

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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UNITED STATES OF AMERICA, NEW JERSEY  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and ADMINISTRATOR,  
NEW JERSEY SPILL COMPENSATION  
FUND,

Plaintiffs,

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

v.

Hercules LLC,

Defendant.

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**CONSENT DECREE**

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## I. BACKGROUND

A. Plaintiffs United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), and the New Jersey Department of Environmental Protection, and the Administrator of the New Jersey Spill Compensation Fund (collectively referred to as “NJDEP”) filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9606 and 9607, and, in the case of NJDEP, the Spill Compensation and Control Act (“the Spill Act”), N.J.S.A. 58:10-23.11 through 23.24.

B. The Plaintiffs in their complaint seek, *inter alia*: (1) reimbursement of costs incurred by EPA, the Department of Justice (DOJ), and NJDEP for response actions at the Hercules, Inc. Superfund Site in Gibbstown, New Jersey (“Site”), together with accrued interest; and (2) performance of response actions by the defendant at the Site (“Settling Defendant” or “SD”) consistent with the National Contingency Plan, 40 C.F.R. Part 300 (NCP).

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New Jersey (the “State”) on September 21, 2018, of negotiations with the potentially responsible party (PRP) regarding the implementation of the remedial design and remedial action (RD/RA) for Operable Units One (OU1) (groundwater) and Two (OU2) (soil/sediment) of the Site, and EPA provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree (CD).

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the National Oceanic and Atmospheric Administration and the Department of the Interior on September 21, 2018 of negotiations with the PRP regarding the release of hazardous substances that may have resulted in injury to natural resources under federal trusteeship and encouraged the trustees to participate in the negotiation of this CD.

E. The SD does not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the complaint, nor does it acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the *Federal Register* on September 8, 1983.

G. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, SD commenced on September 9, 2009, a Remedial Investigation and Feasibility Study (RI/FS) for the Site pursuant to 40 C.F.R. § 300.430.

H. SD completed an RI/FS report on July 26, 2018.

I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on July 27, 2018 in a major local newspaper of general circulation. EPA provided an opportunity for written and oral

comments from the public on the proposed plan for remedial action. A public comment period ran from July 30, 2018 to August 28, 2018. EPA conducted a public meeting on August 16, 2018.

J. After considering the public's comments, the decision by EPA on the remedial action to be implemented at the Site is embodied in a Record of Decision (ROD) executed by the Director of the Emergency and Remedial Response Division (now the Superfund and Emergency Management Division), EPA Region 2, on September 25, 2018, on which the State has given its concurrence. The ROD includes a responsiveness summary which summarizes the public's written and oral comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

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

L. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the remedy set forth in the ROD and the Work to be performed by SD shall constitute a response action taken or ordered by the President for which judicial review shall be limited to the administrative record.

M. The Parties recognize, and the Court by entering this CD finds, that this CD has been negotiated by the Parties in good faith and implementation of this CD will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this CD is fair, reasonable, and in the public interest.

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

## **II. JURISDICTION**

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

## **III. PARTIES BOUND**

2. This CD is binding upon the United States and NJDEP and upon SD and its successors, and assigns. Any change in ownership or corporate or other legal status of SD including, but not limited to, any transfer of assets or real or personal property, shall in no way alter SD's responsibilities under this CD.

3. SD shall provide a copy of this CD to each contractor hired to perform the Work and to each person representing SD with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this CD. SD or its contractors shall provide written notice of the CD to all subcontractors hired

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

#### IV. DEFINITIONS

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

“Affected Property” shall mean all real property at the Site and any other real property where EPA determines, at any time, that access, land, water, or other resource use restrictions, and/or Institutional Controls (“ICs”) are needed to implement the Remedial Action (“RA”), including, but not limited to, the property encompassing approximately 350 acres located at 50 Market Street in Gibbstown, Gloucester County, New Jersey, identified on the current tax map of the town of Greenwich Township at Block 8, Lot 10.01.

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

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

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

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

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

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

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

“Future Oversight Costs” shall mean that portion of Future Response Costs that EPA incurs in monitoring and supervising SD’s performance of the Work to determine whether such performance is consistent with the requirements of this CD, including costs incurred in reviewing deliverables submitted pursuant to this CD, as well as costs incurred in overseeing implementation of the Work; however, Future Oversight Costs do not include, *inter alia*: the costs incurred by the United States pursuant to ¶ 11 (Emergencies and Releases), Section VII

(Remedy Review), Section VIII (Property Requirements), and ¶ 32 (Access to Financial Assurance), or the costs incurred by the United States in enforcing this CD, including all costs incurred pursuant to Section XIII (Dispute Resolution), and all litigation costs.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing deliverables submitted pursuant to this CD, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this CD, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to ¶ 11 (Emergencies and Releases), ¶ 12 (Community Involvement) (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), ¶ 32 (Access to Financial Assurance), Section VII (Remedy Review), Section VIII (Property Requirements) (including the cost of attorney time and any monies paid to secure or enforce access or land, water, or other resource use restrictions and/or to secure, implement, monitor, maintain, or enforce Institutional Controls including the amount of just compensation), and Section XIII (Dispute Resolution), and all litigation costs. Future Response Costs shall also include all Interim Response Costs, and all Interest on those Past Response Costs SD has agreed to pay under this CD that have accrued pursuant to 42 U.S.C. § 9607(a) during the period from September 10, 2009, to Effective Date.

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

“Interim Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the United States in connection with the Site between September 11, 2009, and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

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

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

“NJDEP” shall mean the New Jersey Department of Environmental Protection and any successor departments or agencies of the State of New Jersey.

“NJDEP Future Cleanup and Removal Costs” shall mean all costs, including direct and indirect costs, and State Interest on such costs, that NJDEP will incur after the Effective Date of the CD in connection with the Work.

“NJDEP Natural Resource Damages” shall mean all claims arising from the discharges at the Site that occurred prior to the Effective Date of the CD, and that are recoverable by NJDEP as natural resource damages for injuries to natural resources under the Spill Act; the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 through -20; the Oil Pollution Control Act, 33 U.S.C.A. § § 9601 -2761; the Clean Water Act, 33 U.S.C.A. § § 1251-1387; the Comprehensive Environmental Response Compensation, and Liability Act, 42 U.S.C.A § § 9601 -9675; the Sanitary Landfill Act, or any other state or federal common law, statute, or regulation, and include:

- a. The costs of assessing injury to natural resources and natural resource services, NJDEP’s Office of Natural Resource Restoration’s oversight costs determined pursuant to N.J.A.C. 7:26C-4.7, attorney’s fees, consultants and experts’ fees, other litigation costs, and interest, incurred prior to the Effective Date of this CD; and
- b. Compensation for lost value of, injury to, or destructions of natural resources and natural resource services.

“NJDEP Natural Resource Damages” do not include:

- a. Compliance with any statutory or regulatory requirement that is not within the definition of NJDEP Natural Resource Damages;
- b. Requirements to clean up any contamination as a result of the discharges at the Site; or
- c. The SD’s continuing obligation to pay NJDEP’s oversight costs determined pursuant to N.J.A.C. 7:26C-4.7 and incurred after the Effective Date of this CD.

“NJDEP Past Cleanup and Removal Costs” shall mean all costs, including direct and indirect costs that NJDEP incurred on or before the Effective Date of this CD, and State Interest on such costs.

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

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

“Parties” shall mean the United States, NJDEP, Administrator of the New Jersey Spill Compensation Fund, and SD.

“Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through September 10, 2009, plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a) through such date.



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

“Plaintiffs” shall mean the United States, the NJDEP, and the Administrator of the New Jersey Spill Compensation Fund.

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

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

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to OU1 and OU2 of the Site signed by EPA on September 25, 2018, and all attachments thereto. The ROD is attached as Appendix A.

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

“Remedial Action Objectives” or “RAOs” shall mean the objectives of the remedial action selected in the ROD.

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

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

“Settling Defendant” or “SD” shall mean Hercules LLC.

“Site” shall mean the Hercules, Inc. Superfund Site, encompassing approximately 350 acres, located on 50 Market Street in Gibbstown, Gloucester County, New Jersey, identified on the current tax map of Greenwich Township as Block 8, Lot 10.01.

“State” shall mean the State of New Jersey.

“State Interest” shall mean the interest rate established by R. 4:42 of the then-current edition of the New Jersey Court Rules.

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

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

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



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

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous waste” under N.J.A.C. § 7:26G-5.

