

**48. SCHEDULE 48:**  
**ENVIRONMENTAL**  
**PROVISIONS**

## **Schedule 48 (Environmental Provisions)**

### **1. DEFINITIONS**

- 1.1 The following definitions shall in addition to the definitions in Schedule 1 (Definitions) be used for the interpretation of this Schedule 48:-

<b>Action</b>	means a criminal, civil, judicial, regulatory or administrative proceeding, suit, claim, order or notice by a third party or Relevant Authority (including for the avoidance of doubt the Environment Agency pursuant to the Waste Management Licensing Regulations and/or PPC Regulations) under Environmental Law arising from or connected with Contamination;
<b>Aggravated Contamination</b>	means the discharge, leak, escape, dispersal, emission, release or migration of Historic Contamination and/or Off Site New Contamination where that discharge, leak, escape, dispersal, emission, release, or migration has been increased, accelerated or exacerbated by or as a result of a Contractor Act;
<b>Authority Sites</b>	means the HWRC Sites and the March WTS;
<b>Contamination</b>	means the presence of Hazardous Substances in, on, at, over, under any Site(s) or any accumulation, discharge, spillage, leak, disposal, escape, dispersal, emission, release or migration of any such Hazardous Substances from any Site(s) such that Harm has been, is being caused or there is a reasonable possibility of Harm being caused;
<b>Contractor Act</b>	means any act or omission or activity (during the period of occupation by the Contractor of each Site) of the Contractor, any Contractor Related Party and/or other third party user of a Site (including for the avoidance of doubt any WCA) which is outside or does not conform with Good Industry Practice;
<b>Donarbon Sites</b>	means the Contractor Sites;
<b>Environment</b>	means all and any of the following media being land, water and air (wherever situate) and also including man, his property, his senses, his person, his amenities, flora, fauna

and the ecosystems of which they form a part and/or on which they depend;

**Environmental Law**

means all or any applicable Legislation, common law, code of practice or Guidance, and any order, notice, demand, decree or judgment of any Relevant Authority which has as its purpose or effect the prevention of harm to, or the protection of, the Environment and/or the regulation of any Hazardous Substance;

**Harm**

means actual or potential harm, offence or damage to or interference with the Environment in circumstances which do or is likely to breach Environmental Law or otherwise give rise to an actual or potential liability under Environmental Law;

**Hazardous Substances**

means any substance (including without limitation any physical matter or material, chemical element and its compounds, biological entity or micro-organism), whether alone or in combination with any other substance capable of causing Harm;

**Historic Contamination**

means the presence of any Contamination at the Site Occupation Date or any discharge, leak, dispersal, emission, escape, release or migration of any such Contamination at any time whether before or after the Site Occupation Date (other than Aggravated Contamination);

**Indemnity Claim**

means a claim in relation to any covenant to indemnify under paragraph 3 of this Schedule 48 (Environmental Provisions);

**Liabilities**

means losses, liabilities (including without limitation mitigation costs and expenses, the investigation, monitoring and carrying out of Remediation Works), fines (to the extent that they are recoverable at law), claims, actions, proceedings, demands, charges, damages, penalties, Deductions (including non reimbursement of Landfill Tax for Prohibited Landfill), costs and expenses (including legal and professional fees on an indemnity basis) of any kind whatsoever whether arising under statute, contract or at common law save for any Indirect Losses (but including for the avoidance of doubt and without limitation

Deductions or any non reimbursement of Landfill Tax for any Prohibited Landfill);

**New Contamination**

means Contamination (other than Historic Contamination or Aggravated Contamination) first present in, on, at, over or under any Site or any accumulation, discharge, spillage, leak, disposal, dispersal, emission, release or migration of any such Contamination from any Site after the Site Occupation Date and before the hand back of each Site by the Contractor to the Authority excluding Off Site New Contamination. New Contamination shall include for the avoidance of doubt any Third Party New Contamination;

**Off Site New Contamination**

means any Contamination which has migrated onto any Site during the Contract Period from an adjoining property;

