

REGION 4

IN THE MATTER OF:

Ecusta Mill Site  
Pisgah Forest, Transylvania County,  
North Carolina

P.H. Glatfelter Company,  
Respondent

ADMINISTRATIVE SETTLEMENT  
AGREEMENT AND ORDER ON CONSENT FOR  
REMEDIAL INVESTIGATION/FEASIBILITY  
STUDY

U.S. EPA Region 4  
CERCLA Docket No. 04-2008-3759

Proceeding Under Sections 104, 107 and 122 of the  
Comprehensive Environmental Response,  
Compensation, and Liability Act, as amended, 42  
U.S.C. §§ 9604, 9607 and 9622.

*NCD 003166675*



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## I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and P.H. Glatfelter ("Respondent"). The Settlement Agreement concerns the preparation and performance of a remedial investigation and feasibility study ("RI/FS") for the Davidson and French Broad Rivers impacted by the Ecusta Mill Site located at 1 Ecusta Road in Pisgah Forest, Transylvania County, North Carolina (the "Site") and the reimbursement for future response costs incurred by EPA in connection with the RI/FS.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9604, 9607 and 9622 ("CERCLA"). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994, by EPA Delegation Nos. 14-14-C and 14-14-D, and further redelegated by Regional Delegation 14-14-C, through the Director, Superfund Division, to the Chiefs of the Superfund Remedial and Site Evaluation and Superfund Remedial and Technical Services Branches.

3. In accordance with Sections 104(b)(2) and 122(j)(1) of CERCLA, 42 U.S.C. § 9604(b)(2) and 9622(j)(1), EPA notified the State of North Carolina and the United States Department of the Interior on December 28, 2007, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal and/or State trusteeship.

4. EPA and Respondent recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of fact, conclusions of law and determinations in Sections V and VI of this Settlement Agreement. Respondent agrees to comply with and be bound by the terms of this Settlement Agreement and further agrees that it will not contest the basis or validity of this Settlement Agreement or its terms in any action brought by the United States, including EPA, to enforce the terms and conditions of this Settlement Agreement.

## II. PARTIES BOUND

5. This Settlement Agreement applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Settlement Agreement.

6. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Respondent shall be responsible for any noncompliance with this Settlement Agreement.

7. Each undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind Respondent to this Settlement Agreement.

### III. STATEMENT OF PURPOSE

8. In entering into this Settlement Agreement, the objectives of EPA and Respondent are: (a) to determine the nature and extent of contamination and any threat to the public health, welfare, or the environment caused by hazardous substances, pollutants or contaminants released from the Site to the Davidson and French Broad Rivers (the "Rivers"), by conducting a Remedial Investigation as more specifically set forth in the Scope of Work (the "SOW") attached as Appendix A to this Settlement Agreement; (b) if necessary, to identify and evaluate remedial alternatives to prevent, mitigate or otherwise respond to or remedy any release of hazardous substances, pollutants, or contaminants from the Site to the Rivers, by conducting a Feasibility Study as more specifically set forth in the SOW in Appendix A to this Settlement Agreement; and (c) to recover response and oversight costs incurred by EPA with respect to this Settlement Agreement.

9. The Work conducted under this Settlement Agreement is subject to approval by EPA and shall provide all appropriate and necessary information to assess conditions at the Rivers and evaluate alternatives to the extent necessary to select a remedy that will be consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"). Respondent shall conduct all Work under this Settlement Agreement in compliance with CERCLA, the NCP and all applicable EPA guidances, policies, and procedures.

### IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Settlement Agreement 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 Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

(a) "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

(b) "Day" shall mean a calendar day unless expressly stated to be a Working Day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next Working Day.

(c) "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXX.

(d) "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

(e) "NCDENR" shall mean the North Carolina Department of Environment and Natural Resources and any successor departments or agencies of the State.

(f) "Engineering Controls" shall mean constructed containment barriers or systems that control one or more of the following: downward migration, infiltration or seepage of surface runoff or rain or natural leaching migration of contaminants through the subsurface over time. Examples include caps, engineered bottom barriers, immobilization processes and vertical barriers.

(g) "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 plans, reports and other items pursuant to this Settlement Agreement, verifying the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, Agency for Toxic Substances and Disease Registry ("ATSDR") costs, the costs incurred pursuant to Paragraph 51 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 37 (emergency response), and Paragraph 81 (work takeover).

(h) "Institutional Controls" shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.

(i) "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually, 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.

(j) "Municipal Solid Waste" shall mean waste material: (i) generated by a household (including a single or multifamily residence); or (ii) generated by a commercial, industrial or institutional entity, to the extent that the waste material: (a) is essentially the same as waste normally generated by a household; (b) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (c) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

(k) "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.

(l) "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

(m) "Parties" shall mean EPA and Respondent.

(n) "Property" shall mean the Ecusta Mill consisting of an approximately 527-acre property formerly used for flax pulp and paper manufacturing and located at 1 Ecusta Road, Brevard, Transylvania County, North Carolina and as depicted generally on the map attached as Appendix B.

(o) "RCRA" shall mean the Resource Conservation and Recovery Act, also known as the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901, *et seq.*

(p) "Respondent" shall mean P.H. Glatfelter Company.

(q) "Rivers" shall mean portions of the Davidson and French Broad Rivers impacted by hazardous substances, pollutants, or contaminants released from the Site.

