their*] obligation on this bond.

The liability of the Surety[ies] shall not be discharged by any payment or succession of payments hereunder, unless and until such payments or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety[ies] hereunder exceed the amount of said penal sum.

The Surety[ies] may cancel the bond by sending notice of cancellation by certified mail to the Principal and EPA, provided, however, that cancellation shall not occur during the 120 Days beginning on the date of receipt of the notice of cancellation by both the Principal and EPA, as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety[ies], provided, however, that no such notice shall become effective until the Surety[ies] receive[s] written authorization for termination of the bond by EPA.

In Witness Whereof, The Principal and Surety[ies] have executed this Performance Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety[ies] and that the wording of this surety bond is identical to the wording specified in Appendix 13, Attachment B, Form 3, of the Consent Decree for a Performance Bond.

FOR THE PRINCIPAL:

Date: _____

By [*signature*]: _____

Printed name: _____

Title: _____

Corporate seal: _____

FOR THE CORPORATE SURETY(IES):

[Name and Address]

State of incorporation: _____

Liability limit: \$_____

Date: _____

By *[signature]*: _____

Printed name: _____

Title: _____

Corporate seal: _____

[For every Co-Surety, provide signature(s), corporate seal, and other information in the same manner as for the Surety above.]

Bond premium: \$_____

Instructions: A letter of credit guaranteeing payment into a trust fund, as specified in Appendix 13 of the Consent Decree, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

IRREVOCABLE STANDBY LETTER OF CREDIT

Regional Administrator, Region 8, U.S. Environmental Protection Agency

Dear Sir(s) or Madam(s):

We hereby establish our Irrevocable Standby Letter of Credit No. ____ in your favor, at the request and for the account of *[insert Defendant's name, owner and operator of the facility and Facility address]* up to the aggregate amount of *[insert amount in words]* U.S. dollars \$*[insert amount in numbers]*, available upon presentation of:

- (1) your sight draft, bearing reference to this Letter of Credit No. ____, and
- (2) your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to Consent Decree, U.S. v. Magnesium Corporation of America, et al., (Case No. 2:01CV0040B, United States District Court of Utah, Central Division) entered into, in part, pursuant to the Resource Conservation and Recovery Act of 1976, as amended."

This letter of credit is effective as of *[date]* and shall expire on *[date at least 1 year later]*, but such expiration date shall be automatically extended for a period of *[at least 1 year]* on *[date]* and on each successive expiration date, unless, at least 120 Days before the current expiration date, we notify both you and *[insert Defendant's name, owner or operator of the Facility]* by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 Days after the date of receipt by both you and *[insert Defendant's name, owner or operator of the Facility]*, as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the entire amount of the draft directly into the Trust Fund (Account No.____) created by the Trust Agreement entered by *[insert Defendant's name, ownr or operator of the Facility]*, dated ____ 20__, in accordance with your instructions.

[Signature(s) and title(s) of official(s) of issuing institution] [Date]

This credit is subject to *[insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published and copyrighted by the International Chamber of Commerce," or "the Uniform Commercial Code"]*.

January 2021

U.S. Environmental Protection Agency
Regional Administrator
Region 8
[insert address]

Dear Sir(s) or Madam(s):

In accordance with Paragraph 47 of Consent Decree, U.S. v. Magnesium Corporation of America, et al., (Case No. 2:01CV0040B, United States District of Utah, Central Division) we have established Irrevocable Standby Letter of Credit No. ____ issued by [name of issuing institution] on [issuing date] in the amount of [insert amount in words] U.S. dollars (\$[insert amount in numbers]) for the following Facility:

- Facility Name: [insert name of Facility]
- EPA ID Number: [insert EPA Id. No.]
- [Insert Facility Address]
- [Insert specific activities covered by the LOC (i.e., "Closure", "Closure and Post-Closure" or "Post-Closure" of the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree).)]

I certify that the letter of credit provider is a Federally Insured financial institution. I certify that the wording of the letter of credit is identical to the wording specified in Attachment B, Form 4, of Appendix 13, of the Consent Decree (U.S. v Magnesium Corporation of America, et al., Case No. 2:01CV0040B, United States District Court of Utah, Central Division).

