ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1325

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MERITOR, INC,

***Petitioner*,**

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES, SUPERFUND SETTLEMENTS PROJECT, AND SOCIETY OF CHEMICAL MANUFACTURERS & AFFILIATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The parties in this case are listed in the Opening Brief for Petitioner.

The National Association of Manufacturers ("NAM"), the Chamber of Commerce of the United States ("Chamber"), the Superfund Settlements Project ("SSP"), and the Society of Chemical Manufacturers & Affiliates ("SOCMA") are *amici curiae* and are filing this brief in support of Petitioner, Meritor, Inc.

Reference to the final rule under review, issued by the United States Environmental Protection Agency ("EPA"), is provided in the Opening Brief for Petitioner.

This case has not previously been before this Court or any other court, and counsel for *amici curiae* are not aware of any related cases currently pending.

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS

Petitioner, Meritor, Inc., and Respondent, EPA, have consented to the filing of this *amicus* brief.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, that no party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and that no person

other than the *amici curiae* and their members and counsel made any monetary contribution intended to fund the preparation or submission of this brief.

DISCLOSURE STATEMENTS

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the *amici curiae* make the following statements:

The ***National Association of Manufacturers*** ("NAM") is the largest manufacturing association in the United States. It represents small, medium, and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM is a not-for-profit trade association and has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

The ***Chamber of Commerce of the United States of America*** (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from

every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The ***Superfund Settlements Project*** ("SSP") is an association of companies from a broad cross-section of American industries, including mining, petroleum, chemicals, agriculture, waste management, and manufacturing, which is keenly interested in developments affecting EPA's regulatory program under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), also known as Superfund. The SSP was organized in 1986 to help improve the effectiveness of the Superfund program by encouraging settlements, streamlining the settlement process, and reducing transaction costs for all concerned. SSP's mission includes advancing the efficient and rational operation of the Superfund program to achieve site closures with a minimum of expense and delay. To do so, the SSP provides regular constructive input to EPA, other federal agencies, and Congress on critical regulations and policy issues affecting the cleanup of contaminated sites. The SSP has no parent corporation, and no publicly held company has 10% or greater ownership in the SSP.

The ***Society of Chemical Manufacturers & Affiliates*** ("SOCMA") is an international trade association of batch, custom, and specialty chemical companies. It is part of a $300 billion industry that is fueling the U.S. economy. Its mission is to accelerate the potential for members' growth, increase public confidence in the batch, custom, and specialty chemical industry, and influence the passage of rational laws and regulations. Its members play an indispensable role in the global chemical supply chain, providing specialty chemicals to companies in markets ranging from aerospace and electronics to pharmaceuticals and agriculture**.** SOCMA has no parent corporation, and no publicly held company has 10% or greater ownership in SOCMA.

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GLOSSARY OF TERMS

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	United States Environmental Protection Agency
JA	Joint Appendix
$\mu g/m^3$	micrograms per cubic meter
NAM	National Association of Manufacturers
NPL	National Priorities List
Pet. Br.	Opening Brief for Petitioner
SOCMA	Society of Chemical Manufacturers & Affiliates
SSP	Superfund Settlements Project
TCE	trichloroethene, also known as trichloroethylene

STATUTES AND REGULATIONS

All pertinent statutes and regulations cited in this brief may be found in the Addendum to the Opening Brief for Petitioner.

INTEREST OF *AMICI CURIAE*

The *amici curiae* have strong interests in the outcome of this case. Brief descriptions of each of the *amici* are provided in the foregoing Disclosure Statement. As a general matter, these associations all have a substantial interest in ensuring that decisions by governmental agencies and courts in environmental cases, including those relating to the U.S. Environmental Protection Agency's ("EPA's") Superfund program, do not have unwarranted adverse impacts on their members, while at the same protecting public health and the environment. They thus often participate in cases involving environmental regulations and remediation sites that involve or could affect American manufacturers and other industries and businesses. In particular, the members of all of these associations have a substantial interest in the requirements and operations of the Superfund program; thus, these associations are vitally concerned with ensuring that that program focuses on real, significant risks to human health and the environment and is administered fairly and evenly by EPA in all circumstances, and that courts ensure that such objectives are met. By way of example, the Superfund Settlements Project plays an active leadership role in the shaping of Superfund policy and

practice, regularly commenting on proposed regulations, including the regulations at issue in this case.

This case involves the listing of a site on the National Priorities List ("NPL") under the Superfund program. The NPL is a list of contaminated sites that EPA has determined have the highest priority for investigation and possible cleanup based on their relative risk to public health or the environment. In this case, EPA has listed the site based solely on subsurface intrusion by gases into a building, also known as vapor intrusion. However, in doing so, EPA did not take into account the existence of an active engineered mitigation system that has been installed and is operating at the site pursuant to an EPA order and under EPA oversight and that has effectively mitigated the vapor intrusion. Further, EPA evaluated the site using a benchmark toxicity value based on residential use, even though the site is not, and is legally prohibiting from becoming, residential.

The *amici curiae* have a strong interest in supporting Petitioner's challenge to those unlawful EPA determinations. The industries and companies which they represent have historically used solvents and other products that include the types of chemicals (volatile organic compounds) that are capable of producing vapor intrusion. As a result, there are thousands of manufacturing, industrial, chemical, and other companies and sites throughout the country that have or could have vapor intrusion issues, including many with active mitigation systems. The present

case involves issues of first impression. If EPA's improper determinations here are allowed to stand, they would set a precedent that could have widespread adverse effects on such companies and sites. They would allow EPA to ignore proven mitigations systems and to consider unrealistic residential exposure scenarios in listing industrial sites on the NPL for costly and extensive investigations and remediation. They also would frustrate the requirement of the Superfund program to ensure the implementation of cost-effective remedial actions to protect human health and the environment.

Accordingly, the *amici curiae* submit this brief to provide further support for Petitioner's position and to demonstrate why EPA's improper determinations in this listing could have widespread and substantial adverse impacts on the manufacturing and industrial communities in the United States.

INTRODUCTION

In September 2018, EPA listed the Rockwell International Wheel & Trim Site ("Rockwell Site" or "Site") in Grenada, Mississippi, on the NPL pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), also known as Superfund. 83 Fed. Reg. 46408 (Sept. 13, 2018). Under CERCLA, as noted above, the NPL is a list of the contaminated sites in the United States that EPA has determined have the highest priority for investigation

and possible cleanup based on "relative risk or danger to public health or welfare or the environment" and the "urgency of [taking] action" to address that risk. 42 U.S.C. § 9605(a)(8)(A). Because of the nature of the risk and complexity associated with NPL sites, the listed sites are subject to a process that is more prescriptive, drawn out, and costly as compared to sites not listed on the NPL. Furthermore, sites listed on the NPL incur the reputational stigma of being classified as Superfund sites.

EPA listed the Rockwell Site on the NPL using its Hazard Ranking System under CERCLA. 40 C.F.R. Part 300, Appendix A. That system has been developed to rank sites according to their "relative degree of risk to human health and the environment," 42 U.S.C. § 9605(c)(1), so as to identify the sites for listing on the NPL and thus for prioritization for investigation and possible cleanup. The Hazard Ranking System is a numerically based screening system that can consider various potential "pathways" for people to be exposed to contamination at a site (*e.g.*, via groundwater, surface water, soil, and/or air migration). Sites which score over a predetermined numerical value (28.5) are listed on the NPL.

In this case, EPA listed the Rockwell Site based solely on the pathway of subsurface intrusion, also known as vapor intrusion – *i.e.*, the migration of underground volatile gases, in this case, trichloroethene ("TCE"), as well as two other such gases (cis-1,2-dichloroethene and toluene) – through the subsurface into

the main production building (the "Building") at the Site. It did so using a recent regulatory amendment which added a subsurface intrusion component to the Hazard Ranking System. 82 Fed. Reg. 2760 (Jan. 9, 2017). In scoring the Rockwell Site, EPA did not consider the active engineered mitigation system, known as a sub-slab depressurization system, that Meritor had installed in the Building to mitigate the vapor intrusion.

