

RESOLUTION NO. 29249

A RESOLUTION AUTHORIZING THE MAYOR TO APPLY FOR ACCEPTANCE INTO THE BROWNFIELD VOLUNTARY PROGRAM FOR A 1.2 MILE SECTION OF AN ABANDONED CSX RAIL RIGHT-OF-WAY AND, IF APPROVED, TO EXECUTE THE BROWNFIELD VOLUNTARY AGREEMENT, IN SUBSTANTIALLY THE FORM ATTACHED, WITH THE TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION AND THE PAYMENT OF FEES, AS OUTLINED IN THE AGREEMENT, FOR AN AMOUNT NOT TO EXCEED SIXTEEN THOUSAND TWO HUNDRED FIFTY DOLLARS (\$16,250.00).

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BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, That there be and is hereby authorizing the Mayor to apply for acceptance into the Brownfield Voluntary Program for a 1.2 miles section of an abandoned CSX Rail right-of-way and, if approved, to execute the Brownfield Voluntary Agreement, in substantially the form attached, with the Tennessee Department of Environment and Conservation and the payment of fees, as outlined in the agreement, for an amount not to exceed \$16,250.00.

ADOPTED: November 21, 2017

/mem

**STATE OF TENNESSEE**

**DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

**DIVISION OF REMEDIATION**

**BROWNFIELD VOLUNTARY AGREEMENT**

**RE: CSX Rail Right-of-Way near Broad Street, Chattanooga, Tennessee**

**SITE NUMBER: [TBD]**

**INTRODUCTION**

This Brownfield Voluntary Agreement (hereinafter “AGREEMENT”) is made and entered into as of the last date of execution shown herein below by and between the Tennessee Department of Environment and Conservation (hereinafter “Department”), and the City of Chattanooga, a municipality organized under and existing pursuant to the laws of the State of Tennessee (hereinafter “Voluntary Party”) for the purpose of addressing the above-referenced site (hereinafter “Site”), which has the real or perceived threat of the presence on the Site of hazardous substances, solid waste, or any other pollutant.

Robert J. Martineau, Jr. is the duly appointed Commissioner of the Department. Steve Goins, Director of the Department’s Division of Remediation, has been delegated the authority to enter into this AGREEMENT.

Pursuant to Tennessee Code Annotated § 68-212-224, the Commissioner is authorized to enter into an AGREEMENT with a party who is willing and able to conduct an investigation and/or remediation of a hazardous substance site or Brownfield Project and who did not generate, transport, or release the contamination that is to be addressed at the Site.

**REQUIREMENTS**

**A. SITE LOCATION**

The Site is an approximately 1.2-mile section of abandoned CSX rail line and right-of-way in Chattanooga, Hamilton County, Tennessee. The Site begins northwest of the intersection between Central Avenue and West 38th Street and trends northwest before turning west on the north side of West 33rd Street, crossing Broad Street and terminating at St. Elmo Avenue. A

legal description of the Site and a survey map showing the Site is attached as Exhibit A, which is incorporated herein by reference.

**B. ELIGIBILITY**

As required by Tennessee Code Annotated § 68-212-224, a summary description of all known existing environmental investigations, studies, reports or documents concerning the Site’s environmental condition has been submitted to the Department by the Voluntary Party (a copy of the Summary is attached hereto as Exhibit B). On the date of entering into this AGREEMENT, the Department has determined that the Site is not listed or been proposed for listing on the federal National Priorities List by the United States Environmental Protection Agency (“EPA”). By entering into this AGREEMENT, the Voluntary Party certifies to the best of the Voluntary Party’s knowledge that the Voluntary Party did not generate, transport, or release contamination that is to be addressed under this AGREEMENT.

**C. FINANCIAL REQUIREMENTS**

Tennessee Code Annotated § 68-212-224 requires consideration of a fee to enroll in the Voluntary Cleanup Oversight and Assistance Program. The Commissioner has set the following schedule of fees that may apply to all sites working in cooperation with the Department to recover the expense of oversight. These fees are in place of hourly time charges and normal travel costs during the first 150 hours of oversight for the project.

