**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY**

In the Matter of: MDEQ Reference No. AOC-RD-11-004

Former Old Plank Road Landfill
1100 Old Plank Road, Milford, Oakland County

Proceeding under Section 20134(1) of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended.

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# ADMINISTRATIVE ORDER BY CONSENT FOR RESPONSE ACTIVITIES

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## I. JURISDICTION

This Administrative Order by Consent (Order) is entered into voluntarily by and between the Michigan Department of Environmental Quality (MDEQ) and the Michigan Department of Attorney General (MDAG); and CSX Transportation, Inc.; Village of Milford; and Milford Township (collectively hereinafter the "Settling Parties"), pursuant to the authority vested in the MDEQ and the MDAG by law including Section 20134(1) of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.20101, *et seq*. This Order concerns performance by the Settling Parties of interim response activities at and near the former Old Plank Road Landfill, Oakland County, Michigan, and resolution of liability of the Settling Parties to the State of Michigan (State).

## II. DENIAL OF LIABILITY

The execution of this Order by the Settling Parties is neither an admission or denial of liability with respect to any issue dealt with in this Order nor an admission or denial of any factual allegations or legal determinations stated or implied herein.

## III. PARTIES BOUND

3.1 This Order shall apply to and be binding upon the Settling Parties and the State and their legal successors and assigns. All the Settling Parties are jointly and severally responsible for the performance of all activities specified in this Order and for any penalties that may arise from violations of this Order. Any change in ownership, corporate, or legal status of the Settling Parties, including, but not limited to, any transfer of assets, or of real or personal property, shall in no way alter the Settling Parties' responsibilities under this Order. To the extent that a Settling Party is an owner of a part or all of the Facility, the Settling Party shall provide the MDEQ with written notice prior to its transfer of ownership of part or all of the Facility and shall provide a copy of this Order to any subsequent owners or successors prior to the transfer of any

ownership rights. The Settling Parties shall comply with the requirements of Section 20116 of the NREPA, MCL 324.20116, and the Part 201 Rules.

3.2 Notwithstanding the terms of any contract that the Settling Parties may enter with respect to the performance of interim response activities pursuant to this Order, the Settling Parties are responsible for compliance with the terms of this Order and shall ensure that its contractors, subcontractors, laboratories, and consultants perform all response activities in conformance with the terms and conditions of this Order.

3.3 The signatories to this Order certify that they are authorized to execute this Order and to legally bind the Parties they represent.

## IV. STATEMENT OF PURPOSE

4.1 In entering into this Order, it is the mutual intent of the Parties: (1) to implement interim response activities as specified in Section VIII, Interim Response Activities, in order to abate threats and potential threats to the public health, safety, or welfare, or the environment, caused by the release or threatened release of hazardous substances at the Facility; (2) to define and limit the Settling Parties' liability to the State; and (3) to minimize litigation.

## V. DEFINITIONS

5.1 "CSX Property" means parcel numbers 16-14-251-001, 16-14-101-011 and 16-11-380-007; and is commonly referred to as 1100 Old Plank Road, Milford, Michigan, and is described in the legal description provided in Attachment A.

5.2 "CSX Transportation, Inc." or "CSX" means the foreign, for-profit corporation, whose principal place of business is located at 500 Water Street, J150, Jacksonville, Florida 32202, and its legal successors.

5.3 "Effective Date" means the date the Remediation Division (RD) Chief signs this Order.

5.4 "Facility" or "Old Plank Road Landfill Facility" means any area of the Landfill Property identified in Attachment B where a hazardous substance, in excess of the concentrations that satisfy the cleanup criteria for unrestricted residential use under Part 201 or under Part 213, Leaking Underground Storage Tanks, of the NREPA, has been released, deposited, disposed of, or otherwise comes to be located; and any other area, place, or property where a hazardous substance, in concentrations that exceed these requirements or criteria, has come to be located as a result of the migration of the hazardous substance from the Landfill Property.

5.5 "Interim Response Activity Plan" or "IRA Plan" means the plan prepared by BCI Engineers & Scientists, Inc., on behalf of the Settling Parties and attached hereto as Attachment C. The IRA Plan, which was submitted to and approved by the MDEQ, identifies the interim response activities to be completed by the Settling Parties to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.

5.6 "Landfill Property" means parcel number 16-14-251-001 and the small portion of parcel number 16-14-101-011 where solid waste was deposited; and is described in the legal description provided in Attachment B and depicted in the survey provided in Attachment B. The Landfill Property is surrounded by a fence.

5.7 "MDAG" means the Michigan Department of Attorney General, its successor entities, and those authorized persons or entities acting on its behalf.

5.8 "MDEQ" means the Michigan Department of Environmental Quality, its successor entities, and those authorized persons or entities acting on its behalf.

5.9 "Milford Township" means the local unit of government located in Oakland County, Michigan.

5.10 "Oversight Costs" means all costs incurred by the State or its contractor after the Effective Date of this Order to oversee, enforce, monitor and document compliance by the Settling Parties with this Order; and to perform response activities required by this Order, including, but not limited to, costs incurred to: monitor the response activities performed by the Settling Parties at the Facility; observe and comment on the Settling Parties' field activities; review and comment on the Settling Parties' submissions; collect and analyze samples; evaluate data; purchase equipment and supplies to perform monitoring activities related to response activities performed by the Settling Parties; attend and participate in meetings; prepare and review cost reimbursement documentation; and perform response activities pursuant to Paragraph 8.5 of Section VIII, Performance of Response Activities, and Section XI, Emergency Response.

5.11 "Part 201" means Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.20101 *et seq.*; and the Part 201 Administrative Rules.

5.12 "Part 201 Rules" means the administrative rules promulgated under Part 201.

5.13 "Party" means CSX, Milford Township, the Village of Milford, or the State. "Parties" means CSX, Milford Township, Village of Milford, and the State.

5.14 "RD" means the Remediation Division of the MDEQ and its successor entities.

5.15 "Settling Parties" means CSX Transportation, Inc., Milford Township, Village of Milford and their legal successors.

5.16 "State" or "State of Michigan" means the MDAG and the MDEQ, and any authorized representatives acting on their behalf.

5.17 "Submissions" means all plans, reports, schedules, and other submissions that the Settling Parties are required to provide to the State or the MDEQ pursuant to this Order. "Submissions" does not include the notifications set forth in Section XII, *Force Majeure*.

5.18 "Village of Milford" means a local unit of government located in Oakland County, Michigan.

5.19 Unless otherwise stated herein, all other terms used in this Order, which are defined in Part 3, Definitions, of the NREPA, MCL 324.301; Part 201; or the Part 201 Rules, shall have the same meaning in this Order as in Parts 3 and 201 and the Part 201 Rules. Unless otherwise specified in this Order, "day" means a calendar day.

## VI. FINDINGS OF FACT AND DETERMINATIONS

The State makes the following findings of Fact and Determinations.

6.1 The Landfill Property, a.k.a. the Former Old Plank Road Landfill or the Former Village of Milford Sanitary Landfill, is located at 1100 Old Plank Road, in Section 14 of Milford Township, Oakland County, Michigan. The CSX Property, which includes the Landfill Property, is owned by CSX and is located south of downtown Milford within the Village of Milford. The Landfill Property contains approximately 250,000 cubic yards of waste.

6.2 CSX, as the legal successor to Pere Marquette Railroad Company, has owned the CSX Property, which includes the Landfill Property, since the late 1870s. The Landfill Property was used as a gravel pit until 1939 during which Pere Marquette

Railroad Company entered into an agreement with the Village of Milford that allowed the Village to use the Landfill Property as a dump.

6.3 From 1939 to 1978, the Landfill Property was operated as a dump, which involved the disposal of residential/commercial solid and liquid waste. The use of the Landfill Property as a landfill has resulted in releases and threatened releases of hazardous substances that have caused environmental contamination.

6.4 Analysis of soil and groundwater samples collected at the Facility identified that "hazardous substances" as defined in Section 20101(1)(x) of the NREPA including, but not limited to, volatile organic compounds (VOCs), methane, iron, manganese, aluminum, beryllium, lead, arsenic, cadmium, chromium, and copper are present at the Facility. More specifically:

(a) VOCs were previously detected in groundwater monitoring wells adjacent to and downgradient of the Landfill Property at concentrations that exceed the residential drinking water criteria developed pursuant to Section 20120a(1)(a) of the NREPA;

(b) Beryllium and lead have been detected in soil at concentrations at the Landfill Property that exceed the residential direct contact criteria developed pursuant to Section 20120a(1)(a) of the NREPA; and

(c) Wastes disposed of at the Landfill Property are conducive to the generation of methane at concentrations that may exceed soil screening criteria developed pursuant to Section 20120a(1)(a) of the NREPA.

6.5 The Former Old Plank Road Landfill Facility is a "facility" as that term is defined in Section 20101(1)(r) of the NREPA.

6.6 The disposal of wastes at the Landfill Property have resulted in the presence of hazardous substances and constitute a "release or threatened release" within the meaning of Section 20101(1)(ll) and 20101(1)(uu) of the NREPA.

6.7 CSX, Village of Milford, and Milford Township are each a "person" as that term is defined in Section 301(g) of the NREPA.

