

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_  
\_\_\_\_\_ DIVISION



----- x  
UNITED STATES OF AMERICA  
[and STATE OF \_\_\_\_\_]

Plaintiffs,

Civil Action No. \_\_\_\_\_

v.

\_\_\_\_\_, INC.,

Defendants.

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**MODEL REMEDIAL DESIGN/REMEDIAL ACTION (RD/RA) CONSENT DECREE**

July 2011

[A minor edit was made to ¶55a on March 23, 2012]

This document contains automatic section and paragraph numbers and automatic section and paragraph cross references. If you add or delete sections or paragraphs, please do not attempt to manually renumber any sections or paragraphs or cross references. Please see instructions at the end for more details.

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## 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 Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (“DOJ”) for response actions at the \_\_\_\_\_ Superfund Site in [City, State], together with accrued interest; and (2) performance of response actions by the defendants at the Site consistent with the National Contingency Plan (“NCP”), 40 C.F.R. Part 300.

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of \_\_\_\_\_ (the “State”) on \_\_\_\_\_, 20\_\_\_\_, of negotiations with potentially responsible parties (“PRPs”) regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. [The State has also filed a complaint against the defendants [**if Settling Federal Agencies (“SFAs”), insert:** and the United States] in this Court alleging that the defendants [and Settling Federal Agencies] are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [**list state laws cited in the State’s complaint**], **for:** \_\_\_\_\_.]

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the [**insert name of relevant federal natural resource trustee(s)**] on \_\_\_\_\_, 20\_\_\_\_, of negotiations with PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree.

F. 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], nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment. [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].]

G. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List (“NPL”), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on \_\_\_\_\_, 20\_\_\_\_, \_\_\_ Fed. Reg. \_\_\_\_\_. [**NOTE: For Superfund Alternative Approach settlements, delete this Paragraph.**]

H. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, EPA [or Settling Defendants, other PRPs at the Site, or the

State] commenced on \_\_\_\_\_, 20\_\_, a Remedial Investigation and Feasibility Study (“RI/FS”) for the Site pursuant to 40 C.F.R. § 300.430.

I. EPA [or Settling Defendants, other PRPs at the Site, or the State] completed a Remedial Investigation (“RI”) Report on \_\_\_\_\_, 20\_\_, and EPA [or Settling Defendants, other PRPs at the Site, or the State] completed a Feasibility Study (“FS”) Report on \_\_\_\_\_, 20\_\_.

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on \_\_\_\_\_, 20\_\_, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator [or Regional delegatee, if any], EPA Region \_\_, based the selection of the response action.

K. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision (“ROD”), executed on \_\_\_\_\_, 20\_\_ [, on which the State had a reasonable opportunity to review and comment/on which the State has given its concurrence.] The ROD includes [EPA’s explanation for any significant differences between the final plan and the proposed plan as well as] a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

L. Based on the information presently available to EPA [and the State], EPA [and the State] believe[s] that the Work will be properly and promptly conducted by Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

M. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the remedy set forth in the ROD and the Work to be performed by Settling Defendants shall constitute a response action taken or ordered by the President for which judicial review shall be limited to the administrative record.

N. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby 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 [if the State is a party and asserts state law claims in its complaint, insert: , 1367,] and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal

jurisdiction over Settling Defendants. 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 applies to and 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 status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendants shall provide a copy of this Consent Decree to each contractor hired to perform the Work required by this Consent Decree and to each person representing any Settling Defendant with respect to the Site or the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work in accordance with the terms of this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

### IV. DEFINITIONS

4. Unless otherwise expressly provided in this Consent Decree, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or its appendices, the following definitions shall apply solely for purposes of this Consent Decree:

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

“Consent Decree” shall mean this Consent Decree and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

“Day” or “day” shall mean a calendar day unless expressly stated to be a working day. The term “working day” shall mean a day other than a Saturday, Sunday, or federal or state holiday. In computing any period of time under this Consent Decree, where the last day would

fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next working day.

“DOJ” shall mean the United States Department of Justice and its successor departments, agencies, or instrumentalities.

“Effective Date” shall mean the date upon which this Consent Decree is entered by the Court as recorded on the Court docket, or, if the Court instead issues an order approving the Consent Decree, the date such order is recorded on the Court docket.

“EPA” shall mean the United States Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

[“\_\_\_\_\_” shall mean the **[insert name of State pollution control agency or environmental protection agency]** and any successor departments or agencies of the State.]

**[NOTE: If EPA determines that it is appropriate for the Consent Decree to provide orphan share compensation through forgiveness of RD/RA oversight costs, insert the following “Future Oversight Costs” definition in addition to the standard “Future Response Costs” definition that follows and see Paragraph 55 (Payments by Settling Defendants for Future Response Costs) to understand use of the terms in context.]**

[“Future Oversight Costs” shall mean that portion of Future Response Costs that EPA incurs in monitoring and supervising Settling Defendants’ performance of the Work to determine whether such performance is consistent with the requirements of this Consent Decree, including costs incurred in reviewing plans, reports, and other deliverables submitted pursuant to this Consent Decree, as well as costs incurred in overseeing implementation of the Work; however, Future Oversight Costs do not include, *inter alia*: the costs incurred by the United States pursuant to Paragraph 9 (Notice to Successors-in-Title and Transfers of Real Property), Sections VII (Remedy Review), IX (Access and Institutional Controls), XV (Emergency Response), and Paragraph 48 (Funding for Work Takeover), or the costs incurred by the United States in enforcing the terms of this Consent Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section XX (Dispute Resolution) and all litigation costs.]

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports, and other deliverables submitted pursuant to this Consent Decree, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 9 (Notice to Successors-in-Title and Transfers of Real Property), Sections VII (Remedy Review), IX (Access and Institutional Controls) (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure, implement, monitor,

maintain, or enforce Institutional Controls including, but not limited to, the amount of just compensation), XV (Emergency Response), Paragraph 48 (Funding for Work Takeover), and Section XXX (Community Involvement). Future Response Costs shall also include all Interim Response Costs, [and] all Interest on those Past Response Costs Settling Defendants have agreed to pay under this Consent Decree that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from [insert the date identified in the Past Response Costs definition] to the Effective Date [include the following text if ATSDR is currently conducting activities or anticipates doing so in the future: , and Agency for Toxic Substances and Disease Registry (“ATSDR”) costs regarding the Site].

“Institutional Controls” or “ICs” shall mean Proprietary Controls and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that: (a) limit land, water, and/or resource use to minimize the potential for human exposure to Waste Material at or in connection with the Site; (b) limit land, water, and/or resource use to implement, ensure non-interference with, or ensure the protectiveness of the Remedial Action; and/or (c) provide information intended to modify or guide human behavior at or in connection with the Site.

[“Institutional Control Implementation and Assurance Plan” or “ICIAP” shall mean the plan for implementing, maintaining, monitoring, and reporting on the Institutional Controls set forth in the ROD, prepared in accordance with the Statement of Work (“SOW”).]

**[NOTE: If EPA determines that an ICIAP is required, insert ICIAP definition above and some version of the following text in the SOW, and include, in Paragraphs 26 and 27, the optional text addressing the ICIAP’s requirements. The text for the SOW is as follows:]**

Settling Defendants shall, within \_\_ days after the Effective Date, submit a proposed ICIAP. The ICIAP shall be a plan to implement the Institutional Controls set forth in the ROD. The ICIAP shall include, but shall not be limited to: (a) a description of the pathways for potential human exposure to Waste Material that may remain during and/or after completion of construction of the Remedial Action; (b) a description of the areas where human activities should be restricted, including legal descriptions for such areas, sample maps, and a plan for preparing final survey maps (e.g., survey of hazardous waste cap); (c) a list of properties where Proprietary Controls are needed; (d) a description of the proposed Institutional Controls and their purpose; (e) a description of the proposed duration of each Institutional Control and an explanation for such duration; (f) a schedule for implementing each Institutional Control; (g) a schedule for completing title work; (h) draft Proprietary Controls enforceable under state law to implement the proposed land/water use restrictions; (i) a description of the authority of each affected property owner to implement each Proprietary Control, including title insurance commitments or other title evidence acceptable to EPA for proposed Proprietary Controls; (j) a description of all prior liens and encumbrances existing on any real property that may affect the Proprietary Controls or the protectiveness of the remedy, and a plan for the release or subordination of any such liens and encumbrances (unless EPA waives the release or subordination of such liens or encumbrances); (k) a plan for monitoring, maintaining, reporting on, and ensuring the continued efficacy of the Institutional Controls and a contingency plan in the event ICs are ineffective; and

(l) a schedule for annual certifications regarding whether the Institutional Controls remain in place, regarding whether the Institutional Controls have been complied with, and regarding enforcement of the Institutional Controls. The ICIAP shall be effective upon EPA's [issuance/approval], and shall become an enforceable requirement of the Consent Decree.]

"Interim Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the United States in connection with the Site between **[insert the date identified in the Past Response Costs definition]** and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

"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.

**[NOTE: If the Consent Decree includes provisions under which Settling Defendants will receive disbursement from an EPA special account, the following three definitions should be added. If it does not include a disbursement, but does require payments to be made to the Site's Special Account, only the second definition should be added.]**

["Interest Earned" shall mean interest earned on amounts in the [Site Name] Disbursement Special Account, which shall be computed monthly at a rate based on the annual return on investments of the EPA Hazardous Substance Superfund. The applicable rate of interest shall be the rate in effect at the time the interest accrues.]

["[Site Name] Special Account" shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and **[identify prior settlement under which EPA established the special account].**]

["[Site Name] Disbursement Special Account" shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and Paragraph 62.]

**[NOTE: If including provisions for Settling Defendants and SFAs, if any, to prepay Future Response Costs in accordance with Paragraph 55 (Payments by Settling Defendants for Future Response Costs), add the following definition.]**

["[Site Name] Future Response Costs Special Account" shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and Paragraph 55.c (Prepayment of Future Response Costs).]



**[NOTE: If including Paragraph 107 (Claims Against MSW Generators and Transporters), add the following definition.]**

["Municipal Solid Waste" or "MSW" shall mean waste material: (a) generated by a household (including a single or multifamily residence); or (b) generated by a commercial, industrial, or institutional entity, to the extent that the waste material (1) is essentially the same as waste normally generated by a household; (2) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (3) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.]

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Operation and Maintenance" or "O&M" shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to Section VI (Performance of the Work by Settling Defendants) and the SOW [, and maintenance, monitoring, and enforcement of Institutional Controls as provided in the ICIAP].

"Owner Settling Defendant" shall mean [\_\_\_\_\_].

"Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

"Parties" shall mean the United States [, the State of \_\_\_\_\_,] and Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through **[insert the date of the most recent cost update]**, plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in the ROD and the SOW and any modified standards established pursuant to this Consent Decree.

"Plaintiff[s]" shall mean the United States [and the State of \_\_\_\_\_].

**[NOTE: For remedies such as pump and treat restoration remedies, for which some O&M (operation of the pump and treat system) is needed in order to meet the performance standards, delete the standard definition of O&M above and instead use the two optional definitions for Pre- and Post-Achievement O&M below. Also use the optional language for Pre- and Post-Achievement O&M as noted throughout the Decree. Please note that use of these optional definitions does not change the timing of the Certification of Completion of the Remedial Action under Paragraph 50 or the effective date of the future liability**

**covenant under Paragraph 94. These definitions, when used with the alternative definition of Remedial Action shown below, simply clarify that some O&M activities – those necessary to achieve Performance Standards – are within the Consent Decree’s definition of Remedial Action, and some O&M activities – those necessary to maintain the effectiveness of the Remedial Action after Performance Standards are met – are outside the Consent Decree’s definition of Remedial Action.]**

[“Pre-Achievement O&M” shall mean all operation and maintenance activities required for the Remedial Action to achieve Performance Standards, as provided under the Operation and Maintenance Plan approved or developed by EPA pursuant to Section VI (Performance of the Work by Settling Defendants) and the SOW [, and maintenance, monitoring, and enforcement of Institutional Controls as provided in the ICIAP,] until Performance Standards are met.]

[“Post-Achievement O&M” shall mean all activities required to maintain the effectiveness of the Remedial Action after Performance Standards are met, as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to Section VI (Performance of the Work by Settling Defendants) and the SOW [, and maintenance, monitoring, and enforcement of Institutional Controls after Performance Standards are met, as provided in the ICIAP].]

**[NOTE: If using optional O&M definitions, modify SOW to provide that the O&M Plan includes separate descriptions for Pre-Achievement O&M activities and Post-Achievement O&M activities.]**

“Proprietary Controls” shall mean easements or covenants running with the land that (a) limit land, water, or resource use and/or provide access rights and (b) are created pursuant to common law or statutory law by an instrument that is recorded by the owner in the appropriate land records office.

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the [Site or \_\_ Operable Unit at the Site] signed on \_\_\_\_\_, 20\_\_, by the Regional Administrator, EPA Region \_\_\_\_, or his/her delegate, and all attachments thereto. The ROD is attached as Appendix A. **[NOTE: Modify this definition to reference any ROD Amendments or any Explanations of Significant Differences issued prior to the Effective Date.]**

“Remedial Action” shall mean all activities Settling Defendants are required to perform under the Consent Decree to implement the ROD, in accordance with the SOW, the final approved remedial design submission, the approved Remedial Action Work Plan, and other plans approved by EPA, including implementation of Institutional Controls, until the Performance Standards are met, and excluding performance of the Remedial Design, O&M, and the activities required under Section XXVI (Retention of Records).

