

***RD/RA Orders Template  
(February 24, 2011 update)***

**BEFORE THE  
OHIO ENVIRONMENTAL PROTECTION AGENCY**

<b>In the matter of:</b>	:	
	:	
<b>[Name of Responsible Parties]</b>	:	<b>Director's Final</b>
	:	<b>Findings and Orders</b>
<b>Respondent,</b>	:	
	:	<b>For Remedial Design</b>
	:	<b>and Remedial Action</b>
	:	
	:	
<b>For the Site known as:</b>	:	
	:	
<b>[Common Name of Site]</b>	:	
<b>[Address, County], OH</b>	:	

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Attachment A - Decision Document

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[Optional] Attachment D - Deed Notice Template

[Optional] Attachment E – Environmental Covenant Template

## **PREAMBLE**

It is agreed to by the Parties hereto as follows:

### **I. JURISDICTION**

1. These Director's Final Findings and Orders ("Orders") are issued to [fill in the names of the responsible parties or successors], pursuant to the authority vested in the Director of Ohio EPA under Ohio Revised Code ("ORC") §§ 3734.13, 3734.20, 6111.03, and 3745.01.

### **II. PARTIES BOUND**

2. These Orders shall apply to and be binding upon Respondent and its successors in interest liable under Ohio law.

3. No change in ownership or legal status of the Respondent <sup>1</sup> including, but not limited to, any transfer of assets or real or personal property shall in any way alter Respondent's obligations under these Orders.

4. Respondent shall provide a copy of these Orders to all contractors, subcontractors, laboratories and consultants retained to conduct any portion of the Work performed pursuant to these Orders, within fourteen (14) days of the effective date of these Orders or upon date of retention. Respondent shall ensure that all contractors, subcontractors, laboratories and consultants retained to perform the Work pursuant to these Orders also comply with the applicable provisions of these Orders.

### **III. DEFINITIONS**

5. Unless otherwise expressly provided herein, all terms used in these Orders or in any appendices shall have the same meaning as defined in ORC Chapters 3734 and 6111, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the rules promulgated thereunder. Whenever the terms listed below are used in these Orders or in any appendices, attached hereto and incorporated herein, the following definitions shall apply:

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<sup>1</sup> Final language depends upon the identity of the Respondent and the Facility/Site. For example, if the Respondent is an individual, or a city, county or other political subdivision, the text should read: "No change in ownership of the Facility" or "No change in ownership of the Facility owned by Respondent..." Also only use "heirs" with an individual owner, not business entities.

- a. "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 et seq.
- b. "Contaminant" and "Contamination" means (1) any "hazardous waste" under ORC § 3734.01(J); (2) any "industrial waste" under ORC § 6111.01(C); and/or (3) any "other wastes" under ORC § 6111.01(D), including any release of one or more of the same.
- c. "Day" means a calendar day unless expressly stated to be a business day. "Business day" shall mean a day other than a Saturday, Sunday, or state holiday. In computing any period of time under these Orders, where the last day would fall on a Saturday, Sunday, or state holiday, the period shall run until the close of the next business day.
- d. "Decision Document" means the document detailing the remedial action selected by Ohio EPA for the Site as set forth in the document attached to these Orders as Appendix A.
- \_\_\_ *Optional: "Environmental Covenant" means a servitude arising under an environmental response project that imposes activity and use limitations and that meets the requirements established in section 5301.82 of the Revised Code.*
- \_\_\_ *Optional: "Facility" means [fill in a detailed description that defines the facility in relationship to the terms "Site" and "Property", as defined below.]*
- e. "Feasibility Study" ("FS") means a study undertaken to develop and evaluate options for remedial action. The FS is generally performed concurrently and in an interactive fashion with the Remedial Investigation. The term also refers to a report that describes the results of the study.
- f. "NCP" means the National Oil and Hazardous Substances Pollution Contingency Plan, codified at 40 C.F.R. Part 300 (1990), as amended.
- g. "Ohio EPA" means the Ohio Environmental Protection Agency and its designated representatives.
- h. "Orders" means these Director's Final Findings and Orders and all attachments hereto.
- i. "Paragraph" means a portion of these Orders identified by an arabic numeral or an uppercase or lowercase letter.
- j. "Parties" means Respondent [or, Respondents] and the Ohio EPA.

- . *Optional: "Property" means [include details or a legal description reference that describes that portion of the Site that is subject to activity and use limitations, if any].*
- k. "Respondent" [or, Respondents]  
means \_\_\_\_\_.
- l. "Remedial Action" ("RA") means those activities to be undertaken by Respondent to implement and maintain the effectiveness of the final plans and specifications submitted by Respondent pursuant to the Remedial Design and Remedial Action Work Plan.
- m. "Remedial Design" ("RD") means those activities to be undertaken by Respondent to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design and Remedial Action Work Plan.
- n. "Remedial Design and Remedial Action Work Plan" ("RD/RA Work Plan") means the document submitted by Respondent and approved by Ohio EPA pursuant to the Performance of Work Section of these Orders.
- o. "Response Costs" means all costs incurred by Ohio EPA including, but not limited to, payroll costs, contractor costs, travel costs, direct costs, overhead costs, legal and enforcement related costs, oversight costs, laboratory costs, and the costs of reviewing or developing plans, reports, and other items pursuant to these Orders, verifying the Work, or otherwise implementing or enforcing these Orders.
- p. "Section" means a portion of these Orders identified by a roman numeral.
- q. "Site" means the *[fill in a description of the facility / source areas, and listing the applicable addresses and counties]*, Ohio where the treatment, storage, and/or disposal of hazardous waste, and/or the discharge to waters of the state of industrial waste or other wastes have occurred, including any other area where such hazardous wastes, industrial wastes, and/or other wastes have migrated or threaten to migrate.
- r. "Statement of Work" ("SOW") means the "Model Statement of Work for Remedial Design and Remedial Action for the implementation of the Remedial Design and Remedial Action at the Site, as set forth in Attachment B of these Orders. The SOW is not specific to any Site."<sup>2</sup>

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<sup>2</sup> If for a Site-specific reason the program needs to refer in these Orders to a second SOW, e.g., for an interim action, define each SOW accordingly and expand on the acronym that refers to each SOW, e.g., "RI/FS SOW."

- s. “Supporting Documents” means the field sampling plan (“FSP”), quality assurance project plan (“QAPP”) and health and safety plan (“HASP”) developed concurrently with the RD/RA Work Plan pursuant to these Orders and Section 4 of the SOW.
- t. “Transferee” means any future owner of any interest in the Site, including but not limited to, owners of an interest in fee simple, mortgagors, easement holders, and lessees.
- u. “Work” means all activities Respondent is required to perform under the Performance of the Work by Respondent and Additional Work Sections of these Orders.

*[Other definitions may be inserted as necessary for specific Sites.]*

#### **IV. FINDINGS <sup>3</sup>**

6. The Director of Ohio EPA has determined the following findings:<sup>4</sup>

- a. The *[common name]* Site is located at \_\_\_*[describe location]*.
- b. The *[Site or Facility]* is owned by *[include details regarding the place of incorporation and the ownership relationship to the local entity]*.
- c. The *[Site or Facility]* is operated by *[include details regarding the corporate relationship of the operator to the owner as identified above, and to the local entity, if different. Also include additional paragraphs regarding the current and previous owners or operations at the Site or any prior notices of violations issued by Ohio EPA.]*

*[Optional finding: Respondent is or has been a generator of Contaminants or Contamination at the Site. Respondent has directly or indirectly allowed*

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<sup>3</sup>The number and details of the findings of fact are site specific. After the site-specific paragraphs are inserted, there are the following generic findings of fact to be included.