(r) "River Areas" shall mean those areas as depicted on the survey attached hereto as Appendix C.

(s) "River Investigation Areas" shall mean the River Areas, as well as the additional portion of the French Broad depicted on the figure attached hereto as Appendix D.

(t) "Scope of Work" or "SOW" shall mean the Scope of Work for development of a RI/FS for the Rivers, as set forth in Appendix A to this Settlement Agreement. The Scope of Work is incorporated into this Settlement Agreement and is an enforceable part of this Settlement Agreement as are any modifications made thereto in accordance with this Settlement Agreement.

(u) "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

(v) "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent, the SOW, all appendices attached hereto (listed in Section XXVIII) and all documents expressly incorporated by reference into this document including without limitation EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become a part of the Settlement Agreement upon approval by EPA. In the event of conflict between this Settlement Agreement and any appendix or other expressly incorporated documents, this Settlement Agreement shall control.

(w) "Site" shall mean the Property and all areas to which hazardous substances and/or pollutants from the Property have been stored, disposed of, placed, or otherwise come to be located and as depicted generally on the map attached as Appendix E.

(x) "State" shall mean the State North Carolina.

(y) "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 material" under N.C.G.S. 130A-310(2) and 130A-290(a)(8).

(z) "Work" shall mean all activities Respondent is required to perform under this Settlement Agreement, except those required by Section XIV (Retention of Records).

(aa) "Working Day" shall mean a day other than Saturday, Sunday or a federal holiday.

## V. FINDINGS OF FACT

11. The Ecusta Mill (the "Mill") is a former flax pulping and paper manufacturing facility that has been in production since 1939. Cellophane production also occurred at the Mill for approximately thirty (30) years.

12. The Property is approximately 527 acres situated in a mixed-use commercial/residential setting. The Property consists of the portions of the former manufacturing facility located on the South side of the Davidson River at 1 Ecusta Road, as well as properties located North of Davidson River Road, which include industrial solid waste landfills, an Aeration and Stabilization Basin ("ASB") formerly utilized during facility operation.

13. In addition to the pulping and paper making operations, the following activities have occurred at the Mill: chlorine production operations using Sorenson mercury cells; caustic storage; water and wastewater treatment and printing.

14. Mercury contamination associated with the chlorine production operations has been documented in the soils and groundwater beneath and adjacent to the electro-chemical building, which housed the operations. Mercury contamination has also been documented in the sediments and surface water in the on-site drainage ditches, the Davidson River, and the ASB and its outfall to the French Broad River.

15. Olin Corporation owned and operated the Mill from 1949 to 1985. In July 1985, Olin sold the Property to Ecusta Corporation.

16. P.H. Glatfelter Company is the successor to Ecusta Corporation by merger of Ecusta Corporation and P.H. Glatfelter Company in 1987. P.H. Glatfelter Company owned and operated the facility from 1987 to August 2001.

17. The Property is currently owned by Ecusta Business Development Corporation and affiliated entities.

## VI. CONCLUSIONS OF LAW AND DETERMINATIONS

Based on the Findings of Fact set forth above, EPA has concluded that:

18. The Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

19. The contamination found at the Site, as identified in the Findings of Fact above, includes [a] "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

20. The conditions described in the Findings of Fact above constitute an actual and/or threatened "release" of a hazardous substance from the facility as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

21. Respondent is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

22. Respondent is a responsible party under Sections 104, 107 and 122 of CERCLA, 42 U.S.C. § 9604, 9607 and 9622 as a person who, at the time of disposal of any hazardous substances, owned or operated the Site. Respondent therefore may be liable under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

23. The actions required by this Settlement Agreement are necessary to protect the public health, welfare or the environment, are in the public interest, 42 U.S.C. § 9622(a), are consistent with CERCLA and the NCP, 42 U.S.C. § 9604(a)(1), 9622(a), and will expedite effective remedial action and minimize litigation, 42 U.S.C. § 9622(a).

24. EPA has determined that Respondent is qualified to conduct the RI/FS within the meaning of Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), and will carry out the Work properly and promptly, in accordance with Sections 104(a) and 122(a) of CERCLA, 42 U.S.C. § 9604(a) and 9622(a), if Respondent complies with the terms of this Settlement Agreement.

## **VII. SETTLEMENT AGREEMENT AND ORDER**

25. Based upon the foregoing Findings of Fact and Conclusions of Law and Determinations, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Settlement Agreement, including, but not limited to, all appendices to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

## **VIII. DESIGNATION OF CONTRACTORS AND PROJECT COORDINATORS**

26. Selection of Contractors, Personnel. All Work performed under this Settlement Agreement shall be under the direction and supervision of qualified personnel. Within thirty (30) days of the Effective Date of this Settlement Agreement, and before the Work outlined below begins, Respondent shall notify EPA in writing of the names, titles, and qualifications of the personnel, including contractors, subcontractors, consultants and laboratories to be used in carrying out such Work. With respect to any proposed contractor, Respondent shall demonstrate that the proposed contractor has a quality system which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995 or most recent version), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with EPA Requirements for Quality Management Plans (QA/R-2), (EPA/240/B-01/002, March 2001 or subsequently issued guidance) or equivalent documentation as determined by EPA. The qualifications of the persons undertaking the Work for Respondent shall be subject to EPA's review, for verification that such persons meet minimum technical background and experience requirements. This Settlement Agreement is contingent on Respondent's demonstration to EPA's satisfaction that Respondent