**[NOTE: If using optional Pre- and Post-Achievement O&M definitions, also use alternative Remedial Action definition below.]**

["Remedial Action" shall mean all activities Settling Defendants are required to perform under the Consent Decree to implement the ROD, in accordance with the SOW, the final Remedial Design and Remedial Action Work Plans, and other plans approved by EPA, including Pre-Achievement O&M and implementation of Institutional Controls, until the Performance Standards are met, and excluding performance of the Remedial Design, Post-Achievement O&M, and the activities required under Section XXVI (Retention of Records).]

"Remedial Action Work Plan" shall mean the document developed pursuant to Paragraph 12 (Remedial Action) and approved by EPA, and any modifications thereto.

"Remedial Design" shall mean those activities to be undertaken by Settling Defendants to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

"Remedial Design Work Plan" shall mean the document developed pursuant to Paragraph 11 (Remedial Design) and approved by EPA, and any modifications thereto.

"Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

"Settling Defendants" shall mean those Parties identified in Appendix D.

**[NOTE: If Settling Federal Agencies are making payments toward past and/or future response costs incurred by Settling Defendants, please add definitions for "Settling Defendants' Past Response Costs" and "Settling Defendants' Future Response Costs." DOJ's Environmental Defense Section will generally take the lead in negotiating these definitions.]**

["Settling Federal Agencies" shall mean **[insert names of specific federal entities whose liability is being resolved to make clear that only those entities and each of their direct successors are included]** and their successor departments, agencies, or instrumentalities.]

"Site" shall mean the \_\_\_\_\_ Superfund Site, [encompassing approximately \_\_ acres, located at [address or description of location] in [name of city], \_\_\_\_\_ County, [name of state], and depicted generally on the map attached as Appendix C.]

**[NOTE: The definition of "Site" affects the scope of the covenants not to sue. The definition used should conform with the intended scope of the covenants and the general reservations provided in Section XXII (Covenants by Plaintiff[s]).]**

**[NOTE: Definitions relating to Special Accounts are located after "Interest Earned" above.]**

"State" [or "Commonwealth"] shall mean the State [or Commonwealth] of \_\_\_\_\_.

**[NOTE: If the State is a party to the Consent Decree and the State’s costs are being paid under the Decree, please add definitions for “State Past Response Costs” and “State Future Response Costs.”]**

“Statement of Work” or “SOW” shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and [Pre- and Post-Achievement] O&M at the Site, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

“Supervising Contractor” shall mean the principal contractor retained by Settling Defendants to supervise and direct the implementation of the Work under this Consent Decree.

“Transfer” shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA, [the Settling Federal Agencies,] [and any federal natural resource trustee].

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); [(3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27);] and (4) any [“hazardous material”] under [**insert appropriate State statutory terminology and citation**].

“Work” shall mean all activities and obligations Settling Defendants are required to perform under this Consent Decree, except the activities required under Section XXVI (Retention of Records).

## V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment by the design and implementation of response actions at the Site by Settling Defendants, to pay response costs of the Plaintiff[s], and to resolve the claims of Plaintiff[s] against Settling Defendants [**if SFAs, insert:** and the claims of the [State and] Settling Defendants that have been or could have been asserted against the United States with regard to this Site] as provided in this Consent Decree.

6. Commitments by Settling Defendants [and Settling Federal Agencies].

a. Settling Defendants shall finance and perform the Work in accordance with this Consent Decree, the ROD, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth in this Consent Decree or developed by Settling Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall pay the United States [and the State] for Past Response Costs and Future Response Costs as

provided in this Consent Decree. [Settling Federal Agencies shall pay EPA for Past Response Costs and Future Response Costs, [the State for its response costs, and Settling Defendants for their response costs,] as provided in this Consent Decree.]

b. The obligations of Settling Defendants to finance and perform the Work, including obligations to pay amounts due under this Consent Decree, are joint and several. In the event of the insolvency of any Settling Defendant or the failure by any Settling Defendant to implement any requirement of this Consent Decree, the remaining Settling Defendants shall complete all such requirements.

7. Compliance With Applicable Law. All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be deemed to be consistent with the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. Settling Defendants may seek relief under the provisions of Section XIX (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in Paragraph 8.a and required for the Work, provided that they have submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

**[NOTE: Paragraph 9.a should be used for consent decrees in which there is an Owner Settling Defendant, no ICs have been implemented on the property, and the consent decree does not require the recording of proprietary controls pursuant to the optional access and institutional controls section. Paragraphs 9.b-9.d should be used where there is an Owner Settling Defendant.]**

9. [Notice to Successors-in-Title and Transfers of Real Property.

a. For any real property owned or controlled by Owner Settling Defendant located at the Site, Owner Settling Defendant shall, within 15 days after the Effective Date,

submit to EPA for review and approval a proposed notice to be filed with the appropriate land records office that provides a description of the real property and provides notice to all successors-in-title that the real property is part of the Site, that EPA has selected a remedy for the Site, and that potentially responsible parties have entered into a Consent Decree requiring implementation of the remedy. The notice also shall describe the land use restrictions, if any, set forth in Paragraphs 26.b and 27.a(2) and shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. Owner Settling Defendant shall record the notice within ten days after EPA's approval of the notice. Owner Settling Defendant shall provide EPA with a certified copy of the recorded notice within ten days after recording such notice.

b. Owner Settling Defendant shall, at least 60 days prior to any Transfer of any real property located at the Site, give written notice: (1) to the transferee regarding the Consent Decree and any Institutional Controls regarding the real property; and (2) to EPA and the State regarding the proposed Transfer, including the name and address of the transferee and the date on which the transferee was notified of the Consent Decree and any Institutional Controls.

c. Owner Settling Defendant may Transfer any real property located at the Site only if: (1) any Proprietary Controls required by Paragraph 26.c have been recorded with respect to the real property; or (2) Owner Settling Defendant has obtained an agreement from the transferee, enforceable by Settling Defendants and the United States, to (i) allow access and restrict land/water use, pursuant to Paragraphs 27.a(1) and 27.a(2), (ii) record any Proprietary Controls on the real property, pursuant to Paragraph 27.a(3), and (iii) subordinate its rights to any such Proprietary Controls, pursuant to Paragraph 27.a(3), and EPA has approved the agreement in writing. If, after a Transfer of the real property, the transferee fails to comply with the agreement provided for in this Paragraph 9.c, Owner Settling Defendant shall take all reasonable steps to obtain the transferee's compliance with such agreement. The United States may seek the transferee's compliance with the agreement and/or assist Owner Settling Defendant in obtaining compliance with the agreement. Settling Defendants shall reimburse the United States under Section XVI (Payments for Response Costs), for all costs incurred, direct or indirect, by the United States regarding obtaining compliance with such agreement, including, but not limited to, the cost of attorney time.

d. In the event of any Transfer of real property located at the Site, unless the United States otherwise consents in writing, Settling Defendants shall continue to comply with their obligations under the Consent Decree, including, but not limited to, their obligation to provide and/or secure access, to implement, maintain, monitor, and report on Institutional Controls, and to abide by such Institutional Controls.]

## VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

**[NOTE: Paragraphs 10-12, below, may be modified on a site-by-site basis to reflect Site needs and Regional practice.]**

10. [Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendants pursuant to Sections VI (Performance of the Work by Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling, and Data Analysis), IX (Access and Institutional Controls), and XV (Emergency Response) shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA [after a reasonable opportunity for review and comment by the State]. Within ten days after the lodging of this Consent Decree, Settling Defendants shall notify EPA [and the State] in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Settling Defendants shall demonstrate that the proposed contractor has a quality assurance system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001, reissued May 2006) or equivalent documentation as determined by EPA. EPA will issue a notice of disapproval or an authorization to proceed regarding hiring of the proposed contractor. If at any time thereafter, Settling Defendants propose to change a Supervising Contractor, Settling Defendants shall give such notice to EPA [and the State] and must obtain an authorization to proceed from EPA [, after a reasonable opportunity for review and comment by the State,] before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree. **[If Settling Defendants' Project Coordinator has been selected prior to signature of the Consent Decree, replace the foregoing text with:** All aspects of the Work to be performed by Settling Defendants pursuant to Sections VI (Performance of the Work by Settling Defendants), VIII (Quality Assurance, Sampling, and Data Analysis), IX (Access and Institutional Controls), and XV (Emergency Response) shall be under the direction and supervision of the Supervising Contractor. Settling Defendants have selected and, after reasonable opportunity for review and comment by the State, EPA has issued an authorization to proceed regarding hiring of the following person as Supervising Contractor: **[insert name and contact information]**. If at any time hereafter, Settling Defendants propose to change this Supervising Contractor, Settling Defendants shall give such notice to EPA [and the State] and must obtain an authorization to proceed from EPA [, after a reasonable opportunity for review and comment by the State,] before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree. Settling Defendants shall demonstrate that the proposed replacement contractor has a quality assurance system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001, reissued May 2006) or equivalent documentation as determined by EPA.]

b. If EPA disapproves a proposed [if Alternate text in Paragraph 10.a is used: replacement] Supervising Contractor, EPA will notify Settling Defendants in writing. Settling Defendants shall submit to EPA [and the State] a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days after receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendants may select any contractor from that list that is not disapproved and shall notify EPA [and the State] of the name of the contractor selected within 21 days after EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents Settling Defendants from meeting one or more deadlines in a plan approved by EPA pursuant to this Consent Decree, Settling Defendants may seek relief under Section XIX (Force Majeure).]

#### 11. Remedial Design.

a. Within \_\_ days after EPA's issuance of an authorization to proceed pursuant to Paragraph 10 (Selection of Supervising Contractor), Settling Defendants shall submit to EPA and the State a work plan for the design of the Remedial Action at the Site ("Remedial Design Work Plan"). The Remedial Design Work Plan shall provide for design of the remedy set forth in the ROD, in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the ROD, this Consent Decree, and/or the SOW. Upon its approval by EPA, the Remedial Design Work Plan shall be incorporated into and enforceable under this Consent Decree. Within \_\_ days after EPA's issuance of an authorization to proceed under Paragraph 10, Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field design activities that conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the SOW, including, but not limited to, plans and schedules for the completion of: [List all items that should be included in the Remedial Design Work Plan. This list will be based on site-specific factors and shall include the following items: (1) design sampling and analysis plan (including, but not limited to, a Remedial Design Quality Assurance Project Plan in accordance with Section VIII (Quality Assurance, Sampling, and Data Analysis)); (2) a Construction Quality Assurance Plan ("CQAP"); [and (3) an Institutional Control Implementation and Assurance Plan ("ICIAP");] and may also include: (i) a treatability study, (ii) a Pre-design Work Plan, (iii) a preliminary design submission, (iv) an intermediate design submission, and (v) a pre-final/final design submission.] In addition, the Remedial Design Work Plan shall include a schedule for completion of the Remedial Action Work Plan.

c. Upon approval of the Remedial Design Work Plan by EPA, after a reasonable opportunity for review and comment by the State, and submission of the Health and



Safety Plan for all field activities to EPA and the State, Settling Defendants shall implement the Remedial Design Work Plan. Settling Defendants shall submit to EPA and the State all plans, reports, and other deliverables required under the approved Remedial Design Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans, Reports, and Other Deliverables). Unless otherwise directed by EPA, Settling Defendants shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.

d. The preliminary design submission shall include, at a minimum, the following: (1) design criteria; (2) results of treatability studies; (3) results of additional field sampling and pre-design work; (4) project delivery strategy; (5) preliminary plans, drawings, and sketches; (6) required specifications in outline form; and (7) preliminary construction schedule.

e. The intermediate design submission, if required by EPA or if independently submitted by Settling Defendants, shall be a continuation and expansion of the preliminary design.

f. The pre-final/final design submission shall include, at a minimum, the following: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) CQAP; (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards); and (5) Contingency Plan. The CQAP, which shall detail the approach to quality assurance during construction activities at the Site, shall specify a quality assurance official, independent of the Supervising Contractor, to conduct a quality assurance program during the construction phase of the project.]

12. Remedial Action.

a. Within \_\_ days after the approval of the final design submission, Settling Defendants shall submit to EPA and the State a work plan for the performance of the Remedial Action at the Site (“Remedial Action Work Plan”). The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the ROD and achievement of the Performance Standards, in accordance with this Consent Decree, the ROD, the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan and approved by EPA. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and enforceable under this Consent Decree. At the same time as they submit the Remedial Action Work Plan, Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field activities required by the Remedial Action Work Plan that conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Action Work Plan shall include the following: [List all activities for which methodologies, plans, and schedules should be included in the Remedial Action Work Plan. This list will be based on site-specific factors and shall include the following, as appropriate: (1) schedule for completion of the Remedial Action; (2) method for selection of the contractor; (3) schedule for developing and submitting other required Remedial Action plans;

(4) groundwater monitoring plan; (5) methods for satisfying permitting requirements; (6) methodology for implementing the Operation and Maintenance Plan; (7) methodology for implementing the Contingency Plan; (8) tentative formulation of the Remedial Action team; (9) CQAP (by construction contractor); and (10) procedures and plans for the decontamination of equipment and the disposal of contaminated materials.] The Remedial Action Work Plan also shall include the methodology for implementing the CQAP and a schedule for implementing all Remedial Action tasks identified in the final design submission and shall identify the initial formulation of Settling Defendants' Remedial Action project team (including, but not limited to, the Supervising Contractor).

c. Upon approval of the Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by the State, Settling Defendants shall implement the activities required under the Remedial Action Work Plan. Settling Defendants shall submit to EPA and the State all reports and other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans, Reports, and Other Deliverables). Unless otherwise directed by EPA, Settling Defendants shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.]

