



February 6, 2003

MEMORANDUM

SUBJECT: Issuance of “Revised Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs” and “Revised Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs”

FROM: Susan Bromm, Director /s/
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency

Bruce S. Gelber, Chief /s/
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and
Remediation, Region VIII
Director, Office of Environmental Cleanup, Region X
Director, Office of Environmental Stewardship, Region I
Director, Environmental Accountability Division, Region IV
Regional Counsel, Regions II, III, V, VI, VII, IX, and X
Assistant Regional Administrator, Office of Enforcement, Compliance, and
Environmental Justice, Region VIII
Assistant Section Chiefs, Environmental Enforcement Section, U.S.
Department of Justice
Chief, Assistant Chiefs, Environmental Defense Section, U.S. Department of
Justice

We are pleased to issue the “Revised Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs” and “Revised Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs.” These models supersede the September 25, 1995 past cost models that bear the same names. They are to be used as guidance by EPA and DOJ staff when negotiating CERCLA judicial consent decrees and administrative agreements for recovery of past response costs. We encourage our staffs to adhere as closely as possible to the terms of these two models, subject to modifications needed to reflect site-specific circumstances.

The new models contain a number of revisions, which are generally designed to bring them into conformance with more recently issued CERCLA models, including the January 11, 2001 “Model CERCLA Peripheral Party Cashout Consent Decree,” and the June 15, 2001 Model RD/RA Consent Decree. The revisions include:

- 1) model language for settlement with Federal PRPs;
- 2) updated definition of Interest;
- 3) updated special account creation language;
- 4) optional language for establishing an interest-bearing escrow account to hold the settlor’s payment pending final approval of the settlement after public comment;
- 5) recently-issued non-exempt de micromis party waiver for use at settlements at non-NPL sites;
- 6) optional access to information language;
- 7) updated covenant not to sue by settling parties language; and
- 8) updated certification language.

Please address any questions on these models to Janice Linett of the Regional Support Division at (202) 564-5131 or Leslie Allen of the Environmental Enforcement Section at (202) 514-4114. We appreciate the assistance of the Lead Region Settlement Workgroup and other members of your staffs who provided valuable comments during development of these revised models.

Attachments

cc: Earl Salo, Acting Associate General Counsel for Solid Waste and Emergency Response
Juliette McNeil, Director, Financial Management Division
Office of Regional Counsel Branch Chiefs, Regions I-X
CERCLA Settlement Lead Region Workgroup

bcc: Alan Carpien, OGC
Karen Dworkin, EES/DOJ
Leslie Allen, EES/DOJ
David Glazer, EES/DOJ
Steve Rogers, EDS/DOJ

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
UNITED STATES DEPARTMENT OF JUSTICE REVISED
MODEL CERCLA SECTION 107 CONSENT DECREE FOR
RECOVERY OF PAST RESPONSE COSTS**

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Department of Justice and the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which the Department or Agency uses them in a particular case will depend on the facts of the case.

**REVISED MODEL CERCLA SECTION 107 CONSENT DECREE
FOR RECOVERY OF PAST RESPONSE COSTS**

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [_____]]
[_____] DIVISION¹

UNITED STATES OF AMERICA,)
)
[and)
)
THE STATE OF _____])
)
Plaintiff[s],)
)
v.) Civil Action No. _____
)
[DEFENDANTS]) Judge _____
)
Defendants.)
_____)

CONSENT DECREE

I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (“CERCLA”), seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the [insert Site Name] in [insert City, County, State] (“the Site”).

[_. The State of _____ (the “State”) also filed a complaint against the defendants [if Settling Federal Agencies, insert, “and the United States”] in this Court alleging that the defendants [if Settling Federal Agencies, insert, “and the United States”] are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [list State laws cited in State’s complaint]. The State in its complaint seeks [insert relief sought].]

¹ Follow local rules for caption format.

B. The defendants that have entered into this Consent Decree (“Settling Defendants”) do not admit any liability to Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s].² [If Settling Federal Agencies, insert, “Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim asserted by Settling Defendants [or any claim by the State].”]

C. The United States and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants.³ Solely for the purposes of this Consent Decree and the underlying complaint[s], Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States [and the State], and upon Settling Defendants and their [heirs,] successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings

² In situations where the court has entered summary judgment as to liability, we should preserve that result in a subsequent settlement by deleting this Paragraph B and replacing it with one that describes the summary judgment decision.

³ If pendent State claims are included, also invoke supplemental jurisdiction under 28 U.S.C. § 1367.

assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Consent Decree" shall mean this Consent Decree [and all appendices attached hereto]. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.
- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.
- e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.
- g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.⁴
- l. "Owner Settling Defendants" shall mean [insert names].]
- h. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.
- i. "Parties" shall mean the United States[, the State of _____,] [and] Settling Defendants.
- j. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or DOJ on behalf of EPA has paid at or in connection with the Site

⁴ The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at http://www.epa.gov/budget/finstatement/superfund/int_rate.htm.

through [insert date], plus accrued Interest on all such costs through such date.⁵

k. “Plaintiff[s]” shall mean the United States [and the State].

l. “Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

m. “Settling Defendants” shall mean [insert names of settling non-federal parties, or if numerous, “those parties identified in Appendix A.”]