is qualified to perform properly and promptly the actions set forth in this Settlement Agreement. If EPA disapproves in writing of any person's technical qualifications, Respondent shall notify EPA of the identity and qualifications of the replacements within fifteen (15) days of the written notice. If EPA subsequently disapproves of the replacement, EPA reserves the right to terminate this Settlement Agreement and to conduct a complete RI/FS, and to seek reimbursement for costs and penalties from Respondent. During the course of the RI/FS, Respondent shall notify EPA in writing of any changes or additions in the personnel used to carry out such Work, providing their names, titles, and qualifications. EPA shall have the same right to disapprove changes and additions to personnel as it has hereunder regarding the initial notification.

27. Within fifteen (15) days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present at the River Investigation Areas or readily available during Work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number and qualifications within fifteen (15) days following EPA's disapproval. Respondent shall have the right to change their Project Coordinator, subject to EPA's right to disapprove. Respondent shall notify EPA fifteen (15) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notification. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent.

28. EPA has designated Jennifer Wendel of the Superfund Sites Evaluation Section, Superfund Division, Region 4 as its Project Coordinator. EPA will notify Respondent of a change of its designated Project Coordinator. Except as otherwise provided in this Settlement Agreement, Respondent shall direct all submissions required by this Settlement Agreement to the Project Coordinator at the Atlanta Federal Center, 61 Forsyth Street SW, Atlanta, Georgia 30303.

29. EPA's Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and On-Scene Coordinator ("OSC") by the NCP. In addition, EPA's Project Coordinator shall have the authority consistent with the NCP, to halt any Work required by this Settlement Agreement, and to take any necessary response action when s/he determines that conditions at the River Investigation Areas may present an immediate endangerment to public health or welfare or the environment. The absence of the EPA Project Coordinator from the area under study pursuant to this Settlement Agreement shall not be cause for the stoppage or delay of Work.

30. EPA shall arrange for a qualified person to assist in its oversight and review of the conduct of the RI/FS, as required by Section 104(a) of CERCLA, 42 U.S.C. Section 9604(a). Such person shall have the authority to observe Work and make inquiries in the absence of EPA, but not to modify the RI/FS Work Plan.



## IX. WORK TO BE PERFORMED

31. Respondent shall conduct the RI/FS in accordance with the provisions of this Settlement Agreement, the SOW, CERCLA, the NCP and EPA guidance, including, but not limited to the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive # 9355.3-01, October 1988 or subsequently issued guidance), "Guidance for Data Usability in Risk Assessment" (OSWER Directive #9285.7-05, October 1990 or subsequently issued guidance), and guidance referenced therein, and guidances referenced in the SOW, as may be amended or modified by EPA. The Remedial Investigation ("RI") shall consist of collecting data to characterize the River Investigation Areas conditions, determining the nature and extent of the contamination at or from the River Investigation Areas, assessing risk to human health and the environment and conducting treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered. The Feasibility Study ("FS"), if necessary, shall determine and evaluate (based on treatability testing, where appropriate) alternatives for remedial action to prevent, mitigate or otherwise respond to or remedy the hazardous substances, pollutants, or contaminants released from the Site to the Rivers. If necessary, the alternatives evaluated must include, but shall not be limited to, the range of alternatives described in the NCP, and shall include remedial actions that utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. In evaluating the alternatives, Respondent shall address the factors required to be taken into account by Section 121 of CERCLA, 42 U.S.C. §§ 9621, and Section 300.430(e) of the NCP, 40 C.F.R. 300.430(e). Upon request by EPA, Respondent shall submit in electronic form all portions of any plan, report or other deliverable Respondent is required to submit pursuant to provisions of this Settlement Agreement.

32. Upon receipt of the draft FS report, EPA, as necessary, will evaluate the estimates of the risk to the public and environment that are expected to remain after a particular remedial alternative has been completed and will evaluate the durability, reliability and effectiveness of any proposed Institutional Controls.

33. Modification of the RI/FS Work Plan.

(a) If at any time during the RI/FS process, Respondent identifies a need for additional data, Respondent shall submit a memorandum documenting the need for additional data to the EPA Project Coordinator within fourteen (14) days of identification. EPA in its discretion will determine whether the additional data will be collected by Respondent and whether it will be incorporated into plans, reports and other deliverables. Respondent shall have the right to collect any additional data not specified or required under this Settlement Agreement, except as limited by Section 122(e)(6) of CERCLA.

(b) In the event of unanticipated or changed circumstances at the River Investigation Areas that may cause a delay or restrict implementation of the Work, Respondent shall notify the EPA Project Coordinator within five (5) days of discovery of such unanticipated or changed circumstances. In the event that EPA determines that the immediate threat or the unanticipated or changed circumstances warrant changes in the RI/FS Work Plan, EPA shall

modify or amend the RI/FS Work Plan in writing accordingly. Respondent shall perform the RI/FS Work Plan as modified or amended.

(c) EPA may determine that in addition to tasks defined in the initially approved RI/FS Work Plan, other additional Work may be necessary to accomplish the objectives of the RI/FS. EPA and Respondent shall determine whether such additional Work is necessary for a complete RI/FS.

