



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

US EPA RECORDS CENTER REGION 5



461801

REPLY TO THE ATTENTION OF:

MEMORANDUM

SUBJECT: Administrative Settlement Agreement and Order on Consent with Mercury Marine Corporation for an EE/CA for a Non-Time-Critical Removal at the Cedar Creek Site in Cedarburg, Wisconsin.

FROM: *Larry M. Kyte, Sr.*
Larry Kyte, Associate Branch Chief
Multi-Media Branch 2

THRU: Catherine L. Fox, Chief
Multi-Media Section 1

TO: Richard C. Karl, Director
Superfund Division

Enclosed for your signature is an Administrative Settlement Agreement and Order on Consent (AOC) to produce an Engineering Evaluation/Cost Analysis (EE/CA) for a Non-Time-Critical Removal that Mercury Marine Corporation will undertake at the Cedar Creek Superfund Alternative site (Site) in the Ponds Operable Unit in Cedarburg, Wisconsin. The EE/CA will evaluate response actions for addressing PCB-contaminated sediment in Columbia Pond and Wire and Nail Pond that are in public parks and residential areas of Cedarburg. Mercury Marine has paid all past costs for the Site under previous administrative orders and will pay future costs under this AOC. If you have any questions or need additional information, please contact Richard Nagle at (312) 353-8222.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

Cedar Creek Superfund Alternative Site
Cedar Creek OU2A – Cedar Creek Ponds
Cedarburg, Ozaukee County, Wisconsin

Mercury Marine, a Division of Brunswick
Corporation,

Respondent.

) **ADMINISTRATIVE SETTLEMENT**
) **AGREEMENT AND ORDER ON**
) **CONSENT FOR ENGINEERING**
) **EVALUATION/COST ANALYSIS**

) Docket No.

V-W-14-C-013

) Proceeding Under Sections 104, 106, 107,
) and 122 of the Comprehensive
) Environmental Response, Compensation, and
) Liability Act, as amended, 42 U.S.C.
) §§ 9604, 9606(a), 9607, and 9622

TABLE OF CONTENTS

I. JURISDICTION AND GENERAL PROVISIONS..... 1

II. DEFINITIONS1

III. PARTIES BOUND..... 3

IV. FINDINGS OF FACT 3

V. CONCLUSIONS OF LAW AND DETERMINATIONS5

VI. SETTLEMENT AGREEMENT AND ORDER..... 7

VII. AUTHORITY OF EPA REMEDIAL PROJECT MANAGER..... 12

VIII. REIMBURSEMENT OF COSTS..... 12

IX. DISPUTE RESOLUTION 14

X. FORCE MAJEURE 15

XI. STIPULATED AND STATUTORY PENALTIES..... 15

XII. OTHER CLAIMS 16

XIII. COVENANT NOT TO SUE BY EPA 17

XIV. RESERVATIONS OF RIGHTS BY EPA..... 17

XV. COVENANT NOT TO SUE BY RESPONDENT 19

XVI. CONTRIBUTION..... 20

XVII. INDEMNIFICATION..... 20

XVIII. INSURANCE 20

XIX. FINANCIAL ASSURANCE 21

XX. MODIFICATIONS 22

XXI. NOTICE OF COMPLETION 23

XXII. SUBMITTALS/CORRESPONDENCE 23

XXIII. SEVERABILITY 24

XXIV. EFFECTIVE DATE..... 24

APPENDIX A – SITE MAP

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” or “Agency”) and Mercury Marine, a Division of Brunswick Corporation (“Respondent” or “Mercury”). This Settlement Agreement is issued pursuant to the authority vested in the President of the United States by Sections 104, 106(a), 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9604, 9606(a), 9607, and 9622. This authority has been delegated to the Administrator of the EPA by Executive Order No. 12580, January 23, 1987, 52 Fed. Reg. 2923, and further delegated to the Regional Administrators by EPA Delegation Nos. 14-14-A, 14-14-C, and 14-14-D, and to the Director, Superfund Division, Region 5, by Regional Delegation Nos. 14-14-A, 14-14-C and 14-14-D.

2. This Settlement Agreement requires the Respondent to conduct an Engineering Evaluation and Cost Analysis (“EE/CA”) Report of alternative response actions pursuant to 40 C.F.R. § 300.415(b)(4)(i) and the Superfund Accelerated Cleanup Model (“SACM”) guidance to address the environmental concerns associated with that portion of the Cedar Creek Superfund Alternative Site (the “Site”) identified as Cedar Creek OU2A – Cedar Creek Ponds, as more specifically defined below and depicted generally on the map attached as Appendix A.

3. A copy of this Settlement Agreement will also be provided to the State of Wisconsin (“State”), which has been notified of the issuance of this Settlement Agreement pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondent recognize that this settlement has been negotiated in good faith and that the actions taken by Respondent in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondent’s participation in this Settlement Agreement shall not constitute an admission of liability or admission of the EPA’s findings or determinations contained in this Settlement Agreement except in a proceeding to enforce the terms of this Settlement Agreement. Respondent agrees to comply with and be bound by the terms of this Settlement Agreement. Respondent further agrees that it will not contest the basis or validity of this Settlement Agreement or its terms.