Sincerely,

[Insert Name]
Chief Financial Officer
[Insert company name]

Instructions: A certificate of insurance, as specified in Appendix 13 of the Consent Decree, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

**CERTIFICATE OF INSURANCE FOR
RETROFITTED WASTE POND CLOSURE AND/OR POST-CLOSURE**

Name and Address of Insurer
(herein called the "Insurer"): _____

Name and Address of Insured
(herein called the "Insured"): _____

Facility Covered: *[List for the Facility: The EPA Identification Number, name, address, and the amount of insurance for the Closure and/or Post-Closure amounts for the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree) (these amounts must total the face amount shown below).]*

Face Amount: _____

Policy Number: _____

Effective Date: _____

The Insurer hereby certifies that it has issued to the Insured the policy of insurance identified above to provide Financial Assurance for *[insert specific activity "Closure" or "Closure and Post-Closure" or "Post-Closure"]* of the Retrofitted Waste Pond at the Facility identified above. The Insurer further warrants that such policy conforms in all respects with the requirements specified in Section III.7.d., Appendix 13, of the Consent Decree, U.S. v. Magnesium Corporation of America, et al. (Case No. 2:01CV0040B, United States District Court of Utah, Central Division), as applicable and as such regulations and requirements were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations and requirements are hereby amended to eliminate such inconsistency.

Whenever requested by the EPA Regional Administrator of the U.S. Environmental Protection Agency ("EPA"), the Insurer agrees to furnish the EPA Regional Administrator of the EPA a duplicate original of the policy listed above, including all endorsements thereon.

I hereby certify that the wording of this certificate is identical to the wording specified in Appendix 13, Attachment B Form 5, of the Consent Decree U.S. v. Magnesium Corporation of America, et al. (Case No. 2:01CV0040B, United States District Court of Utah, Central Division), and as such requirements were constituted on the date shown immediately below.

[Authorized signature for Insurer] _____

[Name of person signing] _____

[Title of person signing] _____

Signature of witness or notary: _____

[Date] _____

Instructions: The letter from the Chief Financial Officer, as specified in Appendix 13 of the Consent Decree, must be worded as follows, except that instructions in the brackets are to be replaced with the relevant information and the brackets deleted.

**CORPORATE FINANCIAL TEST
Letter from Chief Financial Officer**

[Address to Regional Administrator of every Region in which facilities for which financial responsibility is to be demonstrated through the corporate financial test are located].

I am the Chief Financial Officer (“CFO”) of *[insert name and address of firm]* (hereinafter, “the firm”). This letter is in support of this firm’s use of the corporate financial test to demonstrate Financial Assurance for costs associated with Closure and/or Post-Closure of the Retrofitted Waste Pond at the Facility referenced below in Paragraph 1.

[Fill out Paragraphs, below, and provide supporting documentation, when required. If your firm has no facilities that belong in the particular paragraph, write “None” in the space indicated. All required schedules, exhibits and attachments must be filed with the CFO Letter when submitting the CFO Letter to EPA as required by Appendix 13 and the Consent Decree.]

1. This firm is the owner or operator of the Facility, listed below, for which Financial Assurance for Closure and/or Post-Closure of the Retrofitted Waste Pond is demonstrated through the corporate financial test specified in Section III.7.e., Appendix 13, of the Consent Decree U.S. v. Magnesium Corporation of America, et. al. (Case No. 2:01CV0040B, U.S. District Court of Utah, Central Division). The current Closure and/or Post-Closure Cost Estimates covered by the corporate financial test are provided for the Facility listed below:

[List Facility and include the EPA Identification Number, name, address, and total current cost estimate for Closure and/or Post-Closure for the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree.)]

2. This firm guarantees, through the Guarantee specified in Section III.7.f., Appendix 13 of the Consent Decree U.S. v. Magnesium Corporation of America, et. al. (Case No. 2:01CV0040B, U.S. District Court of Utah, Central Division), the Closure and/or Post-Closure of the Retrofitted Waste Pond at the Facility, listed below, owned or operated by the guaranteed party, *[insert Defendant’s name, owner or operator of the Facility]*. The current Cost Estimates for the Closure and/or Post-Closure so guaranteed are provided for the Facility listed below:

[List Facility and include the EPA Identification Number, name, address, and total current cost estimate for Closure and/or Post-Closure for the Retrofitted Waste Pond (Paragraph 47.a of the Consent Decree.)]