“Work” shall mean all activities and obligations SD is required to perform under this CD, except the activities required under Section XIX (Retention of Records).

## V. GENERAL PROVISIONS

5. **Objectives of the Parties.** The objectives of the Parties in entering into this CD are to protect public health or welfare or the environment by the design and implementation of response actions at the Site by SD, to pay response costs of Plaintiffs, and to resolve the claims of Plaintiffs against SD.

### 6. Commitments by SD

SD shall finance and perform the Work in accordance with this CD and all deliverables developed by SD and approved or modified by EPA pursuant to this CD. SD shall pay the United States for its response costs and NJDEP for NJDEP Past Cleanup and Removal Costs and NJDEP Future Cleanup and Removal Costs as provided in this CD.

7. **Compliance with Applicable Law.** Nothing in this CD limits SD’s obligations to comply with the requirements of all applicable federal and state laws and regulations. SD must also comply with all applicable or relevant and appropriate requirements of all federal and New Jersey environmental laws as set forth in the ROD, the SOW, and this CD. The activities conducted pursuant to this CD, if approved by EPA, shall be deemed to be consistent with the NCP as provided in Section 300.700(c)(3)(ii) of the NCP.

### 8. Permits

a. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-Site (*i.e.*, within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-Site requires a federal or state permit or approval, SD shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. SD may seek relief under the provisions of Section XII (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in ¶ 8.a. and required for the Work, provided that it has submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.

c. This CD is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

## VI. PERFORMANCE OF THE WORK

### 9. Coordination and Supervision

#### a. Project Coordinators

(1) SD's Project Coordinator must have sufficient technical expertise to coordinate the Work. SD's Project Coordinator may not be an attorney representing SD in this matter and may not act as the Supervising Contractor. SD's Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.

(2) EPA has designated Patricia Pierre, Remedial Project Manager with the Central New York Remediation Section of EPA Region 2, as EPA's Project Coordinator, and Joel Singerman, Chief of the Central New York Remediation Section, as EPA's Alternate Project Coordinator, for the Site. EPA may designate other representatives, which may include its employees, contractors and/or consultants, to oversee the Work. EPA's Project Coordinator/Alternate Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the NCP. This includes the authority to halt the Work and/or to conduct or direct any necessary response action when he or she determines that conditions at the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material.

(3) NJDEP has designated Erica Bergman, Case Manager with the Bureau of Case Management for NJDEP's Site Remediation Program as NJDEP's Project Coordinator and Gwen Zervas, Section Chief with the Bureau of Case Management for NJDEP's Site Remediation Program as NJDEP's Alternate Project Coordinator. NJDEP may designate other representatives, including its employees, contractors and/or consultants to oversee, the Work. For any meetings and inspections in which EPA's Project Coordinator participates, NJDEP's Project Coordinator also may participate. The SD shall notify NJDEP reasonably in advance of any such meetings or inspections.

(4) SD's Project Coordinator shall communicate with EPA's Project Coordinator, and others as directed or determined by EPA, by in-person meetings, conference calls, status reports, or a combination thereof, at least monthly or as otherwise mutually agreed upon in writing by the two Project Coordinators.

b. **Supervising Contractor.** SD's proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system that complies with ANSI/ASQC E4-2004, Quality Systems for

Environmental Data and Technology Programs: Requirements with Guidance for Use (American National Standard).

**c. Procedures for Disapproval/Notice to Proceed**

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

(2) EPA, after a reasonable opportunity for review and comment by the NJDEP, shall issue notices of disapproval and/or authorizations to proceed regarding the proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval, SD shall, within thirty (30) days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. EPA shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. SD may select any coordinator/contractor covered by an authorization to proceed and shall, within twenty-one (21) days, notify EPA of SD's selection.

(3) SD may change its Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of ¶¶ 9.c(1) and 9.c(2).

(4) Notwithstanding the procedures of ¶¶ 9.c(1) through 9.c(3), SD has proposed, and EPA has authorized SD to proceed, regarding the following Project Coordinator and Supervising Contractor: SD has selected CSI Environmental, LLC as its Supervising Contractor. SD has selected John Hoffman of Ashland LLC as its Project Coordinator.

10. **Performance of Work in Accordance with SOW.** SD shall: (a) develop the RD; (b) perform the RA; and (c) operate, maintain, and monitor the effectiveness of the RA in accordance with the SOW and all EPA-approved, conditionally-approved, or modified deliverables as required by the SOW. All deliverables required to be submitted for approval under the CD or SOW shall be subject to approval by EPA, in consultation with NJDEP, in accordance with ¶ 6.6 (Approval of Deliverables) of the SOW.

11. **Emergencies and Releases.** SD shall comply with the emergency and release response and reporting requirements under ¶ 4.3 (Emergency Response and Reporting) of the SOW. Subject to Section XV (Covenants by Plaintiffs), nothing in this CD, including ¶ 4.3 of the SOW, limits any authority of Plaintiffs: (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site. If, due to SD's failure to take appropriate response action under ¶ 4.3 of the SOW, EPA and/or NJDEP

takes such action instead, SD shall reimburse EPA and/or NJDEP, as appropriate, under Section X (Payments for Response Costs) for all costs of the response action.

12. **Community Involvement.** If requested by EPA, SD shall conduct community involvement activities under EPA's oversight as provided for in, and in accordance with, Section 2 (Community Involvement) of the SOW. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator. Costs incurred by the United States under this Section constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

13. **Modification of SOW or Related Deliverables**

a. If EPA determines that it is necessary to modify the work specified in the SOW and/or in deliverables developed under the SOW in order to achieve and/or maintain the Performance Standards or to carry out and maintain the effectiveness of the RA, and such modification is consistent with the Scope of the Remedy set forth in ¶ 1.3 of the SOW, then EPA, in consultation with NJDEP, may notify SD of such modification. If SD objects to the modification it may, within thirty (30) days after EPA's notification, seek dispute resolution under Section XIII.

b. The SOW and/or related work plans shall be modified: (1) in accordance with the modification issued by EPA; or (2) if SD invokes dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this CD, and SD shall implement all work required by such modification. SD shall incorporate the modification into the deliverable required under the SOW, as appropriate.

c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this CD.

14. Nothing in this CD, the SOW, or any deliverable required under the SOW constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW or related deliverable will meet the RAOs.

## VII. REMEDY REVIEW

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

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

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

18. **SD's Obligation to Perform Further Response Actions.** If EPA selects further response actions relating to the Site, EPA may require SD to perform such further response actions, but only to the extent that the reopener conditions in ¶ 69 or 70 (United States' Pre- and Post-Certification Reservations) are satisfied. SD may invoke the procedures set forth in Section XIII (Dispute Resolution) to dispute (a) EPA's determination that the reopener conditions of ¶ 69 or 70 are satisfied, (b) EPA's determination that the RA is not protective of human health and the environment, or (c) EPA's selection of the further response actions. Disputes regarding EPA's determination that the RA is not protective or EPA's selection of further response actions shall be resolved pursuant to ¶ 51 (Record Review).

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

## VIII. PROPERTY REQUIREMENTS

20. **Agreements Regarding Access and Non-Interference.** SD shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by SD and by Plaintiffs, providing that such Non-Settling Owner, and SD shall, with respect to SD's Affected Property: (i) provide Plaintiffs, and its representatives, contractors, and subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the CD, including those listed in ¶ 20.a. (Access Requirements); and (ii) refrain from using such Affected Property in any manner that EPA, in consultation with NJDEP, determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or EPA determines will interfere with or adversely affect the implementation, integrity, or protectiveness of the RA, including the restrictions listed in ¶ 20.b. (Land, Water, or Other Resource Use Restrictions). All Parties' employees, contractors, and other representatives shall comply with applicable health and safety plans when entering property where Work is being performed.

a. **Access Requirements.** The following is a list of activities for which access by the Plaintiffs, including their representatives and/or contractors, is required regarding the Affected Property:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States and/or NJDEP;
- (3) Conducting investigations regarding contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Site;

(6) Assessing implementation of quality assurance and quality control practices as defined in the approved construction quality assurance quality control plan as provided in the SOW;

(7) Implementing the Work pursuant to the conditions set forth in ¶ 73 (Work Takeover);

(8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by SD or its agents, consistent with Section XVIII (Access to Information);

(9) Assessing SD's compliance with the CD;

(10) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the CD; and

(11) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions and Institutional Controls.

b. **Land, Water, or Other Resource Use Restrictions.** The following is a list of land, water, or other resource use restrictions applicable to the Affected Property and wherever contamination has migrated above applicable standards at the time the use restrictions are established:

(1) Limiting use of groundwater through establishment of Classification Exception Areas/Well Restriction Areas;

(2) Prohibiting the following activities that could result in exposure to contaminants in subsurface soils and groundwater: (i) soil excavation, building/construction activities, and any other soil disturbances, including but not limited to installation of borings, which do not follow the Site Health and Safety Plan and any soil management plan and/or risk management plan; (ii) use of groundwater except as provided in the Classification Exception Areas/Well Restriction Areas;

(3) Ensuring that any new structures on the Site will not be constructed in the following manner that could interfere with the RA; and

(4) Ensuring that future use of the Site will be restricted via ICs to commercial/industrial use only and that any new structures on the Site will be constructed in the following manner that will minimize potential risk of inhalation of contaminants: (i) performance of a vapor intrusion evaluation or installation of vapor intrusion mitigation systems, until remediation goals are met; and (ii) adherence to the Site Health and Safety Plan and any soil management plan and/or risk management plan.



