

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8  
AND  
THE STATE OF SOUTH DAKOTA

2018 FEB 12 AM 8:13

FILED  
EPA REGION VII  
HEARING CLERK

---

IN THE MATTER OF: )

Gilt Edge Mine Site )  
Lead, South Dakota )

Agnico Eagle Mines Limited, )

Lessee )

Proceeding Under the Comprehensive )  
Environmental Response, Compensation, )  
and Liability Act, 42 U.S.C. §§ 9601-9675 )

---

CERCLA Docket No. CERCLA-08-2018-0004

**ADMINISTRATIVE SETTLEMENT  
AGREEMENT AND ORDER ON  
CONSENT FOR WORK**

## I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent (Settlement) is entered into voluntarily by the United States Environmental Protection Agency (EPA), the State of South Dakota (State) and Agnico Eagle Mines Limited (Lessee). This Settlement provides for the performance of Work by Lessee and the payment of certain response costs incurred by the United States at or in connection with the property located 4.5 miles southeast of the town of Lead in the northern Black Hills in Lawrence County, South Dakota, known as the Gilt Edge Superfund Site (Site).

2. This Settlement is issued under the authority vested in the President of the United States by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601 – 9675. This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to Regional Administrators by EPA Delegation Nos. 14-14-C (Administrative Actions Through Consent Orders, Apr. 15, 1994) and 14-14-D (Cost Recovery Non-Judicial Agreements and Administrative Consent Orders, May 11, 1994). This Settlement is also entered into pursuant to the authority of the Attorney General to compromise and settle claims of the United States.

3. Lessee represents that it will meet all of the BFPP provisions in CERCLA §§ 101(40)(A)-(H) and 107(r)(1), 42 U.S.C. §§ 9601(40)(A)-(H) and 9607(r)(1) upon execution of a lease with the State of South Dakota, and that it will continue to comply with these requirements during the time in which it has an ownership (including leasehold) interest in the Site. In view, however, of the complex nature and significant extent of the Work to be performed in connection with the Site, and the risk of claims under CERCLA being asserted against Lessee as a consequence of Lessee's activities at the Site pursuant to this Settlement, one of the purposes of this Settlement is to resolve, subject to the reservations and limitations contained in Section XX (Reservations of Rights by United States), any potential liability of Lessee under CERCLA for the Existing Contamination as defined by Paragraph 8 below.

4. EPA, the State, and Lessee recognize that this Settlement has been negotiated in good faith and Lessee agrees to comply with and be bound by the terms of this Settlement and further agrees that it will not contest the basis or validity of this Settlement or its terms.

## II. PARTIES BOUND

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

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

7. Lessee shall provide a copy of this Settlement to each contractor hired to perform the Work required by this Settlement and to each person representing Lessee with respect to the Site or the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Settlement. Lessee or its contractors shall provide written notice of the Settlement to all subcontractors hired to perform any portion of the Work required by this Settlement. Lessee shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work in accordance with the terms of this Settlement.

### III. DEFINITIONS

8. Unless otherwise expressly provided in this Settlement, terms used in this Settlement 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 or its attached appendices, the following definitions shall apply:

“BFPP” shall mean a bona fide prospective lessee as described in Section 101(40) of CERCLA, 42 U.S.C. § 9601(40).

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

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

“Effective Date” shall mean the effective date of this Settlement as provided in Section XXIX.

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

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

“DENR” shall mean the South Dakota Department of Environment and Natural Resources and any successor departments or agencies of the State.

“Existing Contamination” shall mean:

- a. any hazardous substances, pollutants contaminants or Waste Materials present or existing on or under the Site as of the Effective Date;
- b. any hazardous substances, pollutants contaminants or Waste Materials that migrated from the Site prior to the Effective Date; and
- c. any hazardous substances, pollutants contaminants or Waste Materials presently at the Site that migrate onto or under or from the Site after the Effective Date.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, not inconsistent with the NCP, that the United States and the State incur in reviewing or developing deliverables submitted pursuant to this Settlement, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Settlement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, Section XIII (Emergency Response and Notification of Releases), Paragraph 80 (Work Takeover), Paragraph 98 (Access to Financial Assurance), Section XV (Dispute Resolution), and all litigation costs.

“Gilt Edge Special Account” shall mean the special account within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).

“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. Rates are available online at <http://www.epa.gov/superfund/superfund-interest-rates>.

“Lessee” shall mean Agnico Eagle Mines Limited.

“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.

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

“Parties” shall mean EPA, the State, and Lessee.

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

“RPM” shall mean the Remedial Project Manager as defined in 40 C.F.R. § 300.5.

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

“Settlement” shall mean this Administrative Settlement Agreement and Order on Consent for Work and all appendices attached hereto (listed in Section XXX (Integration/Appendices)). In the event of conflict between this Settlement and any appendix, this Settlement shall control.

“Site” shall mean the Gilt Edge Mine Superfund Site, encompassing approximately 390 acres, located 4.5 miles southeast of the town of Lead in the northern Black Hills in Lawrence County, South Dakota, and depicted generally on the map attached as Appendix A.

“State” shall mean the State of South Dakota.

“Statement of Work” or “SOW” shall mean the document describing the activities Lessee must perform pursuant to this Settlement, as set forth in Appendix B, and any modifications made thereto in accordance with this Settlement.

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

“Waste Material” shall mean (a) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (b) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (c) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (d) any “hazardous substances” under South Dakota Chapter 34A-11.

“Work” shall mean all activities and obligations Lessee is required to perform under this Settlement except those required by Section XI (Record Retention).

#### **IV. STATEMENT OF FACTS**

9. The Site is an abandoned gold mine located approximately 4.5 miles southeast of the town of Lead, in the northern Black Hills of Lawrence County, South Dakota.

10. Mining at the Site began in the late 1800s, and continued intermittently until 1999, when operator Brohm Mining Company (Brohm) became insolvent and abandoned the Site, leaving approximately 150 million gallons of acidic, lead, arsenic, and cadmium laden water in various open pits, as well as significant amounts of unsecured and uncontrolled acid generating waste rock.

11. In 2000, EPA added the Site to the National Priorities List, and divided the Site into three operable units (OUs).

12. Operable Unit 1 (OU1) is the primary mine disturbance area, and addresses existing contaminant sources within the primary mine disturbance area, such as acid generating waste rock and fills, spent ore, exposed acid generating bedrock, and sludge.

13. Operable Unit 2 (OU2) consists of water treatment, groundwater, and lower Strawberry Creek. This OU addresses (1) acid rock drainage, including acid rock drainage collection systems, pumping stations, pipelines, water treatment, and the future generation of acid rock drainage sludge; (2) groundwater contamination associated with the Site; and (3) contaminant sources, surface water and sediments in the lower Strawberry Creek area.

14. Operable Unit 3 (OU3) is the Ruby Gulch Waste Rock Dump. This OU addresses contaminant sources located within the Ruby Gulch waste rock dump.

15. EPA issued an Early Action Interim Record of Decision for OU2 in April 2001 to continue water treatment activities previously assumed by the State, followed by an Interim Record of Decision for OU2 in November 2001. The interim OU2 remedy included additional collection of acid rock drainage and construction of a new water treatment plant to treat contaminated waters generated at the Site. The Site currently generates an average of 95 million

gallons of acid rock drainage per year, which is collected and treated before discharge into Strawberry Creek.

16. EPA's investigation of the releases of hazardous substances in OU2 is ongoing.

17. EPA issued an Interim Record of Decision for OU3 in August, 2001 to address contamination associated with the largest acid rock drainage source on the Site, the Ruby Gulch Waste Rock Dump.

18. EPA issued a Record of Decision for OU1 in 2008, and selected a remedy focused on containment of contaminant sources within the primary disturbance area. In 2014, EPA issued an Explanation of Significant Differences, modifying the Record of Decision to further reduce the volume of acid rock drainage generated at the Site. Construction on the OU1 remedy began 2017.