Program Entry	\$ 750
Site Characterization	\$ 2,000
Remediation	\$ 2,500
Risk Assessment	\$ 2,000
Vapor Intrusion Evaluation	\$ 2,000
Voluntary Agreement/Consent Order	\$ 3,000
Land Use Restrictions	\$ 500
Annual O&M Review	\$ 500

In addition to the fees identified previously, an annual longevity fee of \$3,000 will be charged to the Voluntary Party on the anniversary of the date the site was accepted into the

Voluntary Program until a letter requiring no further action has been issued or this AGREEMENT has been terminated.

Upon reaching 150 hours of oversight, the Site will be charged the current hourly rate (e.g. seventy-five dollars (\$75.00) per hour for FY 2015-2016) per hour of oversight in addition to the fee schedule listed above. This amount includes the current hourly rate and pro rata portion benefits for the Department's employees actively employed in oversight of work under this AGREEMENT, including preparation for and attendance at meetings, mileage, any costs billed by State contractor(s) who are actively performing oversight, and the current State overhead rate. Additionally, any out-of-pocket expense, mileage, lab expense or other unusual costs to the Department shall be billed to and paid by the Voluntary Party. The Voluntary Party shall pay each bill referenced in this Section C within sixty (60) days of receipt by Voluntary Party. Fees and financial requirements must be paid to remain in the Voluntary Cleanup Oversight and Assistance Program and to receive a letter of no further action under Section H of this AGREEMENT.

#### **D. IDENTIFICATION AND DOCUMENTATION OF CLEANUP**

Based on the information submitted to the Department by or on behalf of the Voluntary Party, and the Department's own review of this information, the Parties hereto agree that the following environmental conditions are to be addressed under this AGREEMENT:

S&ME, Inc. prepared a "Report of Limited Environmental Assessment" for the Site (hereinafter "Phase II"), dated May 24, 2017. The Phase II assessment included the collection of composite samples along the Site, including along the former rail road right-of-way, former switch locations, former crossing signal locations, and adjacent to the bridges present along the alignment. Soil samples were collected from the upper 6 inches of soil and consisted of silty clays, cinders and foundry sand and commingled clays and foundry sand. Soil samples were analyzed for RCRA metals, polycyclic aromatic hydrocarbons ("PAHs") and polychlorinated biphenyls ("PCBs"). The results of analysis identified concentrations of arsenic, lead, and four PAH compounds in excess of EPA Regional Screening Levels ("RSLs") for industrial soils. PCBs also were detected, but detected concentrations did not exceed the corresponding comparison criteria.

On [Date], S&ME, Inc. ("S&ME"), completed a "Report of Phase I Environmental Site Assessment" for the Site (hereinafter "Phase I"). S&ME identified the following onsite

recognized environmental conditions (“RECs”), Historical RECs, *de minimis* conditions, and other environmental conditions:

- Documented onsite impact from PAHs, PCBs, lead and arsenic in foundry sand and soil;
- Historical onsite operations of rail lines from at least 1917 to the 1980’s;
- Observed presence of surface piles of foundry sand and clayey soil along the eastern and central segments of the subject property;
- Observed oily staining on remnant rail ties and associated burned wood in one location at the eastern segment of the subject property; and
- Moderate amounts of household garbage observed in the central segment of the subject property along West 33rd Street.

S&ME also reported offsite RECs and controlled RECs near the Site in the Phase I. The off-site RECs, which are also detailed in the attachments to the Phase I, include a number of properties adjacent to the Site that have existing contamination of Volatile Organic Compounds (“VOCs”).

S&ME did not recommend any remedial action, monitoring, or maintenance activity at the Site.

The Voluntary Party is proposing to redevelop this Site as a public trail. Pursuant to this AGREEMENT, the Voluntary Party is not being required to fully remediate the pre-existing impacts noted above, but is required to take certain actions specified in this AGREEMENT to ensure that the identified environmental impacts do not pose a threat to human health or the environment during and after completion of the redevelopment.