21. SD shall not Transfer its Affected Property unless it has executed and recorded all instruments necessary to establish use restrictions necessary in accordance with Paragraph 20.b.

22. **Best Efforts.** As used in this Section, “best efforts” means the efforts that a reasonable person in the position of SD would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restriction agreements. If SD is unable to accomplish what is required through “best efforts” in a timely manner, it shall notify EPA, and include a description of the steps taken to comply with the requirements. If the United States deems it appropriate, it may assist SD, or take independent action, in obtaining such access and/or use restrictions. All costs incurred by the United States in providing such assistance or taking such action, including the cost of attorney time and the amount of monetary consideration or just compensation paid, constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

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

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

(1) Notify the proposed transferee that EPA has selected a remedy regarding the Site, that SD has entered into a Consent Decree requiring implementation of such remedy, and that the United States District Court has entered the CD (identifying the name and civil action number of this case and the date the CD was entered by the Court); and

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

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

26. Notwithstanding any provision of the CD, Plaintiffs retain all of their access authorities and rights, as well as all of their rights to require land, water, or other resource use restrictions and ICs, including enforcement authorities related thereto, under CERCLA, RCRA, New Jersey Brownfield and Contaminated Site Remediation Act (N.J.S.A. 58:10B-1 et. seq), the New Jersey Site Remediation Reform Act (N.J.S.A. 58:10C-1 et. seq) and any other applicable statute or regulations.



## IX. FINANCIAL ASSURANCE

27. In order to ensure completion of the Work except for the O&M portion, SD shall secure financial assurance, initially in the amount of \$10,650,000 (“Estimated Cost of the Work”), for the benefit of EPA. To ensure completion of the O&M portion of the Work, SD shall also secure separate financial assurance for O&M initially in the amount of \$650,000 (“Estimated Cost of the O&M”) for the benefit of NJDEP. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA or under the “Financial Assurance - Settlements” category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA and, for the Estimated Cost of the O&M, to NJDEP. SD may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies, except that SD shall not use, at any time, the mechanisms contained in ¶ 27.a, ¶ 27.e, or ¶ 27.f to provide financial assurance for the Estimated Cost of the O&M.

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

b. An irrevocable letter of credit for the Estimated Cost of the Work, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency. An irrevocable letter of credit for the Estimated Cost of the O&M shall be payable to or at the direction of NJDEP, and issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by the State of New Jersey, and licensed by the New Jersey Department of Banking and Insurance to conduct business in the State of New Jersey;

c. A trust fund established for the benefit of EPA (or for NJDEP, with respect to the Estimated Cost of the O&M) that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency (or, with respect to the Estimated Cost of O&M, whose trust operations are regulated by the State of New Jersey and who is not the person responsible for conducting the remediation, including O&M);

d. A policy of insurance that provides EPA (or NJDEP, with respect to the Estimated Cost of the O&M) with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency (or, with respect to the Estimated Cost of O&M, is issued by an insurance carrier that has the authority to issue insurance policies in the State of New Jersey and is licensed by the New Jersey Department of Banking and Insurance to conduct business in the State of New Jersey);

e. A demonstration by SD that it meets the relevant test criteria of ¶ 29, accompanied by a standby funding commitment, which obligates SD to pay funds to or at the

direction of EPA, up to the amount financially assured through the use of this demonstration in the event of a Work Takeover; or

f. A guarantee to fund or perform the Work executed in favor of EPA by a company: (1) that is a direct or indirect parent company of SD or has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with SD; and (2) can demonstrate to EPA’s satisfaction that it meets the financial test criteria of ¶ 29.

28. SD shall, within 14 days of the Effective Date, obtain EPA’s approval of the form of SD’s financial assurance for the Estimated Cost of the Work and NJDEP’s approval of the form of SD’s financial assurance for the Estimated Cost of the O&M. Within 30 days of such approval, SD shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with EPA’s approved form of financial assurance for the Estimated Cost of the Work and NJDEP’s approved form of financial assurance for the Estimated Cost of the O&M, and shall submit such mechanisms and documents to the to the United States, to EPA and to the State as specified in Section XX (Notices and Submissions).

29. If SD is seeking to provide financial assurance for the Estimated Cost of the Work by means of a demonstration or guarantee under ¶¶ 27.e or 27.f, it must, within thirty (30) days of the Effective Date:

a. Demonstrate that:

(1) the SD or guarantor has:

- i. Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
- ii. Net working capital and tangible net worth each at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
- iii. Tangible net worth of at least \$10 million; and
- iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; or

(2) The SD or guarantor has:

- i. A current rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa as issued by Moody's; and
- ii. Tangible net worth at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
- iii. Tangible net worth of at least \$10 million; and
- iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and

b. Submit to EPA for the SD or guarantor: (1) a copy of an independent certified public accountant's report of the entity's financial statements for the latest completed fiscal year, which must not express an adverse opinion or disclaimer of opinion; and (2) a letter from its chief financial officer and a report from an independent certified public accountant substantially identical to the sample letter and reports available from EPA or under the "Financial Assurance - Settlements" subject list category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>.

30. If SD is providing financial assurance by means of a demonstration or guarantee under ¶ 27.e or 27.f it must also:

a. Annually resubmit the documents described in ¶ 29.b within ninety (90) days after the close of the affected Respondent's or guarantor's fiscal year;

b. Notify EPA within thirty (30) days after the SD or guarantor determines that it no longer satisfies the relevant financial test criteria and requirements set forth in this Section; and

c. Provide to EPA, within thirty (30) days of EPA's request, reports of the financial condition of the SD or guarantor in addition to those specified in ¶ 29.b; EPA may make such a request at any time based on a belief that the affected Respondent or guarantor may no longer meet the financial test requirements of this Section.

31. SD shall diligently monitor the adequacy of the financial assurance. If SD becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, then SD shall notify EPA and NJDEP of such information within seven (7) days of its receipt. If EPA determines that the financial assurance for the Estimated Cost of the Work provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, or if

NJDEP determines that the financial assurance for the Estimated Cost of the O&M is inadequate or otherwise no longer satisfies the requirements of this Section, EPA or NJDEP, as appropriate, will notify SD of such determination. SD shall, within thirty (30) days after notifying EPA and NJDEP or receiving notice from EPA or NJDEP under this Paragraph, secure and submit to EPA or NJDEP, as appropriate, for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA or NJDEP, as appropriate, may extend this deadline for such time as is reasonably necessary for SD, in the exercise of due diligence, to secure and submit to EPA or NJDEP, as appropriate, for approval a proposal for a revised or alternative financial assurance mechanism, not to exceed sixty (60) days. SD shall follow the procedures of ¶ 33 (Modification of Amount, Form or Terms of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. SD's inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this Settlement.

