

Appendix 8

FORM OF GUARANTEE OF PAYMENT AND PERFORMANCE TRUST AGREEMENT

Philip Services Site

This **Guarantee of Payment and Performance Trust Agreement** (“Agreement”) is entered into as of _____, 2022, by and between the Philip Services Site PRP Group (“PRP Group”), on behalf of the Work Parties whose names and states of incorporation or organization are set forth in **Schedule A** to this Agreement (“Grantors”), [_____] a [_____] organized and existing under the laws of the State of [_____] (“Trustee”), and the South Carolina Department of Health and Environmental Control (“Beneficiary” or “Department”). Capitalized terms not otherwise defined herein shall have the meanings set forth in the Consent Decree (defined below).

Whereas, the Grantors are members of the PRP Group, an unincorporated association of potentially responsible parties that allegedly arranged for the disposal of hazardous substances at the Site;

Whereas, the Grantors are the Work Parties under that certain Settlement and Consent Decree between the Department, the PRP Group (consisting of certain Work Parties, certain Cash Out Settlers and certain Re-Opener Settlers) and the United States of America, approved and entered as an order by the United States District Court for the District of South Carolina on _____, 2022, in State of South Carolina v. _____, Civil Action no. [_____] (as it may be amended from time to time, the “Consent Decree”);

Whereas, the Consent Decree provides, in Article XII, that the Grantors shall provide assurance that funds will be available as and when needed for performance of the Work required by the Consent Decree;

Whereas, in order to provide such financial assurance, the Grantors have agreed to establish and fund the trust created by this Agreement; and

Whereas, the Grantors, acting through their duly authorized officers or representatives, have selected the Trustee to be the trustee under this Agreement, and the Trustee has agreed to act as trustee hereunder.

Now, therefore, the Grantors and the Trustee agree as follows:

Section 1 Definitions. As used in this Agreement:

(a) The term “Agreement” means this Guarantee of Payment and Performance Trust Agreement.

(b) The term “Beneficiary” means the Department.

(c) The term “Claim Certificate” shall have the meaning set forth in **Section 4(a)** of this Agreement.

(d) The term “Consent Decree” shall have the meaning set forth in the recitals of this Agreement.

(e) The term “Department” means the South Carolina Department of Health and Environmental Control and has the meaning set forth in the Consent Decree.

(f) The term “Effective Date” shall mean _____, 2022, in accordance with the terms of the Consent Decree.

(g) The term “Estimated Cost of the Work” shall have the meaning set forth in the Consent Decree.

(h) The term “Financial Assurance Mechanism” shall have the meaning set forth in the Consent Decree.

(i) The term “Fund” shall have the meaning set forth in **Section 3(c)** of this Agreement.

(j) The term “Grantors” shall have the meaning set forth in the introductory paragraph of this Agreement.

(k) The term “Objection Notice” shall have the meaning set forth in **Section 4(b)** of this Agreement.

(l) The term “Performance Trust Account” shall have the meaning set forth in **Section 3(a)** of this Agreement.

(m) The term “PRP Group” means the Philip Services Site PRP Group, an unincorporated association of potentially responsible parties that allegedly arranged for the disposal of hazardous substances at the Site, and has the meaning set forth in the introductory paragraph of this Agreement.

(n) The term “Site” shall have the meaning set forth in the Consent Decree.

(o) The term “Trustee” shall mean the trustee identified in the introductory paragraph of this Agreement, along with any successor trustee appointed pursuant to the terms of this Agreement.

(p) The term “Work” shall have the meaning set forth in the Consent Decree.

(q) The term “Work Parties” shall have the meaning set forth in the Consent Decree.

(r) The term “Work Takeover” shall have the meaning set forth in the Consent Decree.

Section 2 Identification of Facilities and Costs. This Agreement pertains to costs for Work required pursuant to the Consent Decree at the Site.

Section 3 Establishment of Trust Fund.

(a) The Grantors and the Trustee hereby establish a trust account (“Performance Trust Account”), for the benefit of the Beneficiary, to assure that funds are available to pay for performance of the Work in the event that Grantors fail to conduct or complete the Work required by, and in accordance with the terms of, the Consent Decree. This Performance Trust Account is the initial Financial Assurance Mechanism selected by the Grantors pursuant to Paragraph 47 (Selection of Initial Financial Assurance Mechanism) of the Consent Decree. The Grantors and the Trustee intend that no third-party shall have access to monies or other property in the Performance Trust Account except as expressly provided herein.