6.8 The MDEQ asserts that the Settling Parties are liable or potentially liable pursuant to Section 20126 of the NREPA.

6.9 By letter dated November 13, 2002, the MDEQ notified the Village of Milford and Milford Township of their status as a potentially liable person in accordance with Section 20126 of the NREPA. This letter requested that the Village of Milford and Milford Township conduct response activities to remediate releases of hazardous substances at the Facility in compliance with the requirements of Part 201.

6.10 By letter dated January 31, 2007, the MDEQ notified CSX that the MDEQ had determined that the State has sufficient evidence to bring a legal case against CSX as a potentially liable person under Section 20126 of the NREPA for the Facility. This letter also requested that CSX conduct response activities to remediate releases of hazardous substances at the Facility in compliance with the requirements of Part 201.

6.11 By letters dated November 27, 2002; March 1, 2004; and January 31, 2007, the MDEQ notified the Road Commission of Oakland County (RCOC) of its status as a liable person in accordance with Section 20126 of the NREPA. These letters demanded that the RCOC conduct response activities to remediate releases of hazardous substances at the Facility in compliance with the requirements of Part 201. These letters also recommended that the RCOC coordinate its activities with the Settling Parties. As of the Effective Date of this Order, the RCOC has disputed its liability and has not voluntarily undertaken response activities at the Facility.

6.12 The Settling Parties have supplied bottled water to the residents impacted by the groundwater contamination; conducted a Remedial Investigation and Feasibility Study; conducted additional groundwater and landfill gas sampling; extended public water to the parcels located in the Groundwater Well Restricted Area identified in

Part 201. To continue to effectively monitor the groundwater concentrations and ongoing compliance with the GSI criteria, the Settling Parties will perform the monitoring activities set forth in the IRA Plan. Groundwater monitoring data shall be submitted to the MDEQ as specified in Paragraph 8.4, Progress Reports. In the event the analysis of groundwater samples collected from a GSI Monitoring Well indicates that any of the GSI criteria have been exceeded, then the Settling Parties shall, within sixty (60) days of receipt of the analytical report, collect and analyze groundwater samples from the GSI Monitoring Wells with an exceedance; and submit the analytical report to the MDEQ. In the event a GSI exceedance is confirmed through the confirmation sampling, the Settling Parties will conduct the Contingency Actions set forth in Paragraph 8.2(f)(i).

(d) Soil Gas Pathway. The Settling Parties have undertaken soil gas monitoring to evaluate the soil gas pathway. To continue to effectively monitor methane concentrations in subsurface soils to identify if methane is migrating away from the Landfill Property in concentrations that exceed the applicable Part 201 criteria or pose unacceptable risks (e.g., explosive conditions) to public health and safety, the Settling Parties will within thirty (30) days following the Effective Date of this Order, install three (3) additional landfill gas monitoring probes at the Landfill Property (at the locations identified in Figure 10 of the IRA Plan (Attachment C of this Order); and will conduct soil gas monitoring as set forth in Appendix D of the IRA Plan. Methane monitoring data shall be submitted to the MDEQ as specified in Paragraph 8.4, Progress Reports. In the event any analyses indicate that the methane criteria has been exceeded, the Settling Parties shall re-sample the wells with the exceedances within twenty-four (24) hours. In the event a methane criteria exceedance is confirmed through the confirmation sampling, the Settling Parties will conduct the Contingency Actions set forth in Paragraph 8.2(f)(ii). In the event a person other than one of the Settling Parties undertakes to install a new cover or cap on the Landfill Property in accordance with an MDEQ-approved plan, the Settling Parties' obligations under this Paragraph shall terminate upon initiation of the physical on-site construction activities for the new cover or cap.

(e) Permanent Marker. Within thirty (30) days of the Settling Parties' receipt of the recorded RC, required under Paragraph 8.2(b)(ii) from the Oakland County Register of Deeds, the Settling Parties shall install five (5) permanent markers on the Landfill Property. The markers shall comply with the requirements set forth in Paragraph 5.14 of the IRA Plan (Attachment C of this Order) regarding the materials of construction, inscription, installation, and location of the markers. The Settling Parties shall maintain the permanent markers in a legible condition and in the locations specified in the IRA Plan (Attachment C of this Order). In the event a person other than one of the Settling Parties installs a cap or cover on the Landfill Property, in accordance with an MDEQ-approved plan, the obligations to maintain the permanent markers under this Paragraph 8.2(e) shall terminate.

(f) Contingency Actions.

(i) GSI Pathway. In the event the Settling Parties confirm a GSI criterion has been exceeded during the Section 8.2(c) monitoring activities, the Settling Parties will submit to MDEQ a mixing zone request. Such request shall be submitted to MDEQ within thirty (30) days of confirming the GSI criterion has been exceeded.

(ii) Soil Gas Pathway. In the event that during the Section 8.2(d) monitoring activities a methane concentration is confirmed to have exceeded an applicable Part 201 criterion and poses an unacceptable risk (e.g., explosive conditions) to public health and safety, the Settling Parties will notify the MDEQ and the Milford Fire Department. Such notice will be provided in writing to MDEQ and the Milford Fire Department within forty-eight (48) hours of receiving the sample analysis that confirms the applicable Part 201 criterion was exceeded or otherwise indicated there is a potential unacceptable risk. The Settling Parties are not obligated to take any further action to address any such methane exceedance and any MDEQ costs associated with any future response shall not be considered Oversight Costs.

Appendix E of the IRA Plan (Attachment C of this Order); provided for the abandonment and plugging of the wells listed in Well Abandonment Records (Attachment D of this Order); and agreed to enter into this Order concerning the implementation of the interim response activities set forth in this Order to abate threats posed to the public health, safety, and welfare, and the environment at the Facility via the drinking water, the soil direct contact, and the groundwater-surface water (GSI) pathways.

6.13 To mitigate potential unacceptable exposures to public health, safety, and welfare, and the environment; and to abate the danger or threat caused by the release or threat of release of hazardous substances at the Facility, it is necessary and appropriate that the interim response activities provided in the Order be performed at the Facility.

6.14 On the basis of these Findings of Fact and Determinations, the State has determined that entry of this Order will expedite the performance of response activities; that the Settling Parties will properly perform the interim response activities required by this Order; and that the entry of this Order is in the public interest and will minimize litigation.

BASED ON THE FOREGOING, THE STATE HEREBY ORDERS THE SETTLING PARTIES, AND THE SETTLING PARTIES HEREBY AGREE, TO PERFORM THE INTERIM RESPONSE ACTIVITIES AS SPECIFIED IN THIS ORDER.

## VII. COMPLIANCE WITH STATE AND FEDERAL LAWS

7.1 All actions required to be taken pursuant to this Order shall be undertaken in accordance with the requirements of all applicable or relevant and appropriate State and federal laws, rules, and regulations, including, but not limited to, Part 201, the Part 201 Rules, and laws relating to occupational safety and health. Other agencies may also be called upon to review the performance of interim response activities under this Order.

7.2 This Order does not relieve the Settling Parties' obligation to obtain and maintain compliance with permits.

## VIII. INTERIM RESPONSE ACTIVITIES

8.1 The Settling Parties shall implement interim response activities in accordance with the IRA Plan (Attachment C of this Order) as specifically outlined in Paragraph 8.2. The Settling Parties shall not be obligated to undertake any response activities except as specifically set forth in Section VIII, Interim Response Activities. The IRA Plan and all MDEQ-approved modifications agreed to by the Parties thereto shall be deemed incorporated into and made an enforceable part of this Order.

8.2 Interim Response Activities.

The Settling Parties shall perform, or already have performed, the Interim Response Activities as set forth below.

(a) Groundwater - Drinking Water Pathway. Actions to prevent or eliminate exposures via the drinking water pathway to groundwater containing and potentially containing concentrations of hazardous substances that exceed the residential cleanup criteria developed under Sections 20120a(1)(a) and 20120a(17) of the NREPA:

(i) Alternate Water. The Settling Parties have extended public water to and provided for the proper abandonment of all existing groundwater wells on the property parcels located in the Groundwater Well Restricted Area identified in Appendix E of the IRA Plan (Attachment C of this Order). Attachment D of this Order provides the well abandonment logs documenting that all the known existing groundwater wells located in the Groundwater Restricted Area have been properly plugged and abandoned.

(ii) Land Use or Resource Use Restrictions. Within twenty-one (21) days of the Effective Date of this Order, the Settling Parties shall file for recording, or cause to be filed for recording, with the Oakland County Register of Deeds a restrictive covenant (RC) for the CSX Property (Property Tax ID Numbers, 16-14-251-001, 16-14-101-011, and 16-11-380-007) in the form as provided in Exhibit E of the IRA Plan (Attachment C of this Order) to prohibit the use of groundwater, and restrict soil excavation and relocation and placement of structures. The RC complies with the applicable requirements of Part 201 and has been approved by the MDEQ. The Settling Parties shall provide documentation acceptable to the MDEQ that demonstrates the twenty-one (21)-day time frame was met for recording the RC (e.g., a date-stamped receipt from the Register of Deeds). Such documentation shall be submitted to the MDEQ within seven (7) days of the date that the RC was delivered to the Oakland County Register of Deeds for recording. The Settling Parties shall also provide a true copy of the recorded RC and the liber and page numbers to the MDEQ within thirty (30) days of the Settling Parties' receipt of a copy from the Register of Deeds.

