

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

<p>UNITED STATES OF AMERICA, Plaintiff,  v. MAGNESIUM CORPORATION OF AMERICA, et al., Defendants.</p>	<p>Case No. 2:01CV0040  Judge <u>Dale A. Kimball</u></p>
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**CONSENT DECREE**

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>3</b>
<b>II.</b>	<b>JURISDICTION AND VENUE.....</b>	<b>7</b>
<b>III.</b>	<b>APPLICABILITY.....</b>	<b>8</b>
<b>IV.</b>	<b>DEFINITIONS.....</b>	<b>9</b>
<b>V.</b>	<b>CIVIL PENALTY.....</b>	<b>18</b>
<b>VI.</b>	<b>RCRA WORK REQUIREMENTS.....</b>	<b>19</b>
<b>VII.</b>	<b>CERCLA RESPONSE ACTION.....</b>	<b>28</b>
<b>VIII.</b>	<b>SUBSURFACE ESTATE CONVEYANCE.....</b>	<b>43</b>
<b>IX.</b>	<b>US MAGNESIUM ESCROW ACCOUNT.....</b>	<b>43</b>
<b>X.</b>	<b>FINANCIAL ASSURANCE.....</b>	<b>43</b>
<b>XI.</b>	<b>APPROVAL OF DELIVERABLES.....</b>	<b>48</b>
<b>XII.</b>	<b>CERCLA AND RCRA COORDINATION AND TOLLING AGREEMENT.....</b>	<b>50</b>
<b>XIII.</b>	<b>REPORTING REQUIREMENTS.....</b>	<b>52</b>
<b>XIV.</b>	<b>STIPULATED PENALTIES.....</b>	<b>56</b>
<b>XV.</b>	<b>FORCE MAJEURE.....</b>	<b>59</b>
<b>XVI.</b>	<b>DISPUTE RESOLUTION.....</b>	<b>61</b>
<b>XVII.</b>	<b>INFORMATION COLLECTION AND RETENTION.....</b>	<b>65</b>
<b>XVIII.</b>	<b>EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS.....</b>	<b>67</b>
<b>XIX.</b>	<b>COSTS.....</b>	<b>72</b>
<b>XX.</b>	<b>NOTICES.....</b>	<b>72</b>
<b>XXI.</b>	<b>EFFECTIVE DATE.....</b>	<b>75</b>
<b>XXII.</b>	<b>RETENTION OF JURISDICTION.....</b>	<b>75</b>
<b>XXIII.</b>	<b>MODIFICATION.....</b>	<b>75</b>
<b>XXIV.</b>	<b>TERMINATION.....</b>	<b>76</b>
<b>XXV.</b>	<b>PUBLIC PARTICIPATION.....</b>	<b>78</b>
<b>XXVI.</b>	<b>SIGNATORIES/SERVICE.....</b>	<b>78</b>
<b>XXVII.</b>	<b>INTEGRATION.....</b>	<b>79</b>
<b>XXVIII.</b>	<b>FINAL JUDGMENT.....</b>	<b>79</b>
<b>XXIX.</b>	<b>APPENDICES.....</b>	<b>79</b>

I. **INTRODUCTION**

**WHEREAS**, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed a complaint in this action on January 16, 2001, and a Second Amended Complaint on December 5, 2002, alleging that Magnesium Corporation of America (“MagCorp”), Renco Metals, Inc., (“Metals”), the Renco Group, Inc. (“Group”), the Ira Leon Rennert Revocable Trusts (“Trusts”), Mr. Ira Leon Rennert (“Rennert”) and US Magnesium LLC (“USM”), collectively “Defendants,” violated the Resource Conservation and Recovery Act of 1976 (“RCRA”), [42 U.S.C. §§ 6901–6992k](#), at a magnesium production facility in Rowley, Utah, located approximately 23 miles northwest of Grantsville, Utah (hereinafter, the “Facility”);

**WHEREAS**, the Second Amended Complaint (“Complaint”) alleges that a certain solid waste (“Anode Dust”) and four waste waters (“Chlorine Plant Water Wash Column Water,” “High Energy Scrubber Liquor,” “Chlorine Reduction Burner Water,” and “Chlorine Reduction Burner Seal Leg Water”) generated at the Facility, each of which exhibits at least one characteristic of hazardous waste pursuant to Utah’s RCRA-authorized program, Utah Code Ann. §§ 19-6-101 to 123, are not exempted from the RCRA regulatory requirements of Subtitle C by the “Bevill Amendment,” set forth at [42 U.S.C. § 6921\(b\)\(3\)\(A\)\(ii\)](#), and the regulation EPA promulgated thereunder for magnesium processing wastes, [40 C.F.R. § 261.4\(b\)\(7\)\(ii\)\(O\)](#) (the “Bevill Regulation”), and that Defendants MagCorp and USM thus were required to operate the Facility as a Treatment, Storage and Disposal Facility pursuant to Sections 3004 and 3005 of RCRA, [42 U.S.C. §§ 6924-25](#), and their implementing federal and/or state regulations, but failed to do so;

**WHEREAS**, Plaintiff/Intervenor, United Steelworkers of America (“USWA”), which was renamed the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, AFL-CIO/CLC (“USW”), after merging with the Paper Allied-Industrial, Chemical and Energy Workers International Union (“PACE”) in 2005, and Local 8319 filed a Complaint in Intervention on July 27, 2004, alleging violations of RCRA at the Facility;

**WHEREAS**, MagCorp and Metals on August 2, 2001, each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, Case No. 01-14312 (“Bankruptcy Case”), which by order dated September 24, 2003, were converted to cases under chapter 7 of the Bankruptcy Code;

**WHEREAS**, on August 8, 2008, the Court dismissed all but Claims 1, 4-7, and 9-15 of the Second Amended Complaint, as to which claims it had granted summary judgment in favor of Defendants on October 15, 2007, which judgment was reversed by the Tenth Circuit in *U.S. v. Magnesium Corp. of Am.*, [616 F.3d 1129](#) (10th Cir. 2010), thus reinstating Claims 1, 4-7, and 9-15 of the Second Amended Complaint;

**WHEREAS**, Defendants USM, Group, the Trusts, and Rennert (collectively the “Settling Defendants”), deny the applicability of Subtitle C of RCRA and the regulations promulgated thereunder to certain practices at the USM Facility that are the subject of the Complaint, deny the violations alleged in the Complaint, and maintain that the Facility has been and remains in compliance with RCRA and that Settling Defendants are not liable for civil penalties or injunctive relief arising out of the transactions or occurrences alleged in the Complaint;

**WHEREAS**, pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9605 (“CERCLA”), EPA placed the US Magnesium Site (“Site”) on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on November 4, 2009, 74 Fed. Reg. 57085, 57088;

**WHEREAS**, EPA has made a number of findings relating to the Site in the exercise of its authorities under CERCLA that are set forth in Section V (EPA Findings of Fact) and Section VI (EPA Conclusions of Law and Determinations) of the Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study, CERCLA Docket No. 08-2011-0013 issued by EPA on August 4, 2011, as amended on August 31, 2016 (“CERCLA RI/FS AOC”) and incorporated herein;

**WHEREAS**, after consideration of the factors set forth in Section 300.415(b)(2) of the National Contingency Plan (“NCP”), 40 C.F.R § 300.415(b)(2), EPA has determined the CERCLA Response Action to be performed by Defendant USM pursuant to this Consent Decree is necessary to protect the public health, welfare, or the environment, and if conducted in accordance with this Consent Decree will be consistent with the NCP and with future remedial actions at the Site;

**WHEREAS**, EPA and Defendant USM previously entered into two administrative agreements with EPA for the performance of certain investigative and work activities at the Facility: the CERCLA RI/FS AOC and the RCRA Administrative Order;

**WHEREAS**, the United States and Settling Defendants have reached agreement in the Bankruptcy Case regarding the allowed amount of their respective claims and how the disbursements on such claims will be used (“Bankruptcy Settlement”);

**WHEREAS**, the objectives of the Parties in this Consent Decree are to resolve the civil claims for violations of RCRA alleged against Settling Defendants in the Second Amended Complaint and to address uncontrolled releases of CERCLA hazardous substances at the Site by:

- 1) establishing injunctive relief whereby Defendant USM shall modify certain Facility operations with respect to the management of Complaint Wastes and Bevill-Exempt Wastes at the Facility and shall modify the current Worker Health Order to ensure additional safeguards for worker health;
- 2) requiring Defendant USM to establish appropriate financial assurance for closure or corrective action of certain waste management areas in the operating areas of the Facility;
- 3) assessing an appropriate penalty;
- 4) providing for the performance by Defendant USM of the CERCLA Response Action and the payment of EPA costs incurred in connection with the CERCLA Response Action; and
- 5) implementing the Bankruptcy Settlement to provide conditions for Defendant USM to obtain partial reimbursement of the costs of the CERCLA Response Action;

**WHEREAS**, Settling Defendants have conducted themselves in good faith in their discussions with the Plaintiffs concerning the violations alleged in the Complaint, and Defendant USM has already commenced implementation of certain operational changes and corrective measures at the Facility; and

**WHEREAS**, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation among the Parties, and that this Consent Decree is fair, reasonable, and in the public interest;

**NOW, THEREFORE**, with the consent of the Parties, **IT IS HEREBY ADJUDGED, ORDERED, AND DECREED** as follows:

## **II. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this action, pursuant to [28 U.S.C. §§ 1331, 1345, 1355 and 1367](#), Section 3008(a) and (g) of RCRA, [42 U.S.C. § 6928\(a\) and \(g\)](#), and Sections 106, 107 and 113(b) of CERCLA, [42 U.S.C. § 9606, 9607, and 9613\(b\)](#), and over the Parties in this action. Venue lies in this District pursuant to [28 U.S.C. §§ 1391\(b\) and \(c\)](#), and [1395\(a\)](#), and Section 3008(a) of RCRA, [42 U.S.C. § 6928\(a\)](#), because the Facility is located in this judicial district. For purposes of this Decree, or any action to enforce this Decree, Settling Defendants agree to the Court's jurisdiction over this Decree and any such action and over Settling Defendants, and consent to venue in this judicial district.

2. Pursuant to Section 3008(a)(2) of RCRA, [42 U.S.C. § 6928\(a\)\(2\)](#) and Section 106(a) of CERCLA, [42 U.S.C. § 9606\(a\)](#), notice of the commencement of this action has been given to the State of Utah.

3. For purposes of this Consent Decree, Settling Defendants agree that the Complaint states claims upon which relief may be granted pursuant to Sections 3004 and 3005 of RCRA, [42 U.S.C. §§ 6924 and 6925](#).

### III. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the Plaintiff and upon Settling Defendants as set forth herein, and upon any successors, assigns, or other entities or persons otherwise bound by law. Nothing in this Consent Decree shall apply to administrative or enforcement proceedings other than this action or an action to enforce this Consent Decree. Nor does anything in this Consent Decree relieve Settling Defendants of the obligations to comply with any federal and state laws applicable to activities that are not within the definition of Work in this Consent Decree.

5. No transfer of ownership or operation of the Facility or any portion of the Site, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Settling Defendants of their obligation to ensure that the terms of the Decree as applicable to each of them are implemented unless (1) the transferee agrees to undertake the obligations required by this Decree and to be substituted for one or more of the Settling Defendants as a Party under the Decree and thus be bound by the terms thereof, and (2) the United States consents to relieve one or more of the Settling Defendants of its/their obligations. The United States' decision to refuse to approve the substitution of the transferee for one or more Settling Defendants shall not be subject to judicial review. At least thirty (30) Days prior to such transfer, Defendant USM shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA and the United States Department of Justice, in accordance with Section XX of this Decree (Notices). Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Decree.



6. Defendant USM shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform Work required under this Consent Decree. Defendant USM shall condition any such contract upon performance of the Work in conformity with the terms of this Consent Decree. Defendant USM shall be responsible for ensuring that all employees and contractors involved in performing any Work pursuant to this Consent Decree perform such work in compliance with the requirements of this Consent Decree.