3. The firm identified in Paragraph 2, above, is: *[insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee ____ [insert description of value received]; or (3) engaged in the following substantial business relationship with the owner or operator ____ [insert brief characterization of relationship], and receiving the following value in consideration of this guarantee ____ [insert value received]]. [Attach a written description of the business relationship or a copy of the contract establishing such substantial business relationship to this letter]. _____ [If not applicable as a guarantee is not being provided, insert N/A in the space provided.]*

4. The firm, as owner or operator or guarantor, is using a financial test or guarantee to secure the environmental obligations of the Facility[ies] listed in Schedule B for which financial assurance is required under programs that EPA directly operates and for obligations where EPA has delegated authority to the State or approved a State's program. These obligations include, but are not limited to, closure, post-closure and corrective action cost estimates for hazardous waste treatment, storage and disposal facilities under 40 C.F.R. §§ 264.101, 264.142, 264.144, 265.142, and 265.144. The cost estimates by obligation are provided for each facility in Schedule B, attached to this letter. *[Attach Schedule B with the following information for each facility, as applicable: the EPA Identification Number, name, address, and total current cost estimate for closure, post-closure or corrective action.] _____ [If not applicable, insert "None" in the space provided.]*

A. The firm represents the total of all such environmental obligations specified in this paragraph, in Current Dollars, for the listed facilities in Schedule B of \$ _____ *[insert amount]*, as of _____ *[insert date]*.

5. In States where EPA or an authorized State are not administering the financial requirements of 40 C.F.R. Parts 264 and 265, Subparts H (or analogous authorized State provisions), this firm, as owner or operator or guarantor, is demonstrating financial assurance for the closure and post-closure of the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in 40 C.F.R. Parts 264 and 265, Subparts H (or analogous authorized State provisions). The current closure and/or post-closure cost estimates are shown for each facility: _____ *[If not applicable insert "None" in the space provided.]*

[List Facility and include the EPA Identification Number, name, address, and total current cost estimate for closure and/or post-closure, as applicable.]

6. This firm is the owner or operator of the following hazardous waste management facility(ies) for which financial assurance for closure or, if a disposal facility, post-closure care, is not demonstrated either to EPA or a State through the financial test or any other mechanism specified in 40 C.F.R. Parts 264 and 265, Subparts H, or equivalent or substantially equivalent State mechanisms. The current closure and/or post-closure cost

estimates not covered by such financial assurance are shown for each facility: _____ [If not applicable insert "None" in the space provided.]

[List Facility and include the EPA Identification Number, name, address, and total current cost estimate for closure and/or post-closure, as applicable.]

7. This firm is the owner or operator of the following Underground Injection Control (UIC) facilities for which financial assurance for plugging and abandonment is required under 40 C.F.R. Part 144. The current cost estimates required by 40 C.F.R. § 144.62 are shown for each facility: _____ [If not applicable insert "None" in the space provided.]

[List Facility and include the EPA Identification Number, name, address, and total current cost estimate plugging and abandonment, as applicable.]

This firm [insert "is required" or "is not required"] to file a Form 10K with the Securities and Exchange Commission ("SEC") for the latest fiscal year.

The fiscal year of this firm ends on [insert month, day]. The figures for the following items marked with an asterisk are from this firm's independently audited, year-end financial statements for the latest completed fiscal year, ended [insert year].

[Fill in Alternative I if the criteria of Paragraph 7.e., Appendix 13, (incorporating Utah Admin. Code R315-264-143(f)(1)(i) and Utah Admin. Code R315-264-145(f)(1)(i)) are being used. Fill in Alternative II if the criteria of Paragraph 7.e., Appendix 13 (incorporating Utah Admin. Code R315-264-143(f)(1)(ii) and Utah Admin. Code R315-264-145(f)(1)(ii)) are being used.]

Alternative I

1. Sum of current cost estimates (total of all cost estimates shown in paragraphs 1-7, above) \$ _____

*2. Total Liabilities \$ _____

*3. Tangible net worth \$ _____

*4. Net worth \$ _____

*5. Current Assets \$ _____

*6. Current Liabilities \$ _____

7. Net working capital [line 5 minus line 6] \$ _____

*8. The sum of net income plus depreciation, depletion and amortization \$ _____

*9. Total assets located within United States (required only if less than 90% of firm's assets are located in the U.S.) \$ _____

10. Is line 3 at least \$10 million? (Yes/No) _____

11. Is line 3 at least 6 times line 1? (Yes/No) _____

12. Is line 7 at least 6 times line 1? (Yes/No) _____

*13. Are at least 90% of firm's total assets located within the U.S.? If not, complete line 14 (Yes/No) _____