(b) The Performance Trust Account is established initially as consisting of funds in the amount of Twenty-four Million U.S. Dollars (\$24,000,000.00), which is the initial Estimated Cost of the Work and equal to the amount of the financial assurance required pursuant to Paragraph 46 (Required Financial Assurance for Payment and Performance) of the Consent Decree. This initial payment shall be deposited by the Grantors into the Performance Trust Account within ninety (90) days after the Effective Date of the Consent Decree.

(c) The timing or the amount of payments other than the initial payment, if any, will be governed pursuant to Paragraph 49 (Inadequate Financial Assurance Mechanism) of the Consent Decree. The Trustee shall be notified in writing by Grantors’ Representative(s) of any such payment amounts and timing required pursuant to Paragraph 49 of the Consent Decree. Any such additional funds, along with the initial payment and any other monies and/or other property hereafter deposited into the Performance Trust Account, and together with all earnings and profits thereon, are referred to herein collectively as the “Fund.”

(d) The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantors, any payments necessary to discharge any liabilities of the Grantors owed to the Department.

Section 4 Payment for Work Required Under the Consent Decree. The Trustee shall make payments from the Fund in accordance with the following procedures.

(a) From time to time, the Grantors and/or their authorized Representative(s) may request that the Trustee make payment from the Fund for Work performed under the Consent Decree by delivering to the Trustee and the Department a written invoice and certificate (together, a “Claim Certificate”) signed by the Grantors’ Representative(s) and including:

(i) certification that the invoice is for Work performed at the Site in accordance with the Consent Decree;

(ii) a description of the Work that has been performed, the amount of the claim, and the identity of the payee(s);

(iii) certification that the Grantors have sent a copy of such Claim Certificate to the Department, at its address shown in this Agreement, including the date on which such copy was sent and, in the case of electronic delivery, the date on which such copy was received by the Department as evidenced by an e-mail, facsimile, or other similar delivery methods, or in the case of regular mail, Grantors will provide Trustee with proof of service upon the Department by overnight delivery, certified mail, or other similar delivery methods, within a reasonable time after service is complete; and

(iv) payment instructions for the entity to which the requested payment from the Fund is to be made.

(b) The Department may object to any payment requested in a Claim Certificate submitted by the Grantors (or their authorized Representative(s)), in whole or in part, by delivering to the Trustee a written notice (“Objection Notice”) within fifteen (15) days after the date of the Department’s receipt of the Claim Certificate as shown on the relevant e-mail, facsimile, or return receipt. An Objection Notice sent by the Department shall state (i) whether the Department objects to all or only part of the payment requested in the relevant Claim Certificate; (ii) the basis for such objection; (iii) that the Department has sent a copy of such Objection Notice to the Grantors and the date on which such copy was sent; and (iv) the portion of the payment requested in the Claim Certificate, if any, which is not objected to by the Department, which undisputed portion the Trustee shall proceed to distribute in accordance with **Section 4(d)** below. The Department may object to a request for payment contained in a Claim Certificate only on the grounds that the requested payment is either (x) not for the costs of Work under the Consent Decree or (y) otherwise inconsistent with the terms and conditions of the Consent Decree.

(c) If the Trustee receives a Claim Certificate and does not receive an Objection Notice from the Department within the time period specified in **Section 4(b)** above, the Trustee shall, after the expiration of such time period, promptly make the payment from the Fund requested in such Claim Certificate.

(d) If the Trustee receives a Claim Certificate and also receives an Objection Notice from the Department within the time period specified in **Section 4(b)** above, but which Objection Notice objects to only a portion of the requested payment, the Trustee shall, after the expiration of such time period, promptly make payment from the Fund of the uncontested amount as requested in the Claim Certificate. The Trustee shall not make any payment from the Fund for the portion of the requested payment to which the Department has objected in its Objection Notice.

(e) If the Trustee receives a Claim Certificate and also receives an Objection Notice from the Department within the time period specified in **Section 4(b)** above, which Objection Notice objects to all of the requested payment, the Trustee shall not make any payment from the Fund for amounts requested in such Claim Certificate.

(f) Any disputes among the Grantors and the Department with respect to an Objection Notice shall be resolved pursuant to Article XXII (Dispute Resolution) of the Consent Decree. Upon resolution of the dispute, the Grantors’ Representative(s) or the Department shall

notify the Trustee of the amount, if any, of the disputed payment that should be paid pursuant to the Claim Certificate, and the Trustee shall promptly make such payment from the Fund.