7. In any action to enforce this Consent Decree, Settling Defendants shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

#### IV. DEFINITIONS

8. Terms used in this Consent Decree that are defined in RCRA, CERCLA, or in state regulations authorized by RCRA or CERCLA, shall have the meanings assigned to them in RCRA, CERCLA, or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. “Anode Dust” means particulate matter in exhaust gases from the electrolytic cells;

b. “Bankruptcy Case” means the bankruptcy cases filed by MagCorp and Metals in the United States Bankruptcy Court for the Southern District of New York, Case No. 01-14312;

c. “Bankruptcy Settlement” means the Settlement Agreement filed in the Bankruptcy Case, attached hereto as Appendix 11 (Bankruptcy Settlement), among the United

States, the trustee for the bankruptcy estates for Defendants MagCorp and Metals, and other parties in interest, resolving, among other things, claims asserted by EPA and Settling Defendants against Defendants MagCorp and Metals in the Bankruptcy Case;

d. “Bevill-Exempt Wastes” means “[p]rocess wastewater from primary magnesium processing by the anhydrous process” under the Bevill Amendment. 56 Fed. Reg. 27300 (June 13, 1991). 40 C.F.R. § 261.4(b)(7)(ii)(O); UAC Rule 315-261-4(b)(7)(ii)(O). Bevill-Exempt Wastes do not include the Complaint Wastes generated by Defendant USM;

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

f. “CERCLA Interest” means 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 <https://www.epa.gov/superfund/superfund-interest-rates>;

g. “CERCLA Response Action” means those activities necessary to eliminate uncontrolled releases of hazardous substances from the Current Waste Pond and retrofit it in compliance with the Ground Water Discharge Permit in accordance with the CERCLA SOW attached hereto as Appendix 12 (Statement of Work for the CERCLA Response Action);

h. “CERCLA RI/FS AOC” means the Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study, CERCLA Docket No. 08-2011-0013, issued by EPA on August 4, 2011, as amended on August 31, 2016;

i. “CERCLA SOW” means the Statement of Work for CERCLA Response Action attached hereto as Appendix 12 (Statement of Work for the CERCLA Response Action).

j. “CHCs” means Chlorinated Hydrocarbons, which are hydrocarbon molecules where one or more hydrogen atoms have been replaced by chlorine atoms;

k. “Chlorine Plant Water Wash Column Water” means scrubber solution generated in the water wash column from the scrubbing of residual Anode Dust and hydrogen chloride gas from electrolytic cell exhaust gases;

l. “Chlorine Reduction Burner Seal Leg Water” means any upsets or overflows of scrubber solution used in devices that protect equipment and ducting from pressure surges;

m. “Chlorine Reduction Burner Water” means scrubber solution generated in the chlorine reduction burner from the scrubbing of melt/reaction exhaust gases;

n. “Closure” and “Post-Closure” mean those activities undertaken pursuant to Appendix 4(A) (Salt Cap Closure and Post-Closure Plan) or 4(B) (Statement of Criteria for Alternative Closure of RWP), if applicable, with respect to the RWP;

o. “Complaint” means the Second Amended Complaint filed by the United States in this action;

- p. “Complaint Streams” means the Chlorine Reduction Burner Water, Chlorine Reduction Burner Seal Leg Water, High Energy Scrubber Liquor, and the Chlorine Plant Water Wash Column Water;
- q. “Complaint Wastes” are Anode Dust and the Complaint Streams when disposed;
- r. “Consent Decree” or “Decree” means this Consent Decree and all Appendices attached hereto (listed in Section XXIX of this Decree (Appendices));
- s. “Corrective Action” means those activities undertaken pursuant to the Corrective Action Plans required under Subparagraph 16(b) of this Consent Decree;
- t. “Corrective Action Plan” (“CAP”) means the plan for addressing Waste Material at a Facility unit developed in accordance with the requirements set forth in Paragraph 16(b) and Appendix 4(C) (Statement of Criteria for Corrective Action);
- u. “Cost Estimate” means an estimate of costs to perform certain activities, calculated in accordance with the requirements of this Consent Decree;
- v. “Courtyard” means the area between Cell Buildings 2 and 3 as described in Appendix 5 (Courtyard Capping Plan);
- w. “Current Waste Pond” means the pond currently receiving wastewater from the Facility, including the old waste pond area, and to be retrofitted in compliance with the Ground Water Discharge Permit, as depicted on Map 1 attached hereto as Appendix 1;
- x. “Day” means a calendar Day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;

- y. “Effective Date” shall have the definition provided in Section XXI (Effective Date);
- z. “EPA” means the United States Environmental Protection Agency and any of its successor departments or agencies;
- aa. “EPA Hazardous Substance Superfund” means the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507;
- bb. “EPA Response Action Costs” means all costs, including, but not limited to, direct and indirect costs, that the United States incurs prior to issuance of the Notice of Completion of Response Action and collection of EPA Response Action Costs in reviewing or developing CERCLA deliverables submitted pursuant to this Consent Decree, in overseeing implementation of the CERCLA Response Action, or otherwise implementing, overseeing, or enforcing performance of the CERCLA Response Action, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, community involvement, and all litigation costs. EPA Response Action Costs shall also include costs incurred by the Agency for Toxic Substances and Disease Registry (ATSDR) regarding the CERCLA Response Action;
- cc. “EPA Special Accounts” means the five special accounts 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\(b\)\(3\)](#), in accordance with the Bankruptcy Settlement;
- dd. “Facility” means Defendant USM’s magnesium production facility in Rowley, Utah, located approximately 23 miles northwest of Grantsville, Utah, and depicted on Map 1 and Map 2 attached hereto as Appendix 1;

ee. “Facility Closing Area” means all areas of the Site outside the operating Facility boundary and outside the boundary of the Retrofitted Waste Pond as depicted on Map 2 attached hereto as Appendix 1;

ff. “Filtration System Clean-up Project” means clean-up of the future Filtration System area including the ditches and sanitary lagoon in accordance with the RCRA Administrative Order;

gg. “Filtration System” means the system to remove CHCs from Defendant USM’s wastewaters and certain process streams through filtration, to be constructed in accordance with the Filtration System Design, Construction and Operation Plan attached hereto as Appendix 3;

hh. “Final CERCLA Remedial Action” means the response action to be selected by EPA after manufacturing operations at the Facility cease;

ii. “Financial Assurance” means the establishment of a financial instrument for the benefit of EPA to ensure (1) coverage for third-party liability, Closure and/or Post-Closure of the RWP and Corrective Action pursuant to Subparagraph 16(b), if required, in accordance with Paragraph 47 and Appendix 13 (Financial Assurance) of this Consent Decree; and (2) for the CERCLA Response Action, in accordance with Paragraph 48 of this Consent Decree;

jj. “Ground Water Discharge Permit” or “GWDP” means Ground Water Discharge Permit No. UGW450012, issued by UDEQ in accordance with the Utah Administrative Rules for Ground Water Quality Protection (UAC Rule 317-6) and subsequent 5-year permit renewals;

- kk. “High Energy Scrubber Liquor” means the scrubber solution used to remove residual particulate matter from melt/reaction exhaust gases;
- ll. “Interest” means the interest rate specified in [28 U.S.C. § 1961](#);
- mm. “MagCorp Settlement Funds” means funds received by EPA in accordance with the Bankruptcy Settlement;
- nn. “National Contingency Plan” or “NCP” means 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;
- oo. “Paragraph” means a portion of this Decree identified by an Arabic numeral;
- pp. “Parties” means the United States, USW, and Settling Defendants;
- qq. “Post-Removal Site Control” means actions necessary to ensure the effectiveness and integrity of the CERCLA Response Action to be performed pursuant to this Consent Decree consistent with Sections 300.415(l) and 300.5 of the NCP, [40 C.F.R. §§ 300.415\(l\) and 300.5](#), and “Policy on Management of Post-Removal Site Control” (OSWER Directive No. 9360.2-02, Dec. 3, 1990);
- rr. “RCRA Administrative Order” means the Administrative Order on Consent, RCRA [Docket No. 08-2016-0004](#), entered into by EPA Region 8 and Defendant USM on August 3, 2016;
- ss. “Retrofitted Waste Pond” or “RWP” means the Current Waste Pond as retrofitted by the CERCLA Response Action in compliance with the Ground Water Discharge Permit and depicted on Map 2 attached hereto in Appendix 1;

tt. “RWP Closure Plan and Post-Closure Plan” means the plan for the Retrofitted Waste Pond developed in accordance with the requirements set forth in Appendix 4(A) (Salt Cap Closure and Post-Closure Plan) or Appendix 4(B) (Statement of Criteria for Alternative Closure of RWP), including a Cost Estimate;

uu. “Salt Cap Closure Plan” means the plan for Closure and Post-Closure of the Retrofitted Waste Pond attached hereto as Appendix 4(A);

vv. “Section” means a portion of this Decree identified by a Roman numeral;

ww. “Settling Defendants” means Defendants USM, Group, the Trusts, and Rennert;

xx. “Site” means the US Magnesium Superfund Site, which includes the Facility, the areal extent of contamination at and from the Facility and all suitable areas in very close proximity to the contamination necessary for implementation of response actions;

yy. “Solid Waste Landfill Permit” means a permit issued by the Utah Solid Waste Program pursuant to UAC Rule 315-310;

zz. “State” means the State of Utah;

aaa. “UDEQ” means the Utah Department of Environmental Quality and any of its successor departments or agencies;

bbb. “United States” means the United States of America, acting on behalf of EPA;

ccc. “US Magnesium Reimbursement Escrow Account” means the escrow account established with the proceeds of the disbursement to Defendant USM on its allowed claim in accordance with the Bankruptcy Settlement;



ddd. “US Magnesium Reimbursement Escrow Agreement” means the escrow agreement between Defendant USM and the bankruptcy trustee established in accordance with the Bankruptcy Settlement;

eee. “USM” means US Magnesium LLC. Any references herein to “USM” or “Defendant USM” refer only to USM and not to any other Settling Defendant;

fff. “USW” means Plaintiff/Intervenor, the United Steelworkers of America, renamed the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, AFL-CIO/CLC, after merging with the Paper Allied-Industrial, Chemical and Energy Workers International Union, acting on behalf of its members employed at the Facility;

ggg. “Waste Material” means (a) any “hazardous substance” as defined in Section 101(14) of CERCLA, [42 U.S.C. § 9601\(14\)](#); (b) any pollutant or contaminant as defined in Section 101(33) of CERCLA, [42 U.S.C. § 9601\(33\)](#); (c) any “solid waste” as defined in Section 1004(27) of RCRA, [42 U.S.C. § 6903\(27\)](#); (d) Complaint Wastes; and (e) any hazardous material regulated under State law;

hhh. “Wet Removal Process” means a process by which a series of sprays and washes are used to collect Anode Dust into a specially designed chamber or tank prior to disposal;

iii. “WHO” means the Second Amended Worker Health Order attached hereto as Appendix 10; and

jjj. “Work” means all activities and obligations Settling Defendants are required to perform under this Consent Decree, except the activities required under Paragraph 86 (Retention of Records).

#### V. CIVIL PENALTY

9. Within thirty (30) Days after the Effective Date of this Consent Decree, Defendant USM shall pay the sum of \$250,000 as a civil penalty, together with Interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging. Defendant USM shall pay the civil penalty due by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice in accordance with written instructions to be provided to Defendant USM, following lodging of the Consent Decree, by the Financial Litigation Unit of the U.S. Attorney’s Office for the District of Utah, 185 South State Street, Suite 300, Salt Lake City, Utah 84111, 801-524-5682. At the time of payment, Defendant USM shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *U.S. v. Magnesium Corp. of America*, and shall reference the civil action number and DOJ case number 90-7-1-06980, to the United States in accordance with Section XX of this Decree (Notices); by email to [acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov); and by mail to:

EPA Cincinnati Finance Office  
26 Martin Luther King Dr.  
Cincinnati OH 45268

10. No Settling Defendant shall deduct any penalties paid under this Decree pursuant to this Section or Section XIV (Stipulated Penalties) in calculating their federal or State or local

income tax. Nor shall any Settling Defendant deduct any penalty paid under this Consent Decree by another Settling Defendant.

## VI. RCRA WORK REQUIREMENTS

11. The Project Compliance Schedule sets forth all of Defendant USM's deadlines for deliverables under this Section and is attached hereto as Appendix 14.

12. Defendant USM shall make a RCRA hazardous waste determination, pursuant to UAC Rule 315-262.11, of all solid wastes (other than Bevill-Exempt Wastes and wastes managed in compliance with Paragraphs 13-14 and 16 of this Consent Decree), and leaks and spills from plant operations, including without limitation chlorine and hydrochloric acid production operations, and, if the wastes are hazardous, manage all hazardous wastes in compliance with Sections 3004 and 3005 of RCRA, [42 U.S.C. §§ 6924 and 6925](#), and the applicable regulations in UAC Rule 315-260 to 270.