**32. Access to Financial Assurance by EPA or NJDEP**

a. If EPA issues a notice of implementation of a Work Takeover under ¶73, then, in accordance with any applicable financial assurance mechanism and/or related standby funding commitment, EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with ¶ 32.d

b. If EPA issues a notice of implementation of a Work Takeover under ¶ 73 with respect to the O&M portion of the Work, then NJDEP, in accordance with any applicable financial assurance mechanism and/or related standby funding commitment, is entitled to: (1) the performance of the O&M by another party; and/or (2) require that any funds guaranteed be paid in accordance with ¶ 32.e.

c. If EPA or NJDEP is notified by the issuer of a financial assurance mechanism that it intends to cancel the mechanism, and the SD fails to provide an alternative financial assurance mechanism in accordance with this Section at least thirty (30) days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 32.f.

d. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 73.b, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism and/or related standby funding commitment, whether in cash or in kind, to continue and complete the Work; or (2) the financial assurance is a demonstration or guarantee under ¶ 27.e or 27.f, then EPA is entitled to demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. SD shall, within ten (10) days of such demand, pay the amount demanded as directed by EPA.

e. If, upon issuance of a notice of implementation of a Work Takeover by EPA with respect to the O&M portion of the Work, NJDEP is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism, whether in cash or in kind, for the O&M, then NJDEP is entitled to demand an amount, as determined by

NJDEP, sufficient to cover the cost of the remaining O&M to be performed. SD shall, within ten (10) days of such demand, pay the amount demanded as directed by NJDEP.

f. Any amounts required to be paid under this ¶ 32 shall be, as directed by EPA or NJDEP, as appropriate: (i) paid to EPA or NJDEP in order to facilitate the completion of the Work by EPA, or the completion of the O&M portion of the Work by NJDEP, as appropriate, or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work or the O&M portion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Hercules, Inc. Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

g. All EPA Work Takeover costs not paid under this ¶ 32 must be reimbursed as Future Response Costs under Section X (Payments for Response Costs). All costs incurred by NJDEP not paid under this ¶ 32 must be reimbursed as NJDEP Future Cleanup & Removal Costs under Section X (Payments for Response Costs).

### **33. Modification of Amount, Form, or Terms of Financial Assurance.**

SD may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA and NJDEP in accordance with ¶ 31, and must include an estimate of the cost of the remaining Work including the O&M, an explanation of the basis for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA, or NJDEP if the request concerns the estimated cost of the O&M, will notify SD of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. SD may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval, or NJDEP's approval if the request concerns the estimated cost of the O&M; or (b) if there is a dispute, the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XIII (Dispute Resolution). SD may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval, or NJDEP's approval if the request concerns the estimated cost of the O&M. Any decision made by EPA or NJDEP, as appropriate, on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by SD pursuant to the dispute resolution provisions of this CD or in any other forum. Within thirty (30) days after receipt of EPA's or NJDEP's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, SD shall submit to EPA or NJDEP, as appropriate, documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with ¶ 31.

**34. Release, Cancellation, or Discontinuation of Financial Assurance.** SD may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA, in consultation with NJDEP, issues a Certification of Work Completion under ¶ 4.7 (Certification of Work Completion) of the SOW; (b) in accordance with EPA's approval of such release, cancellation, or discontinuation with respect to financial assurance for the Estimated



Cost of the Work, or such NJDEP approval with respect to financial assurance for the Estimated Cost of the O&M; or (c) if there is a dispute regarding the release, cancellation or discontinuance of any financial assurance, in accordance with the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XIII (Dispute Resolution).

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

### **35. Payment by SD for Past Response Costs and NJDEP Past Cleanup and Removal Costs.**

a. Within thirty (30) days after the Effective Date, SD shall pay to EPA \$143,943.54 in payment for Past Response Costs. Payment shall be made in accordance with ¶ 37.a(1) (instructions for past response cost payments).

b. **Deposit of Past Response Costs Payment.** The total amount to be paid by SD pursuant to ¶ 35.a shall be deposited by EPA in the Hercules, Inc. (Gibbstown Plant) Superfund Site Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

c. **Payment of NJDEP Past Cleanup and Removal Costs.** Within forty-five (45) days after the Effective Date, SD shall pay to the State \$129,036.16 in reimbursement of NJDEP Past Cleanup and Removal Costs. Payment shall be made in accordance with ¶ 37.a(2) (Payment Instructions for SD).

### **36. Payments by SD for Future Response Costs and NJDEP's Future Cleanup and Removal Costs.** SD shall pay to EPA all Future Response Costs not inconsistent with the NCP.

a. **Periodic Bills.** On a periodic basis, EPA will send SD a bill requiring payment that includes a SCORPIOS Report, which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and DOJ. SD shall make all payments within thirty (30) days after SD's receipt of each bill requiring payment, except as otherwise provided in ¶38, in accordance with ¶ 37.b (instructions for future response cost payments).

b. **Deposit of Future Response Costs Payments.** The total amount to be paid by SD pursuant to ¶ 36.a (Periodic Bills) shall be deposited by EPA in the Hercules, Inc. (Gibbstown Plant) Superfund Site Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund, provided, however, that EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Hercules, Inc. (Gibbstown Plan) Superfund Site Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by SD pursuant to the dispute resolution provisions of this CD or in any other forum.

c. **Payment of NJDEP Future Cleanup and Removal Costs.** SD shall reimburse NJDEP for all NJDEP Future Cleanup and Removal Costs. NJDEP will periodically bill SD for these costs.

**37. Payment Instructions for SD**

a. **Past Response Costs Payments**

(1) The Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District of New Jersey shall provide to SD, in accordance with paragraph 94, instructions for making this payment, including a Consolidated Debt Collection System (“CDCS”) reference number. SD shall make such payment at <https://www.pay.gov> in accordance with the FLU’s instructions, including references to the CDCS Number. SD shall send notices of this payment to DOJ and EPA and in accordance with ¶ 94.

(2) SD shall pay the amounts specified in ¶ 35.c by check made payable to the “Treasurer, State of New Jersey.” Payment, with invoice stub, shall be mailed to the address referenced on the invoice. In addition, SD shall mail or otherwise deliver a copy of the payment and invoice to the Section Chief, Environmental Enforcement Section, Department of Law and Public Safety, Division of Law, Richard J. Hughes Justice Complex, 25 Market Street, P.O. Box 093, Trenton, New Jersey 08625-0093.

b. **Future Response Costs Payments and Stipulated Penalties.**

(1) SD shall make payment of Future Response Costs and stipulated penalties at <https://www.pay.gov> using the “EPA Miscellaneous Payments Cincinnati Finance Center” link, and including references to Site/Spill ID Number 02-59 and DJ # 90-11-3-12075 and the purpose of the payment. SD shall send notices of this payment to DOJ and EPA in accordance with ¶ 94.

(2) SD shall pay NJDEP Future Cleanup and Removal Costs and stipulated penalties in accordance with the instructions in ¶ 36.c.

**38. Contesting Future Response Costs.**

a. SD may submit a Notice of Dispute, initiating the procedures of Section XIII (Dispute Resolution), regarding any Future Response Costs billed under ¶ 36 (Payments by SD for Future Response Costs) if it determines that EPA has made a mathematical error or included a cost item that is not within the definition of Future Response Costs, or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. Such Notice of Dispute shall be submitted in writing within thirty (30) days after receipt of the bill and must be sent to the United States pursuant to Section XX (Notices and Submissions). Such Notice of Dispute shall specifically identify the contested Future Response Costs and the basis for objection. If SD submits a Notice of Dispute, SD shall within the thirty (30)-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to the United States, and (b) if the amount in dispute exceeds \$25,000, establish, in a duly chartered bank or trust company, an interest-



bearing escrow account that is insured by the Federal Deposit Insurance Corporation (“FDIC”), and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. SD shall send to the United States, as provided in Section XX (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If the United States prevails in the dispute, SD shall pay the sums due (with accrued interest) to the United States within seven (7) days after the resolution of the dispute. If SD prevails concerning any aspect of the contested costs, then SD shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to the United States within seven (7) days after the resolution of the dispute. SD shall be disbursed any balance of the escrow account. All payments to the United States under this Paragraph shall be made in accordance with ¶ 37.b(1) (instructions for future response cost payments). The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding SD’s obligation to reimburse the United States for its Future Response Costs.

**b. Contesting NJDEP Future Cleanup and Removal Costs.**

(1) SD may contest NJDEP Future Cleanup and Removal Costs by submitting a written request to NJDEP, within forty-five (45) days after the billing date indicated on the cost invoice SD received from NJDEP. SD shall include the following information in a request for an oversight cost review:

- i. A copy of the invoice;
- ii. Payment of all uncontested charges;
- iii. A list of the specific cost charges contested.

(2) SD shall send to NJDEP, as provided in Section XX (Notices and Submissions):

- i. a copy of the transmittal letter and check paying the uncontested NJDEP Future Cleanup and Removal Costs;
- ii. The factual questions at issue in each of the contested charges;
- iii. The name, mailing address, email address, and telephone number of the person making the request; and
- iv. Information supporting the request or other written documents relied upon to support the request.