II. DEFINITIONS

5. Unless otherwise expressly provided in this Settlement Agreement, 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. “Action Memorandum” shall mean the EPA Action Memorandum relating to the Site, signed by the Regional Administrator, EPA Region 5 or her delegate and all attachments thereto.

b. “Cedar Creek OU2A” shall mean that portion of the Cedar Creek Site identified as Cedar Creek OU2A – Cedar Creek Ponds, which includes Cedar Creek, its

impoundments, sediment, raceways, free flowing reaches, and floodplain soils starting after the Ruck Pond dam and continuing downstream 1.3 miles through and including Wire and Nail Pond.

c. "Cedar Creek OU2B" shall mean that portion of the Cedar Creek Site identified as Cedar Creek OU2B – Cedar Creek, which includes Cedar Creek, its sediment, the former Hamilton Pond raceway, free flowing reaches, and floodplain soils starting after Wire and Nail Pond and continuing downstream to Cedar Creek's confluence with the Milwaukee River.

d. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

e. The term "day" shall mean a calendar 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.

f. "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXIV.

g. "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, the costs incurred pursuant to Paragraph 18 (costs and attorney fees and any monies paid to secure access, including the amount of just compensation), Paragraph 22 (emergency response) and Paragraph 58 (Work Takeover).

h. "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 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.

i. "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.

j. "PCBs" shall mean polychlorinated biphenyls.

k. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral or a lower case letter.

l. "Parties" shall mean EPA and Respondent.

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

n. "Respondent" shall mean Mercury Marine, a Division of Brunswick Corporation.

o. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

p. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached thereto. In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

q. "Site" shall mean the Cedarville Dams Site (also known as the Cedar Creek Superfund Alternative Site), consisting of (i) the Plant 2 Operable Unit, (ii) Cedar Creek OU2A, and (iii) Cedar Creek OU2B. The Site does not include Ruck Pond, and is generally depicted on the map attached as Appendix A.

r. "State" shall mean the State of Wisconsin.

s. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, or agencies or instrumentalities.

t. "Waste Material" shall mean (i) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), (ii) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33), (iii) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), and (iv) any "hazardous substance" under Wis. Stat. §§ 292.01(5), 299.01(6) or Wis. Admin. Code § NR 700.03(25).

u. "WDNR" shall mean the Wisconsin Department of Natural Resources and any successor departments or agencies of the state.

v. "Work" shall mean all activities Respondent is required to perform under this Settlement Agreement, except those required by Paragraph 19 (Record Retention).

III. PARTIES BOUND

6. This Settlement Agreement applies to and is binding upon EPA and upon the Respondent and Respondent's officers and directors, receivers, trustees, 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 Respondent's responsibilities under this Settlement Agreement.

7. 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.

IV. FINDINGS OF FACT

8. Based on available information, including the Administrative Record in this matter, EPA hereby finds, and for purposes of enforceability of this Settlement Agreement, Respondent stipulates, that the factual statutory prerequisites under CERCLA necessary for issuance of this Settlement Agreement have been met. EPA's findings and Respondent's stipulation include the following.

a. The Site is located in Ozaukee County, just north of Milwaukee, Wisconsin. In order to facilitate remedial work at the Site, it was divided into two principal operable units (Plant 2 OU and the Creek OU). With the completion of work at the Plant 2 OU, the purpose for this Settlement Agreement is to further divide the Creek OU into two subparts to expedite work at the Site with the intent of commencing the work determined to be necessary after review of the EE/CA required to be completed under this Settlement Agreement for OU2A – Ponds in 2015.

b. The portion of the Site previously identified as the Cedar Creek Operable Unit is being divided into two separate operable units, identified as Cedar Creek OU2A – Cedar Creek Ponds (“Cedar Creek OU2A” or “Ponds”), and Cedar Creek OU2B – Creek (“Cedar Creek OU2B” or “Creek”). Cedar Creek OU2A consists of Cedar Creek, its impoundments, raceways, free flowing reaches, sediment and floodplain soils starting after the Ruck Pond dam and continuing downstream 1.3 miles through and including Wire and Nail Dam and Pond. Cedar Creek OU2B consists of Cedar Creek, its impoundments, raceways, free flowing reaches, sediment and floodplain soils starting after Wire and Nail Pond and continuing to Cedar Creek’s confluence with the Milwaukee River.

c. Ruck Pond, located just upstream of the Site, was remediated by Mercury under an environmental repair agreement with the Wisconsin Department of Natural Resources (“WDNR”) that was signed in 1994. Thus, Ruck Pond does not constitute a part of the Site. The Ruck Pond work is documented in the Construction Documentation Report-Ruck Pond Sediment Removal Action, 1995.

d. In addition to performing work in Ruck Pond, Respondent has performed the following Site activities:

- (1) aerial photographs of the Site were taken in 1997, and base maps were developed with one-foot contour intervals;
- (2) a sediment sampling program was performed during the spring and summer of 1998, and the data are presented in the Cedar Creek Sediment Characterization Report, dated December 1998;
- (3) soil sampling was performed along the banks of the former Hamilton Pond in accordance with the Former Hamilton Pond Soil Characterization Program Work Plan, dated March 1999;
- (4) a removal plan was developed for addressing soils along the former Hamilton Pond, entitled Removal Action Work Plan - Former Hamilton Pond, dated March 2000;
- (5) soils along the former Hamilton Pond were removed as documented in the Former Hamilton Pond Removal Action Program Documentation Report, dated 2001;
- (6) a remedial investigation was completed in 2003, which further characterized floodplain soils and sediment in Cedar Creek OU2A and

Cedar Creek OU2B. The Remedial Investigation Report was accepted by EPA in May 2012;

- (7) the Plant 2 building was demolished and removed under EPA's Toxic Substances Control Act ("TSCA") program; and
- (8) the Plant 2 Operable Unit at the Site was remediated in 2012 and 2013.