Real or perceived hazardous substances, solid wastes, or other pollutants are determined to be present on this Site to an extent that may or may not have yet been fully characterized. As the current owner or operator, or upon becoming an owner or operator of the Site, the Voluntary Party may occupy the status of a “liable party” pursuant to the definition of that term contained in Tennessee Code Annotated § 68-212-202(4). Liability may be apportioned pursuant to factors in Tennessee Code Annotated § 68-212-207 as well as other equitable factors. The Commissioner is authorized to determine an apportionment of liability within this AGREEMENT as authorized by Tennessee Code Annotated § 68-212-224.

## **E. AGREED LIABILITY RELIEF**

Tennessee Code Annotated § 68-212-224(a)(5) provides that the Commissioner is authorized to limit the liability of a participant in a voluntary agreement or consent order entered into pursuant to Tennessee Code Annotated § 68-212-224. Such voluntary agreement or consent order may limit the liability of such participant to the obligations set forth therein and exempt the participant from any further liability under any statute administered by the Department for investigation, remediation, monitoring, and/or maintenance of contamination identified and addressed in the voluntary agreement or consent order (collectively referred to as the "*Matters Addressed in this Agreement*"). The Commissioner may extend this liability protection to successors in interest or in title to the participant, contractors conducting response actions at the Site, developers, future owners, tenants, and lenders, fiduciaries or insurers (collectively "Successor Parties").

The Commissioner agrees that the Voluntary Party's implementation of the actions agreed upon in Section H will constitute satisfaction of the apportioned liability of the Voluntary Party under all environmental statutes administered by the Department for the contamination and environmental conditions identified in Section D of this AGREEMENT. The Voluntary Party and Successor Party, however, remain potentially responsible for any release of hazardous substances or other pollutants that occurs at the Site while it owns or operates the Site or for contamination not identified and addressed in this AGREEMENT.

In accordance with the above referenced authority, TDEC agrees that other than with respect to the obligations set forth in this AGREEMENT and implementation of the actions agreed upon in Section H, the Voluntary Party and Successor Parties (as hereinafter defined) shall bear no liability to the State of Tennessee under any statute administered by the Department for investigation, remediation, monitoring, treatment and/or maintenance of contamination identified in and addressed in this Section D of this AGREEMENT (collectively referred to as the "*Matters Addressed in this Agreement*"); provided, however, that to the extent that the Voluntary Party or Successor Parties (as hereinafter defined) has or maintains an interest in the Site, or possesses and/or controls all or a portion of the Site, its liability protections hereunder are contingent upon its continued adherence and enforcement of any land use restrictions imposed pursuant to or as a result of this AGREEMENT. Nothing in this AGREEMENT shall be construed as limiting the liability or potential liability of the Voluntary Party for contamination

occurring after the effective date of this AGREEMENT or for contamination not identified and addressed in this AGREEMENT. This liability protection and all other benefits conferred by this AGREEMENT are extended to all future “Successor Parties” conditioned upon performance of the obligations contained in this AGREEMENT and compliance with the Land Use Restrictions (hereinafter defined); provided, that such liability protection to other persons does not apply to liability to the extent that such liability arose prior to the effective date of this AGREEMENT. For the avoidance of doubt, a breach of this AGREEMENT by a successor in interest or title will not alter the liability protection provided to a predecessor in interest or title.

#### **F. ADMINISTRATIVE SETTLEMENT; THIRD PARTY LIABILITY**

This AGREEMENT also constitutes an administrative settlement for purposes of Section 113(f) of CERCLA, 42 U.S.C. §9613(f), pursuant to which the Voluntary Party and Successor Parties (as hereinafter defined) have, as of the effective date of this AGREEMENT, resolved their liability to the State of Tennessee for *Matters Addressed in this Agreement*.