<sup>4</sup> If Respondent requests the inclusion of additional factually accurate findings to this section, the Division has discretion regarding whether to include such additional findings. Findings that either contradict the Director’s findings or lay out Respondent’s adversarial position should not be added. In those instances, the following language can be added: “All of the findings necessary for the issuance of these Orders pursuant to ORC §§ 3734.01, 6111.01 and 3745.01 have been made and are outlined below. Nothing in the findings shall be considered to be an admission by Respondent of any matter of law or fact.”

Contamination and/or directed the placement and/or disposal of Contaminants at the Site. <sup>5]</sup>

- \_\_\_ . [Optional finding: In \_\_\_\_\_, Ohio EPA conducted a preliminary assessment and / or site inspection at the Site. Ground water wells were installed and sampled. Laboratory analysis of ground water samples collected from these monitoring wells indicated levels of \_\_\_\_\_ in excess of \_\_\_\_\_ [Select appropriate source of standards: maximum contaminant levels (“MCLs”) / risk-based screening levels] of \_\_\_\_\_ [Insert by name the specific contaminant and numeric value of the standard being exceeded. <sup>6]</sup>
  
- \_\_\_ . [Optional finding: In \_\_\_\_\_, Ohio EPA prepared a site inspection report for U.S. EPA. The report summarized the ground water sampling results which indicated the presence of \_\_\_\_\_.<sup>7]</sup>
  
- d. On \_\_\_\_\_, the Director of Ohio EPA issued Director’s Final Findings and Orders to Respondent to complete a remedial investigation and feasibility study (RI/FS) at the Site. [Additional details about the RI/FS may be appropriate here.]
  
- e. Ohio EPA approved the RI Report on \_\_\_\_ and approved the FS Report on \_\_\_\_ . The RI identified public health and environmental risks at the Site resulting from the treatment, storage, or disposal of contaminated [ground water, soil sediments, or other media]. The RI characterized the nature and extent of the contaminants released at the Site and the potential risks to human health and safety and the environment. The RI revealed that the principal contaminants of concern are [list major contaminants of concern associated with the Site]. The threats at the Site include but are not limited to [fill in details of the RI Report] as detailed in the RI.
  
- f. On \_\_\_\_, Ohio EPA notified the public of its Preferred Plan for remediation of the Site and solicited public comments. The Preferred Plan summarizes the information presented in the RI and FS prepared by \_\_\_\_ and identifies and explains Ohio EPA’s preferred alternative for the remedial action at the Site. The preferred remedial alternative in this Preferred Plan includes the following elements: [A few examples are given below:
  - i. Enhanced in-situ anaerobic reductive dechlorination;

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<sup>5</sup> The purpose of this paragraph is to explain the specific link between Respondent and the Contamination found at the Site. The use of this finding will depend on site-specific circumstances.

<sup>6</sup> May have other media with known exceedances that should be included in the Findings.

<sup>7</sup> May have other media with known exceedances that should be included in the Findings.

- ii. Extraction of \_\_\_\_\_;
  - iii. Institutional/ controls memorialized in an environmental covenant.]
- g. On \_\_\_\_\_, Ohio EPA held a public meeting and hearing on the Preferred Plan. The public comment period ended on \_\_\_\_\_. Ohio EPA responded to the public comments in a responsiveness summary dated [\_\_\_\_\_].
- h. On \_\_\_\_\_, Ohio EPA issued a Decision Document, which selected the remedy for the Site. The Decision Document is attached hereto as Appendix A, and incorporated by reference herein. Ohio EPA's responsiveness summary dated [ ] is attached to the Decision Document.
- i. The Site is a hazardous waste facility, solid waste facility or other location where hazardous waste was treated, stored or disposed.
- j. Because of their quantity, concentration, physical or chemical characteristics, the \_\_\_\_\_ found at the Site are "hazardous waste" as defined under ORC § 3734.01(J).
- k. The \_\_\_\_\_ found at the Site are "industrial waste" or "other wastes" as defined under ORC §§ 6111.01(C) and (D).
- l. The ground and surface waters at the Site are "waters of the state" as defined in ORC § 6111.01(H).
- m. Ohio EPA has incurred Response Costs and continues to incur Response Costs associated with this Site.
- n. Respondent is a "person" as defined under ORC §§ 3734.01(G) and 6111.01(I).
- o. Conditions at the Site constitute a substantial threat to public health or safety or are causing or contributing or threatening to cause or contribute to air or water pollution or soil contamination as provided in ORC § 3734.20(B).
- p. The migration and threatened migration of Contaminants <sup>8</sup> to ground water, or surface water at or from the Site constitutes a discharge to "waters of the state," as the term is defined in ORC § 6111.01(H).
- q. The Work required pursuant to these Orders will contribute to the prohibition or abatement of the discharge of Contaminants to waters of the State.

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<sup>8</sup> Be sure to use consistently the terms "Contaminants" and "Contamination" as defined in these Findings and Orders and used in the SOW.

- r. In issuing these Orders, the Director has given consideration to, and based his determination on, evidence relating to technical feasibility and economic reasonableness of complying with these Orders, and to evidence relating to conditions calculated to result from compliance with these Orders, and their relation to the benefits to the people of the state to be derived from such compliance.
- s. The actions to be taken pursuant to these Orders are reasonable and necessary to protect the public health or safety or the environment as provided in ORC § 3734.20.

## **V. GENERAL PROVISIONS**

### **7. Objectives of the Parties**

The objectives of the Parties in entering into these Orders are to protect public health and safety and the environment from the disposal, discharge, or release of Contaminants through design, construction, implementation, operation, and maintenance of the remedy by Respondent as set forth in the Decision Document and in accordance with these Orders.

### **8. Commitment of Respondent**

Respondent agrees to perform the Work in accordance with these Orders including but not limited to the SOW, all relevant guidance documents, and all standards, specifications, and schedules as approved by Ohio EPA pursuant to these Orders. Respondent also agrees to reimburse Ohio EPA for all Response Costs and perform all other obligations of these Orders.

### **9. Compliance With Law**

- a. All activities undertaken by Respondent pursuant to these Orders shall be performed in accordance with the requirements of all applicable federal, state and local laws and regulations, and in a manner consistent with the NCP.
- b. Ohio EPA expects that activities conducted pursuant to these Orders, if approved by Ohio EPA, would be considered necessary and consistent with the NCP.
- c. Where any portion of the Work requires a permit, license or other authorization from Ohio EPA or any other state, federal or local government agency, Respondent shall submit applications in a timely manner and take all other actions necessary to obtain such permit, license or other authorization. These Orders are not, and shall not be construed to be, [*Optional: except as set forth in*

*the (pick whichever is applicable: ORC 3734.02(G) exemption/ORC 3734.02(G) variance) set forth herein*<sup>9</sup>, a permit, license or other authorization issued pursuant to any statute or regulation.

## **VI. PERFORMANCE OF THE WORK BY RESPONDENT**

### **10. Supervising Contractor**

All Work performed pursuant to these Orders shall be under the direction and supervision of a contractor with expertise in hazardous waste site investigation and remediation. Prior to the initiation of the Work, Respondent shall notify Ohio EPA in writing of the name of the supervising contractor and any subcontractor to be used in performing the Work under these Orders.

### **11. Remedial Design and Remedial Action**

a. RD/RA project initiation meeting. Within seven (7) days of the effective date of these Orders, unless otherwise mutually agreed to by the Parties, Respondent shall meet with Ohio EPA to discuss the requirements of the RD/RA Work Plan.

b. Submission of RD/RA Work Plan. Within thirty (30) days after the effective date of these Orders, unless otherwise specified in writing by Ohio EPA, Respondent shall submit to Ohio EPA a RD/RA Work Plan and schedule for implementation of the Work required under this Section of these Orders. The RD/RA Work Plan shall provide for the design, construction, final operation and maintenance of the remedy as set forth in the Decision Document.

c. Criteria for RD/RA Work Plan development. The RD/RA Work Plan, Supporting Documents, and any other deliverables required under the approved RD/RA Work Plan shall be developed in conformance with the RD/RA SOW contained in Attachment B of these Orders, and the guidance documents listed in Attachment C of these Orders. The RD/RA Work Plan shall include a proposed schedule that includes a completion date for each task. If Ohio EPA determines that any additional or revised guidance documents affect the Work to be performed in implementing the RD/RA, Ohio EPA will notify Respondent, and the RD/RA Work Plan and other affected documents shall be modified accordingly.