[If Settling Federal Agencies, insert the following definition.] [“Settling Federal Agencies” shall mean [insert names of settling federal parties, or if numerous, “those departments, agencies, and instrumentalities of the United States identified in Appendix __.”]

n. “Site” shall mean the ____ Superfund site, encompassing approximately __ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either “generally shown on the map included in Appendix B” or “generally designated by the following property description: _____.”]

[__. “State” shall mean the State [or Commonwealth] of _____.]

[__. “State Past Response Costs” shall mean all costs, including but not limited to direct and indirect costs, together with accrued interest, that the State [or Commonwealth] of _____ has paid through [insert date] in response to the release or threatened release of hazardous substances at or in connection with the Site, but not including amounts reimbursed to the State by EPA.]

⁵ If the past costs settlement is partial, it may be necessary to continue the definition with a brief description of the past response action(s) that are being paid for or compromised, such as: “. . . for the response action described in the Record of Decision for the First Operable Unit at the Site dated _____” or “for the removal action described in the action memorandum for the Site dated _____.” Exercise care in describing the activities covered, as this description may affect the scope of the covenant not to sue and contribution protection. For clarity, the description of the past response action may need to indicate which response actions are not included within the definition of Past Response Costs. Check to be sure that the date used in the definition of Past Response Costs does not inadvertently include costs that are outside the scope of the definition. In some cases, it may be useful to attach a standard, Regionally-prepared cost summary listing the costs that are within the scope of the definition. This may be done: 1) to be sure that no confusion arises as to which costs are being compromised; or 2) to indicate which outstanding past cost claims are being resolved through the settlement.

o. “United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

4. Payment of Past Response Costs to EPA. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to EPA \$ _____, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment.

[NOTE: As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, the following alternative Paragraph 4 may be used if Settling Defendants agree to place the payment amount (plus accrued interest from the Past Response Costs date through the date the escrow account is created) into an interest-bearing escrow account to be disbursed to EPA upon entry of the Decree.]

[4. Within 5 business days after Settling Defendants receive notice from the United States that this Consent Decree has been lodged, Settling Defendants shall deposit \$ _____ into an escrow account bearing interest on commercially reasonable terms, in a federally-chartered bank (the “Escrow Account”). If the Consent Decree is not entered by the Court, and the time for any appeal of that decision has run or if the Court’s denial of entry is upheld on appeal, the monies placed in escrow, together with accrued interest thereon, shall be returned to Settling Defendants. If the Consent Decree is entered by the Court, Settling Defendants shall, within 15 days thereof, cause the monies in the Escrow Account to be paid to EPA in accordance with Paragraphs 5 and 6 below.]

5. **[NOTE: The following language should be used if the payment amount is above \$25,000.]** Payment [if Settling Federal Agencies, insert “by Settling Defendants”] shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with EFT instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney’s Office in the District of _____ following lodging of the Consent Decree.

[NOTE: The following alternative language may be used if the payment amount is less than \$25,000.] Payment [if Settling Federal Agencies, insert “by Settling Defendants”] shall be made by certified check or checks or cashier’s check or checks made payable to “U.S. Department of Justice,” referencing the name and address of the party(ies) making payment, the EPA Region and Site Spill ID Number _____, DOJ Case Number _____, and the civil action number. Settling Defendants shall send the check(s) to:

[Insert address of Financial Litigation Unit of U.S. Attorney’s Office for the District in which the Consent Decree will be entered]

6. At the time of payment, Settling Defendants shall also send notice that payment has

been made to EPA and DOJ in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill Identification Number _____, DOJ case number _____, and the civil action number.

7. The total amount to be paid pursuant to Paragraph 4 [if Settling Federal Agencies, insert, “by Settling Defendants”] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

[NOTE ON SPECIAL ACCOUNTS: Payments made under Paragraph 4 may be deposited in the EPA Hazardous Substance Superfund or in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”). The Decree should include clear instructions indicating which portion of the payment is to be placed in the Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Under Paragraph 7 as written, 100% of the payment will be deposited in a special account. The following language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.]

[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:]

“The total amount to be paid [if Settling Federal Agencies, insert, “by Settling Defendants”] pursuant to Paragraph 4 shall be deposited in the EPA Hazardous Substance Superfund.”

[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]

“Of the total amount to be paid [if Settling Federal Agencies, insert, “by Settling Defendants”] pursuant to Paragraph 4, [‘\$_____’ or ‘_____ %’] shall be deposited in the EPA Hazardous Substance Superfund and [‘\$_____’ or ‘_____ %’] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[If payment is to be made to a State, insert the following paragraph.]