13. Settling Defendants shall continue to implement the Remedial Action until the Performance Standards are achieved. Settling Defendants shall implement [Post-Achievement] O&M for so long thereafter as is required by this Consent Decree.

14. Modification of SOW or Related Work Plans.

a. If EPA determines that it is necessary to modify the work specified in the SOW and/or in work plans developed pursuant to the SOW to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, and such modification is consistent with the scope of the remedy set forth in the ROD, then EPA may issue such modification in writing and shall notify Settling Defendants of such modification. For the purposes of this Paragraph and Paragraphs 50 (Completion of the Remedial Action) and 51 (Completion of the Work) only, the "scope of the remedy set forth in the ROD" is: [**insert site-specific description here**]. If Settling Defendants object to the modification they may, within 30 days after EPA's notification, seek dispute resolution under Paragraph 79 (Record Review).

b. The SOW and/or related work plans shall be modified: (1) in accordance with the modification issued by EPA; or (2) if Settling Defendants invoke dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this Consent Decree, and Settling Defendants shall implement all work required by such modification. Settling Defendants shall incorporate the modification into the Remedial Design or Remedial Action Work Plan under Paragraph 11 (Remedial Design) or Paragraph 12 (Remedial Action), as appropriate.

c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

15. Nothing in this Consent Decree, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by Plaintiff[s] that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

16. Off-Site Shipment of Waste Material.

a. Settling Defendants may ship Waste Material from the Site to an off-Site facility only if they verify, prior to any shipment, that the off-Site facility is operating in compliance with the requirements of Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440, by obtaining a determination from EPA that the proposed receiving facility is operating in compliance with 42 U.S.C. § 9621(d)(3) and 40 C.F.R. § 300.440.

b. Settling Defendants may ship Waste Material from the Site to an out-of-state waste management facility only if, prior to any shipment, they provide written notice to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator. This notice requirement shall not apply to any off-Site shipments when the total quantity of all such shipments will not exceed ten cubic yards. The written notice shall include the following information, if available: (1) the name and location of the receiving facility; (2) the type and quantity of Waste Material to be shipped; (3) the schedule for the shipment; and (4) the method of transportation. Settling Defendants also shall notify the state environmental official referenced above and the EPA Project Coordinator of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. Settling Defendants shall provide the written notice after the award of the contract for Remedial Action construction and before the Waste Material is shipped.

## VII. REMEDY REVIEW

**[NOTE: This Section may be modified or omitted in consent decrees where the United States is not giving a site-wide covenant subject to pre- and post-certification reservations (e.g., operable unit consent decrees that do not address the sole or final operable unit ("OU") at the Site). This Section may also be omitted where no hazardous substances, pollutants, or contaminants will remain at the Site after completion of the Remedial Action.]**

17. Periodic Review. Settling Defendants shall conduct any studies and investigations that EPA requests in order to permit EPA to conduct reviews of whether the Remedial Action is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations.

18. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select

further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

19. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, 42 U.S.C. § 9613(k)(2) or 9617, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

20. Settling Defendants' Obligation To Perform Further Response Actions. If EPA selects further response actions relating to the Site, EPA may require Settling Defendants to perform such further response actions, but only to the extent that the reopener conditions in Paragraph 96 or Paragraph 97 (United States' Pre- and Post-Certification Reservations) are satisfied. Settling Defendants may invoke the procedures set forth in Section XX (Dispute Resolution) to dispute (a) EPA's determination that the reopener conditions of Paragraph 96 or Paragraph 97 are satisfied, (b) EPA's determination that the Remedial Action is not protective of human health and the environment, or (c) EPA's selection of the further response actions. Disputes pertaining to whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 79 (Record Review).

21. Submission of Plans. If Settling Defendants are required to perform further response actions pursuant to Paragraph 20, they shall submit a plan for such response action to EPA for approval in accordance with the procedures of Section VI (Performance of the Work by Settling Defendants). Settling Defendants shall implement the approved plan in accordance with this Consent Decree.

**[NOTE: The preceding two Paragraphs (20 and 21) may be omitted: (1) for Settling Defendants whose liability has been established by court order or judgment; or (2) for Settling Defendants who agree to admit or not to contest liability in the event that the United States institutes an action for further relief based on the reservations set forth in Paragraphs 96 or 97 (United States' Pre- and Post-Certification Reservations) of the Covenants by Plaintiff[s].]**

## VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

### 22. Quality Assurance.

a. Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all [treatability, design, compliance, and monitoring] samples in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001, reissued May 2006), "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/240/R-02/009, December 2002), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification.

b. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan (“QAPP”) that is consistent with the SOW, the NCP, and [applicable guidance documents]. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Consent Decree. Settling Defendants shall ensure that EPA [and State] personnel and its [their] authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Consent Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods that are documented in the “USEPA Contract Laboratory Program Statement of Work for Inorganic Analysis, ILM05.4,” and the “USEPA Contract Laboratory Program Statement of Work for Organic Analysis, SOM01.2,” and any amendments made thereto during the course of the implementation of this Consent Decree; however, upon approval by EPA, after opportunity for review and comment by the State, Settling Defendants may use other analytical methods that are as stringent as or more stringent than the CLP-approved methods. Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent quality assurance/quality control (“QA/QC”) program. Settling Defendants shall use only laboratories that have a documented Quality System that complies with ANSI/ASQC E4-1994, “Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs” (American National Standard, January 5, 1995), and “EPA Requirements for Quality Management Plans (QA/R-2)” (EPA/240/B-01/002, March 2001, reissued May 2006) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (“NELAP”) as meeting the Quality System requirements. Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Consent Decree are conducted in accordance with the procedures set forth in the QAPP approved by EPA.

23. Upon request, Settling Defendants shall allow split or duplicate samples to be taken by EPA [and the State] or its [their] authorized representatives. Settling Defendants shall notify EPA [and the State] not less than [28] days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA [and the State] shall have the right to take any additional samples that EPA [or the State] deem[s] necessary. Upon request, EPA [and the State] shall allow Settling Defendants to take split or duplicate samples of any samples it [they] take[s] as part of Plaintiff[']s['] oversight of Settling Defendants' implementation of the Work.

24. Settling Defendants shall submit to EPA [and the State] \_\_\_ copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

25. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its [their] information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

#### IX. ACCESS AND INSTITUTIONAL CONTROLS

**[NOTE: Paragraphs 26.a and 27.a(1) should routinely be included in consent decrees. Paragraphs 26.b and 27.b should be included if EPA determines that land/water use restrictions are needed on real property owned by settling or non-settling landowners, respectively. Paragraphs 26.c and 27.c should be included if EPA determines that Proprietary Controls are needed on real property owned by settling or non-settling landowners, respectively. Additional changes to this section of the model will be needed in the event that access or institutional controls are needed on or affect a federal facility.]**

26. If the Site, or any other real property where access or land/water use restrictions are needed, is owned or controlled by any of Settling Defendants:

a. such Settling Defendants shall, commencing on the date of lodging of the Consent Decree, provide the United States [, the State,] and the other Settling Defendants, and their representatives, contractors, and subcontractors, with access at all reasonable times to the Site, or such other real property, to conduct any activity regarding the Consent Decree including, but not limited to, the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States [or the State];
- (3) Conducting investigations regarding contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Site;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved CQAP;
- (7) Implementing the Work pursuant to the conditions set forth in Paragraph 100 (Work Takeover);
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXV (Access to Information);

(9) Assessing Settling Defendants' compliance with the Consent Decree;

(10) Determining whether the Site or other real property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Consent Decree; and

(11) Implementing, monitoring, maintaining, reporting on, and enforcing any Institutional Controls [and the requirements of the ICIAP].

b. commencing on the date of lodging of the Consent Decree, such Settling Defendants shall not use the Site, or such other real property, in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material or interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action or [Post-Achievement] O&M. The restrictions shall include, but not be limited to: **[list specific restrictions]**; and

c. such Settling Defendants shall:

(1) execute and record in the appropriate land records office Proprietary Controls that: (i) grant a right of access to conduct any activity regarding the Consent Decree including, but not limited to, those activities listed in Paragraph 26.a; and (ii) grant the right to enforce the land/water use restrictions set forth in Paragraph 26.b, including, but not limited to, the specific restrictions listed therein [and any land/water use restrictions listed in the ICIAP], as further specified in this Paragraph 26.c. The Proprietary Controls shall be granted to one or more of the following persons, as determined by EPA: (i) the United States, on behalf of EPA, and its representatives; (ii) the State and its representatives; (iii) the other Settling Defendants and their representatives; and/or (iv) other appropriate grantees. The Proprietary Controls, other than those granted to the United States, shall include a designation that EPA (and/or the State as appropriate) is a third-party beneficiary, allowing EPA to maintain the right to enforce the Proprietary Controls without acquiring an interest in real property. [If any Proprietary Controls are granted to any Settling Defendants pursuant to this Paragraph 26.c(1), then such Settling Defendants shall monitor, maintain, report on, and enforce such Proprietary Controls.]

**[NOTE: Generally, EPA should be listed as a third-party beneficiary unless state law explicitly rejects such third-party beneficiary rights in connection with real estate instruments. See "Institutional Controls: Third-Party Beneficiary Rights in Proprietary Controls," April 19, 2004, available at:**

**<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ic-thd-pty-rights.pdf>.**

**If the real property affected by the Proprietary Control is in a jurisdiction that has adopted the Uniform Environmental Covenants Act ("UECA"), the draft Proprietary Control**

**should meet the requirements of the applicable state statute implementing UECA, including the designation of EPA as “Agency,” and EPA need not be designated as a third-party beneficiary. Note that certain jurisdictions have statutes governing the recording of Proprietary Controls that are not based upon UECA.]**

(2) [within \_\_ days after the Effective Date / in accordance with the schedule set forth in the ICIAP], submit to EPA for review and approval regarding such real property: (i) draft Proprietary Controls [, in substantially the form attached hereto as Appendix E,] that are enforceable under state law; and (ii) a current title insurance commitment or other evidence of title acceptable to EPA, that shows title to the land affected by the Proprietary Controls to be free and clear of all prior liens and encumbrances (except when EPA waives the release or subordination of such prior liens or encumbrances or when, despite best efforts, Settling Defendants are unable to obtain release or subordination of such prior liens or encumbrances).

(3) within 15 days after EPA’s approval and acceptance of the Proprietary Controls and the title evidence, update the title search and, if it is determined that nothing has occurred since the effective date of the commitment, or other title evidence, to affect the title adversely, record the Proprietary Controls with the appropriate land records office. Within 30 days after recording the Proprietary Controls, such Settling Defendants shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded Proprietary Controls showing the clerk’s recording stamps. If the Proprietary Controls are to be conveyed to the United States, the Proprietary Controls and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title shall be obtained as required by 40 U.S.C. § 3111.

27. If the Site, or any other real property where access and/or land/water use restrictions are needed, is owned or controlled by persons other than any Settling Defendant:

a. Settling Defendants shall use best efforts to secure from such persons:

(1) an agreement to provide access thereto for the United States [, the State,] and Settling Defendants, and their representatives, contractors, and subcontractors, to conduct any activity regarding the Consent Decree including, but not limited to, the activities listed in Paragraph 26.a;

(2) an agreement, enforceable by Settling Defendants and the United States, to refrain from using the Site, or such other real property, in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material or interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action. The agreement shall include, but not be limited to, the land/water use restrictions listed in Paragraph 26.b; and



(3) the execution and recordation in the appropriate land records office of Proprietary Controls, that (i) grant a right of access to conduct any activity regarding the Consent Decree including, but not limited to, those activities listed in Paragraph 26.a, and (ii) grant the right to enforce the land/water use restrictions set forth in Paragraph 26.b, including, but not limited to, the specific restrictions listed therein [and any land/water use restrictions listed in the ICIAP]. The Proprietary Controls shall be granted to one or more of the following persons, as determined by EPA: (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) Settling Defendants and their representatives, and/or (iv) other appropriate grantees. The Proprietary Controls, other than those granted to the United States, shall include a designation that EPA (and/or the State as appropriate) is a third party beneficiary, allowing EPA to maintain the right to enforce the Proprietary Controls without acquiring an interest in real property. [If any Proprietary Controls are granted to any Settling Defendants pursuant to this Paragraph 27.a(3), then such Settling Defendants shall monitor, maintain, report on, and enforce such Proprietary Controls.]