If any information required by the above or the payment required by 38(b)(1)(ii) is not included in the request for a cost review, NJDEP shall deny the request.

(3) Upon the NJDEP's receipt of a request for a cost review, NJDEP shall attempt to resolve any of the factual issues in dispute. If NJDEP determines that a billed cost was incorrect, NJDEP shall adjust the cost and issue a corrected invoice or have the revision in the next invoice, which shall be due and payable according to the corrected or next invoice.

(4) NJDEP's decision shall be binding on SD unless, within ten (10) days after receipt of the decision, SD files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the CD.

(5) If NJDEP prevails in the dispute, SD shall pay the sums due (with accrued interest) to the NJDEP within fourteen (14) days after the resolution of the dispute. If SD prevails concerning any aspect of the contested costs, SD shall pay that portion of the costs (plus associated accrued State Interest) for which it did not prevail to NJDEP within seven (7) days after the resolution of the dispute. All payments to NJDEP under this Paragraph shall be made in accordance with ¶ 37 (Payment Instructions for SD). The dispute procedures set forth in this Paragraph shall be the exclusive mechanism for resolving disputes regarding SD's obligation to reimburse the NJDEP for NJDEP Future Cleanup and Removal Costs. If SD does not file a request for a cost review within forty-five (45) days after the billing date shown on the invoice for NJDEP's costs, the full amount of the costs shall be due and owing. If the invoice is not paid, NJDEP may avail itself of such remedies or sanctions available to NJDEP by virtue of SD's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to ¶ 56 (Stipulated Penalty Amounts – Work).

39. **Interest.** In the event that any payment for Past Response Costs or for NJDEP Past Cleanup and Removal Costs or for Future Response Costs or for NJDEP Future Cleanup and Removal Costs required under this Section is not made by the date required, SD shall pay Interest, or State Interest, on the unpaid balance. The Interest, or State Interest, as applicable, on Past Response Costs or NJDEP's Past Cleanup and Removal Costs shall begin to accrue on the Effective Date day. The Interest on Future Response Costs or NJDEP's Future Cleanup and Removal Costs shall begin to accrue on the date of the bill. The Interest, or State Interest, as applicable, shall accrue through the date of SD's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of SD's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Section XIV (Stipulated Penalties).

## **XI. INDEMNIFICATION AND INSURANCE**

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

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

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

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

42. **Insurance.** No later than fifteen (15) days before commencing any on-site Work, SD shall secure, and shall maintain until the first anniversary after issuance of EPA's Certification of RA Completion pursuant to ¶ 4.5 (Certification of RA Completion) of the SOW, commercial general liability insurance with limits of liability of \$1 million per occurrence, automobile liability insurance with limits of liability of \$1 million per accident, and umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits, naming the United States and NJDEP as additional insureds with respect to all liability arising out of the activities performed by or on behalf of SD pursuant to this CD. In addition, for the duration of this CD, SD shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of SD in furtherance of this CD. Prior to commencement of the Work, SD shall provide to EPA certificates of such insurance and a copy of each insurance policy. SD shall

resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If SD demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, SD need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. SD shall ensure that all submittals to EPA under this Paragraph identify the Hercules, Inc. (Gibbstown Plant) Superfund Site, in Gibbstown, New Jersey, and the civil action number of this case.

## XII. FORCE MAJEURE

43. “Force majeure,” for purposes of this CD, is defined as any event arising from causes beyond the control of SD, of any entity controlled by SD, or of SD’s contractors that delays or prevents the performance of any obligation under this CD despite SD’s best efforts to fulfill the obligation. The requirement that SD exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. “Force majeure” does not include financial inability to complete the Work or a failure to meet the RAOs.

44. If any event occurs or has occurred that may delay the performance of any obligation under this CD for which SD intends or may intend to assert a claim of force majeure, SD shall notify EPA’s Project Coordinator orally or, in his or her absence, EPA’s Alternate Project Coordinator or, in the event both of EPA’s designated representatives are unavailable, the Director of the Waste Management Division, EPA Region 2, within 48 hours of when SD first knew that the event might cause a delay. Within five (5) days thereafter, SD shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; SD’s rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of SD, such event may cause or contribute to an endangerment to public health or welfare, or the environment. SD shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. SD shall be deemed to know of any circumstance of which SD, any entity controlled by SD, or SD’s contractors or subcontractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude SD from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under ¶ 43 and whether SD has exercised its best efforts under ¶ 43, EPA may, in its unreviewable discretion, excuse in writing SD’s failure to submit timely or complete notices under this Paragraph.

45. If EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this CD that are affected by the force majeure will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not,

of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify SD in writing of its decision. If EPA agrees that the delay is attributable to a force majeure, EPA will notify SD in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

46. If SD elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution) regarding EPA's decision, it shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, SD shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that SD complied with the requirements of ¶¶ 43 and 44. If SD carries this burden, the delay at issue shall be deemed not to be a violation by SD of the affected obligation of this CD identified to EPA and the Court.

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

### **XIII. DISPUTE RESOLUTION**

48. Unless otherwise expressly provided for in this CD, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this CD. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of SD that have not been disputed in accordance with this Section.

49. A dispute shall be considered to have arisen when one party sends the other party a written Notice of Dispute. Any dispute regarding this CD shall in the first instance be the subject of informal negotiations between the parties. The period for informal negotiations shall not exceed thirty (30) days from the time the dispute arises, unless it is modified by written agreement of the Parties.

#### **50. Statements of Position.**

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within ten (10) days after the conclusion of the informal negotiation period, SD invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by SD. The Statement of Position shall specify SD's position as to whether formal dispute resolution should proceed under ¶¶ 51 (Record Review) or 52.

b. Within thirty (30) days after receipt of SD's Statement of Position, EPA will serve on SD its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute



resolution should proceed under ¶¶ 51 (Record Review) or 52. Within seven (7) days after receipt of EPA's Statement of Position, SD may submit a Reply.

c. If EPA and SD disagree as to whether dispute resolution should proceed under ¶¶ 51 (Record Review) or 52, the parties shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if SD ultimately appeals to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in ¶¶ 51 and 52.

d. The NJDEP shall receive all Statements of Position served by the Parties under ¶50. The NJDEP may elect, in its sole discretion, to participate in the dispute resolution procedures established in this Section.

**51. Record Review.** Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this CD, and the adequacy of the performance of response actions taken pursuant to this CD. Nothing in this CD shall be construed to allow any dispute by SD regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Deputy Director of the Superfund and Emergency Management Division, EPA Region 2, will issue a final administrative decision resolving the dispute based on the administrative record described in ¶ 51.a. This decision shall be binding upon SD, subject only to the right to seek judicial review pursuant to ¶¶ 51.c and 51.d.

c. Any administrative decision made by EPA pursuant to ¶ 51.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by SD with the Court and served on all Parties within ten (10) days after receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this CD. The United States may file a response to SD's motion.

d. In proceedings on any dispute governed by this Paragraph, SD shall have the burden of demonstrating that the decision of the Deputy Director of the Superfund and Emergency Management Division is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to ¶ 51.a.

52. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. The Deputy Director of the Superfund and Emergency Management Division, EPA Region 2, will issue a final decision resolving the dispute based on the statements of position and reply, if any, served under ¶ 50. The Deputy Director of the Superfund and Emergency Management Division's decision shall be binding on SD unless, within ten (10) days after receipt of the decision, SD files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the CD. The United States or as appropriate, NJDEP, may file a response to SD's motion.

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

53. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of SD under this CD, except as provided in ¶ 38 (Contesting Future Response Costs), as agreed by EPA, or as determined by the Court. Stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute, as provided in ¶ 62. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this CD. In the event that SD does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIV (Stipulated Penalties).

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

54. SD shall be liable to the United States for stipulated penalties in the amounts set forth in ¶¶ 56.a and 57 for failure to comply with the obligations specified in ¶¶ 56.b and 57, unless excused under Section XII (Force Majeure). "Comply" as used in the previous sentence includes SD's completion of all obligations under this CD, in accordance with all applicable requirements of this CD, within the deadlines established by and approved under this CD. If an initially submitted or resubmitted deliverable contains a material defect, and the deliverable is disapproved or modified by EPA under ¶¶ 6.6(a) (Initial Submissions) or 6.6(b) (Resubmissions) of the SOW due to such material defect, then the material defect shall constitute a lack of compliance for purposes of this Paragraph. The provisions of Section XIII (Dispute Resolution) and Section XIV (Stipulated Penalties) shall govern the accrual and payment of any stipulated penalties regarding SD's submissions under this CD.