The relevant facts are set forth in more detail in the Opening Brief for Petitioner ("Pet. Br.") at 8-16.

In its brief, Petitioner, Meritor, challenges EPA's listing of the Rockwell Site on the NPL on the ground that EPA arbitrarily and unlawfully calculated the site's Hazard Ranking System score in two respects: (1) by failing to take into account the active mitigation system at the Site; and (2) by scoring the Site using a residential rather than industrial exposure scenario. In this brief, the *amici curiae* present additional points supporting Meritor on both of those issues, because EPA's actions on those issues have the potential to cause widespread and substantial adverse precedential impacts for U.S. manufacturers and industries.

SUMMARY OF ARGUMENT

1. Refusal to consider vapor mitigation system. EPA's decision not to take into account the sub-slab depressurization system installed at the Rockwell

Site in scoring the Site was arbitrary, capricious, and contrary to EPA's own regulations because: (1) that active mitigation system is a highly effective means of addressing vapor intrusion, as recognized in EPA guidance and numerous federal and state cleanup decisions across the country, and has been shown to be effective at the Rockwell Site: (2) EPA's decision conflicts with its regulations for addressing subsurface intrusion under the Hazard Ranking System, which provide expressly for consideration of such active mitigation systems; (3) contrary to EPA's assertions, the sub-slab depressurization system is not a temporary measure, but is required by an administrative consent order from EPA to continue to be operated and maintained permanently or indefinitely so long as it is needed; and (4) although that system does not fully eliminate the underlying source of contamination, it removes soil gases beneath the slab and interrupts the pathway by which those gases would enter the Building and is thus directly relevant to the purpose of the Hazard Ranking System, which is to assess the relative risk of sites.

If EPA's decision is allowed to stand, it would have serious adverse consequences for many manufacturing, industrial, and other companies throughout the country, which have historically used materials containing volatile organic compounds and have or could have vapor intrusion issues. A sub-slab depressurization system is an industry standard and highly effective technology employed to address vapor intrusion, particularly when removal of the underlying

soil or ground water source is not practicable, as is often the case for existing structures. Refusal to consider that technology in deciding whether to list a site on the NPL ignores the technology's well-recognized purpose – risk reduction and mitigation – as well as EPA's regulations, and would frustrate CERCLA's requirement of providing cost-effective means of reducing such risks. Companies would face the prospect that, despite the installation of such systems, their sites could still be listed on the NPL, and thus be subject to extensive investigation and remediation requirements, based on a pathway that the mitigation system has already effectively addressed, often at great expense. That is inconsistent with the purpose of the NPL to include sites with the highest priority for investigation and potential remediation based upon their relative risk.

2. Use of a residential benchmark. EPA also acted arbitrarily in scoring the Site by using a toxicity benchmark (which is part of the Hazard Ranking System scoring) based on ***residential*** use of the Site, when the Site is unquestionably industrial and legally prohibited from ever being used for residential purposes. Use of a residential benchmark at the Site is unrealistic and inconsistent with EPA's risk assessment guidance to consider the highest exposure "reasonably expected to occur" at a site and to consider current and "reasonably anticipated" future use of the site (neither of which would be residential here) in evaluating it under CERCLA. EPA has also developed benchmarks based on

occupational use of a site by workers (as is the case of the Rockwell Site), and such a benchmark should have been used here. Like EPA's decision to ignore the sub-slab depressurization system, its use of a residential benchmark here would set an adverse precedent for many other industrial sites across the country, which would thus face the risk of being listed as Superfund sites based on use of a benchmark that would not appropriately apply to them.

ARGUMENT

I. EPA's Failure to Take into Account a Permanent, Active, and Effective Vapor Intrusion Mitigation System Was Arbitrary and Unlawful.

EPA listed the Rockwell Site on the NPL based solely on the vapor intrusion pathway, using the Agency's 2017 regulatory revisions adding a subsurface intrusion component to the Hazard Ranking System. EPA acknowledged that Meritor had installed and was operating a sub-slab depressurization system in the Building to address the vapor intrusion, particularly the TCE, under direct EPA oversight. However, it did not take account of that active mitigation system in scoring the Site on the asserted grounds that the system was a "temporary" measure and does not remove the underlying contamination that is present beneath the Building and that is the "source" of the vapor intrusion. EPA, *Support Document for the Revised National Priorities List Final Rule – Rockwell International Wheel & Trim* (Sept. 2018) ("EPA Support Document for

Rockwell"), available at https://semspub.epa.gov/work/HQ/197347.pdf, at 36 and 54 (Joint Appendix ["JA"] __, __). That was arbitrary, capricious, and contrary to EPA's own regulations.

A. EPA's Refusal to Account for the Sub-Slab Depressurization System Was Arbitrary and Contrary to EPA's Own Regulations.

EPA's determination to omit consideration of the sub-slab depressurization system was arbitrary and unlawful for several reasons. ***First***, that system is a highly effective active mitigation technology for addressing vapor intrusion. EPA's own *Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air* (OSWER Publication 9200.2-154 (June 2015), available at https://www.epa.gov/sites/production/files/2015-09/documents/oswer-vapor-intrusion-technical-guide-final.pdf, states (at 147) that active depressurization technologies, such as a sub-slab depressurization system, have "been successfully installed and operated in residential, commercial, and school buildings to control vapor intrusion from subsurface vapor-forming chemicals," are "widely considered the most practical vapor intrusion mitigation strategy for most existing buildings," and are "generally recommended for consideration for vapor intrusion mitigation because of their demonstrated capacity to achieve significant reductions in a wide variety of buildings." A sub-slab depressurization system functions by creating a

pressure differential across the building slab to prevent soil gas entry into the building; this is accomplished by extracting soil gas beneath the slab, treating the bulk of that gas so that it can be removed, and venting the remaining low levels to the atmosphere.

In this case, the sub-slab depressurization system in the Building at the Rockwell Site has been demonstrated to be effective in mitigating the vapor intrusion. Specifically, data collected since that system first began operating in August 2017 indicate that the concentrations of the key indicator pollutant, TCE, have (with a single anomalous exception) been reduced below the target level established by EPA based on protection of workers, including sensitive populations, in the Building – namely, a level of 8.8 micrograms of TCE per cubic meter of air ("$\mu g/m^3$").[1] *See* EPA Support Document for Rockwell at 56 and

[1] EPA specifically established this level to protect workers within a sensitive population from any potentially adverse non-cancer effects. *See* EPA Regional Screening Level (RSL) Composite Worker Ambient Air Table ("EPA RSL Table"), available at https://semspub.epa.gov/work/HQ/197430.pdf; EPA Support Document for Rockwell at 123 (JA ___). It is also protective against cancer risks. EPA considers that potential cancer risks within a range between 10^{-6} (one in a million) and 10^{-4} (one in 10,000) are acceptable under CERCLA. *See* 40 C.F.R. § 300.430(e)(2)(i)(A)(*2*). The level of 8.8 $\mu g/m^3$ is well within (and toward the protective end of) that range. It is slightly higher than the TCE level determined by EPA to be associated with a cancer risk of 10^{-6} for workers, which is 3 $\mu g/m^3$ (EPA RSL Table; EPA Support Document for Rockwell at 124, JA ___), and lower than the level associated with a cancer risk of 10^{-5} (one in 100,000), which would be 30 $\mu g/m^3$.

Appendices A and B (JA ___, ___-___), which present the post-installation data. Further, Meritor's brief shows that the ***average*** concentrations of TCE since the system was installed have been generally been below even the lower concentration (3.0 μg/m^3) that EPA has established as the most conservative level to protect workers from cancer risks. Pet Br. at 51-52. Use of such average concentrations is appropriate when considering cancer risks, which derive from persistent exposures over long time periods, not from discrete individual exposures.

Second, EPA's decision not to consider the sub-slab depressurization system in scoring the Rockwell Site was contrary to its own regulations for evaluating subsurface intrusion under the Hazard Ranking System. Those regulations provide expressly for consideration of an "engineered, active vapor mitigation system" (with or without documented institutional controls and funding in place) in scoring the "structure containment" element of the score. 40 C.F.R. Part 300, Appendix A, § 5.2.1.1.2.1, Table 5-12. In addition, in determining the population within the area of subsurface contamination, the population number is weighted less for a "[p]opulation within a structure where a mitigation system has been installed." *Id.* § 5.2.1.3.2.3, Table 5-21. EPA's interpretation would render those provisions superfluous.