**[NOTE: Generally, EPA should be listed as a third-party beneficiary unless state law explicitly rejects such third-party beneficiary rights in connection with real estate instruments. See “Institutional Controls: Third-Party Beneficiary Rights in Proprietary Controls,” April 19, 2004, available at:**

**<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ic-thd-pty-rights.pdf>.**

**If the real property affected by the Proprietary Controls is in a jurisdiction that has adopted UECA, the draft Proprietary Controls should meet the requirements of the applicable state statute implementing UECA, including the designation of EPA as “Agency,” and EPA need not be designated as a third-party beneficiary. Note that certain jurisdictions have statutes governing the recording of Proprietary Controls that are not based upon UECA.]**

b. Within \_\_\_ days after the Effective Date [in accordance with the schedule set forth in the ICIAP], Settling Defendants shall submit to EPA for review and approval regarding such property: (i) draft Proprietary Controls [, in substantially the form attached hereto as Appendix E,] that are enforceable under state law; and (ii) a current title insurance commitment, or other evidence of title acceptable to EPA, that shows title to the land affected by the Proprietary Controls to be free and clear of all prior liens and encumbrances (except when EPA waives the release or subordination of such prior liens or encumbrances or when, despite best efforts, Settling Defendants are unable to obtain release or subordination of such prior liens or encumbrances).

c. Within 15 days of EPA’s approval and acceptance of the Proprietary Controls and the title evidence, Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment, or other title evidence, to affect the title adversely, record the Proprietary Controls with the appropriate land records office. Within 30 days after the recording of the Proprietary Controls, Settling

Defendants shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded Proprietary Controls showing the clerk's recording stamps. If the Proprietary Controls are to be conveyed to the United States, the Proprietary Controls and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title shall be obtained as required by 40 U.S.C. § 3111.

28. For purposes of Paragraphs 26.c(2), 27.a and 27.b, "best efforts" includes the payment of reasonable sums of money to obtain access, an agreement to restrict land/water use, Proprietary Controls, and/or an agreement to release or subordinate a prior lien or encumbrance. **[NOTE: The preceding sentence may be deleted if the real property where access or land/water use restrictions are needed is owned by a non-settling party whom EPA believes is a PRP. See guidance entitled "Model RD/RA Consent Decree: Acceptable Modifications to Model Language (Directive No. 2)," March 25, 1992.]** If, within \_\_ days after **[modify as appropriate:** the Effective Date / EPA's request for Proprietary Controls / EPA's approval of the ICIAP], Settling Defendants have not: (a) obtained agreements to provide access, restrict land/water use, or record Proprietary Controls, as required by Paragraph 27.a(1), 27.a(2), or 27.a(3); or (b) obtained, pursuant to Paragraph 26.c(2) or 27.b, agreements from the holders of prior liens or encumbrances to release or subordinate such liens or encumbrances to the Proprietary Controls, Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendants have taken to attempt to comply with Paragraph 26 or 27. The United States may, as it deems appropriate, assist Settling Defendants in obtaining access, agreements to restrict land/water use, Proprietary Controls, or the release or subordination of a prior lien or encumbrance. Settling Defendants shall reimburse the United States under Section XVI (Payments for Response Costs) for all costs incurred, direct or indirect, by the United States in obtaining such access, agreements to restrict land/water use, Proprietary Controls, and/or the release/subordination of prior liens or encumbrances including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.

29. If EPA determines that Institutional Controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls are needed at or in connection with the Site, Settling Defendants shall cooperate with EPA's [and the State's] efforts to secure and ensure compliance with such governmental controls.

30. Notwithstanding any provision of the Consent Decree, the United States [and the State] retain[s] all of its [their] access authorities and rights, as well as all of its [their] rights to require Institutional Controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

## X. REPORTING REQUIREMENTS

31. In addition to any other requirement of this Consent Decree, Settling Defendants shall submit to EPA and the State \_\_ copies of written [monthly] progress reports that:  
(a) describe the actions that have been taken toward achieving compliance with this Consent

Decree during the previous [month]; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendants or their contractors or agents in the previous [month]; (c) identify all plans, reports, and other deliverables required by this Consent Decree completed and submitted during the previous [month]; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, that are scheduled for the next [six weeks] and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Settling Defendants have proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Involvement Plan during the previous [month] and those to be undertaken in the next [six weeks]. Settling Defendants shall submit these progress reports to EPA and the State by the [tenth day of every month] following the lodging of this Consent Decree until [EPA notifies Settling Defendants pursuant to Paragraph 51.b of Section XIV (Certification of Completion).] If requested by EPA [or the State], Settling Defendants shall also provide briefings for EPA [and the State] to discuss the progress of the Work.

32. Settling Defendants shall notify EPA of any change in the schedule described in the [monthly] progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

33. Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-know Act (“EPCRA”), 42 U.S.C. § 11004, Settling Defendants shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator nor Alternate EPA Project Coordinator is available, the Emergency Response Section, Region \_\_, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

34. Within 20 days after the onset of such an event, Settling Defendants shall furnish to EPA [and the State] a written report, signed by Settling Defendants’ Project Coordinator, setting forth the events that occurred and the measures taken, and to be taken, in response thereto. Within 30 days after the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

35. Settling Defendants shall submit \_\_ copies of all plans, reports, data, and other deliverables required by the SOW, the Remedial Design Work Plan, the Remedial Action Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendants shall simultaneously submit \_\_ copies of all such plans, reports, data,

and other deliverables to the State. Upon request by EPA, Settling Defendants shall submit in electronic form all or any portion of any deliverables Settling Defendants are required to submit pursuant to the provisions of this Consent Decree.

36. All deliverables submitted by Settling Defendants to EPA that purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of Settling Defendants.

#### XI. EPA APPROVAL OF PLANS, REPORTS, AND OTHER DELIVERABLES

##### 37. Initial Submissions.

a. After review of any plan, report, or other deliverable that is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (1) approve, in whole or in part, the submission; (2) approve the submission upon specified conditions; (3) disapprove, in whole or in part, the submission; or (4) any combination of the foregoing.

b. EPA also may modify the initial submission to cure deficiencies in the submission if: (1) EPA determines that disapproving the submission and awaiting a resubmission would cause substantial disruption to the Work; or (2) previous submission(s) have been disapproved due to material defects and the deficiencies in the initial submission under consideration indicate a bad faith lack of effort to submit an acceptable plan, report, or deliverable.

38. Resubmissions. Upon receipt of a notice of disapproval under Paragraph 37.a(3) or (4), or if required by a notice of approval upon specified conditions under Paragraph 37.a(2), Settling Defendants shall, within \_\_\_ days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. After review of the resubmitted plan, report, or other deliverable, EPA may: (a) approve, in whole or in part, the resubmission; (b) approve the resubmission upon specified conditions; (c) modify the resubmission; (d) disapprove, in whole or in part, the resubmission, requiring Settling Defendants to correct the deficiencies; or (e) any combination of the foregoing.

39. Material Defects. If an initially submitted or resubmitted plan, report, or other deliverable contains a material defect, and the plan, report, or other deliverable is disapproved or modified by EPA under Paragraph 37.b(2) or 38 due to such material defect, then the material defect shall constitute a lack of compliance for purposes of Paragraph 82. The provisions of Section XX (Dispute Resolution) and Section XXI (Stipulated Penalties) shall govern the accrual and payment of any stipulated penalties regarding Settling Defendants' submissions under this Section.

40. Implementation. Upon approval, approval upon conditions, or modification by EPA under Paragraph 37 (Initial Submissions) or Paragraph 38 (Resubmissions), of any plan, report, or other deliverable, or any portion thereof: (a) such plan, report, or other deliverable, or

portion thereof, shall be incorporated into and enforceable under this Consent Decree; and (b) Settling Defendants shall take any action required by such plan, report, or other deliverable, or portion thereof, subject only to their right to invoke the Dispute Resolution procedures set forth in Section XX (Dispute Resolution) with respect to the modifications or conditions made by EPA. The implementation of any non-deficient portion of a plan, report, or other deliverable submitted or resubmitted under Paragraph 37 or 38 shall not relieve Settling Defendants of any liability for stipulated penalties under Section XXI (Stipulated Penalties).

## XII. PROJECT COORDINATORS

41. Within 20 days after lodging this Consent Decree, Settling Defendants [, the State] and EPA will notify each other, in writing, of the name, address, telephone number, and email address of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least five working days before the change occurs, unless impracticable, but in no event later than the actual day the change is made. Settling Defendants' Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. Settling Defendants' Project Coordinator shall not be an attorney for any Settling Defendant in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

42. Plaintiff[s] may designate other representatives, including, but not limited to, EPA [and State] employees, and federal [and State] contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and an On-Scene Coordinator ("OSC") by the NCP, 40 C.F.R. Part 300. EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the NCP, to halt any Work required by this Consent Decree and to take any necessary response action when he or she determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

43. [EPA's Project Coordinator and Settling Defendants' Project Coordinator will meet, at a minimum, on a monthly basis.]

## XIII. PERFORMANCE GUARANTEE

44. In order to ensure the full and final completion of the Work, Settling Defendants shall establish and maintain a performance guarantee, initially in the amount of \$**[insert estimated cost of the Work]**, for the benefit of EPA (hereinafter "Estimated Cost of the Work"). The performance guarantee, which must be satisfactory in form and substance to EPA, shall be in the form of one or more of the following mechanisms (provided that, if Settling Defendants intend to use multiple mechanisms, such multiple mechanisms shall be limited to surety bonds guaranteeing payment, letters of credit, trust funds, and insurance policies):

- a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;
- b. One or more irrevocable letters of credit, payable to or at the direction of EPA, that is issued by one or more financial institution(s) (1) that has the authority to issue letters of credit and (2) whose letter-of-credit operations are regulated and examined by a federal or state agency;
- c. A trust fund established for the benefit of EPA that is administered by a trustee (1) that has the authority to act as a trustee and (2) whose trust operations are regulated and examined by a federal or state agency;
- d. A policy of insurance that (1) provides EPA with acceptable rights as a beneficiary thereof; and (2) is issued by an insurance carrier (i) that has the authority to issue insurance policies in the applicable jurisdiction(s) and (ii) whose insurance operations are regulated and examined by a federal or state agency;
- e. A demonstration by one or more Settling Defendants that each such Settling Defendant meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work (plus the amount(s) of any other federal or any state environmental obligations financially assured through the use of a financial test or guarantee), provided that all other requirements of 40 C.F.R. § 264.143(f) are met to EPA's satisfaction; or
- f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (1) a direct or indirect parent company of a Settling Defendant, or (2) a company that has a "substantial business relationship" (as defined in 40 C.F.R. § 264.141(h)) with at least one Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test and reporting requirements for owners and operators set forth in subparagraphs (1) through (8) of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work (plus the amount(s) of any other federal or any state environmental obligations financially assured through the use of a financial test or guarantee) that it proposes to guarantee hereunder.

45. Settling Defendants have selected, and EPA has found satisfactory, as an initial performance guarantee **[insert type(s)]** pursuant to Paragraph 44.\_\_, in the form attached hereto as Appendix F. Within ten days after the Effective Date, Settling Defendants shall execute or otherwise finalize all instruments or other documents required in order to make the selected performance guarantee(s) legally binding in a form substantially identical to the documents attached hereto as Appendix F, and such performance guarantee(s) shall thereupon be fully effective. Within 30 days after the Effective Date, Settling Defendants shall submit copies of all executed and/or otherwise finalized instruments or other documents required in order to make the selected performance guarantee(s) legally binding to the EPA Regional Financial Management Officer in accordance with Section XXVII (Notices and Submissions), with a copy to **[insert name, title, and address of Regional financial assurance specialist, if one exists in the**

relevant Region] and to the United States and EPA [and the State] as specified in Section XXVII.