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<sup>9</sup> In certain cases, it is necessary to include a ORC §3734.02(G) authorization in the orders. Contact legal to guide you through whether a ORC §3734.02(G) authorization is needed and/or appropriate in the orders. The optional language should only be used if it is decided that a ORC § 3734.02(G) authorization is needed and/or appropriate in the orders.

d. Handling any inconsistencies. Should Respondent identify any inconsistency between any of the laws and regulations and guidance documents that Respondent is required to follow by these Orders, Respondent shall notify Ohio EPA in writing of each inconsistency and the effect of the inconsistencies upon the Work to be performed. Respondent shall also recommend, along with a supportable rationale justifying each recommendation, the requirement that Respondent believes should be followed. Respondent shall implement the affected Work as directed in writing by Ohio EPA.

e. Review of RD/RA Work Plan. Ohio EPA will review the RD/RA Work Plan and Supporting Documents<sup>10</sup> pursuant to the procedures set forth in the Review of Submissions Section of these Orders.

f. Implementation of the RD/RA Work Plan. Upon Ohio EPA's approval of the RD/RA Work Plan, Respondent shall implement the RD/RA Work Plan as approved. Respondent shall submit all plans, reports, or other deliverables required under the approved RD/RA Work Plan, in accordance with the approved schedule, for Ohio EPA's review and approval pursuant to the Review of Submissions Section of these Orders.

## 12. Operation and Maintenance Plan

The O&M Plan, including a schedule for implementation, shall be submitted in accordance with the approved RD/RA Work Plan. Ohio EPA will review the O&M Plan pursuant to the procedures set forth in the Review of Submissions Section of these Orders. Upon approval of the O&M Plan by Ohio EPA, Respondent shall implement the O&M Plan. Respondent shall submit all plans, reports, or other deliverables required under the approved O&M Plan, in accordance with the approved O&M schedule set forth therein, for Ohio EPA's review and approval pursuant to the Review of Submissions Section of these Orders.

## **VII. ASSURANCE OF ABILITY TO COMPLETE WORK**

### 13. Cost Estimates

a. Within sixty (60) days after Respondents' receipt of Ohio EPA's approval of the Final Design Report required under Section VI (PERFORMANCE OF WORK) of these Orders, Respondent shall submit to Ohio EPA a final detailed written estimate of the cost of the work associated with the long-term operation and maintenance ("O&M") and monitoring of the selected remedy identified in the Amended Decision Document, in current dollars ("Initial Cost Estimate") (estimated in the Decision Document to be \$\_\_\_\_\_), including any adjustments for inflation based upon the Gross Domestic Product Implicit Price Deflator ("GDP/IPD") and any adjustments for discount rates based upon the Federal

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<sup>10</sup> The Health and Safety Plan is a Supporting Document.

Reserve Bank's 30-year Treasury Bill rate for the most recent month for which data is available.

- b. Beginning one (1) year after the effective date of these Orders, and semi-annually thereafter, Respondent must submit to Ohio EPA an estimated cost of the remaining O&M and monitoring Work to be performed ("Current Revised Cost Estimate") based upon the procedures described in the preceding paragraph. Information relied upon in support of the Current Revised Cost Estimate must be provided with any request for reduction. If an adjustment is made to any such Current Revised Cost Estimate for inflation and/or discount rates, an explanation shall be provided.
- c. The Current Revised Cost Estimate shall reflect any adjustments caused by the Respondents' agreement to perform any additional O&M and monitoring Work requested by Ohio EPA pursuant to Section IX (ADDITIONAL WORK) or by any other conditions that have increased the cost of the O&M and monitoring Work to be performed under these Orders (e.g., change in contractor).
- d. Respondent shall submit the Initial Cost Estimate and all Current Revised Cost Estimates to Ohio EPA for review and approval, which approval shall not be unreasonably withheld. Ohio EPA will review each cost estimate and notify Respondent in writing of Ohio EPA's approval, disapproval, or combination thereof in accordance with Section XIV (REVIEW OF SUBMISSIONS).

14. Performance Guarantee

- a. In order to secure the full and final completion of the O&M and monitoring Work in accordance with these Orders, within sixty (60) days following the effective date of these Orders or within sixty (60) days following Ohio EPA's approval of the Initial Cost Estimate, whichever date is later, Respondent shall establish financial security for the benefit of Ohio EPA in an amount at least equal to the Initial Cost Estimate. Thereafter, Respondent shall maintain financial security in an amount at least equal to the Current Revised Cost Estimate ("Financial Assurance"). Respondent may use one or more of the Financial Assurance mechanisms described in subparagraphs (i) through (iv) below.

Respondent shall submit draft Financial Assurance instruments and related documents to Ohio EPA, concurrently with Respondents' submission of the Initial Cost Estimate, for Ohio EPA's review and approval in accordance with Section XIV (REVIEW OF SUBMISSIONS).

- i. A trust fund administered by a trustee which is an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency, that is acceptable to Ohio EPA.

The trust agreement shall provide that the trustee shall make payments from the fund, (1) as Respondent shall direct in writing to pay invoices submitted by Respondent from the fund for Work expenditures made by approved contractors engaged by Respondent; Respondent must only direct payment of invoices for which Respondent has submitted a notification to Ohio EPA's Site Coordinator, in accordance with Section XIV (REVIEW OF SUBMISSIONS) of these Orders or (2) in the event of a failure of performance as described in this Section, to pay any other person whom Ohio EPA determines has performed or will perform the Work required by these Orders at the direction of Ohio EPA.

- ii. One or more irrevocable letter(s) of credit, payable at the direction of Ohio EPA, into a standby trust fund that meets the requirements of the trust fund described in subparagraph (i) above. The letter(s) of credit must be issued by one or more financial institution(s) (1) that has the authority to issue letters of credit and (2) whose letter-of-credit operations are regulated and examined by a federal or state agency. The letter(s) of credit must be irrevocable and issued for a period of at least one (1) year. The letter(s) of credit must provide that upon its expiration date, the letter(s) of credit will be automatically extended for a period of at least one (1) year unless, at least one hundred and twenty (120) days before the current expiration date, the issuing institution notifies the Respondent and Ohio EPA by certified mail of a decision not to extend the expiration date. Under the terms of the letter(s) of credit, the one hundred and twenty (120) days will begin on the date when the Respondent and Ohio EPA have received the notice, as evidenced by the return receipts.
- iii. A policy of insurance that (1) provides Ohio EPA with rights as a beneficiary, which is acceptable to Ohio EPA and (2) is issued by an insurance carrier that has the authority to issue insurance policies in Ohio and whose insurance operations are regulated and examined by a federal or state agency. The insurance policy shall be issued for a face amount at least equal to the Initial Cost Estimate or Current Revised Cost Estimate, whichever is the most current estimate, except for those costs covered by another Financial Assurance instrument, as permitted in subparagraphs (i), (ii) and (iv) herein. The policy shall provide that the insurer shall make payments as the Respondent shall direct in writing to (1) reimburse Respondent for expenditures made by Respondent for Work performed in accordance with these Orders or (2) pay any other person whom Ohio EPA determines has performed or will perform the Work in accordance with these Orders, up to an amount equal to the face amount of the policy. The policy shall also provide that it may not be canceled, terminated or non-renewed and that it shall remain in full force and effect in the event that (1) the Respondent is named as a debtor in a voluntary or involuntary

proceeding under Title 11 (Bankruptcy) of the U.S. Code or (2) Ohio EPA issues a Performance Failure Notice under this Section of these Orders.