Third, contrary to EPA's assertions, the sub-slab depressurization system at the Rockwell Site is not a temporary measure, but is a permanent part of the

remediation at the Site. Meritor and EPA have executed an Administrative Settlement Agreement and Order on Consent for Removal Actions (CERCLA Docket No. 04-2018-3753; Aug. 2, 2018). That order requires Meritor to operate the sub-slab depressurization system continuously (subject only to periodic maintenance and unanticipated power interruptions), maintain the system to ensure its continued effectiveness, and periodically sample the indoor air to ensure that the system continues to keep TCE concentrations below 8.8 $\mu g/m^3$ – all under a Removal Work Plan to be submitted to and approved by EPA. *Id.* ¶ 36. Meritor has in fact submitted that Removal Work Plan, and EPA has approved it. Thus, Meritor is under a continuing legal obligation to operate, maintain, and test the system until such time as EPA determines that it is not needed.

No further action by EPA is required to ensure protection of human health from vapor intrusion at the Site. Indeed, based on the existing structure, nature of contamination, and EPA guidance, it is hard to imagine what other measures EPA could reasonably require to address the risk. Where EPA has addressed a risk to human health or the environment through the exercise of its authority to require such effective mitigation systems, listing on the NPL is not needed.

Fourth, EPA's reliance on the fact that the sub-slab depressurization system does not remove the underlying source of the contamination is likewise unavailing and inconsistent with the purpose of the Hazard Ranking System. Although the

system does not entirely eliminate the underlying contamination source, it blocks and interrupts the subsurface pathway by which the gases in question would migrate into the Building where the workers would be exposed to them and removes such gases to a large degree beneath the slab. This has resulted in the reduction of the concentrations of those gases in the indoor air to levels below the target level that EPA established to be protective of workers in the Building.

That mitigation is relevant to the purpose of the Hazard Ranking System, which is "a scoring system used to assess the relative risk associated with actual or potential releases of hazardous substances from a site" and was "designed to be a measure of relative risk among sites." 82 Fed. Reg. at 2761. *See also* 42 U.S.C. § 9605(c)(1), directing EPA to ensure that the Hazard Ranking System "accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review." There is no doubt that an engineered system that removes the soil gases and reduces the actual exposures of the population involved to acceptable levels is directly relevant to the relative risk associated with subsurface releases at the Site compared to the risk at other sites. Indeed, when EPA amended its regulations to add a subsurface intrusion component to the Hazard Ranking System, it clearly understood that engineered active mitigation systems, such as a sub-slab depressurization system, do not entirely eliminate the underlying contamination; and yet it provided explicitly for them to be considered

in the scoring the site, as discussed above, thus recognizing their relevance to the ranking system.[2]

In short, EPA's decision not to take account of the SSDS at the Rockwell Site was arbitrary and capricious for failure to "consider an important aspect of the problem," *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and unlawful as inconsistent with its own regulations, which the Agency is bound to follow, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

B. EPA's Decision Would Have Widespread Adverse Impacts on the Industrial Community.

If EPA's decision is allowed to stand, it would have serious adverse consequences for manufacturing, chemical, and other industrial companies

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[2] In its support document for the Rockwell Site, EPA cited a passage from the preamble to the 1990 Hazard Ranking System stating that, although EPA will consider interim removal actions, it "will not consider the effects of responses that do not reduce waste quantities such as providing alternate drinking water supplies to populations with drinking water supplies contaminated by the site." EPA Support Document for Rockwell at 55 (JA ___), quoting 55 Fed. Reg. 51532, 51568 (Dec. 14, 1990). This preamble statement, of course, cannot override the actual regulatory provisions, cited above, directing EPA to consider vapor intrusion mitigation systems in the scoring. Moreover, a sub-slab depressurization system does involve removal – namely, the removal of subsurface gases – and thus is different in kind from non-removal actions, such as the provision of alternate water supplies mentioned in the 1990 preamble. In any event, in other situations, actions other than removal are relevant to the scoring by blocking the exposure pathway. *See* Pet. Br. at 28-29. *See also id* at 29-31 (explaining that EPA's quoted passage is inapposite here).

throughout the country. Many industries have historically used products and solvents that contain volatile organic compounds; and those materials have leaked into or otherwise reached subsurface soils and groundwater, from which the volatile organic compounds can volatilize, then migrate through the ground and potentially enter nearby buildings, where they can be present in the indoor air of such buildings. As a consequence, there are thousands of industrial sites throughout the country that have or could have vapor intrusion issues. As discussed above, use of active depressurization technologies, such as a sub-slab depressurization system, is a common and highly effective mechanism for addressing such potential vapor intrusion risks by removing sub-slab gases and reducing the concentrations of such gases in the indoor air. Thus, companies with vapor intrusion issues have a strong incentive to (and do) proactively install and operate such systems, at considerable cost, under agreements with EPA and states to protect human health, particularly when removal of the underlying soil or groundwater source is not practicable, as is frequently the case for existing structures.

EPA's decision in this case, however, would undermine that incentive and conflict with the salutary purpose of installing such active mitigation systems. Under EPA's decision, such companies would face the prospect that, despite having installed such systems under EPA or state agreements or orders, their sites

are still subject to being listed as Superfund sites, and thus subject to potentially more extensive investigation and potential remediation requirements, based on a pathway that the mitigation system has already addressed and without consideration of that system.

The Superfund program and the NPL should focus on sites that present real, significant risks to human health and the environment and cannot be remediated in a timely manner under other programs. Indeed, the NPL is designed to include those sites that have high priority for investigation and remediation "based upon relative risk or danger to public health or welfare or the environment." 42 U.S.C. § 9605(A)(8)(A). EPA's decision here conflicts with that objective by listing the Site on the NPL without consideration of an effective engineering solution that has already been implemented there, is required to be operated and maintained indefinitely under a binding settlement agreement and administrative consent order, and is protective of the health of the workers at the Site. Indeed, it would be unwise Superfund policy, as well as inconsistent with the purpose of the NPL, to use the NPL for sites that already have effective remedial systems in place. Further, that result would frustrate CERCLA's requirement to ensure that remedial actions to protect human health and the environment are cost-effective. 42 U.S.C. §§ 9621(a)&(b)(1). Given the existence of an effective remedial technology, there

is no need or justification for the extra investigative and remedial costs, potential litigation costs, and adverse reputational impacts which can come with NPL listing.

II. EPA' s Use of a Benchmark Based on Residential Use at an Industrial Site Where Residential Use Is Prohibited Was Arbitrary and Capricious.

In the Hazard Ranking System scoring for determining whether to list a site on the NPL, one of the critical elements is the use of a benchmark to identify the level of the contaminant that could cause adverse health effects. The appropriate benchmark for the site depends on how the site is used. For example, a residential site requires a more stringent benchmark than an industrial site because it involves more prolonged and consistent exposure. Yet in this case, as discussed below, EPA improperly used a residential benchmark for an industrial site that is not, and is legally prohibited from becoming, residential; and that decision could also have sweeping adverse impacts at other industrial sites.

A. Selection of an Appropriate Toxicity Benchmark Requires Consideration of the Populations That Are Regularly Present in the Structure at the Site.

A key input in the scoring is the determination of whether and to what extent the contamination is "Level I" or "Level II"; this requires comparison of concentrations of the constituents to an "appropriate benchmark" based on protection of human health. 40 C.F.R. Part 300, Appendix A, § 5.2.1.3.1. Concentrations at or above the benchmark value are Level I, and those below the

benchmark are Level II. *Id*. For subsurface intrusion, Level I concentrations are weighted much more heavily in the scoring; such concentrations are multiplied by 10, while Level II concentrations are not. *Id*. § 5.2.1.3.2.1.4.