19. The Lessee is a Canadian company doing business in the State of South Dakota.

## **V. DETERMINATIONS**

20. Based on the Statement of Facts set forth above, EPA has determined that:

a. The Gilt Edge Mine Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

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

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

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

e. The Work required by this Settlement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VI. SETTLEMENT AGREEMENT AND ORDER**

21. Based upon the Statements of Facts and Determinations set forth above, it is hereby Ordered and Agreed that Lessee shall comply with all provisions of this Settlement, including, but not limited to, all appendices to this Settlement and all documents incorporated by reference into this Settlement.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND REMEDIAL PROJECT MANAGER**

22. Lessee may retain one or more contractors or subcontractors to perform the Work and shall notify EPA of the names, titles, addresses, telephone numbers, email addresses, and qualifications of such contractors or subcontractors within 7 days after the Effective Date. Lessee shall also notify EPA of the names, titles, contact information, and qualifications of any other contractors or subcontractors retained to perform the Work at least 7 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Lessee. If EPA disapproves of a selected contractor or subcontractor, Lessee shall retain a different contractor or subcontractor and shall notify EPA of that contractor's or subcontractor's name, title, contact information, and qualifications within 7 days after EPA's disapproval. With respect to any proposed contractor performing activities related to the Work, Lessee shall demonstrate that the proposed contractor demonstrates compliance with ASQ/ANSI E4:2014 "Quality management systems for environmental information and technology programs – Requirements with guidance for use" (American Society for Quality, February 2014), 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, Reissued May 2006) or equivalent documentation as determined by EPA. The qualifications of the persons undertaking the Work for Lessee shall be subject to EPA's review for verification based on objective assessment criteria (e.g., experience, capacity, technical expertise) and that they do not have a conflict of interest with respect to the project.

23. Lessee has designated, and EPA has approved, Sandor Ringhoffer as its Project Coordinator who shall be responsible for administration of all actions by Lessee required by this Settlement. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA and retains the right to disapprove of the designated Project Coordinator who does not meet the requirements of Paragraph 22. If EPA disapproves of the designated Project Coordinator, Lessee shall retain a different Project Coordinator and shall notify EPA of that person's name, title, contact information, and qualifications within 7 days following EPA's disapproval. Notice or communication relating to this Settlement from EPA to Lessee's Project Coordinator shall constitute notice or communication to Lessee.

24. EPA has designated Joy Jenkins of the Superfund Remedial Program, as its Remedial Project Manager (RPM). EPA and Lessee shall have the right, subject to Paragraph 23, to change their respective designated RPM or Project Coordinator. Lessee shall notify EPA 7 days before such a change is made. The initial notification by Lessee may be made orally, but shall be promptly followed by a written notice.

25. The RPM shall be responsible for overseeing Lessee's implementation of this Settlement. The RPM shall have the authority stated in the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement, or to direct any other response action undertaken 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. WORK TO BE PERFORMED

26. Lessee shall perform, at a minimum, all actions necessary to implement the SOW, and approved Work Plans, which comprise studies to determine sources of cadmium contamination found in lower Strawberry Creek. The SOW and approved Work Plans will include a hydrogeological study of fracture zone and groundwater flow, and a study of sediments and potential near surface sources along lower Strawberry Creek. The activities are anticipated to assist EPA and the State in future remedy selection. Lessee shall develop technical reports to document the findings of the studies that will be used in the future development by EPA of a final remedial investigation for OU2. Specific activities include the following:

- a. Subsurface-Hydrogeological Investigation: Borehole drilling and logging, collection of core samples, subsurface measurements that may include borehole imaging such as video, sonar, or other downhole monitoring technologies. Geochemical characterization of core samples, including acid base accounting (ABA). Abandonment of boreholes, once data collection is complete, will require complete sealing and grouting the length of the borehole.
- b. Strawberry Creek Surface Source Investigation: Data collection for surface and near surface sources may include topographical surveys such as Light Detection and Ranging (LIDAR), and walking surveys, sediment and soil sampling for geochemical characterization including ABA, water sampling, flow monitoring, and weather monitoring (station installation).
- c. Site Facility Upgrades: Site facility upgrades or improvements to be implemented by Lessee to accommodate requirements for office space, communications, and data processing for the purposes of supporting the investigations described above.

27. For any regulation or guidance referenced in the Settlement, the reference will be read to include any subsequent modification, amendment, or replacement of such regulation or guidance. Such modifications, amendments, or replacements apply to the Work only after Lessee receives notification from EPA of the modification, amendment, or replacement.

### 28. Work Plans and Implementation

a. Within 7 days after the Effective Date, in accordance with Paragraph 29 (Submission of Deliverables), Lessee shall submit to EPA for approval a draft work plan to implement the SOW generally described in Paragraph 26(a) above. Within 30 days after the Effective Date, in accordance with Paragraph 29 (Submission of Deliverables), Lessee shall submit to EPA for approval a draft work plan to implement the SOW generally described in Paragraph 26(b) and 26(c) above. The Work implementing the SOWs generally described in Paragraph 26(a), 26(b), and 26(c) is collectively referred to as the "Work Plans." The draft Work Plans shall provide a description of, and an expeditious schedule for, the actions required by this Settlement.

b. EPA may approve, disapprove, require revisions to, or modify each draft Work Plan in whole or in part. If EPA requires revisions, Lessee shall submit a revised draft Work Plan within 7 days of receipt of EPA's notification of the required revisions. Lessee shall implement the Work Plan as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Settlement.

c. Upon approval or approval with modifications of the Work Plans, Lessee shall commence implementation of the Work in accordance with the schedule included therein. Lessee shall not commence or perform any Work except in conformance with the terms of this Settlement.

d. Unless otherwise provided in this Settlement, any additional deliverables that require EPA approval under the SOW and/or Work Plan shall be reviewed and approved by EPA in accordance with this Paragraph.

**29. Submission of Deliverables**

a. General Requirements for Deliverables

(1) Except as otherwise provided in this Settlement, Lessee shall direct all submissions required by this Settlement to the RPM by email at [jenkins.joy@epa.gov](mailto:jenkins.joy@epa.gov) or mail to:

Joy Jenkins  
US Environmental Protection Agency Region 8  
8EPR-SR  
1595 Wynkoop St.  
Denver, CO 80202

and the State at:

Mark Lawrensen  
South Dakota Department of Environment and Natural Resources  
523 East Capitol Ave.  
Pierre, South Dakota 57501-3182

Lessee shall submit all deliverables required by this Settlement, the attached SOW, or any approved work plan to EPA in accordance with the schedule set forth in such plan.

(2) Lessee shall submit all deliverables in electronic form and paper copies of all final versions of reports, SAP, QAPP, maps and figures shall also be submitted to EPA and the State. Technical specifications for sampling and monitoring data and spatial data are addressed in Paragraph 29.b. All other deliverables shall be submitted to EPA in the form specified by the RPM. If any

deliverable includes maps, drawings, or other exhibits that are larger than 8.5 x 11 inches, Lessee shall also provide EPA with paper copies of such exhibits.

b. Technical Specifications for Submission of Environmental Data.

(1) Sampling and monitoring data should be submitted in standard Regional Electronic Data Deliverable (EDD) format as found in the Region 8 Data Management Plan Guidance (2017, or most current version at start of Work). Environmental data will be entered into SCRIB by EPA or EPA contractors for data management. Other delivery methods may be allowed if electronic direct submission presents a significant burden or as technology changes.

(2) Spatial data, including spatially-referenced data and geospatial data, should be submitted in accordance with the US EPA Region 8 GIS Deliverable Guidance (May 24, 2017, or most current version at start of Work).

(3) Each file must include an attribute name for each site unit or sub-unit submitted. Consult <http://www.epa.gov/geospatial/geospatial-policies-and-standards> for any further available guidance on attribute identification and naming.