- iv. An escrow agreement administered by an escrow agent which is an entity that has the authority to act as an escrow agent and whose escrow banking operations are regulated and examined by a federal or state agency, that is acceptable to Ohio EPA. The escrow account shall be an interest-bearing account in an amount agreed upon by the Parties, and shall be dedicated solely for the payment of costs associated with the long-term O&M and monitoring work at the Site. The escrow agreement shall provide that the escrow agent make payments from the escrow account at a rate of one dollar (\$1.00) per one dollar (\$1.00) spent, (1) as Respondent shall direct in writing to pay invoices submitted by Respondent from the escrow account for Work expenditures made by approved contractors engaged by Respondent; Respondent must only direct payment of invoices for which Respondent has submitted a notification to Ohio EPA's Site Coordinator, in accordance with Section XIV (REVIEW OF SUBMISSIONS) of these Orders or (2) in the event of a failure of performance as described in this Section, to pay any other person whom Ohio EPA determines has performed or will perform the Work required by these Orders at the direction of Ohio EPA.
- b. Within thirty (30) days of notification of Ohio EPA's approval, the executed Financial Assurance instrument(s) provided pursuant to this Section (including, without limitation, the original versions of letters of credit and other negotiable instruments issued for Ohio EPA's benefit) shall be submitted by Respondents to the Ohio EPA Site Coordinator in accordance with Section XIV (REVIEW OF SUBMISSIONS) of these Orders.
- c. Whenever the Current Revised Cost Estimate exceeds the amount of Financial Assurance already provided pursuant to this Section by more than five percent (5%), the Respondent shall, within sixty (60) days thereafter, obtain and present to Ohio EPA, for review and approval a revised form of Financial Assurance (and otherwise acceptable under this Section) that reflects such cost increase.
- d. In the event that an institution involved in the management of funds provided to guarantee performance under this Section, or responsible for providing such performance guarantee, becomes unable to perform its obligations, or to provide the funds or financial resources for the Work as required by these Orders, Ohio EPA shall issue a written notification to Respondent of such incapacity. Thereafter, within sixty (60) days of receipt of such notification, Respondent shall either secure proper performance of the guarantee from the institution to satisfy Ohio EPA, or submit to Ohio EPA for approval an alternative form of Financial Assurance that meets the requirements of this Section. Respondents' inability to

post Financial Assurance shall in no way excuse performance of any other requirements of these Orders, including, without limitation, the Respondents' obligation to complete the O&M and monitoring Work in accordance with the terms hereof.

15. Performance Failure

- a. Financial Assurance instruments provided pursuant to this Section shall provide Ohio EPA with immediate access to resources, whether in cash or in kind services, to continue and complete the O&M and monitoring Work in the event Ohio EPA determines that Respondent (1) has ceased implementation of any portion of the O&M and monitoring Work, (2) is significantly or repeatedly deficient or late in their performance of the O&M and monitoring Work, or (3) is implementing the O&M and monitoring Work in a manner that may cause a substantial threat to public health or safety or the environment. Upon making such determination, Ohio EPA may issue a written notice ("Performance Failure Notice") to the Respondent and the Financial Assurance provider of Respondents' failure to perform. The Performance Failure Notice will specify the grounds upon which such a notice was issued and will provide the Respondent with a period of fourteen (14) days within which to remedy the circumstances giving rise to the issuance of such notice. Upon the expiration of the 14-day notice period, Respondent may invoke the procedures set forth in Section XV (DISPUTE RESOLUTION), to dispute Ohio EPA's determination that any of the circumstances described in clauses (i), (ii) or (iii) of this paragraph has occurred.
- b. Failure by the Respondent to remedy the relevant Performance Failure to Ohio EPA's satisfaction before the expiration of the fourteen-day notice period specified in this paragraph shall trigger Ohio EPA's right to have immediate access to and benefit of the Financial Assurance provided pursuant to this Section, and Ohio EPA may, at any time after the expiration of the fourteen-day notice period, order Respondent to cease performance of the Work and direct the Financial Assurance provider to immediately (1) deposit into a newly created trust fund approved by Ohio EPA, the remaining funds obligated under the Financial Assurance instrument or (2) arrange for performance of the O&M and monitoring Work in accordance with these Orders.
- c. If Ohio EPA has issued a Performance Failure Notice but is nevertheless unable after reasonable efforts to secure the resources (whether in cash or in-kind services) necessary to continue and complete the O&M and monitoring Work from the Financial Assurance instrument(s) posted by Respondent pursuant to this Section, then, upon receiving written notice from Ohio EPA, Respondent shall (in the event Respondent does not prevail in Dispute Resolution, if any, as set forth in Section XV (DISPUTE RESOLUTION) of these Orders), secure the resources available under the Financial Assurance mechanism, or deposit into

an account specified by Ohio EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount equal to the Current Revised Cost Estimate.

- d. If Respondent disputes an Ohio EPA determination under this paragraph that identifies a substantial threat to public health or safety or the environment that warrants immediate action, Ohio EPA may direct the Trustee of the trust account newly-created by Ohio EPA following the Performance Failure Notice to make any appropriate payments from such trust fund to address such threat. Otherwise, Ohio EPA may direct the Trustee to not make any payments from the newly-created trust fund, pending resolution of a dispute. If Respondent prevails in dispute resolution, all funds in the newly-created trust fund, including any interest that accrued on the funds, shall be returned to a Financial Assurance provider who has agreed to continue providing Financial Assurance to the Respondent.

16. Reduction of Amount of Financial Assurance

Concurrent with the submission of the Current Revised Cost Estimate, if the Respondent believes that the estimated cost to complete the remaining O&M and monitoring Work has decreased below the aggregate amount of the Financial Assurance mechanism or mechanisms selected by Respondents, the Respondent may, at the time of submittal of the Current Revised Cost Estimate, submit a written request to Ohio EPA to reduce the current amount of Financial Assurance to an amount no less than the Current Revised Cost Estimate. If Ohio EPA decides to accept such a proposal, Ohio EPA shall issue a notification to the Respondent of such decision in writing. After receiving Ohio EPA's written acceptance, which shall not be unreasonably withheld, Respondent may reduce the amount of the Financial Assurance in accordance with and to the extent permitted by such written acceptance.

17. Release of Financial Assurance

Respondent may petition Ohio EPA to allow the release or discontinuance of the Financial Assurance required hereunder. Respondent shall submit a written proposal for such release to Ohio EPA which shall specify the basis for the requested release (e.g., full and final completion of the O&M and monitoring Work). If Ohio EPA decides to accept such a proposal, Ohio EPA shall notify the Respondent and the provider of the Financial Assurance of such decision in writing. The provider of the Financial Assurance may be released from its obligations under the instrument only upon a written release from Ohio EPA.

**VIII. LAND USE AND CONVEYANCE OF TITLE**

[Optional paragraph 18: If there is an existing deed notice and it remains adequate, you may choose not to use this paragraph. If there is no deed notice in existence or if site conditions have changed such that an existing deed notice is not adequate, consider inserting this paragraph.

18. Deed Notice

Within thirty (30) days after the effective date of these Orders [, or after acquiring an interest in the Property, as defined herein,] Respondent shall record with the County Recorder's Office for \_\_\_[name] , County, Ohio, a deed notice for the real property owned by Respondent for the Site. The deed notice shall be consistent with the template contained in Attachment D and shall be approved by Ohio EPA. The deed notice shall reference the existence of these Orders and the need to contact the Respondent before any construction or excavation is undertaken at the Property. A copy of the recorded deed notice shall be submitted to Ohio EPA within thirty (30) days of recording the notice. Thereafter, if Respondent conveys any interest in the property included in the Site, each deed, title, or other instrument shall contain a notice stating that the Property is subject to these Orders and shall reference the potential for any [security, monitoring, treatment, or containment systems] present on the Property as a result of these Orders. Respondent shall record a new deed notice for the Property to reflect the subsequent construction of any [security, monitoring, treatment or containment systems] at the Property.]