13. Complaint Stream Reuse. Defendant USM shall modify operations at its Facility to reuse the Complaint Streams in accordance with the statement of work attached hereto as Appendix 2 (Complaint Waste Re-Use Plan) and the Project Compliance Schedule attached hereto as Appendix 14.

14. Filtration System Clean-up Project. Defendant USM has implemented the clean-up of the future Filtration System area pursuant to the RCRA Carve-Out Clean-up Project as set forth in the RCRA Administrative Order.

15. Filtration System. Defendant USM shall design, construct, and operate the Filtration System at its Facility to filter CHCs from Defendant USM's wastewaters and certain process waters in accordance with the Filtration System Design, Construction and Operation

Plan attached hereto as Appendix 3 and the Project Compliance Schedule attached hereto as Appendix 14. Defendant USM is developing a potential alternative magnesium chloride production process which, if successful, will eliminate creation of CHCs from the Melt/Reactor process. If Defendant USM determines, during preparation and review of the Final Filtration System Design Report specified in Task I of Appendix 3, but prior to implementing construction of that system, that the new process will eliminate CHC formation, it may submit a written demonstration of its findings to EPA and request a meeting to propose modifications to the Filtration System design as warranted by the data. EPA shall schedule such a meeting to consider Defendant's demonstration and proposal and, in its sole discretion, may approve modifications to the Filtration System design and implementation schedule.

a. Filtration System Wastewaters. Once the Filtration System becomes operational, Defendant USM shall:

(1) Dispose of the residual acidic wastewaters following filtration in the Current Waste Pond (designated the RWP following retrofit). Until the Filtration System is operational, Defendant USM may continue to dispose of acidic wastewaters in the Current Waste Pond without filtration.

(2) Sample and analyze the residual acidic wastewaters following filtration on a monthly basis during the first fifteen months of Filtration System operation, and quarterly thereafter, and provide all test results to EPA and UDEQ within fourteen (14) Days of Defendant USM's receipt. During the first fifteen months of Filtration System operation, Defendant USM shall operate the Filtration System to maximize its ability to meet the universal treatment standards (UTS) set forth at UAC

Rule 315-268-48. After the first fifteen months of Filtration System operation, effluent from the filtration system must meet the UTS, except as provided in Subparagraphs (i) and (ii) below:

(i). Defendant USM may, within sixty (60) Days after the end of the first fifteen months of Filtration System operation, submit to EPA for approval a proposed alternative compliance limit for each UTS constituent for which Defendant USM contends it is technically impracticable to reliably meet UTS limits. Defendant USM may include in its proposal one or more operating parameters that may be used as a compliance limit in lieu of a concentration limit. Any submission shall also include for approval a proposed monitoring frequency. Any proposed alternative compliance limit must reflect the level of filtration that the Filtration System can reliably achieve when operated properly, defined as two standard deviations above the mean, calculated using effluent sampling data from the first fifteen months of Filtration System operation while operating properly, or, based on its review of the data distribution from these sampling data, Defendant USM may propose an alternative statistical methodology for establishing an alternative compliance limit. During the pendency of EPA's review or subsequent dispute resolution, Defendant USM shall comply with the proposed alternative limit.

(ii). Any exceedance of the UTS or approved alternative concentration-based compliance limit by an amount less than or equal to the margin of analytical uncertainty specified in the analytical data report for that

sample shall not be considered an exceedance of the UTS or alternative compliance limit. Defendant USM may only exceed the UTS or approved compliance limit (whether based on a concentration limit or operating parameter) once per calendar year. Compliance with concentration-based limits shall be determined on a per sample (not per constituent) basis. Stipulated penalties will apply to each such exceedance after the first exceedance in any calendar year.

b. Filtration System Solids. Defendant USM shall manage residual solid material following filtration in compliance with applicable laws. Defendant USM shall maintain a log of all solids generated and tabulate monthly solids quantities to provide to EPA in its semi-annual reporting or upon request.

c. Filtration System Closure. Defendant USM shall close the Filtration System in accordance with applicable federal, State, and local regulations and permits.

16. Closure and Corrective Action Plans.

a. Retrofitted Waste Pond (RWP).

(1) Initial Salt Cap Closure and Post-Closure Plan. Attached hereto as Appendix 4(A) is the approved initial Salt Cap Closure and Post-Closure Plan for the RWP based upon a salt cap, including an initial Cost Estimate in accordance with Appendix 13 (Financial Assurance), and a Conditional Partial Assignment and Grant of Rights.

(2) Salt Cap Study. In the event EPA determines, based on conditions at the Site or receipt of information previously unknown to EPA, together with any other relevant information, that implementation of the initial Salt Cap Closure and Post-Closure

Plan would not be protective of public health or the environment, EPA will provide notice of such determination to Defendant USM (“Notice”). The information and the conditions previously known to EPA will include only that information and those conditions known to EPA as of the date of approval of the initial Salt Cap Closure and Post-Closure Plan for the RWP. Within sixty (60) Days of such Notice, Defendant USM shall submit to EPA for approval a work plan (“Salt Cap Study”) to evaluate and address the concerns identified by EPA in the Notice, together with a proposed schedule for completion not in excess of seven years. EPA reserves its right to assert that the Salt Cap Study can be performed in less than seven years. Defendant USM shall perform the Salt Cap Study in accordance with the approved work plan and schedule. EPA’s Notice is not subject to Dispute Resolution.

(3) Initial Alternative RWP Closure and Post-Closure Plan. After the conclusion of the Salt Cap Study, if EPA again determines that a salt cap closure would not be protective of public health or the environment (“Determination”), Defendant USM shall, within one-hundred eighty (180) Days after receiving the Determination from EPA, submit to EPA for approval an initial Alternative Closure and Post-Closure Plan in accordance with the requirements set forth in Appendix 4(B) (Statement of Criteria for Alternative Closure of RWP). Within ninety (90) Days of EPA approval, Defendant USM shall adjust the amount of the Financial Assurance to reflect the approved updated Cost Estimate, in accordance with Appendix 13 (Financial Assurance). Dispute Resolution may be invoked when EPA has made its Determination, based on the administrative record supporting the Determination.

(4) Final RWP Closure and Post-Closure Plans. At least ninety (90) Days prior to removing the RWP from service, Defendant USM shall submit to EPA for approval a final Closure Plan and Post-Closure Plan pursuant to either Appendix 4(A) (Salt Cap Closure and Post-Closure Plan) or 4(B) (Statement of Criteria for Alternative Closure of RWP), as applicable, including an updated Cost Estimate and implementation schedule. Within ninety (90) Days of EPA approval, Defendant USM shall adjust the amount of the Financial Assurance to reflect the approved updated Cost Estimate, in accordance with Appendix 13 (Financial Assurance).

b. Other Units Handling Waste Material. At least ninety (90) Days prior to replacing or removing from service: a) the spent liquor tank; b) the sanitary lagoon; c) the smut piles; d) the Gypsum Pile; and/or e) any other units at the Facility (other than the RWP) containing Waste Material, Defendant USM shall provide notice of such replacement/removal to EPA. If EPA determines, at any time, that a release of Waste Material from such unit(s) could adversely affect human health and the environment, Defendant USM shall, within sixty (60) Days of such determination, submit to EPA for approval a Corrective Action Plan (“CAP”) for the unit(s), in compliance with the requirements of Appendix 4(C) (Statement of Criteria for Corrective Action). If the release of Waste Material addressed by the CAP occurs prior to the cessation of manufacturing operations at the Facility, Defendant USM shall implement the approved CAP on the approved schedule.

17. Anode Dust. Defendant USM has implemented a system for handling Anode Dust generated in Electrolytic Cell Buildings 1, 2 and 3 using the Wet Removal Process. In accordance with the requirements of Appendix 14 (Project Compliance Schedule), Defendant



USM shall cease operating the electrolytic cells in Electrolytic Cell Building 4 unless Anode Dust generated in that building is removed by the Wet Removal Process. If Building 4 is re-commissioned and resumes operations, Anode Dust generated in that building shall be removed by the Wet Removal Process. Defendant USM shall not revert to a dry removal process in any of the Electrolytic Cell Buildings. Defendant USM shall collect and dispose of any Anode Dust from the cleaning of ducts and equipment, and any from any maintenance or retrofit operations that cannot be handled through the Wet Removal Process, in compliance with applicable laws.

18. Courtyard. Defendant USM shall implement the Courtyard Capping Plan to address soil contamination in the Courtyard among the electrolytic process buildings in accordance with the requirements of Appendix 5 (Courtyard Capping Plan) and Appendix 14 (Project Compliance Schedule).

19. Spent Liquor Tank. Defendant USM shall implement the Spent Liquor Tank Plan in accordance with the requirements of Appendix 6 (Spent Liquor Tank Plan) and Appendix 14 (Project Compliance Schedule).

20. Electrolytic Ducon Scrubber and Sump. Defendant USM shall implement the Electrolytic Ducon Scrubber and Sump Plan in accordance with the requirements of Appendix 7 (Electrolytic Ducon Scrubber and Sump Plan) and Appendix 14 (Project Compliance Schedule).

21. Emergency Offgas System. Defendant USM has implemented the Emergency Offgas System (“EOG”) Redesign Plan attached hereto as Appendix 8. Any fugitive emissions controls installed at the EOG as of the Effective Date of this Consent Decree shall not be removed or reconfigured unless Defendant USM, on a schedule approved by EPA, installs alternative fugitive emissions controls that meet or exceed the performance of the current

controls. Defendant USM, in making any changes to processes or operations in the melt/reactor or electrolytics buildings that have the potential to increase fugitive emissions, or render existing controls less effective, shall submit to EPA for approval, within thirty (30) Days of making such changes, a plan and schedule to assess and minimize fugitive emissions relating to such changes, and shall implement the approved plan on the approved schedule. This Paragraph does not require Defendant USM to seek EPA approval for process or operational changes made by Defendant USM.

22. Landfill. In accordance with the requirements of Appendix 14 (Project Compliance Schedule), Defendant USM shall take all such actions as are necessary to complete its application for, obtain and comply with, a Solid Waste Landfill Permit for the on-site landfill as depicted on Map 1 and Map 2 attached hereto as Appendix 1, from the Utah Division of Waste Management & Radiation Control pursuant to UA C Rule 315-310. Defendant USM shall provide copies of all submittals regarding permitting to EPA at the same time such submittals are made to the Utah Division of Waste Management & Radiation Control, and shall provide additional data, information, reports or records pertaining to the Solid Waste Landfill Permit to EPA upon request.

23. TSDF Status. Provided that Defendant USM remains in compliance with the requirements set forth in Paragraphs 11 through 22 of this Section VI (RCRA Work Requirements), Section VII (CERCLA Response Action), and Section X (Financial Assurance), the Facility shall not be required to operate as a treatment, storage and disposal facility (“TSDF”) pursuant to Section 3005 of RCRA, [42 U.S.C. § 6925](#), and its implementing federal and/or state regulations.

24. Avian Risk Mitigation Plan. Attached hereto as Appendix 9 is Defendant USM's approved Avian Risk Mitigation Plan to address risks to migratory birds from CHCs. Defendant USM shall implement the approved plan in accordance with the requirements and schedule set forth in Appendix 9 (Avian Risk Mitigation Plan).

25. Worker Health Order. Pursuant to the WHO (Second Amended Worker Health Order), incorporated herein by reference and attached hereto as Appendix 10, Defendant USM shall implement various measures to further protect the health and welfare of workers, including the construction of a new shower and locker facility in accordance with the requirements set forth in the WHO. Defendant USM shall certify the completion of the new shower and locker facility to the Parties following construction, including the total cost, within sixty (60) Days of completion, pursuant to Paragraph 64. Defendants Group, Trusts and Rennert shall pay toward the cost of that new shower and locker facility the greater of Two Hundred Fifty Thousand Dollars (\$250,000) or one-half of the cost of that facility: (a) by payment of Two Hundred Fifty Thousand Dollars (\$250,000) to Defendant USM by bank check or wire transfer within thirty (30) Days of entry of this Consent Decree, with notice to the Parties pursuant to Section XX (Notices); and (b) in the event that the shower facility costs more than a total of \$500,000, by payment of one-half of the balance of that excess over \$500,000 to Defendant USM by bank check or wire transfer within thirty (30) Days of receipt of documentation of the cost of the shower facility, with notice to the Parties pursuant to Section XX (Notices).