Tennessee Code Annotated § 68-212-224(a)(6), subject to the notice requirements provided therein, provides that this AGREEMENT also constitutes an administrative settlement for purposes of Section 113(f) of CERCLA, 42 U.S.C. §9613(f) for inactive hazardous substance sites. Voluntary Party and Successor Parties (as hereinafter defined) have, as of the effective date of this AGREEMENT, resolved their liability to the State of Tennessee for *Matters Addressed in this Agreement*.

The Voluntary Party shall not be liable to third parties for contribution regarding *Matters Addressed in this Agreement*; provided that, the Voluntary Party gave the third party actual or constructive notice of this AGREEMENT, and the third party was given an actual or constructive opportunity to comment upon this AGREEMENT. The Voluntary Party has demonstrated to the Department that constructive notice was accomplished by publishing a summary of this AGREEMENT in a newspaper of general circulation within the geographical area of the Site at least thirty (30) days prior to the Effective Date of this AGREEMENT. The Voluntary Party has demonstrated to the Department that actual notice was accomplished by providing copies of certified letters summarizing this AGREEMENT that were sent to adjacent landowners and governments having jurisdiction over the property. Nothing in this AGREEMENT shall impair the rights of third parties with respect to tort liability claims for damage to person or property arising from the contamination addressed by the voluntary agreement.

## **G. LAND USE RESTRICTIONS**

Upon acquiring the Site, the Voluntary Party agrees that said property will be restricted as follows:

Non-residential uses only.

The Voluntary Party agrees that it will file any land use restriction identified by the Department as necessary for the safe use of the property in accordance with Tennessee Code Annotated § 68-212-225. Any Party receiving liability protection under this AGREEMENT that seeks approval for restricted uses or seeks to cancel or make a Restriction less stringent shall be responsible for any costs incurred by the Department in the review and oversight of work associated with the restriction modification. Upon filing, a copy of this notice shall be mailed to all local governments having jurisdiction over any part of the subject property.

## **H. AGREED ACTIONS TO BE TAKEN**

The Voluntary Party agrees to conduct the following activities:

1. The Voluntary Party agrees to send notification of this AGREEMENT by certified mail to all local governments having jurisdiction over any part of the subject property and to all owners of adjoining properties. The Voluntary Party shall provide adequate documentation to the Department to demonstrate that public notice has been accomplished.
2. The Voluntary Party agrees that criteria required in Tennessee Code Annotated § 68-212-206(d) shall be used in determining containment and cleanup actions, including monitoring and maintenance options to be followed under this Agreement.
3. The Voluntary Party, and/or any Successor Party who intends to develop the Site, agrees to develop and implement a TDEC-approved Soil Management Plan ("SMP") that addresses how soils and other materials should be managed during redevelopment activities to protect human health, safety or the environment. S&ME had previously submitted an SMP as part of the limited sampling plan. A final SMP shall be submitted to the Department for approval prior to Site redevelopment activities. The SMP shall be attached as an exhibit to the Notice



of Land Use Restrictions referenced at Section G that is to be recorded for the Site. The final SMP shall at a minimum include:

- a. Identification of areas where impacted soil or other material is believed to remain at the Site, the constituents of concern in such areas, and a brief summary of prior investigations and remedial activities at the Site.
- b. Procedures for onsite handling and management of excavated soils and other material during Site redevelopment activities including without limitation, demolition of structures, installation of subsurface utilities, and installation of new building foundations. The entire Site shall be deemed an "area of contamination" to enable on-Site handling and management of soils and other material in connection with redevelopment activities.
- c. Procedures that comply with federal, state and local laws, regulations and ordinances for the characterization, manifesting and proper offsite disposal of soils or other material in the event that such soils or materials are to be removed from the Site as part of redevelopment activities.
- d. Protocols for future, post-redevelopment soil management and maintenance of any covers, caps or other engineered barriers that are in place after initial redevelopment activities at the Site.

Upon completion of the work, the Voluntary Party agrees to submit to the Department any "as built" drawings or reports applicable to the work completed subject to this AGREEMENT.