14. Is line 9 at least 6 times line 1? (Yes/No) _____

15. Is line 2 divided by line 4 less than 2.0? (Yes/No) _____

16. Is line 8 divided by line 2 greater than 0.1? (Yes/No) _____

17. Is line 5 divided by line 6 greater than 1.5? (Yes/No) _____

Alternative II

1. Sum of current cost estimates (total of all cost estimates shown in paragraphs 1-7, above) \$ _____

2. Current bond rating of most recent issuance and bond designation (e.g., Moody's long-term Corporate Family Rating) of this firm's, and name of rating service

3. Date of issuance of bond _____

4. Date of maturity of bond _____

*5. Tangible Net Worth \$ _____

*6. Total assets located within U.S. (required only if less than 90% of firm's assets are located in the U.S.) \$ _____

7. Is line 5 at least \$10 million? (Yes/No) _____

8. Is line 7 at least 6 times line 1? (Yes/No) _____

*9. Are at least 90% of firm's total assets located within the U.S.? If not, complete line 10 (Yes/No) _____

10. Is line 6 at least 6 times line 1? (Yes/No) _____

January 2021

I hereby certify in my capacity as the Chief Financial Officer of the firm, based on my knowledge after reasonable due diligence, that the information included in this letter, including all attachments and exhibits, is true and accurate. I further certify in my capacity as the Chief Financial Officer of the firm, that the language of this letter is identical to the wording specified in Appendix 13, Attachment B, Form 6, of the Consent Decree, U.S. v. Magnesium Corporation of America, et. al. (Case No. 2:01:CV0040B, U.S. District Court of Utah, Central Division).

Attached is a special report of procedures and findings from the firm's independent certified public accountant resulting from an agreed-upon procedures performed in accordance with the AICPA Statement on Standards for Attestation Engagements, AT Section 201 – Agreed Upon Procedures Engagements (including AICPA related attestation interpretations), as updated, that describes the procedures performed and related findings. The CPA's report discloses whether or not differences and/or discrepancies were found in the comparison of financial information disclosed in this letter (including all attachments and exhibits) with the independently audited financial statements (including attachments), as of the firm's latest completed fiscal year end [*insert date*]. Where differences or discrepancies exist between the financial information disclosed in this letter (including all attachments and exhibits) with the firm's independently audited financial statements (including attachments), the CPA's report of procedures and findings identifies and reconciles any difference or discrepancy between the values or information represented in this letter and the firm's independently audited year-end financial statements.

[Signature] _____

[Name] _____

[Title] Chief Financial Officer

Date: _____

Instructions: The Corporate Guarantee, as specified in Appendix 13 of the Consent Decree, must be worded as follows, except the instructions in the brackets are to be replaced with the relevant information, if applicable, and the brackets deleted.

CORPORATE GUARANTEE

Corporate Guarantee for Retrofitted Waste Pond Closure and/or Post-Closure

Guarantee made this [date] by [name of guaranteeing entity], a business corporation organized under the laws of the State of [insert name of State], herein referred to as guarantor. This guarantee is made on behalf of the [Defendant's name, owner or operator of the Facility(ies)] of [business address], which is [one of the following: "our subsidiary"; "a subsidiary of (insert name and address of common parent corporation), of which guarantor is a subsidiary"; or "an entity with which guarantor has a 'Substantial Business Relationship,' as defined in Section I, Appendix 13, of the Consent Decree] to the United States Environmental Protection Agency ("EPA").

Recitals

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in Section III, Appendix 13, of the Consent Decree U.S. v. Magnesium Corporation of America, et al. (Case No. 2:01CV0040B, United States District Court of Utah, Central Division) ("Consent Decree" or "Decree"), as applicable.
2. [Defendant's name, owner or operator] owns or operates the following Facility covered by this Guarantee: [List for each Facility: EPA Identification Number, name, and address. Indicate whether the Guarantee is for Closure, Post-Closure, or both Closure and Post-Closure.]
3. "Closure Plan" and "Post-Closure Plan" as used below refers to the [insert specific plan as identified in Paragraph 16 of the Consent Decree] as required by the Consent Decree for the Closure and/or Post-closure of the Retrofitted Waste Pond for the Facility identified above.
4. For value received from [Defendant's name, owner or operator of the Facility], guarantor guarantees to EPA that in the event that [Defendant's name, owner or operator of the Facility] fails to perform [insert "Closure," "Post-Closure" or "Closure and Post-Closure," as applicable] of the Retrofitted Waste Pond at the above referenced Facility in accordance with the Closure and/or Post-Closure Plan, the guarantor shall do so or establish a trust fund as specified in Appendix 13 of the Consent Decree, as applicable, in the name of [Defendant's name, owner or operator of the Facility] in the amount of the current Closure and/or Post-Closure Cost Estimates as specified in the Consent Decree, Appendix 13.
5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within ninety (90) Days, by certified mail, notice to EPA as provided for in Section XX (Notices) of the Consent Decree, the EPA Regional Administrator, Region 8, and to [Defendant's name, owner or operator of the Facility] that the guarantor intends to provide alternate Financial Assurance as specified in