(d) Respondent shall confirm its willingness to perform the additional Work in writing to EPA within seven (7) days of receipt of the EPA request. If Respondent objects to any modification determined by EPA to be necessary pursuant to this Paragraph, Respondent may seek dispute resolution pursuant to Section XVI (Dispute Resolution). The SOW and/or RI/FS Work Plan shall be modified in accordance with the final resolution of the dispute.

(e) Respondent shall complete the additional Work according to the standards, specifications, and schedule set forth or approved by EPA in a written modification to the RI/FS Work Plan or written RI/FS Work Plan supplement. EPA reserves the right to conduct the Work itself at any point, to seek reimbursement from Respondent, and/or to seek any other appropriate relief.

(f) Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions at the River Areas.

34. Off-Site Shipment of Waste Material. Respondent shall, prior to any off-site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to EPA's Designated Project Coordinator. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

(a) Respondent shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

(b) The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the remedial investigation and feasibility study. Respondent shall provide the information required by Subparagraph 34(a) and 34(c) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

(c) Before shipping any hazardous substances, pollutants, or contaminants from the River Investigation Areas to an off-site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall

only send hazardous substances, pollutants, or contaminants from the River Investigation Areas to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

35. Meetings. At the request of EPA, Respondent shall make presentations at, and participate in, meetings during the initiation, conduct, and completion of the RI/FS. In addition to discussion of the technical aspects of the RI/FS, topics will include anticipated problems or new issues. Meetings will be scheduled at reasonable times and at EPA's discretion.

36. Progress Reports. In addition to the plans, reports and other deliverables set forth in this Settlement Agreement, Respondent shall provide to EPA monthly progress reports by the 15<sup>th</sup> day of the following month (or any other schedule agreed to in writing by the Project Coordinators). At a minimum, with respect to the preceding month, these progress reports shall (1) describe the actions which have been taken to comply with this Settlement Agreement during that month, (2) include all results of sampling and tests and all other data received by Respondent, (3) describe Work planned for the next forty-five (45) days with schedules relating such Work to the overall project schedule for RI/FS completion, and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.

37. Emergency Response and Notification of Releases.

(a) In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the River Investigation Areas that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the EPA Project Coordinator or, in the event of his/her unavailability, the OSC or the Regional Duty Officer, Emergency and Removal Response Branch, EPA Region 4 at (404)562-8700 of the incident or River Investigation Areas conditions or the National Response Center at (800) 424-8802. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XIX (Payment of Response Costs).

(b) In addition, in the event of any release of a hazardous substance from the River Investigation Areas, Respondent shall immediately notify the EPA Project Coordinator, the OSC or Regional Duty Officer, Emergency and Removal Response Branch, EPA Region 4 at (404)562-8700 and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. 11004, *et seq.*

## X. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

38. After review of any plan, report or other item that is required to be submitted for approval pursuant to this Settlement Agreement, in a notice to Respondent EPA shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Respondent modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Respondent at least one notice of deficiency and an opportunity to cure within twenty-one (21) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects.

39. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Subparagraph 38(a), (b), (c) or (e), Respondent shall proceed to take any action required by the plan, report or other deliverable, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XVI (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA approval or modification of a submission or portion thereof, Respondent shall not thereafter alter or amend such submission or portion thereof unless directed by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Subparagraph 38(c) and the submission had a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XVII (Stipulated Penalties).

### 40. Resubmission.

(a) Upon receipt of a notice of disapproval, Respondent shall, within twenty-one (21) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. Any stipulated penalties applicable to the submission, as provided in Section XVII, shall accrue during the 21-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 41 and 42.

(b) Notwithstanding the receipt of a notice of disapproval, Respondent shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by EPA. Implementation of any non-deficient portion of a submission shall not relieve Respondent of any liability for stipulated penalties under Section XVII (Stipulated Penalties).

(c) Respondent shall not proceed further with any subsequent activities or tasks until receiving EPA approval, approval on condition or modification of the following deliverables: RI/FS Work Plan, Sampling and Analysis Plan, Draft Remedial Investigation Report, and, if necessary, Treatability Testing Work Plan and Draft Feasibility Study Report. While awaiting EPA approval, approval on condition or modification of these deliverables, Respondent shall proceed with all other tasks and activities which may be conducted independently of these deliverables, in accordance with the schedule set forth under this Settlement Agreement.

(d) For all remaining deliverables not listed above in Subparagraph 40(c), Respondent shall proceed with all subsequent tasks, activities and deliverables without awaiting EPA approval on the submitted deliverable. EPA reserves the right to stop Respondent from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS.

41. If EPA disapproves a resubmitted plan, report or other deliverable, or portion thereof, EPA may again direct Respondent to correct the deficiencies. EPA shall also retain the right to modify or develop the plan, report or other deliverable. Respondent shall implement any such plan, report, or deliverable as corrected, modified or developed by EPA, subject only to Respondent's right to invoke the procedures set forth in Section XVI (Dispute Resolution).

42. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA due to a material defect, Respondent shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately unless Respondent invokes the dispute resolution procedures in accordance with Section XVI (Dispute Resolution) and EPA's action is revoked or substantially modified pursuant to a Dispute Resolution decision issued by EPA or superceded by an agreement reached pursuant to that Section. The provisions of Section XVI (Dispute Resolution) and Section XVII (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is not otherwise revoked, substantially modified or superceded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XVI, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVII.

