

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9

<p>IN THE MATTER OF: TUBA CITY DUMP Villages of Upper Moenkopi and Lower Moenkopi, Arizona Hopi Reservation and Tuba City, Arizona Navajo Nation  United States Bureau of Indian Affairs, Department of Interior, RESPONDENT</p>	<p>ADMINISTRATIVE ORDER ON CONSENT for CLEANUP, CLOSURE, POST-CLOSURE MAINTENANCE and GROUNDWATER MONITORING  U.S. EPA Region 9 Docket No. RCRA-09-2024-0017 Proceeding Under Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6901, <i>et seq.</i>, as amended</p>
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## I. INTRODUCTION

1. This Administrative Order on Consent (“AOC”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and Respondent United States Department of Interior, Bureau of Indian Affairs (“BIA” or “Respondent”). This AOC provides for the performance by BIA of the cleanup and closure of the Tuba City Dump (“TCD”) Site (“Site”), located near the villages of Upper Moenkopi and Lower Moenkopi<sup>1</sup> on the Hopi Reservation, and Tuba City on the Navajo Nation. In entering into this AOC, the mutual objectives of EPA and BIA are to address the potential imminent and substantial endangerment to human health and environment posed by the TCD and to bring the TCD into compliance with the requirements of the Resource, Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 to 6992k by properly closing the TCD in accordance with RCRA, securing post-closure monitoring and maintenance and long-term groundwater monitoring in accordance with 40 CFR Part 258, and ensuring that the Work ordered herein be designed and implemented to protect human health and/or the environment. These mutual objectives are described in Attachment A, the Work to be Performed (“WTBP”), which is hereby incorporated into this AOC by reference. BIA shall finance and perform the Work in accordance with this AOC, and the plans, standards, specifications, and schedules set forth in this AOC, and the WTBP.
2. EPA has determined that BIA failed to comply with the closure, post-closure care, corrective action, and recordkeeping requirements in 40 CFR Part 258 at the TCD and that it may present an imminent and substantial endangerment to health or the environment.
3. EPA has notified the Hopi Tribe and the Navajo Nation and of this action pursuant to Section 7003(a) of RCRA, 42 U.S.C. § 6973(a), on June 1 (Hopi Tribe) and June 7 (Navajo Nation), 2023.
4. BIA’s participation in this AOC shall not constitute or be construed as an admission of liability. BIA neither admits nor denies the factual allegations and legal conclusions set forth in this AOC.
5. EPA and BIA acknowledge that this AOC has been negotiated by the Parties in good faith and that this AOC is fair, reasonable, and in the public interest.

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<sup>1</sup> These two villages are adjacent to each other; the village names are spelled differently.

## II. JURISDICTION AND GENERAL PROVISIONS

6. This AOC is issued under the authority vested in the Administrator of EPA by Section 7003 of RCRA, which authority has been delegated to the Regional Administrators of EPA by Delegations 8-22-A and 8-22-C (April 20, 1994), and redelegated to the Directors and Deputy Directors of the Enforcement, Land and Superfund Divisions, EPA Region 9, by Region 9 Directive R9-22 (March 8, 2017). BIA shall undertake and complete all actions required by the terms and conditions of this AOC. BIA agrees to comply with this AOC and agrees not to contest EPA's jurisdiction to issue this AOC and enforce its terms.
7. This AOC concerns the planning for and execution of closure and post-closure maintenance for an open solid waste dump known as the TCD, which lies mostly on the Hopi Reservation, near the Upper Village of Moenkopi and the Lower Village of Moencopi, and partially on the Navajo Nation near Tuba City. These Indian trust lands are located in the State of Arizona.
8. Under this AOC, BIA will close the TCD by moving the waste contained in the TCD to landfills located off of Hopi Tribal lands. Either Painted Desert Landfill near Joseph City or the Cinder Lake Landfill in or near Flagstaff shall be the primary disposal site. BIA will notify EPA when it determines which of these two landfills it will use. In addition, BIA may use secondary disposal sites, provided that they are permitted landfills and otherwise appropriate for such disposal. BIA will notify EPA when it designates such secondary landfills. The original TCD dump site will be backfilled with clean, fill material and a routine monitoring program will be instituted, including groundwater monitoring and site maintenance. BIA will comply with all applicable statutes and regulations, including the regulations within 40 C.F.R. Part 258 that are applicable based on the timing, circumstances and location.
9. This AOC is a civil administrative enforcement action instituted pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973. The actions required herein are intended to satisfy the requirements of Subchapter IV of RCRA at 42 U.S.C. §§ 6941-6949a, and the implementing regulations at 40 CFR Part 258, for closure of the TCD, and to address the potential endangerment to human health and the environment presently posed by the TCD.
10. BIA expressly waives its opportunity to confer with the Administrator of EPA pursuant to Section 6001(b)(2) of RCRA, 42 U.S.C. § 6961(b)(2), and any right to further review of the issuance of this AOC pursuant to any provision of law.
11. EPA and BIA recognize that this AOC has been negotiated in good faith and that the actions undertaken by BIA in accordance with this AOC do not constitute an admission of liability. BIA does not admit and retains the right to controvert in any subsequent proceedings, other than proceedings to implement or enforce this AOC, the validity of the conclusions of law in Section VI

(“Conclusions of Law and Determinations”) of this AOC. BIA agrees to comply with and be bound by the terms of this AOC and further agrees that it will not contest the basis or validity of the AOC or its terms, except as provided herein. Both BIA and EPA have devoted substantial resources to understand and address the environmental conditions at the TCD. Both agencies have determined that entry into this AOC will most efficiently meet the requirements for closure of the TCD and address the imminent and substantial endangerment to human health and the environment posed by the TCD.

### **III. PARTIES BOUND**

12. This AOC applies to and is binding upon EPA and BIA and their respective successor departments, agencies, or instrumentalities.
13. No change in ownership or operation of any property covered by this AOC, or change in the status of BIA shall in any way alter, diminish, or otherwise affect BIA’s obligations and responsibilities under this AOC.
14. BIA is subject to the requirements of this AOC pursuant to RCRA Section 7003, 42 U.S.C. § 6973 and is subject to the requirements of RCRA pursuant to Section 6001 of RCRA, 42 U.S.C. § 6961, in the same manner as a person as that term is defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).
15. BIA is responsible for carrying out all activities required by this AOC. Each undersigned representative of BIA certifies that he or she is fully authorized to enter the terms and conditions of this AOC and to execute and legally bind BIA to this AOC.
16. BIA shall provide a copy of this AOC to its contractors, subcontractors, and representatives within 7 (seven) calendar days of the effective date of this AOC or date of contractor/subcontractor retention, whichever is later. BIA shall condition all contracts or agreements with contractors, subcontractors, laboratories and/or consultants in connection with this AOC upon compliance with this AOC and shall ensure that its contractors, subcontractors, laboratories, and consultants comply with this AOC. BIA shall be responsible for any noncompliance with this AOC, except as provided in Section XVII, Force Majeure.
17. BIA shall notify EPA of any proposed voluntary transfer of interest in or operation of the TCD not later than 60 (sixty) days prior to such proposed transfer. BIA shall submit copies of transfer documents to EPA within fourteen (14) days after any transfer. In addition, BIA shall provide a copy of this AOC to any successor to BIA and/or Facility at least 15 (fifteen) calendar days prior to the effective date of such change.

#### IV. DEFINITIONS

18. Unless otherwise expressly provided herein, terms used in this AOC that are defined in RCRA or the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) or their implementing regulations shall have the meaning assigned to them in those statutes or regulations. Whenever the terms listed below are used in this AOC, the follow definitions shall apply:

“AOC” shall mean this Administrative Order on Consent, any amendments thereto, and documents incorporated by reference into this AOC, including the Work to Be Performed (“WTBP”), Project Cleanup, Closure, and Post-Closure Documents (“PCPCD”) and Groundwater Network and Monitoring Plan (“GNMP”).