(iii) Institutional Control. The Settling Parties have passed and recorded a Village of Milford groundwater ordinance limiting the use of any existing or future groundwater wells within the Groundwater Well Restricted Area as defined in Appendix E, Village of Milford Groundwater Ordinance, of the IRA Plan (Attachment C of this Order). The Settling Parties shall assure that the Village of Milford Groundwater Ordinance remains in effect and provide for the proper enforcement of the Ordinance until the Settling Parties demonstrate to the MDEQ that the Ordinance is no longer necessary to prevent unacceptable exposures via the drinking water pathway and the MDEQ approves rescission of the Ordinance in writing.

(iv) Natural Groundwater Flow. The Settling Parties will assure that any groundwater well that may be installed in the future on Parcel Numbers 16-14-101-050; 16-14-101-051; 16-14-101-052; 16-14-101-053; and 16-14-251-005, as generally identified in Exhibit 1, Legal Description and Survey of the

Property, of the IRA Plan (Attachment C of this Order), will have a withdrawal capacity of 70 gallons per minute or less, unless (1) a groundwater well permit has been issued by the local or State groundwater well permitting authority, as may be applicable, or (2) the withdrawal capacity will not alter the natural groundwater flow direction (i.e., east-northeast) to the extent that hazardous substances present in groundwater may exceed the Part 201 residential drinking water criteria at the Parcels, identified here within, as the result of a changed groundwater flow. The Settling Parties may request MDEQ's review and concurrence that the water withdrawal capacity will not alter the natural groundwater flow direction. Costs incurred by the MDEQ associated with such requests shall be considered Oversight Costs.

(b) Soil - Direct Contact Pathway. Actions to prevent or eliminate exposures via the direct contact pathway to soils containing concentrations of hazardous substances that exceed the residential cleanup criteria developed under Sections 20120a(1)(a) and 20120a(17) of the NREPA:

(i) Due Care Activities. The Settling Parties will ensure that "due care" activities in accordance with MCL 324.20107a continue to be performed at the Landfill Property, including continuing restricting access to the Landfill Property with perimeter fencing and posting of appropriate warning signs; and

(ii) Land Use or Resource Use Restriction. The Settling Parties shall restrict soil excavation and relocation and the placement of structures on the CSX Property via a RC, as identified in Paragraph 8.2(a)(ii).

(c) Groundwater to Surface Water Interface Pathway. The Settling Parties have undertaken groundwater monitoring to evaluate the groundwater to surface water interface (GSI) pathway. Groundwater sample results from wells closest to the nearest surface water body to the Facility (MW-5-03, MW-10-04, and MW-6-03), defined hereafter as "GSI Monitoring Wells" and further identified in Figure 8a of the IRA Plan (Attachment C of this Order), did not exceed the GSI criteria established under

Part 201. To continue to effectively monitor the groundwater concentrations and ongoing compliance with the GSI criteria, the Settling Parties will perform the monitoring activities set forth in the IRA Plan. Groundwater monitoring data shall be submitted to the MDEQ as specified in Paragraph 8.4, Progress Reports. In the event the analysis of groundwater samples collected from a GSI Monitoring Wells indicates that any of the GSI criteria have been exceeded, then the Settling Parties shall, within sixty (60) days of receipt of the analytical report, collect and analyze groundwater samples from the GSI Monitoring Wells with an exceedance; and submit the analytical report to the MDEQ. In the event a GSI exceedance is confirmed through the confirmation sampling, the Settling Parties will conduct the Contingency Actions set forth in Paragraph 8.2(f)(i).

(d) Soil Gas Pathway. The Settling Parties have undertaken soil gas monitoring to evaluate the soil gas pathway. To continue to effectively monitor methane concentrations in subsurface soils to identify if methane is migrating away from the Landfill Property in concentrations that exceed the applicable Part 201 criteria or pose unacceptable risks (e.g., explosive conditions) to public health and safety, the Settling Parties will within thirty (30) days following the Effective Date of this Order, install three (3) additional landfill gas monitoring probes at the Landfill Property (at the locations identified in Figure 10 of the IRA Plan (Attachment C of this Order); and will conduct soil gas monitoring as set forth in Appendix D of the IRA Plan. Methane monitoring data shall be submitted to the MDEQ as specified in Paragraph 8.4, Progress Reports. In the event any analyses indicate that the methane criteria has been exceeded, the Settling Parties shall re-sample the wells with the exceedances within twenty-four (24) hours. In the event a methane criteria exceedance is confirmed through the confirmation sampling, the Settling Parties will conduct the Contingency Actions set forth in Paragraph 8.2(f)(ii). In the event a person other than one of the Settling Parties undertakes to install a new cover or cap on the Landfill Property in accordance with an MDEQ-approved plan, the Settling Parties' obligations under this Paragraph shall terminate upon initiation of the physical on-site construction activities for the new cover or cap.

(e) Permanent Marker. Within thirty (30) days of the Settling Parties' receipt of the recorded RC, required under Paragraph 8.2(b)(ii) from the Oakland County Register of Deeds, the Settling Parties shall install five (5) permanent markers on the Landfill Property. The markers shall comply with the requirements set forth in Paragraph 5.14 of the IRA Plan (Attachment C of this Order) regarding the materials of construction, inscription, installation, and location of the markers. The Settling Parties shall maintain the permanent markers in a legible condition and in the locations specified in the IRA Plan (Attachment C of this Order). In the event a person other than one of the Settling Parties installs a cap or cover on the Landfill Property, in accordance with an MDEQ-approved plan, the obligations to maintain the permanent markers under this Paragraph 8.2(e) shall terminate.

(f) Contingency Actions.

(i) GSI Pathway. In the event the Settling Parties confirm a that GSI criterion has been exceeded during the Section 8.2(c) monitoring activities, the Settling Parties will submit to MDEQ a mixing zone request. Such request shall be submitted to MDEQ within thirty (30) days of confirming the GSI criterion has been exceeded.

(ii) Soil Gas Pathway. In the event that during the Section 8.2(d) monitoring activities a methane concentration is confirmed to have exceeded an applicable Part 201 criterion and poses an unacceptable risk (e.g., explosive conditions) to public health and safety, the Settling Parties will notify the MDEQ and the Milford Fire Department. Such notice will be provided in writing to MDEQ and the Milford Fire Department within forty-eight (48) hours of receiving the sample analysis that confirms the applicable Part 201 criterion was exceeded or otherwise indicated there is a potential unacceptable risk. The Settling Parties are not obligated to take any further action to address any such methane exceedance and any MDEQ costs associated with any future response shall not be considered Oversight Costs.

(iii) Provided further, in the event there is change to the current topography and geology of the Landfill Property or an adjacent property (except for the placement of a landfill cover or cap over the waste mass on the Landfill Property) after the Effective Date of this Order, due to something other than an act of God, an act of war, or an act or omission of a third party that is not within the control of the Settling Parties, that prevents the natural venting of methane such that concentrations of methane present in groundwater and subsurface soil gas adjacent to and outside of the Landfill Property boundary may exceed the applicable Part 201 criteria or pose unacceptable risks to the public health and safety, the Settling Parties shall be required by MDEQ to install additional landfill gas monitoring probes in a quantity and at locations agreed upon by the Parties in order to continue to effectively monitor methane concentrations in subsurface soils. The Settling Parties shall follow the monitoring schedule for these additional gas monitoring probes as set forth in the IRA Plan (Attachment C of this Order). The location of any additional monitoring probes required pursuant to this subparagraph shall be limited to the CSX Property or a public roadway right-of-way. In no event shall the Settling Parties be required to seek access to a privately-owned property. If upon monitoring such additional probes, a methane concentration is confirmed to exceed the applicable Part 201 criteria, the Settling Parties will provide notice to the MDEQ and the Milford Fire Department as provided above. As provided in Paragraph 8.2(d), in the event a person other than one of the Settling Parties undertakes to install a new cover or cap on the Landfill Property, the Settling Parties' obligations under this Paragraph 8.2(f) shall terminate upon initiation of the physical on-site construction activities for the new cover or cap.

8.3 Modification of the Interim Response Activity Plan.

(a) The MDEQ may determine that placement of additional landfill gas probes pursuant to Paragraph 8.2(f)(iii) requires a modification to the IRA Plan. To the extent such a modification is required by the MDEQ, it will be incorporated into the IRA Plan (Attachment C of this Order) previously approved by the MDEQ. The Settling Parties may at any time request that the MDEQ consider a modification to the IRA Plan

(Attachment C of this Order) by submitting such request for modification along with the proposed change in the IRA Plan and the justification for that change to the MDEQ for review and approval. Any such request for modification by the Settling Parties must be forwarded to the MDEQ at least thirty (30) days prior to the date that the performance of any affected response activity is due and shall be submitted to the MDEQ for review and approval in accordance with the procedures set forth in Section XV, Submissions and Approvals.

(b) Upon receipt of the MDEQ's approval, the Settling Parties shall perform the response activities specified in the modified IRA Plan in accordance with the MDEQ-approved implementation schedules.