(g) If, at any time during the term of this Agreement, the Department implements a “Work Takeover” pursuant to the terms of the Consent Decree that is not the subject of any pendant dispute being resolved pursuant to Article XXII of the Consent Decree, and intends to direct payment of monies from the Fund to pay for performance of Work during the period of such Work Takeover, the timing and amounts of the payments established by **Section 4(a)-(e)** above shall be superseded, and consistent with the requirements of Paragraph 50 (Funding for Work Takeover) of the Consent Decree. The Department shall notify the Trustee in writing of the Department’s commencement of such Work Takeover. Upon receiving such written notice from the Department and so long as the Work Takeover is not the subject of any pendant dispute, the disbursement procedures set forth in **Section 4(a)-(e)** above shall immediately be suspended, and the Trustee shall thereafter make payments from the Fund only to such person or persons as the Department may direct in writing from time to time for the sole purpose of providing payment for performance of Work required by the Consent Decree. Further, after receiving such written notice from the Department, the Trustee shall not make any disbursements from the Fund at the request of the Grantors, including their Representatives(s), or of any other person for Work conducted after the date of such notice except at the express written direction of the Department. If the Department ceases such a Work Takeover in accordance with the terms of the Consent Decree, the Department shall so notify the Trustee in writing and, upon the Trustee’s receipt of such notice, the disbursement procedures specified in **Section 4(a)-(e)** above shall be reinstated.

(h) While this Agreement is in effect, disbursements from the Fund are governed exclusively by the express terms of this Agreement.

Section 5 Disbursements Upon Reduction of Amount of Financial Assurance Mechanism. If the amount of the Financial Assurance Mechanism is reduced at any time pursuant to Paragraph 51(a) (Reduction of Amount of Financial Assurance Mechanism) of the Consent Decree, the Grantors may instruct the Trustee to disburse to the Grantors an amount equal to the then current value of the Fund, minus the revised Estimated Cost of the Work. The Trustee shall promptly disburse such amount to the Grantors upon receipt of written notice from the Department to the Grantors confirming the revised Estimated Cost of the Work.

Section 6 Trust Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the entire Fund invested, without distinction between principal and income, in accordance with directions which the Grantors (or their authorized Representative(s)) may communicate in writing to the Trustee from time to time, except that the Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7 Commingling and Investment.

(a) The Trustee is expressly authorized in its discretion to transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions hereof and thereof, to be commingled with the assets of other trusts participating therein.

(b) The Trustee is authorized to purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee.

Section 8 *Express Powers of Trustee.* Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) to make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(b) to register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the U.S. government or any U.S. state government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund; and

(c) to deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the U.S. government.

Section 9 *Taxes and Expenses.* The Fund is intended to be treated as a qualified settlement fund as described in Treasury Regulations Section 1.468B-1. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses and charges incurred by the Trustee in connection with the administration of the Performance Trust Account, including fees for legal services rendered to the Trustee, the compensation of the Trustee, and all other proper charges and disbursements of the Trustee, shall be paid from the Fund upon written notice to the Department.

Section 10 *Annual Valuation.* The Trustee shall annually, no more than thirty (30) days after each anniversary date of this Agreement, furnish to the Grantors' Representative(s) and to the Beneficiary a statement confirming the value of the Fund. Any securities in the Fund shall be valued at market value as of no more than sixty (60) days prior to the anniversary date of establishment of the Fund. The annual statement shall include an accounting of any fees or expenses levied against the Fund. The Trustee shall also provide such information concerning the Fund and the Performance Trust Account as the Department may request from time to time.

Section 11 *Advice of Counsel.* The Trustee may from time to time consult with counsel with respect to any question arising as to the construction of this Agreement or any

action to be taken hereunder; provided, however, that any counsel retained by the Trustee for such purposes may not, during the period of its representation of the Trustee, serve as counsel to the Grantors under this Agreement.

Section 12 Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing with the Grantors and as notified in writing to the Beneficiary.

Section 13 Trustee and Successor Trustee. The Trustee and any replacement Trustee must be approved in writing by the Department and must not be affiliated with any of the Grantors. The Trustee may resign or the Grantors may replace the Trustee, but such resignation or replacement shall not be effective until the Grantors have appointed a successor trustee approved in writing by the Department and this successor accepts such appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantors cannot or do not act in the event of the resignation of the Trustee, the Trustee may apply to the Department or a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the Fund and the Performance Trust Account in a writing sent to the Grantors, the Beneficiary, and the present Trustee by certified mail no less than ten (10) days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in **Section 9**.

Section 14 Instructions to the Trustee. All orders, requests, and instructions to the Trustee by the Grantors shall be in writing and signed by any of the persons designated in the attached **Schedule B** ("Grantors' Representative(s)") or such other designees as the Grantors may designate by amendment to **Schedule B**. All instructions to the Trustee by the Beneficiary shall be in writing, signed by such persons as are empowered to act on behalf of the entity giving such instructions. Such instruction may include, but not be limited to, instructions to direct the Trustee in any manner regarding the preparation and filing of tax returns, if any, by the Trustee. The Trustee shall be fully protected (*i.e.*, shall not be liable) in acting without inquiry on such written instructions given in accordance with the terms of this Agreement. The Trustee shall have no duty to act in the absence of such written instructions, except as expressly provided for herein.