26. Permits. Where any compliance obligation under this Section requires Defendant USM to obtain a federal, state, or local permit or approval, Defendant USM shall submit timely and complete applications and take such actions as are necessary to obtain all such permits or

approvals. Defendant USM may seek relief under the provisions of Section XV of this Consent Decree (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendant USM has submitted timely and complete applications and has taken such actions as are necessary to obtain all such permits or approvals.

27. Periodic Review of Work Status. Once every three (3) years following the Effective Date of this Consent Decree, or more often if the Parties so agree, Settling Defendants may request a meeting to review the status of the Work and to evaluate whether discrete portions of the Work have either been completed or may be accomplished and supervised under an administrative order or permit in lieu of this Consent Decree. If the Parties agree to such a modification, such agreement shall be memorialized in a written modification to this Consent Decree pursuant to Section XXIII (Modification) and shall not require judicial approval. If the Parties agree that such modifications allow this Consent Decree to be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree. The Parties' inability to reach agreement under this Paragraph shall not be subject to dispute resolution or judicial review.

## **VII. CERCLA RESPONSE ACTION**

28. CERCLA Work to be Performed. Defendant USM shall perform all actions necessary to retrofit the Current Waste Pond and to eliminate uncontrolled releases of hazardous substances in compliance with the requirements of the Ground Water Discharge Permit and the CERCLA SOW attached hereto as Appendix 12 (Statement of Work for the CERCLA Response Action).

29. Designation of Contractor, Project Coordinator, and On-Scene Coordinator.

a. Defendant USM shall retain one or more contractors or subcontractors to perform the CERCLA Response Action, and shall notify EPA of the names, titles, addresses, telephone numbers, email addresses, and qualifications of such contractors or subcontractors within thirty (30) Days after the Effective Date of this Consent Decree. Defendant USM shall also notify EPA of the names, titles, contact information, and qualifications of any other contractors or subcontractors retained to perform the CERCLA Response Action at least ten (10) Days prior to commencement of work performing the CERCLA Response Action. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Defendant USM. If EPA disapproves of a selected contractor or subcontractor, Defendant USM 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 thirty (30) Days after EPA's disapproval. The qualifications of the persons undertaking the CERCLA Response Action for Defendant USM 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.

b. Within thirty (30) Days after the Effective Date of this Consent Decree, Defendant USM shall designate a Project Coordinator who shall be responsible for administration of all actions by Defendant USM in performing the CERCLA Response Action and shall submit to EPA the designated Project Coordinator's name, title, address, telephone number, email address, and qualifications.

c. EPA has designated Paul Peronard of EPA Region 8 as its On-Scene Coordinator (OSC) and Martin McComb as the alternate OSC.

d. EPA and Defendant USM shall have the right, subject to Subparagraph (a), above, to change their respective designated OSCs or Project Coordinator. Defendant USM shall notify EPA ten (10) Days before such a change is made. The initial notification by Defendant USM may be made orally but shall be promptly followed by a written notice.

e. The OSC shall be responsible for overseeing Defendant USM's implementation of the CERCLA Response Action. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any CERCLA Response Action required by this Consent Decree, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

30. CERCLA Statement of Work and Implementation. In accordance with the CERCLA SOW attached hereto as Appendix 12 (Statement of Work for the CERCLA Response Action), Defendant USM shall submit to EPA for approval the RWP Work Plan that includes design deliverables and documents for the implementation of the CERCLA Response Action, consistent with the Ground Water Discharge Permit.

31. Off-Site Shipments.

a. Defendant USM may ship Waste Material generated from the CERCLA Response Action 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, and applicable Utah Division of Waste Management & Radiation Control regulations. Defendant USM will be deemed to be in

compliance with CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440 regarding a shipment if Defendant USM 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. Defendant USM may ship Waste Material generated from the CERCLA Response Action 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 OSC. This written notice requirement shall not apply to any off-Site shipments when the total quantity of all such shipments will not exceed ten (10) 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. Defendant USM also shall notify the state environmental official referenced above and the OSC of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. Defendant USM shall provide the written notice after the award of the contract for the CERCLA Response Action and before the Waste Material is shipped.

c. Defendant USM may ship Investigation-Derived Waste (IDW) generated from the CERCLA Response Action 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), 40 C.F.R. § 300.440, and EPA's "Guide to Management of Investigation-Derived Waste," OSWER 9345.3-03FS (Jan. 1992). 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.

32. Post-Removal Site Control. Defendant USM shall comply with the Ground Water Discharge Permit, and all modifications thereto, which shall serve as Post-Removal Site Control. Defendant USM shall provide copies of all submittals regarding permitting to EPA at the same time such submittals are made to UDEQ. Additional data, information, reports, or records pertaining to the Ground Water Discharge Permit shall be made available to EPA upon request.

33. Final Report. Within sixty (60) Days after Defendant USM concludes that the CERCLA Response Action has been fully performed (other than continuing obligations listed in Paragraph 34 (Notice of Completion of CERCLA Response Action)), it shall schedule and conduct an inspection to be attended by Defendant USM, EPA and UDEQ. If EPA determines that the CERCLA Response Action is not complete, EPA shall so notify Defendant USM. EPA's notice will include a description of the activities that Defendant USM must perform to complete the CERCLA Response Action, and a schedule for such activities, or will require Defendant USM to submit a schedule for EPA approval. Defendant USM shall submit a pre-final inspection report which describes the activities required by EPA and documents their completion. A re-inspection shall be conducted if requested by EPA or UDEQ. If, after the initial pre-notice inspection or subsequent re-inspection, Defendant USM believes that the CERCLA Response Action has been fully performed, it shall submit to EPA for approval a final report requesting issuance of Notice of Completion of the CERCLA Response Action, pursuant to Section XI (Approval of Deliverables). In the report Defendant USM's Project Coordinator shall state that the CERCLA Response Action has been completed in full satisfaction of the requirements of this Consent Decree. The final report shall comply with the requirements set forth in Section 300.165 of the NCP, 40 C.F.R. § 300.165, entitled "OSC Reports." The final report shall include a good



faith estimate of total costs or a statement of actual costs incurred in completing the CERCLA Response Action, 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 CERCLA Response Action (e.g., manifests, invoices, contracts and permits). The final report shall also include a certification, pursuant to Paragraph 64, signed by a responsible corporate official of Defendant USM or Defendant USM's Project Coordinator.

34. Notice of Completion of CERCLA Response Action. If EPA determines, after EPA's review of the Final Report, that the CERCLA Response Action has been fully performed in accordance with this Consent Decree, except for any continuing obligations required by this Consent Decree, including Post-Removal Site Control, EPA will provide written notice thereof to Defendant USM. If EPA determines that such CERCLA Response Action has not been completed in accordance with this Consent Decree, EPA will notify Defendant USM, provide a list of the deficiencies, and require that Defendant USM correct such deficiencies within a designated period of time. Defendant USM shall submit a revised Final Report in accordance with the EPA notice. Failure by Defendant USM to correct the deficiencies shall be a violation of this Consent Decree.

35. Payments for EPA Response Action Costs. Defendant USM shall pay to EPA all costs incurred by EPA in connection with the CERCLA Response Action not inconsistent with the NCP (EPA Response Action Costs).

a. Periodic Bills. On a periodic basis, EPA will send Defendant USM an electronic billing notification to the following email addresses:

accountspayable@usmagnesium.com and [rhartman@usmagnesium.com](mailto:rhartman@usmagnesium.com).

(1) The billing notification will include a standard regionally-prepared cost report with the direct and indirect costs incurred by the EPA and its contractors. Defendant USM shall make all payments within thirty (30) Days of receipt of the electronic bill, except as otherwise provided in Paragraph 36 of this Consent Decree. Defendant USM shall make payments using one of the payment methods set forth in the electronic billing notification.

(2) Defendant USM may change its email billing address by providing notice of the new address to:

Financial Management Office  
US EPA Region 8 TMS-FMP  
1595 Wynkoop Street  
Denver CO 80202-1129

(3) If the electronic billing notification is undeliverable, the EPA will mail a paper copy of the billing notification to Defendant USM in accordance with Section XX (Notices).

b. Deposit of Payments for EPA Response Action Costs. The total amount to be paid by Defendant USM pursuant to Subparagraph 35(a) (Periodic Bills), above, shall be deposited by EPA in the EPA Special Account 5 to be retained and used to conduct or finance response actions at or in connection with the Site, or, subject to the conditions in Paragraph 43, to be transferred by EPA to the EPA Hazardous Substance Superfund.

c. CERCLA Interest. If any payment for EPA Response Action Costs is not made by the date required, Defendant USM shall pay CERCLA Interest on the unpaid balance. The CERCLA Interest shall begin to accrue on the date of the bill. The CERCLA Interest shall accrue through the date of Defendant USM's payment. Payments of CERCLA Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Defendant USM's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XIV (Stipulated Penalties).

36. Contesting EPA Response Action Costs. Defendant USM may initiate the procedures of Section XVI (Dispute Resolution) regarding payment of any EPA Response Action Costs billed under Paragraph 35 (Payments for EPA Response Action Costs) if it determines that EPA has made a mathematical error or included a cost item that is not within the definition of EPA Response Action Costs, or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. To initiate such dispute, Defendant USM shall submit a Notice of Dispute in writing to the OSC within thirty (30) Days after receipt of the bill. Any such Notice of Dispute shall specifically identify the contested EPA Response Action Costs and the basis for objection. If Defendant USM submits a Notice of Dispute, Defendant USM shall within the 30-day period, as a requirement for initiating the dispute, (a) pay all uncontested EPA Response Action Costs to EPA in the manner described in Paragraph 35, 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 EPA Response Action Costs. Defendant USM shall send to the OSC a copy of the transmittal letter and check paying the uncontested EPA Response Action 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 five (5) Days after the resolution of the dispute, Defendant USM shall pay the sums due (with accrued CERCLA Interest) to EPA in the manner described in Paragraph 35. If Defendant USM prevails concerning any aspect of the contested costs, Defendant USM shall pay that portion of the costs (plus accrued CERCLA Interest) for which they did not prevail to EPA in the manner described in Paragraph 35. Defendant USM shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Defendant USM's obligation to reimburse the EPA for its Response Action Costs.

37. Work Takeover.

a. In the event EPA determines that Defendant USM: (1) has ceased implementation of any portion of the CERCLA Response Action; (2) is seriously or repeatedly deficient or late in their performance of the CERCLA Response Action; or (3) is implementing the CERCLA Response Action in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice ("Work Takeover Notice") to Defendant USM. 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 Defendant USM a period of thirty

(30) Days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 30-Day notice period specified in Paragraph 37(a), Defendant USM has not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the CERCLA Response Action as EPA deems necessary ("Work Takeover"). EPA will notify Defendant USM in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 37(b).

c. Defendant USM may invoke the procedures set forth in Paragraph 79 (Formal Dispute Resolution) to dispute EPA's implementation of a Work Takeover under Subparagraph 37(b). However, notwithstanding Defendant USM's invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Subparagraph 37(b) until the earlier of (1) the date that Defendant USM 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 79 (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.

38. Disbursement of EPA Special Account Funds.

a. Agreement to Disburse Funds to Defendant USM. In accordance with the Bankruptcy Settlement, EPA has established five EPA Special Accounts with MagCorp Settlement Funds. EPA shall disburse funds from EPA Special Account 1 in accordance with the procedures set forth in this Section. After all the funds in the US Magnesium Reimbursement Escrow Account have been disbursed in accordance with the US Magnesium Reimbursement Escrow Agreement and Section IX (US Magnesium Escrow Account) of this Consent Decree, and subject to the terms and conditions set forth in this Section, EPA agrees to make the funds in EPA Special Account 1, plus accrued CERCLA Interest thereon, available for disbursement to Defendant USM as partial reimbursement for performance of the CERCLA Response Action. Notwithstanding the foregoing, no disbursements will be made if adequate Financial Assurance is not maintained in accordance with Paragraphs 48 and 49(a), or if any such disbursement would result in inadequate Financial Assurance as set forth in Paragraphs 48 and 49(a). At EPA's request, prior to any disbursement, Defendant USM will submit a revised Cost Estimate for the remainder of the CERCLA Response Action.

b. Timing, Amount, and Method of Disbursing Funds from the EPA Special Account. Within sixty (60) Days after EPA's receipt of a Cost Summary and Certification, as described in this Section, or if EPA has requested additional information or a revised Cost Summary and Certification as set forth below, within thirty (30) Days after receipt of the additional information or revised Cost Summary and Certification, and subject to the conditions set forth in this Section, EPA shall disburse the funds from the EPA Special Account 1 after completion of a work milestone as set forth in the CERCLA SOW for the CERCLA Response

Action. EPA shall disburse the funds from the EPA Special Account 1 to Defendant USM in accordance with the instructions for electronic funds transfer provided by Defendant USM.