8.4 Progress Reports.

(a) The Settling Parties shall provide to the MDEQ Project Coordinator written progress reports regarding interim response activities and other matters at the Facility related to the implementation of this Order. These progress reports shall include the following:

(i) A description of the activities that have been taken toward achieving compliance with this Order during the specified reporting period;

(ii) All results of sampling and tests and other data that relate to the interim response activities performed pursuant to this Order received by the Settling Parties, its employees, or authorized representatives during the specified reporting period;

(iii) The status of any access issues that have arisen, which affect or may affect the performance of interim response activities, a description of how the Settling Parties propose to resolve those issues, and the schedule for resolving the issues;

(iv) A description of the nature and amount of waste materials that were generated as a result of work performed by the Settling Parties pursuant to Paragraph 8.2 and the name and location of the facilities that were used for the off-site transfer, storage, and treatment or disposal of those waste materials;

(v) A description of data collection and other activities scheduled for the next reporting period; and

(vi) Any other relevant information regarding other activities or matters at the Facility that affect or may affect the implementation of the requirements of this Order.

(b) The first progress report shall be submitted to the MDEQ within sixty (60) days following the Effective Date of this Order. Thereafter, progress reports shall be submitted within thirty (30) days following the end of each calendar quarter, and shall cover activities during such immediately preceding calendar quarter. Pursuant to Paragraph 24.1, Modifications of This Order, the MDEQ may approve modification of the schedule for the submission of progress reports.

8.5 The MDEQ's Performance of Response Activities.

If the Settling Parties cease to perform the interim response activities set forth in Section VIII, Interim Response Activities without obtaining MDEQ approval; are not performing such interim response activities in accordance with this Order; or are performing such interim response activities in a manner that causes an endangerment to human health or the environment, the MDEQ may, at its option and upon providing a thirty (30)-day prior written notice to the Settling Parties, an opportunity to cure, take over the performance of such interim response activities. The MDEQ, however, is not required to provide a thirty (30)-day written notice or an opportunity to cure prior to performing response activities that the MDEQ determines are necessary pursuant to Section XI, Emergency Response. If the MDEQ finds it necessary to take over the performance of such interim response activities, the Settling Parties shall reimburse the State for its costs to perform these response activities, including any accrued interest. Interest, at the rate specified in Section 20126a(3) of the NREPA, shall begin to accrue on the State's costs on the day the State begins to incur costs for such response activities. Costs incurred by the State to perform such interim response activities pursuant to this Paragraph shall be considered to be "Oversight Costs." The Settling

Parties shall provide reimbursement of these costs and any accrued interest to the State in accordance with Paragraphs 16.1, 16.3, and 16.4 of Section XVI, Reimbursement of Costs.

## IX. ACCESS

9.1 Upon the Effective Date of this Order, the Settling Parties shall allow the MDEQ and its authorized employees, agents, representatives, contractors, and consultants to enter the Facility and associated properties at all reasonable times to the extent access to the Facility and any associated properties is owned, controlled by, or available to the Settling Parties either individually or jointly. Upon presentation of proper credentials and upon making a reasonable effort to contact the person in charge of the Facility, the MDEQ staff and its authorized employees, agents, representatives, contractors, and consultants shall be allowed to enter the Facility and associated properties for the purpose of conducting any activity for which access is required for the implementation of this Order or to otherwise fulfill any responsibility under State or federal laws with respect to the Facility, including, but not limited to, Paragraph 9.1, (a) through (i). The MDEQ agrees to provide the Settling Parties reasonable notice when conducting any planned activities pursuant to Paragraph 9.1(b) through (e):

(a) Monitoring response activities or any other activities taking place pursuant to this Order at the Facility;

(b) Verifying any data or information submitted to the MDEQ;

(c) Assessing the need for, or planning, or conducting, investigations relating to the Facility;

(d) Obtaining samples;

(e) Assessing the need for, or planning, or conducting, response activities at or near the Facility;

(f) Assessing compliance with requirements for the performance of monitoring, operation and maintenance, or other measures necessary to assure the

effectiveness and integrity of the interim response activities undertaken pursuant to this Order;

(g) Inspecting and copying non-privileged records, operating logs, contracts, or other documents;

(h) Determining whether the Facility or other property is being used in a manner that is or may need to be prohibited or restricted pursuant to this Order; and

(i) Assuring the protection of public health, safety, and welfare, and the environment.

9.2 Upon the Effective Date of this Order and presentation of proper credentials, the Settling Parties shall not interfere with and, to the extent the Settling Parties own or control the Facility either individually or jointly, shall allow any other party and its authorized employees, agents, representatives, contractors, and consultants to enter the Facility at all reasonable times for purposes of implementing response activities that have been approved by the MDEQ. The MDEQ will provide the Settling Parties with a reasonable opportunity to review and comment on any work plans prior to performing any such response activities.

9.3 To the extent that the Facility, or any other property where the response activities are to be performed by the Settling Parties under this Order, is owned or controlled by persons other than the Settling Parties, the Settling Parties shall use their best efforts to secure from such persons written access agreements or judicial orders providing access for the Parties and their authorized employees, agents, representatives, contractors, and consultants. The Settling Parties shall provide the MDEQ with a copy of each written access agreement or judicial order secured pursuant to this Section of the Order. For purposes of this paragraph, "best efforts" include, but are not limited to, providing reasonable consideration acceptable to the owner or taking judicial action to secure such access. If judicial action is required to obtain access, the Settling Parties shall provide documentation to the MDEQ that such judicial action has been filed in a court of appropriate jurisdiction in accordance with Part 201 and its administrative rules. If the Settling Parties have not been able to obtain access within

sixty (60) days after filing judicial action, the Settling Parties shall promptly notify the MDEQ of the status of its efforts to obtain access and shall describe how any delay in obtaining access may affect the performance of response activities for which the access is needed. Any delay in obtaining access shall not be an excuse for delaying the performance of response activities, unless the State determines that the delay was caused by a *Force Majeure* event pursuant to Section XII, *Force Majeure*. To the extent the Settling Parties are subject to the requirements of Section 20114 of the NREPA, the Settling Parties' failure to petition the court within one (1) year of having reason to believe that access to another person's property is necessary to comply with Section 20114 of the NREPA subjects the Settling Parties to stipulated penalties pursuant to Paragraph 17.3 of Section XVII, Stipulated Penalties.

9.4 Any lease, purchase, contract, or other agreement entered into by the Settling Parties that transfers to another person a right of control over the Facility or a portion of the Facility shall contain a provision preserving for the MDEQ or any other person undertaking the response activities, and their authorized representatives, the access provided under this Section and Section XIII, Record Retention/Access to Information.

9.5 The Settling Parties and their authorized representatives that are granted access to the Facility pursuant to this Order shall comply with all applicable health and safety laws and regulations, including CSX's Environmental Safety Rules and Procedures (Attachment E of this Order) where applicable.

## X. SAMPLING AND ANALYSIS

10.1 All sampling and analysis conducted by the Settling Parties pursuant to this Order shall be in accordance with quality assurance requirements as specified in the IRA Plan (Attachment C).

10.2 The Settling Parties, or their consultants or subcontractors, shall provide the MDEQ a ten (10)-day notice prior to any sampling activity to be conducted pursuant to this Order to allow the MDEQ Project Coordinator, or his or her authorized representative, the opportunity to take split or duplicate samples or to observe the sampling procedures. In circumstances where a ten (10)-day notice is not possible, the Settling Parties or their consultants or subcontractors shall provide notice of the planned sampling activity as soon as possible to the MDEQ Project Coordinator and explain why earlier notification was not possible. If the MDEQ Project Coordinator concurs with the explanation provided, the Settling Parties may forego the ten (10)-day notification period for that particular sampling event (except in the event of an emergency condition under Section XI, Emergency Response, in which case sampling may be conducted as appropriate).

10.3 The Settling Parties shall provide the MDEQ with the results of all environmental sampling, and other analytical data generated in the performance or monitoring of any requirement under this Order, including, but not limited to, any monitoring performed under Section XI, Emergency Response; Part 201 of the NREPA; or other relevant authorities. These results shall be included in the progress reports set forth in Paragraph 8.4.

10.4 For the purpose of quality assurance monitoring, the Settling Parties shall assure that the MDEQ and its authorized representatives are allowed access to any laboratory and laboratory documentation used by the Settling Parties in implementing this Order.

## XI. EMERGENCY RESPONSE

11.1 If, during the course of the Settling Parties performing interim response activities conducted pursuant to this Order, an act or event by a Settling Party causes a release or threat of release of a hazardous substance at or from the Facility or causes exacerbation of existing contamination at the Facility, and the release, threat of release,

or exacerbation poses or threatens to pose an imminent and substantial endangerment to public health, safety, or welfare, or the environment, the Settling Parties shall immediately undertake all appropriate actions to prevent, abate, or minimize such release, threat of release, or exacerbation; and shall immediately notify the MDEQ Project Coordinator. In the event of the MDEQ Project Coordinator's unavailability, the Settling Parties shall notify the MDEQ's Pollution Emergency Alerting System at 1-800-292-4706.

11.2 Within ten (10) business days of notifying the MDEQ of such an act or event, the Settling Parties shall submit a written report setting forth a description of the act or event that occurred; the measures taken or to be taken to mitigate any release, threat of release, or exacerbation caused or threatened by the act or event; and measures to prevent recurrence of such an act or event. Regardless of whether the Settling Parties notify the MDEQ under this Section, if an act or event by a Settling Party causes a release, threat of release, or exacerbation, the MDEQ may: (a) require the Settling Parties to stop implementation of the interim response activities at the Facility for such period of time as may be needed to prevent or abate any such release, threat of release, or exacerbation; (b) require the Settling Parties to undertake any actions that the MDEQ determines are necessary to prevent or abate any such release, threat of release, or exacerbation which results from the act or occurrence caused by the Settling Party, or authorized representative or contractor; or (c) undertake any actions that the MDEQ determines are necessary to prevent or abate such release, threat of release, or exacerbation.

