

**** SAMPLE DOCUMENT ****

Please note that actual agreements contain appropriate site-specific variations.

NEW MEXICO ENVIRONMENT DEPARTMENT VOLUNTARY REMEDIATION AGREEMENT

I. Introduction

This Voluntary Remediation Agreement (“agreement”) is entered into voluntarily by [**Type Participant Name, Title, Company**] (“participant”) and the secretary of the New Mexico Environment Department (“department”), or his or her designee, pursuant to the Voluntary Remediation Act, Sections 74-4G-1 *et seq.* NMSA 1978, and the New Mexico Voluntary Remediation Regulations (20.6.3 NMAC). The purpose of this agreement is to detail the obligations and functions of each party relevant to the remediation to be conducted at the [**Type Site Name**] (“site”), located at [Type street address] in [Type City (or County)], under the Voluntary Remediation Program (**VRP #00000000**).

The activities conducted by the participant under this agreement are subject to approval by the department. The activities conducted by the participant shall be consistent with this agreement, all applicable laws and regulations, and any pertinent guidance documents. The participant shall employ sound scientific, engineering, and construction practices in the voluntary remediation activities at this site.

II. Statement of Eligibility

The secretary or his designee has determined that the application, [If application materials were submitted on multiple dates, add here: "consisting of materials"] submitted by the participant to the department on [Type date or list of dates], is complete, and that the participant is eligible to enter into this agreement in accordance with Section 74-4G-5 NMSA 1978 and 20.6.3.200.A NMAC.

III. Parties Bound

This agreement shall apply to and be binding upon the participant, its officers, managing agents, directors, principals, partners, employees, receivers, trustees, agents, parents, subsidiaries and affiliates, and upon the department, its employees, and agents. The participant has submitted with the application a signed Declaration of Ability and Intent as set forth in 20.6.3.200.B(2) NMAC. No change in ownership, corporate, or partnership status shall in any way alter the participant’s status or responsibilities under this agreement unless the participant or department terminates this agreement in accordance with 20.6.3.300.H NMAC.

The participant shall provide a copy of this agreement to any subsequent owners or successors before ownership rights are transferred. The participant shall provide a copy of this agreement to all contractors, subcontractors, laboratories, and consultants or other parties, which are retained by the participant, to conduct any work under this agreement, within 14 days after the effective date of this agreement or within 14 days of the date of retaining their services.

IV. Designated Project Manager

On or before the effective date of this agreement, the department shall designate a project

manager. The Primary Applicant specified on the Voluntary Remediation Program Application will function as the project manager for the participant. Each project manager shall be responsible for overseeing the implementation of this agreement. The department project manager will be the department-designated representative at the site. To the maximum extent possible, communications between the participant and department and all documents (including reports, approvals, and other correspondence) concerning the activities performed pursuant to the terms and conditions of this agreement shall be directed through the project managers. During implementation of this agreement, the project managers shall, whenever possible, operate by consensus and shall attempt in good faith to resolve disputes informally through discussion of the issues. Each party has the right to change its respective project manager by notifying the other party in writing at least five days prior to the change.

V. Definitions

“Site” means the area described in the Voluntary Remediation Application. This description is attached and incorporated herein as Exhibit 1. All other terms used are defined in Section 74-4G-3 NMSA 1978 and 20.6.3.7 NMAC.

VI. Addresses for All Correspondence

Documents, including reports, approvals, notifications, disapprovals, and other correspondence to be submitted under this agreement, may be sent by certified mail, first class mail, hand delivery, overnight mail, or by courier service to the following addresses or to such addresses as the participant or department designates in writing.

Documents to be submitted to the department should be sent to:

Mailing Address:

[Type VRP Staff Member Name]
Ground Water Quality Bureau
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502
E-mail: [Type e-mail address]
Phone number: [Type phone #]
Fax number: (505) 827-2965

Physical Address:

[Type VRP Staff Member Name]
Ground Water Quality Bureau
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87505

Documents to be submitted to the participant should be sent to:

Mailing Address:

[Type Primary Applicant name, address, phone, email]

Physical Address:

[Type Name & Address or Type "Same as Mailing Address"]

VII. Compliance with Applicable Laws

All work undertaken by the participant pursuant to this agreement shall be performed in compliance with all applicable federal, state and local laws, ordinances and regulations, including, but not limited to all Occupational Safety and Health Administration, Department of

Transportation, Resource Conservation and Recovery Act, New Mexico Water Quality Control Commission, and New Mexico Environmental Improvement Board Petroleum Storage Tank regulations. In the event of a conflict between federal, state, or local laws, ordinances, or regulations, the participant shall comply with the most stringent of such laws, ordinances, or regulations, unless provided otherwise in writing by the department or other appropriate regulatory personnel with jurisdiction over such laws, ordinances, and regulations. Where it is determined that a permit is required under federal, state or local laws, ordinances, or regulations, the participant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. The participant shall be responsible for obtaining all permits that are necessary for the performance of the work hereunder, and for all ongoing or proposed site activities, and for all ongoing or proposed facility operations.