43. In the event that EPA takes over some of the tasks, but not the preparation of the RI Report or the FS Report, Respondent shall incorporate and integrate information supplied by EPA into the final reports.

44. All plans, reports, and other deliverables submitted to EPA under this Settlement Agreement shall, upon approval or modification by EPA, be incorporated into and enforceable under this Settlement Agreement. In the event EPA approves or modifies a portion of a plan, report, or other deliverable submitted to EPA under this Settlement Agreement, the approved or modified portion shall be incorporated into and enforceable under this Settlement Agreement.

45. Neither failure of EPA to expressly approve or disapprove of Respondent's submissions within a specified time period, nor the absence of comments, shall be construed as approval by EPA. Whether or not EPA gives express approval for Respondent's deliverables, Respondent is responsible for preparing deliverables acceptable to EPA.

## **XI. QUALITY ASSURANCE, SAMPLING AND ACCESS TO INFORMATION**

46. Quality Assurance. Respondent shall assure that Work performed, samples taken and analyses conducted conform to the requirements of the SOW, the QAPP and guidances identified therein. Respondent will assure that field personnel used by Respondent is properly trained in the use of field equipment and in chain of custody procedures. Respondent shall only

use laboratories which have a documented quality system that complies with "EPA Requirements for Quality Management Plans" (QA/R-2) (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA.

47. Sampling.

(a) All results of sampling, tests, modeling or other data (including raw data) required by this Settlement Agreement and generated by Respondent, or on Respondent's behalf, during the period that this Settlement Agreement is effective, shall be submitted to EPA in the next monthly progress report as described in Paragraph 36 of this Settlement Agreement. EPA will make available to Respondent validated data generated by EPA unless it is exempt from disclosure by any federal or state law or regulation.

(b) Respondent shall verbally notify EPA and the State at least fourteen (14) days prior to conducting significant field events as described in the SOW, RI/FS Work Plan or Sampling and Analysis Plan. At EPA's verbal or written request, or the request of EPA's oversight assistant, Respondent shall allow split or duplicate samples to be taken by EPA or the State (and their authorized representatives) of any samples collected in implementing this Settlement Agreement. All split or duplicate samples collected by EPA or the State shall be analyzed by the methods identified in the QAPP.

48. Access to Information.

(a) Respondent shall provide to EPA and the State, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the River Investigation Areas or to the implementation of this Settlement Agreement, 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 related to the Work. Respondent shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work. Such persons shall be made available at reasonable times and upon reasonable request of EPA and the State.

(b) Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA and the State under this Settlement Agreement 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). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to EPA or the State, or if EPA has notified Respondent that the documents or information 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 documents or information without further notice to Respondent. Respondent shall segregate and clearly identify all documents or information submitted under this Settlement Agreement for which Respondent asserts business confidentiality claims.

(c) Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent asserts such a privilege in lieu of providing documents, they shall provide EPA and the State with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

(d) No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the River Investigation Areas.

49. In entering into this Settlement Agreement, Respondent waives any objections to any data gathered, generated, or evaluated by EPA, the State or Respondent in the performance or oversight of the Work that has been verified according to the quality assurance/quality control ("QA/QC") procedures required by the Settlement Agreement or any EPA-approved RI/FS Work Plans or Sampling and Analysis Plans. If Respondent objects to any data relating to the RI/FS, Respondent shall submit to EPA a report that specifically identifies and explains its objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. The report must be submitted to EPA within fifteen (15) days of the monthly progress report containing the data.

## **XII. RIVER INVESTIGATION AREAS ACCESS AND INSTITUTIONAL CONTROLS**

50. If the River Investigation Areas, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by Respondent, Respondent shall, commencing on the Effective Date, provide EPA and the State, and their representatives, including contractors, with access at all reasonable times to the River Investigation Areas, or such other property, for the purpose of conducting any activity related to this Settlement Agreement.

51. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within forty-five (45) days after the Effective Date, or as otherwise specified in writing by the EPA Project Coordinator. Respondent shall immediately notify EPA if after using its best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing its efforts to obtain access. If Respondent cannot obtain access agreements, EPA may either (i) obtain access for Respondent or assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate; (ii) perform those tasks or activities with EPA contractors; or (iii) terminate the Settlement Agreement. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such

access, in accordance with the procedures in Section XIX (Payment of Response Costs). If EPA performs those tasks or activities with EPA contractors and does not terminate the Settlement Agreement, Respondent shall perform all other tasks or activities not requiring access to that property, and shall reimburse EPA for all costs incurred in performing such tasks or activities. Respondent shall integrate the results of any such tasks or activities undertaken by EPA into its plans, reports and other deliverables.

52. Notwithstanding any provision of this Settlement Agreement, EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

### **XIII. COMPLIANCE WITH OTHER LAWS**

53. Respondent shall comply with all applicable local, state and federal laws and regulations when performing the RI/FS. No local, state, or federal permit shall be required for any portion of any action conducted entirely on-site or in the River Investigation Areas (*i.e.*, within the areal extent of contamination or in close proximity to the contamination and necessary for the Work), including studies, if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621. Where any portion of the Work is to be conducted off-site or outside the River Investigation Areas and requires a federal or state permit or approval, Respondent shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. This Settlement Agreement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

### **XIV. RETENTION OF RECORDS**

54. During the pendency of this Settlement Agreement and for a minimum of ten (10) years after commencement of construction of any remedial action, each Respondent shall preserve and retain all non-identical copies of documents, records, and other information (including documents, records, or other information in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until ten (10) years after commencement of construction of any remedial action, Respondent shall also instruct their contractors and agents to preserve all documents, records, and other information of whatever kind, nature or description relating to performance of the Work.