Upon completion of all tasks set forth in this AGREEMENT, the Department shall issue to the Voluntary Party a letter stating the requirements of this AGREEMENT have been fulfilled and no further action is required of the Voluntary Party concerning contamination identified and addressed in this AGREEMENT. Upon the request of the Voluntary Party from time to time, the Department shall issue an interim status letter identifying what specific obligations remain to achieve completion of the work under this AGREEMENT. Issuance of a no further action letter shall not relieve the Voluntary Party of any responsibilities for operation and maintenance activities or continued adherence to and enforcement of land use restrictions, if any, pursuant to Tennessee Code Annotated § 68-212-225. The Department reserves the right to require

additional action for contamination caused by the Voluntary Party occurring after the date of this AGREEMENT or for contamination not identified and addressed under this AGREEMENT, if any.

## **I. ADDITIONAL REQUIREMENTS**

The Voluntary Party may request a time extension for any deadline included in this AGREEMENT prior to the deadline. The time extension may be granted through mutual consent for good cause shown.

The Voluntary Party or any Successor Party agrees not to disturb, move or remove any areas of hazardous substances, solid waste or other pollutant(s) that are subject to liability protection under this AGREEMENT without written approval by the Department unless the activities are being conducted under the terms and conditions of this AGREEMENT or necessitated by the normal day-to-day activities of any on-going business.

The Voluntary Party or any Successor Party shall be responsible for the following obligations during periods when it owns the Site:

- (a) Comply with land use restrictions;
- (b) Do not impede effectiveness or integrity of any engineering and/or institutional controls present;
- (c) Take “reasonable steps” to stop on-going releases;
- (d) Prevent or limit human and environmental exposure to any previous releases;
- (e) Provide cooperation, assistance and access;
- (f) Comply with information requests and subpoenas relative to environmental conditions at the property; and
- (g) Whether or not permits are required for onsite cleanup activities, such activities shall meet the standards that would apply if such permits were required.

The Department acknowledges that the Voluntary Party itself may conduct redevelopment activities at the Site in addition to preparing the Site for development for Successor Parties, and enters into this AGREEMENT in order to facilitate Voluntary Party’s

development of the Site or Successor Parties' development of the Site as herein agreed by Voluntary Party. The Department further acknowledges that Voluntary Party and more than one Successor Party may develop different portions of the Site. Accordingly, Voluntary Party and one or more Successor Parties may assume the obligations and liability protections provided under this Agreement upon such Successor Parties' acquisition of property interests in the Site. The Voluntary Party or any Successor Party that transfers its interest at the Site shall be relieved of any further obligations under this Agreement.

**J. SITE ACCESS**

During the effective period of this AGREEMENT, and until certification by the Department of completion of all activities under this AGREEMENT, the Department and its representatives or designees shall have access during normal business hours to the Site. Nothing herein shall limit or otherwise affect the Department's right of entry, pursuant to any applicable statute, regulation or permit. The Department and its representative shall comply with all reasonable health and safety plans published by the Voluntary Party or its contractor and used by Site personnel for the purpose of protecting life and property.

**K. SUBMISSION OF INFORMATION, REPORTS, OR STUDIES**

Any information, reports, or studies submitted under the terms of this AGREEMENT shall contain the following notarized statement:

"I certify under penalty of law that this document and all attachments were prepared by me, or under my direction or supervision. The submitted information is to 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. As specified in Tennessee Code Annotated Section 39-16-702(a)(4), this declaration is made under penalty of perjury."

**L. RESERVATION OF RIGHTS**

This AGREEMENT shall not be construed as waiving any right or authority available to the Commissioner to assess responsible parties other than the Voluntary Party for liability for civil penalties or damages incurred by the State, including any natural resource damage claims

which the Department or the State of Tennessee may have under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) or any other statute, rule, regulation or common law.

Nothing in this AGREEMENT shall be construed as limiting or waiving any right or authority available to the Commissioner to require a liable party to address contamination occurring after the effective date of this AGREEMENT or for contamination not identified and addressed in this AGREEMENT.