. *[Optional paragraph, b; revise as appropriate to account for additional properties:* To the extent that the Site, or any portion of the Site, is owned or controlled by persons other than Respondent, Respondent shall use its best efforts to secure the filing of deed notices by said property owners for all the properties affected by the Contamination at the Site. The deed notice shall be consistent with the template attached as Attachment D and shall be approved by Ohio EPA. Copies of all deed notices filed for properties affected by the Contamination on, underlying or emanating from the Site shall be obtained by Respondent and provided to Ohio EPA upon request.]

19. Environmental Covenant

Within thirty (30) days after the effective date of these Orders, or after acquiring an interest in the property, Respondent shall record with the [\_\_\_\_\_] County Recorder's Office an Environmental Covenant for the property that is part of the Site owned by the Respondent. The Environmental Covenant shall be consistent with the template contained in Attachment E, shall be signed by Respondent, and shall be approved and signed by Ohio EPA. The Environmental Covenant shall be recorded in the deed or official records of the County Recorder of [\_\_\_\_\_] County, Ohio pursuant to R.C. 5301.82. The terms and conditions of the Environmental Covenant are incorporated into these Orders and shall be binding upon Respondent. Thereafter, if Respondent conveys any interest in the property included in the Site, each deed, title, or other

instrument shall contain a notice stating that the property is subject to these Orders and shall reference any monitoring, treatment, or containment systems present on the property as a result of these Orders.

20. Proof of Filing Environmental Covenant

Within thirty (30) days after filing with the [\_\_\_\_\_] County Recorder the executed Environmental Covenant, Respondent shall certify to Ohio EPA that the Environmental Covenant has been filed for recording, and include with the certification a file and date-stamped copy of the recorded Environmental Covenant. If the Environmental Covenant is violated or breached by Respondent, the Respondent shall be in violation of these Orders.

21. Land Use Self-Reporting Requirement

Respondent shall ensure that no portion of the Site will be used in any manner that would adversely affect the integrity of any [security, containment, treatment, or monitoring systems] at the Site. Respondent shall submit on an annual<sup>11</sup> basis, written documentation verifying that any [security, containment, treatment, or monitoring systems are in place and operational].

22. Notice of Intention to Transfer Property

Prior to each conveyance [by Respondent] of an interest in any portion of the Site, including but not limited to easements, deeds, leases and mortgages, Respondent shall notify Transferee of the existence of [*choose as applicable*: the security, containment, treatment, or monitoring systems *and/or* activity and use limitations] and shall provide a copy of these Orders to Transferee. Respondent shall notify Ohio EPA at least thirty (30) days in advance of each conveyance of an interest in any portion of the Site that is owned by Respondent. Respondent's notice shall include the name and address of the Transferee and a description of the provisions made for the continued access to and maintenance of the [security, containment, treatment, and monitoring systems].

23. Instrument and Confirmation of Conveyance

Upon each conveyance by Respondent of an interest in any portion of the Property, including but not limited to easements, deeds, leases and mortgages, Respondent shall include in the instrument of conveyance a restatement consistent with paragraph 10 of the Environmental Covenant. Within thirty (30) days after each conveyance of an interest in any portion of the Site that is owned by Respondent, Respondent shall submit to Ohio EPA, via certified mail, the following information:

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<sup>11</sup>The frequency for reporting by the Respondent may be negotiated.

- a. A copy of the deed or other documentation evidencing the conveyance;
- b. The name, address, and telephone number of the new property owner and the name, address, and telephone number of the contact person for the property owner;
- c. A legal description of the property, or the portion of the property, being transferred;
- d. A survey map of the property, or the portion of the property, being transferred; and
- e. The closing date of the transfer of ownership of the property, or portion of the property.

#### **IX. ADDITIONAL WORK**

24. Ohio EPA or Respondent may determine that in addition to the tasks defined in the approved RD/RA Work Plan, additional Work may be necessary to accomplish the Objectives of the Parties as provided in the General Provisions Section of these Orders. Additional Work may also include, pursuant to ORC § 3734.20 or other applicable law, the implementation of interim actions to address substantial threats to public health or safety or the environment should such threats be identified during the conduct of the RD/RA.

25. Within thirty (30) days of receipt of written notice from Ohio EPA that additional Work is necessary, unless otherwise specified in writing by Ohio EPA, Respondent shall submit a proposed addendum to the RD/RA Work Plan (“RD/RA Work Plan Addendum”), which contains (a) a work plan for the implementation of the additional Work, (b) any revisions to the Supporting Documents and other RD/RA deliverables, as appropriate, (c) a schedule for the performance of the additional Work, and (d) revisions to other schedules impacted by the additional Work, if any. If Respondent disputes the necessity of additional Work, Respondent shall initiate the procedures for dispute resolution set forth in the Dispute Resolution Section of these Orders within fourteen (14) days after receipt of Ohio EPA’s notification of the need for additional Work. The RD/RA Work Plan Addendum shall conform to the standards and requirements set forth in the documents attached to these Orders as Attachments B and C (RD/RA SOW and List of Relevant Guidance Documents). Upon approval of the RD/RA Work Plan Addendum by Ohio EPA pursuant to the Review of Submissions Section of these Orders, Respondent shall implement the approved RD/RA Work Plan Addendum in accordance with the schedules contained therein.

26. If Respondent determines that additional Work is necessary, Respondent shall submit a proposal to Ohio EPA to explain what the additional Work is, why the additional Work is necessary, and what impact, if any, the additional Work will have on the RD/RA Work Plan and schedule. If Ohio EPA concurs with the request to perform additional Work, Respondent shall submit a RD/RA Work Plan Addendum, as described above, for the performance of additional Work. The RD/RA Work Plan Addendum shall conform to the standards and requirements set forth in the documents attached to these Orders as Appendices B and C. Upon approval of the RD/RA Work Plan Addendum by Ohio EPA pursuant to the Review of Submissions Section of these Orders, Respondent shall implement the approved RD/RA Work Plan Addendum in accordance with the schedules contained therein. Additional Work does not include any activity performed in response to an emergency at the Site for which Respondent submits to Ohio EPA written notice of the performed activity.

#### **X. SAMPLING AND DATA AVAILABILITY**

27. Unless otherwise agreed to by the Site Coordinators, Respondent shall notify Ohio EPA not less than fifteen (15) days in advance of all sample collection activity. Upon request, Respondent shall allow split and/or duplicate samples to be taken by Ohio EPA or its designated contractor. Ohio EPA shall also have the right to take any additional samples it deems necessary. Upon request, Ohio EPA shall allow Respondent to take split and/or duplicate samples of any samples Ohio EPA takes as part of its oversight of Respondent's implementation of the Work.

28. Within seven (7) days of Respondent's receipt of a request by Ohio EPA, Respondent shall submit to Ohio EPA copies of the results of all sampling and/or tests or other data, including raw data and original laboratory reports, generated by or on behalf of Respondent with respect to the Site and/or the implementation of these Orders. An electronic copy shall also be provided in a format approved by Ohio EPA.<sup>12</sup> Respondent may submit to Ohio EPA any interpretive reports and written explanations concerning the raw data and original laboratory reports. Such interpretive reports and written explanations shall not be submitted in lieu of original laboratory reports and raw data. Should Respondent subsequently discover an error in any report or raw data, Respondent shall promptly notify Ohio EPA of such discovery and provide the correct information.

#### **XI. ACCESS**

29. Ohio EPA and its contractors shall have access at all reasonable times to the Site and any other property to which access is required for the implementation of these

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<sup>12</sup> This provision anticipates the growth of electronic data filings.