[. Payment of State Past Response Costs. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the State \$_____, in reimbursement of State Past Response Costs, in the form of a certified check or checks or cashier’s check or checks. The check(s) shall be made payable to _____ and shall reference [insert name of case]. Settling Defendants shall send the check[s] to:

[Insert address provided by State]]

[If Settling Federal Agencies are making payments, insert the following paragraph.]

[7.1. As soon as reasonably practicable after the date of entry of this Consent Decree[, and consistent with Paragraph 7.1(a)(iii),] the United States, on behalf of Settling Federal Agencies, shall:

(a)(i). Pay to the EPA \$ ____, in reimbursement of Past Response Costs, plus an additional sum for interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through date of payment.

(a)(ii). The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 7.1(a)(i) shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. **[Insert one of the following alternative instructions if part or all of Settling Federal Agencies' payment will be deposited in the EPA Hazardous Substance Superfund:]**

“The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 7.1(a)(i) shall be deposited in the EPA Hazardous Substance Superfund.”

“Of the total amount to be paid by Settling Federal Agencies pursuant to Paragraph 7.1(a)(i), [‘\$ ____’ or ‘ ____%’] shall be deposited in the EPA Hazardous Substance Superfund and [‘\$ ____’ or ‘ ____%’] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

(a)(iii). If the payment to EPA required by this Paragraph 7.1(a)(i) is not made as soon as reasonably practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the date of entry of this Consent Decree, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter agreement dated December 28, 1998.

(b.) Pay to the State \$ _____, in reimbursement of State Past Response Costs, by ACH Electronic Funds Transfer in accordance with instructions provided by the State.

(c.) Pay to the Settling Defendants \$ _____, in reimbursement of Settling Defendants' past response costs at the Site, by ACH Electronic Funds Transfer in accordance with instructions provided by Settling Defendants.

7.2. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of Settling Federal Agencies under this Consent Decree can only be paid from

appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.]

VI. FAILURE TO COMPLY WITH CONSENT DECREE

8. Interest on Late Payments. If any Settling Defendant fails to make any payment under Paragraph 4 (Payment of Response Costs) [also reference State payment, if applicable] by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

9. Stipulated Penalty.

a. If any amounts due under Paragraph 4 [also reference State payment, if applicable] are not paid by the required date, Settling Defendants shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 8, \$ _____ per violation per day that such payment is late.

[NOTE: If the Decree includes any non-payment obligations for which a stipulated penalty is due, insert, “If Settling Defendants do not comply with [insert reference to any non-payment obligations], Settling Defendants shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, \$___ per violation per day of such noncompliance.” Escalating penalty payment schedules may be used for payment or non-payment obligations.]

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA [or the State]. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of the party(ies) making payment, the Site name, the EPA Region and Site Spill ID Number _____, DOJ Case Number _____, and the civil action number. Settling Defendants shall send the check (and any accompanying letter) to:

EPA Superfund
[Insert Regional lockbox number and address]

c. At the time of each payment, Settling Defendants shall also send notice that payment has been made to EPA and DOJ in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number _____, DOJ Case Number _____, and the civil action number.

[NOTE: If applicable, insert State payment instructions for stipulated penalties for failure

to pay State Past Response Costs.]

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA [or the State] has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations are included, insert, “or performance”] is due [if non-payment obligations are included, insert, “or the day a violation occurs,”] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, “or the final day of correction of the noncompliance or completion of the activity”]. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

10. If the United States [or the State] brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States [and the State] for all costs of such action, including but not limited to costs of attorney time.

11. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff[s] by virtue of Settling Defendants’ failure to comply with the requirements of this Consent Decree.

12. The obligations of Settling Defendants to pay amounts owed the United States [and the State] under this Consent Decree are joint and several. In the event of the failure of any one or more Settling Defendants to make the payments required under this Consent Decree, the remaining Settling Defendants shall be responsible for such payments.

13. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendants from payment as required by Section V or from performance of any other requirements of this Consent Decree.

VII. COVENANT NOT TO SUE BY PLAINTIFF[S]

[If Settling Federal Agencies are making payments, delete “not to sue” from title of this Section.]

14. Covenant Not to Sue [if Settling Federal Agencies are making payments, insert, “Settling Defendants”] by United States. Except as specifically provided in Section VIII (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 4 (Payment of Response Costs) and any amount due under Section VI (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

[NOTE: If Settling Federal Agencies are making payments for Past Response Costs, insert the following covenant. If they are addressing future response costs, the covenant will require case-specific discussion.]

[14.1. Covenant for Settling Federal Agencies by EPA. Except as specifically provided in Section VIII (Reservation of Rights by United States), EPA covenants not to take administrative action against Settling Federal Agencies pursuant to Section 107(a) of CERCLA, 42 U.S.C. §9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all payments required by Paragraph 7.1 of Section V. This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. This covenant extends only to Settling Federal Agencies and does not extend to any other person.]