55. SD shall be liable to NJDEP for stipulated penalties in the amounts set forth in ¶¶ 56.a for failure to comply with the obligations set forth in ¶¶ 56.b(2), (4), and (5). "Comply" as used in the previous sentence includes SD's completion of all obligations specific to NJDEP under this CD, in accordance with all applicable requirements of this CD, within the deadlines established by and approved under this CD. The provisions of Section XIII (Dispute Resolution)



and Section XIV (Stipulated Penalties) shall govern the accrual and payment of any stipulated penalties regarding SD’s submissions under this CD.

**56. Stipulated Penalty Amounts – Payments, Financial Assurance, Major Deliverables and Other Milestones).**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in ¶ 56.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$1,500
15th through 30th day	\$3,000
31st day and beyond	\$4,500

**b. Obligations**

- (1) Payment of Past Response Costs – 45 days after Effective Date.
- (2) Payment of NJDEP Past Cleanup and Removal Costs – 45 days after Effective Date.
- (3) Payment of Future Response Costs – 45 days after receipt of bill and SCORPIOS Report from EPA.
- (4) NJDEP Future Cleanup and Removal Costs – 45 days after receipt of bill from NJDEP.
- (5) Establishment and maintenance of financial assurance in compliance with the timeliness and other substantive and procedural requirements of Section IX (Financial Assurance).
- (6) Award RA contract in accordance with the Statement of Work.
- (7) Submission of satisfactory Remedial Action Work Plan in accordance with Statement of Work.
- (8) Start of Construction in accordance with Statement of Work.
- (9) Submission of a satisfactory O&M Plan in accordance with the Statement of Work.
- (10) Implementation of Institutional Controls in accordance with Statement of Work.
- (11) Submission of a satisfactory Remedial Action Report in accordance with the Statement of Work.
- (12) Establishment of an escrow account to hold any disputed Future Response Costs under ¶ 39 (Contesting Future Response Costs).

57. **Stipulated Penalty Amounts – Other Deliverables.** The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables pursuant to the CD or SOW other than those specified in Paragraph 56(b).

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$1,000
15th through 30th day	\$2,000
31st day and beyond	\$3,000

58. In the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 73 (Work Takeover), SD shall be liable for a stipulated penalty in the amount of \$1,000,000. Stipulated penalties under this Paragraph are in addition to the remedies available under ¶¶ 33 (Access to Financial Assurance) and 73 (Work Takeover).

59. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under ¶ 6.6 (Approval of Deliverables) of the SOW, during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies SD of any deficiency; (b) with respect to a decision by the Deputy Director of the Superfund and Emergency Management Division, EPA Region 2, under ¶¶ 51.b or 52.a of Section XIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that SD's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XIII (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute; or (d) under Paragraph 38.b (Contesting NJDEP Future Cleanup and Removal Costs), during the period, if any, beginning on the 31<sup>st</sup> day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing in this CD shall prevent the simultaneous accrual of separate penalties for separate violations of this CD.

60. Following EPA's determination that SD has failed to comply with a requirement of this CD, or NJDEP's determination that SD has failed to comply with ¶ 56.b.(2),(4) and (5), EPA or NJDEP, as appropriate, may give SD written notification of the same and describe the noncompliance. EPA or NJDEP may send SD a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified SD of a violation.

61. All penalties accruing under this Section shall be due and payable to the United States or NJDEP, as appropriate, within thirty (30) days after SD's receipt from EPA or NJDEP, as appropriate, of a demand for payment of the penalties, unless SD invokes the Dispute Resolution procedures under Section XIII (Dispute Resolution) or contests NJDEP Future Cleanup and Removal Costs under ¶ 38.b within the thirty (30)-day period. SD shall make payments under this Section to the United States in accordance with ¶ 37.b(1). All payments to

the NJDEP under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with ¶ 37.b(2) (instructions for payment of NJDEP's future costs and stipulated penalties).

62. Penalties shall continue to accrue as provided in ¶ 59 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement of the parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA or NJDEP, as appropriate, within 15 days after the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States or NJDEP, as appropriate, prevails in whole or in part, SD shall pay all accrued penalties determined by the Court to be owed to EPA or NJDEP, as appropriate, within sixty (60) days after receipt of the Court's decision or order, except as provided in ¶ 62.c;

c. If the District Court's decision is appealed by any Party, SD shall pay all accrued penalties exceeding \$25,000 determined by the District Court to be owed to the United States or NJDEP, as appropriate, into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within sixty (60) days after receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA, or NJDEP, as appropriate, or to SD to the extent that it prevails.

63. If SD fails to pay stipulated penalties when due, SD shall pay Interest or State Interest, as appropriate, on the unpaid stipulated penalties as follows: (a) if SD has timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest or State Interest, as appropriate, shall accrue from the date stipulated penalties are due pursuant to ¶ 61 until the date of payment; and (b) if SD fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 60 until the date of payment. If SD fails to pay stipulated penalties and Interest when due, the United States or NJDEP, as appropriate, may institute proceedings to collect the penalties and Interest.

64. The payment of penalties and Interest, if any, shall not alter in any way SD's obligation to complete the performance of the Work required under this CD.

65. Nothing in this CD shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or NJDEP to seek any other remedies or sanctions available by virtue of SD's violation of this CD or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), provided, however, that the United States or NJDEP shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided in this CD, except in the case of a willful violation of this CD.

66. Notwithstanding any other provision of this Section, each of the United States or NJDEP may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued to it pursuant to this CD.

## XV. COVENANTS BY PLAINTIFFS

67. **Covenants for SD by United States.** Except as provided in ¶¶ 69, 70 (United States' Pre- and Post-Certification Reservations), and 73 (General Reservations of Rights), the United States covenants not to sue or to take administrative action against SD pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), relating to the Site. Except with respect to future liability, these covenants shall take effect upon the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of RA Completion by EPA pursuant to ¶ 4.6 (Certification of RA Completion) of the SOW. These covenants are conditioned upon the satisfactory performance by SD of its obligations under this CD. These covenants extend only to SD and do not extend to any other person.

68. **Covenants for SD by NJDEP.** In consideration of the payment SD is making pursuant to ¶¶ 35.c and 36.c, above, and except as otherwise provided in ¶ 72 (General Reservation of Rights), below, the NJDEP covenants not to sue or take administrative action against the SD for reimbursement of NJDEP Past Cleanup and Removal Costs or NJDEP Future Cleanup and Removal Costs. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by SD of its obligations under this CD. These covenants extend only to SD and do not extend to any other person.

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

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

71. For purposes of ¶ 69 (United States' Pre-Certification Reservations), the information and the conditions known to EPA will include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the ROD for the

Site and the administrative record supporting the ROD. For purposes of ¶ 70 (United States' Post-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of RA Completion and set forth in the ROD, the administrative record supporting the ROD, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this CD prior to Certification of RA Completion.

72. **General Reservations of Rights.** The United States and NJDEP reserve, and this CD is without prejudice to, all rights against SD with respect to all matters not expressly included within Plaintiffs' covenants. Notwithstanding any other provision of this CD, the United States and NJDEP reserve all rights against SD with respect to:

- a. liability for failure by SD to meet a requirement of this CD;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based on the operation of the Site by SD when such operation commences after signature of this CD by SD and does not arise solely from SD's performance of the Work;
- d. liability based on SD's transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this CD by SD;
- e. liability to the United States for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. criminal liability;
- g. liability for violations of federal or state law that occur during or after implementation of the Work; and
- h. liability, prior to meeting Performance Standards, for additional response actions that EPA determines are necessary to meet Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, but that cannot be required pursuant to ¶ 13 (Modification of SOW or Related Deliverables).
- i. liability for costs that the NJDEP will incur regarding the Site that are not within the definition of NJDEP Future Cleanup and Removal Costs;
- j. liability for NJDEP Natural Resource Damages, including any claims asserted against SD for injuries to natural resources and/or Natural Resource Damages in *New Jersey Department of Environmental Protection v. Hercules, L.L.C.*, Dkt. No. MID-L-8749-07; and
- k. liability for failure to comply with applicable State law and regulations subsequent to the Site being delisted by the EPA from the National Priorities List, including, but

not limited to, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq., the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et. seq, the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

**73. Work Takeover.**

a. In the event EPA determines that SD: (1) has ceased implementation of any portion of the Work; (2) is seriously or repeatedly deficient or late in its performance of the Work; or (3) is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to SD. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide SD a period of ten (10) days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.

b. If, after expiration of the ten (10)-day notice period specified in ¶ 73.a, SD has not remedied to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary (“Work Takeover”). If the Work Takeover Notice concerns the O&M portion of the Work, then after expiration of the ten (10)-day notice period specified in ¶ 73.a, NJDEP may at any time thereafter assume the performance of all or any portion(s) of the O&M portion of the Work. EPA will notify SD in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this ¶ 73.b. Funding of Work Takeover costs is addressed under ¶ 32 (Access to Financial Assurance).

c. SD may invoke the procedures set forth in ¶ 52 (Record Review), to dispute EPA’s implementation of a Work Takeover under ¶ 73.b. However, notwithstanding SD’s invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under ¶ 73.b until the earlier of (1) the date that SD remedy, to EPA’s satisfaction, the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, or (2) the date that a final decision is rendered in accordance with ¶ 51 (Record Review) requiring EPA to terminate such Work Takeover.