Orders, to the extent access to the property is controlled by Respondent. Access under these Orders shall be for the purposes of conducting any activity related to these Orders including but not limited to the following:

- a. Monitoring the Work;
- b. Conducting sampling [including background monitoring wells];
- c. Inspecting and copying records, operating logs, contracts, and other documents related to the implementation of these Orders;
- d. Conducting investigations, tests, and other activities associated with the implementation of these Orders; and
- e. Verifying any data and/or other information submitted to Ohio EPA.

30. To the extent that the Site or any other property to which access is required for the implementation of these Orders is owned or controlled by persons other than Respondent, Respondent shall use its best efforts to secure from such persons access for Respondent and Ohio EPA and its contractors as necessary to effectuate these Orders. Copies of each access agreement obtained by Respondent shall be provided to Ohio EPA upon execution of the access agreement. If any access required to implement these Orders is not obtained prior to Respondent's submission of the RD/RA Work Plan [unless otherwise agreed to in writing by Ohio EPA], Respondent shall promptly notify Ohio EPA in writing of the steps Respondent has taken to attempt to obtain access. Ohio EPA may, as it deems appropriate, assist Respondent in obtaining access.

31. Notwithstanding any provision of these Orders, the State of Ohio retains all of its access rights and authorities, including enforcement authorities related thereto, under any applicable statute or regulation including but not limited to ORC §§ 3734.20 and 6111.05.

## **XII. DESIGNATED SITE COORDINATORS**

32. Within seven (7) days of the effective date of these Orders, Respondent shall notify Ohio EPA, in writing, of the name, address and telephone number [and email address] of its designated Site Coordinator and Alternate Site Coordinator.

33. As used in these Orders, the term "Site Coordinator" refers interchangeably to the Site Coordinator and the Alternate Site Coordinator designated for a named party. If any designated Site Coordinator is changed, the identity of the successor will be given

to the other Party at least seven (7) days before the changes occur, unless impracticable, but in no event later than the actual day the change is made.

34. To the maximum extent practicable, except as specifically provided in these Orders, communications between Respondent and Ohio EPA concerning the implementation of these Orders shall be made between the Site Coordinators. Respondent's Site Coordinator shall be available for communication with Ohio EPA regarding the implementation of these Orders for the duration of these Orders. Each Site Coordinator shall be responsible for ensuring that all communications from the other Party are appropriately disseminated and processed. Respondent's Site Coordinator shall be present on the Site or on call during all hours of Work at the Site.

35. Without limitation of any authority conferred on Ohio EPA by statute or regulation, Ohio EPA's Site Coordinator's authority includes but is not limited to the following:

- a. Directing the type, quantity and location of samples to be collected by Respondent pursuant to an approved Work Plan;
- b. Collecting samples;
- c. Observing, taking photographs, or otherwise recording information related to the implementation of these Orders, including the use of any mechanical or photographic device;
- d. Directing that the Work stop whenever Ohio EPA's Site Coordinator determines that the activities at the Site may create or exacerbate a threat to public health or safety, or threaten to cause or contribute to air or water pollution or soil contamination;
- e. Conducting investigations and tests related to the implementation of these Orders;
- f. Inspecting and copying records, operating logs, contracts and/or other documents related to the implementation of these Orders; and
- g. Assessing Respondent's compliance with these Orders.

### **XIII. PROGRESS REPORTS AND NOTICE**

36. Unless otherwise directed by Ohio EPA, Respondent shall submit a written progress report to the Ohio EPA by the tenth (10) day of every month. At a minimum, the progress reports shall include that information designated in Section 10 of the

SOW.<sup>13</sup> Monthly reports may not be used to propose modifications to approved plans; Respondent shall submit such requests to Ohio EPA in a separate written correspondence.

37. Progress reports (one copy only) shall be sent either by e-mail with confirmed receipt or by hard copy to the address listed below. All other documents (two copies) required to be submitted pursuant to these Orders to Ohio EPA shall be sent to the following agency address(s):

Name of Site Coordinator  
Ohio EPA  
\_\_\_\_\_ District Office  
street address and PO Box  
City, Ohio Zip Code

Email address: *[add Site Coordinator's email address]*

and

*[add Name and address of any other contact that notices are to be sent, e.g., the Alternate Site Coordinator.]*

All written (including electronic) correspondence to Respondent shall be directed to:

Name of Site Coordinator  
Name of Respondent  
Address of Respondent  
City and State of Respondent

Email address: *[add Site Coordinator's email address]*

and

*[add Name and address of any other contact that notices are to be sent, e.g., the Alternate Site Coordinator.]*

A Party may designate an alternative contact name or address upon written notification to the other Party and in accordance with the Designated Site Coordinators Section of these Orders, as applicable.

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<sup>13</sup> List in these Orders any additional information for a Site for Respondent to include in the progress reports that is not identified in the SOW, e.g., environmental measures.

#### **XIV. REVIEW OF SUBMISSIONS**

38. Ohio EPA shall review any work plan, report, or other item required to be submitted pursuant to these Orders<sup>14</sup>.

39. Upon review, Ohio EPA may in its sole discretion: (a) approve the submission in whole or in part; (b) approve the submission with specified conditions; (c) modify or, modify and approve, the submission; (d) disapprove the submission in whole or in part; or (e) any combination of the above. The results of Ohio EPA's review shall be detailed in writing and shall identify any conditions, modifications and/or deficiencies. Excluded from Ohio EPA approval pursuant to this Section are the health and safety plan (HASP), progress reports, and the PER (which is subject to approval as a constituent of the RI/FS Work Plan).

40. In the event that Ohio EPA approves an initial submission, Respondent shall proceed to take such action as required by Ohio EPA. In the event that Ohio EPA approves with conditions or modification an initial submission, Respondent shall either (a) proceed to take such action as required by Ohio EPA, or (b) initiate the procedures for dispute resolution set forth in the Dispute Resolution Section of these Orders, within fourteen (14) days of receipt of Ohio EPA's written response to Respondent's submission. Respondent shall proceed to take any action required by an unmodified or unconditioned portion of the submission, as those portions are considered approved.

41. In the event that Ohio EPA disapproves an initial submission in whole or in part and notifies Respondent in writing of the deficiencies Respondent shall within fourteen (14) days, or such longer period of time as specified by Ohio EPA in writing, correct the deficiencies, and/or incorporate the conditions, and submit a revised submission to Ohio EPA for approval. The revised submission shall incorporate all of the changes, additions, and/or deletions specified by Ohio EPA in its notice of disapproval. Revised submissions shall be accompanied by a letter indicating how and where each of Ohio EPA's comments was incorporated into the revised submission. To facilitate review of the revised submission, those portions of the document not affected by the Ohio EPA comments should remain unchanged. The letter accompanying the submission should indicate, however, any indirect changes necessitated by Ohio EPA's comments.

42. To the extent that Respondent disputes any of Ohio EPA's changes, additions, and/or deletions to an initial submission, Respondent shall initiate the procedures for dispute resolution set forth in the Dispute Resolution Section of these Orders, within

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<sup>14</sup> Ohio EPA's review of a HASP focuses on whether the HASP appears protective of human health based on Site conditions. The agency's review does not, by law, encompass matters that are subject to OSHA's oversight or approval. For example, Ohio EPA's comments may address whether the HASP appears (a) comprehensive based on Site conditions, (b) understandable to Site workers, (c) consistent with the RD/RA process, and (d) protective of public health and safety.

fourteen (14) days after receipt of Ohio EPA's written notice of disapproval. Notwithstanding the disapproval, Respondent shall proceed to take any action required by a portion of the submission that is not specified as disapproved in the notice of disapproval.