**[NOTES ON PARAGRAPHS 44 AND 45: Case teams should negotiate and finalize the form and substance, including value, of Settling Defendants' performance guarantee well in advance of the lodging of the Consent Decree, in order that the final performance guarantee mechanism can actually take effect within ten days after the Effective Date. Case teams should also ensure that entities providing a demonstration or guarantee pursuant to Paragraph 44.e or 44.f above (1) have submitted all documentation required under 40 C.F.R. § 264.143(f) well in advance of the lodging of the Consent Decree in order that EPA can determine that such performance guarantee is sufficient and can take effect within ten days after the Effective Date, and (2) have fully and accurately reflected in their financial statements all of their environmental obligations to the United States or any state, i.e., that all CERCLA, RCRA, and other obligations guaranteed by such entity as a performance guarantee and/or as "financial assurance" have been properly accounted for in determining whether such entity passes the financial test referenced in 40 C.F.R. § 264.143(f). When reviewing which of the permissible performance guarantee mechanisms set forth in Paragraph 44 may be appropriate for inclusion in this Consent Decree, case teams should consider, as part of the facts and circumstances of each case, the industry sector(s) in which the Settling Defendants operate, i.e., Regions have discretion, for example, to require that Settling Defendants provide the performance guarantee through a liquid mechanism rather than through a demonstration or guarantee pursuant to Paragraph 44.e or 44.f above.]**

**[NOTE FOR SETTLEMENTS USING THE SUPERFUND ALTERNATIVE APPROACH ("SA Approach"): Superfund Trust Fund monies cannot be used for remedial actions at sites not listed on the National Priorities List. Therefore, for settlements using the SA Approach, case teams should ensure that parties provide some amount of the financial assurance through one or more liquid instrument(s) at least equal to the amount of funds estimated to be necessary in order to keep cleanup work going through the listing process, in the event the Site needs to be listed. Based on case-specific circumstances, case teams may require PRPs to provide liquid financial assurance instrument(s) for the entire amount of the estimated costs. Acceptable liquid financial assurance instruments include those listed at Paragraph 44.a through 44.d above. For more specific information, case teams should review the "Revised Response Selection and Settlement Approach for Superfund Alternative Sites," OSWER 9208.0-18 (June 17, 2004) available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-sas-04-trans-mem.pdf>.]**

46. If, at any time after the Effective Date and before issuance of the Certification of Completion of the Work pursuant to Paragraph 51, Settling Defendants provide a performance guarantee for completion of the Work by means of a demonstration or guarantee pursuant to Paragraph 44.e or 44.f, the relevant Settling Defendants shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f) relating to these mechanisms unless otherwise provided in this Consent Decree, including but not limited to: (a) the initial submission of required

financial reports and statements from the relevant entity's chief financial officer ("CFO") and independent certified public accountant ("CPA"), in the form prescribed by EPA in its financial test sample CFO letters and CPA reports available at:

<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fa-test-samples.pdf>; (b) the annual resubmission of such reports and statements within 90 days after the close of each such entity's fiscal year; and (c) the prompt notification of EPA after each such entity determines that it no longer satisfies the financial test requirements set forth at 40 C.F.R. § 264.143(f)(1) and in any event within 90 days after the close of any fiscal year in which such entity no longer satisfies such financial test requirements. For purposes of the performance guarantee mechanisms specified in this Section XIII, references in 40 C.F.R. Part 264, Subpart H, to "closure," "post-closure," and "plugging and abandonment" shall be deemed to include the Work; the terms "current closure cost estimate," "current post-closure cost estimate," and "current plugging and abandonment cost estimate" shall be deemed to include the Estimated Cost of the Work; the terms "owner" and "operator" shall be deemed to refer to each Settling Defendant making a demonstration under Paragraph 44.e; and the terms "facility" and "hazardous waste facility" shall be deemed to include the Site.

47. In the event that EPA determines at any time that a performance guarantee provided by any Settling Defendant pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, or in the event that any Settling Defendant becomes aware of information indicating that a performance guarantee provided pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, Settling Defendants, within 30 days after receipt of notice of EPA's determination or, as the case may be, within 30 days after any Settling Defendant becoming aware of such information, shall obtain and present to EPA for approval a proposal for a revised or alternative form of performance guarantee listed in Paragraph 44 that satisfies all requirements set forth in this Section XIII; provided, however, that if any Settling Defendant cannot obtain such revised or alternative form of performance guarantee within such 30-day period, and provided further that the Settling Defendant shall have commenced to obtain such revised or alternative form of performance guarantee within such 30-day period, and thereafter diligently proceeds to obtain the same, EPA shall extend such period for such time as is reasonably necessary for the Settling Defendant in the exercise of due diligence to obtain such revised or alternative form of performance guarantee, such additional period not to exceed \_\_ days. **[NOTE: The Region may insert up to 60 days. If 60 days is chosen, also insert:** On day 30, Settling Defendant shall provide to EPA a status report on its efforts to obtain the revised or alternative form of guarantee.] In seeking approval for a revised or alternative form of performance guarantee, Settling Defendants shall follow the procedures set forth in Paragraph 49.b(2). Settling Defendants' inability to post a performance guarantee for completion of the Work shall in no way excuse performance of any other requirements of this Consent Decree, including, without limitation, the obligation of Settling Defendants to complete the Work in strict accordance with the terms of this Consent Decree.



48. Funding for Work Takeover. The commencement of any Work Takeover pursuant to Paragraph 100 shall trigger EPA's right to receive the benefit of any performance guarantee(s) provided pursuant to Paragraphs 44.a, 44.b, 44.c, 44.d, or 44.f, and at such time EPA shall have immediate access to resources guaranteed under any such performance guarantee(s), whether in cash or in kind, as needed to continue and complete the Work assumed by EPA under the Work Takeover. Upon the commencement of any Work Takeover, if (a) for any reason EPA is unable to promptly secure the resources guaranteed under any such performance guarantee(s), whether in cash or in kind, necessary to continue and complete the Work assumed by EPA under the Work Takeover, or (b) in the event that the performance guarantee involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 44.e or Paragraph 44.f(2), Settling Defendants (or in the case of Paragraph 44.f(2), the guarantor) shall immediately upon written demand from EPA deposit into a special account within the EPA Hazardous Substance Superfund or such other account as EPA may specify, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of completing the Work as of such date, as determined by EPA. In addition, if at any time EPA is notified by the issuer of a performance guarantee that such issuer intends to cancel the performance guarantee mechanism it has issued, then, unless Settling Defendants provide a substitute performance guarantee mechanism in accordance with this Section XIII no later than 30 days prior to the impending cancellation date, EPA shall be entitled (as of and after the date that is 30 days prior to the impending cancellation) to draw fully on the funds guaranteed under the then-existing performance guarantee. All EPA Work Takeover costs not reimbursed under this Paragraph shall be reimbursed under Section XVI (Payments for Response Costs).

49. Modification of Amount and/or Form of Performance Guarantee.

a. Reduction of Amount of Performance Guarantee. If Settling Defendants believe that the estimated cost of completing the Work has diminished below the amount set forth in Paragraph 44, Settling Defendants may, on any anniversary of the Effective Date, or at any other time agreed to by the Parties, petition EPA in writing to request a reduction in the amount of the performance guarantee provided pursuant to this Section so that the amount of the performance guarantee is equal to the estimated cost of completing the Work. Settling Defendants shall submit a written proposal for such reduction to EPA that shall specify, at a minimum, the estimated cost of completing the Work and the basis upon which such cost was calculated. In seeking approval for a reduction in the amount of the performance guarantee, Settling Defendants shall follow the procedures set forth in Paragraph 49.b(2) for requesting a revised or alternative form of performance guarantee, except as specifically provided in this Paragraph 49.a. If EPA decides to accept Settling Defendants' proposal for a reduction in the amount of the performance guarantee, either to the amount set forth in Settling Defendants' written proposal or to some other amount as selected by EPA, EPA will notify the petitioning Settling Defendants of such decision in writing. Upon EPA's acceptance of a reduction in the amount of the performance guarantee, the Estimated Cost of the Work shall be deemed to be the estimated cost of completing the Work set forth in EPA's written decision. After receiving EPA's written decision, Settling Defendants may reduce the amount of the performance guarantee in accordance with and to the extent permitted by such written acceptance and shall

submit copies of all executed and/or otherwise finalized instruments or other documents required in order to make the selected performance guarantee(s) legally binding in accordance with Paragraph 49.b(2). In the event of a dispute, Settling Defendants may reduce the amount of the performance guarantee required hereunder only in accordance with a final administrative or judicial decision resolving such dispute pursuant to Section XX (Dispute Resolution). No change to the form or terms of any performance guarantee provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraphs 47 or 49.b.

b. Change of Form of Performance Guarantee.

(1) If, after the Effective Date, Settling Defendants desire to change the form or terms of any performance guarantee(s) provided pursuant to this Section, Settling Defendants may, on any anniversary of the Effective Date, or at any other time agreed to by the Parties, petition EPA in writing to request a change in the form or terms of the performance guarantee provided hereunder. The submission of such proposed revised or alternative performance guarantee shall be as provided in Paragraph 49.b(2). Any decision made by EPA on a petition submitted under this Paragraph shall be made in EPA's sole and unreviewable discretion, and such decision shall not be subject to challenge by Settling Defendants pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.

(2) Settling Defendants shall submit a written proposal for a revised or alternative performance guarantee to EPA that shall specify, at a minimum, the estimated cost of completing the Work, the basis upon which such cost was calculated, and the proposed revised performance guarantee, including all proposed instruments or other documents required in order to make the proposed performance guarantee legally binding. The proposed revised or alternative performance guarantee must satisfy all requirements set forth or incorporated by reference in this Section. Settling Defendants shall submit such proposed revised or alternative performance guarantee to the EPA Regional Financial Management Officer in accordance with Section XXVII (Notices and Submissions) [, with a copy to **[insert name, title, and address of Regional financial assurance specialist, if one exists in the relevant Region]**]. EPA will notify Settling Defendants in writing of its decision to accept or reject a revised or alternative performance guarantee submitted pursuant to this Paragraph. Within ten days after receiving a written decision approving the proposed revised or alternative performance guarantee, Settling Defendants shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected performance guarantee(s) legally binding in a form substantially identical to the documents submitted to EPA as part of the proposal, and such performance guarantee(s) shall thereupon be fully effective. Settling Defendants shall submit copies of all executed and/or otherwise finalized instruments or other documents required in order to make the selected performance guarantee(s) legally binding to the EPA Regional Financial Management Officer within 30 days after receiving a written decision approving the proposed revised or alternative performance guarantee in accordance with Section XXVII (Notices and Submissions) [, with a copy to **[insert name, title, and address of Regional financial assurance**

**specialist, if one exists in the relevant Region]]** and to the United States and EPA [and the State] as specified in Section XXVII.

c. Release of Performance Guarantee. Settling Defendants shall not release, cancel, or discontinue any performance guarantee provided pursuant to this Section except as provided in this Paragraph. If Settling Defendants receive written notice from EPA in accordance with Paragraph 51 that the Work has been fully and finally completed in accordance with the terms of this Consent Decree, or if EPA otherwise so notifies Settling Defendants in writing, Settling Defendants may thereafter release, cancel, or discontinue the performance guarantee(s) provided pursuant to this Section. In the event of a dispute, Settling Defendants may release, cancel, or discontinue the performance guarantee(s) required hereunder only in accordance with a final administrative or judicial decision resolving such dispute pursuant to Section XX (Dispute Resolution).

**[NOTE: A performance guarantee provided under this Section should not be released until the Work has been fully completed. The definition of Work includes all activities Settling Defendants are required to perform under the Consent Decree, including O&M obligations. Therefore, Regions should ensure that an appropriate performance guarantee remains in place until all obligations, including O&M obligations, are fully satisfied in accordance with the terms of the Consent Decree.]**

#### XIV. CERTIFICATION OF COMPLETION

**[NOTE: Paragraph 50 (Completion of the Remedial Action), below, should be used for consent decrees addressing the sole or final operable unit for the Site, in which the United States has decided to grant a site-wide covenant (i.e., where Certification of Completion of the Remedial Action is necessary to trigger a site-wide covenant under Sections 106 and 107 of CERCLA). Consistent with Regional practices, Paragraph 50 also may be used for non-final OU consent decrees.]**

##### 50. Completion of the Remedial Action.

a. Within 90 days after Settling Defendants conclude that the Remedial Action has been fully performed and the Performance Standards have been achieved, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants[,] [and] EPA [, and the State]. If, after the pre-certification inspection, Settling Defendants still believe that the Remedial Action has been fully performed and the Performance Standards have been achieved, they shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans, Reports, and Other Deliverables) within 30 days after the inspection. In the report, a registered professional engineer and Settling Defendants' Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of a Settling Defendant or Settling Defendants' Project Coordinator:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity for review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the “scope of the remedy set forth in the ROD,” as that term is defined in Paragraph 14.a. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans, Reports, and Other Deliverables). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion of the Remedial Action and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendants. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXII (Covenants by Plaintiff[s]). Certification of Completion of the Remedial Action shall not affect Settling Defendants’ remaining obligations under this Consent Decree.

51. Completion of the Work.

a. Within 90 days after Settling Defendants conclude that all phases of the Work, other than any remaining activities required under Section VII (Remedy Review), have been fully performed, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants [,] [and] EPA [, and the State]. If, after the pre-certification inspection, Settling Defendants still believe that the Work has been fully performed, Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the statement set forth in Paragraph 50.a, signed by a responsible corporate official of a Settling Defendant or Settling Defendants’ Project Coordinator. If, after

review of the written report, EPA, after reasonable opportunity for review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the “scope of the remedy set forth in the ROD,” as that term is defined in Paragraph 14.a. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans, Reports, and Other Deliverables). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion of the Work by Settling Defendants and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify Settling Defendants in writing.

## XV. EMERGENCY RESPONSE

52. If any action or occurrence during the performance of the Work that causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendants shall, subject to Paragraph 53, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA’s Project Coordinator, or, if the Project Coordinator is unavailable, EPA’s Alternate Project Coordinator. If neither of these persons is available, Settling Defendants shall notify the EPA [Emergency Response Unit], Region \_\_. Settling Defendants shall take such actions in consultation with EPA’s Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendants fail to take appropriate response action as required by this Section, and EPA [or, as appropriate, the State] take[s] such action instead, Settling Defendants shall reimburse EPA [and the State] all costs of the response action under Section XVI (Payments for Response Costs).

53. Subject to Section XXII (Covenants by Plaintiff[s]), nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States [, or the State,] (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

## XVI. PAYMENTS FOR RESPONSE COSTS

### 54. Payment by Settling Defendants for Past Response Costs.

a. Within 30 days after the Effective Date, Settling Defendants shall pay to EPA \$\_\_\_\_\_ in payment for Past Response Costs. Payment shall be made in accordance with Paragraphs 58.a (Instructions for Past Response Cost Payments).