“BIA” shall mean the Bureau of Indian Affairs and any successor departments or agencies of the United States.

“Closure Plan” shall mean the Cleanup, Closure and Post-Closure Maintenance Plan, a deliverable required pursuant to this AOC.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 6901 *et seq.*, otherwise known as the Superfund law or Superfund.

“Cleanup and Closure Activities” shall mean any and all activities undertaken by BIA as required by this AOC at the location of the current TCD, at temporary or permanent waste repositories for TCD waste, at locations from which soil material is derived to build waste covers, at locations from which water is being obtained to implement the cleanup action, and on roadways or passageways between such points on which TCD waste, cover material, water, or other materials necessary for the cleanup action are being moved; in order to implement any field preparation and mobilization, excavation, consolidation, stockpiling, backfilling, construction, filling, compaction, cover construction and placement, water acquisition, dust suppression, traffic control, and field and site control pursuant to this AOC.

“EPA” shall mean the United States Environmental Protection Agency.

“ESA” shall refer to the Endangered Species Act, 16 U.S.C. Sections 1531 *et seq.*

“GNMP” shall mean the Groundwater Network and Monitoring Plan.

“Hopi Tribe” shall mean the Hopi Tribe, a federally recognized Indian tribe, whose lands are known as the “Hopi Reservation.”

“Navajo Nation” shall mean the Navajo Nation, a federally recognized Indian tribe.

“NEPA” shall mean the National Environmental Policy Act, 42 U.S.C. Sections 4321 *et seq.*

“NHPA” shall mean the National Historic Preservation Act. 16 U.S.C. Sections 470 *et seq.*

“PCPCD” shall mean the Project Cleanup, Closure, and Post-Closure Documents.

“Parties” shall mean EPA and BIA.

“Paragraph” shall mean the numbered paragraphs in this AOC.

“Post-Closure Activities” shall mean any and all activities undertaken at the location of the current TCD location in order to implement post-closure maintenance or groundwater monitoring and as set forth in the approved Closure and Post-Closure Maintenance Plan and the Groundwater Network and Monitoring Plan.

“RI/FS” shall mean the Remedial Investigation / Feasibility Study for the Tuba City Dump Site performed by BIA under EPA oversight and in coordination with the Hopi Tribe and Navajo Nation. “RI” or “FS” shall refer to remedial investigation or feasibility study as separate reports.

“RCRA” shall mean the Resource Conservation and Recovery Act, as amended, at 42 U.S.C. § 6901 *et seq.* and “RCRA Requirements” shall refer to the promulgated regulations at 40 CFR Part 258 unless otherwise specified.

“Section” shall mean a portion of this AOC identified by a Roman numeral with or without sub numeral, unless otherwise specified.

“Site” shall mean the 41-acre fenced area surrounding and including the Tuba City Dump and any areas where TCD waste or other contamination from the Tuba City Dump have come to be located.

“WTBP” shall mean the Work to Be Performed, attached as Appendix A to this AOC.

“TCD” shall mean the Tuba City Dump, a former municipal solid waste open dump presently fenced and covered with soil, straddling the boundary between the Navajo Nation and the Hopi Reservation, near Tuba City, Arizona and extending further onto both Hopi and Navajo Lands.

“TCD waste” shall mean any material of any kind placed or disposed of in the TCD during the time that BIA operated or held the TCD available for disposal and also during the time since BIA ceased operation, regraded the TCD contents, and temporarily covered the TCD with soil. The term shall also refer to any and all ash or burned material in the TCD resulting from burning of the waste; any or all materials as may have been mixed into the TCD during its management; and any byproducts or substances that may have come to exist in the TCD. To the extent they exist, satellite general waste deposits lying outside the contiguous TCD proper that were originally displaced from or intended for disposal in the TCD also shall be considered TCD waste.

“Tribes” shall mean the Navajo Nation and the Hopi Tribe, unless otherwise stated.

“Work” shall mean the work described in the Work to be Performed as set forth in Section VIII. of this AOC and in the WTBP, as well as the work described in the PCPCD (including GNMP).

## **V. FINDINGS OF FACT**

### **A. Site Location and Description**



19. The Site covers about 41 acres near Tuba City, Arizona. The TCD lies between 500 and 2200 feet south of U.S. Highway 160 and its entrance road is about 6800 feet east of the intersection of that highway with U.S. Highway 264. The TCD lies about 2000 feet east of the point where U.S. Highway 160 crosses over Pasture Canyon.

B. Operational History of Tuba City Dump

20. BIA operated the TCD as an unregulated open general waste dump for local Indian communities from the 1950s until 1997. The TCD provided a location for municipal solid waste disposal for the Navajo residents of Tuba City and the Hopi residents of the villages of Upper Moenkopi and Lower Moenkopi. It was primarily used by local businesses, BIA, the U.S. Indian Health Service, and the public, to dispose of municipal waste. BIA did not control who disposed of waste, did not supervise waste disposal, and did not keep records of what was disposed of at the TCD, or by whom. BIA periodically excavated trenches for waste disposal. To reduce the volume of waste, BIA periodically burned the municipal organic wastes to ash in the open air and in burn pits and trenches. The ash was mixed with soil and non-burnable wastes in the TCD. When BIA stopped receiving wastes at TCD in 1997, BIA regraded some of the material prior to placing a temporary soil cover and encircling the TCD with a fence.
21. The TCD was never closed in accordance with the requirements of 40 CFR Part 258, and is not in compliance with the groundwater monitoring, corrective action, recordkeeping, post-closure, or financial assurance requirements of 40 CFR Part 258. There is no liner under the waste nor cover over the waste that would prevent continued rainwater infiltration, leaching and erosion to groundwater or surface water. The waste in some locations remains exposed and is subject to further exposure over time without a permanent cover, increasing the risk of human exposure, erosion, leaching, and movement.
22. The Site covers about 41 acres and holds about 307,000 cubic yards of material in two adjacent disposal areas or “cells.” The “Old Cell,” which was filled first, covers about 22 acres, and lies nearest to Highway 160. The “New Cell” was filled later, covers about 19 acres, and lies adjacent and immediately southeast of the Old Cell. BIA estimates that the waste thickness varies between one foot and 15 feet.
23. Tribal residents have recalled uncontrolled waste dumping, fires, and air pollution when the TCD operated. Discarded iron and ceramic balls from a mill grinding machine were found at the TCD. These are not toxic or radioactive, but the finding prompted concerns among the tribal community that the TCD may contain uranium waste from the former Rare Metals uranium mill located four miles to the east of the TCD, on Highway 160. In 2008, levels exceeding 400 micrograms per liter

of dissolved uranium were found in a very shallow groundwater well adjacent to the TCD, within about 100 feet of the western edge of the dump waste. This increased community concerns.

24. The Indian Health Service disposed of waste in the Dump and residents have described seeing medical waste from local medical facilities being dumped at the TCD.

### C. Regulatory History of Tuba City Dump

25. On February 23, 2000, EPA issued a letter notifying BIA that it had failed to comply with the requirement to close the TCD in accordance with RCRA, and that the TCD was subject to the requirements of 40 CFR Part 258. EPA's letter also stated that if the TCD met the requirements of 40 CFR § 258.1(f)(1) and had placed that information in the operating record, it would be exempt from the design, groundwater monitoring, and corrective action requirements, but would still be required to comply with applicable location, operating, design, closure and post-closure criteria. EPA's letter requested that BIA submit a plan to bring the TCD into compliance with the closure requirements in 40 CFR § 258.60(a), and a copy of the information in the operating record showing that the facility meets the requirements of 40 CFR § 258.1(f)(1). BIA did not submit the requested information. On September 25, 2000, BIA sent a letter to EPA requesting mediation, including representatives of the Navajo Nation, Hopi Tribe, and other federal agencies, to involve affected stakeholders in identifying a resolution for the TCD.
26. Between 1997 and 2010, many environmental studies were performed at and near the TCD by various parties, including the Hopi Tribe, Navajo Nation, U.S. Geologic Survey, the BIA, and EPA. Among these were a boring study of the landfill contents by the Hopi Tribe in 2008, installation, sampling, and gauging of multiple groundwater monitoring wells, geophysical hydrogeological studies, radiologic studies and surveys, landfill gas testing, and an intensive boring study of landfill contents and surroundings by EPA in 2009. Some studies reached differing interpretations and certain site assessment questions remained unanswered.
27. Due to the Tribes' concerns about the possible presence of uranium bearing waste in the dump, fears about migration of uranium in groundwater reaching drinking water wells in this drought-stricken tribal area with outdated and limited water infrastructure, and the possibility that contamination from the TCD may have migrated beyond the footprint of the TCD, EPA and BIA entered into an agreement to use CERCLA authorities to investigate the TCD. In September 2010, EPA and BIA signed an administrative settlement and order on consent ("AOC") under the authority of CERCLA, requiring that BIA pay for and perform an RI/FS, under EPA's oversight and approval.