Appendix 13 of the Consent Decree, as applicable, in the name of [*Defendant's name, owner or operator of the Facility*]. Within 120 Days after the end of such fiscal year, the guarantor shall establish such Financial Assurance unless [*Defendant's name, owner or operator of the Facility*] has done so. Guarantor also agrees that if it determines that it no longer meets the financial test criteria, then it shall notify EPA as provided for in Section XX (Notices) of the Consent Decree, the EPA Regional Administrator, Region 8, and [*Defendant's name, owner or operator of the Facility*] that it intends to provide alternate Financial Assurance as specified in Appendix 13 of the Consent Decree, as applicable, in the name of [*Defendant's name, owner or operator of the Facility*]. Within thirty (30) Days after the guarantor provides notice, the guarantor shall establish such Financial Assurance unless [*Defendant's name, owner or operator of the Facility*] has done so.

6. The guarantor agrees to notify the EPA as provided for in Section XX (Notices) of the Consent Decree and the EPA Regional Administrator, Region 8, by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within ten (10) Days after commencement of the proceeding.

7. Guarantor agrees that within thirty (30) Days after being notified by the EPA of a determination that guarantor no longer meets the financial test criteria or that it is disallowed from continuing as a guarantor for Closure and/or Post-Closure of the Retrofitted Waste Pond at the above referenced Facility, it shall establish alternate Financial Assurance as specified in Appendix 13 of the Consent Decree, as applicable, in the name of [*Defendant's name, owner or operator of the Facility*] unless [*Defendant's name, owner or operator of the Facility*] has done so.

8. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the Closure and/or Post-Closure Plan, amendment or modification of the Consent Decree, the extension or reduction of the time of performance of Closure or Post-Closure, or any other modification or alteration of an obligation of the [*Defendant's name, owner or operator of the Facility*] pursuant to the Consent Decree.

9. Guarantor agrees to remain bound under this guarantee for as long as [*Defendant's name, owner or operator of the Facility*] must comply with the applicable Financial Assurance requirements of the Consent Decree, including Appendix 13 of the Decree, for the above-listed Facility, except as provided in Recital 10 of this agreement.

10. [*Insert the following language if the guarantor is (a) a direct or higher-tier corporate parent, or (b) a firm whose parent corporation is also the parent corporation of the owner or operator:*

Guarantor may terminate this guarantee by sending notice to EPA as provided for under Section XX (Notices) of the Consent Decree, the EPA Regional Administrator, Region 8, and to [*Defendant's name, owner or operator of the Facility*], by certified mail, provided that this guarantee may not be terminated unless and until [*Defendant's name, owner or operator of the Facility(ies)*] obtains, and the EPA approves, alternate Financial Assurance for Closure and/or Post-Closure in compliance with the Consent Decree, including Appendix 13.]

[Insert the following language if the guarantor is a firm qualifying as a guarantor due to its “substantial business relationship” with its owner or operator of the Facility.]

Guarantor may terminate this guarantee 120 Days following the receipt of notification, through certified mail, by EPA and *[Defendant’s name, owner or operator of the Facility].*

11. Guarantor agrees that if *[Defendant’s name, owner or operator of the Facility]* fails to provide alternate Financial Assurance as specified in the Consent Decree, Appendix 13, as applicable, and obtain written approval of such Financial Assurance from the EPA and within ninety (90) Days after a notice of cancellation by the guarantor is received by the notificants in Recital 10, above, from guarantor, then guarantor shall provide such alternate Financial Assurance in the name of *[Defendant’s name, owner or operator of the Facility]*.

12. Guarantor expressly waives notice of acceptance of this guarantee by EPA or by *[Defendant’s name, owner or operator of the Facility]*. Guarantor also expressly waives notice of amendments or modifications of the Closure and/or Post-Closure Plan and of amendments or modifications of the Consent Decree.

I hereby certify that the wording of this guarantee is identical to the wording required under Appendix 13, Attachment B, Form 7 of the Consent Decree.

Effective Date: _____

Name of Guarantor: _____

Authorized signature for Guarantor: _____

Name of person signing: _____

Title of person signing: _____

Signature of witness or notary: _____