e. In 1997, 1998, and 2003, Respondent sampled Cedar Creek sediment for PCBs. The higher concentrations of PCBs are located in the two impoundments constituting OU2A – Ponds. The PCBs may also move downstream to OU2B – Creek, contaminating more of the Cedar Creek system. However, lower concentrations of PCBs are found in OU2B – Creek, with concentrations decreasing downstream.

f. WDNR and/or Respondent collected fish PCB data from Cedar Creek and its impoundments over the course of several years, including 1986, 1997, 2003, 2004, and 2005 (caged fish only). PCB levels from fish tissue samples taken on-site vary depending on species. Results from the 2003 and 2004 data sets show sport fish range in PCB concentrations from 0.22 to 8.4 milligrams per kilogram ("mg/kg") and forage fish range in PCB concentrations from 1.9 to 12 mg/kg in Columbia and Wire and Nail ponds. Fish consumption is the primary human exposure pathway potentially associated with carcinogenic risks and/or non-carcinogenic hazards above EPA targets (*i.e.*, cancer risk of 1×10^{-4} and hazard index of 1). Potential ecological risks for mink were highest for OU2A. This result is directly related to the higher forage fish (and sediment) PCB concentrations observed in OU2A – Ponds (based on the 2003-2004 data set).

g. The Site is not proposed to the National Priorities List ("NPL"). Mercury voluntarily requested EPA to accept the Site as a Superfund Alternative ("SA") site. As an SA site, it must go through the Superfund cleanup process, as described in the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300, as amended ("NCP").

h. The Respondent designated Tom Baumgartner as its project coordinator. Mr. Baumgartner can be reached via email at Tom.Baumgartner@mercmarine.com; via telephone at 920-929-5379; and via mail at W6250 West Pioneer Road, Fond du Lac, Wisconsin 54936-1939. EPA designated Scott Hansen of the Remedial Response Branch as the On-Scene Coordinator/Remedial Project Manager. Mr. Hansen can be reached via email at hansen.scott@epa.gov, via telephone at 312-886-1999, and via mail at 77 West Jackson Boulevard (SR-6J), Chicago, Illinois 60604-3507.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

9. Based on the Findings of Fact set forth above and the Administrative Record in this matter, EPA has determined that:

- a. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b. There are "hazardous substances" at the Site as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Respondent is a “person” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Respondent was the “owner” and/or “operator” of the Site at the time of disposal of hazardous substances at the Site, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2); and/or a person who arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at the Site, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3); and/or a person who accepts or accepted hazardous substances for transport to the Site, within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).

e. The presence of hazardous substances at the Site, or the past, present, or potential migration of hazardous substances currently located at or emanating from the Site, constitute an actual or threatened “release” of a hazardous substance from the Site into the “environment” as defined by Sections 101(22) and (8) of CERCLA, 42 U.S.C. §§ 9601(22) and (8), respectively.

f. The conditions present at the Site constitute a threat to public health, welfare, or the environment based upon the factors set forth in Section 300.415(b)(2) of the NCP, 40 C.F.R. § 300.415(b)(2). These factors include, but are not limited to, the following.

- (1) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances, pollutants or contaminants – this factor is present at the Site due to the existence of elevated concentrations of PCBs in creek sediment. The maximum concentration from Cedar Creek sediment samples from 1997-2003 is 345 mg/kg collected from Columbia Pond.
- (2) Actual or potential contamination of sensitive ecosystems – this factor is present at the Site due to the existence of elevated concentrations of PCBs in creek sediment and resident fish. Results from the 2003 and 2004 data sets show sport fish range in PCB concentrations from 0.22 to 8.4 mg/kg and forage fish range in PCB concentrations from 1.9 to 12 mg/kg in Columbia and Wire and Nail ponds. As a direct result of PCB discharges, Cedar Creek is included in the State of Wisconsin’s Fish and Wildlife Consumption Advisory. The affected reaches of Cedar Creek are in the most restrictive category, “Do Not Eat” any species, regardless of size.
- (3) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released – this factor is present at the Site due to the existence of elevated concentrations of PCBs that may migrate. Cedarburg, Wisconsin is in the temporal zone that experiences significant winter precipitation that later results in significant spring thaw events that can lead to flooding conditions. There is also the potential for flooding due to other precipitation events.

g. The actual or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health, welfare, or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

h. In order to expedite Work at the Site, it is necessary to divide the current OU2 into two subparts – OU2A – Ponds addressing the impoundments and OU2B – Creek addressing the remaining downstream area of the creek.

i. The actions required by this Settlement Agreement for OU2A – Ponds, if properly performed, are consistent with the NCP, 40 C.F.R. Part 300, as amended, and with CERCLA, and are reasonable and necessary to protect the public health, welfare, and the environment.

VI. SETTLEMENT AGREEMENT AND ORDER

10. Based upon the foregoing Findings of Fact, Conclusions of Law, and Determinations, and the Administrative Record for the Site, it is hereby ordered and agreed that, for OU2A – Ponds, Respondent shall comply with the following provisions, including but not limited to all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement, and perform the following actions.