Nothing in this AGREEMENT shall be interpreted as limiting the Voluntary Party’s right to preserve the confidentiality of attorney work product or client-attorney communication. Tennessee Code Annotated § 68-212-202 et seq. contains no provisions for confidentiality or proprietary information. Therefore, records, reports, test results, or other information submitted to the Department under this AGREEMENT shall be subject to public review. Any and all records, reports, test results or other information relating to a hazardous substance site or the possible hazardous substance at the Site submitted under this AGREEMENT may be used by the Department for all purposes set forth in Tennessee Code Annotated § 68-212-201 et seq.

Voluntary Parties or Successor Parties may terminate this AGREEMENT as it pertains to them at any time upon written notice to the Department during the time period that they own the Site and/or conduct operations at the Site. Upon such termination, the Voluntary Party shall have no further obligations hereunder other than payment of oversight costs accrued to the date of notice of termination and adherence to any notice of land use controls filed under Tennessee Code Annotated § 68-212-225; provided, that both Parties shall have and retain all authority, rights and defenses as if this AGREEMENT had never existed.

The Department may terminate this AGREEMENT by written notice to the Voluntary Party in the event that the Department receives timely comments from third-party contribution claim holders pursuant to the notice sent under Section F of this AGREEMENT, if any, and such comments disclose facts or considerations that indicate that this AGREEMENT is inappropriate, improper or inadequate; provided, however, absent fraud or intentional misconduct, that in such event the Voluntary Party may elect to waive the protections set forth in Section F hereunder and the remainder of the terms and conditions of this AGREEMENT shall continue to be in full force and effect. The Department’s notice of termination must be made within thirty (30) days of the end of the 30-day notice period required by Section F. The Voluntary Party’s waiver notice must be made within fifteen (15) days after receipt of the Department’s termination notice.

The Department reserves the right to terminate this AGREEMENT if the Voluntary Party fails to timely pay fees and other financial requirements specified in Section C Financial Requirements or to comply with any material requirement of this AGREEMENT. Prior to exercising any right to terminate this AGREEMENT, the Department shall provide written notice to Voluntary Party or Successor Party of the specific failure to comply and afford Voluntary Party or Successor Party a reasonable opportunity to cure any such failure. Voluntary Party or Successor Party shall commence to cure such failure within sixty (60) days following receipt of written notice. For the purpose of this AGREEMENT, timely payment means the Department receiving payment from the Voluntary Party within 60 days of the first billing of a financial requirement or according to a payment plan agreed in writing between Voluntary Party and the Department.

If any provision of this AGREEMENT is held to be invalid or unenforceable by a court of competent jurisdiction, then the remaining provisions of this AGREEMENT will remain in full force and effect.

Nothing in this AGREEMENT shall be interpreted as limiting the liability for the improper management and/or disposal of contaminated material removed from the site.

The individual signing below on behalf of the Voluntary Party represents that he or she is a duly authorized agent, capable of entering into a binding AGREEMENT on behalf of the Voluntary Party. By entering into this AGREEMENT, this individual certifies that the Voluntary Party did not generate or did not cause to generate, transport or release the contamination that is to be addressed at this Site.

The Effective Date of this AGREEMENT is the thirtieth (30th) day after the publication of the notice described in Section F of this AGREEMENT.

[SIGNATURES TO APPEAR ON THE FOLLOWING PAGE]

BY THE DEPARTMENT OF ENVIRONMENT AND CONSERVATION  
DIVISION OF REMEDIATION:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Steve Goins  
Director

BY THE CITY OF CHATTANOOGA:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Voluntary Party:

DRAFT

**Exhibit A –  
Legal Description**

DRAFT

**Exhibit B –**

**Summary of Environmental Reports**

<b>Date</b>	<b>Author</b>	<b>Title</b>
May 24, 2017	S&ME, Inc.	Report of Limited Environmental Assessment
[Final TBD]	S&ME, Inc.	Report of Phase I Environmental Site Assessment

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