55. At the conclusion of this document retention period, Respondent shall notify EPA at least ninety (90) days prior to the destruction of any such documents, records or other information, and, upon request by EPA, Respondent shall deliver any such documents, records, or other information to EPA. Respondent may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA with the following: 1) the title of the document, record, or other information; 2) the date of the document, record, or other information; 3) the name and title of the author of the document, record, or other information; 4) the name and title of each addressee and recipient; 5) a description of the subject



of the document, record, or other information; and 6) the privilege asserted by Respondent. However, no documents, records or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

56. Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

#### **XV. NATURAL RESOURCE DAMAGES**

57. For the purposes of Section 113(g)(1) of CERCLA, the parties agree that, upon issuance of this Settlement Agreement for performance of an RI/FS at the River Investigation Areas, remedial action under CERCLA shall be deemed to be scheduled and an action for damages (as defined in 42 U.S.C. § 9601(6)) must be commenced within three (3) years after the completion of the remedial action.

#### **XVI. DISPUTE RESOLUTION**

58. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally. If EPA contends that Respondent is in violation of this Settlement Agreement, EPA shall notify Respondent in writing, setting forth the basis for its position. Respondent may dispute EPA's position pursuant to Paragraphs 59 and 60.

59. If Respondent objects to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, it shall notify EPA in writing of its objection(s) within thirty (30) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have forty-five (45) days from EPA's receipt of Respondent's written objection(s) to resolve the dispute (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Such extension may be granted verbally but must be confirmed in writing.

60. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Division Director level or higher will issue a written decision. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondent's obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the

requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs, and regardless of whether Respondent agrees with the decision.

## **XVII. STIPULATED PENALTIES**

61. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 62. and 63 for failure to comply with any of the requirements of this Settlement Agreement specified below unless excused under Section XVIII (Force Majeure). "Compliance" by Respondent shall include completion of the Work under this Settlement Agreement or any activities contemplated under any RI/FS Work Plan or other plan approved under this Settlement Agreement identified below, in accordance with all applicable requirements of law, this Settlement Agreement, the SOW, and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

62. Stipulated Penalty Amounts - Work.

The following stipulated penalties shall accrue per day for any noncompliance related to the Work, excluding failure to submit timely or adequate reports pursuant to Paragraphs 32, 33, 36, and 40:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 2,500	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 5,000	31 <sup>st</sup> day and beyond

63. Stipulated Penalty Amounts - Reports.

The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports pursuant to Paragraphs 32, 33, 36, and 40:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 100	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 250	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 500	31 <sup>st</sup> day and beyond

64. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 81 of Section XXI (Reservation of Rights by EPA), Respondent shall be liable for a stipulated penalty in the amount of \$25,000.

65. 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: (1) with respect to a deficient submission under Section X (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31<sup>st</sup> day after EPA's

receipt of such submission until the date that EPA notifies Respondent of any deficiency; and (2) with respect to a decision by the EPA Management Official designated in Paragraph 60 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA Management Official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

66. Following EPA's determination that Respondent has failed to comply with a requirement of this Settlement Agreement, EPA shall give Respondent written notification of the same and describe the noncompliance. EPA may send Respondent a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation.

67. All penalties accruing under this Section shall be due and payable to EPA within thirty (30) days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures in accordance with Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Fines and Penalties, Cincinnati Finance Center, PO Box 979077, St. Louis, MO 63197-9000, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number A4AK, the EPA Docket Number 04-2008-3759, and the name and address of the party(ies) making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s) shall be sent to Jennifer Wendel and Paula Batchelor, U.S. EPA, 61 Forsyth St., SW., Atlanta, GA 30303.

68. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Settlement Agreement.

69. Penalties shall continue to accrue as provided in Paragraph 67 during any dispute resolution period, but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

70. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of late payment made pursuant to Paragraph 67.

71. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Settlement Agreement 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), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XXI (Reservation of Rights by EPA),

Paragraph 81. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

### XVIII. FORCE MAJEURE

72. Respondent agrees to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Settlement Agreement, *force majeure* is defined as any event arising from causes beyond the control of Respondent or of any entity controlled by Respondent, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

73. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within ten (10) working days of when Respondent first knew that the event might cause a delay. Within fourteen (14) days thereafter, Respondent shall provide to EPA in writing 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; Respondent's rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

74. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event 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* event 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* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

## XIX. PAYMENT OF RESPONSE COSTS

### 75. Payments of Future Response Costs.

(a) Respondent shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Respondent a bill requiring payment that includes a SCORPIOS Report. Respondent shall make all payments within thirty (30) days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 77 of this Settlement Agreement. Respondent shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party(ies) making payment and EPA Site/Spill ID number A4AK. Respondent shall send the check(s) to:

U.S. Environmental Protection Agency  
Superfund Payments – Region 4  
Cincinnati Finance Center  
PO Box 979076  
St. Louis, MO 63197-9000

(b) At the time of payment, Respondent shall send notice that payment has been made to Jennifer Wendel and Paula Batchelor, U.S. EPA, 61 Forsyth St., SW., Atlanta, GA 30303.