**[NOTE ON DIRECTING PAYMENTS TO EPA HAZARDOUS SUBSTANCE SUPERFUND AND/OR TO SITE-SPECIFIC SPECIAL ACCOUNT: Payments made under Paragraph 54.a may be deposited in the EPA Hazardous Substance Superfund or may be deposited in a site-specific Special Account within the EPA Hazardous Substance Superfund. The Consent Decree should include clear instructions indicating which portion of the payment is to be deposited in the EPA Hazardous Substance Superfund and which portion of the payment is to be deposited in a special account. Sample instructions for the three possible deposit options (EPA Hazardous Substance Superfund, Special Account, or split between the EPA Hazardous Substance Superfund and Special Account) follow.]**

b. **[Insert one of the following three sentences here.] [If the entire payment will be deposited in the EPA Hazardous Substance Superfund:** The total amount to be paid by Settling Defendants pursuant to Paragraph 54.a shall be deposited by EPA in the EPA Hazardous Substance Superfund.] **[If the entire payment will be deposited in a special account:** The total amount to be paid by Setting Defendants pursuant to Paragraph 54.a shall be deposited by EPA in the [Site Name] Special Account 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 the payment will be split between the EPA Hazardous Substance Superfund and a special account:** Of the total amount to be paid by Settling Defendants pursuant to Paragraph 54.a, [“\$ \_\_\_\_\_” or “\_\_\_ %”] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [“\$ \_\_\_\_\_” or “\_\_\_ %”] shall be deposited by EPA in the [Site Name] Special Account 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.]

c. [Within 30 days after the Effective Date, Settling Defendants shall pay to the State \$ \_\_\_\_\_ by official bank check(s) made payable to \_\_\_\_\_, in payment of State Past Response Costs. Settling Defendants shall send the bank check(s) to \_\_\_\_\_.]

55. Payments by Settling Defendants for Future Response Costs. Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the NCP[.] **[If EPA determines that it is appropriate for this Consent Decree to provide orphan share compensation to Settling Defendants through forgiveness of RD/RA oversight costs, insert the following clause:** , excluding the first \$[insert amount of future oversight compromise] of Future Oversight Costs.]

a. On a periodic basis, EPA will send Settling Defendants a bill requiring payment that includes a [**insert name of standard Regionally-prepared cost summary**], which includes direct and indirect costs incurred by EPA, its contractors, and DOJ. Settling Defendants shall make all payments within 30 days after Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 59, in accordance with Paragraphs 58.b (Instructions for Future Response Cost Payments).

b. [**Insert instructions on whether payments for Future Response Costs should be deposited in the EPA Hazardous Substance Superfund, a Special Account, or split between the EPA Hazardous Substance Superfund and a Special Account. Sample language for the three options is provided in Paragraph 54.b.**]

**[NOTE ON USE OF PREPAID FUTURE RESPONSE COSTS SPECIAL ACCOUNTS: If Settling Defendants will be prepaying any part of EPA's Future Response Costs, delete Paragraphs 55.a and 55.b, above, and keep alternative Paragraphs 55.c through 55.f, below. Otherwise delete Paragraphs 55.c through 55.e. The subparagraphs and cross-references thereto will renumber automatically regardless. For an explanation of prepaid accounts, including when prepayment is appropriate, see "Additional Guidance on Prepayment of Oversight Costs and Special Accounts," December 22, 2006 available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/spec-acct-oversight.pdf>.]**

c. [Prepayment of Future Response Costs. Within 30 days after the Effective Date, Settling Defendants shall pay to EPA \$ \_\_\_\_\_ as a prepayment of [**if the Paragraph 55.e optional provision for replenishment is used substitute**: as an initial payment toward] Future Response Costs. Payment shall be made in accordance with Paragraphs 58.a (Instructions for Past Response Cost Payments). The total amount paid shall be deposited by EPA in the [Site Name] Future Response Costs Special Account. These funds shall be retained and used by EPA to conduct or finance future response actions at or in connection with the Site.

d. On a periodic basis, EPA will send Settling Defendants a bill requiring payment that includes a [**insert name of standard Regionally-prepared cost summary**], which includes direct and indirect costs incurred by EPA, its contractors, and DOJ. Settling Defendants shall make all payments within 30 days after Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 59, in accordance with Paragraphs 58.b (Instructions for Future Response Cost Payments).

**[NOTE: Paragraph 55.e is an optional provision for replenishment of the Future Response Costs Special Account in the event of a shortfall in the prepayment.]**

e. EPA will notify Settling Defendants in the event that the balance in the [Site Name] Future Response Costs Special Account falls below \$ \_\_\_\_\_. Settling Defendants shall, within 30 days after receipt of such notice, pay \$ \_\_\_\_\_ to EPA. Payment shall be made in accordance with Paragraphs 58.b (Instructions for Future Response Cost Payments). The amounts paid shall be deposited by EPA in the [Site Name] Future Response Costs Special

Account. These funds shall be retained and used by EPA to conduct or finance future response actions at or in connection with the Site.

f. After EPA issues the Certification of Completion of the Work pursuant to Paragraph 51 and a final accounting of Future Response Costs (including crediting Settling Defendants for any amounts received under Paragraphs 55.c (prepayment) or 55.d (periodic bill) [or 55.e (shortfall payment)], EPA will **[choose one or more of the following three clauses:** (1) [offset the final bill for Future Response Costs by the unused amount paid by Settling Defendants pursuant to Paragraphs 55.c or 55.d [or 55.e]]; (2) [apply any unused amount paid by Settling Defendants pursuant to Paragraphs 55.c or 55.d [or 55.e] to any other unreimbursed response costs or response actions remaining at the Site]; or (3) [remit and return to Settling Defendants any unused amount of the funds paid by Settling Defendants pursuant to Paragraphs 55.c or 55.d [or 55.e]]. **[If option 2 is chosen, insert:** Any decision by EPA to apply unused amounts to unreimbursed response costs or response actions remaining at the Site shall not be subject to challenge by Settling Defendants pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.]

g. Payments by Settling Defendants to State. Settling Defendants shall pay to the State all State Future Response Costs not inconsistent with the NCP. The State will send Settling Defendants a bill requiring payment that includes a **[insert name of standard State-prepared cost summary, which includes direct and indirect costs incurred by the State and its contractors]** on a [periodic] basis. Settling Defendants shall make all payments within 30 days after Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 59. Settling Defendants shall make all payments to the State required by this Paragraph in accordance with Paragraph 54.c: **[or insert alternate instructions].**

56. Payments by Settling Federal Agencies.

a. Payment to EPA.

(1) As soon as reasonably practicable after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay to EPA \$ \_\_\_\_\_, in payment of Past Response Costs and Future Response Costs.

(2) **[Insert one of the following three sentences here:]** **[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:** The total amount to be paid on behalf of Settling Federal Agencies pursuant to this Paragraph shall be deposited by EPA in the EPA Hazardous Substance Superfund.] **[If the entire payment will be deposited in a special account:** The total amount to be paid on behalf of Settling Federal Agencies pursuant to this Paragraph shall be deposited by EPA in the [Site name] Special Account 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 the payment will be split between the EPA Hazardous Substance Superfund and a special account:** Of the total amount to be paid on behalf of Settling Federal Agencies pursuant to this Paragraph, [“\$ \_\_\_\_” or



“ \_\_\_ %”] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [“\$ \_\_\_” or “ \_\_\_ %”] shall be deposited by EPA in the [Site name] Special Account 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.]

b. Payment to the State. As soon as reasonably practicable after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay to the State \$ \_\_\_\_\_ [insert as appropriate: in payment of State Past Response Costs and State Future Response Costs] by Automated Clearing House (“ACH”) Electronic Funds Transfer in accordance with instructions provided by the State.

c. Payment to Settling Defendants. As soon as reasonably practicable after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay to Settling Defendants \$ \_\_\_\_\_ [insert as appropriate: in payment of Settling Defendants’ Past Response Costs and Settling Defendants’ Future Response Costs] by Automated Clearing House (“ACH”) Electronic Funds Transfer in accordance with instructions provided by Settling Defendants.

**[NOTE: Where SFAs participate in the Consent Decree, they will usually “cash out” of Past Response Costs, Future Response Costs, and Settling Defendants’ past response costs and future response costs as well. In those cases where Settling Defendants’ future response costs cannot be resolved under the Decree in this manner, alternative “pay-as-you-go” provisions should be included for Settling Defendants’ future response costs.]**

d. Interest. In the event that any payment required by Paragraphs 56.a, 56.b, or 56.c is not made within 120 days after the Effective Date, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), with such Interest commencing on the 121st day after the Effective Date and accruing through the date of the payment.

57. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of the 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.]

58. Payment Instructions for Settling Defendants.

a. Instructions for Past Response Costs Payments [and Future Response Costs Prepayments]. All payments required, elsewhere in this Consent Decree, to be made in accordance with this Paragraph 58.a shall be made at <https://www.pay.gov> to the U.S. Department of Justice account, in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District of \_\_\_\_\_ after the Effective Date. **[NOTE: If payment exceeds \$9.9 million, it cannot be made using pay.gov unless it is split into multiple payments no one of which may be greater than**

**\$9.9 million. If Settling Defendants do not want to do this, you may add the following substitute language:** Any payments exceeding \$9.9 million and required, elsewhere in this Consent Decree, to be made in accordance with this Paragraph may be made by Fedwire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with current EFT procedures, and in accordance with instructions provided to Settling Defendants by the FLU after the Effective Date.] The payment instructions provided by the Financial Litigation Unit shall include a Consolidated Debt Collection System (“CDCS”) number, which shall be used to identify all payments required to be made in accordance with this Consent Decree. The FLU shall provide the payment instructions to:

**[Insert name, address, phone number, and email address of the individual who will be responsible for making the payment]**

on behalf of Settling Defendants. Settling Defendants may change the individual to receive payment instructions on their behalf by providing written notice of such change in accordance with Section XXVII (Notices and Submissions). When making payments under this Paragraph 58.a, Settling Defendants shall also comply with Paragraph 58.c.]

**[NOTE: If Settling Defendants have difficulty making online or EFT payments, you may substitute the following:** Payment [if Settling Federal Agencies, insert: “by Settling Defendants”] shall be made by official bank check(s) made payable to “U.S. Department of Justice,” referencing the name and address of the party(ies) making payment, Site/Spill ID Number \_\_\_\_\_, DOJ Case Number \_\_\_\_\_, and the Consolidated Debt Collection System (“CDCS”) number, which shall be used to identify all payments required to be made in accordance with this Consent Decree. The CDCS number and any additional payment instructions will be provided to Settling Defendants by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District of \_\_\_\_\_ after the Effective Date. The FLU shall provide this information to:

**[Insert name, address, phone number, and email address of the individual who will be responsible for making the payment]**

on behalf of Settling Defendants. Settling Defendants may change the individual to receive payment instructions on their behalf by providing written notice of such change in accordance with Section XXVII (Notices and Submissions). Settling Defendants shall send the check(s):

**By regular mail to:**

U.S. Department of Justice  
Nationwide Central Intake Facility  
P.O. Box 70932  
Charlotte, NC 28272-0932

**Or overnight mail to:**

QLP Wholesale Lockbox - D1113-022

Lockbox #70932  
1525 West WT Harris Blvd.  
Charlotte, NC 28262

When making payments under this Paragraph 58.a, Settling Defendants shall also comply with Paragraph 58.c.]

b. Instructions for Future Response Costs Payments [other than Future Response Costs Prepayments] and Stipulated Penalties. All payments required, elsewhere in this Consent Decree, to be made in accordance with this Paragraph 58.b shall be made by Fedwire EFT to:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York NY 10045  
Field Tag 4200 of the Fedwire message should read “D 68010727 Environmental Protection Agency”

When making payments under this Paragraph 58.b, Settling Defendants shall also comply with Paragraph 58.c.]

**[NOTE: Regions may substitute the following instructions for payment by Automated Clearinghouse (“ACH”) or for online payment:**

**For ACH payment:**

PNC Bank  
808 17th Street, NW  
Washington, DC 20074  
Contact – Jesse White 301-887-6548  
ABA = 051036706  
Transaction Code 22 - checking  
Environmental Protection Agency  
Account 310006  
CTX Format

**For online payment:**

Payment shall be made at <https://www.pay.gov> to the U.S. EPA account in accordance with instructions to be provided to Settling Defendants by EPA following lodging of the Consent Decree.]

**[NOTE: If Settling Defendants have difficulty making EFT payments, you may substitute the following:** [All payments] . . . shall be made by official bank check(s) made payable to “EPA Hazardous Substance Superfund,” referencing the name and address of the party making the payment. Settling Defendants shall send the check(s) to:

US Environmental Protection Agency  
Superfund Payments  
Cincinnati Finance Center  
PO Box 979076  
St. Louis, MO 63197-9000]

**[For ACH, online, or check payments, end instructions with:** “When making payments under this Paragraph 58.b, Settling Defendants shall also comply with Paragraph 58.c.]

c. Instructions for All Payments. All payments made under Paragraphs 58.a (Instructions for Past Response Cost Payments) or 58.b (Instructions for Future Response Cost Payments) shall reference the CDCS Number, Site/Spill ID Number \_\_\_\_\_, and DOJ Case Number \_\_\_\_\_. At the time of any payment required to be made in accordance with Paragraphs 58.a or 58.b, Settling Defendants shall send notice that payment has been made to the United States, and to EPA, in accordance with Section XXVII (Notices and Submissions), and to the EPA Cincinnati Finance Office by email at [acctsreceivable.cinwd@epa.gov](mailto:acctsreceivable.cinwd@epa.gov), or by mail at 26 Martin Luther King Drive, Cincinnati, Ohio 45268. Such notice shall also reference the CDCS Number, Site/Spill ID Number, and DOJ Case Number.