(4) Spatial data submitted by Lessee does not, and is not intended to, define the boundaries of the Site.

30. Health and Safety Plan. In accordance with the schedule set forth in the SOW, Lessee shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-site work under this Settlement. This plan shall be prepared in accordance with “OSWER Integrated Health and Safety Program Operating Practices for OSWER Field Activities,” Pub. 9285.0-OIC (Nov. 2002), available on the NSCEP database at <http://www.epa.gov/nscep>, and “EPA’s Emergency Responder Health and Safety Manual,” OSWER Directive 9285.3-12 (July 2005 and updates), available at <http://www.epaosc.org/HealthSafetyManual/manual-index.htm>. 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 for potential mine impacted water releases. EPA may comment and make recommendation to the Health and Safety Plan, however, Lessee assumes full responsibility to adhere to applicable OSHA regulations. Lessee shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the response action.

31. Quality Assurance, Sampling, and Data Analysis

a. Lessee shall use quality assurance, quality control, and other technical activities and chain of custody procedures for all environmental samples collected related to the Work consistent with “EPA Requirements for Quality Assurance Project Plans (QA/R5)” EPA/240/B-01/003 (March 2001, reissued May 2006), “Guidance for Quality Assurance Project

Plans (QA/G-5)” EPA/240/R-02/009 (December 2002), or “Uniform Federal Policy for Quality Assurance Project Plans,” Parts 1-3, EPA/505/B-04/900A-900C (March 2005).

b. Sampling and Analysis Plan. Within 7 days after the Effective Date, Lessee shall submit a Sampling and Analysis Plan related to the Work to EPA for review and approval. This plan shall consist of a Field Sampling Plan (FSP) and a Quality Assurance Project Plan (QAPP) that is consistent with the SOW, the NCP and applicable guidance documents, including, but not limited to, “Guidance for Quality Assurance Project Plans (QA/G-5)” EPA/240/R-02/009 (December 2002), “EPA Requirements for Quality Assurance Project Plans (QA/R-5)” EPA 240/B-01/003 (March 2001, reissued May 2006), or “Uniform Federal Policy for Quality Assurance Project Plans,” Parts 1-3, EPA/505/B-04/900A-900C (March 2005). Upon its approval by EPA, the Sampling and Analysis Plan shall be incorporated into and become enforceable under this Settlement. For current Region 8 QA requirements and guidance, refer to <https://www.epa.gov/quality/managing-quality-environmental-data-epa-region-8>.

c. Lessee shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Lessee in implementing this Settlement. In addition, Lessee shall ensure that such laboratories shall analyze pursuant to this Settlement all samples submitted by EPA pursuant to the QAPP for quality assurance, quality control, and technical activities that will satisfy the stated performance criteria as specified in the QAPP and that environmental sampling and field activities are conducted in accordance with the Agency’s “EPA QA Field Activities Procedure,” CIO 2105-P-02.1 (9/23/2014) available at <http://www.epa.gov/irmpoli8/epa-qa-field-activities-procedures>. Lessee shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Settlement meet the competency requirements set forth in EPA’s “Policy to Assure Competency of Laboratories, Field Sampling, and Other Organizations Generating Environmental Measurement Data under Agency-Funded Acquisitions” available at <http://www.epa.gov/measurements/documents-about-measurement-competency-under-acquisition-agreements> and that the laboratories perform all analyses according to accepted EPA methods. Accepted EPA methods consist of, but are not limited to, methods that are documented in the EPA’s Contract Laboratory Program (<http://www.epa.gov/clp>), SW 846 “Test Methods for Evaluating Solid Waste, Physical/Chemical Methods” (<http://www3.epa.gov/epawaste/hazard/testmethods/sw846/online/index.htm>), “Standard Methods for the Examination of Water and Wastewater” (<http://www.standardmethods.org/>), 40 C.F.R. Part 136, “Air Toxics - Monitoring Methods” (<http://www3.epa.gov/ttnamti1/airtox.html>). It is anticipated that assay tests of the borehole core samples will not be covered by EPA or standard environmental methods. Other specialized tests may be performed by Lessee for Lessee’s own purposes.

d. However, upon approval by EPA, after a reasonable opportunity for review and comment by the State, Lessee may use other appropriate analytical method(s), as long as (i) quality assurance/quality control (QA/QC) criteria are contained in the method(s) and the method(s) are included in the QAPP, (ii) the analytical method(s) are at least as stringent as the methods listed above, and (iii) the method(s) have been approved for use by a nationally recognized organization responsible for verification and publication of analytical methods, e.g., EPA, ASTM, NIOSH, OSHA, etc. Lessee shall ensure that all laboratories they use for analysis of samples taken pursuant to this Settlement have a documented Quality System that complies

with ASQ/ANSI E4:2014 “Quality management systems for environmental information and technology programs - Requirements with guidance for use” (American Society for Quality, February 2014), and “EPA Requirements for Quality Management Plans (QA/R-2)” EPA/240/B-01/002 (March 2001, reissued May 2006), or equivalent documentation as determined by EPA. EPA may consider Environmental Response Laboratory Network (ERLN) laboratories, laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP), or laboratories that meet International Standardization Organization (ISO 17025) standards or other nationally recognized programs as meeting the Quality System requirements. Lessee shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Settlement are conducted in accordance with the procedures set forth in the QAPP approved by EPA.

e. Upon request, Lessee shall provide split or duplicate environmental samples related to the Work to EPA and the State or their authorized representatives. Lessee shall notify EPA and the State not less than 7 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA and the State shall have the right to take any additional samples related to the Work that EPA or the State deem necessary. Upon request, EPA and the State shall provide to Lessee split or duplicate samples of any samples they take as part of EPA’s oversight of Lessee’s implementation of the Work.

f. Other than resource related data associated with the exploration activities, Lessee shall submit to EPA and the State results of all sampling and/or tests or other data obtained or generated by or on behalf of Lessee with respect to the Site and/or the implementation of this Settlement.

32. Progress Reports. Lessee shall submit a written monthly progress report to EPA and the State concerning actions undertaken pursuant to this Settlement, or as otherwise requested by EPA, from 30 days after the Effective Date until issuance of Notice of Completion of Work pursuant to Section XXVIII, unless otherwise directed in writing by the RPM. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

33. Final Report. Within 60 days after completion of all Work required by this Settlement, other than continuing obligations listed in Paragraph 104 (Notice of Completion), Lessee shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Settlement. The format of the final report or reports is included in the SOW. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP titled “OSC Reports.” The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the Work

(e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a responsible corporate official of Lessee or Lessee's Project Coordinator: "I certify under penalty of law that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this document and all attachments, the information submitted is true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

#### 34. Off-Site Shipments and Wastes Generated On-Site

a. Lessee may ship hazardous substances, pollutants and contaminants from the Site to an off-Site facility only if it complies with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Lessee will be deemed to be in compliance with CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440 regarding a shipment if Lessee obtains a prior determination from EPA that the proposed receiving facility for such shipment is acceptable under the criteria of 40 C.F.R. § 300.440(b).

b. Lessee may ship Waste Material from the Site to an out-of-state waste management facility only if, prior to any shipment, it provides written notice to the appropriate state environmental official in the receiving facility's state and to the RPM. This written notice requirement shall not apply to any off-Site shipments when the total quantity of all such shipments will not exceed ten cubic yards. The written notice must include the following information, if available: (1) the name and location of the receiving facility; (2) the type and quantity of Waste Material to be shipped; (3) the schedule for the shipment; and (4) the method of transportation. Lessee also shall notify the state environmental official referenced above and the RPM of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. Lessee shall provide the written notice after the award of the contract for the Work and before the Waste Material is shipped.

c. Lessee may ship Investigation Derived Waste (IDW) from the Site to an off-Site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), 40 C.F.R. § 300.440, EPA's "Guide to Management of Investigation Derived Waste," OSWER 9345.3-03FS (Jan. 1992), and any IDW-specific. Wastes shipped off-Site to a laboratory for characterization, and RCRA hazardous wastes that meet the requirements for an exemption from RCRA under 40 C.F.R. § 261.4(e) shipped off-Site for treatability studies, are not subject to 40 C.F.R. § 300.440.

d. Certain investigation-derived waste generated from drilling activities such as water collected in the solid removal unit (SRU) and borehole cuttings that are not collected as samples may be disposed of in the on-Site sludge repository with prior written approval from the RPM with concurrence from the State. If drilling occurs on undisturbed ground without pre-existing mining waste, sumps must be lined and sump water collected for disposal or tested to verify compliance with State surface water quality standards before discharge to the ground.