11. Designation of Contractor, Project Coordinator, EPA Remedial Project Manager.

a. Respondent shall perform the actions required by this Settlement Agreement itself, or retain a contractor(s) to undertake and complete the requirements of this Settlement Agreement. Respondent shall notify EPA of Respondent's qualifications or the name and qualifications of such contractor(s), whichever is applicable, within five business days of the Effective Date of this Settlement Agreement. Respondent shall also notify EPA of the name and qualifications of any other contractors or subcontractors retained to perform work under this Settlement Agreement at least five business days prior to commencement of such work. EPA retains the right to disapprove of Respondent or any of the contractors and/or subcontractors retained by Respondent. If EPA disapproves a selected contractor, Respondent shall retain a different contractor within thirty days following EPA's disapproval and shall notify EPA of that contractor's name and qualifications within thirty days of EPA's disapproval.

b. Respondent's Project Coordinator, who shall be responsible for administration of all Respondent's actions required by the Settlement Agreement, is listed above in Paragraph 8.h. EPA retains the right to disapprove of any Project Coordinator named by Respondent. If EPA disapproves a selected Project Coordinator, Respondent shall retain a different Project Coordinator within five business days following EPA's disapproval and shall notify EPA of that person's name and qualifications within five business days of EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent.

c. With respect to any proposed contractor or Project Coordinator, Respondent shall demonstrate that the proposed contractor or proposed Project Coordinator has a quality

management system that is in compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's or proposed Project Coordinator's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "U.S. EPA Requirements for Quality Management Plans (QA/R-2)" (U.S. EPA/240/B0-1/002), or equivalent documentation approved by EPA. If at any time Respondent proposes to use a different contractor or Project Coordinator, Respondent shall notify EPA at least ten days prior to that contractor or Project Coordinator beginning work under this Settlement Agreement.

d. EPA designated Scott Hansen of the Remedial Response Branch, Region 5, as its On-Scene Coordinator ("OSC") and Remedial Project Manager ("RPM"), as listed in the Findings of Fact. Respondent shall direct all submissions required by this Settlement Agreement to the RPM at 77 West Jackson Boulevard (SR-6J), Chicago, Illinois 60604-3507, by certified or express mail. Respondent shall also send a copy of all submissions to Richard Nagle of the Office of Regional Counsel, 77 West Jackson Boulevard (C-14J), Chicago, Illinois 60604-3507. Respondent is encouraged to make its submissions to EPA on recycled paper (which includes significant post-consumer waste paper content where possible) and using two-sided copies.

e. EPA and Respondent shall have the right, subject to the immediately preceding paragraph, to change their designated RPM or Project Coordinator. EPA shall notify Respondent, and Respondent shall notify EPA, as early as possible before such a change is made but in no case less than 24 hours before such a change. The initial notification may be made orally, but it shall be promptly followed by a written notice within two business days of oral notification.

12. Work to Be Performed.

a. Respondent shall develop and submit to EPA an EE/CA Report in accordance with the requirements of this Settlement Agreement.

b. The EE/CA Report shall be consistent with, at a minimum, EPA guidance entitled, "Guidance on Conducting Non-Time-Critical Removal Actions Under CERCLA," U.S. EPA/540-R-93-057, Publication 9360.32, PB 93-963402, dated August 1993.

13. Health and Safety Plan.

Within 30 days after the Effective Date, Respondent shall submit to EPA for review and comment a plan that ensures the protection of the public health and safety during performance of on-site work under this Settlement Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondent shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of on-site work pursuant to this Settlement Agreement.

14. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Settlement Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with EPA guidance. Respondent shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondent shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (U.S. EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by EPA, Respondent shall have such a laboratory analyze samples submitted by EPA for quality assurance monitoring. Respondent shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis. Respondent shall also ensure provision of analytical tracking information consistent with, at a minimum, OSWER Directive No. 9240.0-2B, "Extending the Tracking of Analytical Services to PRP-Lead Superfund Sites."

c. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples of any samples collected by Respondent or its contractors or agents while performing work under this Settlement Agreement. Respondent shall notify EPA not less than five business days in advance of any sample collection activity. EPA shall have the right to take any additional samples that it deems necessary.

15. Reporting.

a. Respondent shall submit a monthly written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement, beginning 30 calendar days after the Effective Date of this Settlement Agreement, until termination of this Settlement Agreement, unless otherwise directed in writing by the RPM. These reports shall describe all significant developments during the preceding period, including the work performed and any problems encountered, analytical data received during the reporting period, and developments anticipated during the next reporting period, including a schedule of work to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondent shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice of this Settlement Agreement to the transferee and written notice of the proposed conveyance to EPA and the State. The notice to EPA and the State shall include the name and address of the transferee. The party conveying such an interest shall require that the transferee provide access as described in Section VI.18 (Access to Property).

16. Additional Work. In the event that EPA or Respondent determines that additional work, including EE/CA support sampling and/or an engineering evaluation, is necessary to accomplish the objectives of the EE/CA Report, notification of such additional work shall be provided to the other party in writing. Any additional work that Respondent determines to be necessary shall be subject to EPA's written approval prior to commencement of the additional work. Respondent shall complete, in accordance with standards, specifications, and schedules EPA has approved, any additional work Respondent has proposed and has provided written notice of pursuant to this paragraph and which EPA has approved in writing or that EPA has determined to be necessary.

17. EE/CA Report.

a. Within 60 calendar days after the Effective Date, Respondent shall submit to EPA for approval a draft EE/CA Report that is consistent with this Settlement Agreement.

b. EPA may approve, disapprove, require revisions to, or modify the draft EE/CA Report. If EPA requires revisions, Respondent shall submit a revised EE/CA Report incorporating all of EPA's required revisions within 30 business days of receipt of EPA's notification of the required revisions. In the event of EPA disapproval of the revised EE/CA Report, Respondent may be deemed in violation of this Settlement Agreement; however, approval shall not be unreasonably withheld by EPA. In such event, EPA retains the right to terminate this Settlement Agreement, conduct a complete EE/CA, and obtain reimbursement for costs incurred in conducting the EE/CA from Respondent. The revised report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this EE/CA Report, the information submitted is true, accurate, and complete.

c. Respondent shall not commence or undertake any removal actions at the Site without prior EPA approval.