59. Settling Defendants may contest any Future Response Costs billed under Paragraph 55 (Payments by Settling Defendants for Future Response Costs) **[if prepayment paragraphs are used reference only 55.d]** if they determine that EPA [or the State] has made a mathematical error or included a cost item that is not within the definition of Future Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. Such objection shall be made in writing within 30 days after receipt of the bill and must be sent to the United States [(if the United States’ accounting is being disputed) or the State (if the State’s accounting is being disputed)] pursuant to Section XXVII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Settling Defendants shall pay all uncontested Future Response Costs to the United States [or the State] within 30 days after Settling Defendants’ receipt of the bill requiring payment. Simultaneously, Settling Defendants shall establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (“FDIC”), and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Settling Defendants shall send to the United States, as provided in Section XXVII (Notices and Submissions), [and the State] a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account.

Simultaneously with establishment of the escrow account, Settling Defendants shall initiate the Dispute Resolution procedures in Section XX (Dispute Resolution). If the United States [or the State] prevails in the dispute, Settling Defendants shall pay the sums due (with accrued interest) to the United States [or the State, if State costs are disputed] within five days after the resolution of the dispute. If Settling Defendants prevail concerning any aspect of the contested costs, Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States [or the State, if State costs are disputed] within five days after the resolution of the dispute. Settling Defendants shall be disbursed any balance of the escrow account. All payments to the United States under this Paragraph shall be made in accordance with Paragraphs 58.b (Instructions for Future Response Cost Payments). The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendants' obligation to reimburse the United States [and the State] for its [their] Future Response Costs.

**[NOTE: If a prepayment provision is used, insert the following additional paragraph for disputes concerning the final accounting issued under Paragraph 55.f above.]**

60. [Settling Defendants may contest the final accounting of Future Response Costs issued under Paragraph 55.f if they determine that the United States has made a mathematical error. Such objection shall be made in writing within [30] days after receipt of the final accounting and must be sent to the United States pursuant to Section XXVII (Notices and Submissions). Any such objection shall specifically identify the alleged final mathematical error and the basis for objection. EPA will review the alleged mathematical error and either affirm the initial accounting or issue a corrected final accounting [within \_\_ days]. If a corrected final accounting is issued, EPA will take such action as may be necessary to correct the final disposition of unused amounts paid in accordance with Paragraph 55.f. If Settling Defendants disagree with EPA's decision, Settling Defendants may, within [seven] days after receipt of the decision, appeal the decision to the Director of the Waste Management Division, EPA Region \_\_. The Director of the Waste Management Division will issue a final administrative decision resolving the dispute, which shall be binding upon Settling Defendants and shall not be subject to challenge by Settling Defendants pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.]

**[NOTE: If there are SFAs and they are reimbursing future costs after they are incurred, please modify above two paragraphs as appropriate.]**

61. Interest. In the event that any payment for Past Response Costs or for Future Response Costs required under this Section is not made by the date required, Settling Defendants shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs [, prepaid Future Response Costs,] [and State Past Response Costs] under this Paragraph shall begin to accrue on the Effective Date. The Interest on [**if prepaid Future Response Costs add:** all subsequent] Future Response Costs shall begin to accrue on the date of the bill [**if prepaid Future Response Costs add:** or on the date of the prepayment shortfall notice pursuant to Paragraph 55.e]. The Interest shall accrue through the date of Settling Defendants' payment.

Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendants' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 83.

**[NOTE ON DISBURSEMENT OF SPECIAL ACCOUNT FUNDS: Insert the following language when EPA agrees to disburse special account funds to Settling Defendants who are performing Work under this Consent Decree. The decision to disburse funds is within EPA's sole discretion and should be done consistent with the "Interim Final Guidance on Disbursement of Funds From EPA Special Accounts to CERCLA Potentially Responsible Parties" (November 3, 1998), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/disburs-spact-mem.pdf>, and the "Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts" (October 4, 2002) available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/congui-estmgt-specacct.pdf>.]**

## XVII. DISBURSEMENT OF SPECIAL ACCOUNT FUNDS

62. [Creation of [Site Name] Disbursement Special Account and Agreement to Disburse Funds to Settling Defendants. Within 30 days after the Effective Date, EPA shall establish the [Site Name] Disbursement Special Account and shall transfer \$ \_\_\_\_ from the [Site Name] Special Account to the [Site Name] Disbursement Special Account. **[NOTE: If, as part of the RD/RA Consent Decree, there are cashout parties whose funds will be deposited into a special account and then disbursed to Settling Defendants, contact Headquarters to consult on appropriate language.]** Subject to the terms and conditions set forth in this Section, EPA agrees to make the funds in the [Site Name] Disbursement Special Account, including Interest Earned on the funds in the [Site Name] Disbursement Special Account, available for disbursement to Settling Defendants as partial reimbursement for performance of the Work **[or specify the activity for which the special account funds are to be disbursed]** under this Consent Decree. EPA shall disburse funds from the [Site Name] Disbursement Special Account to Settling Defendants in accordance with the procedures and milestones for phased disbursement set forth in this Section.

63. Timing, Amount, and Method of Disbursing Funds From the [Site Name] Disbursement Special Account. Within \_\_ days after EPA's receipt of a Cost Summary and Certification, as defined by Paragraph 64.b, or if EPA has requested additional information under Paragraph 64.b or a revised Cost Summary and Certification under Paragraph 64.c, within \_\_ days after receipt of the additional information or revised Cost Summary and Certification, and subject to the conditions set forth in this Section, EPA shall disburse the funds from the [Site Name] Disbursement Special Account at the completion of the following milestones, and in the amounts set forth below:

**[NOTE: The Decree should outline a phased payment plan that typically lists two to four milestones of the Work. The completion of a milestone will trigger the right to request**

**disbursement of a set amount or percentage of funds from the Disbursement Special Account in partial reimbursement for Work performed up to the date of completion of that milestone. In most situations the appropriate milestones will be (1) completion of all activities in the EPA-approved Remedial Design Work Plan, (2) completion of one or two components of the EPA-approved Remedial Action Work Plan, and (3) Certification of Completion of the Remedial Action. Sample language follows.]**

<u>Milestone</u>	<u>Disbursement of Funds</u>
1. EPA approval of the Remedial Design Work Plan	\$ _____ [or ____% of funds] from the [Site Name] Disbursement Special Account
2. EPA approval of the [insert task]	\$ _____ [or ____% of remaining funds] from the [Site Name] Disbursement Special Account
3. EPA Certification of Completion of the Remedial Action	Remainder of funds in the [Site Name] Disbursement Special Account

EPA shall disburse the funds from the [Site Name] Disbursement Special Account to Settling Defendants in the following manner:

**[Insert name and address for payment or instructions for electronic funds transfer.]**

64. Requests for Disbursement of Special Account Funds.

a. Within \_\_ days after issuance of EPA’s written confirmation that a milestone of the Work, as defined in Paragraph 63 (Timing, Amount, and Method of Disbursing Funds), has been satisfactorily completed, Settling Defendants shall submit to EPA a Cost Summary and Certification, as defined in Paragraph 64.b, covering the Work performed pursuant to this Consent Decree up to the date of completion of that milestone. Settling Defendants shall not include in any submission costs included in a previous Cost Summary and Certification following completion of an earlier milestone of the Work if those costs have been previously sought or reimbursed pursuant to Paragraph 63.

b. Each Cost Summary and Certification shall include a complete and accurate written cost summary and certification of the necessary costs incurred and paid by Settling Defendants for the Work covered by the particular submission, excluding costs not eligible for disbursement under Paragraph 65 (Costs Excluded from Disbursement). Each Cost Summary and Certification shall contain the following statement signed by the **[insert “Chief Financial Officer of a Settling Defendant,” “Independent Certified Public Accountant,” or title of other specified independent person acceptable to EPA]**:

To the best of my knowledge, after thorough investigation and review of Settling Defendants’ documentation of costs incurred and paid for Work performed pursuant to this Consent Decree **[insert, as appropriate:** “up to the date of completion of milestone 1,” “between the date of completion of milestone 1 and the date of completion of milestone 2,” “between the date of completion of milestone 2 and the date of

completion of the milestone 3,”) I certify that the information contained in or accompanying this submission is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment.

The [insert “**Chief Financial Officer of a Settling Defendant,**” “**Independent Certified Public Accountant,**” or title of other specified independent person acceptable to EPA] shall also provide EPA a list of the documents that he or she reviewed in support of the Cost Summary and Certification. Upon request by EPA, Settling Defendants shall submit to EPA any additional information that EPA deems necessary for its review and approval of a Cost Summary and Certification.

c. If EPA finds that a Cost Summary and Certification includes a mathematical error, costs excluded under Paragraph 65 (Costs Excluded from Disbursement), costs that are inadequately documented, or costs submitted in a prior Cost Summary and Certification, it will notify Settling Defendants and provide them an opportunity to cure the deficiency by submitting a revised Cost Summary and Certification. If Settling Defendants fail to cure the deficiency within \_\_\_ days after being notified of, and given the opportunity to cure, the deficiency, EPA will recalculate Settling Defendants’ costs eligible for disbursement for that submission and disburse the corrected amount to Settling Defendants in accordance with the procedures in Paragraph 63 (Timing, Amount, and Method of Disbursing Funds). Settling Defendants may dispute EPA’s recalculation under this Paragraph pursuant to Section XX (Dispute Resolution). In no event shall Settling Defendants be disbursed funds from the [Site Name] Disbursement Special Account in excess of amounts properly documented in a Cost Summary and Certification accepted or modified by EPA.

65. Costs Excluded from Disbursement. The following costs are excluded from, and shall not be sought by Settling Defendants for, disbursement from the [Site Name] Disbursement Special Account: (a) response costs paid pursuant to Section XVI (Payments for Response Costs); (b) any other payments made by Settling Defendants to the United States pursuant to this Consent Decree, including, but not limited to, any interest or stipulated penalties paid pursuant to Section XXI (Stipulated Penalties); (c) attorneys’ fees and costs, except for reasonable attorneys’ and costs necessarily related to [**insert reference to any obligations under the Decree for which legal services are essential, such as obtaining access or institutional controls**] as required by Section IX (Access and Institutional Controls); (d) costs of any response activities Settling Defendants perform that are not required under, or approved by EPA pursuant to, this Consent Decree; (e) costs related to Settling Defendants’ litigation, settlement, development of potential contribution claims, or identification of defendants; (f) internal costs of Settling Defendants, including but not limited to, salaries, travel, or in-kind services, except for those costs that represent the work of employees of Settling Defendants directly performing the Work; (g) any costs incurred by Settling Defendants prior to the Effective Date [**if Remedial Design or other response activity performed under this Decree is commenced prior to the effective date of the Decree insert**: except for approved Work completed pursuant to this Consent Decree]; or (h) any costs incurred by Settling Defendants pursuant to Section XX (Dispute Resolution).



66. Termination of Disbursements from the Special Account. EPA's obligation to disburse funds from the [Site Name] Disbursement Special Account under this Consent Decree shall terminate upon EPA's determination that Settling Defendants: (a) have knowingly submitted a materially false or misleading Cost Summary and Certification; (b) have submitted a materially inaccurate or incomplete Cost Summary and Certification, and have failed to correct the materially inaccurate or incomplete Cost Summary and Certification within \_\_\_ days after being notified of, and given the opportunity to cure, the deficiency; or (c) failed to submit a Cost Summary and Certification as required by Paragraph 64 (Requests for Disbursement of Special Account Funds) within \_\_\_ days (or such longer period as EPA agrees) after being notified that EPA intends to terminate its obligation to make disbursements pursuant to this Section because of Settling Defendants' failure to submit the Cost Summary and Certification as required by Paragraph 64. EPA's obligation to disburse funds from the [Site Name] Disbursement Special Account shall also terminate upon EPA's assumption of performance of any portion of the Work pursuant to Paragraph 100 (Work Takeover), when such assumption of performance of the Work is not challenged by Settling Defendants or, if challenged, is upheld under Section XX (Dispute Resolution). Settling Defendants may dispute EPA's termination of special account disbursements under Section XX.

67. Recapture of Special Account Disbursements. Upon termination of disbursements from the [Site Name] Disbursement Special Account under Paragraph 66 (Termination of Disbursements from the Special Account), if EPA has previously disbursed funds from the [Site Name] Disbursement Special Account for activities specifically related to the reason for termination, e.g., discovery of a materially false or misleading submission after disbursement of funds based on that submission, EPA shall submit a bill to Settling Defendants for those amounts already disbursed from the [Site Name] Disbursement Special Account specifically related to the reason for termination, plus Interest on that amount covering the period from the date of disbursement of the funds by EPA to the date of repayment of the funds by Settling Defendants. Within \_\_\_ days after receipt of EPA's bill, Settling Defendants shall reimburse the EPA Hazardous Substance Superfund for the total amount billed. Payment shall be made in accordance with Paragraphs 58.b (Instructions for Future Response Cost Payments). Upon receipt of payment, EPA may deposit all or any portion thereof in the [Site Name] Special Account, the [Site Name] Disbursement Special Account, or the EPA Hazardous Substance Superfund. The determination of where to deposit or how to use the funds shall not be subject to challenge by Settling Defendants pursuant to the dispute resolution provisions of this Consent Decree or in any other forum. Settling Defendants may dispute EPA's determination as to recapture of funds pursuant to Section XX (Dispute Resolution).