Drill cuttings must also be collected and disposed of if drilling is conducted on undisturbed ground.

## **IX. PROPERTY REQUIREMENTS**

35. Lessee agrees to provide the State, EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Site and to any other property owned or controlled by Lessee to which access is required for the implementation of response actions at the Site. EPA agrees to provide reasonable notice to Lessee of the timing of response actions to be undertaken at the Site and other areas owned or controlled by Lessee. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and other authorities.

36. For so long as Lessee is a tenant of the Property, Lessee shall require that assignees, successors in interest, and any lessees, sublessees and other parties with rights to use the Property shall provide access and cooperation to the State, EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Lessee shall require that assignees, successors in interest, and any lessees, sublessees, and other parties with rights to use the Property implement and comply with any land use restrictions and institutional controls on the Property in connection with the Work, and not contest EPA's authority to enforce any land use restrictions and institutional controls on the Site.

37. Lessee shall provide a copy of this Settlement to any current, sublessee, and other party with rights to use the Site as of the Effective Date.

38. Notwithstanding any provision of this Settlement, EPA and the State retain all of their access authorities and rights, as well as all of its rights to require land, water or other resource use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

## **X. ACCESS TO INFORMATION**

39. Lessee shall, subject to the record retention period in Paragraph 43 and, if necessary, in accordance with Paragraph 40, provide to EPA and the State, upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as "Records") within Lessee's possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Settlement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Work. Lessee 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.

#### 40. Privileged and Protected Claims

a. Lessee may assert all or part of a Record requested by EPA or the State is privileged or protected as provided under federal law, in lieu of providing the Record, provided Lessee complies with Paragraph 40.b, and except as provided in Paragraph 40.c.

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

c. Except for Business Confidential Claims permitted in Paragraph 41, Lessee may make no claim of privilege or protection regarding: (1) any data, other than non-environmental data, regarding the Site, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or (2) the portion of any Record that Lessee is required to create or generate pursuant to this Settlement.

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

42. Notwithstanding any provision of this Settlement, EPA and the State retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

### **XI. RECORD RETENTION**

43. Until ten (10) years after EPA provides Lessee with notice, pursuant to Section XXVIII (Notice of Completion of Work), that all Work has been fully performed in accordance with this Settlement, Lessee shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in their possession or control, or that come into their possession or control, that relate in any manner to Lessee's representations of the BFPP provisions of CERCLA §§ 101(40)(A)-(H) and 107(r)(1), 42 U.S.C. §§ 9601 (40)(A)-(H) and

9607(r)(1) with regard to the Site, provided, however, that a Lessee who is potentially liable as an owner or operator of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Lessee must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in their possession or control or that come into their possession or control that relate in any manner to the performance of the Work, provided, however, that Lessee (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

44. At the conclusion of the document retention period, Lessee shall notify EPA at least 90 days prior to the destruction of any such Records, and, upon request by EPA, and except as provided in Paragraph 40 (Privileged and Protected Claims), Lessee shall deliver any such Records to EPA.

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

## **XII. COMPLIANCE WITH OTHER LAWS**

47. Nothing in this Settlement limits Lessee's obligations to comply with the requirements of all applicable state and federal laws and regulations, except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-site actions required pursuant to this Settlement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (ARARs) under federal environmental or state environmental or facility siting laws. Lessee shall identify ARARs in the Work Plan subject to EPA approval.

48. No local, state, or federal permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work), 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 that is not on-site requires a federal or state permit or approval, Lessee shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. Lessee may seek relief under the provisions of Section XVI (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval required for the Work, provided that they have submitted timely and complete applications and

taken all other actions necessary to obtain all such permits or approvals. This Settlement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

### **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

49. **Emergency Response.** If any event occurs during performance of the Work that causes or threatens to cause a release of Waste Material on, at, or from the Site that either constitutes an emergency situation or that may present an immediate threat to public health or welfare or the environment, Lessee shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release. Lessee shall take these actions in accordance with all applicable provisions of this Settlement, including, but not limited to, the Health and Safety Plan. Lessee shall also immediately notify the RPM or, in the event of his/her unavailability, the Regional Duty Officer at 303-293-1788 of the incident or Site conditions. The Lessee shall also notify the State in accordance with Section XXXIII (Notices). In the event that Lessee fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Lessee shall reimburse EPA for all costs of such response action not inconsistent with the NCP pursuant to Section XIV (Payment of Future Response Costs).

50. **Release Reporting.** Upon the occurrence of any event during performance of the Work that Lessee is required to report pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), 42 U.S.C. § 11004, Lessee shall immediately orally notify the RPM or, in the event of his/her unavailability, the Regional Duty Officer at 303-293-1788, and the National Response Center at (800) 424-8802. 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.

51. For any event covered under this Section, Lessee shall submit a written report to EPA within 7 days after the onset of such event, setting forth the action or event that occurred and the measures taken, and to be taken, to mitigate any release or threat of release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release or threat of release.

### **XIV. PAYMENT OF FUTURE RESPONSE COSTS**

52. Payments for Future Response Costs. Lessee shall pay to EPA all Future Response Costs not inconsistent with the NCP.

- a. **Periodic Bills.** On a periodic basis, EPA will send Lessee an electronic billing notification to the following email address:  
gregg.loptien@agnicoeagle.com

The billing notification will include a standard regionally-prepared cost report with the direct and indirect costs incurred by EPA and its contractors. Lessee shall make all payments within 30 days of receipt of the electronic bill, except otherwise provided in Paragraph 53 (Contesting Future Response Costs). Lessee shall make payments using one of the payment methods set forth in the electronic billing notification.

Lessee may change its email billing address by providing notice of the new address to:

Financial Management Officer  
US EPA Region 8 (TMS-FMP)  
1595 Wynkoop Street  
Denver, Colorado 80202

If the electronic billing notification is undeliverable, EPA will mail a paper copy to the billing notification to Lessee to:

Gregg Loptien  
Agnico Eagle Mines Ltd. (USA)  
1675 East Prater Way, Suite 102  
Sparks, Nevada 89434

b. At the time of each payment, Lessee shall send notice that such payment has been made to RPM and to the EPA Cincinnati Finance Office by email at [cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov), and to [mcguffey.elizabeth@epa.gov](mailto:mcguffey.elizabeth@epa.gov) and shall reference Site/Spill ID Number 087T and the EPA docket number for this action.

c. Deposit of Future Response Costs Payments. The total amount to be paid by Lessee pursuant to Paragraph 52 may be deposited by EPA in the Gilt Edge Mine Site Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund, provided, however, that EPA may deposit any Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Gilt Edge Mine Site Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by Lessee pursuant to the dispute resolution provisions of this Settlement or in any other forum.

d. Interest. In the event that any payment for Future Response Costs is not made within thirty (30) days of Lessee's receipt of a bill, Lessee shall pay Interest on the unpaid balance. Interest shall begin to accrue on the date of the bill. The Interest shall continue to accrue through the date of Lessee's 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 Lessee's failure to make timely payments under this Section, including but not limited to, payments of stipulated penalties pursuant to Section XVII (Stipulated Penalties).