11.3 Nothing in this Section shall be construed as affecting any due care obligations of any of the Settling Parties under Section 20107a of the NREPA.

## XII. ***FORCE MAJEURE***

12.1 The Settling Parties shall perform the requirements of this Order within the time limits established herein, unless performance is prevented or delayed by events that constitute a *Force Majeure.* Any delay in the performance attributable to a *Force Majeure* shall not be deemed a violation of this Order in accordance with this Section.

12.2 For the purposes of this Order, a *Force Majeure* event is defined as any event arising from causes beyond the control of and without the fault of the Settling Parties, of any person controlled by the Settling Parties, or of the Settling Parties' contractors, that delays or prevents the performance of any obligation under this Order despite the Settling Parties' "best efforts to fulfill the obligation." The requirement that the Settling Parties exercise "best efforts to fulfill the obligation" includes the Settling Parties using best efforts to anticipate any potential *Force Majeure* event and to address the effects of any potential *Force Majeure* event during and after the occurrence of the event, such that the Settling Parties minimize any delays in the performance of any obligation under this Order to the greatest extent possible. *Force Majeure* includes an occurrence or nonoccurrence arising from causes beyond the control of and without the fault of the Settling Parties, such as an act of God, untimely review of permit applications or submissions by the MDEQ or other applicable authority, and acts or omissions of third parties that could not have been avoided or overcome by the diligence of the Settling Parties and that delay the performance of an obligation under this Order. *Force Majeure* does not include, among other things, unanticipated or increased costs, changed financial circumstances, or failure to obtain a permit or license as a result of actions or omissions of the Settling Parties.

12.3 The Settling Parties shall notify the MDEQ by telephone within seventy-two (72) hours of discovering any event that causes a delay in its compliance with any provision of this Order. Verbal notice shall be followed by written notice within ten (10) calendar days and shall describe, in detail, the anticipated length of delay for each specific obligation that will be impacted by the delay, the cause or causes of delay,

the measures taken by the Settling Parties to prevent or minimize the delay, and the timetable by which those measures shall be implemented. The Settling Parties shall use its best efforts to avoid or minimize any such delay.

12.4 Failure of the Settling Parties to comply with the notice requirements of Paragraph 12.3, above, shall render this Section XII, *Force Majeure*, void and of no force and effect as to the particular incident involved. The MDEQ may, at its sole discretion and in appropriate circumstances, waive the notice requirements of Paragraph 12.3.

12.5 If the parties agree that the delay or anticipated delay was beyond the control of the Settling Parties, this may be so stipulated and the parties to this Order may agree upon an appropriate modification of this Order. If the parties to this Order are unable to reach such agreement, the dispute shall be resolved in accordance with Section XVIII, Dispute Resolution. The burden of proving that any delay was beyond the control of the Settling Parties, and that all the requirements of this section have been met by the Settling Parties, is on the Settling Parties.

12.6 An extension of one compliance date based upon a particular incident does not necessarily mean that the Settling Parties qualified for an extension of a subsequent compliance date without providing proof, regarding each incremental step or other requirement for which an extension is sought.

## XIII. RECORD RETENTION/ACCESS TO INFORMATION

13.1 The Settling Parties shall preserve and retain, for a period of ten (10) years after completion of operation and maintenance and long-term monitoring at the Facility, all records, sampling and test results, charts, and other documents relating to the release or threatened release of hazardous substances, and the storage, generation, disposal, treatment, and handling of hazardous substances at the Facility; and any other records that are maintained or generated pursuant to any requirement of

this Order, including records that are maintained or generated by representatives, consultants, or contractors of the Settling Parties. The Settling Parties shall retain any records pertaining to land use or resource use restrictions, including, but not limited to the institutional control (IC), in perpetuity until the MDEQ determines that land use and resource use restrictions are no longer needed. After the ten (10)-year period of document retention following completion of operation and maintenance and long-term monitoring at the Facility, the Settling Parties may seek the MDEQ's written permission to destroy any documents that are not required to be held in perpetuity. In the alternative, the Settling Parties may make a written commitment, with the MDEQ's approval, to continue to preserve and retain the documents for a specified period of time, or the Settling Parties may offer to relinquish custody of all documents to the MDEQ. In any event, the Settling Parties shall obtain the MDEQ's written permission prior to the destruction of any documents covered by this Paragraph. The Settling Parties' request shall be accompanied by a copy of this Order and sent to the address listed in Section XIV, Project Coordinators and Communications/Notices, or to such other address as may subsequently be designated in writing by the MDEQ.

13.2 Upon request, the Settling Parties shall provide to the MDEQ copies of all non-privileged documents and information within its possession, or within the possession or control of its employees, contractors, agents, or representatives, relating to the performance of interim response activities or other requirements of this Order, including, but not limited to, records regarding the collection and analysis of samples, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing forms, or other correspondence, documents, or information related to response activities. Upon request, the Settling Parties shall also make available to the MDEQ, upon reasonable notice, the Settling Parties' employees, contractors, agents, or representatives with knowledge of relevant facts concerning the performance of response activities.

13.3 If the Settling Parties submit documents or information to the MDEQ that the Settling Parties believe are entitled to protection as provided for in Section 20117(10) of the NREPA, the Settling Parties may designate in that submission the documents or

information which it believes are entitled to such protection. If no such designation accompanies the information when it is submitted to the MDEQ, the MDEQ may provide the information to the public without further notice to the Settling Parties. Information described in Section 20117(11)(a) through (h) of the NREPA shall not be claimed as confidential or privileged by the Settling Parties. Information or data generated under this Order shall not be subject to Part 148, Environmental Audit Privilege and Immunity, of the NREPA, MCL 324.14801 *et seq.*

## XIV. PROJECT COORDINATORS AND COMMUNICATIONS/NOTICES

14.1 Each Party shall designate one or more Project Coordinators. Whenever notices, progress reports, information on the collection and analysis of samples, sampling data, work plan submissions, approvals, or disapprovals, or other technical submissions are required to be forwarded by one Party to the other Party under this Order, or whenever other communications between the Parties is needed, such communications shall be directed to the designated Project Coordinator at the address listed below. Notices and submissions may be initially provided by electronic means but a hard copy must be concurrently sent. If any Party changes its designated Project Coordinator, the name, address, and telephone number of the successor shall be provided to the other Party, in writing, as soon as practicable.

(a) As to the MDEQ:

(1) For all matters pertaining to this Order, except those specified in Paragraphs 14.1(a)(2), (3), and (4) below:

Gregory Barrows, Project Coordinator
Remediation Division
Department of Environmental Quality
2777 Donald Court
Warren, MI 48092
Telephone: 586-753-3807
Fax: 586-753-3859
E-mail Address: BARROWSG@Michigan.gov

This Project Coordinator will have primary responsibility for the MDEQ for overseeing the performance of interim response activities at the Facility and other requirements specified in this Order.

(2) For all matters specified in this Order that are to be directed to the RD Chief:

Chief, Remediation Division
Department of Environmental Quality
P.O. Box 30426
Lansing, MI 48909-7926
Telephone: 517-335-1104
Fax: 517-373-2637

Via courier:
Chief, Remediation Division
Department of Environmental Quality
Constitution Hall, 4th Floor, South Tower
525 West Allegan Street
Lansing, MI 48933-2125

A copy of all correspondence that is sent to the Chief of the RD shall also be provided to the MDEQ Project Coordinator designated in Paragraph 14.1(a)(1).

(3) For providing a true copy of a recorded RC pursuant to Section VIII, Interim Response Activities; for questions concerning record retention pursuant to Section XIII, Record Retention/Access to Information; and for questions concerning financial matters pursuant to Section VIII, Interim Response Activities:

Chief, Compliance and Enforcement Section
Remediation Division
Department of Environmental Quality
P.O. Box 30426
Lansing, MI 48909-7926
Telephone: 517-373-7818
Fax: 517-241-9581

Via courier:
Chief, Compliance and Enforcement Section
Remediation Division
Department of Environmental Quality
Constitution Hall, 4th Floor, South Tower
525 West Allegan Street
Lansing, MI 48933-2125

A copy of all correspondence that is sent to the Chief of the Compliance and Enforcement Section, RD, shall also be provided to the MDEQ Project Coordinator designated in Paragraph 14.1(a)(1).

(4) For all payments pursuant to Section XVI, Reimbursement of Costs:

Revenue Control Unit
Finance Section
Administration Division
Department of Environmental Quality
P.O. Box 30657
Lansing, MI 48909-8157

Via courier:
Revenue Control Unit
Finance Section
Administration Division
Department of Environmental Quality
Constitution Hall, 5th Floor, South Tower
525 West Allegan Street
Lansing, MI 48933-2125

To ensure proper credit, all payments made pursuant to this Order must reference the Old Plank Road Landfill, the MDEQ Reference No. AOC-RD-11-004, and the RD Account No. RRD3011. A copy of all correspondence that is sent to the Revenue Control Unit shall also be provided to the MDEQ Project

Coordinator designated in Paragraph 14.1(a)(1), the Chief of the Compliance and Enforcement Section designated in Paragraph 14.1(a)(3), and the Assistant in Charge designated in Paragraph 14.1(b).