18. Access to Property.

a. Respondent shall provide or obtain access to the Site and off-site areas to which access is necessary to implement this Settlement Agreement, and shall provide access to all records and documentation related to the conditions at the Site and the actions conducted pursuant to this Settlement Agreement. Such access shall be provided to EPA employees, contractors, agents, consultants, designees, representatives, and State of Wisconsin representatives. These individuals shall be permitted to move freely at the Site and appropriate off-site areas to which Respondent has access in order to conduct actions which EPA determines to be necessary. Respondent shall submit to EPA, upon request/receipt, the results of all sampling or tests and all other data generated by Respondent or its contractor(s), or on Respondent's behalf during implementation of this Settlement Agreement.

b. Where work/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 60 calendar days after the Effective Date of this Settlement Agreement or as otherwise specified in writing by the RPM. Respondent shall notify EPA within two business days if, after using its best efforts, it is unable to obtain such agreements. Respondent shall describe in writing its efforts to obtain access. EPA may, in its discretion, then assist Respondent in gaining access, to the extent necessary to effectuate the actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney fees incurred by the United States in obtaining such access.

19. Record Retention, Documentation, Availability of Information.

a. Respondent shall preserve all documents and information in its possession relating to work performed under this Settlement Agreement, or relating to the hazardous substances found on or released from the Site, for 10 years following completion of the actions required by this Settlement Agreement. At the end of this 10-year period and at least 60 days before any document or information is destroyed, Respondent shall notify EPA that such documents and information are available to EPA for inspection and, upon request, shall provide the originals or copies of such documents and information to EPA. In addition, Respondent shall provide copies of any such non-privileged documents and information retained under this Section at any time before expiration of the 10-year period at the written request of EPA. Any information that Respondent is required to provide or maintain pursuant to this Settlement Agreement is not subject to the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.*

b. If Respondent asserts a privilege in lieu of providing documents, it shall provide EPA 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.

20. Off-Site Shipments.

All hazardous substances, pollutants, or contaminants removed off-site pursuant to this Settlement Agreement for treatment, storage or disposal shall be treated, stored, or disposed of at a facility in compliance, as determined by EPA, with the EPA Revised Off-Site Rule, 40 C.F.R. § 300.440, 58 Fed. Reg. 49215 (Sept. 22, 1993).

21. Compliance With Other Laws.

a. Respondent shall perform all activities required pursuant to this Settlement Agreement in accordance with all the requirements of all federal and state laws and regulations. EPA has determined that the activities contemplated by this Settlement Agreement are consistent with the NCP.

b. Except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and the NCP, no permit shall be required for any portion of the activities conducted entirely on-site.

Where any portion of the activities requires a federal or state permit or approval, Respondent shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

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

22. Emergency Response and Notification of Releases.

a. If any incident, or change in Site conditions, during the activities conducted pursuant to this Settlement Agreement causes or threatens to cause an additional release of hazardous substances from the Site or an endangerment to the public health, welfare, or the environment, Respondent shall immediately take all appropriate action to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the RPM or, in the event of his/her unavailability, shall notify the Regional Duty Officer, Emergency Response Branch, Region 5 at (312) 353-2318, of the incident or Site conditions.

b. If Respondent fails to respond, EPA may respond to the release or endangerment and reserve the right to recover costs associated with that response.

c. Respondent shall submit a written report to EPA within seven business 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. Respondent shall also comply with any other notification requirements, including those in Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11004.

VII. AUTHORITY OF EPA REMEDIAL PROJECT MANAGER

23. The RPM shall be responsible for overseeing the implementation of this Settlement Agreement. The RPM shall have the authority vested in an RPM and an OSC by the NCP, including the authority to halt, conduct, or direct any activities required by this Settlement Agreement, or to direct any other response action undertaken by EPA or Respondent at the Site. Absence of the RPM from the Site shall not be cause for stoppage of work unless specifically directed by the RPM.

VIII. REIMBURSEMENT OF COSTS

24. Respondent shall pay EPA all oversight costs not inconsistent with the NCP. "Oversight Costs" are 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. On a periodic basis, EPA will send Respondent a bill requiring payment of oversight costs, along with an Itemized Cost Summary, which includes direct and indirect costs incurred by EPA and its contractors. Respondent shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 28 of this Settlement Agreement, according to the following procedures: Electronic Fund Payments (wire transfers) should be sent to the Federal Reserve Bank of New York, 33 Liberty Street, New York, NY 10045,

and include the ABA No. 021030004, Account No. 68010727 and SWIFT address FRNYUS33. In the Field Tag 4200 of the Fedwire message enter: "D 68010727 Environmental Protection Agency." A note identifying the name and address of the party making payment, the Site name, U.S. EPA Region 5, and the Site/Spill ID Number WID988590261 shall also be included.

25. At the time of payment, Respondent shall send notice that payment has been made by email to acctsreceivable.cinwd@epa.gov and to:

U.S. EPA
Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, OH 45268

Notice shall include the site name and the EPA site identification number (Site/Spill ID Number WID988590261).

26. In the event that any payment is not made within the deadlines described above, Respondent shall pay interest on the unpaid balance. Interest is established at the rate specified in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). The interest shall begin to accrue on the date of Respondent's receipt of the bill (or for past response costs, on the Effective Date of this Settlement Agreement).

27. Interest shall accrue at the rate specified through the date of the payment. 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.

28. Respondent may contest payment of any oversight costs billed under Paragraph 24 if it determines that EPA has made an accounting 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 30 days of receipt of the bill and must be sent to EPA pursuant to Paragraph 78. Any such objection shall specifically identify the contested oversight costs and the basis for objection. In the event of an objection, Respondent shall within the 30-day period pay all uncontested oversight costs to EPA in the manner described in Paragraph 24. Simultaneously, Respondent shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State Wisconsin and remit to that escrow account funds equivalent to the amount of the contested oversight costs. Respondent shall send to the RPM a copy of the transmittal letter and check paying the uncontested oversight 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.