39. Requests for Disbursement of EPA Special Account Funds.

a. Following EPA's confirmation that a work milestone has been satisfactorily completed, Defendant USM shall submit to EPA a Cost Summary and Certification, as described in this Section.

b. The Cost Summary and Certification shall include a complete and accurate written cost summary and certification of the necessary costs incurred and paid by Defendant USM in performing the CERCLA Response Action, excluding costs not eligible for disbursement under Paragraph 40 as set forth below (Costs Excluded from Disbursement). The Cost Summary and Certification shall contain a certification, pursuant to Paragraph 64, signed by the Vice President of Finance of Defendant USM or an Independent Certified Public Accountant.

c. The Vice President of Finance of Defendant USM or an Independent Certified Public Accountant shall also provide EPA a list of the documents that he or she reviewed in support of the Cost Summary and Certification. Upon request by EPA, Defendant USM shall submit to EPA any additional information that EPA deems necessary for its review and approval of a Cost Summary and Certification.

(1) If EPA finds that a Cost Summary and Certification includes a mathematical error, costs excluded under Paragraph 40 (Costs Excluded from Disbursement), or costs that are inadequately documented, it will notify Defendant USM and provide it an opportunity to cure the deficiency by submitting a revised Cost Summary and Certification.

(2) If Defendant USM fails to cure the deficiency within thirty (30) Days after being notified of, and being given the opportunity to cure, the deficiency, EPA will recalculate Defendant USM's costs eligible for disbursement for that submission and disburse the corrected amount to Defendant USM in accordance with the procedures in Subparagraph 38(b) (Timing, Amount, and Method of Disbursing Funds from the EPA Special Account).

(3) Defendant USM may dispute EPA's recalculation under this Paragraph pursuant to Section XVI (Dispute Resolution). In no event shall Defendant USM be disbursed funds from the EPA Special Account 1 in excess of amounts properly documented in a Cost Summary and Certification accepted or modified by EPA.

40. Costs Excluded from Disbursement. The following costs are excluded from, and shall not be sought by Defendant USM for, disbursement from the EPA Special Account 1:

- (a) response costs paid pursuant to Paragraph 35 (Payments for EPA Response Action Costs);
- (b) any other payments made by Defendant USM to the United States pursuant to this Consent Decree, including, but not limited to, any CERCLA Interest, Interest, or penalties paid pursuant to Paragraph 35 (Payments for EPA Response Action Costs), Section V (Civil Penalty), or Section XIV (Stipulated Penalties);
- (c) costs of any response activities Defendant USM performs that are not required under, or approved by EPA pursuant to, this Consent Decree;
- (d) costs of the RCRA Work Requirements (Section VI) and of Financial Assurance (Section X);
- (e) costs related to Defendant USM's litigation, settlement, development of potential contribution claims, or identification of defendants;
- (f) internal costs of Defendant USM, including but not limited to, salaries, travel, or in-kind services, except for those costs that represent the work of employees of



Defendant USM directly performing the CERCLA Response Action; (g) any costs incurred by Defendant USM prior to the Effective Date; (h) any costs incurred by Defendant USM pursuant to Section XVI (Dispute Resolution); or (i) any costs incurred by, or payments made by Defendant USM to, Defendants Group, Trusts and Rennert.

41. Termination of Disbursements from the EPA Special Account. EPA's obligation to disburse funds from the EPA Special Account 1 under this Consent Decree shall terminate upon EPA's determination that Defendant USM: (a) has knowingly submitted a materially false or misleading Cost Summary and Certification; (b) has submitted a materially inaccurate or incomplete Cost Summary and Certification, and has failed to correct the materially inaccurate or incomplete Cost Summary and Certification within thirty (30) days after being notified of, and given the opportunity to cure, the deficiency; or (c) failed to submit a Cost Summary and Certification as required by Paragraph 39 (Requests for Disbursement of EPA Special Account Funds) within sixty (60) Days (or such longer period as EPA agrees) after being notified that EPA intends to terminate its obligation to make disbursements pursuant to this Section because of Defendant USM's failure to submit the Cost Summary and Certification as required by Paragraph 39. EPA's obligation to disburse funds from the EPA Special Account 1 shall also terminate upon EPA's determination that Defendant USM has materially violated the terms of this Consent Decree. Defendant USM may dispute EPA's termination of special account disbursements under Section XVI (Dispute Resolution).

42. Recapture of EPA Special Account Disbursements. Upon termination of disbursements from the EPA Special Account 1 under Paragraph 41 (Termination of Disbursements from the EPA Special Account), if EPA has previously disbursed funds from the

EPA Special Account 1 for activities specifically related to the reason for termination, e.g., discovery of a materially false or misleading submission after disbursement of funds based on that submission, EPA shall submit a bill to Defendant USM for those amounts already disbursed from the EPA Special Account 1 specifically related to the reason for termination, plus CERCLA Interest on that amount covering the period from the date of disbursement of the funds by EPA to the date of repayment of the funds by Defendant USM. Within thirty (30) Days after receipt of EPA's bill, Defendant USM shall reimburse the EPA Hazardous Substance Superfund for the total amount billed. Payment shall be made in accordance with Paragraph 35 (Payments for EPA Response Action Costs). Upon receipt of payment, EPA may deposit all or any portion thereof in EPA Special Account 5, EPA Special Account 1, or, subject to the conditions in Paragraph 43 (Balance of EPA Special Account Funds), the EPA Hazardous Substance Superfund. The determination of where to deposit or how to use the funds shall not be subject to challenge by Defendant USM pursuant to the dispute resolution provisions of this Consent Decree or in any other forum. Defendant USM may dispute EPA's determination as to recapture of funds pursuant to Section XVI (Dispute Resolution).

43. Balance of EPA Special Account Funds. After EPA completes all disbursements to Defendant USM in accordance with this Section, if any funds remain in the EPA Special Account 1, EPA may transfer such funds to EPA Special Account 4 or to EPA Special Account 5. Surplus funds may be transferred by EPA to the EPA Hazardous Substance Superfund only as provided in Appendix 11 (Bankruptcy Settlement). Any transfer of funds to the EPA Hazardous Substance Superfund shall be subject to challenge only as to whether the conditions for transfer set forth in Appendix 11 (Bankruptcy Settlement) have been met.

**VIII. SUBSURFACE ESTATE CONVEYANCE**

44. The United States holds title to the subsurface estate for certain of the parcels at the Site and has determined that this reservation interferes with the CERCLA Response Action, but that the CERCLA Response Action is a more beneficial use of the land in order to protect human health and the environment than any potential mineral development.

45. Defendant USM is seeking to acquire some or all of the subsurface estate (the mineral interest) currently owned by the United States in accordance with the Federal Land Policy and Management Act (FLPMA) Section 209(b) (43 U.S.C. 1719(b)) and all applicable regulations including, but not limited to, 43 C.F.R. 2720 Subpart 2720 - Conveyance of Federally-Owned Mineral Interests (conveyance regulations).

**IX. US MAGNESIUM REIMBURSEMENT ESCROW ACCOUNT**

46. The conditions for Defendant USM to seek disbursements from the US Magnesium Reimbursement Escrow Account for reimbursement of costs incurred in performing the Work are set forth in Appendix 11 (Bankruptcy Settlement).

**X. FINANCIAL ASSURANCE**

47. RCRA Financial Assurance for Operating Facility.

a. Closure/Post-Closure of Retrofitted Waste Pond.

(1) Salt Cap Closure. Within thirty (30) Days of the Effective Date of this Consent Decree, Defendant USM shall secure and maintain Financial Assurance in the amount of \$10,610,000 for the benefit of EPA, pursuant to the requirements of Appendix 13 (Financial Assurance) of this Consent Decree, based on the initial Salt Cap Closure and Post-Closure Plan and Cost Estimate for the RWP submitted under

Paragraph 16(a) (Initial Salt Cap Closure and Post-Closure Plan) and Appendix 4(A) (Salt Cap Closure and Post-Closure Plan), and including the amount required for third-party liability pursuant to 40 C.F.R. 264.147. Within ninety (90) Days of EPA approval of any updated Cost Estimate required by Appendix 13, Section X (Financial Assurance), including the final RWP Closure Plan and Post-Closure Plan, Defendant USM shall adjust the amount of the Financial Assurance to reflect the approved updated Cost Estimate for RWP salt cap Closure and Post-closure, in accordance with Appendix 13 (Financial Assurance).

(2) Alternative Closure. Following any EPA Determination pursuant to Subparagraph 16(a)(3) (Initial Alternative RWP Closure and Post-Closure Plan) that salt cap closure would not be protective of human health or the environment, Defendant USM, within ninety (90) Days of EPA approval of the initial Alternative Closure and Post-Closure Plan submitted pursuant to Paragraph 16(a)(3) and Appendix 4(B) (Statement of Criteria for Alternative Closure of RWP), shall adjust the amount of Financial Assurance to reflect the approved Cost Estimate. Within ninety (90) Days of EPA approval of any updated Cost Estimate required by Appendix 13, Section X (Financial Assurance), including the final Closure and Post-Closure Plan, Defendant USM shall adjust the amount of the Financial Assurance to reflect the approved updated Cost Estimate for RWP Alternative Closure and Post-Closure in accordance with Appendix 13 (Financial Assurance).

b. Continuing RCRA Financial Assurance. Upon cessation of manufacturing operations at the Facility and initiation of a final Site-wide remedial investigation/feasibility

study for the Site to select a Final CERCLA Remedial Action, the Financial Assurance maintained for Closure and Post-Closure of the Retrofitted Waste Pond shall be maintained by Defendant USM until EPA selects a Final CERCLA Remedial Action and Defendant USM enters into an agreement with EPA to perform the Final CERCLA Remedial Action. If Defendant USM enters into an agreement to perform the Final CERCLA Remedial Action, the RCRA Financial Assurance for Closure and Post-Closure of the RWP will be adjusted to secure the estimated cost of implementing the Final CERCLA Remedial Action. If Defendant USM does not enter into such an agreement, the Financial Assurance shall continue to secure final Closure and Post-Closure of the RWP under RCRA until released by EPA.

c. Defendant USM's inability to secure and/or maintain Financial Assurance shall in no way excuse performance of the Work or any other requirements of this Consent Decree or any other statutory or regulatory obligation.

48. CERCLA Response Action Financial Assurance. Within thirty (30) Days of the Effective Date of this Consent Decree, Defendant USM shall secure and maintain Financial Assurance in the amount of \$5.9 million for the benefit of EPA to ensure completion of the CERCLA Response Action, pursuant to the requirements of Appendix 13 (Financial Assurance). Within sixty (60) Days of EPA approval of the revised Cost Estimate, Defendant USM will provide Financial Assurance pursuant to the requirements of Appendix 13 (Financial Assurance) of this Consent Decree. Defendant USM may submit, on any anniversary of the Effective Date or at any other time agreed to by EPA, a request to reduce the amount, or change the form or terms, of the Financial Assurance mechanism. Any such request must be submitted to EPA and must include a Cost Estimate of the remaining work to implement the CERCLA Response Action, an

explanation of the bases for that estimate, and a description of the proposed changes, if any, to the form or terms of the Financial Assurance. EPA will notify Defendant USM of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Defendant USM 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, final administrative decision, or final judicial decision resolving such dispute under Section XVI (Dispute Resolution). Defendant USM may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by Defendant USM pursuant to the dispute resolution provisions of this Consent Decree or in any other forum. Within thirty (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, Defendant USM shall submit to EPA documentation of the reduced, revised, or alternative Financial Assurance mechanism. Defendant USM's obligation to secure Financial Assurance under this Paragraph for the CERCLA Response Action shall terminate upon issuance of the Notice of Completion of CERCLA Response Action under Paragraph 34.

49. EPA Special Account Funds.

a. Financial Assurance Offset.