28. BIA completed the Final Remedial Investigation (“RI”) Report, Tuba City Dump Site, Tuba City Arizona in 2015 and The Final Feasibility Study Report, Tuba City Dump Site, Tuba City Arizona (May 2017) under EPA’s oversight. All phases of plan development, field work, data quality, data interpretation, analysis, and evaluation at key points in the development and execution of the RI/FS were subject to open discussion, participation, input, and coordination by a broad stakeholder group. The Navajo Nation and Hopi Tribe and their consultants have been directly and continually involved at every phase of the RI/FS process, including formal and informal meetings, conference calls, routine correspondence, provision of comments, and both informal and formal consultation processes.
29. The TCD is not listed on the Superfund National Priorities List (“NPL”) of hazardous waste sites in the United States and thus, is not eligible for long-term remedial action (cleanup) financing under the federal Superfund Program.

#### D. Tribal Context

30. Initially, the TCD lay entirely within the Navajo Nation, north of the border with the Hopi Reservation. With the judicial resolution of the Bennett Freeze, the boundary between the two tribal nations in the vicinity of the TCD shifted, and most of TCD now lies within the Hopi Reservation. Today, only about two acres of the northernmost portion of the Old Cell in the TCD lies within the Navajo Nation (about 5% of TCD area), and the remaining TCD acreage (about 95% of TCD area), including all the New Cell, lies within the Hopi Reservation. The land upon which the TCD Site is located is currently held in trust by the United States for the benefit of the Tribes, and is administered by the U.S. Department of Interior, Bureau of Indian Affairs.
31. The majority, if not all, of the TCD is currently located on the Hopi Reservation near the Villages of Upper Moenkopi and Lower Moenkopi. The Hopi villages lie in a landlocked “island” of the Hopi Reservation that is separated from the rest of the Hopi Reservation and is surrounded by the Navajo Nation. Land and water resource availability for the Hopi Tribe in this area are limited. Space for housing and commercial and economic development is at a premium for the Hopi residents of these villages. The land on which TCD sits is adjacent to U.S. Highway 160, and the Hopi Tribe has stated that it intends to use this location for development, commercial enterprises, and/or housing for those Hopis seeking to return, after receiving education or starting families outside of the Reservation. The land occupied by the TCD cannot be reused or redeveloped in its current state.

32. There are Navajo Nation residents living immediately adjacent to the TCD. A general concern to both the Hopi Tribe and the Navajo Nation is the shortage of clean, potable drinking water for residents and businesses in the area. The area is suffering from extended drought, and available supplies of drinking and irrigation water from groundwater and local springs is dwindling. It is therefore of added concern to the Tribes and U.S. Government that water supplies remain safe and reliable.
33. Prior to the RI, environmental concerns of the Tribes related to TCD included (1) the possibility of radiological waste in the TCD itself, (2) migration of contamination from TCD to water in drinking water supply wells and to usable groundwater generally, (3) migration of contamination from TCD to natural springs, (4) the possibility of buried radiological waste around the TCD, (4) contamination in sediments of Pasture Canyon, which is used for crops and conveying irrigation water, and (5) soil contamination and possible impact on crops or grazing lands.

E. Major Findings from the Remedial Investigation (“RI”)

34. During the RI, BIA performed extensive new sampling, evaluation, analyses, surveys, and studies, and integrated the findings from these investigations with usable data and analysis from other investigations performed prior to the RI/FS effort.
35. The RI included sampling, analysis, and investigation of the contents of the TCD, including hundreds of borings into the TCD throughout the area of both TCD cells. The RI examined the potential for contamination and/or radioactive wastes in sediments, soils, and surface drainage pathways surrounding the TCD, and in Pasture Canyon; as well as the potential for impacts to groundwater and to drinking water sources, from waste constituents in the TCD. The RI characterized the local groundwater hydrology, identifying how fast and in what direction groundwater moves in the water-bearing aquifers at and near TCD, and determined background levels of contaminants in soils and groundwater. Groundwater flow and transport modeling was performed. BIA also sampled and evaluated Tribal supply wells, springs, drainages, soils, and aquifers.
36. The area investigated extended from east of the TCD as far north as Pasture Canyon Reservoir, as far west as the east side of the village of Upper Moenkopi, and as far south as the village of Lower Moenkopi, the Moenkopi Wash, and Moenkopi Springs.
37. Among major findings of the RI are:
- a. The TCD waste is mostly composed of burned municipal waste. The waste was burned in the open air and in burn pits and trenches.

In the waste itself, the RI found:

- i. The TCD waste includes medical waste; low levels of volatile organic compounds (“VOCs”), including 1,3-butadiene, chloroform, trichloroethylene, and ethylbenzene; household hazardous wastes that would be typical of household and municipal solid waste; demolition debris such as wood, brick, concrete, asphalt, scrap metal, plastic, and sand; coal and other ash.
  - ii. Uranium mill waste was not found in the TCD, and the groundwater chemistry indicates that uranium-contaminated mill waste is not present.
  - iii. No radioactivity above background was found in TCD waste, and uranium was not found in TCD waste at levels above local soil background levels.
  - iv. The TCD waste is composed of approximately 20% ash. While it is highly heterogeneous, the ash from burned waste likely sporadically contains incomplete combustion byproducts.
  - v. TCD waste extends directly into the homesite leases, livestock holding areas, and grazing areas, of Navajo residents located to the north of the Old Cell of the TCD. TCD waste extends to within four feet of the water table under the TCD and is within the capillary fringe of the water table in some parts of the TCD.
- b. In the soils, sands, or sediments near the TCD, the RI found:
- i. No uranium mill waste and no uranium above background soil levels was found in soils around TCD, in sand or sediments in storm drainage pathways near TCD, or in Pasture Canyon; and no radioactivity above background levels was found in these areas.
- c. In the groundwater the RI found:
- i. The drinking water from the Moenkopi supply wells, the Moenkopi Springs, and Tuba City water supply wells, has not been and cannot be affected by the TCD. Direct aquifer tests revealed a groundwater divide and showed that groundwater in contact with the TCD cannot flow to the supply wells, even with pumps running. The Moenkopi Springs are fed by a deeper aquifer that is unaffected by the TCD. Water in Pasture Canyon is unaffected by the TCD. Groundwater in the deeper aquifer, called the Kayenta-Navajo Transition Zone, is not affected by the TCD.
  - ii. The very shallow groundwater aquifer called the Navajo Sandstone, near the TCD on either side of Pasture Canyon, is affected by natural geochemical processes that allow small zones of locally elevated dissolved uranium. This groundwater moves very little and tends to exhibit high levels of naturally occurring arsenic and total

dissolved solids. This is the reason for the elevated uranium found in a well near the TCD. These effects are local, as the Navajo Sandstone thins dramatically near Pasture Canyon. In shallow groundwater, and limited almost entirely to the fence line of TCD, landfill leachates of anions, total dissolved solids (“TDS”), salts, and chemical complexes from the TCD, have geochemically altered the shallow groundwater to enhance natural chemical processes that allow metals, including naturally occurring uranium, to dissolve more readily into groundwater. This effect is spatially limited in the low permeability groundwater of the fine-grained Navajo Sandstone adjacent to the TCD. If not addressed, this process will continue, and may worsen if rainwater infiltration were to increase due to major storms or climate change, or if the water table were to rise farther into the waste in the future.