29. Simultaneously with establishment of the escrow account, Respondent shall initiate the dispute resolution procedures in Section IX (Dispute Resolution). If EPA prevails in the dispute, within five days of the resolution of the dispute, Respondent shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 24. If Respondent prevails concerning any aspect of the contested costs, Respondent shall pay that portion of the costs (plus

associated accrued interest) for which it did not prevail to EPA in the manner described in Paragraph 24.

30. 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 IX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondent's obligation to reimburse EPA for its oversight costs.

31. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested costs in accordance with Paragraph 24 on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the RPM. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within 20 calendar days after the dispute is resolved.

IX. DISPUTE RESOLUTION

32. The parties to this Settlement Agreement shall attempt to resolve, expeditiously and informally, any disagreements concerning this Settlement Agreement.

33. If Respondent objects to any EPA action taken pursuant to this Settlement Agreement, including billings for response costs, Respondent shall notify EPA in writing of its objection(s) within ten calendar days of such action, unless the objection(s) has (have) been informally resolved. This written notice shall include a statement of the issues in dispute, the relevant facts upon which the dispute is based, all factual data, analysis, or opinion supporting Respondent's position, and all supporting documentation on which Respondent relies (hereinafter the "Statement of Position").

34. EPA and Respondent shall, within 15 calendar days of EPA's receipt of Respondent's Statement of Position, attempt to resolve the dispute through formal negotiations ("Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. EPA's decision regarding an extension of the Negotiation Period shall not constitute an EPA action subject to dispute resolution or a final agency action giving rise to judicial review.

35. An administrative record of any dispute under this Section shall be maintained by EPA. The record shall include the written notification of such dispute, and the Statement of Position served pursuant to Paragraph 33.

36. Any agreement reached by the parties pursuant to this Section shall be in writing, signed by all parties, and shall upon signature by the parties be incorporated into and become an enforceable element of this Settlement Agreement. If the parties are unable to reach an agreement within the Negotiation Period, the Director of the Superfund Division, EPA Region 5 will issue a written decision on the dispute to Respondent. The decision of EPA shall be incorporated into and become an enforceable element of this Settlement Agreement upon Respondent's receipt of the EPA decision regarding the dispute.

37. 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. No EPA decision made pursuant to this Section shall constitute a final Agency action giving rise to judicial review.

X. FORCE MAJEURE

38. Respondent agrees to perform all requirements under 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, a "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 its contractors and subcontractors, that 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.

39. Respondent shall notify EPA orally within 24 hours after Respondent becomes aware of any event that Respondent contends constitute a force majeure and in writing within 7 calendar days after Respondent becomes aware of any events which constitute a force majeure. Such notice shall identify the event causing the delay or anticipated delay, estimate the anticipated length of delay (including necessary demobilization and remobilization), state the measures taken or to be taken to minimize the delay, and estimate the timetable for implementation of the measures.

40. Respondent shall take all reasonable measures to avoid and minimize the delays caused by a force majeure. Failure to comply with the notice provision of this Section shall be grounds for EPA to deny Respondent an extension of time for performance/waive any claim of force majeure by Respondent.

41. Respondent shall have the burden of demonstrating by a preponderance of the evidence that the event is a force majeure, that the delay is warranted under the circumstances, and that best efforts were exercised to avoid and mitigate the effects of the delay.

42. If EPA determines a delay in performance of a requirement under this Settlement Agreement is or was attributable to a force majeure, the time period for performance of that requirement shall be extended as deemed necessary by EPA. Such an extension shall not alter Respondent's obligation to perform or complete other tasks required by the Settlement Agreement that are not directly affected by the force majeure.

XI. STIPULATED AND STATUTORY PENALTIES

43. For each calendar day, or portion thereof, that Respondent fails to fully perform any requirement of this Settlement Agreement in accordance with the schedule established pursuant to this Settlement Agreement, Respondent shall be liable as follows:

- (a) failure to Submit a Draft EE/CA Report: \$1,000 per day for the first 7 days; \$2,500 per day for each day thereafter;
- (b) failure to Submit a Revised EE/CA Report: \$1,000 per day for the first 7 days; \$2,500 per day for each day thereafter;
- (c) failure to Submit Progress Reports or Other Miscellaneous Reports/Submittals: \$250 per day for the first 7 days; \$500 per day for each day thereafter;
- (d) failure to meet any scheduled deadline in the Settlement Agreement: \$250 per day for the first 7 days; \$500 per day for each day thereafter.

44. Upon receipt of written demand by EPA, Respondent shall make payment to EPA within 20 calendar days and interest shall accrue on late payments in accordance with Section VIII (Reimbursement of Costs) of this Settlement Agreement.

45. Even if violations are simultaneous, separate penalties shall accrue for separate violations of this Settlement Agreement. Penalties accrue and are assessed per violation per day. Penalties shall accrue regardless of whether EPA has notified Respondent of a violation or an act of noncompliance.

46. The payment of penalties shall not alter in any way Respondent's obligation(s) to complete the performance of the work required under this Settlement Agreement. Stipulated penalties shall accrue, but need not be paid, during any dispute resolution period concerning the particular penalties at issue. If Respondent prevail(s) upon resolution, Respondent shall pay only such penalties as the resolution requires. In its unreviewable discretion, EPA may waive its rights to demand all or a portion of the stipulated penalties due under this Section.