The regulations provide further that, for subsurface intrusion, the screening benchmark values for cancer effects "correspond[] to the 10^{-6} [one chance in a million] individual cancer risk for inhalation exposures," and such values for non-cancer toxicological responses correspond to a reference concentration developed by EPA to protect against adverse non-cancer effects from inhalation exposures. *Id*. § 2.5.2 and § 5.2.1.3.2, Table 5-20.

However, the "appropriate" screening benchmark for both cancer risks and non-cancer effects will necessarily vary depending on the type of the subject population and their exposure. For example, as EPA has recognized, the screening value for residents, who can be exposed to the airborne contaminants every day, will be more stringent than for workers, who are exposed for shorter periods of time each day and only during the work week.[3]

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[3] EPA recognizes this by establishing different screening values for residents and workers. For example, EPA's TCE value for residents based on 10^{-6} cancer risk is 0.4 μg/m^3 and its TCE value for workers based on the same risk is 3 μg/m^3. *See* EPA Support Document for Rockwell at 123-124 (JA ___-___). Similarly, for non-cancer effects, EPA's TCE value for residents is 2 μg/m^3 and its TCE value for workers is 8.8 μg/m^3. *Id*. at 123 (JA ___).

Neither EPA's regulations on subsurface intrusion nor its Technical Support for that rule specifically mandates which exposure scenario to use in scoring the subsurface intrusion component under the Hazard Ranking System. But they do indicate that EPA should consider "all exposed individuals ***regularly present*** in an eligible structure," whether they be residents, students, or workers. 40 C.F.R. Part 300, Appendix A, § 5.2.1.3.2.1 (emphasis added). *See also Technical Support Document for U.S. EPA's Final Rule: Addition of a Subsurface Intrusion Component to the Hazard Ranking System* (Nov. 2016) ("Technical Support Document for Rule"), available at https://www.regulations.gov/document?D=EPA-HQ-SFUND-2010-1086-0105, at 55, 61.

B. EPA's Use of a Residential Benchmark Was Arbitrary.

In scoring the Rockwell Site, EPA used the lowest TCE benchmark for inhalation exposure by individual ***residents*** (0.4 µg/m^3), not the comparable level that applies to workers (3 µg/m^3). EPA Support Document for Rockwell at 119, 122, 123 (JA ___, ___, ___).[4] It did so despite the fact that the Building at the Site is industrial (not residential), contains only workers (not residents), and is subject

[4] EPA also compared the concentrations of the other gases involved at the Site (cis-1,2-dichloroethene and toluene) to residential benchmarks, but found no concentrations above those benchmarks. Hazard Ranking System Documentation Record for Rockwell Site (Jan. 2018), at 43-44 (JA ___-___).

to legal deed restrictions, as well as zoning, prohibiting its use for residential or similar purposes.[5] Thus, the "exposed individuals regularly present" in the Building are not, and never will be, residents. In this situation, the use of a residential benchmark, which is wholly unrealistic for this industrial site, was arbitrary and capricious.

EPA recognizes that its Hazard Ranking System regulations do not specify the type of exposure scenario to use in selecting a media-specific toxicity benchmark. EPA Support Document for Rockwell at 120-121 (JA ___-___). However, it notes that EPA should rely on its guidance for conducting risk assessments at CERCLA sites, which requires evaluation of a "reasonable maximum exposure." *Id*. at 121 (JA ___); Technical Support Document for Rule at 55, 62. That guidance, however, does not require or support the use of a residential benchmark. EPA's own risk assessment guidance, cited in the EPA Support Document for Rockwell at 121 (JA ___), defines "reasonable maximum

[5] There are two deed restrictions covering the Rockwell Site – one for the County-owned property and one for the City-owned property. They have both been recorded in the Chancery Clerk's Office in Grenada County, Mississippi, in 2005 in Book 331, Page 102, and Book 332, Page 165, respectively. Copies are attached as Exhibits A and B. Both deed restrictions provide in Section 2 that the "Property is hereby restricted to non-residential use only, and shall not be used as a hospital, school, day care facility, or other child-occupied facility . . . ." In addition, based on the zoning map cited in Meritor's brief, the Building and adjacent property are zoned exclusively for "Heavy Industrial" use. Pet Br. at 37.

exposure" as "the highest exposure that is ***reasonably expected to occur*** at a site." EPA, *Risk Assessment Guidance for Superfund, Volume I, Human Health Evaluation Manual* (Part A), EPA/540/1-89/002 (Dec. 1989), available at https://www.epa.gov/sites/production/files/2015-09/documents/rags_a.pdf, at 6-5 (emphasis added). That guidance further makes clear that reasonable maximum exposures should be evaluated for the particular exposure scenario(s) at the site, such as residential, commercial/industrial, or recreational, using different exposure assumptions for each. *Id*. at 6-5, 6-6, 6-19.

EPA guidance also makes clear that, in conducting risk assessments and other evaluations at CERCLA sites, EPA should limit its consideration to current and "reasonably anticipated future land use" at the site. EPA, *Land Use in the CERCLA Remedy Selection Process*, OSWER Directive No. 9355.7-04 (May 25, 1995) ("1995 Land Use Directive"), available at https://www.epa.gov/sites/production/files/documents/landuse.pdf, at 6, 7; EPA, *Considering Reasonably Anticipated Future Land Uses and Reducing Barriers to Reuse at EPA-lead Superfund Remedial Sites*, OSWER Directive 9355.7-19 (Mar. 17, 2010) ("2010 Land Use Directive") , available at https://semspub.epa.gov/work/11/175563.pdf, at 2, 3. The guidance notes further that where the reasonably anticipated future land use requires a land use restriction to be protective, an institutional control should be implemented to prevent an

unanticipated change in land use (*e.g.*, from industrial to residential). 1995 Land Use Directive at 8, 9; 2010 Land Use Directive at 10.

In this case, it is clear that future residential use of the Rockwell Site is not "reasonably anticipated," and institutional controls in the form of deed restrictions are in place to prevent such use. Accordingly, it was inconsistent with EPA guidance, as well as unreasonable and unrealistic, for EPA to use a residential benchmark in the determination of Levels I and II in the scoring, particularly when EPA has also developed worker-based benchmarks.

EPA has attempted to justify its approach by pointing out that, although the worker exposure scenario was not used in selecting screening benchmarks, its scoring system takes account of the worker scenario in another part of the scoring. Specifically, it notes that in assessing the population subject to Level I contamination, it weights workers differently from the types of populations that could be involved at other sites by dividing the number of full-time workers by a factor of three. EPA Support Document for Rockwell at 124 (JA ___). *See also* 82 Fed. Reg. at 2769; Technical Support Document for Rule at 62.

This adjustment is insufficient to make up for the Agency's failure to use an appropriate toxicity benchmark in the first place. Use of the appropriate benchmark for the type of exposure scenario in the Building is critical because it sets the dividing line between Level I and Level II concentrations (with the former

weighed 10 times greater). Moreover, EPA's most conservative cancer-based benchmark for workers (3 μg/m^3) is itself approximately 10 times higher than its comparable benchmark for residents (0.4 μg/m^3). As a result, the selection of an appropriate benchmark is much more significant than the simple adjustment of dividing the worker population by three. *See also* Pet Br. at 40-42.

C. EPA's Decision Would Set a Significant Adverse Precedent for Industrial Sites.

EPA's use of a residential benchmark at an industrial site that is not, and is legally prohibited from becoming, residential would set an adverse precedent for many other industrial sites across the country with vapor intrusion issues, which could be listed on the NPL based on use of a benchmark that is wholly unrealistic and inapplicable for them. As a result, such sites could be subject to substantial unnecessary requirements and costs based on the unrealistic and improper assumption that they are or could become residential. Furthermore, allowing EPA to ignore its own guidance on "reasonable maximum exposure" and "reasonably anticipated future land use" would have far-ranging impacts throughout the Superfund program because those concepts are important not only in NPL listing decisions, but in many other decisions at CERCLA sites – *e.g.*, risk assessments, evaluations of future land use in determining appropriate cleanup remedies.

CONCLUSION

For the foregoing reasons, the Court should vacate EPA's listing decision and remand the matter to EPA for reconsideration and rescoring, including consideration of the sub-slab depressurization system and use of an industrial, worker-based benchmark.