43. In the event that Ohio EPA disapproves or modifies a revised submission, in whole or in part, and notifies Respondent in writing of the deficiencies, Respondent shall within fourteen (14) days, or such longer period of time as specified in writing by Ohio EPA, correct the deficiencies and incorporate all changes, additions, and/or deletions, and submit the revised submission to Ohio EPA for approval. If Respondent fails to submit a revised submission incorporating all changes, additions, modifications and/or deletions within fourteen (14) days, or such longer period of time as specified by Ohio EPA in writing, Respondent shall be considered in breach and/or violation of these Orders. If Respondent is in breach and/or violation of these Orders, Ohio EPA retains the right to perform any additional remediation, conduct a complete or partial Remedial Investigation or Feasibility Study, conduct a complete or partial Remedial Design or Remedial Action; and/or enforce the terms of these Orders as provided in the Reservation of Rights Section of these Orders.

44. All work plans, reports, or other items required to be submitted to Ohio EPA under these Orders shall, upon approval by Ohio EPA, be deemed to be incorporated in and made an enforceable part of these Orders. In the event that Ohio EPA approves a portion of a work plan, report, or other item, the approved portion shall be deemed to be incorporated in and made an enforceable part of these Orders.

## **XV. DISPUTE RESOLUTION**

45. The Site Coordinators shall, whenever possible, operate by consensus.

46. In the event of a disapproval, or an approval with condition(s) or modification(s) by Ohio EPA of a submission by Respondent, or a disagreement regarding the Work performed under these Orders, Respondent's Site Coordinator shall notify Ohio EPA's Site Coordinator in writing that Respondent wishes to invoke an informal dispute pursuant to this Section. The notification to invoke an informal dispute shall occur prior to the submission deadline.

47. The Parties shall have ten (10) days from the date written notice of the informal dispute is received by Ohio EPA's Site Coordinator to negotiate in good faith to resolve the dispute. This informal dispute resolution period may be extended by agreement of the Site Coordinators for up to twenty (20) additional days.

48. In the event that the dispute is not resolved during the informal dispute resolution period, Respondent's Site Coordinator shall notify Ohio EPA's Site Coordinator in

writing by the end of the informal dispute resolution period that Respondent wishes to invoke a formal dispute pursuant to this Section. This notice shall include a brief description of the item(s) in dispute. Within twenty (20) days of receipt of the written notice invoking the formal dispute resolution procedure, the Site Coordinators shall exchange written positions, including technical rationale supporting their positions. The Site Coordinators shall have ten (10) days from the date they have exchanged written positions to negotiate in good faith to resolve the formal dispute. This formal dispute period may be extended by agreement of the Site Coordinators for up to twenty (20) additional days.

49. In the event the dispute is not resolved in the formal dispute resolution period, Respondent's Site Coordinator shall notify Ohio EPA's Site Coordinator in writing by the end of the formal dispute resolution period whether Respondent wishes to submit final written positions to a DERR Manager for review and resolution. The Site Coordinators shall have ten (10) days from the end of the formal dispute resolution period to submit their written positions. The DERR Manager will resolve the dispute based upon and consistent with these Orders, the SOW, the RD/RA Work Plan, and applicable or relevant and appropriate federal and state laws. The decision of the DERR Manager is considered final for the purposes of these Orders.

50. The pendency of a dispute under this Section shall extend only the time period for completion of the item(s) in dispute, except that upon mutual agreement of the Site Coordinators, any time period may be extended as is deemed appropriate under the circumstances. Such agreement shall not be unreasonably withheld by Ohio EPA. Elements of the Work not affected by the dispute shall be completed in accordance with the applicable schedules and time frames.

51. This Section does not apply to the Reimbursement of Costs Section of these Orders.

## **XVI. UNAVOIDABLE DELAYS**

52. Respondent shall cause all Work to be performed in accordance with applicable schedules and time frames set forth in these Orders or any approved work plan unless any such performance is prevented or delayed by an event that constitutes an unavoidable delay. For purposes of these Orders, an "unavoidable delay" shall mean an event beyond the control of Respondent that prevents or delays performance of any obligation required by these Orders and that could not be overcome by due diligence on the part of Respondent. Increased cost of compliance, among other circumstances, shall not be considered an event beyond the control of Respondent for the purposes of these Orders.

53. Respondent shall notify Ohio EPA in writing within ten (10) days after the

occurrence of an event that Respondent contends is an unavoidable delay. Such written notification shall describe the anticipated length of the delay, the cause or causes of the delay, the measures taken and to be taken by Respondent to minimize the delay, and the timetable under which these measures will be implemented. Respondent shall have the burden of demonstrating that the event constitutes an unavoidable delay.

54. If Ohio EPA does not agree that the delay has been caused by an unavoidable delay, Ohio EPA will notify the Respondent in writing of that finding and of the noncompliance with these Orders. If Ohio EPA agrees that the delay is attributable to an unavoidable delay, Ohio EPA will notify Respondent in writing of the length of the extension for the performance of the obligations affected by the unavoidable delay.

## **XVII. REIMBURSEMENT OF COSTS**

55. Ohio EPA has incurred and continues to incur Response Costs in connection with the Site. Respondent shall reimburse Ohio EPA for all Response Costs incurred both prior to and after the effective date of these Orders.

56. Within thirty (30) days of receipt of an itemized invoice for the Response Costs incurred prior to the effective date of these Orders, Respondent shall remit a check to Ohio EPA for the full amount invoiced.

57. For Response Costs incurred after the effective date of these Orders, Ohio EPA will submit to Respondent on an annual basis an itemized invoice of its Response Costs for the previous year. Within thirty (30) days of receipt of such itemized invoice, Respondent shall remit payment for all of Ohio EPA's Response Costs for the previous year. In the event that Respondent does not remit payment of Response Costs within sixty (60) days after receipt of such invoice, Respondent shall remit payment for unpaid balance and the interest accrued on the unpaid balance. Interest shall accrue beginning thirty (30) days from the date of the invoice until the date payment is remitted, and shall be calculated at the rate specified by ORC § 5703.47(B) or any subsequent rate adjustments.

58. Respondent shall remit payments to Ohio EPA pursuant to this Section as follows:

a. Payment shall be made by bank check payable to "Treasurer, State of Ohio / Hazardous Waste Special Cleanup Account" and shall be forwarded to Office of Fiscal Administration, Attn: Brenda Case, Ohio EPA, Lazarus Government Center, P.O. Box 1049, Columbus, Ohio 43216-1049;

b. A copy of the transmittal letter and check shall be sent to the Fiscal Officer,

DERR, Ohio EPA, P.O. Box 1049, Columbus, Ohio 43216-1049, and to the Ohio EPA Site Coordinator; and

c. Each payment shall identify the name and address of the party making payment, the Site name, and Ohio EPA's revenue number identified on the associated invoice.

### **XVIII. ACCESS TO INFORMATION**

59. Upon request, Respondent shall provide to Ohio EPA within fourteen (14) days, copies of all documents and information within its possession or control or that of its contractors or agents relating to events or conditions at the Site including but not limited to manifests, reports, correspondence, or other documents or information related to the Work. This provision shall not be a limitation on any request for information to the Respondent by Ohio EPA made under state or federal law for information relating to events or conditions at the Site.

60. Respondent may assert a claim that documents or other information submitted to Ohio EPA pursuant to these Orders are confidential under the provisions of OAC 3745-50-30(A) or ORC § 6111.05(A). If no such claim of confidentiality accompanies the documents or other information when it is submitted to Ohio EPA, it may be made available to the public without notice to Respondent.

61. Respondent may assert that certain documents or other information are privileged under the attorney-client privilege or any other privilege recognized by state law. If Respondent makes such an assertion, it shall provide Ohio EPA with the following: (1) the title of the document or information; (2) the date of the document or information; (3) the name and title of the author of the document or information; (4) the name and title of each addressee and recipient; (5) a general description of the contents of the document or information; and (6) the privilege being asserted by Respondent.

62. No claim of confidentiality shall be made with respect to any data or reports, including but not limited to laboratory or interpretive reports, and all sampling, analytical, and monitoring data.