VIII. RESERVATIONS OF RIGHTS BY UNITED STATES

15. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] with respect to all matters not expressly included within the Covenant Not to Sue [if Settling Federal Agencies, delete “Not to Sue”] by Plaintiff in Paragraph 14 [if Settling Federal Agencies, insert “and the Covenant for Settling Federal Agencies by EPA in Paragraph 14.1.”] Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants [if Settling Federal Agencies, insert “and EPA and the federal natural resource trustees reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies,”] with respect to:

- a. liability for failure of Settling Defendants [or Settling Federal Agencies] to meet a requirement of this Consent Decree;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

[NOTE: If the State is a co-plaintiff, insert separate paragraphs for the State’s covenant not to sue Settling Defendants (and Settling Federal Agencies, if any) and reservation of rights.]

IX. COVENANT NOT TO SUE BY SETTLING DEFENDANTS

16. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States [or the State], or its [their] contractors or employees, with respect to Past Response Costs [and State Past Response Costs] or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State [or Commonwealth] of _____, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.⁶

17. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

[NOTE: Insert the following waiver in settlements that involve sites that are not listed in final on the National Priorities List.⁷]

[__]. Settling Defendants agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed

⁶ The settlement should, wherever possible, release or resolve any claims by Settling Defendants against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be revised to allow private parties to reserve specifically delineated rights to seek contribution against the United States.

⁷ This waiver is not necessary at NPL sites because of the statutory de minimis exemption provided in Section 107(o) of CERCLA, as amended, 42 U.S.C. § 9607(o).

by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

__. The waiver in Paragraph __ [reference preceding paragraph] shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Settling Defendant. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or “RCRA”), 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.]

[Use as appropriate if a *de minimis* settlement has been concluded at the Site.]

[__. Settling Defendants agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final *de minimis* settlement under Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), with EPA with respect to the Site as of the date of entry of the Consent Decree. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.]

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

18. [Except as provided in Paragraphs __ (Non-Exempt De Micromis Waiver) and __ (*De Minimis* Waiver)], [n]othing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. [Except as provided in Paragraphs __ (Non-Exempt De Micromis Waiver) and __ (*De Minimis* Waiver)], [t]he Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

19. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants [and Settling Federal Agencies] are entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of

CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are Past Response Costs.⁸

20. Each Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ [and the State] within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

21. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States [or the State] in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff[s] [if Settling Federal Agencies, delete “not to sue”] set forth in Section VII.

[__]. SITE ACCESS⁹

[__]. If the Site, or any other property where access is needed to implement response activities at the Site, is owned or controlled by any of the Owner Settling Defendants, such Owner Settling Defendants shall, commencing on the date of lodging of this Consent Decree, provide the United States[, the State,] and its [their] representatives, including EPA and contractors, with access at all reasonable times to the Site, or to such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;

⁸ In exceptional situations, different coverage may apply.

⁹ Include this Section if access to the Site is needed and any of the Settling Defendants are Site owners or otherwise control access to the Site or to any other property to which access is needed. If any of the Settling Defendants will need to provide institutional controls as part of a response action, consider whether such a provision should be included here. Model language is included in Section IX of the Revised Model RD/RA Consent Decree (June 15, 2001, or more recent update).

- State];
2. Verifying any data or information submitted to the United States [or the State];
 3. Conducting investigations relating to contamination at or near the Site;
 4. Obtaining samples;
 5. Assessing the need for, planning, or implementing response actions at or near the Site;
 6. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section ___ (Access to Information); and
 7. Assessing Settling Defendants' compliance with this Agreement.

___ . Notwithstanding any provision of this Agreement, EPA [and the State] retain[s] all of its [their] access authorities and rights, as well as all of its [their] rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.]

[_. ACCESS TO INFORMATION¹⁰]

[__ . Settling Defendants shall provide to EPA [and the State], upon request, copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to activities at the Site [if needed, include "or to the implementation of this Consent Decree"], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

___ . Confidential Business Information and Privileged Documents.

a. Settling Defendants may assert business confidentiality claims covering part or all of the records submitted to Plaintiff[s] under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA [and the State], or if EPA has notified Settling Defendants that the records are

¹⁰ Include this Section only if Settling Defendants have been or will be involved in cleanup efforts at the Site or if they may possess information that may assist the Agency in its cleanup or enforcement efforts.

not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such records without further notice to Settling Defendants.

b. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege in lieu of providing records, they shall provide Plaintiff[s] with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff[s] in redacted form to mask the privileged information only. Settling Defendants shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

__. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]

XI. RETENTION OF RECORDS

22. Until [10] years after the entry of this Consent Decree, each Settling Defendant shall preserve and retain all [records] [if Access to Information Section is not used, insert "records, reports, or information (hereinafter referred to as "records")"] now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

23. After the conclusion of the [10]-year document retention period in the preceding paragraph, Settling Defendants shall notify EPA and DOJ [and the State] at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ [or the State], Settling Defendants shall deliver any such records to EPA [or the State]. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, they shall provide Plaintiff[s] with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff[s] in redacted form to mask the privileged information only. Settling Defendants shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor. However, no records created or generated pursuant to the

requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

24. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6972.