Respectfully submitted,

/s/ James R. Bieke
James R. Bieke
C. Frederick Beckner III
SIDLEY AUSTIN LLP
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(202) 736-8000
jbieke@sidley.com
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Duke K. McCall, III
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(202) 739-3000
Counsel for the Superfund Settlements Project

/s/ Robert F. Helminiak
Robert F. Helminiak
SOCIETY OF CHEMICAL
MANUFACTURERS & AFFILIATES
1400 Crystal Drive, Suite 630
Arlington, VA 22202
(571) 348-5107
Counsel for the Society of Chemical Manufacturers and Affiliates

Dated: April 8, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure ("FRAP"), I hereby certify that the foregoing Brief of the National Association of Manufacturers, Chamber of Commerce of the United States, Superfund Settlements Project, and Society of Chemical Manufacturers & Affiliates as *Amici Curiae* in Support of Petitioner, which has been prepared in a proportionally spaced typeface using 14-point Times New Roman font, contains 5,445 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, but excluding the items listed in FRAP 32(f). It thus meets the length requirements of FRAP 29(a)(5) and Circuit Rule 32(e)(3).

/s/ James R. Bieke
James R. Bieke

EXHIBIT A

Declaration of Use Restrictions, County Land

DECLARATION OF USE RESTRICTIONS

WHEREAS, Grenada County is the record owner ("Owner") of certain real property situated in the City of Grenada, County of Grenada, State of Mississippi and legally described on Exhibit A attached hereto and incorporated herein by reference and the improvements thereto (the "Property");

WHEREAS, Owner hereby desires to establish and impose certain covenants and restrictions on the Property for the purpose of supporting ongoing environmental activities being completed under the oversight and control of the United States Environmental Protection Agency ("U.S. EPA") and the Mississippi Department of Environmental Quality ("MDEQ"); and

WHEREAS, by imposing the covenants and restrictions to the Property described more fully below, Owner intends and desires to insure that the Property can continue to be used lawfully and safely in the future for commercial and/or industrial purposes;

NOW, THEREFORE, Owner, for itself and its successors and assigns in ownership of the Property, including, without limitation, lessees, does hereby declare the Property subject to the following perpetual restrictions, covenants and stipulations, to-wit:

1. No person shall install any groundwater wells or extract the groundwater in the uppermost aquifer located at or underlying the Property for any purpose, potable or non-potable, except for groundwater sampling, groundwater investigation, or remedial activities, as warranted and approved by the U.S. EPA and/or MDEQ.

2. The Property is hereby restricted to non-residential use only, and shall not be used as a hospital, school, day care facility, or other child-occupied facility, as those terms may be currently defined, or defined in the future, by zoning ordinance(s) of the City of Grenada or any other local governmental entity with jurisdiction and authority to regulate the land use at the Property.

3. There shall be no surface or subsurface demolition, excavation, drilling or other similar activities in the former chrome plating line area of the Property identified on Exhibit B without the prior written approval of the U.S. EPA and MDEQ.

4. Owner hereby grants access to the Property at all reasonable times to the U.S. EPA, the MDEQ, and any private persons (including their contractors, subcontractors and agents) who have not otherwise been granted access to the Property and who are authorized by the U.S. EPA and/or the MDEQ to undertake environmental activities on the Property relating in any way to the State of Mississippi Hazardous Waste Management Permit No. HW-007-037-278 or U.S. EPA RCRA Permit No. MSD 007 037 278. All parties obtaining or granted access to the Property under this provision shall conduct their activities on the Property in a manner which minimizes to the fullest extent possible any disruptions to the use and enjoyment of the Property by Owner, its

successors or assigns, and/or any other persons having an ownership or property interest in the Property.

5. This Declaration of Use Restrictions is intended to benefit and protect current and future owners and lessees of the Property (as well as any and all successors and assigns of the Property), adjoining property owners, citizens of the City and County of Grenada, and citizens of the State of Mississippi. Compliance with the Declaration of Use Restrictions contained herein may be enforced by a legal or equitable action brought in a court of competent jurisdiction by or on behalf of one or more of the following parties: (i) the U.S. EPA or its representative, (ii) the MDEQ or its representative; or (iii) any local governmental entity with the jurisdiction and legal authority to regulate land use at the Property. Delay or failure on the part of any of the foregoing parties to take any action to enforce compliance with the Declaration of Use Restrictions shall not bar any subsequent enforcement with respect to the failure of compliance in question, nor shall any delay or failure on the part of any of the foregoing parties to take any action to enforce compliance with the Declaration of Use Restrictions be deemed a waiver of the right of any such party to take any such action with respect to any failure of compliance.

6. Owner hereby reserves unto itself, its successors and assigns, and/or any other persons having an ownership or property interest in the Property all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights, and covenants granted herein or otherwise previously granted.

7. This Declaration of Use Restrictions shall run with the land and be binding upon all current owners and lessees of the Property, and all successors and assigns of the Property, or any portion of the Property, including any leasehold interests on the Property or any portion of the Property unless and until the restrictions set forth herein are amended in writing by Owner, its successors or assigns, and approved in writing by the U.S. EPA and MDEQ.

8. This Declaration of Use Restriction shall be recorded in the same manner as a deed in the Office of the Chancery Clerk of Grenada, Mississippi, and shall be deemed incorporated by reference in any instrument hereafter conveying any interest in the Property, including, without limitation, any leases or easements.

9. If any one or more provisions of the Declaration of Use Restrictions herein contained shall be found to be unenforceable in any respect, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. This Declaration of Use Restrictions shall be governed by and interpreted in accordance with the laws of the State of Mississippi.

10. Any instrument hereafter conveying any interest in the Property or any portion thereof shall contain a recital acknowledging this Declaration and providing the recording location of this Declaration.

IN WITNESS WHEREOF, Grenada County, Mississippi, has executed this Declaration of Use Restrictions as of the 30th day of March, 2005.

Grenada County, Mississippi

By: Christopher C. Hankins

Christopher C. Hankins,
President, Grenada County
Board of Supervisors

County Seal

Attest: Powell Vanee, D.C.

Powell Vanee, Chancery Clerk
Grenada County, Mississippi

Prepared by:

Gore, Kilpatrick, Purdie, Metz & Adcock, PLLC
P. O. Box 901
Grenada, MS 38902-0901
662-226-1891

Indexing Instructions:

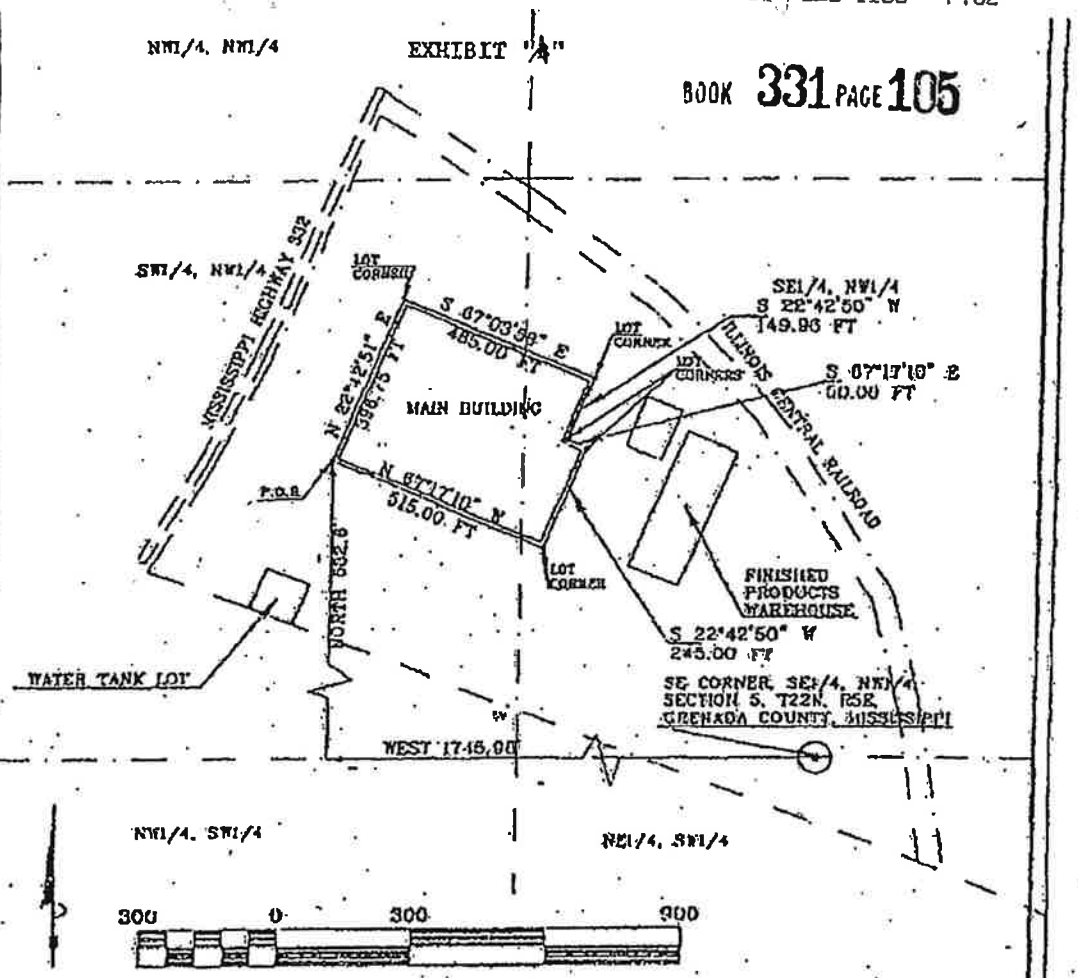
Part of the SW Quarter of the NW Quarter, and part of the SE Quarter of the NW Quarter, all in Section 5, T22N, R5 E, Grenada County, Mississippi, containing 4.5 acres, more or less.

03

219038 JAN-96

BOOK 331 PAGE 105

EXHIBIT "A"



Scale 1" = 300 ft

DESCRIPTION:
Part of the SW quarter of the NW quarter, and part of the SE quarter of the NW quarter, all in Section 5, T22N, R5E, City of Grenada, Grenada County, Mississippi, more particularly described as follows:
Beginning at a point 1745.00 FT west and 602.60 FT north of the SE corner of the SE quarter of the NW quarter of said Section 5; proceed thence N 22°42'51" E a distance of 398.75 FT to a point; thence S 67°03'58" E a distance of 485.00 FT to a point; thence S 22°42'50" W a distance of 149.96 FT to a point; thence S 67°17'10" E a distance of 50.00 FT to a point; thence S 22°42'50" W a distance of 245.00 FT to a point; thence N 67°17'10" W a distance of 515.00 FT to the point of beginning, containing 4.5 acres, more or less.

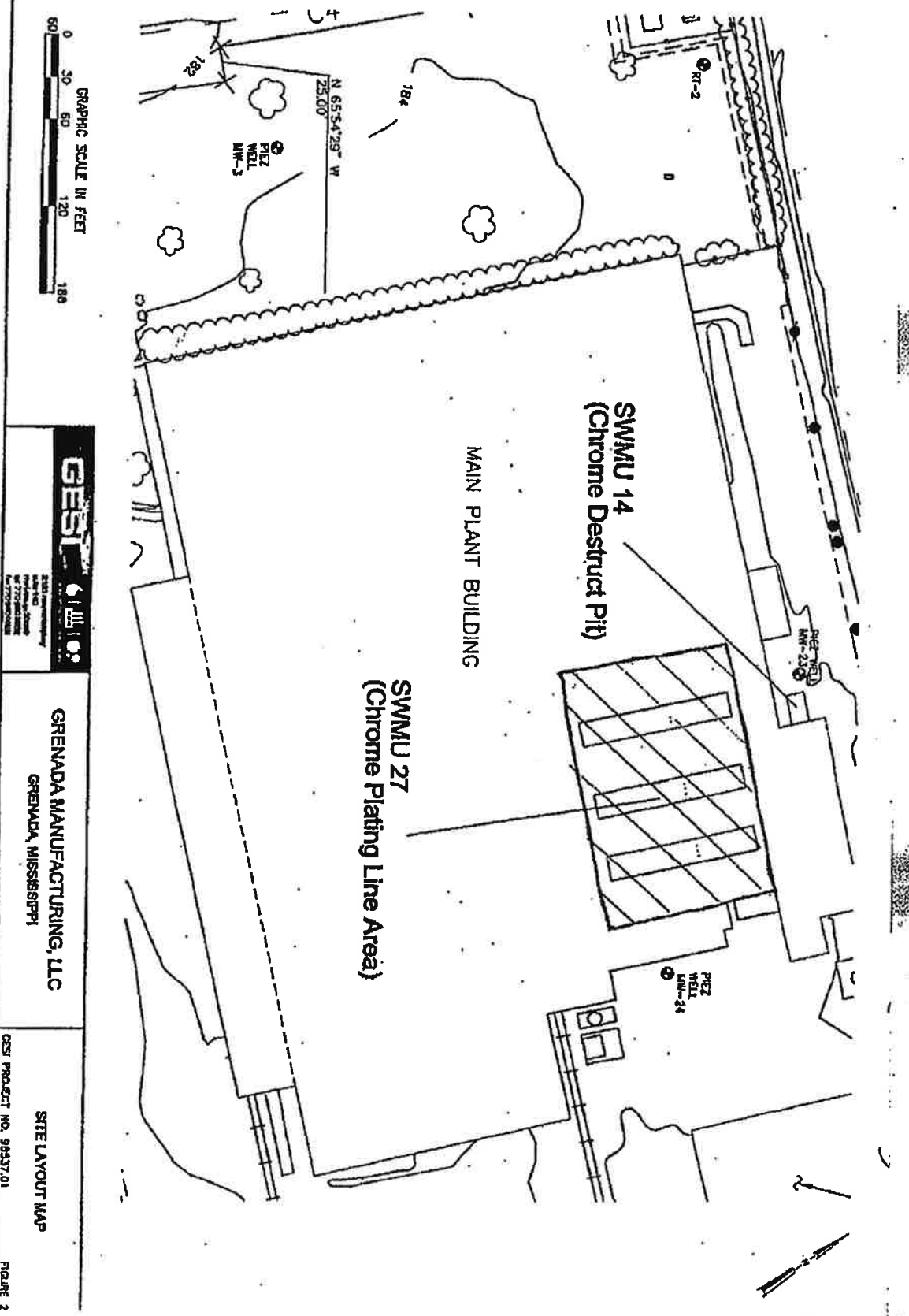
JOE A. SUTHERLAND, JR. P.E.-L.S.	SURVEY PLAT
ENGINEER-SURVEYOR P.O. BOX 838 GRENADA, MISS. 38902-0838 TEL. (662)226-3306	CLIENT: RANDALL TEXTRON PROPERTY DIVISION
DRAWN BY: JAS	CHECKED BY: JAS
DATE 5-8-99	RANDYHILL.GL
RANDYT.DWG	

TOTAL P.02

BOOK 331 PAGE 106

EXHIBIT "B"

FILE: P:\YEXTRON\GRENADA\CLOSURES\PLATING_LINE_CLOSURE\CLOS_REPORT\FIGURES2_3_4.DWG PLOT DATE: 01/23/2004



GESI

GRENADA MANUFACTURING, LLC
GRENADA, MISSISSIPPI

SITE LAYOUT MAP

GESI PROJECT NO. 98537.01

FIGURE 2

From: 601 226 1166 Page: 2/2 Date: 11/2/2004 11:01:05 AM

BOOK 331 PAGE 107

STATE OF MISSISSIPPI
COUNTY OF GRENADA

PERSONALLY appeared before me, the undersigned authority in and for the jurisdiction aforesaid on this the 30th day of March, 2005, the within named C. Columbus Hankins who acknowledged that he is the President of the Board of Supervisors and Powell Vance, and that for and on behalf of Grenada County, as its act and deed, they have executed the above and foregoing instrument, after first having been duly authorized by said county so to do.