F. The Feasibility Study (“FS”)

38. The Final Feasibility Study Report, Tuba City Dump Site, Tuba City Arizona (May 2017) conducted by BIA, evaluated and compared detailed cleanup/closure alternatives for the TCD waste. It spanned possibilities that ranged among 1) placing a cover over the TCD waste in place; 2) excavating and consolidating the TCD waste in a new waste repository within the original TCD footprint with or without a bottom liner; 3) excavating and consolidating the TCD waste in a new repository outside, but very nearby the original TCD footprint; 4) hauling the TCD waste off site for disposal at a new waste repository over 20 miles away on the Hopi Reservation; and 5) hauling the TCD waste off the Reservation to a permitted solid waste disposal facility.
39. The findings of the RI/FS indicate that the form of closure that will be conducted at the TCD has been shown to be acceptable and beneficial to the Hopi Tribe, as the TCD waste will be removed from Hopi Tribal land, effectively opening the location of the TCD to future development by the Hopi Tribe. Given the limited availability of land to the Hopi Tribe in the area, the removal of TCD waste to a permitted solid waste facility is of great benefit to the Hopi Tribe and aligns with their long-standing preference for TCD cleanup and closure. The chosen TCD cleanup option of transporting dump contents to an off-reservation permitted landfill provides the greatest benefits to the Hopi Tribe in terms of addressing the imminent and substantial endangerment and violations at the Site, including groundwater protection, protection of residents from exposure to waste, ensuring public safety and minimal community disruption, implementability of long-term post-closure maintenance, and the potential for sovereign tribal property reuse.

## VI. CONCLUSIONS OF LAW AND DETERMINATIONS

40. Based on the Findings of Fact set forth above, the Conclusions of Law set forth in this Section, and upon EPA's review of information set forth in the Administrative Record, which supports the issuance of this AOC, EPA has made the following determinations, to which BIA neither admits nor denies.
41. The TCD is located entirely in Indian Country.
42. BIA is a person, as defined by RCRA Section 1004(15), 42 U.S.C. § 6903(15).
43. The TCD is an "open dump" as defined in Section 1004(14) of RCRA, 42 U.S.C. § 6903(14).
44. Pursuant to the requirement of Section 4005(c)(1)(A) of RCRA, 42 U.S.C. § 6945(c)(1)(A), EPA adopted regulations codified in 40 CFR Part 258 governing municipal solid waste landfills.
45. The TCD is a municipal solid waste landfill unit ("MSWLF") as defined in 40 CFR § 258.2.
46. RCRA Section 4005(c)(2)(A), 42 U.S.C. § 6945(c)(2)(A), provides that "in any State that the Administrator determines has not adopted an adequate program for" municipal solid waste landfills as required under Section 4005(c)(1)(B), EPA "may use the authorities available under sections 6927 and 6928 [RCRA Sections 3007 and 3008] of this title to enforce the prohibition [on open dumping] contained in subsection (a) of this section with respect to such facilities."
47. EPA has determined that, because states generally do not have jurisdiction over Indian Country within their borders, and because Arizona's EPA-approved municipal solid waste permitting program does not establish regulatory jurisdiction over MSWLFs in Indian Country, MSWLFs in Indian Country in Arizona are "in a state that has not adopted an adequate program" for regulating such landfills. EPA has also determined that the authority to "enforce the prohibition on open dumping" includes the authority to enforce the requirements of 40 CFR Part 258. Therefore, EPA may use the enforcement authorities of RCRA Sections 3007 and 3008 to require compliance with 40 CFR Part 258 at the TCD.
48. RCRA Section 3008(a) provides that if EPA determines that any person has violated or is in violation of Subchapter III of RCRA (pertaining to hazardous waste management), EPA "may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both."
49. RCRA Section 6001(b) provides that federal agencies having jurisdiction over any solid waste management facility or disposal site, or engaged in any activity resulting or which may result in the disposal or management of solid waste or hazardous waste shall be subject to and comply with federal, State, interstate and local requirements, both substantive and procedural, respecting

control and abatement of solid waste, or hazardous waste, in the same manner, and to the same extent, as any person subject to such requirements.

50. RCRA Section 6001(b) provides that the Administrator of EPA may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the federal government, pursuant to the enforcement authorities of RCRA.

### **Prohibited Open Dump and Open Burning**

51. Section 4005(a) of RCRA, 42 U.S.C. § 6945(a) prohibits the open dumping and open burning of solid waste, or hazardous waste, effective upon the promulgation of standards for the management of solid waste.
52. Federal regulations promulgated on September 13, 1979, established standards for solid waste disposal facilities and practices, at 40 CFR Part 257. 40 CFR § 257.1(a)(1) and (2) provide that facilities and practices failing to satisfy either the criteria in 40 CFR §§ 257.1 through 257.4 or §§ 257.5 through 257.30 constitute open dumping and are prohibited under Section 4005(a) of RCRA, 42 U.S.C. § 6945(a).
53. The TCD has failed, and continues to fail, to meet the groundwater monitoring and corrective action requirements of 40 CFR §§ 258.50 through 258.58, the recordkeeping requirements of 40 CFR § 257.30, and the closure and post-closure requirements in 40 CFR §§ 258.60 through 258.62.
54. Federal regulations establishing standards for municipal solid waste landfills, 40 CFR Part 258, were promulgated on October 9, 1991. 40 CFR § 258.1(h) provides that municipal solid waste landfill units failing to satisfy the criteria of 40 CFR Part 258 constitute open dumps as prohibited by Section 4005(a) of RCRA, 42 U.S.C. § 6945(a).

### **Failure to Close and Failure to Prepare a Closure Plan**

55. As an operator of a solid waste landfill unit that accepted waste for disposal after October 9, 1991, and stopped receiving waste before October 9, 1997, BIA was required to complete final closure of the TCD in accordance with the requirements of 40 CFR § 258.60(a) by October 9, 1998, pursuant to 40 CFR § 258.1(c)(3). Owners and operators of solid waste landfills that do not complete final closure by the required deadline are subject to all the requirements of 40 CFR Part 258.



56. BIA did not meet the requirements of completing final closure in accordance with 40 CFR Part 258.60(a) by October 9, 1998. Therefore, the TCD is subject to all the requirements of 40 CFR Part 258.
57. 40 CFR § 258.60(c) requires that owners or operators prepare a plan for execution of closure, and 40 CFR § 258.60(f) requires the owner or operator to begin closure activities within 30 (thirty) days after the known final receipt of wastes. BIA has not prepared a closure plan as required and did not timely begin closure activities.

### **Imminent and Substantial Endangerment**

58. As set forth more specifically in the Findings of Fact, BIA's past or present handling, storage, treatment, transportation, or disposal of any solid waste, or hazardous waste, may present an imminent and substantial endangerment to human health or the environment. RCRA Section 7003 provides that upon receipt of evidence that the past or present handling, storage, treatment, transportation, or disposal, of any solid waste, or hazardous waste, may present an imminent and substantial endangerment to health or the environment, the Administrator may issue an order to the past or present generator, transporter, owner, or operator, to restrain such person from handling, storing, treating, transporting, or disposing of such waste, or order such person to take such other action as may be necessary, or both.

## **VII. ORDER ON CONSENT**

59. Based upon the administrative record for the Site and the Findings of Fact (Section V.) and Conclusions of Law and Determinations (Section VI.) set forth above, and in consideration of the promises set forth herein, the following is hereby agreed to and ordered. BIA shall comply with all provisions of this AOC, including, but not limited to, the appendices, which are incorporated into this AOC and which consist of: the WTBP, the PCPCD, and the GNMP, as well as any approved modifications to those documents. BIA shall finance and perform the Work in accordance with this AOC, plans, standards, specifications, and schedules, set forth in this AOC, or developed by BIA and approved by EPA pursuant to this AOC.