47. The stipulated penalties set forth above shall not be the sole or exclusive remedy for violations of this Settlement Agreement. Violation of any provision of this Settlement Agreement may subject Respondent to civil penalties of up to \$37,500 per violation per day, as provided in Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1).

48. Respondent may also be subject to punitive damages in an amount up to three times the amount of any cost incurred by the United States as a result of such violation, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Should Respondent violate this Settlement Agreement or any portion hereof, EPA may carry out the required actions unilaterally, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and/or may seek judicial enforcement of this Settlement Agreement pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606.

XII. OTHER CLAIMS

49. 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. The United States or EPA shall not be a party or be held out as a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out activities pursuant to this

Settlement Agreement. Each party shall bear its own costs and attorney's fees in connection with the action resolved by this Settlement Agreement.

50. Except as expressly provided in Section XIII (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 the Respondent or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or the common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106(a) or 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) or 9607(a).

51. This Settlement Agreement does not constitute a preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2). Respondent waive(s) any claim to payment under Sections 106(b), 111, and 112 of CERCLA, 42 U.S.C. §§ 9606(b), 9611, and 9612, against the United States or the Hazardous Substance Superfund arising out of any action performed under this Settlement Agreement.

52. 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).

XIII. COVENANT NOT TO SUE BY EPA

53. 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 pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the work that is required to be performed under this Settlement Agreement and as described in Section VI (Settlement Agreement and Order), and for oversight 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 the work set forth in Section VI (Settlement Agreement and Order), and payment of oversight costs pursuant to Section VIII (Reimbursement of Costs). This covenant not to sue extends only to Respondent and does not extend to any other person.

54. Except as otherwise specifically provided in this Settlement Agreement, upon issuance of the EPA notice referred to in Section XXI (Notice of Completion), EPA covenants not to sue Respondent for judicial imposition of damages or civil penalties or to take administrative action against Respondent for any failure to perform actions agreed to in this Settlement Agreement except as otherwise reserved herein.

55. These covenants not to sue are conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Settlement Agreement. These covenants not to sue extend only to Respondent and do not extend to any other person.

XIV. RESERVATIONS OF RIGHTS BY EPA

56. 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 on, at, or from the Site. 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.

57. The covenant not to sue set forth in Section XIII (Covenant Not to Sue By EPA) 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 other than oversight costs as defined in Section VIII (Reimbursement of Costs) of this Settlement Agreement;
- (c) liability for performance of response action other than the work required to be performed hereunder;
- (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 outside of the Site; and
- (g) liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

58. Work Takeover.

In the event EPA determines that Respondent has ceased implementation of any portion of the work required to be performed hereunder, is seriously or repeatedly deficient or late in its performance of the work, or is implementing the work in a manner that may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the work as EPA determines necessary. Respondent may invoke the procedures set forth in Section IX (Dispute Resolution) to dispute EPA's determination that takeover of the work is warranted under this paragraph. Costs incurred by the United States in performing the work pursuant to this paragraph shall be considered response costs that Respondent shall pay in accordance with the procedures described in Section VIII (Reimbursement of 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.

XV. COVENANT NOT TO SUE BY RESPONDENT

59. 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 or other requirements of this Settlement Agreement, including but not limited to:

- (a) any direct or indirect claim for reimbursement 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 response actions at or in connection with the Site, including any claim under the United States Constitution, the Wisconsin 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 Site.

60. Except as provided in Paragraph 62 of this Section, 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 Subparagraphs 57 and 58 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.

61. Nothing in this Settlement 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).

62. 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:

- (a) the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of (i) 0.002% of the total volume of waste at the Site or (ii) 110 gallons of liquid materials or 200 pounds of solid materials; and
- (b) this waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site.

63. 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 that has entered into a final de minimis settlement under Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), with EPA with respect to the Site as of the Effective Date.

XVI. CONTRIBUTION

64. 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 required to be performed under this Settlement Agreement as described in Section VI (Settlement Agreement and Order) and oversight costs as described in Section VIII (Reimbursement of Costs).

65. The parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondent has, as of the Effective Date, resolved its liability to the United States for the work required under this Settlement Agreement and oversight costs.

66. Nothing in this Settlement Agreement precludes the parties from asserting any claims, causes of action, or demands against any persons not parties to this Settlement Agreement for indemnification, contribution, or cost recovery.

XVII. INDEMNIFICATION

67. Respondent agrees to 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:

- (a) arising from, or on account of, acts or omissions of Respondent and Respondent’s officers, heirs, directors, employees, agents, contractors, subcontractors, receivers, trustees, successors, or assigns in carrying out actions pursuant to this Settlement Agreement; and
- (b) for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any persons for performance of work on or relating to the Site, including claims on account of construction delays.

Nothing in this Settlement Agreement, however, requires indemnification by Respondent for any claim or cause of action against the United States based on negligent action taken solely and directly by EPA (not including oversight or approval of plans or activities of Respondent).

XVIII. INSURANCE

68. At least 10 days prior to commencing any on-site 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

\$2,000,000, combined single limit, naming EPA as an additional insured. Within the same time 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 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 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 that is not maintained by such contractor or subcontractor.

XIX. FINANCIAL ASSURANCE

69. Within 30 days of the Effective Date, Respondent shall establish and maintain financial security for the benefit of EPA in the amount of \$1 million in one or more of the following forms in order to secure the full and final completion of the Work by Respondent:

- 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;
- 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 that ensures the payment and/or performance of the Work;
- e. a written guarantee to pay for or perform the Work provided by one or more parent companies of Respondent or by one or more unrelated companies that have a substantial business relationship with Respondent, including a demonstration that any such guarantor company satisfies the financial test requirements of 40 C.F.R. § 264.143(f); and/or
- f. a demonstration of sufficient financial resources to pay for the Work made by Respondent, which shall consist of a demonstration that Respondent satisfies the requirements of Section 40 C.F.R. § 264.143(f).