VIII. Performance Standards and Associated Requirements

The participant has submitted with [Type appropriate article: his, her, its, or their] application to the department a preliminary work plan describing the proposed voluntary remediation activities as they are currently envisioned as being submitted in a final voluntary remediation work plan, which includes a description of the known and suspected contaminants to be addressed by the proposed voluntary remediation activities. This preliminary work plan was prepared pursuant to 20.6.3.200.B NMAC. A copy of the preliminary work plan is attached and incorporated herein as Exhibit 2.

The contaminants covered by this agreement are described as follows:

[To the extent possible, type here each known or suspected contaminant identified in the preliminary work plan or which the parties have otherwise agreed is covered by this agreement, and the media in which the contaminant is located.]

Voluntary remediation activities undertaken pursuant to this agreement shall achieve the following standards or risk-based levels:

[List documents containing the applicable standards or levels - these are examples.]

- *New Mexico Ground and Surface Water Regulations, Standards for Ground Water (20.6.2.3103 NMAC), effective date [type effective date];*
- *Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC), effective date [type effective date];*
- *New Mexico Environment Department Risk Assessment Guidance for Site Investigations and Remediation, Table A-1: NMED Soil Screening Levels, June 2012; and*
- *Results of a risk assessment conducted in accordance with 20.6.3.10.B(3) NMAC and approved by the department to determine [describe required risk assessment].*

It is understood that the parties may wish to modify the list of contaminants and the media in which the contaminants are located, as covered by this agreement, as additional information about the site is developed. The department may approve such changes through approval of work plans and other submittals provided by the participant during the course of undertaking voluntary remediation activities.

IX. Access

To the extent that the site or other areas where work is to be performed hereunder are presently owned or controlled by parties other than those bound by this agreement, the participant shall obtain or shall use its best efforts to obtain access agreements from the present owners. Best efforts shall include, at a minimum, certified letters from participant to the present owners of such properties requesting access agreements to permit the participant, department, and their authorized representatives' access to such property. Such agreements shall provide access for the department and authorized representatives of the department, as specified below. In the event that such access agreements are not obtained, the participant shall so notify the department, which may then, at its discretion, assist the participant in gaining access.

The participant shall provide authorized representatives of the department access to the site and other areas where work is to be performed at all reasonable times. Such access shall be related solely to the work being performed on the site pursuant to this agreement and may include, but is not limited to: inspecting and copying of site and facility records; reviewing the progress of the participant in carrying out the terms of this agreement; conducting such tests, inspections, and sampling as the department may deem necessary; using a camera, sound recording, or other documentary type equipment for field activities; and verifying the data submitted to the department by the participant hereunder. Prior to conducting remediation activities, the participant shall provide a minimum of 72 hours notice to the department to allow observation of site activities and to allow the department's authorized representatives to collect split samples, at the department's discretion. The participant shall permit the department's authorized representatives to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, which pertain to this agreement and over which the participant exercises authority.

X. Deliverables and Submittal Schedule

A. Final Voluntary Remediation Work Plan

In accordance with 20.6.3.400 NMAC, the participant shall submit to the department a proposed final voluntary remediation work plan, detailing investigation and remediation activities to be undertaken to achieve the performance standards described in Section VIII of this agreement. At a minimum, the final work plan must include the elements listed in 20.6.3.400.B NMAC.

Submittal Schedule:

The proposed final work plan shall be submitted by the participant no later than [Type 30, 45 or 60] days after this agreement has been signed.

If the work plan is to be prepared in phases, the work plan for the first phase shall be submitted no later than [Type 30, 45 or 60 - same as previous] days after this agreement has been signed. Following completion, to the department's satisfaction, of the work which is the subject of the final work plan for the first phase, the department may require submission of one or more proposed final work plans for subsequent phases.

Department Review:

The secretary or his designee shall review and approve, approve with conditions, or disapprove a proposed final work plan within 45 days of receipt. Written notice shall be made of any conditions or deficiencies. If the secretary or his designee disapproves a final work plan, the participant may be granted an opportunity to submit a revised version, as determined by the secretary or his designee.

Modification of Voluntary Remediation Work Plan:

The approved final voluntary remediation work plan may be modified at the request of the participant and/or the department, with both parties' approval, in accordance with 20.6.3.400.D NMAC.