53. Contesting Future Response Costs. Lessee may initiate the procedures of Section XV (Dispute Resolution) regarding payment of any Future Response Costs billed under

Paragraph 52 (Payments of Future Response Costs) if it determines that EPA has made a mathematical error or included a cost item that is not within the definition of Future Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. To initiate such dispute, Lessee shall submit a Notice of Dispute in writing to the RPM within 30 days after receipt of the bill. Any such Notice of Dispute shall specifically identify the contested Future Response Costs and the basis for objection. If Lessee submits a Notice of Dispute, Lessee shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 52, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC) and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Lessee shall send to the RPM a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If EPA prevails in the dispute, within 5 days after the resolution of the dispute, the escrow agent shall release the sums due (with accrued interest) to EPA in the manner described in Paragraph 52. If Lessee prevails concerning any aspect of the contested costs, the escrow agent shall release that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in Paragraph 52. Lessee shall be disbursed any balance of the escrow account within 5 days after the resolution of the dispute. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Lessee's obligation to reimburse EPA for its Future Response Costs.

## **XV. DISPUTE RESOLUTION**

54. Unless otherwise expressly provided for in this Settlement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement. The Parties shall attempt to resolve any disagreements concerning this Settlement expeditiously and informally.

55. Informal Dispute Resolution. If Lessee objects to any EPA action taken pursuant to this Settlement, including billings for Future Response Costs, it shall send EPA a written Notice of Dispute describing the objection(s) within 14 days after such action. EPA and Lessee shall have 30 days from EPA's receipt of Lessee's Notice of Dispute to resolve the dispute through informal negotiations (the Negotiation Period). The Negotiation Period may be extended at the sole discretion of EPA. 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.

56. Formal Dispute Resolution. If the Parties are unable to reach an agreement within the Negotiation Period, Lessee shall, within 20 days after the end of the Negotiation Period, submit a statement of position to the RPM. EPA may, within 20 days thereafter, submit a

statement of position. Thereafter, an EPA management official at the Supervisory level or higher will issue a written decision on the dispute to Lessee. EPA's decision shall be incorporated into and become an enforceable part of this Settlement. Lessee shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

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

#### **XVI. FORCE MAJEURE**

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

59. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement for which Lessee intends or may intend to assert a claim of force majeure, Lessee shall notify EPA's RPM orally or, in her absence, the Director of the Superfund Remedial Program, EPA Region 8, within 10 days of when Lessee first knew that the event might cause a delay. Within 5 days thereafter, Lessee shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Lessee's rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Lessee, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Lessee shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Lessee shall be deemed to know of any circumstance of which Lessee, any entity controlled by Lessee, or Lessee's contractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Lessee from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under Paragraph 58 and whether Lessee

has exercised their best efforts under Paragraph 58, EPA may, in its unreviewable discretion, excuse in writing Lessee's failure to submit timely or complete notices under this Paragraph.

60. If EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Settlement that are affected by the force majeure will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify Lessee in writing of its decision. If EPA agrees that the delay is attributable to a force majeure, EPA will notify Lessee in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure

61. If Lessee elects to invoke the dispute resolution procedures set forth in Section XV (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Lessee shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Lessee complied with the requirements of Paragraphs 58 and 59. If Lessee carries this burden, the delay at issue shall be deemed not to be a violation by Lessee of the affected obligation of this Settlement identified to EPA.

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

#### **XVII. STIPULATED PENALTIES**

63. Lessee shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 64 and 65 for failure to comply with the obligations specified in Paragraphs 64.b and 65, unless excused under Section XVI (Force Majeure). "Comply" as used in the previous sentence include compliance by Lessee with all applicable requirements of this Settlement, within the deadlines established under this Settlement.

64. Stipulated Penalty Amounts – Payments, Financial Assurance

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 64.b:

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

b. Obligations

- (1) Payment of any amount due under Section XIV (Payment of Future Response Costs).
- (2) Establishment and maintenance of financial assurance in accordance with Section XXVI (Financial Assurance).
- (3) Establishment of an escrow account to hold any disputed Future Response Costs under Paragraph 53 (Contesting Future Response Costs).

65. Stipulated Penalty Amounts – Other Deliverables. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables pursuant to this Settlement, other than those specified in Paragraph 64.a:

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

66. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 80 (Work Takeover), Lessee shall be liable for a stipulated penalty in the amount of \$ 10,000. Stipulated penalties under this Paragraph are in addition to the remedies available to EPA under Paragraphs 80 (Work Takeover) and 98 (Access to Financial Assurance).

67. 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. Penalties shall continue to accrue during any dispute resolution period, and shall be paid within 15 days after the agreement or the receipt of EPA's decision or order. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under Paragraph 28 (Work Plan and Implementation), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Lessee of any deficiency; and (b) with respect to a decision by the EPA Management Official at the Director level or higher, under Paragraph 56 (Formal Dispute Resolution), during the period, if any, beginning on the 21<sup>st</sup> day after the Negotiation Period begins until the date that the EPA Management Official issues a final decision regarding such dispute. Nothing in this Settlement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement.

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

69. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Lessee's receipt from EPA of a demand for payment of the penalties, unless Lessee invokes the Dispute Resolution procedures under Section XII (Dispute Resolution) within the 30-day period. All payments to EPA under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with Paragraph 52 (Payments for Future Response Costs).

70. If Lessee fails to pay stipulated penalties when due, Lessee shall pay Interest on the unpaid stipulated penalties as follows: (a) if Lessee timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to Paragraph 52.d until the date of payment; and (b) if Lessee fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under Paragraph 52 until the date of payment. If Lessee fails to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

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

72. Nothing in this Settlement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA or the State to seek any other remedies or sanctions available by virtue of Lessee's violation of this Settlement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Settlement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, (Reservation of Rights by the United States), Paragraph 80.

73. 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.

#### **XVIII. CERTIFICATION**

74. By entering into this Settlement, Lessee certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Lessee and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Settlement. Lessee also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. Lessee further certifies to the representations made under Paragraph 3.

#### **XIX. COVENANTS BY UNITED STATES AND THE STATE**

75. Except as provided in Section XX (Reservations of Rights by United States), the United States and the State covenant not to sue or to take administrative action against Lessee

pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work, Existing Contamination, and Future Response Costs. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the complete and satisfactory performance by Lessee of their obligations under this Settlement. These covenants are also conditioned upon the veracity of the information provided to EPA by Lessee relating to Lessee's Work at the Site and the certification made by Lessee in Paragraph 74. This covenant extends only to Lessee and does not extend to any other person.

76. Nothing in this Settlement constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, or the State to seek or obtain further relief from Lessee, if the information provided to EPA by Lessee relating to Lessee's Work at the Site, or the certification made by Lessee in Paragraph 74, is false or in any material respect, inaccurate.

## **XX. RESERVATIONS OF RIGHTS BY UNITED STATES AND THE STATE**

77. Except as specifically provided in this Settlement, nothing in this Settlement shall limit the power and authority of the United States and/or the State 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, except as specifically provided in this Settlement, nothing in this Settlement shall prevent the United States and/or the State from seeking legal or equitable relief to enforce the terms of this Settlement, from taking other legal or equitable action as it deems appropriate and necessary.

78. The covenants set forth in Section XIX (Covenants by the United States and the State) do not pertain to any matters other than those expressly identified therein. The United States and the State reserve, and this Settlement is without prejudice to, all rights against Lessee with respect to all other matters, including, but not limited to:

- a. liability for failure by Lessee to meet a requirement of this Settlement;
- b. criminal liability;
- c. liability for violations of federal or state law that occur during or after implementation of the Work;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants at or in connection with the Site after the Effective Date, not within the definition of Existing Contamination;
- f. liability resulting from exacerbation of Existing Contamination not associated with the Work by Lessee, its successors, assigns, lessees, or sublessees; and

- g. liability arising from the disposal, release or threat of release of Waste Materials outside of the Site.