[If Settling Federal Agencies, insert, “___. The United States acknowledges that each Settling Federal Agency 1) is subject to all applicable Federal record retention laws, regulations, and policies; and 2) has fully complied with any and all EPA [and State] requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.”¹¹]

XII. NOTICES AND SUBMISSIONS

25. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Defendants in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, [the Settling Federal Agencies], [the State,] and Settling Defendants, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # _____)
P.O. Box 7611
Washington, D.C. 20044-7611

[If Settling Federal Agencies, insert:
Chief, Environmental Defense Section

¹¹ EPA attorneys must assure that the Agency has received a written response to any Information Requests that it has sent to Settling Federal Agencies containing a certification substantially similar to that required from private PRPs. *See* Paragraph 24.

Environment and Natural Resources Division
U.S. Department of Justice (DJ # _____)
P.O. Box 23986
Washington, D.C. 20026-3986]

As to EPA:

[Insert names and addresses of EPA Regional Attorney, Remedial Project Manager, or Project Coordinator, and contact in Regional Comptroller’s Office]

[As to the State:

Insert name and address of State contact if the State is a party to the Consent Decree]

As to Settling Defendants:

[Insert name and address of one person who will serve as the contact for all Settling Defendants]

XIII. RETENTION OF JURISDICTION

26. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XIV. INTEGRATION[/APPENDICES]

27. This Consent Decree [and its appendices] constitute[s] the final, complete and exclusive agreement and understanding among the Defendants with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. [The following appendices are attached to and incorporated into this Consent Decree: “Appendix A” is the complete list of Settling Defendants; [and] “Appendix B” is the map of the Site[; and “Appendix ___” is the complete list of Settling Federal Agencies].]

XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

28. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

29. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVI. SIGNATORIES/SERVICE

30. Each undersigned representative of a Settling Defendant to this Consent Decree and the [Assistant Attorney General for the Environment and Natural Resources Division]¹² of the United States Department of Justice [insert State official] certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

31. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

32. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree.¹³ Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. [Unless a complaint has already been filed and answered, insert, “The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.”]

XVII. FINAL JUDGMENT

33. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States[, the State,] and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ____ DAY OF _____, 20__ .

United States District Judge

¹² Substitute Chief/Deputy Chief, Environmental Enforcement Section, where the case involves a site where site costs do not exceed \$20 million, exclusive of interest, and the difference between the gross amount of the United States’ claim and the proposed settlement does not exceed \$1 million, or where the settlement results from inability to pay analysis as confirmed by a qualified financial expert. Note also that Associate Attorney General approval is required if the difference between the total amount of the claim and the amount of the settlement exceeds \$2 million or 15% of claim (whichever is greater). *See* 28 C.F.R. 0.160.

¹³ If Settling Defendants are numerous, consider requesting that they appoint a liaison counsel, with service though that party, as an administrative convenience.

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

[Name]
[Assistant Attorney General/Chief/Deputy Chief]¹⁴
[Environmental Enforcement Section]
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

United States Attorney
[Address]

[Name]
Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

[If Settling Federal Agencies, add EDS signature line:]

Date: _____

[Name]
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

¹⁴ See *supra* n.12.

[Name]¹⁵
Assistant Administrator for Enforcement and Compliance
Assurance
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

[Name]
[Regional Administrator or Delegatee], Region []
U.S. Environmental Protection Agency
[Address]

[Name]
Assistant Regional Counsel
U.S. Environmental Protection Agency
[Address]

¹⁵ Include AA-OECA signature block only if he or she has a concurrence role under Delegation No. 14-13-B.

[THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR THE STATE OF []

Date: _____

[Names and addresses of State signatories]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR DEFENDANT [_____]

Date: _____

[Names and address of Defendant's signatories]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: _____

Title: _____

Address: _____

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REVISED MODEL CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS**

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.

**REVISED MODEL CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS**

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**REVISED MODEL CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS**

IN THE MATTER OF:)	AGREEMENT FOR RECOVERY
)	OF PAST RESPONSE COSTS
[Site Name])	
[City, County, State])	U.S. EPA Region _____
)	CERCLA Docket No. _____
[Names of Settling Parties])	
SETTLING PARTIES)	PROCEEDING UNDER SECTION
)	122(h)(1) OF CERCLA
_____)	42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to [insert reference to any Regional redelegations].

2. This Agreement is made and entered into by EPA[, and] [insert names or reference attached appendix listing settling parties] (“Settling Parties”)[, and insert names or reference attached appendix listing settling federal agencies (“Settling Federal Agencies”). Each Settling Party [and Settling Federal Agency] consents to and will not contest EPA’s authority to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the [insert Site name] (“Site”) located in [insert Site location]. EPA alleges that the Site is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. **[NOTE: A brief description of the release or threatened release and of the response actions taken by EPA or potentially responsible parties may be included.]**

5. In performing response action, EPA has incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Parties [if Settling Federal Agencies, insert, “and Settling

Federal Agencies”] are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred or to be incurred at or in connection with the Site.