## **VIII. WORK**

60. BIA shall perform the work as set forth in this AOC, the WTBP as approved by EPA, as well as the work set forth in the PCPCD, including the GNMP, and any modifications to those documents. If BIA determines that it is unable to perform the work in accordance with the WTBP, PCPCD (including the GNMP) and the approved schedule, BIA may seek an extension

of deadlines pursuant to Section XVII (Force Majeure). If BIA is either unable to establish the need for an extension of the deadline pursuant to the Section XVII (Force Majeure), or determines that it cannot perform the work even with a reasonable extension of the relevant deadlines, BIA shall, within 60 days of determining that it cannot perform the work in accordance with the WTBP and the approved schedule or of the denial of the extension of relevant deadlines, propose an alternative Closure Plan to EPA for approval, that complies with the closure and post-closure care requirements of 40 CFR Part 258. If EPA approves the alternative Closure Plan, BIA shall implement the approved Closure Plan. EPA reserves the right to initiate an action consistent with its authorities, or to take any appropriate response action to enforce this AOC and/or the requirements of RCRA Subchapter IV and the regulations in 40 CFR Part 258.

61. BIA shall perform the work specified and described in the WTBP, attached as Appendix A to this AOC. The WTBP is hereby incorporated by reference into this AOC. The requirements specified in the WTBP shall have the full force and effect of this AOC shall be subject to all enforceable provisions of this AOC. Modifications to the WTBP shall be subject to the same provisions as put forth in this AOC for Modifications to the AOC and for Additional Work as put forth in this AOC. Any report, or other document, submitted by BIA pursuant to this AOC, that makes recommendations as to whether or not further actions are necessary, or makes any representation concerning BIA's compliance with any requirement of this AOC, shall be certified by a duly authorized representative of BIA, who is authorized to perform policy or decision-making functions on behalf of BIA. A person is a "duly authorized representative" only if the individual or position has responsibility for the overall operation of a regulated facility/activity (a duly authorized representative may thus be either a named individual or any individual occupying, whether on an acting or permanent basis, a named position).

62. The certification required by Paragraph 61 above, shall be in the following form:

I certify under penalty of law that this document and all attachments were prepared under my direction, or supervision, in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to be the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

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

#### **IX. EPA REVIEW AND COMMENT ON SUBMISSIONS**

63. The Project Closure Work Plan, Project Design Report, Project Engineer Drawings, Project Construction Specifications, Annual Notices of Funding Availability and Annual Work Plans required by the Work to Be Performed, and TCD Closure Report (collectively, PCPCD, including the GNMP, are subject to the review and comment by EPA pursuant to this AOC).
64. BIA shall also provide the PCPCD to the Hopi Tribe and the Navajo Nation for review and comment.
65. EPA will review and comment on the proposed PCPCD (including the GNMP). After review EPA will endeavor to provide its review and comments to BIA as soon as reasonably possible. If EPA requests that BIA modify the Submission, BIA shall have an opportunity to respond. If BIA agrees that EPA's specified conditions or requested modifications are technically and legally reasonable and feasible, BIA shall comply with the specified conditions or requested modifications in accordance with the schedule in the WTBP.
66. Failure to provide the PCPCD (including the GNMP) according to the scheduled deadlines in this AOC, or failure to submit a deliverable, or submittal, of sufficient quality and completeness, such that EPA can approve the deliverable, or submission, shall be considered a violation of this AOC by BIA and subject BIA to Stipulated Penalties set forth in Section XVI of this AOC.

#### **X. ADDITIONAL WORK**

67. EPA may determine that certain tasks and deliverables, including but not limited to investigatory work, or engineering evaluations, require additional work. These tasks and deliverables may not have appeared in the WTBP. If EPA determines that such additional work is necessary, EPA shall request, in writing to BIA, that BIA perform the additional work and shall specify the reasons for EPA's determination that additional work is necessary. Within 15 (fifteen) days after receipt of such request, BIA shall have the opportunity to meet, or confer, with EPA, to discuss the additional work EPA has requested. In the event that BIA agrees to perform the additional work, it shall be subject to the provisions of this AOC as all other work performed pursuant to the WTBP. In the event that BIA declines or fails to perform the additional work, the dispute will be resolved through dispute resolution.

## XI. MODIFICATION OF THE WORK PLAN

68. Pursuant to this AOC and the WTBP, BIA shall generate a Project Closure Work Plan summarizing all work to be performed for the Project, as well as Annual Work Plans summarizing the work to be performed in the forthcoming fiscal year. If at any time during the implementation of the Work, BIA identifies a need for a compliance date modification, or revision of the Project Closure Work Plan or Annual Work Plans, BIA shall submit a memorandum documenting the need for the modification, or revision, to the EPA Project Coordinator. EPA, in its discretion, will determine if the modification, or revision, is warranted, and may provide written approval or disapproval. Any approved modified compliance date or work plan modification is incorporated by reference into this AOC.
69. Emergency Response. In the event of any action, or occurrence, during the performance of the Work, that constitutes an emergency situation, or may present an immediate threat to human health and the environment, BIA shall immediately take all appropriate action to minimize such emergency or threat, and shall immediately notify the EPA's Project Coordinator and the Tribes. BIA shall take such immediate and appropriate actions in consultation with EPA's Project Coordinator. BIA shall then submit to EPA written notification of such emergency or threat at the Site within 3 (three) calendar days of such discovery. BIA shall thereafter submit to EPA for approval, within 20 (twenty) calendar days of such discovery, a plan to mitigate this threat. EPA will approve or modify this plan, and BIA shall implement this plan as approved or modified by EPA. In the case of an extreme emergency, BIA may act as it deems appropriate, at its own risk, to protect human health or the environment.
70. Proper notification as required in this Section does not relieve BIA of any other notification responsibility BIA may have under any other law, including but not limited to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-Know Act.

## XII. QUALITY CONTROL AND QUALITY ASSURANCE

71. Throughout all sample collection and analysis activities, BIA shall use EPA-approved quality assurance, quality control, and chain-of-custody procedures, as specified in the EPA-approved Data Collection and Quality Assurance Plan. BIA shall use only laboratories that have a documented quality system that complies with the "Uniform Federal Policy for Quality Assurance Project Plans" (March 2005), and the "EPA requirements for Quality Management Plans for Environmental Data Operations (QA/R-5)" (EPA/240/B-01/003, March 2001), or equivalent documentation as determined by EPA.

72. In support of the Closure Plan and the GNMP required under the WTBP, BIA shall submit a Quality Assurance Project Plan (“QAPP”) for EPA review and comment. The QAPP shall address quality assurance and quality control, procedures, methodology, and chain-of-custody, regarding all field sampling, monitoring, measuring, and analytical activities that are undertaken by BIA under this AOC. It shall include data quality objectives and ensure that any data collection or analytical activity produces data of appropriate and known quality and that data are sufficient to support their intended use as required by this AOC.
73. BIA shall ensure that laboratories perform analysis according to the methods approved by EPA. EPA may reject data that does not meet the data quality requirements of the QAPP, the approved Closure Plan, and GNMP, and may require resampling and additional analysis in such instances.
74. BIA shall ensure that all laboratories used for sample analysis or testing participate in a quality assurance/quality control (“QA/QC”) program equivalent to EPA’s program, including utilization of the ASTM (American Society Testing Methods) Standards for representative sampling. BIA shall, upon EPA’s request, make arrangements for EPA to conduct a performance and QA/QC audit of the laboratories used by the BIA whether before, during or after sample analysis. If the audit reveals deficiencies in the laboratory’s performance, BIA shall submit a plan to address the deficiencies and EPA may require resampling and/or additional analysis.
75. EPA reserves the right to require a change in laboratories for reasons which may include, but shall not be limited to, QA/QC problems, performance issues, conflict of interest, fraud, and lab problems identified in confidential agency audit information. In the event EPA requires a laboratory change, BIA shall propose two alternative laboratories within 45 (forty five) calendar days. Once EPA approves an alternative laboratory, BIA shall select an EPA-approved alternative and ensure that laboratory service shall be made available within 15 (fifteen) calendar days. EPA’s decision to require a change in laboratories shall not be subject to the dispute resolution procedures of Section XVIII.