(b) As to the MDAG:

Assistant in Charge
Environment, Natural Resources, and Agriculture Division
Department of Attorney General
G. Mennen Williams Building, 6th Floor
525 West Ottawa Street
Lansing, MI 48933
Telephone: 517-373-7540
Fax: 517-373-1610

(c) As to the Settling Parties:

(i) For the Village:
Village Manager, Project Coordinator
Village of Milford
1100 Atlantic Street
Milford, MI 48381-2002
Telephone: 248-684-1515
Fax: 248-684-5502

(ii) For the Township:
Supervisor, Project Coordinator
Milford Township
1100 Atlantic Street
Milford, MI 48381
Telephone: 248-685-8731
Fax: 248-685-9236

A copy of all correspondence sent to the Village or Township shall also be provided to:

Thomas P. Wilczak
Pepper Hamilton LLP
4000 Town Center - Suite 1800
Southfield, MI 48075-1505
Telephone: 248-359-7398
Fax: 248-359-7700

A copy of all correspondence sent to the Village or Township regarding matters related to Section VIII, Interim Response Activities, shall also be provided to:

Mark B. Sweatman
BCI Engineers & Scientists, Inc.
10503 Citation Drive, Suite 600
Brighton, MI 48116
Telephone: 810-360-0500
Fax: 810-360-0495

(iii) For CSX Transportation:
CSX Transportation, Inc.
Attn: Paul J. Kurzanski, Project Coordinator
Manager, Environmental Remediation
500 Water Street, J- 275
Jacksonville, FL 32202
Telephone: 904-359-3101
Fax: 904-245-2826

A copy of all correspondence sent to CSX shall also be provided to:

CSX Transportation, Inc.
Attn: Senior Counsel - Environmental, Jeffrey Styron
500 Water Street, J-150
Jacksonville, FL 32202
Telephone: 904-366-4058
Fax: 904-245-2930

and to:

Fredrick J. Dindoffer
Bodman PLC
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, MI 48226
Telephone: 313-393-7595
Fax: 313-393-7579

14.2 The Settling Parties' Project Coordinator shall have primary responsibility for overseeing the performance of the response activities at the Facility and other requirements specified in this Order for the Settling Parties.

14.3 The MDEQ may designate other authorized representatives, employees, contractors, and consultants to observe and monitor the progress of any activity undertaken pursuant to this Order.

## XV. SUBMISSIONS AND APPROVALS

15.1 All Submissions required by this Order shall comply with all applicable laws and regulations and the requirements of this Order, and shall be delivered to the MDEQ in accordance with the schedule set forth in this Order. All Submissions delivered to the MDEQ pursuant to this Order shall include a reference to the Former Old Plank Road Landfill and MDEQ Reference No. AOC-RD-11-004. All Submissions delivered to the MDEQ for approval shall also be marked "Draft" and shall include, in a prominent location in the document, the following disclaimer: "*Disclaimer: This document is a DRAFT document that has not received approval from the Michigan Department of Environmental Quality (MDEQ). This document was prepared pursuant to a governmental administrative order. The opinions, findings, and conclusions expressed are those of the authors and not those of the MDEQ.*"

15.2 After receipt of any Submission relating to response activities that is required to be submitted for approval pursuant to this Order, the MDEQ District Supervisor will, in writing: (a) approve the Submission; (b) approve the Submission with modifications; or (c) disapprove the Submission and notify the Settling Parties of the deficiencies in the Submission. Upon receipt of a notice of approval or approval with modifications from the MDEQ, the Settling Parties shall proceed to take the actions required by the Submission, as approved or as modified, and shall submit a new cover page and any modified pages of the Submission marked "Approved."

15.3 Upon receipt of a notice of disapproval from the MDEQ pursuant to Paragraph 15.2(c), the Settling Parties shall correct the deficiencies and provide the revised Submission to the MDEQ for review and approval within thirty (30) days, unless the notice of disapproval specifies a longer time period for resubmission. Unless

otherwise stated in the MDEQ's notice of disapproval, the Settling Parties shall proceed to take the actions and perform the response activities not directly related to the deficient portion of the Submission. Any stipulated penalties applicable to the delivery of the Submission shall accrue during the thirty (30)-day period or other time period specified for the Settling Parties to provide the revised Submission, but shall not be assessed unless the resubmission is also disapproved and the MDEQ demands payment of stipulated penalties pursuant to Section XVII, Stipulated Penalties. The MDEQ will review the revised Submission in accordance with the procedure set forth in Paragraph 15.2. If the MDEQ disapproves a revised Submission, the MDEQ will so advise the Settling Parties; and, as set forth above, stipulated penalties shall accrue from the date of the MDEQ's disapproval of the original Submission and continue to accrue until the Settling Parties deliver an approvable Submission.

15.4 If any initial Submission contains significant deficiencies such that the Submission is not in the judgment of the MDEQ a good faith effort by the Settling Parties to deliver an acceptable Submission that complies with Part 201 and this Order, the MDEQ will notify the Settling Parties of such and will deem the Settling Parties to be in violation of this Order. Stipulated penalties, as set forth in Section XVII, Stipulated Penalties, shall begin to accrue on the day after the Submission was due and continue to accrue until an approvable Submission is provided to the MDEQ.

15.5 Upon approval by the MDEQ, any Submission and attachments to Submissions required by this Order shall be considered part of this Order and are enforceable pursuant to the terms of this Order. If there is a conflict between the requirements of this Order and any Submission or an attachment to a Submission, the requirements of this Order shall prevail.

15.6 An approval or approval with modifications of a Submission shall not be construed to mean that the MDEQ concurs with any of the conclusions, methods, or statements in any Submission or warrants that the Submission comports with law.

15.7 Informal advice, guidance, suggestions, or comments by the MDEQ regarding any Submission provided by the Settling Parties shall not be construed as relieving the Settling Parties of their obligation to obtain any formal approval required under this Order.

## XVI. REIMBURSEMENT OF COSTS

16.1 The Settling Parties shall reimburse the State for all Oversight Costs incurred by the State, which shall not exceed Ten Thousand Dollars ($10,000) annually (Annual Oversight Cost Cap). However, Oversight Costs incurred by the State under Paragraph 8.2(a)(iv) or Paragraph 8.5 or to enforce this Order shall not be included in the amount subject to the Annual Oversight Cost Cap.

16.2 Within one (1) year of the Effective Date of this Order and annually thereafter, the MDEQ will provide the Settling Parties with a demand for payment and summary report (Summary Report), that identifies all Oversight Costs incurred through the dates specified in the Summary Report. Any such demand will set forth, with reasonable specificity, the nature of the costs incurred. Except as provided by Section XVIII, Dispute Resolution, the Settling Parties shall reimburse the MDEQ for such costs within sixty (60) days of the Settling Parties' receipt of a written demand from the MDEQ.

16.3 The Settling Parties shall have the right to request a full and complete accounting of all MDEQ demands made hereunder, including time sheets, travel vouchers, contracts, invoices, and payment vouchers as may be available to the MDEQ. The MDEQ's provision of these documents to the Settling Parties may result in the MDEQ incurring additional Oversight Costs, which will be included in the annual demand for payment of Oversight Costs.

16.4 All payments made pursuant to this Order shall be by certified check, made payable to the "State of Michigan – Environmental Response Fund," and shall be

sent by first class mail to the Revenue Control Unit at the address listed in Paragraph 14.1(a)(4) of Section XIV, Project Coordinators and Communications/ Notices. The Facility name, the MDEQ Reference No. AOC-RD-11-004, and the RD Account No. RRD3011 shall be designated on each check. A copy of the transmittal letter and the check shall be provided simultaneously to the MDEQ Project Coordinator at the address listed in Paragraph 14.1(a)(1); the Chief of the Compliance and Enforcement Section, RD, at the address listed in Paragraph 14.1(a)(3); and the Assistant in Charge at the address listed in Paragraph 14.1(b). Costs recovered pursuant to this Section and payment of stipulated penalties pursuant to Section XVII, Stipulated Penalties, shall be deposited into the Environmental Response Fund in accordance with the provisions of Section 20108(3) of the NREPA.

16.5 If the Settling Parties fail to make full payment to the MDEQ of the Oversight Costs as specified in Paragraph 16.1, interest, at the rate specified in Section 20126a(3) of the NREPA, shall begin to accrue on the unpaid balance on the day after payment was due until the date upon which the Settling Parties make full payment of those costs and the accrued interest to the MDEQ (except in the event that the Settling Parties are successful pursuant to Section XVIII, Dispute Resolution). In any challenge by the Settling Parties to an MDEQ demand for reimbursement of costs, the Settling Parties shall have the burden of establishing that the MDEQ did not lawfully incur those costs in accordance with Section 20126a(1)(a) of the NREPA.

## XVII. STIPULATED PENALTIES

17.1 The Settling Parties shall be liable for stipulated penalties in the amounts set forth in Paragraphs 17.2 and 17.3 for failure to comply with the requirements of this Order, unless excused under Section XII, *Force Majeure*. "Failure to Comply" by the Settling Parties shall include: (1) failure to complete submissions and notifications as required by this Order; and (2) failure to perform response activities as required by this Order, including the specified implementation schedules established or approved under this Order.