[NOTE: If Attorney General approval is not required for this settlement because total past and projected response costs of the United States at the Site are not expected to exceed \$500,000, excluding interest, insert the following paragraph and renumber all subsequent paragraphs.]

[___. EPA has determined that the total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.]

7. EPA and Settling Parties [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

8. This Agreement shall be binding upon EPA [if Settling Federal Agencies, insert, “and Settling Federal Agencies,”] and upon Settling Parties and their [heirs], successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Party’s responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. “Agreement” shall mean this Agreement [and any attached appendices]. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. “Day” shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

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

successor departments, agencies or instrumentalities of the United States.

e. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.¹

[. “Owner Settling Parties” shall mean [insert names].]

f. “Paragraph” shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

g. “Parties” shall mean EPA[, and] Settling Parties[, and Settling Federal Agencies.].

h. “Past Response Costs” shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through [insert date], plus accrued Interest on all such costs through such date.²

i. “Section” shall mean a portion of this Agreement identified by a Roman numeral.

¹ The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at http://www.epa.gov/budget/finstatement/superfund/int_rate.htm.

² If the past costs settlement is partial, it may be necessary to continue the definition with a brief description of the past response action(s) that are being paid for or compromised, such as: “. . . for the response action described in the Record of Decision for the First Operable Unit at the Site dated _____” or “for the removal action described in the action memorandum for the Site dated _____.” Exercise care in describing the activities covered, as this description may affect the scope of the covenant not to sue and contribution protection. For clarity, the description of the past response action may need to indicate which response actions are not included within the definition of Past Response Costs. Check to be sure that the date used in the definition of Past Response Costs does not inadvertently include costs that are outside the scope of the definition. In some cases, it may be useful to attach a standard, Regionally-prepared cost summary listing the costs that are within the scope of the definition. This may be done: 1) to be sure that no confusion arises as to which costs are being compromised; or 2) to indicate which outstanding past cost claims are being resolved through the settlement.

[If Settling Federal Agencies, insert the following definition.] [“Settling Federal Agencies” shall mean [insert names of settling federal parties, or if numerous, “those departments, agencies, and instrumentalities of the United States identified in Appendix __.”]]

j. “Settling Parties” shall mean [insert names of settling non-federal parties, or if numerous, “those parties identified in Appendix __.”]

k. “Site” shall mean the ____ Superfund site, encompassing approximately __ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either “generally shown on the map included in Appendix __” or “generally designated by the following property description: _____.”]

l. “United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

10. Within 30 days of the effective date of this Agreement, Settling Parties shall pay to EPA \$_____, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment.

[NOTE: As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, the following alternative Paragraph 10 may be used if Settling Parties agree to place the payment amount (plus accrued interest from the Past Response Costs date through the date the escrow account is created) into an interest-bearing escrow account to be disbursed to EPA upon the effective date of the Agreement.]

[10. Within 5 business days after Settling Parties receive notice from EPA that this Agreement has been signed by EPA (if DOJ approval is needed, insert “and approved by the Attorney General or his/her designee”), Settling Parties shall deposit \$_____ into an escrow account bearing interest on commercially reasonable terms, in a federally-chartered bank (the “Escrow Account”). If the Agreement is not made effective after public comment, the monies placed in escrow, together with accrued interest thereon, shall be returned to Settling Parties. If the Agreement is made effective after public comment, Settling Parties shall, within 15 days thereof, cause the monies in the Escrow Account to be paid to EPA in accordance with Paragraphs 11 and 12 below.]

11. **[NOTE: The following language should be used if the payment amount is above \$25,000. Regional attorneys should consult with the Comptroller’s Office in the Region to determine if more specific EFT instructions should be included.]** Payment [if Settling Federal Agencies, insert “by Settling Parties”] shall be made to EPA by Electronic Funds Transfer (“EFT”) in accordance with current EFT procedures to be provided to Settling Parties by EPA Region __, and shall be accompanied by a statement identifying the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID Number _____, and

the EPA docket number for this action.

[NOTE: The following alternative language may be used if the payment amount is less than \$25,000.] Payment [if Settling Federal Agencies, insert “by Settling Parties”] shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” Each check, or a letter accompanying each check, shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID Number _____, and the EPA docket number for this action. Settling Parties shall send the check(s) to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

12. At the time of payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section __ (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number _____ and the EPA docket number for this action.

13. The total amount to be paid pursuant to Paragraph 10 [if Settling Federal Agencies, insert, “by Settling Parties”] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

[NOTE ON SPECIAL ACCOUNTS: Payments made under Paragraph 10 may be deposited in the EPA Hazardous Substance Superfund or in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”). The Agreement should include clear instructions indicating which portion of the payment is to be placed in the Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Under Paragraph 13 as written, 100% of the payment will be deposited in a special account. The following language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.]