### **XIII. SITE ACCESS**

76. Pursuant to RCRA Section 3007(a), 42 U.S.C. Section 6927(a), BIA shall make best efforts to provide access to the TCD property and work areas, under this AOC, to EPA’s contractors and oversight officials. BIA shall provide access to EPA, EPA’s contractors, and oversight officials, at all reasonable times, to all records and documentation in its possession or control, including those records and documents in the possession or control of BIA’s contractors and employees, related to the conditions at TCD and the actions conducted pursuant to this AOC. BIA shall use

its best efforts to gain access to areas owned by, or in the possession of, persons other than BIA, as necessary to implement this Order. EPA, its contractors, and oversight officials, shall notify BIA of their presence at the TCD, or other work areas, by presenting credentials. All parties with access to TCD under this Paragraph shall comply with pertinent worker health and safety regulations and training requirements.

77. Pursuant to this Section, denial of access to EPA by BIA to any portion of the TCD or Site work areas, where a request for access was made for the purposes of enforcing the requirements of RCRA or this AOC, shall be construed as a violation of the terms of this AOC and subject to the stipulated penalty provisions set forth in Section XVI. However, BIA shall not have deemed to have denied access to EPA when BIA has used its best efforts to gain access to areas owned by, or in possession of, persons other than BIA.

78. Access Agreements. Prior to starting field work, and where activities pursuant to this AOC are to be performed in areas owned by, or in the control of, someone other than BIA, BIA shall use its best efforts to obtain all necessary access agreements, for such areas where access is necessary. Best efforts shall include, but not be limited to, agreement to reasonable conditions for access and/or the payment of reasonable fees. Any such access agreement shall provide for access by EPA, and its representatives, to move freely in order to conduct actions that EPA deems necessary to evaluate actions and monitor compliance with this AOC. Such access agreements shall specify that BIA is not EPA's representative with respect to the activities to be performed. BIA shall provide EPA's Project Coordinator with copies of all access agreements. BIA shall notify EPA immediately if, after using BIA's best efforts, it is unable to obtain such agreements within 30 (thirty) days of the expected start of field work.

Notwithstanding any provision of this AOC, EPA retains all its access and information-gathering authorities and rights under RCRA and any other applicable statute or regulations.

#### **XIV. SAMPLING AND DATA/DOCUMENT ACCESSIBILITY**

79. If requested by EPA, BIA shall validate and submit results of sampling, testing, modeling measurements, field notes or drawings, field photographs, or other data (including raw data if requested by EPA) generated by BIA or on BIA's behalf during implementation of this AOC to EPA within 30 (thirty) days of EPA's request.

80. BIA shall notify EPA orally, or in writing, at least 7 (seven) days prior to conducting field sampling. At EPA's request, BIA shall allow split or duplicate samples to be taken by EPA or EPA's representative.

81. Confidential Business Information. BIA may assert a claim of business confidentiality, covering all or part of the information submitted to EPA, pursuant to the terms of this AOC under 40 CFR Section 2.203, in the manner described at 40 CFR Section 2.203(b). Such information need not be provided to the Tribes under this AOC. EPA agrees not to disclose, copy, reproduce, or otherwise make available to any other person, firm, corporation, partnership, association, or other entity, information designated as proprietary or confidential without consent of the entity claiming confidentiality, except as such information may be subject to disclosure under the Freedom of Information Act (5 U.S.C. § 552), and applicable provisions of EPA's regulations at 40 CFR Part 2, or as otherwise authorized by law. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the Tribes and the public by EPA, without further notice to BIA. BIA agrees not to assert confidentiality claims with respect to any physical, sampling, monitoring, or analytical data, related to Site conditions or the Work performed, pursuant to this AOC. Except for confidential business information claims submitted under 40 CFR Section 2.203, BIA agrees not to assert confidentiality claims with respect to any documentation subject to release under the Freedom of Information Act, or that is collected pursuant to this AOC, or reflects Site conditions.

#### **XV. PROJECT COORDINATORS AND NOTIFICATION**

82. EPA hereby designates Daniel Fernandez as the EPA Project Coordinator. Notification and submittals to EPA shall be addressed as follows:

Daniel Fernandez

U.S. Environmental Protection Agency, Region 9 (ENF-2-2)

75 Hawthorne Street

San Francisco, CA 94105

[fernandez.daniel@epa.gov](mailto:fernandez.daniel@epa.gov)

(415) 972-3299

83. BIA designates Mr. John F. Krause as the BIA Project Coordinator. Notification and other communication with BIA shall be addressed to:

Mr. John F. Krause

U.S. BIA Western Region

2600 Central Avenue

Phoenix, AZ 85004

[john.krause@bia.gov](mailto:john.krause@bia.gov)

(602) 379-3723

84. Each project coordinator shall be responsible for overseeing and coordinating the implementation of his or her respective Agency's responsibilities under this AOC. To the maximum extent practicable, communications including correspondence, reports, notifications, approvals, deliverables, and coordinating information, pertaining to this AOC, and the Work under this AOC, shall be directed through the project coordinators.
- BIA shall provide 15 (fifteen) calendar days written notice to EPA prior to changing its project coordinator, and shall promptly inform EPA of any change to the project coordinator's contact information. EPA will notify BIA of any change in its project coordinator or its project coordinator's contact information.
85. In the event that the EPA project coordinator cannot be reached for any reason, BIA shall contact and provide any outstanding submittals to Kaoru Morimoto, Assistant Director for the Air Waste and Chemicals Branch; Enforcement and Compliance Assurance Division; U.S. EPA Region IX; at the address shown above, except that the mail code is ENF-2. Contact information is [morimoto.kaoru@epa.gov](mailto:morimoto.kaoru@epa.gov) or (415) 972-3306.
86. In the event that the BIA project coordinator cannot be reached for any reason, EPA shall contact and provide any outstanding submittals to the Regional Director, Western Regional Office, U.S. BIA at the address shown above.

## **XVI. STIPULATED PENALTIES**

87. Stipulated Penalties. Any time BIA fails to comply with any term or condition of this AOC, BIA shall be liable for stipulated penalties in the amounts set forth in this Section, unless a Force Majeure event has occurred, as defined in Section XVII (Force Majeure), and EPA has approved the extension of a deadline as required by Section XVII (Force Majeure). Compliance with this AOC by BIA shall include completion of an activity, or any matter under this AOC, in accordance with this AOC, and within the specified time schedules approved under this AOC.
88. Penalties shall begin to accrue on the day after the complete performance is due, or the day a violation occurs, and shall continue to accrue through the final day of correction of the violation or completion of the activity. Payment shall be due within 30 (thirty) days of receipt of a demand letter from EPA. Nothing herein shall prevent the simultaneous accrual of separate stipulated penalties for separate violations of this AOC, even where those violations concern the same event (e.g., submission of a Work Plan that is late and is of unacceptable quality).



89. BIA shall make payments within 30 (thirty) days of EPA's request, shall indicate that the payment is for stipulated penalties, and shall be paid to "Treasurer, United States" by Automated Clearinghouse (ACH) to:

U.S. Environmental Protection Agency Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

Payments shall include a reference to the name of the Facility, BIA's name and address, and the EPA Docket Number of this action.