70. Any and all financial assurance instruments provided pursuant to this section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondent shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 69 above. In addition, if at any time EPA notifies Respondent that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondent shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this section) that reflects such cost increase. Respondent's inability to demonstrate financial assurance to

complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

71. If Respondent seeks to ensure completion of the Work through a guarantee pursuant to Paragraph 69.e or f of this Settlement Agreement, Respondent shall: (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. § 264.143(f) and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. § 264.143(f) annually, on the anniversary of the Effective Date or such other date as agreed by EPA, to EPA. For purposes of this Settlement Agreement, wherever 40 C.F.R. § 264.143(f) references "sum of current closure and post-closure cost estimates and the current plugging and abandonment cost estimates," the dollar amount to be used in the relevant financial test calculations shall be the current cost estimate of \$1 million for the Work at the Site plus any other RCRA, CERCLA, Toxic Substance Control Act or other federal environmental obligations financially assured by the Respondent or guarantor to EPA by means of passing a financial test.

72. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 69 of this section, Respondent may, on any anniversary date of the Effective Date or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this section to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this section, and may reduce the amount of the security after receiving written approval from EPA. In the event of a dispute, Respondent may seek dispute resolution pursuant to Section IX (Dispute Resolution). Respondent may reduce the amount of security in accordance with EPA's written decision resolving the dispute.

73. Respondent may change the form of financial assurance provided under this section at any time, upon notice to and prior written approval of EPA, provided that EPA determines that the new form of assurance meets the requirements of this section. In the event of a dispute, Respondent may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

XX. MODIFICATIONS

74. Except as otherwise specified in Section VI (Settlement Agreement and Order) of this Settlement Agreement, if any party believes modifications to any plan or schedule are necessary during the course of this project, it shall conduct informal discussions regarding such modifications with the other party. Any agreed-upon modifications to any plan or schedule shall be memorialized in writing within seven business days; however, the effective date of the modification shall be the date of the RPM's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual agreement of the parties. Any modification to this Settlement Agreement shall be incorporated into and made an enforceable part of this Settlement Agreement.

75. If Respondent seeks permission to deviate from any approved plan or schedule, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis.

76. No informal advice, guidance, suggestion, or comment by EPA regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligations to obtain such formal approval as may be required by this Settlement Agreement, and to comply with all requirements of this Settlement Agreement unless it is formally modified.

XXI. NOTICE OF COMPLETION

77. When EPA determines, after EPA's review of the EE/CA Report or the revised EE/CA Report, that all work has been fully performed in accordance with this Settlement Agreement, except for certain continuing obligations required by this Settlement Agreement (*e.g.*, record retention, payment of costs), EPA will provide written notice to Respondent. If EPA determines that any activities have not been completed in accordance with this Settlement Agreement, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the EE/CA Report or revised EE/CA Report if appropriate to correct such deficiencies. Respondent shall implement the modified and approved revised EE/CA Report and shall submit a modified final report in accordance with the EPA notice. Failure to implement the approved modifications into the revised EE/CA Report shall be a violation of this Settlement Agreement.

XXII. SUBMITTALS/CORRESPONDENCE

78. Any notices, documents, information, reports, plans, approvals, disapprovals, or other correspondence required to be submitted from one party to the other under this Settlement 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 Respondent shall be addressed to:

Mr. Thomas C. Baumgartner
Director, Safety & Environmental Compliance
Mercury Marine, a Division of Brunswick Corporation
W6250 West Pioneer Road
P.O. Box 1939
Fond du Lac, WI 54936-1939

Submissions to EPA shall be addressed to:

Mr. Scott Hansen
EPA Remedial Project Manager
United States Environmental Protection Agency-Region 5
Mail Code SR-6J
77 West Jackson Boulevard
Chicago, IL 60604

With copies to:

Mr. Richard Nagle
Assistant Regional Counsel
United States Environmental Protection Agency-Region 5
Mail Code C-14J
77 West Jackson Boulevard
Chicago, IL 60604

XXIII. SEVERABILITY

79. If a court issues an order that invalidates any provision of this Settlement Agreement or finds that Respondent has sufficient cause not to comply with one or more provisions of this Settlement Agreement, Respondent shall remain bound to comply with all provisions of this Settlement Agreement not invalidated by the court's order.

XXIV. EFFECTIVE DATE

80. This Settlement Agreement shall be effective upon signature by the Director, Superfund Division, EPA Region 5 ("Effective Date").

[Signature Page Follows]

The Undersigned Party enters into this Administrative Settlement Agreement and Order on Consent in the matter of the Cedar Creek Superfund Alternative Site, Cedar Creek OU2A – Cedar Creek Ponds, Cedarburg, Ozaukee County, Wisconsin.

Agreed this 9th day of July, 2014.

For Respondent:

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION

By



Todd Lemke

Vice President, General Counsel
Mercury Marine, division of Brunswick Corporation

IN THE MATTER OF:

Cedar Creek Superfund Alternative Site
Cedar Creek OU2A – Cedar Creek Ponds
Cedarburg, Ozaukee County, Wisconsin,

Respondent.

It is so **ORDERED AND AGREED** this 21 day of August, 2014.

By Jan Janaka
for Richard C. Karl, Director
Superfund Division
United States Environmental Protection Agency-Region 5

APPENDIX A
SITE MAP