79. With respect to any claim or cause of action asserted by the United States, Lessee shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination and that Lessee has complied with all of the requirements of 42 U.S.C. §§ 9601(40)(A)-(H) and 9607(r)(1).

80. Work Takeover

a. In the event EPA determines that Lessee: (1) has ceased implementation of any portion of the Work, (2) is seriously or repeatedly deficient or late in its performance of the Work, or (3) is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may issue a written notice (Work Takeover Notice) to Lessee. Any Work Takeover Notice issued by EPA (which writing may be electronic) will specify the grounds upon which such notice was issued and will provide Lessee a period of 15 days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 15-day notice period specified in Paragraph 80.a, Lessee has not remedied or begun to remedy to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary (Work Takeover). EPA will notify Lessee in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 80.b.

c. Lessee may invoke the procedures set forth in Section XII (Formal Dispute Resolution) to dispute EPA's implementation of a Work Takeover under Paragraph 80.b. However, notwithstanding Lessee invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 80.b until the earlier of (1) the date that Lessee remedies, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, or (2) the date that a written decision terminating such Work Takeover is rendered in accordance with Paragraph 56 (Formal Dispute Resolution).

d. Notwithstanding any other provision of this Settlement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XXI. COVENANTS BY LESSEE**

81. Lessee covenants not to sue and agrees not to assert any claims or causes of action against the State, the United States, or their contractors or employees, with respect to Existing Contamination, the Work, Future Response Costs, and this Settlement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through 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 State of South Dakota Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law; or

c. any claim pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law regarding, the Work, Future Response Costs, and this Settlement.

82. 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 any of the reservations set forth in Section XX (Reservations of Rights by the United States and the State), other than in Paragraph 78.a (liability for failure to meet a requirement of the Settlement), 78.b (criminal liability), or 78.c (violations of federal/state law during or after implementation of the Work), but only to the extent that Lessee's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

83. Nothing in this Settlement 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).

84. Lessee reserves, and this Settlement is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA; for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Lessee's deliverables or activities.

85. Lessee reserves, and this Settlement is without prejudice to, arguments that any claim or cause of action, or part thereof, is attributable solely to Existing Contamination and that Lessee has complied with all of the requirements of 42 U.S.C. §§ 9601(40)(A)-(H) and 9607(r)(1).

## **XXII. OTHER CLAIMS**

86. By issuance of this Settlement, the United States, the State, and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Lessee. The United States, the State, and EPA shall not be deemed a party to any contract entered into by Lessee or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement.

87. Except as expressly provided in Section XIX (Covenants by the United States and the State), nothing in this Settlement constitutes a satisfaction of or release from any claim or cause of action against Lessee or any person not a party to this Settlement, 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.

88. No action or decision by EPA pursuant to this Settlement 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).

### **XXIII. EFFECT OF SETTLEMENT/CONTRIBUTION**

89. Nothing in this Settlement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement. Except as provided in Section XXI (Covenants by Lessee), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response actions and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

90. If a suit or claim for contribution is brought against Lessee with respect to Existing Contamination (including any claim based on the contention that Lessee is liable as a result of response actions taken in compliance with this Settlement or at the direction of EPA's RPM), the Parties agree that this Settlement constitutes an administrative settlement pursuant to which Lessee has, as of the Effective Date, resolved liability to the United States within the meaning of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and 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, or as may be otherwise provided by law, for the "matters addressed" in this Settlement. The "matters addressed" in this Settlement are the Work, Existing Contamination, and Future Response Costs.

91. Lessee shall, with respect to any suit or claim brought by it for matters related to this Settlement, notify EPA in writing no later than sixty (60) days prior to the initiation of such suit or claim. Lessee shall, with respect to any suit or claim brought against it for matters related to this Settlement, notify EPA in writing within ten (10) days after service of the complaint or claim upon it. In addition, Lessee shall notify EPA within ten (10) days after service or receipt of any Motion for Summary Judgment and within ten (10) days after receipt of any order from a court setting a case for trial, for matters related to this Settlement.

### **XXIV. INDEMNIFICATION**

92. The United States and the State do not assume any liability by entering into this Settlement or by virtue of any designation of Lessee as EPA's authorized representatives under

Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and 40 C.F.R. 300.400(d)(3). Lessee shall indemnify, save, and hold harmless the United States and the State, their officials, agents, employees, contractors, subcontractors, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Lessee, their officers, directors, employees, agents, contractors, or subcontractors, and any persons acting on Lessee's behalf or under their control, in carrying out activities pursuant to this Settlement. Further, Lessee agrees to pay the United States and the State all costs they incur, including but not limited to attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Lessee, their 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. The United States and the State shall not be held out as a party to any contract entered into by or on behalf of Lessee in carrying out activities pursuant to this Settlement. Neither Lessee nor any such contractor shall be considered an agent of the United States or the State.

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

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

## **XXV. INSURANCE**

95. No later than 14 days before commencing any on-site Work, Lessee shall secure, and shall maintain until the first anniversary after issuance of Notice of Completion of Work pursuant to Section XXVIII (Notice of Completion of Work), commercial general liability insurance with limits of \$1 million per occurrence, and automobile liability insurance with limits of liability of \$1 million per accident, and umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits, naming EPA as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Lessee pursuant to this Settlement. In addition, for the duration of the Settlement, Lessee shall provide EPA with certificates of such insurance and a copy of each insurance policy. Lessee shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement, Lessee 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 Lessee in furtherance of this Settlement. If Lessee 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 a lesser amount, Lessee need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Lessee shall ensure that all submittals to EPA under this Paragraph identify the Gilt Edge Mine Site name and the EPA docket number for this action.

## XXVI. FINANCIAL ASSURANCE

96. In order to ensure completion of the Work, Lessee shall secure financial assurance, initially in the amount of \$ 1.5 million (Estimated Cost of the Work), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from the "Financial Assurance" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. Lessee may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

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

b. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;

97. Lessee shall submit such mechanisms and documents to the Regional financial assurance specialist at the following address:

Daniela Golden, ENF-RC  
U.S. EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202  
[Golden.daniela@epa.gov](mailto:Golden.daniela@epa.gov).

98. Lessee shall diligently monitor the adequacy of the financial assurance. If Lessee becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, such Lessee shall notify EPA of such information within 7 days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the Lessee of such determination. Lessee shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for the Lessee, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. Lessee shall follow the procedures of Paragraph 99 (Modification of Amount, Form, or Terms of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Lessee's inability to secure and submit to EPA financial assurance in accordance with this Section shall in no way excuse performance of any other requirements of this Settlement, including, without limitation, the obligation of Lessee to complete the Work in accordance with the terms of this Settlement.

99. Access to Financial Assurance.

a. If EPA issues a notice of implementation of a Work Takeover under Paragraph 80, then, in accordance with any applicable financial assurance mechanism, EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with Paragraph 98.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel such mechanism, and the Lessee fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with Paragraph 98.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under Paragraph 80, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism, whether in cash or in kind, to continue and complete the Work; or (2) the financial assurance is provided under Paragraph 95.e, then EPA may demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. Lessee shall, within 7 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this Paragraph shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Gilt Edge Mine Site Special Account within the EPA

Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs, not inconsistent with the NCP, and not paid under this Paragraph must be reimbursed as Future Response Costs under Section XIV (Payments for Response Costs).

100. **Modification of Amount, Form, or Terms of Financial Assurance.** Lessee may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with Paragraph 99, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify Lessee of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Lessee may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement or written decision resolving such dispute under Section XV (Dispute Resolution). Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall be made in EPA's sole and unreviewable discretion, and such decision shall not be subject to challenge by Lessee pursuant to the dispute resolution provisions of this Settlement or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, Lessee shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with Paragraph 96.