SANDRA GAIL EDWARDS NOTARY PUBLIC STATE OF MISSISSIPPI

Sandra Gail Edwards
Notary Public

My Commission expires:
My Commission Expires June 26, 2007

EXHIBIT B

Declaration of Use Restrictions, City Land

STATE OF MISSISSIPPI
GRENADA COUNTY

CHANCERY CLERK'S OFFICE

I hereby certify that the within instrument was filed for record in my office on the 31st day of May 2005 at 3:30 o'clock P.M. and recorded this 31st day of May 2005 in Book 332 Page 165

POWELL VANCE, Chancery Clerk

BOOK 332 PAGE 165

DECLARATION OF USE RESTRICTIONS

WHEREAS, City of Grenada is the record owner ("Owner") of certain real property situated in the City of Grenada, County of Grenada, State of Mississippi and legally described on Exhibit A attached hereto and incorporated herein by reference and the improvements thereto (the "Property");

WHEREAS, Owner hereby desires to establish and impose certain covenants and restrictions on the Property for the purpose of supporting ongoing environmental activities being completed under the oversight and control of the United States Environmental Protection Agency ("U.S. EPA") and the Mississippi Department of Environmental Quality ("MDEQ"); and

WHEREAS, by imposing the covenants and restrictions to the Property described more fully below, Owner intends and desires to insure that the Property can continue to be used lawfully and safely in the future for commercial and/or industrial purposes;

NOW, THEREFORE, Owner, for itself and its successors and assigns in ownership of the Property, including, without limitation, lessees, does hereby declare the Property subject to the following perpetual restrictions, covenants and stipulations, to-wit:

1. No person shall install any groundwater wells or extract the groundwater in the uppermost aquifer located at or underlying the Property for any purpose, potable or non-potable, except for groundwater sampling, groundwater investigation, or remedial activities, as warranted and approved by the U.S. EPA and/or MDEQ.

2. The Property is hereby restricted to non-residential use only, and shall not be used as a hospital, school, day care facility, or other child-occupied facility, as those terms may be currently defined, or defined in the future, by zoning ordinance(s) of the City of Grenada or any other local governmental entity with jurisdiction and authority to regulate the land use at the Property.

3. There shall be no surface or subsurface demolition, excavation, drilling or other similar activities in the former chrome plating line area of the Property identified on Exhibit B without the prior written approval of the U.S. EPA and MDEQ.

4. Owner hereby grants access to the Property at all reasonable times to the U.S. EPA, the MDEQ, and any private persons (including their contractors, subcontractors and agents) who have not otherwise been granted access to the Property and who are authorized by the U.S. EPA and/or the MDEQ to undertake environmental

activities on the Property relating in any way to the State of Mississippi Hazardous Waste Management Permit No. HW-007-037-278 or U.S. EPA RCRA Permit No. MSD 007 037 278. All parties obtaining or granted access to the Property under this provision shall conduct their activities on the Property in a manner which minimizes to the fullest extent possible any disruptions to the use and enjoyment of the Property by Owner, its successors or assigns, and/or any other persons having an ownership or property interest in the Property.

5. This Declaration of Use Restrictions is intended to benefit and protect current and future owners and lessees of the Property (as well as any and all successors and assigns of the Property), adjoining property owners, citizens of the City and County of Grenada, and citizens of the State of Mississippi. Compliance with the Declaration of Use Restrictions contained herein may be enforced by a legal or equitable action brought in a court of competent jurisdiction by or on behalf of one or more of the following parties: (i) the U.S. EPA or its representative, (ii) the MDEQ or its representative; or (iii) any local governmental entity with the jurisdiction and legal authority to regulate land use at the Property. Delay or failure on the part of any of the foregoing parties to take any action to enforce compliance with the Declaration of Use Restrictions shall not bar any subsequent enforcement with respect to the failure of compliance in question, nor shall any delay or failure on the part of any of the foregoing parties to take any action to enforce compliance with the Declaration of Use Restrictions be deemed a waiver of the right of any such party to take any such action with respect to any failure of compliance.

6. Owner hereby reserves unto itself, its successors and assigns, and/or any other persons having an ownership or property interest in the Property all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights, and covenants granted herein or otherwise previously granted.

7. This Declaration of Use Restrictions shall run with the land and be binding upon all current owners and lessees of the Property, and all successors and assigns of the Property, or any portion of the Property, including any leasehold interests on the Property or any portion of the Property unless and until the restrictions set forth herein are amended in writing by Owner, its successors or assigns, and approved in writing by the U.S. EPA and MDEQ.

8. This Declaration of Use Restriction shall be recorded in the same manner as a deed in the Office of the Chancery Clerk of Grenada, Mississippi, and shall be deemed incorporated by reference in any instrument hereafter conveying any interest in the Property, including, without limitation, any leases or easements.

9. If any one or more provisions of the Declaration of Use Restrictions herein contained shall be found to be unenforceable in any respect, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. This Declaration of Use Restrictions shall be governed by and interpreted in accordance with the laws of the State of Mississippi.

BOOK 332 PAGE 167

10. Any instrument hereafter conveying any interest in the Property or any portion thereof shall contain a recital acknowledging this Declaration and providing the recording location of this Declaration.

IN WITNESS WHEREOF, City of Grenada has executed this Declaration of Use Restrictions as of the day and year first written above.

CITY OF GRENADA, MISSISSIPPI

By: Dianna Freelon-Foster

Its: MAYOR

Date: December 14, 2004

STATE OF MISSISSIPPI)
) ss:
COUNTY OF GRENADA)

Before me, a Notary Public, in and for said County, personally appeared Dianna Freelon-Foster as Mayor of City of Grenada who acknowledged the signing of the foregoing instrument to be his free act and deed and that of Grenada for the uses and purposes therein mentioned.

Witness my hand and Notarial Seal this 14th day of December, 2004.

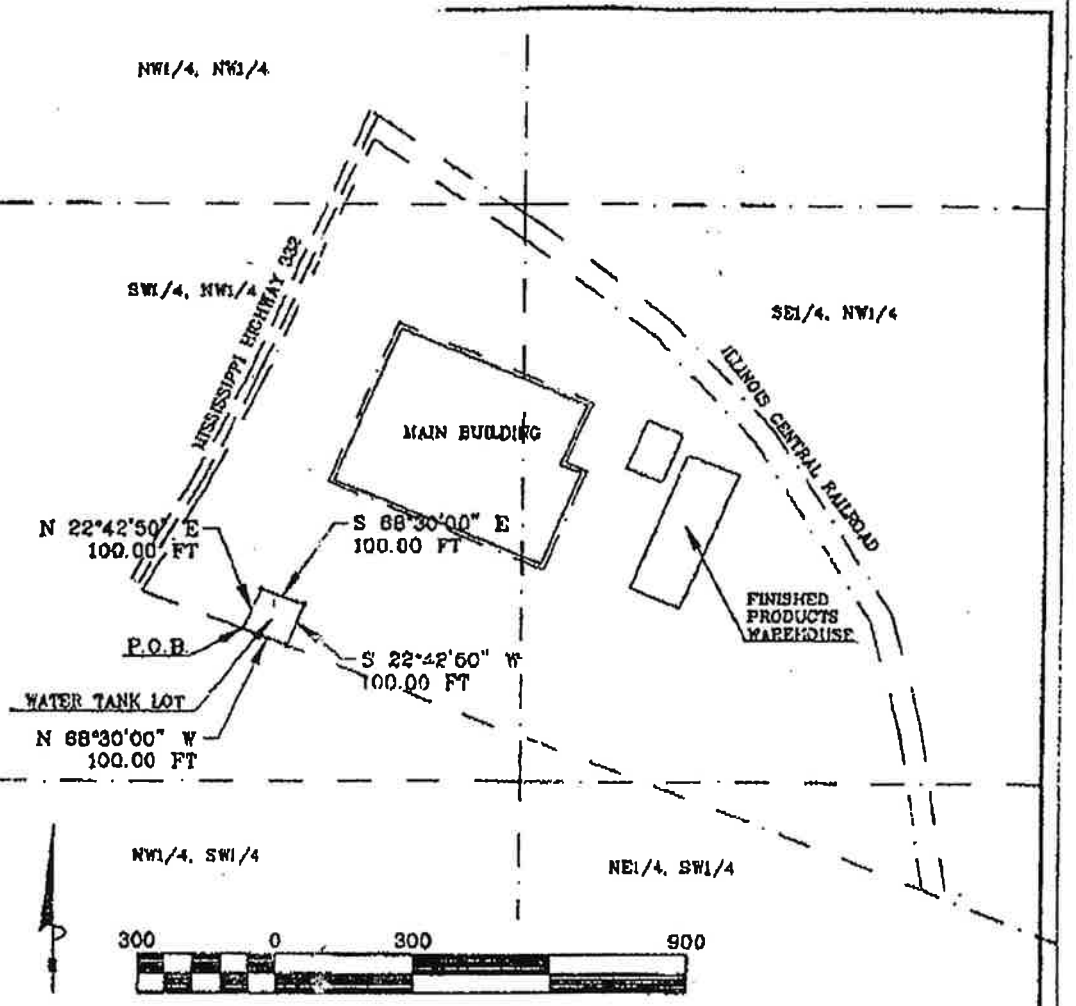
(SEAL)