**Remediation Works**

means the actions or works:

- a) to the minimum standard required by Environmental Law or specifically and lawfully mandated by a Relevant Authority acting under the authority of Environmental Law (which shall include a requirement to undertake such works on a voluntary or a mandatory basis pursuant to the provisions of Part IIA of the EPA so that the relevant site is Suitable for Use); and/or
- b) required in accordance with the PPC Regulations and/or Waste Management Licensing Regulations as applicable in the circumstances),

but in all cases excluding voluntary investigation works (except as provided in limb a) above) or investigations or monitoring works as part of the day to day maintenance of any Consents;

**Site Occupation Date**

means:-

- (a) in respect of the Authority Sites, the Lease Commencement Date or the Contractor's actual occupation date for each Site as the case may be; or
- (b) in respect of the Donarbon Sites, the earlier of the Contract Commencement

Date or the Contractor's actual occupation date;

**Suitable for Use**

means in relation to the presence of Contamination the state and condition required so that the Sites are suitable for their relevant Waste Management Use and for the avoidance of doubt such condition shall relate to the whole of the Site including any land integral to the satisfactory operation of the relevant Site and not just any operational part;

**Third Party New Contamination**

means New Contamination arising from any act or omission or activity of any user of, visitor to (including for the avoidance of doubt any WCA) or trespasser on any Site;

**Trigger Event**

means:-

- (a) an Action being made, commenced, served or threatened in writing; or
- (b) any circumstances where it is reasonably anticipated that an Action will be made, commenced or served; or
- (c) any Remediation Works;

**Waste Management Use**

means the waste management use to which the relevant Site is and has been put during the Contract Period in accordance with the provisions of the Contract excluding any requirements which would be in excess of any standard required by any Waste Management Licence, PPC Permit, Planning Permission and/or any Planning Obligations binding at the relevant time.

**2. ENVIRONMENTAL OBLIGATIONS**

- 2.1 Without prejudice to any Indemnity Claim under this Schedule 48, the Contractor shall comply with all conditions of any Waste Management Licence, PPC Permit, Planning Permission and/or any Planning Obligations relating to Contamination including for the avoidance of doubt carrying out any Remediation Works from time to time required as a result of any Action all in accordance with Clause 18 and Schedule 11.

### **3. ENVIRONMENTAL INDEMNITIES**

#### **3.1 Authority Sites**

- 3.1.1 The Authority agrees and covenants to pay and shall indemnify and keep indemnified the Contractor from and against any and all Liabilities suffered or incurred by the Contractor arising directly from or in connection with Historic Contamination at or from the Authority Sites.
- 3.1.2 The Contractor agrees and covenants to pay and shall indemnify and keep indemnified the Authority from and against any and all Liabilities suffered or incurred by the Authority arising directly from or in connection with any New Contamination and/or Aggravated Contamination at or from the Authority Sites.
- 3.1.3 For the purposes of the indemnities contained in paragraphs 3.1.1 and 3.1.2 any Contamination shall be deemed to be Historic Contamination unless the Authority can prove on the balance of probabilities that any Liabilities relating to Contamination or part thereof relate to New Contamination and/or Aggravated Contamination in which case the Contractor shall be liable pursuant to paragraph 3.1.2 for any Liabilities to the extent such relate to New Contamination and/or Aggravated Contamination.

#### **3.2 Donarbon Sites**

- 3.2.1 The Contractor agrees and covenants to pay and shall indemnify and keep indemnified the Authority from and against any and all Liabilities suffered or incurred by the Authority arising directly from or in connection with Historic Contamination and/or New Contamination and/or Aggravated Contamination at or from the Donarbon Sites.
- 3.2.1A To the extent provided for in the definition of Deemed New Contract and New Contract, for the purpose of Clause 92.4 (No Retendering Procedure) and Clause 92.3 (Retendering Procedure) only this paragraph 3.2.1A shall be substituted for paragraph 3.2.1 as follows:-
- 3.2.1A.1 the Authority agrees and covenants to pay and shall indemnify and keep indemnified the Contractor from and against any and all Liabilities suffered or incurred by the Contractor arising directly from or in connection with Historic Contamination at or from Donarbon Sites;
- 3.2.1A.2 the Contractor agrees and covenants to pay and shall indemnify and keep indemnified the Authority from and against any and all Liabilities suffered or incurred by the Authority arising directly from or in connection with any New Contamination and/or Aggravated Contamination at or from the Donarbon Sites.