[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:]

“The total amount to be paid [if Settling Federal Agencies, insert, “by Settling Parties”] pursuant to Paragraph 10 shall be deposited in the EPA Hazardous Substance Superfund.”

[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]

“Of the total amount to be paid [if Settling Federal Agencies, insert, “by Settling Parties”] pursuant to Paragraph 10, [‘\$ _____’ or ‘ _____%’] shall be deposited in the EPA Hazardous Substance Superfund and [‘\$ _____’ or ‘ _____%’] shall be deposited in the [Site name] Special

Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[If Settling Federal Agencies are making payments, insert the following paragraph.]

[13.1. As soon as reasonably practicable after the effective date of this Agreement[, and consistent with Paragraph 13.1(a)(iii),] the United States, on behalf of Settling Federal Agencies, shall:

(a)(i). Pay to the EPA \$ ____, in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment.

(a)(ii). The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i) shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. **[Insert one of the following alternative instructions if part or all of the Settling Federal Agencies’ payment will be deposited in the EPA Hazardous Substance Superfund:]**

“The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i) shall be deposited in the EPA Hazardous Substance Superfund.”

“Of the total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i), [‘\$ ____’ or ‘ ____%’] shall be deposited in the EPA Hazardous Substance Superfund and [‘\$ ____’ or ‘ ____%’] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

(a)(iii). If the payment to EPA required by this Paragraph 13.1(a)(i) is not made as soon as reasonably practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the effective date of this Agreement, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter agreement dated December 28, 1998.

(b.) Pay to the Settling Parties \$ _____, in reimbursement of Settling Parties’ past response costs at the Site, by ACH Electronic Funds Transfer in accordance with instructions provided by Settling Parties.

13.2. The Parties to this Agreement recognize and acknowledge that the payment obligations of Settling Federal Agencies under this Agreement can only be paid from appropriated

funds legally available for such purpose. Nothing in this Agreement shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.]

VI. FAILURE TO COMPLY WITH AGREEMENT

14. Interest on Late Payments. If any Settling Party fails to make any payment required by Paragraph 10 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

15. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 10 are not paid by the required date, Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 14 \$_____ per violation per day that such payment is late.

[NOTE: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, “If Settling Parties do not comply with [insert reference to any non-payment obligations], Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, \$_____ per violation per day of such noncompliance.” Escalating penalty payment schedules may be used for payment or non-payment obligations.]

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of the party(ies) making payment, the Site name, the EPA Region and Site Spill ID Number, and the EPA Docket Number for this action. Settling Parties shall send the check (and any accompanying letter) to:

EPA Superfund
[Insert Regional lockbox number and address]

c. At the time of each payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall identify the EPA Region and Site Spill ID Number _____ and the EPA Docket Number for this action.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment

obligations are included, insert, “or performance”) is due [if non-payment obligations are included, insert, “or the day a violation occurs,”] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, “or the final day of correction of the noncompliance or completion of the activity”].] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties’ failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with the requirements of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

17. The obligations of Settling Parties to pay amounts owed to EPA under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

18. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Payment of stipulated penalties shall not excuse Settling Parties from payment as required by Section V or from performance of any other requirements of this Agreement.

VII. COVENANT NOT TO SUE BY EPA

[If Settling Federal Agencies are making payments, delete “not to sue” from the title of this Section.]

19. Covenant Not to Sue [if Settling Federal Agencies are making payments, insert, “Settling Parties”] by EPA. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

[NOTE: If Settling Federal Agencies are making payments for Past Response Costs, insert the following covenant. If they are addressing future response costs, the covenant will require case-specific discussion.]

[19.1. Covenant for Settling Federal Agencies by EPA. Except as specifically provided in Section VIII (Reservation of Rights by EPA), EPA covenants not to take administrative action

against Settling Federal Agencies pursuant to Section 107(a) of CERCLA, 42 U.S.C. §9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all payments required by Paragraph 13.1 of Section V. This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Agreement. This covenant extends only to Settling Federal Agencies and does not extend to any other person.]

VIII. RESERVATIONS OF RIGHTS BY EPA

20. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] with respect to all matters not expressly included within the Covenant Not to Sue [if Settling Federal Agencies, delete “Not to Sue”] by EPA in Paragraph 19 [if Settling Federal Agencies, insert “and the Covenant for Settling Federal Agencies by EPA in Paragraph 19.1.”] Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Parties [if Settling Federal Agencies, insert “and EPA reserves, and this Agreement is without prejudice to, all rights against Settling Federal Agencies,”] with respect to:

- a. liability for failure of Settling Parties [or Settling Federal Agencies] to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

21. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

IX. COVENANT NOT TO SUE BY SETTLING PARTIES

22. Settling Parties covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C.

§§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State [Commonwealth] of _____, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.³

23. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

[NOTE: Insert the following waiver in settlements that involve sites that are not listed in final on the National Priorities List.⁴]

[__]. Settling Parties agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Parties with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

__. The waiver in Paragraph __ [reference preceding paragraph] shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Settling Party. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

³ The settlement should, wherever possible, release or resolve any claims by Settling Parties against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be revised to allow private parties to reserve specifically delineated rights to seek contribution against the United States.