90. BIA shall send simultaneous notices of such payments, including copies of the transmittal request, to EPA's Project Coordinator and the EPA Cincinnati Finance Office at the following addresses:

Daniel Fernandez  
U.S. Environmental Protection Agency, Region 9 (ENF-2-2) 75 Hawthorne  
Street  
San Francisco, CA 94105

EPA Cincinnati Finance Office  
26 W. Martin Luther King Drive  
Cincinnati, Ohio, 45268  
Or by email at  
[cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov)

91. BIA may dispute an EPA determination that it failed to comply with this AOC, by invoking the dispute resolution procedures under Section XVIII (Dispute Resolution), unless the matter has already been in, or is the subject of, dispute resolution. Penalties shall accrue, but need not be paid during the dispute resolution period. If BIA does not prevail upon resolution, all penalties shall be due to EPA within 30 (thirty) days of resolution of the dispute. If BIA prevails upon resolution, no penalties shall be paid. In the event that BIA prevails in part, penalties shall be due on those matters in which BIA did not prevail.

92. Neither the invocation of dispute resolution, nor the payment of penalties, shall alter in any way BIA's obligation to comply with the terms and conditions of this AOC. The stipulated penalties set forth in this Section do not preclude EPA from pursuing any other remedies or sanctions,

which may be available to EPA, by reason of BIA's failure to comply with any of the terms and conditions of this AOC.

93. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this AOC.
94. The PCPCD (including the GNMP) required by the WTBP shall be enforceable under this AOC, and BIA's failure to submit PCPCD or GNMP, or complete such activities, in accordance with the schedule shall be subject to the stipulated penalties in this Section.
95. Penalties shall apply at a rate of \$1,000 per day for each continued day of non-compliance for violations of requirements listed in the WTBP.

### **XVII. FORCE MAJEURE**

96. BIA shall perform all requirements of this AOC within the time limits established under this AOC, unless the performance is delayed by a force majeure.
97. For purposes of this AOC, a force majeure is defined as any event arising from causes beyond the control of BIA, or any entity controlled by BIA, or BIA's contractors, which delays or prevents performance of any obligation under this AOC, despite BIA's best efforts to fulfill the obligations. The requirement that BIA exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event: (1) as it is occurring, and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible.
98. Force majeure does not include financial inability to complete the Work, increased cost of performance, changes in BIA's business or economic circumstances. However, to the extent the Anti-Deficiency Act provisions within this AOC apply, those provisions supersede this sentence. Force majeure does not include inability to attain media cleanup standards.
99. If any event occurs, or has occurred, that may delay the performance of any obligation under this AOC, whether or not caused by a force majeure event, BIA shall notify EPA orally within 7 (seven) days from when BIA determines that the event might cause a delay. Within 21 (twenty-one) days from when BIA determines that the event might cause a delay, BIA shall provide to EPA in writing, an explanation including a description of the event and reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; BIA's rationale for attributing such delay to a force majeure event if BIA intends to assert such a claim; and a statement as to whether, in the opinion of BIA, such event may cause or contribute to an endangerment of public health, welfare or the environment.

100. Failure to comply with the above, shall preclude BIA from asserting any claim of force majeure and for any additional delay caused by such failure.
101. If EPA agrees that the delay, or anticipated delay in performance of a requirement of this AOC, is attributable to a force majeure event, the time for performance of the requirement under this AOC, affected by the force majeure event, will be extended by EPA for such time reasonably necessary to complete those obligations. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify BIA in writing of the length of the extension, if any, for performance of the requirement(s) affected by the force majeure event.
102. An extension of the time for performance of the obligations affected by the force majeure event, shall not extend the time for performance of any other requirement under this AOC.
103. If EPA does not agree that the delay, or anticipated delay, has been, or will be, caused by a force majeure event, EPA will notify BIA in writing of its decision. BIA may elect to invoke the dispute resolution provision and shall follow the procedures set forth in Section XVIII (Dispute Resolution). In any such proceeding, BIA shall have the burden of demonstrating by a preponderance of the evidence, that the delay, or anticipated delay, has been, or will be, caused by a force majeure, that the duration of the delay or the extension sought was, or will be, warranted under the circumstances, that BIA exercised its best efforts to avoid and mitigate the effects of the delay, and that BIA complied with the requirements of this Section. If BIA satisfied this burden, then EPA will extend the time for performance as EPA reasonably necessary.

### **XVIII. DISPUTE RESOLUTION**

104. Unless otherwise expressly provided for in this AOC, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this AOC. If a dispute arises under this AOC, the procedures of this Section shall apply. The Parties shall make reasonable efforts to informally, diligently, and in good faith work together to resolve disputes at the Project Manager or immediate supervisor level.
105. If BIA disagrees, in whole or in part, with any EPA disapproval, modification or other decision or directive made by EPA pursuant to this AOC, BIA shall notify EPA in writing, including email, of its objections, and the basis therefore, within thirty (30) calendar days of receipt of EPA's disapproval, decision, or directive. Such notice shall set forth the specific points of the dispute, the position which BIA asserts should be adopted as consistent with the requirements of this AOC, the basis for BIA's position, and any matters which it considers necessary for EPA's determination. EPA and BIA shall have an additional thirty (30) calendar days from the

receipt by EPA of the notification of objection, during which time representatives of EPA and BIA may confer in person, by virtual meeting, or by telephone, to resolve any disagreement. In the event that resolution is not reached within this thirty (30)-calendar-day period, EPA will furnish to BIA, in writing, its decision on the pending dispute. Said written decision shall state the basis and rationale for the decision.

106. In the event that the parties cannot resolve a dispute under the informal procedures set forth in the preceding Paragraph, within thirty (30) calendar days after its receipt of EPA's decision set forth in the Preceding Paragraph, BIA must submit to EPA a written statement of its position ("Statement of Position") on the matter in dispute, including, but not limited to, any factual data analysis or opinion supporting that position and any supporting documentation relied upon by BIA. After receipt of BIA's Statement of Position, EPA will serve upon BIA its Statement of Position. If the Parties are unable to reach an agreement after an additional thirty (30) calendar days, the dispute will be referred to the EPA Division Director, who will issue a decision resolving the dispute. The determination of the EPA Division Director shall be final.
107. All Parties shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Section. If BIA does not agree to perform, or does not actually perform the Work in accordance with the final determination, EPA reserves the right in its sole discretion to conduct the work itself, seek reimbursement from BIA, seek enforcement of this Order, seek stipulated penalties, or any other appropriate relief.
108. The invocation of formal dispute resolution procedures under this Section shall not excuse, toll, or suspend any obligation or deadline in any way of BIA under this AOC, not directly in dispute, unless EPA determines otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this AOC. In the event that BIA does not prevail on the disputed issue, stipulated penalties may be assessed and paid as provided in Section XVI.
109. If EPA and BIA reach agreement on the dispute at any stage, the agreement shall be set forth in writing, and shall, upon signature of both parties, be incorporated into, and become an enforceable part of this AOC.
110. Notwithstanding any other provisions of this AOC, no action or decision by EPA, including, without limitation, decisions of the EPA Division Director pursuant to this AOC, shall constitute final agency action giving rise to any right to judicial review prior to EPA's initiation of judicial action to compel BIA's compliance with this AOC.

### **XIX. COMPLIANCE WITH OTHER LAWS**

111. All actions required to be taken pursuant to this AOC shall be undertaken in accordance with the requirements of all applicable State, local, tribal, and federal laws and regulations. BIA shall obtain or require its authorized representatives to obtain all permits and approvals necessary under such laws and regulations. This AOC does not relieve BIA of any obligation to obtain and comply with such permits and approvals.
112. At a minimum, the Work required by this AOC shall comply with the requirements of the National Environmental Policy Act (“NEPA”), the National Historic Preservation Act (“NHPA”), and the Endangered Species Act (“ESA”), including public notice and public participation requirements. BIA shall generate and make available to EPA, other federal agencies as applicable, the Hopi Tribe and the Navajo Nation, all necessary information, analysis, and documents, as may be required for NEPA, NHPA, and ESA compliance. EPA may make its approval of the Closure Plan and GNMP and/or its certification of closure contingent upon its determination that the pertinent provisions of NEPA, NHPA, and/or ESA, including all pertinent public notification and comment provisions, have been met or will be met in the Closure Plan and GNMP.