Notary Public
My Commission Expires: MISSISSIPPI STATEWIDE NOTARY PUBLIC MY COMMISSION EXPIRES FEB. 17, 2008 BONDED THRU STEGALL NOTARY SERVICE

This Instrument Was Prepared By:
Mary A. Brown
Attorney-at-Law
P.O. Box 2046
Grenada, Mississippi 38902
662-226-5878
MS Bar #: 4661

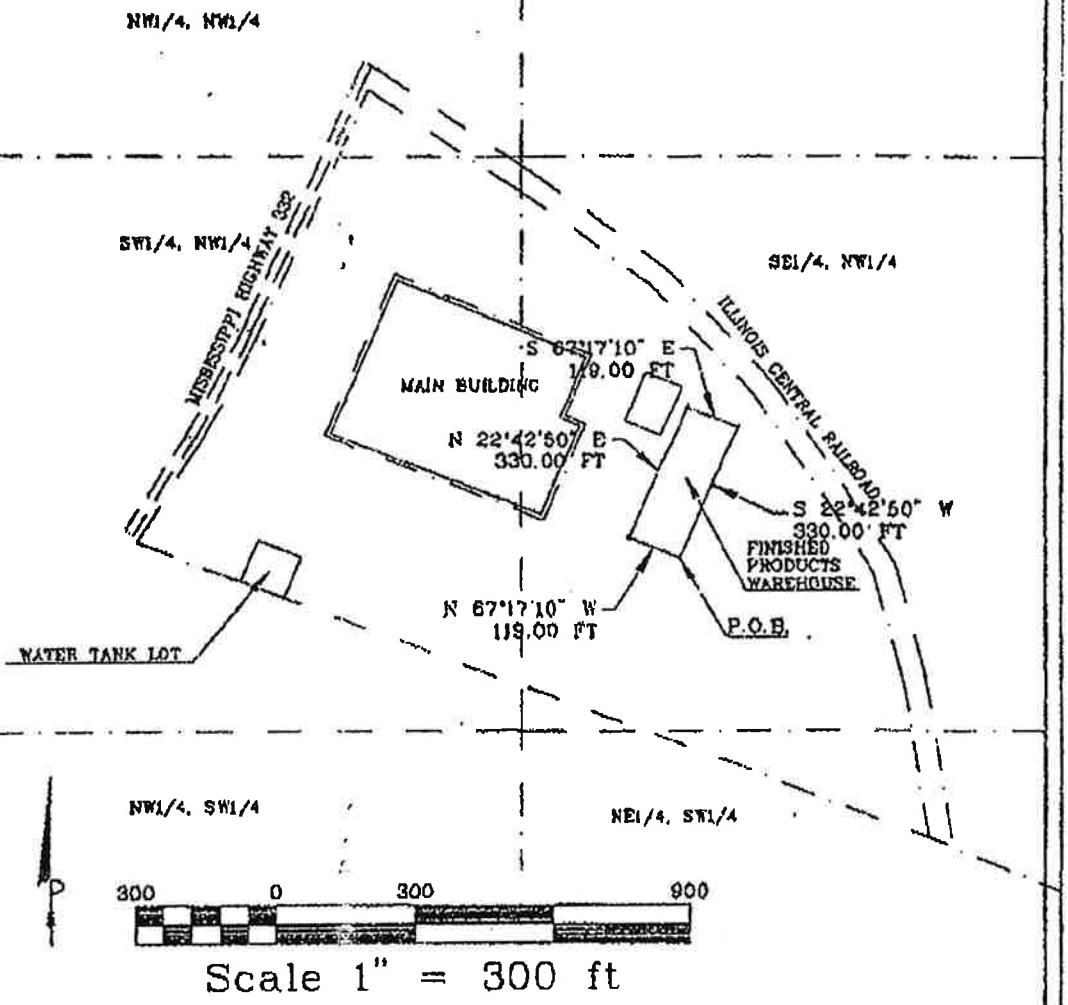
Indexing Instructions
Part of the SE quarter of the NW quarter of Section 5, T22N,R5E, Grenada County, Mississippi and Part of the SW quarter of the NW quarter of Section 5, T22N,R5E, Grenada County, Mississippi

05/27/2005 16:43 2268408 BOOK 332 PG 168 PAGE 01



DESCRIPTION:
Part of the SW quarter of the NW quarter of Section 5, T22N, R5E, Grenada County, Mississippi, more particularly described as follows:
Beginning at a fence corner post 1924.33 feet west and 346.02 feet north of the SE corner of the SE quarter of the NW quarter of said Section 5; proceed thence N 22°42'50" E a distance of 100.00 FT to a point; thence S 68°30'00" E a distance of 100.00 FT to a point; thence S 22°42'50" W a distance of 100.00 FT to a point; thence N 68°30'00" W a distance of 100.00 FT to the point of beginning, containing 0.2 acres, more or less.

JOE A. SUTHERLAND, JR. P.E.-L.S.	SURVEY PLAT	
ENGINEER-SURVEYOR P.O. BOX 856 & 62 S. GRANT ST. GRENADA, MISS. 38901-0856 TEL. 662/226-2303	CLIENT: RANDALL TEXTRON PROPERTY DIVISION	
DRAWN BY: JAS	CHECKED BY: JAS	DATE: 5-6-99	RANDYTAN.LGL	RANDYT.DWG



DESCRIPTION:
Part of the SE quarter of the NW quarter of SEction 5, T22N, R5E, Grenada County, Mississippi, more particularly described as follows:
Beginning at a point at the corner of the finished products warehouse at Randall Textron, said point being 397.64 feet north and 921.98 feet west of the SE corner of the SE quarter of the NW quarter of said Section 5; proceed thence along said warehouse wall N 67°17'10" W a distance of 119.00 FT to a corner; thence along said wall N 22°42'50" E a distance of 330.00 FT to a corner; thence along said wall S 67°17'10" E a distance of 119.00 FT to a corner; thence along said wall S 22°42'50" W a distance of 330.00 FT to the point of beginning, containing 0.9 acres, more or less.

JOE A. SUTHERLAND, JR., P.E.-L.S.	SURVEY PLAT	
ENGINEER-SURVEYOR P.O. BOX 67 E GRENADA, MISS. 38901-0067 TEL. (662) 226-3600	CLIENT: RANDALL TEXTRON PROPERTY DIVISION	
DRAWN BY: JAS	CHECKED BY: JAS	DATE: 5-6-99	RANDYTFN.LGL	RANDYT.DWG

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that on this 8th day of April, 2019, I served one copy of the foregoing Brief of the National Association of Manufacturers, Chamber of Commerce of the United States, Superfund Settlements Project, and Society of Chemical Manufacturers & Affiliates as *Amici Curiae* in Support of Petitioner on all registered counsel in this case through the Court's CM/ECF system.

/s/ James R. Bieke
James R. Bieke