101. **Release, Cancellation, or Discontinuation of Financial Assurance.** Lessee may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA issues a Notice of Completion of Work under Section XXVIII (Notice of Completion of Work); (b) in accordance with EPA's approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation, or discontinuance of any financial assurance, in accordance with the agreement or final decision resolving such dispute under Section XV (Dispute Resolution).

## **XXVII. MODIFICATION**

102. EPA's RPM may modify any plan or schedule or the SOW in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the RPM's oral direction. Any other requirements of this Settlement may be modified in writing by mutual agreement of the Parties.

103. If Lessee seeks permission to deviate from any approved Work Plan or schedule or the SOW, Lessee's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Lessee may not proceed with the requested deviation until receiving oral or written approval from EPA's RPM pursuant to Paragraph 101.

104. No informal advice, guidance, suggestion, or comment by the RPM or other EPA representatives regarding any deliverable submitted by Lessee shall relieve Lessee of its obligation to obtain any formal approval required by this Settlement, or to comply with all requirements of this Settlement, unless it is formally modified.

### **XXVIII. NOTICE OF COMPLETION OF WORK**

105. When EPA, in consultation with the State, determines, after review of the Final Report, that all Work has been fully performed in accordance with this Settlement, with the exception of any continuing obligations required by this Settlement, EPA will provide written notice to Lessee. If EPA determines that any such Work has not been completed in accordance with this Settlement, EPA will notify Lessee, provide a list of the deficiencies, and require that Lessee modify the Work Plans if appropriate in order to correct such deficiencies. Lessee shall implement the modified and approved Work Plans and shall submit a modified Final Report in accordance with the EPA notice. Failure by Lessee to implement the approved modified Work Plan shall be a violation of this Settlement.

### **XXIX. PUBLIC COMMENT**

106. This Settlement shall be subject to a thirty (30) day public comment period, after which EPA may modify or withdraw its consent to this Settlement if comments received disclose facts or considerations which indicate that this Settlement is inappropriate, improper or inadequate.

### **XXX. INTEGRATION/APPENDICES**

107. This Settlement and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement. The following appendices are attached to and incorporated into this Settlement.

- a. Appendix A is a map of the Site.
- b. Appendix B is the SOW.

### **XXXI. EFFECTIVE DATE**

108. The effective date of this Settlement shall be the date upon which EPA issues written notice to Lessee that EPA has fully executed the Settlement after review of and response to any public comments received. If, by the time EPA issues such notice to Lessee, and Lessee has yet not executed a lease with the State of South Dakota, the effective date of this Settlement shall be the date upon which Lessee and the State of South Dakota execute such lease.

## XXXII. DISCLAIMER

109. This Settlement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Site nor constitutes any representation by EPA that the Site is fit for any particular purpose.

## XXXIII. NOTICES AND SUBMISSIONS

110. Any notices, documents, information, reports, plans, approvals, disapprovals, or other correspondence required to be submitted from one party to another under this Settlement, shall be deemed submitted either when an email is transmitted and received, it is hand-delivered or as of the date of receipt by certified mail/return receipt requested, express mail, or facsimile.

Submissions to Lessee shall be addressed to:

Greg Loptien  
Agnico Eagle Mines Ltd. (USA)  
1675 East Prater Way, Suite 102  
Sparks, Nevada 89434

With copies to:

Chris Vollmershausen  
Agnico Eagle Mines Limited  
145 King Street East, Suite 400  
Toronto, Ontario, Canada  
M5C 2V7

and

Hal J. Pos  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84111

All submissions to U.S. EPA shall be addressed to:

Joy Jenkins, EPR-SR  
U.S. EPA Region 8  
1595 Wynkoop St.  
Denver, CO 80202  
[Jenkins.joy@epa.gov](mailto:Jenkins.joy@epa.gov)

With electronic copies to:

[Piggott.amelia@epa.gov](mailto:Piggott.amelia@epa.gov)

All submissions to the State shall be addressed to:

Mark Lawrensen  
South Dakota Department of Environment and Natural Resources  
523 East Capitol Ave.  
Pierre, South Dakota 57501-3182  
[Mark.lawrensen@state.sd.us](mailto:Mark.lawrensen@state.sd.us)

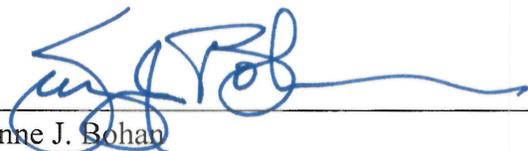
With electronic copies to

[Rich.williams@state.sd.us](mailto:Rich.williams@state.sd.us)

IT IS SO AGREED:  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BY:

 \_\_\_\_\_ 2/9/18  
Date

Betsy Smidinger  
Assistant Regional Administrator  
Office of Ecosystems Protection and Remediation  
U.S. EPA Region 8

 \_\_\_\_\_ 2/9/18  
Date

Suzanne J. Bohan  
Assistant Regional Administrator  
Office of Enforcement, Compliance, and  
Environmental Justice  
U.S. EPA Region 8

IT IS SO AGREED:  
STATE OF SOUTH DAKOTA  
BY:



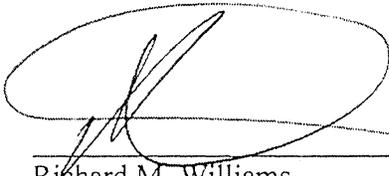
Steven M. Pirner

Secretary

South Dakota Department of Environment and Natural Resources  
523 East Capitol Ave.  
Pierre, South Dakota 57501-3182

12/27/17

Date



Richard M. Williams

Deputy Attorney General

1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-5070

12-27-17

Date

The undersigned representative of Lessee certifies that it is fully authorized to enter into the terms and conditions of this Settlement and to bind the party it represents to this document.

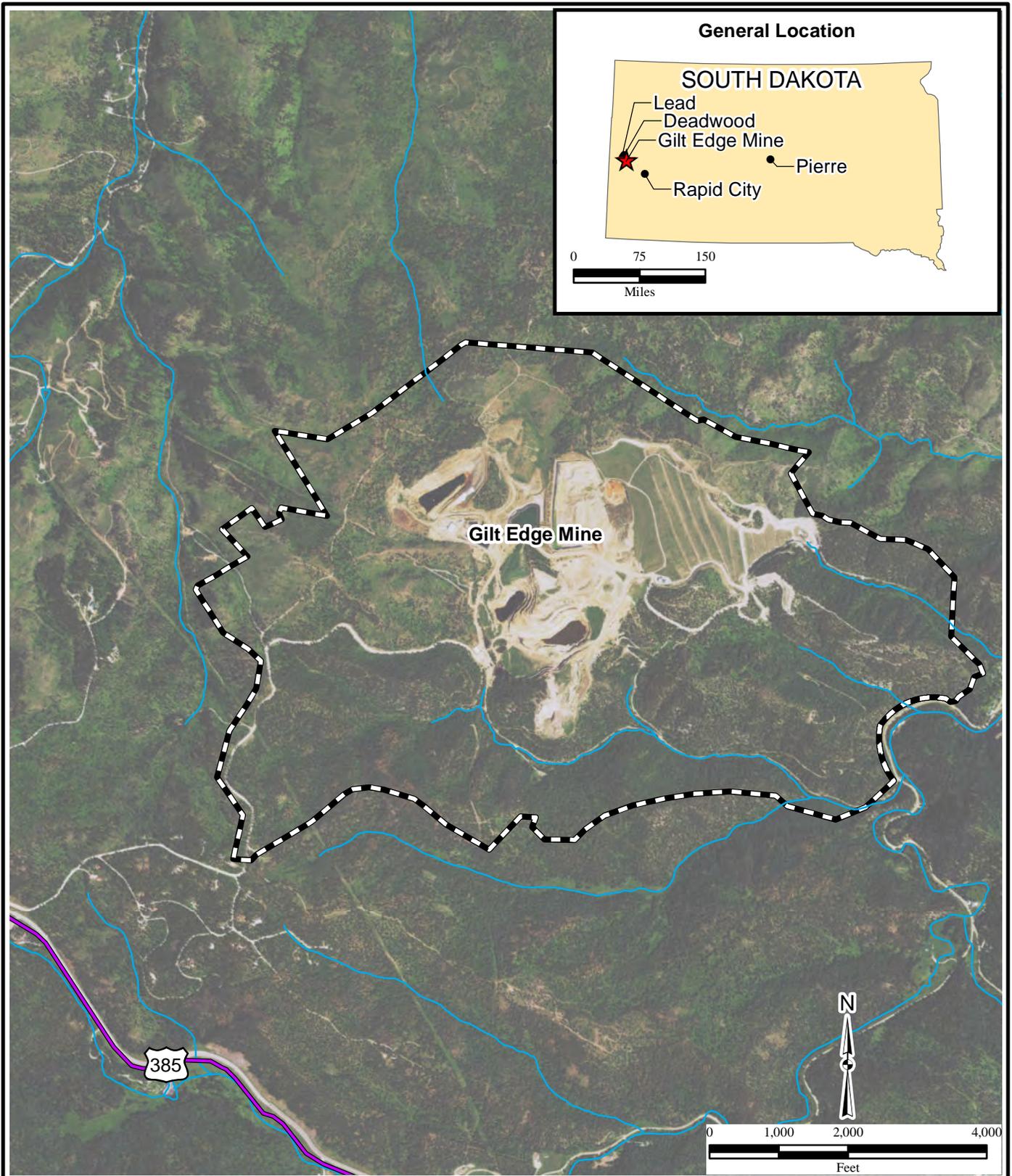
IT IS SO AGREED:

BY:

  
\_\_\_\_\_  
Name (Lessee) Date

R. Gregory Laing  
General Counsel, SVP Legal and  
Corporate Secretary

Appendix A  
Site Location Map



\\Gst-srv-01\hglgis\Gilt\_Edge\MSIW\2015\_Q1\_Quarterly\_Report (1-01)Site\_Location.mxd  
8/10/2015 JG  
Source: HGL, CDM Smith, ArcGIS Online Imagery

Legend

-  Site Location
-  Town
-  Highway
-  Surface Water Course
-  Gilt Edge Mine Site Boundary

**Figure 1.1**  
**Site Location**



Appendix B  
Statement of Work

**APPENDIX B – STATEMENT OF WORK  
ADMINISTRATIVE SETTLEMENT AND AGREEMENT  
AND ORDER ON CONSENT FOR WORK GILT EDGE MINE**

**Purpose:**

The purpose and objective of the work described by this Statement of Work is to obtain information that furthers the understanding of the Gilt Edge Mine Superfund Site's subsurface conditions and potential sources of cadmium contamination to lower Strawberry Creek. This information is anticipated to be used by EPA and the State of South Dakota in the future to develop appropriate response actions to address the cadmium source(s). Work will include a hydrogeological study of fracture zones and groundwater flow, a study of sediments and potential near surface sources along lower Strawberry Creek, and facility upgrades to support the field activities. Technical reports will be developed to document the findings of the studies. These reports are anticipated to be incorporated by EPA into the future development of a final remedial investigation for OU2.

This Statement of Work describes the following activities Lessee must perform pursuant to Paragraph 26 of the Settlement Agreement and Order on Consent for Work (Agreement). Further details of work activities will be included in work plans that will be approved by the RPM in consultation with the State Project Manager.

**I. Subsurface-Hydrogeological Investigation:**

Acquire, through diamond core drilling methods, subsurface geotechnical, structural, geochemical and hydrologic data using downhole logging instruments that may include one or more of the following methods based on the effectiveness, applicability and quality of data obtained by each:

A. Downhole optical televiewer, which collects subsurface borehole structural data that can be analyzed using statistical tools which can include diagrams, stereonet, aperture, fracture-density and 3D projections of the dominate fracture networks. The data will be supported and validated with detailed, traditional geologic core logging methods. The optical televiewer captures following types of data:

1. Fracture orientation and evaluation
2. Visual observation of sulfide distribution
3. Bedding / fracture / fault dips
4. Lithological characterization
5. Borehole deviation

B. A Corehole Dynamic Flowmeter™ (CDFM™), which measures fluid flow rates, fluid conductivity and temperature in open, saturated sections of boreholes. The probe collects fracture-specific flow rates, fracture-specific permeabilities and fracture-specific head (water level).

C. Acoustical logging, which uses high frequency sound waves that can gather information such as formation water velocity, rock/structure permeability, fracture identification, rock strength properties, deposition environment and porosity.

D. Electrical / Magnetics, which can be used to evaluate stratigraphic correlations, lithology and mineral identification, shale/clay content, porosity, and formation water quality.

The data, once acquired for all the planned boreholes, will be supplemented with traditional core logging methods, geochemical analysis and then will be compiled into the existing geologic model. Upon completion of data compilation, the relevant information will be interpreted, and summarized into a final report.

Boreholes will be abandoned pursuant to South Dakota DENR borehole abandonment regulations 74:02:04:67.

## **II. Strawberry Creek Surface Source Investigation:**

A. LIDAR, which stands for Light Detection and Ranging, is a remote sensing method that uses light in the form of a pulsed laser to measure ranges (variable distances) to the Earth. These light pulses – combined with other data recorded by the airborne system – generate precise, three-dimensional information about the shape of the Earth and its surface characteristics. This method creates a 3D point cloud of digital data which can effectively “see” through a pine forest canopy. LIDAR can effectively map historic mine dumps, adits, surface disturbance in addition to possibly mapping subtle geologic structures that may be masked by soil or thick tree cover. The LIDAR point data can be used to generate a base topographic map to act as an overlay for field mapping data from the Strawberry Creek tailings mapping program described in item B below. The LIDAR may also potentially identify anomalous areas of tailings deposition or other historic, human activities that may exist along the drainage.

B. Strawberry Creek Tailings Mapping / Sampling Program – Strawberry Creek has been impacted by historic mining since the late 1870’s, and was the site of a modern heap leach mine in operation between 1987 through 1999. An unknown, but significant amount of historic mill tailings from several old mills, the largest of which was located at the south end of the Sunday Pit, discharged, and later stacked tailings directly into, and adjacent to the creek. Most of the historic tailings pile that existed prior to Brohm’s activities were removed from the north bank of the creek and deposited in the spent ore repository. Based on field observations, there are additional volumes of tailings located along the Strawberry Creek drainage which are now covered and/or naturally reclaimed but which may still be affecting water quality due to erosion and re-deposition during high water events. The purpose of the program is to map in detail the locations of any significant areas of tailings, estimate (if possible) the volume of tailings, and collect samples to determine if they may be contributing low levels of cadmium or other metals to surface and shallow groundwater.

C. Installation of an automated weather monitoring station for collection of site specific weather and precipitation events.

## **III. Site Facility Upgrades or Improvements:**

A. Upgrading of Site internet/communication systems including a hard wired cable connection and upgraded phone system to facilitate communications and data processing for the completion of the various projects described in items I and II above.

B. Renovate Site office with new flooring and windows and other office/infrastructure improvements to accommodate requirements for office space and/or storage

for the purpose of supporting work described in I and II above as well as potential future remedial work at the Site.

#### **IV. Plans and Reporting**

Various Plans and Deliverables are required per the Agreement. Specific deliverables and reporting are highlighted here.

A. Required Plans Include:

1. Health and Safety Plan
2. Quality Assurance Project Plan/Sampling Analysis Plan
3. Hydraulic Hazard Potential evaluation memorandum

B. Deliverables Include:

1. Environmental Data
2. Geospatial Data
3. Final Investigation Report

Report will describe the studies conducted, the data collected, evaluation of the data, and conclusions drawn from the data with respect to the subsurface conditions and surface and near surface sources of cadmium to lower Strawberry Creek. Report to include maps, graphs, charts and other visual presentations of the data collected.