B. Periodic Status Reports

The participant shall submit periodic status reports, which detail activities completed for the reporting period and those planned for the upcoming reporting period, to the department for the duration of this agreement. The status report shall identify any proposed variances to the approved work plan and describe interim progress on implementation of the work plan, including analytical results of any sampling, water level measurements, site maps or photos, as appropriate. [Add additional description if needed.]

Submittal Schedule:

The first status report shall be submitted by the participant no later than [Type 90 or other appropriate #] days after this agreement has been signed. Subsequent status reports shall be submitted on a [Type weekly, monthly, quarterly, etc.] basis until the completion report is submitted to the department.

[OPTION: if no status reports are required, replace the above with the statement (otherwise delete):] Periodic status reports are not required.

C. Voluntary Remediation Completion Report

In accordance with 20.6.3.500.B NMAC, following the completion of site voluntary remediation activities, the participant shall demonstrate to the department that site conditions meet the applicable standards specified in Section VIII of this agreement by submitting to the department a voluntary remediation completion report. The content of the completion report is detailed in 20.6.3.500.B NMAC. The report shall be submitted to the department with the legal description of the affected property, and with an Affidavit of Completion of Voluntary Remediation signed by the participant that indicates that remediation is complete, in accordance with this agreement and applicable regulations and guidance.

Submittal Schedule:

The voluntary remediation completion report shall be submitted to the department within 90 days following completion of voluntary remediation activities.

Department Review:

The department shall review and determine the sufficiency of a completion report within 45 days of receipt. If the secretary or his designee does not approve the completion report, the secretary or his designee shall either issue a finding that the participant is not in compliance with the agreement and terminate the agreement, or advise the participant in writing of data gaps in the report. The participant shall correct any identified data gaps and resubmit the completion report within 30 days of receipt of notice of data gaps.

XI. Certificate of Completion

If the secretary or his designee approves the voluntary remediation completion report, the secretary or his designee will issue either a Certificate of Completion or a Conditional Certificate of Completion, as appropriate, pursuant to Section 74-4G-7 NMSA 1978 and 20.6.3.500.B NMAC. If a Conditional Certificate of Completion is issued, the department shall conduct audits to ensure that all engineering controls, remediation systems, post-closure care, and affirmations of future non-residential land use are being maintained appropriately. These audits shall be performed at least every other year for the first 10 years following the issuance of the Conditional Certificate of Completion, and every five years thereafter. If, during the course of such an audit, the department finds that any of the monitoring requirements, engineering controls, remediation systems, post-closure care, or affirmations of future non-residential land use are not being properly maintained such that the performance standards described in Section VIII of this agreement are no longer being met, the department may revoke the Conditional Certificate of Completion and initiate an enforcement action.

No Certificate of Completion or Conditional Certificate of Completion shall be issued to a participant who has not paid invoiced oversight costs in full to the department.

XII. Covenant Not to Sue

Pursuant to Section 74-4G-8 NMSA 1978 and 20.6.3.600 NMAC, after the secretary or his designee issues the Certificate of Completion or Conditional Certificate of Completion, the secretary or his designee shall provide a covenant not to sue to a purchaser or prospective purchaser of the site that did not contribute to the site contamination, for any direct liability, including future liability, for claims based upon the contamination covered by the agreement and over which the department has authority. Except as may be provided under federal law or as may be agreed to by a federal government entity, the covenant not to sue shall not release or otherwise apply to claims by the federal government for claims based on federal law. Except as may be agreed to by another department or agency of the state, the covenant not to sue shall not release or otherwise apply to claims of any other office, department, or agency of the state. Except as may be agreed to by a third party, the covenant not to sue shall not release or otherwise affect a person's liability to third parties.

XIII. Dispute Resolution

This section shall apply to any dispute arising under any section of this agreement, unless specifically excepted. Dispute resolution shall be conducted in accordance with 20.6.3.300.I NMAC).

XIV. Reservation of Rights

The department and participant reserve all rights and defenses they may have pursuant to any available legal authority unless expressly waived herein. The department expressly reserves the right to take any action, including any enforcement action, to address any release not covered by this agreement, including any release that occurs after issuance of the Certificate of Completion or any release of a contaminant not covered by the voluntary remediation agreement. The secretary's covenant not to sue shall not apply to any such release.

Nothing herein is intended to release, discharge, or in any way affect any claims, causes of action or demands in law or equity which the parties may have against any person, firm, partnership or corporation not a party to this agreement for any liability it may have arising out of, or relating in any way to the generation, storage, treatment, handling, transportation, release or disposal of any materials, hazardous substances, hazardous waste, contaminants or pollutants at, to, or from the site. The parties to this agreement expressly reserve all rights, claims, demands, and causes of action they have against any and all other persons and entities who are not parties to this agreement, and as to each other for matters not covered hereby.