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

## **XVI. COVENANTS BY SD**

75. **Covenants by SD.** Subject to the reservations in ¶ 77, SD covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State with respect to the Site, and this CD, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112 or 113, or any other provision of law;



b. any direct or indirect claim for reimbursement from the Spill Compensation Fund (“Spill Fund”) within the meaning of N.J.S.A. 58:10-23.11k or N.J.A.C. 7:11 or the Sanitary Landfill Facility Contingency Fund (“Sanitary Landfill Fund”) within the meaning of N.J.S.A. 13:1E-107 or N.J.A.C. 7:11 concerning the Site;

c. any claims under CERCLA §§ 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a)), the Spill Act, or other state laws regarding the Work, past response actions regarding the Site, Past Response Costs, NJDEP Past Cleanup and Removal Costs, Future Response Costs, NJDEP Future Cleanup and Removal Costs, and this CD; or

d. any other claims arising out of response actions in connection with the Work, past response actions regarding the Site, Past Response Costs, NJDEP Past Cleanup and Removal Costs, Future Response Costs, NJDEP Future Cleanup and Removal Costs, and this CD, including any claim under the United States Constitution, the New Jersey Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

e. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

76. Except as provided in ¶¶ 79 (Waiver of Claims by SD) and 85 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States or NJDEP brings a cause of action or issues an order pursuant to any of the reservations in Section XV (Covenants by Plaintiffs), other than in ¶¶ 72.a (claims for failure to meet a requirement of the CD), 72.f (criminal liability), and 72.g (violations of federal/state law during or after implementation of the Work), but only to the extent that SD’s claims arise from the same response action, response costs, or damages that the United States or the NJDEP is seeking pursuant to the applicable reservation.

77. SD reserves, and this CD is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA’s selection of response actions, or the oversight or approval of SD’s deliverables or activities. SD reserves, and this CD is without prejudice to, claims against the State of New Jersey, subject to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 through -12-3; the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 through 13-10; the New Jersey Constitution, N.J. Const. art. VIII, § 2, ¶2; or any other applicable provision of law, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any State employee while within the scope of his office or employment under circumstances where the State, if a private person, would be liable to the claimant. Any such



claim, however, shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a State employee as that term is defined in N.J.S.A. 59:1-3; nor shall any such claim concern the Site, including NJDEP's oversight or approval of SD's plans or activities relating to the remediation. The foregoing applies only to claims that SD may bring pursuant to any statute other than the Spill Act, the Water Pollution Control Act and/or the Sanitary Landfill Act, and for which the waiver of sovereign immunity is found in a statute other than the Spill Act, the Water Pollution Control Act and/or the Sanitary Landfill Act.

78. Nothing in this CD shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d). Additionally, nothing in this CD shall be deemed to constitute preauthorization of a claim against the Spill Fund, within the meaning of N.J.S.A. 58:10-23.11k or N.J.A.C. 7:1J, or the Sanitary Landfill Fund, within the meaning of N.J.S.A. 13:1E-107 or N.J.A.C. 7:11.

79. **Waiver of Claims by SD.**

a. SD agrees not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA and the Spill Act) that it may have:

(1) ***De Micromis Waiver.*** For all matters relating to the Site against any person where the person's liability to SD with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials; and

(2) ***De Minimis/Ability to Pay Waiver.*** For response costs relating to the Site against any person that has entered or in the future enters into a final CERCLA § 122(g) *de minimis* settlement, or a final settlement based on limited ability to pay, with EPA with respect to the Site.

b. **Exceptions to Waiver.**

(1) The waivers under this ¶ 80 shall not apply with respect to any defense, claim, or cause of action that a SD may have against any person otherwise covered by such waivers if such person asserts a claim or cause of action relating to the Site against such SD.

(2) Intentionally omitted.

(3) The waiver under ¶ 79.a(1) (*De Micromis Waiver*) shall not apply to any claim or cause of action against any person otherwise covered by such waiver if EPA determines that: (i) the materials containing hazardous substances

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

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

80. Except as provided in ¶ 79 (Waiver of Claims by SD), nothing in this CD shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this CD. Except as provided in Section XVI (Covenants by SD), each Party expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this CD diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2). Additionally, nothing in this CD diminishes the right of NJDEP, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3) or Section 8 of the Spill Act, N.J.S.A. 58:10-23.11g., to pursue such persons to obtain additional response costs/cleanup and removal costs and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2) or Section 7a.(2)(b) of the Spill Act, N.J.S.A. 58:10-23.11f.a.(2)(b).

81. The Parties agree, and by entering this CD this Court finds, that this CD constitutes a judicially-approved settlement pursuant to which SD has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and NJDEP within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and Section 7f.a.(2)(b) of the Spill Act, N.J.S.A. 58:10-23.11f.a.(2)(b)., and are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA and N.J.S.A. 58:10-23.11f.a.(2)(b)., or as may be otherwise provided by law, for the “matters addressed” in this CD. The “matters addressed” in this CD are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States and NJDEP, or any other person, including NJDEP’s Past Cleanup and Removal Costs and NJDEP’s Future Cleanup and Removal Costs; provided, however, that if the United States exercises rights under the reservations in Section XV (Covenants by Plaintiffs), other than in ¶¶ 72.a (claims for failure to meet a requirement of the CD), 72.f (criminal liability), or 72.g (violations of federal/state law during or after implementation of the Work), the “matters addressed” in this CD will no longer include those response costs or response actions that are within the scope of the exercised reservation.

82. The Parties further agree, and by entering this CD this Court finds, that the complaint filed by the United States and NJDEP in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this CD constitutes a judicially-approved settlement pursuant to which SD has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B) and NJDEP within the meaning of Section 113(f)(3)(B) of CERCLA and Section 7f.a.(2)(b) of the Spill Act.

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

84. SD shall, with respect to any suit or claim brought against it for matters related to this CD, notify in writing the United States and NJDEP within ten (10) days after service of the complaint on such SD. In addition, each SD shall notify the United States and NJDEP within ten (10) days after service or receipt of any Motion for Summary Judgment and within ten (10) days after receipt of any order from a court setting a case for trial.

85. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, or NJDEP for injunctive relief, recovery of cleanup and removal costs or other appropriate relief relating to the Site, SD shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or NJDEP in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XV (Covenants by Plaintiffs).

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

86. SD shall provide to EPA (and to NJDEP with regard to O&M), upon request and subject to paragraphs 87 and 88, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within SD’s possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this CD, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Work. SD shall also make available to EPA (and to NJDEP with regard to O&M), for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

#### **87. Privileged and Protected Claims.**

a. SD may assert that all or part of a Record requested by Plaintiffs is privileged or protected as provided under federal law and/or State law, in lieu of providing the Record, provided SD complies with ¶ 87.b, and except as provided in ¶ 87.c.

b. If SD asserts a claim of privilege or protection, it shall provide Plaintiffs with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, SD shall provide the Record to Plaintiffs in redacted form to mask the privileged or protected portion only. SD shall retain all Records that it claims to be privileged or protected until Plaintiffs have had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the SD's favor.

c. SD may make no claim of privilege or protection regarding: (1) any data regarding the Site, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or (2) the portion of any Record that SD is required to create or generate pursuant to this CD.