17.2 The following stipulated penalties shall accrue per violation per day for any violation of Section VIII, Interim Response Activities:

| Penalty Per Violation Per Day | Period of Noncompliance |
|---|---|
| $250 | 1st through 14th day |
| $500 | 15th through 30th day |
| $1,000 | 31st day and beyond |

17.3 Except as provided in Paragraph 17.2; Section XII, *Force Majeure;* and Section XVIII, Dispute Resolution, if the Settling Parties fail or refuse to comply with any other term or condition of this Order, the Settling Parties shall pay the MDEQ stipulated penalties of Two Hundred and Fifty Dollars ($250) a day for each and every failure or refusal to comply.

17.4 All penalties shall begin to accrue on the day after the performance of an activity was due or the day a violation occurs, and shall continue to accrue through the final day of completion of performance of the activity or correction of the violation. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

17.5 Except as provided in Section XVIII, Dispute Resolution, the Settling Parties shall pay stipulated penalties owed to the State no later than sixty (60) days after the Settling Parties' receipt of a written demand from the State. Payment shall be made in the manner set forth in Paragraph 16.4. Interest, at the rate provided for in Section 20126a(3) of the NREPA, shall begin to accrue on the unpaid balance at the end of the sixty (60)-day period on the day after payment was due until the date upon which the Settling Parties make full payment of those stipulated penalties and the accrued interest to the MDEQ. Failure to pay the stipulated penalties within sixty (60) days after receipt of a written demand constitutes a further violation of the terms and conditions of this Order.

17.6 The payment of stipulated penalties shall not alter in any way the Settling Parties' obligation to perform the response activities required by this Order.

17.7 If the Settling Parties fail to pay stipulated penalties when due, the State may institute proceedings to collect the penalties, as well as any accrued interest. However, the assessment of stipulated penalties is not the State's exclusive remedy if the Settling Parties violate this Order. For any failure or refusal of the Settling Party to comply with the requirements of this Order, the State also reserves the right to pursue any other remedies to which it is entitled under this Order or any applicable law, including, but not limited to, seeking civil fines, injunctive relief, the specific performance of response activities, reimbursement of costs, and sanctions for contempt of court.

17.8 Notwithstanding any other provision of this Section, the State may waive, in its unreviewable discretion, any portion of stipulated penalties and interest that has accrued pursuant to this Order.

## XVIII. DISPUTE RESOLUTION

18.1 The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Order. However, the procedures set forth in this Section shall not apply to actions by the State to enforce any of the Settling Parties' obligations that have not been disputed in accordance with this Section. Engagement of dispute resolution pursuant to this Section shall not be cause for the Settling Parties to delay the performance of any response activity required under this Order.

18.2 The State shall maintain an administrative record of any disputes initiated pursuant to this Section. The administrative record shall include the information the Settling Parties provide to the State under Paragraphs 18.3 through 18.5 and any documents the MDEQ and the State rely on to make the decisions set forth in Paragraphs 18.3 through 18.5.

18.3 Except for undisputable matters identified in Paragraph 18.1, any dispute that arises under this Order with respect to the MDEQ's disapproval, modification, or other decision concerning requirements of this Order shall in the first instance be the subject of informal negotiations between the MDEQ Project Coordinator and the Settling Parties. A dispute shall be considered to have arisen on the date that a Party to this Order receives a written Notice of Dispute from the other Party. The Notice of Dispute shall state the issues in dispute; the relevant facts upon which the dispute is based; factual data, analysis, or opinion supporting the Party's position; and supporting documentation upon which the Party bases its position. In the event the Settling Parties object to any MDEQ notice of disapproval, modification, or decision concerning the requirements of this Order that is subject to dispute under this Section, the Settling Parties shall submit the Notice of Dispute within ten (10) business days of receipt of the MDEQ's notice of disapproval, modification or decision. The period of informal negotiations shall not exceed ten (10) business days from the date a Party receives a Notice of Dispute, unless the time period for negotiations is modified by written agreement between the Parties. If the Parties do not reach an agreement within ten (10) business days or within the agreed-upon time period, the RD District Supervisor will thereafter provide the MDEQ's Statement of Position, in writing, to the Settling Parties. In the absence of initiation of formal dispute resolution by the Settling Parties under Paragraph 18.4, the MDEQ's position as set forth in the MDEQ's Statement of Position shall be binding on the Parties.

18.4 If the Settling Parties and the MDEQ cannot informally resolve a dispute under Paragraph 18.3, the Settling Parties may initiate formal dispute resolution by submitting a written Request for Review to the RD Chief, with a copy to the MDEQ Project Coordinator, requesting a review of the disputed issues. This Request for Review must be submitted within ten (10) business days of the Settling Parties' receipt of the Statement of Decision issued by the MDEQ pursuant to Paragraph 18.3. The Request for Review shall state the issues in dispute; the relevant facts upon which the dispute is based; factual data, analysis, or opinion supporting the Party's position; and supporting documentation upon which the Party bases its position. When the MDEQ

issues a Request for Review, the Settling Parties will have twenty (20) days to submit a written rebuttal to the RD Chief, with a copy to the MDEQ Project Coordinator. Within twenty (20) business days of the RD Chief's receipt of the Settling Parties' Request for Review or the Settling Parties' rebuttal, the RD Chief will provide the MDEQ's Statement of Decision, in writing, to the Settling Parties, which will include a statement of his/her understanding of the issues in dispute; the relevant facts upon which the dispute is based; factual data, analysis, or opinion supporting his/her position; and supporting documentation he/she relied upon in making the decision. The time period for the RD Chief's review of the Request for Review may be extended by written agreement between the Parties. The MDEQ's Statement of Decision shall be binding on the Parties. Except as otherwise prohibited by Section 20137(6) of the NREPA, in the event the Parties are unable to resolve the dispute as set forth in Section XVIII, Dispute Resolution, the Parties may file an action in the Ingham County Circuit Court.

18.5 Notwithstanding the invocation of a dispute resolution proceeding, stipulated penalties shall accrue from the first day of the Settling Parties' failure or refusal to comply with any term or condition of this Order, but payment shall be stayed pending resolution of the dispute. In the event, and to the extent that the Settling Parties do not prevail on the disputed matters, the MDEQ may demand payment of stipulated penalties and the Settling Parties shall pay stipulated penalties as set forth in Paragraph 17.5 of Section XVII, Stipulated Penalties. The Settling Parties shall not be assessed stipulated penalties for disputes that are resolved in their favor. The MDAG, on behalf of the MDEQ, may take civil enforcement action against the Settling Parties to seek the assessment of civil penalties or damages pursuant to Section 20137(1) of the NREPA, or other statutory and equitable authorities.

18.6 Notwithstanding the provisions of this section and in accordance with Section XVII, Stipulated Penalties, the Settling Parties shall pay to the MDEQ that portion of a demand for reimbursement of costs or for payment of stipulated penalties that is not the subject of an ongoing dispute resolution proceeding.

## XIX. INDEMNIFICATION AND INSURANCE

19.1 The State does not assume any liability by entering into this Order. This Order shall not be construed to be an indemnity by the State for the benefit of the Settling Parties or any other person.

19.2 The Settling Parties shall indemnify and hold harmless the State and its departments, agencies, officials, agents, employees, contractors, and representatives for any claims or causes of action that arise from, or on account of, acts or omissions of the Settling Parties, their officers, employees, agents, or any other person acting on their behalf or under their control, in performing the activities required by this Order.

19.3 The Settling Parties shall indemnify and hold harmless the State and its departments, agencies, officials, agents, employees, contractors, and representatives for all claims or causes of action for damages or reimbursement from the State that arise from, or on account of, any contract, agreement, or arrangement between the Settling Parties and any person for the performance of response activities at the Facility, including any claims on account of construction delays.

19.4 The State shall provide the Settling Parties notice of any claim for which the State intends to seek indemnification pursuant to Paragraphs 19.2 or 19.3.

19.5 Neither the State nor any of its departments, agencies, officials, agents, employees, contractors, or representatives shall be held out as a party to any contract that is entered into by or on behalf of the Settling Parties for the performance of activities required by this Order. Neither the Settling Parties nor any contractor shall be considered an agent of the State.

19.6 The Settling Parties waive all claims or causes of action against the State and its departments, agencies, officials, agents, employees, contractors, and representatives for damages, reimbursement, or set-off of any payments made or to be

made to the State that arise from, or on account of, any contract, agreement, or arrangement between the Settling Parties and any other person for the performance of response activities at the Facility, including any claims on account of construction delays.

19.7 Prior to commencing any response activities pursuant to this Order and for the duration of this Order, the Settling Parties shall secure and maintain comprehensive general liability insurance with limits of Five Hundred Thousand Dollars ($500,000) combined single limit, which names the MDEQ, the MDAG, and the State as additional insured parties. If the Settling Parties demonstrate by evidence satisfactory to the MDEQ that any contractor or subcontractor maintains insurance equivalent to that described above, then with respect to that contractor or subcontractor, the Settling Parties need to provide only that portion, if any, of the insurance described above that is not maintained by the contractor or subcontractor. Regardless of the insurance method used by the Settling Parties, and prior to commencement of response activities pursuant to this Order, the Settling Parties shall provide the MDEQ Project Coordinator and the MDAG with certificates evidencing such insurance; and the MDEQ, the MDAG, and the State's status as additional insured parties. Such certificates shall specify the Former Old Plank Road Landfill, the MDEQ Reference No. AOC-RD-11-004, and the RD. In addition, and for the duration of this Order, the Settling Parties shall satisfy or shall ensure that their contractors or subcontractors satisfy all applicable laws and regulations regarding the provision of Workers' Disability Compensation Insurance for all persons performing response activities on behalf of the Settling Parties in furtherance of this Order.