(1) Any funds held in EPA Special Accounts 2, 3 and 4, as long as such sums are still being held and have not yet been disbursed to Defendant USM or otherwise for environmental actions at the Site, plus any accrued CERCLA Interest, will be taken into account toward satisfying Defendant USM's obligation to provide Financial

Assurance under Paragraph 47 (RCRA Financial Assurance for Operating Facility).

There are currently ~\$11.9M in EPA Special Accounts 2, 3 and 4 and no additional Financial Assurance for RWP Closure and Post-Closure is required at this time.

(2) Any funds held in EPA Special Account 1, as long as such sums are still being held and have not yet been disbursed to Defendant USM or otherwise for environmental actions at the Site, plus any accrued CERCLA Interest, will be taken into account toward satisfying Defendant USM's obligation to provide Financial Assurance under Paragraph 48 (CERCLA Response Action Financial Assurance). There are currently ~\$6.3M in EPA Special Account 1 and no additional Financial Assurance for the CERCLA Response Action is required at this time.

(3) If requests for disbursements to Defendant USM from Special Accounts 1 through 4 pursuant to Paragraph 38 and 39 of this Consent Decree or other enforceable agreement(s) allowing such disbursement would cause the balances remaining in those Special Accounts to be less than the updated Cost Estimates for the Work secured by those Special Accounts pursuant to Subparagraphs 49(a)(1) and/or (2), above, Defendant USM shall secure and maintain Financial Assurance in the amount of the deficit for the benefit of EPA, pursuant to the requirements of Appendix 13 (Financial Assurance). As provided in Paragraph 38, EPA will not make the requested disbursement(s) until such Financial Assurance is in place.

b. At the time EPA approves any Cost Estimate or updated Cost Estimate required under Paragraphs 47 or 48, or required by Appendix 13 (Financial Assurance), EPA will identify the value of funds held in the EPA Special Accounts, including any accrued CERCLA

Interest, and approve the amount, or adjustment of the amount, of Defendant USM's Financial Assurance mechanism(s) consistent with Paragraphs 49(a)(1) or 49(a)(2).

c. In addition to the Financial Assurance information included in the reports provided pursuant to this Consent Decree, Defendant USM shall provide to EPA, upon request, any information or reports that EPA is authorized to request pursuant to Section 3007 of RCRA, [42 U.S.C. § 6927](#), [40 C.F.R. Part 264 Subpart H](#), or any other statutory or regulatory information-gathering authorities, regarding the financial status of Defendant USM, the financial mechanism(s) provided by Defendant USM to meet its obligations for Financial Assurance for the RCRA operating Facility (Paragraph 47) and the CERCLA Response Action (Paragraph 48) as set forth in this Consent Decree, and the financial institution providing the financial mechanism(s) to secure Defendant USM's obligation. Defendant USM's inability to secure and/or maintain Financial Assurance shall in no way excuse performance of the Work or any other requirements of this Consent Decree or any other statutory or regulatory obligation.

#### **XI. APPROVAL OF DELIVERABLES**

50. Approval of Deliverables. Any plan, report, or other item for implementation of the Work that is required to be submitted by Defendant USM to EPA for approval pursuant to this Consent Decree shall also be submitted to UDEQ for notice purposes and opportunity for review. Upon request, EPA shall forward copies of such deliverables to USW. EPA, following review of the submission and, in its discretion, any consultation with UDEQ or USW, shall in writing: a) approve the submission; b) approve the submission upon specified conditions; c) approve part of the submission and disapprove the remainder; or d) disapprove the submission.



In the event of disapproval of any portion of the submission, EPA shall include a statement of the reasons for such disapproval in its response.

51. If the submission is approved pursuant to Paragraph 50, Defendant USM shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part, pursuant to Paragraph 50, Defendant USM shall, upon written direction from EPA, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions, subject to Defendant USM's right to dispute only the specified conditions or the disapproved portions, under Section XVI of this Decree (Dispute Resolution).

52. If the submission is disapproved in whole or in part pursuant to Paragraph 50, Defendant USM shall, within forty-five (45) Days or such other time as EPA and Defendant USM agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, Defendant USM shall proceed in accordance with the preceding Paragraph.

53. Any stipulated penalties applicable to the original submission, as provided in Section XIV (Stipulated Penalties) of this Decree, shall accrue during the 45-Day or other specified period, but shall not be payable unless the re-submission is untimely or is disapproved in whole or in part; provided that, if the original submission was so deficient as to constitute a material breach of Defendant USM's obligations under this Decree, the stipulated penalties

applicable to the original submission shall be due and payable notwithstanding any subsequent re-submission.

54. If a re-submitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA may again require Defendant USM to correct any deficiencies, in accordance with the preceding Paragraphs, or may itself correct any deficiencies, subject to Defendant USM's right to invoke Dispute Resolution and the right of EPA to seek stipulated penalties as provided in the preceding Paragraphs. In the event of: 1) material or substantial alterations or additions to the facility or its operations; 2) the receipt of information not available at the time of deliverable approval that would have justified changes to the deliverable; or 3) new statutory requirements or regulations that reveal any need to modify any deliverable, report or other item previously approved by EPA, EPA may notify Defendant USM of such modification and/or require the submission to be revised in accordance with EPA direction and resubmitted to EPA for approval.

## **XII. CERCLA AND RCRA COORDINATION AND TOLLING AGREEMENT**

55. To conserve Superfund resources and avoid duplication of effort, for so long as Defendant USM continues manufacturing operations at the Facility in compliance with this Consent Decree and RCRA, Defendant USM's obligations at the Facility will be governed by this Consent Decree and RCRA, and CERCLA remedial activities at the operating Facility other than those required by this Consent Decree will be deferred to RCRA authorities and this Consent Decree, subject to Section XVIII (Effect of Settlement/Reservation of Rights).

56. After entry of this Consent Decree, EPA and Defendant USM will modify the CERCLA RI/FS AOC as follows:

a. Defendant USM will complete the Site-wide remedial investigation report in accordance with the terms of the CERCLA RI/FS AOC; and

b. Upon completion of the remedial investigation report, Defendant USM will proceed with the feasibility study for the Facility Closing Area in accordance with the terms of the CERCLA RI/FS AOC.

57. Upon cessation of manufacturing operations at the Facility, EPA will, in accordance with CERCLA and the NCP, initiate a final Site-wide remedial investigation/feasibility study for the Site and select a Final CERCLA Remedial Action. EPA will take into consideration, to the extent practicable, existing information and data in the course of such remedial investigation/feasibility study. EPA will treat the activities required by the final approved RWP Closure and Post-Closure Plan and any CAPs as presumptive remedies under CERCLA, subject to applicable law. Defendant USM's continuing obligations to provide RCRA Financial Assurance are set forth in Subparagraph 47(b). The United States' reservation of rights to require Corrective Action under RCRA is set forth in Paragraph 96.

58. Tolling Agreement. The United States and the Settling Defendants agree the period commencing as of the Effective Date of this Consent Decree and ending upon EPA's selection of the Final CERCLA Remedial Action (Tolling Period) shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the United States on Tolled Claims as defined herein (Tolling Agreement). Tolled Claims are any and all claims of the United States pursuant to CERCLA against Settling Defendants for cost recovery and/or injunctive relief at the Site not resolved by Section XVIII (Effect of Settlement/Reservation of Rights) of this Consent Decree. Settling Defendants shall not assert, plead or raise

against the United States in any fashion, whether by answer, motion, or otherwise, any defense of laches, estoppel, or waiver, or other similar defense based on the running of any statute of limitations or the passage of time during the Tolling Period in any action brought on the Tolloed Claims. The United States may commence suit on Tolloed Claims at any time during the Tolling Period.

59. This Tolling Agreement does not constitute any admission or acknowledgment of any fact, conclusion of law, or liability by any Party to this Consent Decree. Nor does this Tolling Agreement constitute any admission or acknowledgment on the part of the United States that any statute of limitations, or similar defense concerning the timeliness of commencing a civil action, is applicable to the Tolloed Claims. The United States reserves the right to assert that no statute of limitations applies to any of the Tolloed Claims and that no other defense based upon the timeliness of commencing a civil action is applicable.

60. Nothing herein shall affect the rights of the United States to commence any action to protect the public health, welfare, or the environment, or to enforce this Consent Decree.

61. This Tolling Agreement does not limit or affect the nature or scope of any claims that could be brought by the United States in a complaint against Settling Defendants or the date on which the United States may file such a complaint.

62. This Tolling Agreement is not intended to affect any claims by or against third parties.

### **XIII. REPORTING REQUIREMENTS**

63. Defendant USM shall submit the following reports to EPA, and to UDEQ for notice purposes. Upon receipt, EPA shall forward copies of such reports to USW.

a. Semiannual Reports.

(1) On or before January 31<sup>st</sup> and July 31<sup>st</sup> of each year following the Effective Date of this Consent Decree, and continuing until termination of this Decree pursuant to Section XXIV (Termination), Defendant USM shall submit a report for the preceding six months that shall include, as applicable to the Work required under this Consent Decree, a list of deliverables submitted to EPA for approval, and their status; a list of any notices submitted to EPA pursuant to this Consent Decree; the status of any construction or compliance measures; completion of milestones; problems encountered or anticipated, together with implemented or proposed solutions; status of permit applications; reports to UDEQ; operation and maintenance difficulties or concerns; reports on the operation of Defendant USM's re-use and filtration systems (including flow rates, hazardous waste characterizations, sludge removal, the log of solids and tabulated monthly solids quantities, and any bypass or upset events); notices of violation, force majeure, disputes and any resolution thereof, and status of Financial Assurance. The report required by this Subparagraph (a) is separate from the annual "WHO Certification" required under the WHO. Defendant USM shall submit the "WHO Certification" required under Paragraph XX of the WHO simultaneously to EPA and USW.

(2) The report shall also include a description of any non-compliance with the requirements of this Consent Decree and an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If Defendant USM violates, or has reason to believe that it may violate, any

requirement of this Consent Decree, Defendant USM shall notify the United States (and UDEQ and USW for notice purposes) of such violation and its likely duration, in writing, within ten (10) Days of the date Defendant USM first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendant USM shall so state in the report.

Defendant USM shall investigate the cause of the violation and shall then submit to EPA an amendment to the report, including a full explanation of the cause of the violation, within thirty (30) Days of the date Defendant USM becomes aware of the cause of the violation. Upon request, EPA shall forward to UDEQ and USW a copy of this amended report. Nothing in this Paragraph or the following Paragraph relieves Defendant USM of its obligation to provide the notice required by Section XV of this Consent Decree (Force Majeure).

b. 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, Defendant USM shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release. Defendant USM shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer at (303) 293-1788 of the incident or Site conditions. If Defendant USM fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Defendant USM shall reimburse EPA for all costs of such response action not inconsistent with the NCP pursuant to Paragraph 35

(Payments for EPA Response Action Costs). Defendant USM shall submit a written report to EPA within seven (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.

c. Upon the occurrence of any event during performance of the Work that Defendant USM 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 of 1986 (EPCRA), 42 U.S.C. § 11004, Defendant USM shall immediately orally notify the OSC 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 of CERCLA, 42 U.S.C. § 9603, and Section 304 of EPCRA, 42 U.S.C. § 11004.

64. Each report submitted by Defendant USM under this Section shall be signed by a responsible corporate official of Defendant USM and include the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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.

This certification requirement does not apply to emergency or similar notifications where

compliance would be impractical.

65. The reporting requirements of this Consent Decree do not relieve Defendant USM of any reporting obligations required by RCRA or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

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

66. Defendant USM shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section XV (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any deliverable or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

67. Late Payment of Civil Penalty. If Defendant USM fails to pay the civil penalty required to be paid under Section V of this Decree (Civil Penalty) when due, Defendant USM shall pay a stipulated penalty of \$3,000 per Day for each Day that the payment is late for the first ten (10) Days. Thereafter, Defendant USM shall pay \$5,000 per Day for each Day that the payment is late.

68. Work Requirements. The following stipulated penalties shall accrue per violation per Day for each violation by Defendant USM of the requirements of Paragraph 5 (transfer of ownership or operation) and of Section VI (RCRA Work Requirements), Section VII (CERCLA Response Action), including failure to comply with the Ground Water Discharge Permit to be



obtained for the Retrofitted Waste Pond and the Solid Waste Landfill Permit to be obtained for the on-site landfill, Section X (Financial Assurance), and Section XVII (Information Collection and Retention) of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$3,000	1st through 14th Day
\$4,000	15th through 30th Day
\$5,000	31st Day and beyond

If the violations are predicated on Defendant USM's failure to comply with the Ground Water Discharge Permit to be obtained for the Retrofitted Waste Pond and the Solid Waste Landfill Permit to be obtained for the on-site landfill, EPA will consult with UDEQ prior to making a demand for stipulated penalties.

69. Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation by Defendant USM of the requirements of Section XIII of this Consent Decree (Reporting Requirements):

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

70. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree. Except as provided in Paragraph 71, Defendant USM shall pay any stipulated penalty within thirty (30) Days of receiving the United States' written demand. The United States may, in the

unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Decree.

71. Stipulated penalties shall continue to accrue as provided in Paragraph 70 during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendant USM shall pay accrued penalties determined to be owing, together with Interest, to the United States within thirty (30) Days of the effective date of the agreement or the receipt of EPA's decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant USM shall pay all accrued penalties determined by the Court to be owing, together with Interest, within sixty (60) Days of receiving the Court's decision or order, except as provided in Subparagraph c, below.

c. If the United States or Defendant USM appeals the District Court's decision, Defendant USM shall pay all accrued penalties determined to be owing, together with Interest, within fifteen (15) Days of receiving the final appellate court decision. Defendant USM shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Section XX (Notices), except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

72. If Defendant USM fails to pay stipulated penalties according to the terms of this Consent Decree, Defendant USM shall be liable for Interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall

be construed to limit the United States from seeking any remedy otherwise provided by law for any failure by Defendant USM to pay any stipulated penalties.

73. Subject to the provisions of Section XVIII of this Consent Decree (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Settling Defendants' violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of RCRA or its implementing regulations, Defendant USM or Settling Defendants, as applicable, shall be allowed a credit for any stipulated penalties paid against any statutory penalties imposed for such violation.

#### **XV. FORCE MAJEURE**

74. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant USM, of any entity controlled by Defendant USM or of Defendant USM's contractors, that delays or prevents the performance of any of Defendant USM's obligations under this Consent Decree despite Defendant USM's best efforts to fulfill the obligation. The requirement that Defendant USM exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure event, to minimize the delay and any adverse effects of the delay to the greatest extent possible. "Force majeure" does not include Defendant USM's financial inability to perform any obligation under this Consent Decree.

75. Notice of Force Majeure. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree and for which Defendant USM intends

a. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Defendant USM in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

b. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendant USM in writing of its decision. If Defendant USM elects to invoke the dispute resolution procedures set forth in Section XVI (Dispute Resolution), it shall do so no later than fifteen (15) Days after receipt of EPA's notice. In any such proceeding, Defendant USM 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 event, 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 Defendant USM complied with the requirements of Paragraphs 74 and 75, above. If Defendant USM carries this burden, the delay at issue shall be deemed not to be a violation by Defendant USM of the affected obligation of this Consent Decree identified to EPA and the Court.

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

77. The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve disputes between the United States and Settling Defendants regarding this

Consent Decree. USW may not invoke Dispute Resolution under this Consent Decree to dispute any decision, approval, or action by the United States taken pursuant to this Consent Decree.

USW reserves all rights it may have under authorities other than this Consent Decree to dispute EPA final action. Any disputes between Defendant USM and USW shall be resolved pursuant to the WHO or by other available means. Nothing in this Section shall affect any USW right to seek appropriate relief from Defendant USM for any alleged violations of the WHO. The failure of any Settling Defendant to seek resolution of a dispute under this Section shall preclude Settling Defendants from raising any disputed issue as a defense to an action by the United States to enforce any obligation arising under this Decree.

78. Informal Dispute Resolution. Any dispute between the United States and the Settling Defendant raising the dispute shall first be the subject of informal negotiations, which may include any third-party assisted, non-binding alternative dispute resolution process agreeable to the United States and the Settling Defendant raising the dispute. The dispute shall be considered to have arisen when a Settling Defendant sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute.

a. The period of informal negotiations, which may include consultation with UDEQ or USW by EPA in its unreviewable discretion, shall not exceed twenty (20) Days from the date the dispute arises, unless that period is modified by written agreement.

b. If the United States and the Settling Defendant that raised the dispute cannot resolve the dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within thirty (30) Days after the conclusion of the

informal negotiation period, the Settling Defendant invokes formal dispute resolution procedures as set forth below.

79. Formal Dispute Resolution. If a Settling Defendant elects to invoke formal dispute resolution, it shall, within thirty (30) Days after the conclusion of the informal negotiation period, serve on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting the Settling Defendant's position and any supporting documentation relied upon by such Settling Defendant.

80. The United States shall serve its Statement of Position on the Settling Defendant that raised the dispute within forty-five (45) Days of receipt of such Settling Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding upon the Parties, unless the United States and the relevant Settling Defendant agree to the exchange of supplemental Statements of Position or such Settling Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

81. A Settling Defendant may seek judicial review of the dispute by filing with the Court and serving on the Parties, in accordance with Section XX of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of the Settling Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation,

and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree. The United States shall respond to the motion of the Settling Defendant that raised the dispute within the time period allowed by the Local Rules of this Court. Such Settling Defendant may file a reply memorandum to the extent permitted by the Local Rules.

82. Standard of Review.

a. Disputes Concerning Matters Accorded Record Review. In any dispute pertaining to the adequacy of the performance of Work undertaken pursuant to this Consent Decree or pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; or that is accorded review on the administrative record under applicable principles of administrative law, Settling Defendants shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. In any other dispute, Settling Defendants shall bear the burden of demonstrating that Settling Defendants' position complies with this Consent Decree and furthers the objectives of the Consent Decree.

83. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of any Settling Defendant under this Consent Decree, unless and until final resolution of the dispute so provides, or unless EPA agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the

dispute. If a Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIV (Stipulated Penalties).

**XVII. INFORMATION COLLECTION AND RETENTION**

84. The United States, the State and their representatives, including attorneys, contractors, and consultants, shall have the right of entry into the Facility at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by Defendant USM or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Defendant USM's compliance with this Consent Decree.

85. Upon request, Defendant USM shall provide EPA or its authorized representative's splits of any samples taken by Defendant USM. Upon request, EPA shall provide Defendant USM splits of any samples taken by EPA.

86. Until five years after the termination of this Consent Decree, Defendant USM shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendant USM's performance of its obligations under this Consent Decree. This information-retention



requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by EPA, in consultation with UDEQ and USW, Defendant USM shall provide to EPA copies of any documents, records, or other information required to be maintained under this Paragraph.

87. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant USM shall notify EPA at least ninety (90) Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by EPA, in consultation with UDEQ and USW, Defendant USM shall deliver any such documents, records, or other information to EPA.

88. In connection with any request for documents, records, or other information pursuant to this Consent Decree, including the submission of reports or information required by this Consent Decree, the Parties agree that they remain bound by the following protective orders previously entered in this case relating to confidential business information (“CBI”): Stipulation and Protective Order Regarding Confidential Business Information, [Docket No. 52, 1/16/02](#), as amended by [Docket No. 187, 4/19/05](#), and supplemented by [Docket No. 238, 3/10/06](#), and the Protective Order Regarding Worker Health and Safety, [Docket No. 186, 4/19/05](#) (collectively “CBI Orders”), and that these CBI Orders will govern any subsequent exchanges of documents or information among the Parties relating to Defendant USM’s performance of the Work that are claimed to be CBI.

89. Defendant USM may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant USM asserts such a privilege, it shall provide the following: (1) the title of the

document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant USM. However, Defendant USM shall not assert a legal privilege for any data, records, or information generated or received in connection with Defendant USM's obligations pursuant to the requirements of this Consent Decree.

90. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States or USW pursuant to applicable federal laws, regulations, permits, contracts, or the WHO attached hereto as Appendix 10, nor does it limit or affect any duty or obligation of Defendant USM to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

#### **XVIII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

91. Subject to the reservations set forth in this Section, below, this Consent Decree resolves the civil claims of the United States against the Settling Defendants for the violations alleged in the Complaint filed in this action, and the civil claims alleged in USW's Complaint in Intervention, through the date of the lodging of the Consent Decree. For continuing violations alleged in the Complaint, provided that Settling Defendants comply with this Consent Decree from the date of lodging of the Consent Decree through its Effective Date, these claims shall also be resolved through the Effective Date of this Consent Decree, as of the Effective Date; and, provided that Settling Defendants comply with this Consent Decree from the Effective Date of this Consent Decree through the date of termination of this Consent Decree pursuant to Section

XXIV (Termination), these claims shall be finally resolved as of the date the Consent Decree terminates.

95. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States or, as applicable, UDEQ or USW, to obtain penalties or injunctive relief under RCRA or its implementing regulations or under other federal or state laws, regulations, or permit conditions, except as expressly specified in this Section.

96. The United States reserves the right to seek corrective action and financial assurance under Section 3008(h) of RCRA, [42 U.S.C. § 6928\(h\)](#), and its implementing regulations for all areas of the Facility where hazardous wastes have been placed on the land. In any such action by the United States seeking corrective action or financial assurance, Settling Defendants reserve all their rights and defenses.

97. CERCLA Covenant Not to Sue. Except as otherwise provided in Paragraph 98 (CERCLA Reservations of Rights), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, [42 U.S.C. §§ 9606 and 9607\(a\)](#), for the CERCLA Response Action and EPA Response Action Costs. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the complete and satisfactory performance by Settling Defendants of the requirements of this Consent Decree. These covenants extend only to Settling Defendants and do not extend to any other person. Nothing in this Consent Decree or the Work to be performed pursuant to it shall be deemed to waive or abrogate the pre-enforcement review bar set forth in Section 113(h) of CERCLA, [42 U.S.C. § 9613\(h\)](#), with respect to the Site.

Nothing in this Consent Decree relieves Defendant USM of its obligations to comply with the CERCLA RI/FS AOC or the RCRA Administrative Order.

98. CERCLA Reservations of Rights. The covenants set forth in Paragraph 97 (CERCLA Covenant Not to Sue) do not pertain to any matters other than those expressly identified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including, but not limited to:

- a. liability for failure by a Settling Defendant to meet a requirement of this Consent Decree;
- b. liability for costs not included within the definition of EPA Response Action Costs;
- c. liability for performance of response actions other than the CERCLA Response Action;
- d. criminal liability;
- e. liability for violations of federal or state law that occur during or after implementation of the Work;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- g. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and

h. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site not paid as EPA Response Action Costs under this Settlement.

99. Subject to Paragraph 101 (Waiver of Claims by Settling Defendants), Settling Defendants reserve all their rights and defenses with respect to any claims asserted by the United States pursuant to CERCLA.

100. The United States and, as applicable USW, further reserve all legal and equitable remedies 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, whether related to the violations addressed in this Consent Decree or otherwise. In any such action, Settling Defendants reserve all their rights and defenses.

101. Waiver of Claims by Settling Defendants. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, EPA Response Action Costs, and this Consent Decree, 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 claims under 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, EPA Response Action Costs, and this Consent Decree; or

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

d. any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or USW in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 97 (CERCLA Covenant Not to Sue) of this Section.

102. The covenants not to sue in Paragraph 101 (Waiver of Claims by Settling Defendants) 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 Paragraph 98 (CERCLA Reservations of Rights), other than in Subparagraph 98(a) (liability for failure to meet a requirement of this Consent Decree), 98(d) (criminal liability), or 98(e) (violations of federal/state law during or after implementation of the Work), but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

103. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States or, as applicable, USW, to obtain penalties or injunctive relief under RCRA or its implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in this Section.

104. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Defendant USM is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendant USM's compliance with this Consent Decree shall be no defense to liability in any action commenced pursuant to any such laws, regulations, or permits, except as provided in Paragraph 23 (TSDF Status). Compliance with the terms of this Consent Decree does not guarantee compliance with all applicable federal, state, or local laws, regulations, or permits.

105. This Consent Decree does not limit or affect the rights of the Parties against any third-parties (persons not a Party to this Consent Decree), nor does it limit the rights of third-parties against Settling Defendants except as otherwise provided by law.

106. This Consent Decree shall not be construed to create rights or obligations in, or grant any cause of action to, any third-party.

#### **XIX. COSTS**

107. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect costs (including attorneys' fees) incurred in any action necessary to access Financial Assurance pursuant to Section X (Financial Assurance) of this Consent Decree, or to collect any portion of the CERCLA Response Costs, the civil penalty, or any stipulated penalties or other costs due under this Consent Decree but not paid by Defendant USM.