Section 15 Amendment of Agreement. This Agreement may be amended only by an instrument in writing executed by the Grantors or the Grantors' Representative(s) and the Trustee, and with the prior written consent of the Department; provided, however, that the Grantors may amend **Schedule B** to appoint or remove any Grantor Representative(s) without the Department's or the Trustee's written consent, so long as the Grantors deliver to the Department and the Trustee such amended **Schedule B**.

Section 16 Irrevocability and Termination. The trust established by this Agreement shall be irrevocable and shall continue until terminated upon the earlier to occur of (a) receipt by the Trustee from Grantors or the Department of the Department's Certification of Completion of the Work pursuant to the Consent Decree, (b) receipt by the Trustee of written notification from

the Department that the Performance Trust Account may be terminated pursuant to Paragraph 51(b) (Change of Form of Financial Assurance Mechanism) or 52 (Release of Financial Assurance Mechanism) of the Consent Decree, or (c) the complete exhaustion of the Fund comprising the Performance Trust Account as certified in writing by the Trustee to the Department and the Grantors upon request by the Department or the Grantors. Upon termination of the Performance Trust Account pursuant to this **Section 16**, all remaining trust property (if any), less final trust administration expenses, shall be disbursed in accordance with a joint written instruction signed by the Beneficiary and the Grantors' Representative(s).

Section 17 Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of the Performance Trust Account, or in carrying out any directions by the Grantors or the Department issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantors from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct made by the Trustee in good faith in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantors fail to provide such defense. If the Grantors fail to fulfill their obligations as set forth in this Section, the Fund shall indemnify and save harmless the Trustee as provided hereinabove.

Section 18 Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of South Carolina.

Section 19 Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

Section 20 Notices. All notices and other communications given under this Agreement shall be in writing and shall be addressed to the parties as follows or to such other address as the parties shall by written notice designate:

(a) If to the Grantors, to:

Marc Ferries, P.E.
Project Coordinator for Philip Service Site PRP Group
Project Navigator, Ltd.
15990 N. Barkers Landing Rd, Suite 325
Houston, TX 77079
E-mail: mferries@projectnavigator.com

With a copy to:

Emily S. Sherlock
Common Counsel to Philip Services Site PRP Group
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon St, Suite 1900
Charlotte, NC 28246
E-mail: esherlock@robinsonbradshaw.com

(b) If to the Trustee, to:

[_____]

(c) If to the Department, to:

R. Gary Stewart, Section Manager
SC DHEC-BLWM
State Remediation Section
2600 Bull Street
Columbia, SC 29201
E-mail: stewarrg@dhec.sc.gov

Carol Crooks, Project Manager
SC DHEC-BLWM
State Remediation Section
2600 Bull Street
Columbia, SC 29201
E-mail: crookscl@dhec.sc.gov

With copies to:

Jacquelyn S. Dickman
SC DHEC
Office of General Counsel
2600 Bull Street
Columbia, SC 29201
E-mail: dickmajs@dhec.sc.gov

Kelly D. H. Lowry
753 E. Main St, Suite 7
Spartanburg, SC 29302
(864) 921-8915
E-mail: kelly@kellydhlwry.com

Section 21 Method of Execution. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. Delivery of a photocopy or electronic copy of a signed counterpart of this Agreement by facsimile or e-mail transmission shall be effective as delivery for all purposes, and no exchange of originally signed counterparts of this Agreement shall be required for it to be in effect.

[Signatures appear on the following pages.]

IN WITNESS WHEREOF, the parties, through their authorized representatives, have executed this Agreement as of the date first written above.

TRUSTEE:

[_____]

By: _____

Name: _____

Title: _____

GRANTORS:

Philip Services Site PRP Group

By: _____

Name: _____

Title: _____

BENEFICIARY:

South Carolina Department of Health and
Environmental Control

By: _____

Name: _____

Title: _____

Schedule A

Grantors

Name	State of Incorporation or Organization

Schedule B

Grantors' Representative(s)

Marc Ferries, P.E.
Project Coordinator for Philip Service Site PRP Group
Project Navigator, Ltd.
15990 N. Barkers Landing Rd, Suite 325
Houston, TX 77079
E-mail: mferries@projectnavigator.com

Emily S. Sherlock
Common Counsel to Philip Services Site PRP Group
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon St, Suite 1900
Charlotte, NC 28246
E-mail: esherlock@robinsonbradshaw.com