88. **Business Confidential Claims.** SD may assert that all or part of a Record provided to Plaintiffs under this Section or Section XIX (Retention of Records) is business confidential to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). SD shall segregate and clearly identify all Records or parts thereof submitted under this CD for which SD asserts business confidentiality claims. Records that SD claims to be confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA, or if EPA has notified SD that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to SD.

89. If relevant to the proceeding, SD agrees that validated sampling or monitoring data generated in accordance with the SOW and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this CD.

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

## **XIX. RETENTION OF RECORDS**

91. Until 7 years after EPA's Certification of Work Completion under ¶ 4.7 (Certification of Work Completion) of the SOW, SD shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to its liability under CERCLA or the Spill Act with respect to the Site, provided, however, that SD who is potentially liable as an owners or operator of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA or the Spill Act with respect to the Site. SD must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that

relate in any manner to the performance of the Work, provided, however, that SD (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

92. At the conclusion of this record retention period, SD shall notify the United States and NJDEP at least ninety (90) days prior to the destruction of any such Records, and, upon request by the United States, and except as provided in ¶ 87 (Privileged and Protected Claims), SD shall deliver any such Records to EPA.

93. SD certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State and that it has fully complied with any and all EPA and State requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

## **XX. NOTICES AND SUBMISSIONS**

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

**As to the United States:**

EES Case Management Unit  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7611  
Washington, DC 20044-7611  
eescdcopy.enrd@usdoj.gov  
Re: DJ # 90-11-3-12075

**As to EPA:**

Patricia Simmons Pierre  
Remedial Project Manager  
Superfund and Emergency Management Division  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway, 19<sup>th</sup> Floor  
New York, NY 10007  
pierre.patricia@epa.gov

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

Chief, Resource Management/Cost Recovery Section  
Superfund and Emergency Management Division  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway, 18<sup>th</sup> Floor  
New York, NY 10007

**As to EPA Cincinnati Finance  
Center:**

EPA Cincinnati Finance Center  
26 W. Martin Luther King Drive  
Cincinnati, OH 45268  
cinwd\_acctsreceivable@epa.gov



**As to the NJDEP:**

Erica Bergman  
Site Remediation Program – Bureau of Case  
Management  
New Jersey Department of Environmental Protection  
401 E. State Street – Mail Code 401-05F  
P.O. Box 420  
Trenton, NJ 08625-0420  
Erica.bergman@dep.nj.gov

**And:**

Section Chief  
Environmental Enforcement & Environmental  
Enforcement Section  
Department of Law and Public Safety  
Division of Law  
Richard J. Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, NJ 08625-0093  
(609) 633-8713

**As to SD**

Mr. John Hoffman  
Project Manager  
Hercules LLC  
c/o Ashland LLC  
Environmental Health and Safety, Remediation  
500 Hercules Road  
Wilmington, DE 19808-1588

**XXI. RETENTION OF JURISDICTION**

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

**XXII. APPENDICES**

96. The following appendices are attached to and incorporated into this CD:  
“Appendix A” is the ROD.

“Appendix B” is the SOW.

### **XXIII. MODIFICATION**

97. Except as provided in ¶ 13 (Modification of SOW or Related Deliverables), material modifications to this CD, including the SOW, shall be in writing, signed by the United States, NJDEP, and SD, and shall be effective upon approval by the Court. Except as provided in ¶ 13, non-material modifications to this CD, including the SOW, shall be in writing and shall be effective when signed by duly authorized representatives of the United States, NJDEP, and SD. A modification to the SOW shall be considered material if it implements a ROD amendment that fundamentally alters the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(ii). Before providing its approval to any modification to the SOW, the United States will provide the NJDEP with a reasonable opportunity to review and comment on the proposed modification.

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

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

99. This CD shall be lodged with the Court for at least thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the CD disclose facts or considerations that indicate that the CD is inappropriate, improper, or inadequate. SD consents to the entry of this CD without further notice.

100. The NJDEP, in accordance with N.J.S.A. 58:10-23.11e.2, shall arrange for written notice of the CD to all other potentially responsible parties of whom NJDEP had notice as of the date NJDEP published notice of the proposed settlement in this matter in the New Jersey Register. NJDEP shall publish notice of this CD in the New Jersey Register and on NJDEP’s web site for public comment for a period of sixty (60) days. In accordance with N.J.S.A. 58:10-23.11e.2, such notice shall include the following information: a.) the caption of this case; b.) the name and location of the Site; c.) the name of the SD; d.) a summary of the terms of this CD; and e.) that there are sixty (60) days to comment on the proposed CD.

101. NJDEP reserves the right to withdraw or withhold its consent to this CD if NJDEP receives information that discloses facts or considerations that indicate to NJDEP in its sole discretion, that the CD is inappropriate, improper, or inadequate.

102. If for any reason the Court should decline to approve this CD in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

## XXV. SIGNATORIES/SERVICE

103. The undersigned representative of the SD to this CD and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice, each representative of NJDEP and the Deputy Attorney General for the Office of the Attorney General, State of New Jersey certifies that he or she is fully authorized to enter into the terms and conditions of this CD and to execute and legally bind such Party to this document.

104. SD agrees not to oppose entry of this CD by this Court or to challenge any provision of this CD unless the United States and NJDEP have notified SD in writing that it no longer supports entry of the CD.

105. SD shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this CD. SD agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. SD needs not file an answer to the complaint in this action unless or until the Court expressly declines to enter this CD.

## XXVI. FINAL JUDGMENT

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

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

SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 20\_\_.

---

United States District Judge

Signature Page for CD regarding the Hercules, Inc. Superfund Site

**FOR THE UNITED STATES OF AMERICA:**

Jonathan D. Brightbill  
Principal Deputy Assistant Attorney General  
U.S. Department of Justice  
Environment and Natural Resources Division  
Washington, D.C. 20530

Dated: September 24, 2020

*s/ Patrick B. Bryan*  
Patrick B. Bryan  
Senior Attorney  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
P.O. Box 7611  
Washington, D.C. 20044-7611  
202-616-8299  
patrick.bryan@usdoj.gov

Signature Page for CD regarding the Hercules, Inc. (Gibbstown Plant) Superfund Site

Evangelista,  
Pat



Digitally signed by  
Evangelista, Pat  
Date: 2020.08.27 19:23:58  
-04'00'

\_\_\_\_\_  
Date

\_\_\_\_\_  
Pat Evangelista  
Director  
Superfund and Emergency Management Division  
U.S. Environmental Protection Agency  
290 Broadway, 19<sup>th</sup> Floor  
New York, NY 10007

WILLIAM  
REILLY



Digitally signed by  
WILLIAM REILLY  
Date: 2020.08.26 13:15:39  
-04'00'

\_\_\_\_\_  
Date

\_\_\_\_\_  
William Reilly  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 17<sup>th</sup> Floor  
New York, NY 10007  
212-637-3154

Signature Page for CD regarding the Hercules, Inc. (Gibbstown Plant) Superfund Site

**FOR THE NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION:**

8-25-20

Date

Kevin F. Kratina

Kevin F. Kratina

Assistant Director

Enforcement and Information Support Element



Signature Page for CD regarding the Hercules, Inc. (Gibbstown Plant) Superfund Site

**FOR THE NEW JERSEY SPILL COMPENSATION  
FUND:**

A handwritten signature in blue ink, consisting of several overlapping loops and a vertical stroke on the left side.

25 August 2020

Date

---

David E. Haymes  
Administrator  
New Jersey Spill Compensation Fund

Signature Page for CD regarding the Hercules, Inc. (Gibbstown Plant) Superfund Site

**FOR THE NEW JERSEY ATTORNEY GENERAL:**

Gurbir S. Grewal  
Attorney General of New Jersey  
Attorney for the New Jersey Department of Environmental  
Protection and Administrator of the New Jersey Spill  
Compensation Fund

By:

8/25/20  
Date



Daniel J. Harrison  
Daniel J. Harrison  
Deputy Attorney General

Signature Page for CD regarding the Hercules, Inc. (Gibbstown Plant) Superfund Site

**FOR Hercules LLC:**

8/24/20  
Date

RL Williams  
Name (print):

Richmond L. Williams  
Title: Vice President  
Address: 500 Hercules Road  
Wilmington, DE 19808

Richmond Williams  
Agent Authorized to Accept Service Name (print):

on Behalf of Above-signed Party:

HERCULES LLC

Title: Vice President  
Company: Hercules LLC  
Address: 500 Hercules Rd  
Wilmington DE 19808  
Phone: 302 5940-7020  
email: rwilliams@ashland.com