**XX. NOTICES**

108. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Box 7611 Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-7-1-06980

Ann Stephanos  
Office of Civil Enforcement  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

Andrew J. Lensink, Senior Attorney  
8ORC-LE  
U.S. EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129

Annette Maxwell, Physical Scientist  
8ENF-RO-R  
RCRA/OPA Enforcement Branch  
U.S. EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129

To Settling Defendants:

Rob Hartman  
Environmental Manager  
US Magnesium LLC  
238 North 2200 West  
Salt Lake City, UT 84116-2912

M. Lindsay Ford



Parsons Behle & Latimer  
South Main Street, Suite 1800  
Salt Lake City, UT 84111

To USW:

Michael Wright  
Director, Department of Health, Safety, and Environment  
United Steelworkers  
5 Gateway Center  
Pittsburgh, PA 15222

Steve Sallman  
Assistant Director, Department of Health, Safety, and Environment  
United Steelworkers  
5 Gateway Center  
Pittsburgh, PA 15222  
Cody Brown  
United Steelworkers  
P.O. Box 1945  
West Jordan, UT 84084

Joseph M. Santarella Jr.  
Santarella & Eckert, LLC  
7050 Puma Trail  
Littleton, CO 80125

To UDEQ:

Michael Storck  
Division of Environmental Response and Remediation  
195 North 1950 West  
P.O. Box 144840  
Salt Lake City, Utah 84114-4840

Dan Hall  
Ground Water Protection Section Manager  
Division of Water Quality  
Utah Department of Environmental Quality  
P.O. Box 144870  
Salt Lake City, Utah 84114-4870

Brad Maulding  
Corrective Action Manager  
Division of Waste Management and Radiation Control

Utah Department of Environmental Quality  
P.O. Box 144880  
Salt Lake City, Utah 84114-4880

109. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

**XXI. EFFECTIVE DATE**

110. The Effective Date of this Consent Decree shall be the date upon which it is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket; provided, however, that Defendant USM agrees that it shall be bound to perform any duties scheduled to occur prior to the Effective Date as of the date of execution of this Consent Decree. In the event the United States withdraws or withholds consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, then any requirement to perform Work under this Consent Decree shall terminate.

**XXII. RETENTION OF JURISDICTION**

111. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections XXIV (Termination) and XVI (Dispute Resolution), or effectuating or enforcing compliance with the terms of this Decree.

**XXIII. MODIFICATION**

112. The terms of this Consent Decree may be modified only as set forth herein. Any modifications or amendments of the WHO must be made by written agreement signed by USW

and Defendant USM and shall be effective upon approval by the Court. Except as set forth in Paragraph 124 of this Decree, changes to provisions of this Consent Decree (excluding the WHO) that expressly allow for change upon the written agreement of the United States and Defendant USM or that do not constitute a material change to this Decree, may be made upon written agreement of the United States and Defendant USM with notice to USW and all Settling Defendants. Upon execution, such modifications shall become enforceable under this Consent Decree and periodically shall be filed with the Court. Any modification that constitutes a material change to this Decree must be by written agreement signed by the United States and Defendants USM and Group and shall become effective upon approval by the Court.

113. Any disputes between the United States and Defendant USM concerning modification of this Decree shall be resolved pursuant to Section XVI (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 82 (Standard of Review), the Party seeking judicial review of such a refusal shall bear the burden of demonstrating that it is entitled to the requested modification based on a significant change in factual conditions or the law or other reason that would make inequitable the continued application of the Consent Decree without the modification sought.

#### **XXIV. TERMINATION**

114. After Defendant USM has completed the requirements of Section VI (RCRA Work Requirements) including Corrective Action if required, Section VII (CERCLA Response Action), and Section X (Financial Assurance) of this Consent Decree, and has paid the civil penalty and any accrued stipulated penalties not waived or reduced by the United States pursuant to Paragraph 70, and EPA has issued a notice of completion of the Final CERCLA Remedial

Action, Defendant USM may serve upon the United States a Request for Termination, with notice to USW and all Settling Defendants, stating that Defendant USM has satisfied the requirements of the Consent Decree, together with all necessary supporting documentation.

115. Following receipt by the United States of Defendant USM's Request for Termination, the United States and Defendant USM shall confer informally concerning the Request and any disagreement that they may have as to whether Defendant USM has satisfactorily complied with the requirements for termination of this Consent Decree. USW may submit comments to EPA for review and comment. If the United States agrees that the Decree may be terminated, the United States and Defendant USM shall submit, for the Court's approval, a joint stipulation terminating the Decree, with notice to USW and to all Settling Defendants. Certain Consent Decree requirements may be excepted from termination upon the agreement of the Parties.

116. If the United States does not agree that the Decree may be terminated, Defendant USM may invoke Dispute Resolution under Section XVI of this Decree (Dispute Resolution). However, Defendant USM shall not seek Dispute Resolution of any dispute regarding termination until one-hundred eighty (180) Days after service of its Request for Termination.

117. Notwithstanding the foregoing, the WHO shall survive the termination of this Consent Decree and remain in effect for the life of the Facility unless amended or terminated by written agreement of USW and Defendant USM and court order. Nothing in this Section shall affect any USW right to seek appropriate relief from Defendant USM for any alleged violations of the WHO.

**XXV. PUBLIC PARTICIPATION**

118. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) Days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, [42 U.S.C. § 9622\(d\)\(2\)](#), and [28 C.F.R. § 50.7](#). The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. This Consent Decree is also subject to RCRA Section 7003(d), [42 U.S.C. § 6973\(d\)](#). Settling Defendants consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Decree.

**XXVI. SIGNATORIES/SERVICE**

119. Each undersigned representative of Settling Defendants, Plaintiff/Intervenors, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

120. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Settling Defendants agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court.

**XXVII. INTEGRATION**

121. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

**XXVIII. FINAL JUDGMENT**

122. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, the Plaintiff/Intervenors, and Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under [Fed. R. Civ. P. 54](#) and 58.

**XXIX. APPENDICES**

123. The following appendices are attached to and part of this Consent Decree:

- Appendix 1-Map 1 is the Facility Map depicting the Current Waste Pond;
- Appendix 1-Map 2 is the Facility Map depicting the Retrofitted Waste Pond;
- Appendix 2 is the Complaint Waste Re-Use Plan;
- Appendix 3 is the Filtration System Design, Construction and Operation Plan;
- Appendix 4(A) is the Salt Cap Closure and Post-Closure Plan;
- Appendix 4(B) is the Statement of Criteria for Alternative Closure of RWP;
- Appendix 4(C) is the Statement of Criteria for Corrective Action;

Appendix 5 is the Courtyard Capping Plan;

Appendix 6 is the Spent Liquor Tank Plan;

Appendix 7 is the Electrolytic Ducon Scrubber and Sump Plan;

Appendix 8 is the Emergency Offgas System (“EOG”) Redesign Plan;

Appendix 9 is the Avian Risk Mitigation Plan;

Appendix 10 is the Second Amended Worker Health Order;

Appendix 11 is the Bankruptcy Settlement;

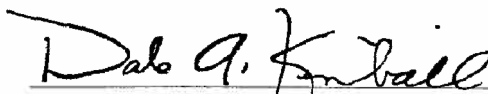
Appendix 12 is the Statement of Work for the CERCLA Response Action;

Appendix 13 is Financial Assurance; and

Appendix 14 is the Project Compliance Schedule.

124. Changes to the schedules and technical requirements of Appendices 1-9 and 12-14 may be made from time to time upon written agreement of EPA and Defendant USM and are not considered material modifications of this Decree.

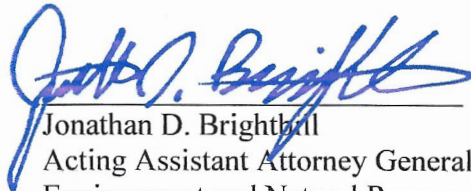
Dated and entered this 30th day of June, 2021.

  
\_\_\_\_\_  
HONORABLE Dale A. Kimball  
UNITED STATES DISTRICT JUDGE  
DISTRICT OF UTAH, CENTRAL DIVISION

WE HEREBY CONSENT to the entry of the Consent Decree in United States et al. v. Magnesium Corporation of America, et al., subject to the public notice requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES OF AMERICA:

Date: 1/19/21



Jonathan D. Brightbill  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Date: 1/19/21



DEBORAH M. REYHER  
Senior Counsel  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
(202) 514-4113



WE HEREBY CONSENT to the entry of the Consent Decree in United States et al. v. Magnesium Corporation of America, et al., subject to the public notice requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: 1-15-21



SUSAN BODINE, Assistant Administrator  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
Washington, D.C. 20460

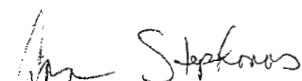
WE HEREBY CONSENT to the entry of the Consent Decree in United States et al. v. Magnesium Corporation of America, et al., subject to the public notice requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: \_\_\_\_\_

\_\_\_\_\_  
SUSAN BODINE, Assistant Administrator  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
Washington, D.C. 20460

Date: 1/15/2021

  
\_\_\_\_\_  
ANN STEPHANOS, Attorney-Advisor  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
Washington, D.C. 20460

WE HEREBY CONSENT to the entry of the Consent Decree in United States et al. v. Magnesium Corporation of America, et al., subject to the public notice requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: \_\_\_\_\_

**DEBRA THOMAS** Digitally signed by DEBRA THOMAS  
Date: 2021.01.15 08:46:09 -07'00'

DEBRA H. THOMAS,  
Acting Regional Administrator  
United States Environmental Protection Agency  
Region 8  
Denver, CO 80202

Date: \_\_\_\_\_

**Schefski, Kenneth** Digitally signed by Schefski, Kenneth  
Date: 2021.01.15 08:10:10 -07'00'

KENNETH C. SCHEFSKI, Regional Counsel  
United States Environmental Protection Agency  
Region 8  
Denver, CO 80202

Date: \_\_\_\_\_

**SUZANNE BOHAN** Digitally signed by SUZANNE BOHAN  
Date: 2021.01.14 16:04:07 -07'00'

SUZANNE J. BOHAN, Director  
Enforcement and Compliance Assurance Divison  
United States Environmental Protection Agency  
Region 8  
Denver, CO 80202

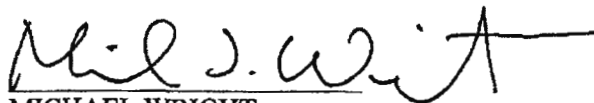
Date: \_\_\_\_\_

**BETSY SMIDINGER** Digitally signed by BETSY SMIDINGER  
Date: 2021.01.15 09:06:43 -07'00'

BETSY SMIDINGER, Director  
Superfund and Emergency Management Division  
United States Environmental Protection Agency  
Region 8  
Denver, CO 80202

FOR PLAINTIFF/INTERVENORS, UNITED STEEL, PAPER & FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICES WORKERS  
INTERNATIONAL UNION, AFL-CIO/CLC AND LOCAL 8319

Date: 15 Jan 2021

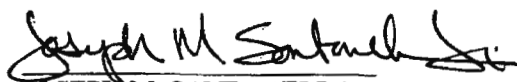


MICHAEL WRIGHT

USW

Director, Health, Safety and the Environment

Date: 15 Jan 2021



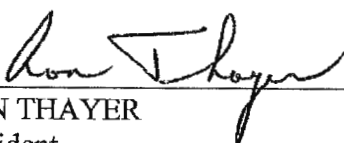
JOSEPH M. SANTARELLA JR

USW

Legal Counsel

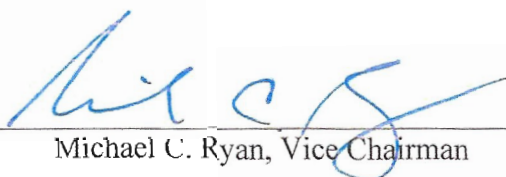
FOR DEFENDANT US MAGNESIUM LLC

Date: 1/18/21

  
\_\_\_\_\_  
RON THAYER  
President

DEFENDANT THE RENCO GROUP, INC., ON ITS OWN BEHALF AND ON BEHALF OF  
THE IRA LEON RENNERT REVOCABLE TRUSTS AND IRA LEON RENNERT

Date: January 14, 2021



Michael C. Ryan, Vice Chairman