### 3.3 New HWRC Sites

- 3.3.1 Contamination at or from any Replacement Authority HWRC Site shall be subject to the indemnity provisions in paragraph 3.1 ("**Authority Sites**") except for any Replacement Authority HWRC Sites which are introduced into the Project pursuant to Clause 107 (Anticipated Change), where the Parties may agree to amend the provisions of this paragraph 3 in relation to those Sites as part of the negotiations for the Anticipated Change.

### 3.4 Off Site New Contamination

- 3.4.1 Neither Party shall be required to indemnify the other in relation to Off Site New Contamination. For the avoidance of doubt the parties acknowledge and agree this Contract shall not limit or modify any common law rights which they may have to recover any Liabilities from any Adjoining Owners in respect of Off Site New Contamination.

## 4. OBLIGATION TO MITIGATE

- 4.1 Without prejudice to paragraphs 2 and 3 above, the Contractor or the Authority shall as soon as either becomes aware of any circumstance which could reasonably result in or has resulted in a Trigger Event take all reasonable steps in accordance with Good Industry Practice to mitigate the consequences of any Harm from any Contamination and any Liabilities.

## 5. INDEMNITY CLAIM PROCEDURE

### 5.1 Supply of information and notification of a Trigger Event

- 5.1.1 At any time during the Contract Period, as soon as either Party becomes aware of any circumstance which could reasonably result in or has resulted in a Trigger Event any Party to this Contract shall supply the other Party with copies of all notices, directions, reports or correspondence howsoever received which concerns or may concern or relate to any Contamination.
- 5.1.2 If either Party to this Contract becomes aware of a Trigger Event having been satisfied it shall give written notice to the other Party of the matter as soon as reasonably possible.
- 5.1.3 Once notice is served under paragraph 5.1.2 both Parties shall:-
- (a) retain and preserve all relevant documents, records and information within their custody, power, possession or control which are relevant to any Trigger Event;
  - (b) meet within 15 (fifteen) Business Days of that written notification or such longer period agreed between the Parties in order to discuss how to deal with the matters raised in the notification;
  - (c) provide copies of any relevant documents, records or other information reasonably required at the recipient's cost;

- (d) consult with the other Party as to whether and how any Action should be avoided, resisted, construed, defended, compromised or otherwise dealt with;
- (e) permit the other Party or a nominated representative to attend any meetings with any Relevant Authority or third party with regard to any Action; and
- (f) work jointly with the relevant insurer(s) and provide all information and mitigation plans reasonably requested or required by the insurer(s).

## **5.2 Conduct of Claims**

- 5.2.1 Subject to the provisions of this paragraph 5 the provisions of Clause 115.7 (Conduct of Claims) shall apply to any indemnity claim pursuant to this Schedule 48.

## **5.3 Limitation on Indemnity Claims**

- 5.3.1 A Party will only be entitled to make an Indemnity Claim pursuant to the indemnity provisions of this Schedule 48 (Environmental Provisions) where:-

- (a) a Trigger Event has been satisfied in relation to the matter giving rise to the relevant Indemnity Claim; and
- (b) notification of an Indemnity Claim has been made within 2 years from the date of handback of the relevant Site by the Contractor to the Authority or, if any Extended Reporting Period agreed between the Parties pursuant to Clause 120.13 (Authority Variation) and Part 4 of Section 2 of Schedule 36 (Required Insurances) has extended the period of cover for any relevant Required Insurances beyond 2 years from the date of handback of the relevant Site by the Contractor to the Authority, then provided that an Indemnity Claim is covered by such Required Insurance the notification of an Indemnity Claim can be made within that period of cover.