63. Respondent shall preserve for the duration of these Orders and for a minimum of ten (10) years after termination of these Orders, all documents and other information within its possession or control, or within the possession or control of its contractors or agents, which in any way relate to the Work notwithstanding any document retention policy to the contrary. Respondent may preserve such documents by microfiche or other electronic or photographic device. At the conclusion of this document retention period, Respondent shall notify Ohio EPA at least sixty (60) days prior to the destruction of these documents or other information; and upon request, shall deliver such documents and other information to Ohio EPA.

## **XIX. PERIODIC REVIEW**

64. Respondent shall conduct studies and investigations as requested by Ohio EPA in order to permit Ohio EPA to conduct reviews as to the effectiveness of the Remedial Action at least every five (5) years as described in section 121(c) of CERCLA and any applicable regulations.

65. If Ohio EPA determines that information received, in whole or in part, during a review conducted pursuant to the Periodic Review Section of these Orders indicates that the Remedial Action is not protective of public health and safety and the environment, the Respondent shall undertake any further response actions Ohio EPA has determined are appropriate. Respondent shall submit a plan for such work to Ohio EPA for approval in accordance with the procedures set forth in the Review of Submissions Section of these Orders, within thirty (30) days of receiving a request from Ohio EPA to submit such a work plan.

66. Respondent may invoke the procedures in the Dispute Resolution Section to dispute (1) Ohio EPA's determination that the Remedial Action is not protective of public health and safety and the environment, or (2) Ohio EPA's selection of further response actions.

## **XX. MODIFICATIONS**

67. These Orders may be modified by agreement of the Parties. Modifications shall be in writing, signed by the authorized representative of the Respondent and by the Director, and shall be effective on the date entered in the Journal of the Director of Ohio EPA.

## **XXI. INDEMNITY**

68. Respondent agrees to indemnify, save, and hold harmless Ohio EPA from any and all claims or causes of action arising from, or related to, the implementation of these Orders or to events or conditions at the Site, including any acts or omissions of Respondent, and its successors in interest. Said indemnification shall not apply to acts or omissions of the State of Ohio, its employees, agents or assigns at, on, upon, or related to the Site if said acts are negligent, performed outside the scope of employment or official responsibilities, or performed with malicious purpose, in bad faith, or in a wanton or reckless manner. Ohio EPA shall not be considered a party to and shall not be held liable under any contract entered into by Respondent in carrying out the activities pursuant to these Orders. Ohio EPA agrees to provide notice to Respondent within thirty (30) days after receipt of any claim that may be the subject of indemnity as provided in this Section, and to cooperate with Respondent in the defense of any such

claim or action against Ohio EPA.

## **XXII. CONTRIBUTION AND AGREEMENT NOT TO REFER**

69. With respect to matters addressed in these Orders, the Parties hereto agree that these Orders constitute an administrative settlement for purposes of CERCLA sections 113(f)(2) and 113 (f)(3)(B), 42 U.S.C. § 9613(f)(2) and § 9613(f)(3)(B), pursuant to which Respondent has resolved its liability to the State, and that Respondent is entitled to contribution protection and contribution rights as of the effective date of these Orders as to any liable persons who are not parties to these Orders, as provided by CERCLA section 113(f)(2) and (f)(3)(B), 42 U.S.C. § 9613(f)(2) and (f)(3)(B), provided that Respondent complies with these Orders. The “matters addressed” in these Orders are all investigative and remedial actions taken or to be taken and all response costs incurred or to be incurred by Ohio EPA or any other person with respect to the Site, including without limitation the Work and Response Costs under these Orders.

70. During the implementation of these Orders, and provided Respondent is considered by Ohio EPA to be in compliance with these Orders, Ohio EPA agrees not to refer Respondent to the Ohio Attorney General’s Office for enforcement, or take administrative enforcement action against Respondent or its successors in interest liable under Ohio law for Work required under these Orders at the Site. Upon termination of these Orders pursuant to the Termination Section, Ohio EPA agrees to not refer Respondent to the Ohio Attorney General’s Office for enforcement, or take administrative enforcement action against Respondent and its successors in interest liable under Ohio law for Work required under these Orders at the Site.

## **XXIII. OTHER CLAIMS**

71. Nothing in these Orders shall constitute or be construed as a release from any claim, cause of action, or demand in law or equity against any person, firm, partnership, or corporation not a Party to these Orders, for any liability arising from, or related to, events or conditions at the Site.

## **XXIV. RESERVATION OF RIGHTS**

72. Ohio EPA reserves the right to seek legal and/or equitable relief to enforce the terms and conditions of these Orders, including penalties against Respondent for noncompliance with these Orders. Except as provided herein, Respondent reserves any rights it may have to raise any legal or equitable defense in any action brought by Ohio EPA to enforce the terms and conditions of these Orders.

73. Ohio EPA reserves the right to terminate these Orders and/or perform all or any portion of the Work or any other measures in the event that the requirements of these Orders are not wholly complied with within the time frames required by these Orders.

74. Ohio EPA reserves the right to take any action, including but not limited to any enforcement action, action to recover costs, or action to recover damages to natural resources, pursuant to any available legal authority as a result of past, present, or future violations of state or federal laws or regulations or the common law, and/or as a result of events or conditions arising from, or related to, the Site. Upon termination pursuant to the Termination Section of these Orders, Respondent shall have resolved its liability to Ohio EPA only for the Work performed pursuant to these Orders.

## **XXV. TERMINATION**

75. Respondent's obligations under these Orders shall terminate upon Ohio EPA's written approval of Respondent's written certification to Ohio EPA that all Work required to be performed under these Orders including payment of Response Costs has been completed. The Respondent's certification shall contain the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate, and complete." This certification shall be submitted by Respondent to Ohio EPA and shall be signed by a responsible official of Respondent. The termination of Respondent's obligations under these Orders shall not terminate the Respondent's obligations under the Reservation of Rights, Access to Information, Indemnity, Other Claims, Contribution and Agreement Not to Refer, and Land Use and Conveyance of Title Sections of these Orders.

## **XXVI. WAIVER AND AGREEMENT**

76. In order to resolve disputed claims, without admission of fact, violation, or liability, Respondent consents to the issuance of these Orders, and agrees to comply with these Orders.

77. Respondent hereby waives the right to appeal the issuance, terms and conditions, and service of these Orders and Respondent hereby waives any and all rights that it may have to seek administrative or judicial review of these Orders either in law or equity.

78. Notwithstanding the waiver herein of Respondent's right to appeal or seek administrative or judicial review, Ohio EPA and Respondent agree if these Orders are appealed by any other party to the Environmental Review Appeals Commission, or any court, Respondent retains the right to intervene and participate in such appeal. In such event, Respondent shall continue to comply with these Orders notwithstanding such appeal and intervention unless these Orders are stayed, vacated or modified.

**XXVII. EFFECTIVE DATE**

79. The effective date of these Orders shall be the date these Orders are entered in the Journal of the Director of Ohio EPA.

**XXVIII. SIGNATORY AUTHORITY**

80. Each undersigned representative of a Party to these Orders certifies that he or she is fully authorized to enter into these Orders and to legally bind such Party to these Orders.

**IT IS SO ORDERED AND AGREED:**

**OHIO ENVIRONMENTAL PROTECTION AGENCY**

\_\_\_\_\_  
Scott J. Nally, Director  
Ohio Environmental Protection Agency

\_\_\_\_\_  
Date

**IT IS SO AGREED:**

*[Name of Respondent]*

BY:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name & Title

*Place Holders - Each appendix is a separate document with the appendix letter typed or labeled on the first page.*

**Attachment A**

Decision Document

**Attachment B**

RD/RA SOW

**Attachment C**

List of Relevant Guidance Documents

**[Optional] Attachment D**

Deed Notice Template

**[Optional] Attachment E**

Environmental Covenant Template