⁴ This waiver is not necessary at NPL sites because of the statutory de micromis exemption provided in Section 107(o) of CERCLA, 42 U.S.C. § 9607(o).

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or “RCRA”), 42 U.S.C. § 6972, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.]

[Use as appropriate if a *de minimis* settlement has been concluded at the Site.]

[___. Settling Parties agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final *de minimis* settlement under Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), with EPA with respect to the Site as of the effective date of this Agreement. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.]

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

24. [Except as provided in Paragraphs __ (Non-Exempt De Micromis Waiver) and __ (*De Minimis* Waiver)], [n]othing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. [Except as provided in Paragraphs __ (Non-Exempt De Micromis Waiver) and __ (*De Minimis* Waiver)], [t]he Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

25. EPA and Settling Parties agree that the actions undertaken by Settling Parties [and “Settling Federal Agencies”] in accordance with this Agreement do not constitute an admission of any liability by any Settling Party [or any “Settling Federal Agency”]. Settling Parties [and “Settling Federal Agencies”] do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

26. The Parties agree that Settling Parties [and Settling Federal Agencies] are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Agreement. The “matters addressed” in this Agreement are Past Response Costs.

27. Each Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

28. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue [if Settling Federal Agencies, delete “not to sue”] by EPA set forth in Section VII.

[. **SITE ACCESS**⁵]

[. If the Site, or any other property where access is needed to implement response activities at the Site, is owned or controlled by any of the Owner Settling Parties, such Owner Settling Parties shall, commencing on the Effective Date of this Agreement, provide EPA[, the State,] and its [their] representatives, including contractors, with access at all reasonable times to the Site, or to such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;
2. Verifying any data or information submitted to the United States [or the State];
3. Conducting investigations relating to contamination at or near the Site;
4. Obtaining samples;

⁵ Include this Section if access to the Site is needed and any of the Settling Parties are Site owners or otherwise control access to the Site or to any other property to which access is needed. If any of the Settling Parties will need to provide institutional controls as part of a response action, consider whether such a provision should be included here. Model language is included in Section IX of the Revised Model RD/RA Consent Decree (June 15, 2001, or more recent update).

5. Assessing the need for, planning, or implementing response actions at or near the Site;

6. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Parties or their agents, consistent with Section ___ (Access to Information); and

7. Assessing Settling Parties' compliance with this Agreement.

___ . Notwithstanding any provision of this Agreement, EPA [and the State] retain[s] all of its [their] access authorities and rights, as well as all of its [their] rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.]

[___ . **ACCESS TO INFORMATION**⁶]

[___ . Settling Parties shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to activities at the Site [if needed, include "or to the implementation of this Agreement"], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

___ . Confidential Business Information and Privileged Documents.

a. Settling Parties may assert business confidentiality claims covering part or all of the records submitted to EPA under this Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Parties that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such records without further notice to Settling Parties.

b. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege in lieu of providing records, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address

⁶ Include this Section only if Settling Parties have been or will be involved in cleanup efforts at the Site or if they may possess information that may assist the Agency in its cleanup or enforcement efforts.

of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Parties' favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

__. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]

XI. RETENTION OF RECORDS

29. Until [10] years after the effective date of this Agreement, each Settling Party shall preserve and retain all [records] [if Access to Information Section is not used, insert "records, reports, or information (hereinafter referred to as "records")"] now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

30. After the conclusion of the [10]-year document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records and, upon request by EPA, Settling Parties shall deliver any such records to EPA. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

31. Each Settling Party hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and

Section 3007 of RCRA, 42 U.S.C. § 6927.

[If Settling Federal Agencies, insert, “___. The United States acknowledges that each Settling Federal Agency 1) is subject to all applicable Federal record retention laws, regulations, and policies; and 2) has fully complied with any and all EPA [and State] requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.”⁷]

XII. NOTICES AND SUBMISSIONS

32. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA[,] Settling Parties [,and Settling Federal Agencies].

As to EPA:

[Insert names and addresses of EPA Regional Attorney, Remedial Project Manager, or Project Coordinator, and contact in the Regional Comptroller’s Office]

[As to Settling Federal Agencies:]

As to Settling Parties:

[Insert name and address of one person who will serve as the contact for all Settling Parties]

XIII. INTEGRATION[/APPENDICES]

33. This Agreement [and its appendices] constitute[s] the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. [The following appendices are attached to and incorporated into this Agreement: “Appendix A” is a complete list of the Settling Parties; [and] “Appendix B” is the map of the Site; and “Appendix C” is the complete list of Settling Federal Agencies].]

XIV. PUBLIC COMMENT

⁷ EPA attorneys must assure that the Agency has received a written response to any Information Requests that it has sent to Settling Federal Agencies containing a certification substantially similar to that required from private PRPs. See Paragraph 31.