- 5.3.2 In the event of any Remediation Works and/or investigative works and/or monitoring being undertaken as a result of a Trigger Event being satisfied during the Contract Period the Contractor shall not be required by the Authority to carry out such works to a specification or standard higher than the minimum specification or standard required to ensure the Site is Suitable for Use or as otherwise specifically and lawfully mandated by a Relevant Authority (other than the Authority acting as contracting counterparty to this Contract) acting under Environmental Law which shall include for the avoidance of doubt a requirement to undertake such works on a voluntary or a mandatory basis pursuant to the provisions of Part IIA of the EPA.

- 5.3.3 Subject to paragraph 5.3.4 below, the maximum aggregate amount for which the Contractor shall be liable to indemnify the Authority under this



Schedule 48 (Environmental Provisions) in respect of all Liabilities against which the Contractor is not required to maintain insurance pursuant to Clause 118 (Insurance) and Schedule 36 (Required Insurances) (excluding for the avoidance of doubt any excesses or deductibles relating to the Required Insurances) shall be £1,000,000 (one million pounds) (Indexed) in the aggregate in respect of all such Liabilities.

5.3.4 In respect of Liabilities other than those referred to in paragraph 5.3.3 above the maximum aggregate amount for which the Contractor shall be liable to indemnify the Authority under this Schedule 48 shall be the greater of:

- (a) the amount that is required to be covered under the terms of Clause 118 (Insurance) and Schedule 36 (Required Insurances) in respect of such Liabilities; or
- (b) the amount which would have been recovered if the Required Insurance had been maintained as required under Clause 118 (Insurance) and Schedule 36 (Required Insurances).

## **6. VOLUNTEERING INFORMATION TO THIRD PARTIES**

6.1 Save where permitted in the circumstances set out in paragraph 6.2 and save in the case of the Authority acting in its capacity as statutory authority to other sections or divisions of the Authority, neither Party shall knowingly or wilfully notify or report or disclose to any Relevant Authority any information regarding the environmental state and condition of the Sites or the presence of any Contamination without the prior written consent of the other Party (such consent not to be unreasonably withheld or delayed).

6.2 For the purposes of paragraph 6.1, information shall be permitted for disclosure:-

- 6.2.1 where it is required by a Relevant Authority pursuant to any Consents; or
- 6.2.2 where it is specifically mandated by a Relevant Authority (other than the Authority acting as contracting counterparty to this Contract) acting under the authority of Legislation; or
- 6.2.3 where it is required to be notified or disclosed pursuant to a request under the FOIA and/or EIR.

## **7. RECOVERY FROM THIRD PARTIES**

7.1 Where either Party has paid monies to the other in respect of any Indemnity Claim (the "Indemnifying Party") and the other Party recovers from a third party or insurance policy any sum which is referable to a fact, matter, event or circumstance giving rise to that Indemnity Claim, the other Party shall:-

- 7.1.1 notify the Indemnifying Party as soon as reasonably possible; and
- 7.1.2 pay to the Indemnifying Party an amount equal to the amount that it receives by virtue of the payment (having deducted any reasonable costs

incurred in recovering or obtaining such payment and any tax, premium or excess) (the "Benefit") to the extent that the amount of the Benefit does not exceed the aggregate payments previously made by the Indemnifying Party.

**8. AGREEMENT ON LIABILITIES**

- 8.1 The Parties agree that the provisions of this Schedule constitute an agreement on liabilities for the purposes of Part IIA of the EPA and the statutory guidance issued in respect of it (including without limitation paragraph D38 of Defra Circular 01/2006) and the Parties acknowledge that either may show this Schedule to any Relevant Authority for the purposes of establishing any allocation of liability in relation to the Sites.
- 8.2 This Schedule 48 (Environmental Provisions) shall survive the Expiry Date or (as applicable) Termination Date of this Contract.