The participant reserves the right to seek contribution, indemnity, or any other available remedy against any person other than the department found to be responsible or liable for contribution, indemnity or otherwise for any amounts which have been or will be expended by the participant in connection with the site.

XV. Enforcement Shield

Pursuant to the provisions of 20.6.3.300.A NMAC, the secretary will not initiate any enforcement action, including an administrative or judicial action, against a participant for the contamination or release thereof, or for the activity that results in the contamination or release thereof, if the contamination is the subject of an agreement pursuant to 20.6.3 NMAC. However, this Section shall not be a bar to any enforcement action if the agreement is not finalized, if the agreement is terminated or rescinded, or if the participant does not successfully initiate or implement the agreement within a reasonable time under the schedules set forth in this agreement and approved work plans.

XVI. Oversight Costs

The participant agrees to reimburse the department for all of its costs associated with oversight and implementation of this agreement in accordance with 20.6.3.300.J NMAC. These costs shall include those described in 20.6.3.300.J NMAC, as well as long-term oversight performed by the department, as described in 20.6.3.500.B(5) NMAC, if a Conditional Certificate of Completion is issued.

Oversight will be invoiced based on actual hours of staff oversight, at a variable rate beginning at \$90.00 per hour. The hourly rate is calculated and updated on November 1 of each year, following a 30 calendar day public comment period. Travel and per diem costs will be invoiced at state-designated rates. Sampling and analysis costs will be invoiced at actual cost plus indirect overhead rate.

The department will track all costs to the department for review and oversight activities related to the site and provide quarterly (or more often at the discretion of the department) invoices per this agreement for said costs. The participant shall pay these invoiced costs to the department within 30 calendar days after the date that the participant receives notice that these costs are due and owed. If payment is not made within 30 days, the department may terminate this agreement and bring an action to collect the amount owed and the costs of bringing the collection action. If the department prevails in such collection action, the participant shall pay the department's reasonable attorneys' fees and costs incurred in the collection action.

In the event that this agreement is terminated for any reason, the participant agrees to reimburse the department for all costs incurred or obligated by the department before the date of notice of termination of the agreement.

XVII. Notice of Bankruptcy

As soon as participant has knowledge of its intention to file bankruptcy, or no later than seven days prior to the actual filing of a voluntary bankruptcy petition, participant shall notify the department of its intention to file a bankruptcy petition. In the case of an involuntary bankruptcy petition, participant shall give notice to the department as soon as it acquires knowledge of such petition.

XVIII. Indemnification

The Participant shall defend, indemnify and hold harmless the Department and the State of New Mexico from all actions, proceedings, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Participant, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Participant resulting in injury or damage to persons or property during the time when the Participant or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement.

XIX. Effective Date and Subsequent Modification

The agreement shall become final and effective upon being signed by both the secretary or his designee and the participant. The effective date of the agreement shall be the later date of signature by either the secretary or his designee or the participant. This agreement may be amended only by mutual agreement of the department and the participant. Amendments shall be in writing and shall be effective upon being signed by both the secretary or his designee and the participant.

XX. Termination

As provided for in 20.6.3.300.H NMAC, if an agreement is not reached between an applicant and the secretary or his designee on or before the 30th calendar day after the secretary or his designee determines an applicant to be eligible pursuant 20.6.3.200 and 20.6.3.300 NMAC, the applicant or the secretary or his designee may withdraw from the negotiations. The participant may terminate the voluntary remediation agreement upon 60 calendar days' written notice via certified mail, return receipt requested to the department. The secretary or his designee may terminate this agreement upon finding that the participant is not in compliance with this

agreement. Notice of termination will be made to the participant via certified mail, return receipt requested, and facts supporting the rationale for termination shall be set forth in the notification. The department's costs incurred or obligated before the date the notice of termination is received are recoverable by the department under the agreement if the agreement is terminated.

XXI. Complete Agreement

This agreement contains the entire agreement of the parties.

XXII. Applicable Law

This agreement shall be governed by and construed in accordance with the laws of the State of New Mexico.

The provisions of this agreement shall be satisfied when the department gives the participant written notice in the form of a Certificate of Completion that the participant has demonstrated to the secretary's satisfaction that the terms of this agreement have been completed, including the selection and implementation of a remedial action, when appropriate.

Nothing in this agreement shall restrict the State of New Mexico from seeking other appropriate relief to protect human health or the environment from contamination at or from this site if not remediated in accordance with this agreement.

Signatures

Participant(s):

By: _____
(Signature of authorized representative)

Name: _____
(Print or type)

Date: _____

New Mexico Environment Department:

By: _____
(Secretary or designee)

Name: _____
(Print or type)

Date: _____

Enclosures: Exhibit 1: Legal Description of Property
 Exhibit 2: Preliminary Work Plan

SAMPLE