(c) The total amount to be paid by Respondent pursuant to Subparagraph 75(a) shall be deposited in the Ecusta Mill 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 Rivers, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

76. If Respondent does not pay Future Response Costs within thirty (30) days of Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance of Future Response Costs, respectively. The Interest on unpaid Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. If EPA receives a partial payment, Interest shall accrue on any unpaid balance. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payments of stipulated penalties pursuant to Section XVII. Respondent shall make all payments required by this Paragraph in the manner described in Paragraph 75.

77. Respondent may contest payment of any Future Response Costs under Paragraph 75 if it determines that EPA has made an accounting or mathematical error or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the EPA Project Coordinator. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondent shall within the thirty-day period pay all uncontested Future Response Costs to EPA in the

manner described in Paragraph 75. Simultaneously, Respondent shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of North Carolina and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondent shall send to the EPA Project Coordinator 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. Simultaneously with establishment of the escrow account, Respondent shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution). If EPA prevails in the dispute, within five (5) days of the resolution of the dispute, Respondent shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 75. If Respondent prevails concerning any aspect of the contested costs, Respondent shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in Paragraph 75. Respondent shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondent's obligation to reimburse EPA for its Future Response Costs.

## **XX. COVENANT NOT TO SUE BY EPA**

78. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondent and its successors, assigns, officers, directors and employees pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work performed under this Settlement Agreement and for recovery of Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondent of all obligations under this Settlement Agreement, including, but not limited to, payment of Future Response Costs pursuant to Section XIX. This covenant not to sue extends only to Respondent and its successors, assigns, officers, directors and employees and does not extend to any other person.

## **XXI. RESERVATIONS OF RIGHTS BY EPA**

79. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste to the Rivers. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

80. The covenant not to sue set forth in Section XX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement

Agreement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

(a) claims based on a failure by Respondent to meet a requirement of this Settlement Agreement;

(b) liability for costs not included within the definition[s] of Future Response Costs;

(c) liability for performance of response action other than the Work;

(d) criminal liability;

(e) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

(f) liability arising from the past, present, or future disposal, release or threat of release of Waste Materials by Respondent at off-site locations; and

(g) liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Rivers.

81. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any material portion of the Work for thirty (30) days or more for reasons other than a *force majeure*, are seriously or repeatedly deficient or late in its performance of materials portions of the Work, or are implementing the Work in a manner which may cause endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Prior to taking over the Work, EPA shall issue written notice to Respondent specifying the grounds upon which such notice was issued and providing Respondent with a timeframe within which to commence actions reasonably calculated to remedy the circumstances giving rise to EPA's issuance of the notice. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by EPA in performing the Work pursuant to this Paragraph that are not inconsistent with the NCP shall be considered Future Response Costs that Respondent shall pay pursuant to Section XIX (Payment of Response Costs). Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XXII. COVENANT NOT TO SUE BY RESPONDENT**

82. Except as provided below, Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs; or this Settlement Agreement, including, but not limited to:

(a) any direct or indirect claim for reimbursement in connection with the Work from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections

106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

(b) any claim arising out of the Work or arising out of the response actions for which the Future Response Costs have or will be incurred, including any claim under the United States Constitution, the North Carolina Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

(c) any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work or payment of Future Response Costs.

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

83. These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 80(b), (c), and (e) - (g), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

84. Respondent reserves, and this Settlement Agreement is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, 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 while acting within the scope of his 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, any such claim 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 federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of Respondent's plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

85. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

86. Respondent agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent 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.

87. The waiver in Paragraph 86 shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Respondent. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

(a) that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6972, 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 has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

(b) that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

### **XXIII. OTHER CLAIMS**

88. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent.

89. Except as expressly provided in Section XX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

90. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

### **XXIV. CONTRIBUTION**

91. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. § 9613(f)(2) and 9622(h)(4), for matters addressed in this Settlement Agreement. The matters addressed in this Settlement Agreement are the Work, Past Response Costs, and Future Response Costs. Except as provided in Section XXII (Covenant Not to Sue by Respondent), nothing in this Settlement

Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands against any person not parties to this Settlement Agreement for indemnification, contribution, or cost recovery.

## **XXV. INDEMNIFICATION**

92. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement, except in cases where any intentional or negligent act or omission of the United States contributed to the claim, loss or damage. In addition, Respondent agrees to pay the United States all costs incurred by the United States, 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 based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement, except in cases where any intentional or negligent act or omission of the United States contributed to the claim, loss or damage. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Settlement Agreement. Neither Respondent nor any such contractor shall be considered an agent of the United States.

93. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

94. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the River Areas. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the River Areas.