## XX. COVENANTS NOT TO SUE BY THE STATE

20.1 In consideration of the actions and response activities that have previously been undertaken by the Settling Parties and that will be performed by the Settling Parties under the terms of this Order, and except as specifically provided for in this Section and Section XXI, Reservation of Rights by the State, the State hereby

covenants not to sue or to take further administrative action against the Settling Parties for performance of response activities or payment of response activity costs related to the Facility other than Oversight Costs, provided that the Settling Parties have performed the interim response activities set forth in Section VIII, Interim Response Activities. The State's covenants not to sue are conditioned upon the satisfactory performance of all the Settling Parties' obligations under this Order.

20.2 The State's covenants not to sue under this Order shall take effect as follows:

(a) With respect to the Settling Parties' liability for response activities, the covenant not to sue shall take effect upon the Effective Date of this Order.

(b) With respect to the Settling Parties' liability for Oversight Costs incurred and paid by the State, the covenant not to sue shall take effect upon the MDEQ's receipt of payments for those costs, including any applicable interest that has accrued pursuant to Paragraph 16.5.

20.3 The covenants not to sue extend only to the Settling Parities and do not extend to any other person.

## XXI. RESERVATION OF RIGHTS BY THE STATE

21.1 The covenants not to sue apply only to those matters specified in Paragraph 20.1 of Section XX, Covenants Not to Sue by the State. The State expressly reserves, and this Order is without prejudice to, all rights to take administrative action or to file a new action pursuant to any applicable authority against the Settling Parties with respect to the following:

(a) The Settling Parties fail to perform the interim response activities set forth in Section VIII, Interim Response Activities, or fail to pay the State its Oversight Costs.

(b) The past, present, or future treatment, handling, disposal, release, or threat of release of hazardous substances that occur outside of the Facility and that are not attributable to the Facility.

(c) The past, present, or future treatment, handling, disposal, release, or threat of release of hazardous substances taken from the Facility by one or more of the Settling Parties.

(d) Damages for injury to, destruction of, or loss of natural resources, and the costs for any natural resource damage assessment, except as it relates to damages associated with the lost use of groundwater at or emanating from the Facility.

(e) Criminal acts.

(f) Any matters for which the State is owed indemnification under Section XIX, Indemnification and Insurance.

(g) The release or threatened release of hazardous substances that occurs during or after the performance of response activities required by this Order or any other violations of State or federal law for which the Settling Parties are responsible and have not received a covenant not to sue.

21.2 The State reserves the right to take action against the Settling Parties if it discovers at any time that any material information provided by the Settling Parties prior to or after entry of this Order was known or should have been known to be false or misleading.

21.3 The MDEQ and the MDAG expressly reserve all of their rights and defenses pursuant to any available legal authority to enforce this Order.

21.4 Except as otherwise set forth in this Order, the MDEQ retains all of its authority and reserves all of its rights to perform, or contract to have performed, any response activities that the MDEQ determines are necessary.

21.5 In addition to, and not as a limitation of any provision of this Order, the MDEQ and the MDAG retain all of their information-gathering, inspection, access, and

enforcement authorities and rights under Part 201 and any other applicable statute or regulation.

21.6 Failure by the MDEQ or the MDAG to enforce any term, condition, or requirement of this Order in a timely manner shall not:

(a) Provide or be construed to provide a defense for the Settling Parties' noncompliance with any such term, condition, or requirement of this Order.

(b) Estop or limit the authority of the MDEQ or the MDAG to enforce any such term, condition, or requirement of the Order, or to seek any other remedy provided by law.

21.7 This Order does not constitute a warranty or representation of any kind by the MDEQ that the response activities performed by the Settling Parties in accordance with the MDEQ-approved IRA Plan (Attachment C) required by this Order will result in the achievement of the remedial criteria established by law, or that those response activities will mitigate unacceptable exposures or assure protection of public health, safety, or welfare, or the environment.

21.8 Except as provided in Paragraph 20.1 of Section XX, Covenants Not to Sue by the State, nothing in this Order shall limit the power and authority of the MDEQ or the State, pursuant to Section 20132(8) of the NREPA, to direct or order all appropriate action to protect the public health, safety, or welfare, or the environment; or to prevent, abate, or minimize a release or threatened release of hazardous substances, pollutants, or contaminants on, at, or from the Facility.

## XXII. COVENANT NOT TO SUE BY SETTLING PARTIES

22.1 The Settling Parties hereby covenant not to sue or to take any civil, judicial, or administrative action against the State, its agencies, or their authorized representatives, for any claims or causes of action against the State that arise from this Order, including, but not limited to, any direct or indirect claim for reimbursement from

the Cleanup and Redevelopment Fund pursuant to Section 20119(5) of the NREPA, or any other provision of law.

22.2 After the Effective Date of this Order, if the MDAG initiates any administrative or judicial proceeding for injunctive relief, recovery of response activity costs, or other appropriate relief relating to the Facility against the Settling Parties, the Settling Parties agree not to assert and shall not maintain any defenses or claims that are based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, or claim-splitting, or that are based upon a defense that contends any claims raised by the MDEQ or the MDAG in such a proceeding were or should have been brought in this case; provided, however, that nothing in this paragraph affects the enforceability of the covenants not to sue set forth in Section XX, Covenants Not to Sue by the State.

## XXIII. CONTRIBUTION

23.1 Pursuant to Section 20129(5) of the NREPA; and Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, 1980 PL 96-510, as amended (CERCLA), 42 USC Section 9613(f)(2); and to the extent provided in Section XX, Covenants Not to Sue by the State, the Settling Parties shall not be liable for claims for contribution for the matters set forth in Paragraph 20.1 of Section XX, Covenants Not to Sue by the State, to the extent allowable by law. The Parties agree that entry of this Order constitutes an administratively approved settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 USC 9613(f)(3)(B), pursuant to which the Settling Parties have, as of the Effective Date, resolved their liability to the MDEQ for the matters set forth in Paragraph 20.1. Entry of this Order does not discharge the liability of any other person that may be liable under Section 20126 of the NREPA, or Sections 9607 and 9613 of the CERCLA. Pursuant to Section 20129(9) of the NREPA, any action by the Settling Parties for contribution from any person that is not a Party to this Order shall be subordinate to the rights of the State

if the State files an action pursuant to the NREPA or other applicable State or federal law.

## XXIV. MODIFICATIONS

24.1 The Parties may only modify this Order according to the terms of this Section. The modification of any Submission or schedule required by this Order, excluding the IRA Plan (Attachment C of this Order), may be made only by written agreement between Settling Parties and the MDEQ Project Coordinator. Any modifications to the MDEQ-approved IRA Plan (Attachment C of this Order) must be approved in writing by Settling Parties and the RD Chief or his or her authorized representative.

24.2 Modification of any other provision of this Order shall be made only by written agreement between the Settling Parties, the RD Chief or his or her authorized representative, and the designated representative of the MDAG.

## XXV. SEPARATE DOCUMENTS

25.1 The Parties may execute this Order in duplicate original form for the primary purpose of obtaining multiple signatures, each of which shall be deemed an original, but all of which together shall constitute the same instrument.

## XXVI. SEVERABILITY

26.1 The provisions of this Order shall be severable. If a court of competent jurisdiction declares that any provision of this Order is inconsistent with State or federal law and therefore unenforceable, the remaining provisions of this Order shall remain in full force and effect.

IT IS SO AGREED TO AND ORDERED BY:

**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY:**

Anne Couture, Acting Chief
Remediation Division

1-16-12
Date

**MICHIGAN DEPARTMENT OF ATTORNEY GENERAL:**

Kathleen L. Cavanaugh P38006
Assistant Attorney General
Environment, Natural Resources, and Agriculture Division

1-12-12
Date

MDEQ Reference No. AOC-RD-11-004

IT IS SO AGREED BY:

**VILLAGE OF MILFORD:**

Theresa Rusas George

12/12/11
Date

Theresa Rusas George
Council President
Village of Milford
1100 Atlantic Street
Milford, MI 48381-2002

IT IS SO AGREED BY:

Arthur Shufflebarger
*Village Manager*
*1100 Atlantic Street*
*Milford, MI 48381-2002*
Village of Milford

Date

Donald Green

12/29/2011
Date

Donald Green
*Supervisor*
*1100 Atlantic Street*
*Milford, MI 48381-2002*
Milford Township

Person with Signing Authority
*Title*
*500 Water Street, J150*
*Jacksonville, FL 32202*
CSX Transportation, Inc.

Date

MDEQ Reference No. AOC-RD-11-004

IT IS SO AGREED BY:

**CSX TRANSPORTATION, INC.:**

Paul J. Kurzanski
Manager Environmental Remediation
CSX Transportation, Inc.
500 Water Street, J150
Jacksonville, FL 32202

1/13/12
Date