### **XX. RECORD RETENTION**

113. Consistent with 40 C.F.R. § 258.29, except as required in the next paragraph, BIA shall preserve, during the pendency of this AOC, and for a minimum of at least 10 (ten) years after its termination all data, results, analysis, evaluations, correspondence, and other documents, in its possession, or in the possession of its divisions, officers, directors, employees, agents, contractors, successors, and Assigns, which relate to this AOC. This shall include all official government records as defined by the Records Retention Act and the Freedom of Information Act. After 10 (ten) years, or earlier if requested by EPA, BIA shall make such records available to EPA for inspection or provide copies of all such records to EPA. BIA shall also provide copies of such records to the Hopi Tribe or Navajo Nation, if requested by the tribes. BIA shall notify EPA at least 45 (forty-five) days prior to the proposed destruction of any records related to this AOC, and provide EPA with reasonable opportunity to inspect, copy, and/or take possession of any such records. BIA shall not destroy any record to which EPA has requested access for inspection and/or copying, until EPA has obtained such access or withdrawn its request for such access. Nothing in this Section shall limit the authority of EPA

under Section 3007 of RCRA, 42 U.S.C. § 6927, or any other access or information gathering authority of EPA.

114. BIA shall retain all records associated with long-term maintenance and groundwater monitoring actions for a period of at least 10 (ten) years after termination of this AOC. After 10 (ten) years, or earlier if requested by EPA, BIA shall make such records available to EPA for inspection, or provide copies of all such records to EPA. BIA shall also provide copies of such records to the Hopi Tribe and/or Navajo Nation, if requested. BIA shall notify EPA at least 45 (forty-five) days prior to the proposed destruction of any records related to this AOC, and provide EPA with reasonable opportunity to inspect, copy, and/or take possession of any such records. BIA shall not destroy any record to which EPA has requested access for inspection and/or copying, until EPA has obtained such access or withdrawn its request for such access.

#### **XXI. FUNDING AND ANTIDEFICIENCY ACT**

115. It is the expectation of the Parties that all obligations of BIA arising under this AOC will be fully funded. BIA shall seek sufficient funding in a timely manner, through its budgetary process, to fulfill its obligations under this AOC.
116. BIA shall include in its submission in its annual report to Congress the specific cost estimates and budgetary proposals associated with the implementation of this AOC.
117. Any requirement for the obligation of funds by BIA, pursuant to this AOC, shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, and 1511-1519.
118. In cases where obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds, shall be appropriately adjusted. If funds are not available to fulfill BIA's obligations under this AOC, EPA reserves the right to initiate an action consistent with its authorities or to take any appropriate response action.
119. Consistent with law, and applicable Office of Management and Budget ("OMB") regulations and policies concerning the release of budgetary information, BIA shall timely apprise EPA of budget information available to BIA that may adversely affect project schedules. BIA shall honor all EPA requests for budget information pertinent to requests for extensions of project schedules, claims of force majeure, or other event based on budget limitation.

#### **XXII. RESERVATION OF RIGHTS**

120. Notwithstanding any other provisions of this AOC, EPA retains all of its authority to take, direct, or order any and all actions necessary to protect public health or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste or constituents of such wastes, on, at, or from the Site, including but not limited to the right to bring enforcement actions under RCRA, CERCLA, and any other applicable statutes or regulations.
121. EPA reserves all of its statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, which may pertain to BIABIA's failure to comply with any of the requirements of this AOC, including without limitation the assessment of penalties under Section 7003 of RCRA, 42 U.S.C. § 6973.
122. This AOC shall not be construed as a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers, claims, and/or authorities, civil or criminal, which EPA has under RCRA, CERCLA, or any other statutory, regulatory, or common law authority of the United States.
123. This AOC is not intended to be nor shall it be construed to be a permit. BIA acknowledges and agrees that EPA's approval of the Work and/or Work Plan does not constitute a warranty or representation that the Work and/or Work Plans will achieve the required cleanup or performance standards. Compliance by BIA with the terms of this AOC shall not relieve BIA of its obligations to comply with RCRA or any other applicable local, state, or federal laws and regulations.
124. Notwithstanding any other provision of this AOC, no action or decision by EPA pursuant to this AOC, including without limitation, decisions of the Regional Administrator, the Director of Enforcement and Compliance Assurance, or any authorized representative of EPA, shall constitute final agency action giving rise to any right of judicial review prior to EPA's initiation of a judicial action to enforce this AOC, including an action for penalties or an action to compel BIA's compliance with the terms and conditions of this AOC.
125. Failure to diligently conduct the Work may subject BIA to an action under Section 7002 of RCRA, 42 U.S.C. § 6972.

### **XXIII. NOTICE OF NON-LIABILITY OF EPA**

126. EPA shall not be deemed a party to any contract involving BIA, and relating to activities at the TCD, and shall not be liable for any claim or cause of action arising from, or on account of, any act or the omission of BIA, its officers, employees, contractors, receivers, trustees, agents or assigns, in carrying out the activities required by this AOC.

#### **XXIV. PUBLIC COMMENT ON THIS AOC**

127. EPA shall provide public notice, opportunity for a public meeting, and a reasonable opportunity for public comment, on the proposed AOC. After consideration of any comments submitted during a public comment period of not less than 30 (thirty) days (which EPA may extend), EPA may withhold consent, or seek an agreement with BIA to modify all or part of this AOC, if EPA determines that comments received disclose facts or considerations which indicate that this AOC is inappropriate, improper, or inadequate.

#### **XXV. SEVERABILITY**

128. If any provision or authority of this AOC, or the application of this AOC to any party or circumstance, is held by any judicial or administrative authority to be invalid, the application of such provision to the other parties or circumstances and the remainder of this AOC shall not be affected thereby and shall remain in full force.

#### **XXVI. MODIFICATION OF THIS AOC**

129. Except as provided in the next Paragraph, this AOC may be amended only by mutual agreement of EPA and BIA. Any such amendment shall be in writing, shall be signed by each party's signatory to this AOC, or a person in the same title or position as the signatory, or their delegate. Such amendment shall have as its effective date the date on which it is signed by EPA, and shall be incorporated into this AOC.
130. Minor modifications in the studies, techniques, procedures, designs or schedules, utilized in carrying out this AOC, and necessary for the completion of the project, may be made by the written agreement of the Project Coordinators. Such modifications shall have as an effective date the date on which the agreement is signed by the EPA Project Coordinator.
131. No informal guidance, suggestions, or comments, by EPA regarding reports, plans, specifications, schedules, and any other writing submitted by BIA, shall be construed as relieving BIA of its obligation to obtain written approval, if and when required by this AOC.

#### **XXVII. TERMINATION AND SATISFACTION**

132. The provisions of this AOC shall be deemed satisfied upon written notice from EPA to BIA, that BIA has demonstrated, to the satisfaction of EPA, that the terms of the AOCAOC have been satisfactorily completed. EPA shall not unreasonably withhold its determination that BIA has satisfied the provisions of this AOC. This notice shall not however, terminate BIA's obligation to comply with any continuing obligations for long-term groundwater monitoring



and their applicable requirements and maintenance as set forth in the approved Closure Plan and GNMP, or to comply with Sections XX., XXII., XXVI. or XIX. of this AOC (“Record Retention,” “Reservation of Rights,” “Other Claims,” and “Compliance with Other Laws”).

#### **XXVIII. EFFECTIVE DATE**

133. This AOC shall be effective on the date the AOC is signed by whichever party signs latest.

It is so ORDERED AND AGREED this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

Signed: Darryl  
LaCounte  
Date: 2023.10.27

BY: \_\_\_\_\_

Darryl LaCounte  
Director, Bureau of Indian Affairs

Signed: AMY MILLER-  
BOWEN  
Date: 2023.11.28

BY: \_\_\_\_\_

Amy C. Miller-Bowen  
Director  
Enforcement and Compliance Assurance Division  
U.S. Environmental Protection Agency, Region 9