## **XXVI. INSURANCE**

95. At least seven (7) days prior to commencing any Work under this Settlement Agreement, Respondent shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of two million dollars, combined single limit, naming the EPA as an additional insured. Within the same period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondent shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement Agreement, Respondent shall satisfy, or shall ensure that their 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 Respondent in furtherance of this

Settlement Agreement. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

## XXVII. FINANCIAL ASSURANCE

96. The Parties agree and acknowledge that, in the event that Respondent ceases implementation of or otherwise fails to complete the Work in accordance with the Settlement Agreement, Respondent shall ensure that EPA is held harmless from or reimbursed for all costs required for completion of the Work. For these purposes, Respondent shall establish and maintain Financial Assurance for the benefit of EPA in the amount of \$150,000 (hereinafter "Estimated Cost of the Work") in one or more of the following forms, each of which must be satisfactory in form and substance to EPA:

(a) a surety bond unconditionally guaranteeing payment and/or performance of the Work;

(b) one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA equaling the total estimated cost of the Work;

(c) a trust fund administered by a trustee acceptable in all respects to EPA;

(d) a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;

(e) a corporate guarantee to perform the Work provided by one or more parent corporations or subsidiaries of Respondent, or by one or more unrelated corporations that have a substantial business relationship with Respondent; including a demonstration that any such company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or

(f) a corporate guarantee to perform the Work by Respondent, including a demonstration that any such Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

97. Respondent has selected, and EPA has approved, as an initial Financial Assurance mechanism, a corporate guarantee, pursuant to Paragraph 96(f). Within thirty (30) of the Effective Date, Respondent shall submit all executed and/or otherwise finalized instruments and other documents required in order to make the selected Financial Assurance mechanism legally binding to Debbie Jourdan, Superfund Enforcement Records Management Section, U.S. EPA, Region 4, 61 Forsyth St, SW, Atlanta, GA 30303, with a copy to Jennifer Wendel in accordance with Section XXXI (Notices and Submissions) of the Settlement Agreement.

98. If Respondent desires to reduce the amount of any Financial Assurance mechanism(s), change the form or terms of any Financial Assurance mechanism(s), or release, cancel or discontinue any Financial Assurance mechanism(s) because the Work has been fully

and finally completed in accordance with this Agreement, Respondent shall make this request to EPA in writing and EPA shall either approve or disapprove the request in writing.

#### **XXVIII. INTEGRATION/APPENDICES**

99. This Settlement Agreement, as defined in Paragraph 10(v), constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

“Appendix A” is the SOW;

“Appendix B” is the map of the Property;

“Appendix C” is a map of the River Areas;

“Appendix D” is a map of the Additional Investigation Area; and

“Appendix E” is a map of the Site.

#### **XXIX. ADMINISTRATIVE RECORD**

100. EPA will determine the contents of the administrative record file for selection of the remedial action. Respondent shall submit to EPA documents developed during the course of the RI/FS upon which selection of the response action may be based. Upon request of EPA, Respondent shall provide copies of plans, task memoranda for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports and other reports. Upon request of EPA, Respondent shall additionally submit any previous studies conducted under state, local or other federal authorities relating to selection of the response action, and all communications between Respondent and state, local or other federal authorities concerning selection of the response action. At EPA’s discretion, Respondent shall establish a community information repository at or near the Site, to house one copy of the administrative record.

#### **XXX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION**

101. This Settlement Agreement shall be effective five (5) days after the Settlement Agreement is signed by EPA.

102. This Settlement Agreement may be amended by mutual agreement of EPA and Respondent. Amendments shall be in writing and shall be effective when signed by EPA. EPA Project Coordinators do not have the authority to sign amendments to the Settlement Agreement.

103. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain

any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

### **XXXI. NOTICES AND SUBMISSIONS**

104. Any notices, documents, information, reports, plans, approvals, disapprovals, or other correspondence required to be submitted from one party to another under this Agreement, shall be deemed submitted either when hand-delivered or as of the date of receipt by certified mail/return receipt requested, express mail, or facsimile.

Submissions to EPA shall be addressed to:

Jennifer Wendel  
Remedial Project Manager  
U.S. EPA  
61 Forsyth St., SW  
Atlanta, GA 30303

Submissions to Respondent shall be addressed to:

P.H. Glatfelter Company  
96 South George Street  
York, PA 17401-1434  
Attn: Thomas G. Jackson  
Fax: (717) 225-2729  
Email: tgjackson@glatfelter.com

With copy to:

Kilpatrick Stockton, LLP  
3737 Glenwood Avenue, Suite 400  
Raleigh, NC 27612  
Attn: Steven J. Levitas  
Fax: (919) 420-1800

### **XXXII. NOTICE OF COMPLETION OF WORK**

105. At the written request of Respondent, EPA shall promptly determine whether all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including but not limited to payment of Future Response Costs and record retention, EPA will provide written notice to Respondent. Upon such determination by EPA, EPA shall provide prompt written notice to Respondent, and this Settlement Agreement shall terminate with the exception of Respondent's continuing obligations. Such notice shall not be unreasonably withheld. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondent, provide a detailed list of the deficiencies and require that Respondent correct such deficiencies.

Agreed this \_\_\_ day of \_\_\_\_\_, 2008.

For Respondent \_\_\_\_\_

By:  \_\_\_\_\_

Title: Senior Vice President and  
Chief Financial Officer

It is so ORDERED AND AGREED this 23<sup>rd</sup> day of January, 2008.

BY: R. D. Rigger DATE: 1/23/08

Don Rigger, Chief  
Superfund Remedial and Site Evaluation Branch  
Region 4  
U.S. Environmental Protection Agency

EFFECTIVE DATE: 1/28/08