68. Balance of Special Account Funds. After EPA issues its written Certification of Completion of the Remedial Action pursuant to this Consent Decree [**or if Certification of Completion of Remedial Action is not used substitute:** After the Remedial Action has been performed in accordance with this Consent Decree and the Performance Standards have been achieved], and after EPA completes all disbursement to Settling Defendants in accordance with this Section, if any funds remain in the [Site Name] Disbursement Special Account, EPA may transfer such funds to the [Site Name] Special Account or to the EPA Hazardous Substance Superfund. Any transfer of funds to the [Site Name] Special Account or the EPA Hazardous

Substance Superfund shall not be subject to challenge by Settling Defendants pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.]

#### XVIII. INDEMNIFICATION AND INSURANCE

69. Settling Defendants' Indemnification of the United States [and the State].

a. The United States [and the State] do[es] not assume any liability by entering into this Consent Decree or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). Settling Defendants shall indemnify, save and hold harmless the United States [, the State,] and its [their] officials, agents, employees, contractors, subcontractors, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, Settling Defendants agree to pay the United States [and the State] all costs it [they] incur[s] including, but not limited to, attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States [or the State] based on negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. [Neither] the United States [nor the State] shall [not] be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither Settling Defendants nor any such contractor shall be considered an agent of the United States [or the State].

b. The United States [and the State] shall give Settling Defendants notice of any claim for which the United States [or the State] plans to seek indemnification pursuant to this Paragraph 69, and shall consult with Settling Defendants prior to settling such claim.

70. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States [and the State] for damages or reimbursement or for set-off of any payments made or to be made to the United States [or the State], arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendants shall indemnify and hold harmless the United States [and the State] with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

71. No later than 15 days before commencing any on-site Work, Settling Defendants shall secure, and shall maintain until the first anniversary after [issuance of EPA’s Certification of Completion of the Remedial Action pursuant to Paragraph 50.b of Section XIV (Certification of Completion),] [**or if Certification of Completion of Remedial Action is not used substitute:** the Remedial Action has been performed in accordance with this Consent Decree and the Performance Standards have been achieved] commercial general liability insurance with limits of \_\_\_ million dollars, for any one occurrence, and automobile liability insurance with limits of \_\_\_ million dollars, combined single limit, naming the United States [and the State] as [an] additional insured[s] with respect to all liability arising out of the activities performed by or on behalf of Settling Defendants pursuant to this Consent Decree. In addition, for the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker’s compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendants shall provide to EPA [and the State] certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendants demonstrate by evidence satisfactory to EPA [and the State] that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor.

#### XIX. FORCE MAJEURE

72. “Force majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants’ contractors that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants’ best efforts to fulfill the obligation. The requirement that Settling Defendants exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. “Force majeure” does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

73. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree for which Settling Defendants intend or may intend to assert a claim of force majeure, Settling Defendants shall notify EPA’s Project Coordinator orally or, in his or her absence, EPA’s Alternate Project Coordinator or, in the event both of EPA’s designated representatives are unavailable, the Director of the Waste Management Division, EPA Region \_\_, within [**insert period of time**] of when Settling Defendants first knew that the event might cause a delay. Within \_\_ days thereafter, Settling Defendants shall provide in writing to EPA [and the State] an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule

for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Settling Defendants' rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Settling Defendants, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or Settling Defendants' contractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Settling Defendants from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late notice, is able to assess to its satisfaction whether the event is a force majeure under Paragraph 72 and whether Settling Defendants have exercised their best efforts under Paragraph 72, EPA may, in its unreviewable discretion, excuse in writing Settling Defendants' failure to submit timely notices under this Paragraph.

74. If EPA [, after a reasonable opportunity for review and comment by the State,] agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Consent Decree that are affected by the force majeure will be extended by EPA [, after a reasonable opportunity for review and comment by the State,] for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA [, after a reasonable opportunity for review and comment by the State,] does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify Settling Defendants in writing of its decision. If EPA [, after a reasonable opportunity for review and comment by the State,] agrees that the delay is attributable to a force majeure, EPA will notify Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

75. If Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 72 and 73. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

## XX. DISPUTE RESOLUTION

**[NOTE: The dispute resolution procedures set forth in this Section may be supplemented to provide for use of mediation in appropriate cases. Mediation provisions should contain time limits to ensure that mediation does not cause delays in dispute resolution that could delay the remedial action.]**

76. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of Settling Defendants that have not been disputed in accordance with this Section.

77. Any dispute regarding this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

78. Statements of Position.

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within \_\_ days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States [and the State] a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by Settling Defendants. The Statement of Position shall specify Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 79 (Record Review) or 80.

b. Within \_\_ days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 79 (Record Review) or Paragraph 80. Within \_\_ days after receipt of EPA's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and Settling Defendants as to whether dispute resolution should proceed under Paragraph 79 (Record Review) or 80, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 79 and 80.

79. Record Review. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree, and the adequacy of the performance of response actions taken pursuant to this

Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Waste Management Division, EPA Region \_\_, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 79.a. This decision shall be binding upon Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraphs 79.c and 79.d.

c. Any administrative decision made by EPA pursuant to Paragraph 79.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendants with the Court and served on all Parties within ten days after receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Waste Management Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 79.a.

80. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 78, the Director of the Waste Management Division, EPA Region \_\_, will issue a final decision resolving the dispute. The Waste Management Division Director's decision shall be binding on Settling Defendants unless, within ten days after receipt of the decision, Settling Defendants file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendants' motion.

b. Notwithstanding Paragraph M (CERCLA Section 113(j) Record Review of ROD and Work) of Section I (Background), judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

81. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Settling Defendants under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 89. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXI (Stipulated Penalties).

**XXI. STIPULATED PENALTIES**

82. Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 83 and 84 to the United States [and the State - specify percentage split] for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XIX (Force Majeure). “Compliance” by Settling Defendants shall include completion of all payments and activities required under this Consent Decree, or any plan, report, or other deliverable approved under this Consent Decree, in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans, reports, or other deliverables approved under this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

83. Stipulated Penalty Amounts - Work (Including Payments and Excluding Plans, Reports, and Other Deliverables).

a. [The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 83.b:

Penalty Per Violation Per Day	Period of Noncompliance
\$ _____	1st through 14th day
\$ _____	15th through 30th day
\$ _____	31st day and beyond]

b. Compliance Milestones.

(1) [List violations or compliance milestones including due dates for payments.]

84. Stipulated Penalty Amounts - Plans, Reports, and other Deliverables. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports [or other plans or deliverables] pursuant to the Consent Decree:

Penalty Per Violation Per Day	Period of Noncompliance
\$ _____	1st through 14th day
\$ _____	15th through 30th day
\$ _____	31st day and beyond

85. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 100 (Work Takeover), Settling Defendants shall be liable for a stipulated penalty in the amount of \_\_\_\_\_.] Stipulated penalties under this Paragraph are in addition to the remedies available under Paragraphs 48 (Funding for Work Takeover) and 100 (Work Takeover).

86. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under Section XI (EPA Approval of Plans, Reports, and Other Deliverables), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency; (b) with respect to a decision by the Director of the Waste Management Division, EPA Region \_\_, under Paragraph 79.b or 80.a of Section XX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing in this Consent Decree shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

87. Following EPA's determination that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendants written notification of the same and describe the noncompliance. EPA [and the State] may send Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Settling Defendants of a violation.

88. All penalties accruing under this Section shall be due and payable to the United States [and the State] within 30 days after Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XX (Dispute Resolution) within the 30-day period. All payments to the United States under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with Paragraph 58.b (Instructions for Future Response Cost Payments).

**[NOTE: Where a State is a party and is entitled to a portion of the stipulated penalties, insert procedures for payment to the State.]**

89. Penalties shall continue to accrue as provided in Paragraph 86 during any dispute resolution period, but need not be paid until the following:



a. If the dispute is resolved by agreement of the Parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA [and the State] within 15 days after the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA [and the State] within 60 days after receipt of the Court's decision or order, except as provided in Paragraph 89.c;

c. If the District Court's decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined by the District Court to be owed to the United States [and the State] into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 60 days after receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA [and the State] or to Settling Defendants to the extent that they prevail.

90. If Settling Defendants fail to pay stipulated penalties when due, Settling Defendants shall pay Interest on the unpaid stipulated penalties as follows: (a) if Settling Defendants have timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to Paragraph 89 until the date of payment; and (b) if Settling Defendants fail to timely invoke dispute resolution, Interest shall accrue from the date of demand under Paragraph 88 until the date of payment. If Settling Defendants fail to pay stipulated penalties and Interest when due, the United States [or the State] may institute proceedings to collect the penalties and Interest.

91. The payment of penalties and Interest, if any, shall not alter in any way Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

92. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States [or the State] to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided in this Consent Decree, except in the case of a willful violation of this Consent Decree.

**[NOTE: A provision for the United States to elect between seeking stipulated and statutory penalties for a particular consent decree violation may be substituted in the paragraph above in appropriate cases by changing "for any violation for which a stipulated penalty is**

**provided in this Consent Decree, except in the case of a willful violation” to “for any violation for which a stipulated penalty is collected pursuant to this Consent Decree.”]**

93. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

## XXII. COVENANTS BY PLAINTIFF[S]

**[NOTE: If the United States is granting site-wide covenants, please use Alternative 1, below, and Paragraphs 96-98 (the pre- and post-certification reservations). If the United States is not granting site-wide covenants, such as in a non-final operable unit consent decree that does not address the sole or final OU at the Site (hereinafter “non-final OU” consent decree), please use Alternative 2, below, and delete Paragraphs 96-98.]**

94. Covenants for Settling Defendants by United States. **[Alternative 1 (for final OU decrees):** In consideration of the actions that will be performed and the payments that will be made by Settling Defendants under this Consent Decree, and except as specifically provided in Paragraphs 96, 97 (United States’ Pre- and Post-Certification Reservations), and 99 (General Reservations of Rights), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA] relating to the Site. Except with respect to future liability, these covenants shall take effect upon the receipt by EPA of the payment[s] required by Paragraph 54.a (Payments for Past Response Costs) **[if prepaid Future Response Costs add:** and Paragraph 55.c (Prepayment of Future Response Costs)] and any Interest or stipulated penalties due thereon under Paragraph 61 (Interest) or Section XXI (Stipulated Penalties). With respect to future liability, these covenants shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 50.b of Section XIV (Certification of Completion). These covenants are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants extend only to Settling Defendants and do not extend to any other person.]

**[Alternative 2 (for non-final OU decrees):** In consideration of the actions that will be performed and the payments that will be made by Settling Defendants under this Consent Decree, and except as specifically provided in Paragraph 99 (General Reservations of Rights) of this Section, the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA] for the Work **[if addressed: , Past Response Costs, and Future Response Costs,] [if SFAs are making payments for Settling Defendants’ response costs, insert as appropriate:** Settling Defendants’ Past Response Costs, Settling Defendants’ Future Response Costs]. These covenants shall take effect upon the receipt by EPA of the payment[s] required by Paragraph 54.a (Payments for Past Response Costs) **[if prepaid Future Response Costs add:** and Paragraph 55.c (Prepayment of Future Response Costs)] and any Interest or stipulated penalties due thereon under Paragraph 61 (Interest) or Section XXI (Stipulated Penalties). These covenants are conditioned upon the satisfactory performance by Settling Defendants of their

obligations under this Consent Decree. These covenants extend only to Settling Defendants and do not extend to any other person.]

**[NOTE: If including a RCRA 7003 covenant in Paragraph 94 (Covenants for Settling Defendants by United States) and 95 (Covenant for Settling Federal Agencies) (if SFAs), pursuant to Section 7003(d) of RCRA, you must offer to have a public meeting regarding the settlement and hold such a meeting if requested. To do this, please include language in the Federal Register notice providing for an opportunity for a public meeting in the affected area. For guidance regarding how to comply with this requirement, see “Revised Model Notice Language for Compliance with Public Participation Requirements of Section 7003(d) of RCRA” (October 30, 1996) available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/pub-part-7003-notice-mem.pdf>.]**

**[NOTE: This model contains no natural resource damages (“NRD”) provisions. If the covenants are to cover NRD, they must be negotiated with the NRD Trustees and DOJ. You also will need to modify Paragraph 94 (Covenants for Settling Defendants by United States) and 95 (Covenants for Settling Federal Agencies) (if SFAs), add two new paragraphs after Paragraph 99 (General Reservations of Rights), one containing the reopener for new information and unknown conditions regarding NRD and another defining the known information and conditions, delete Paragraph 99.f (reservation for NRD), and modify Paragraphs 102 (Covenants by Settling Defendants) and 114 (defining what constitutes “matters addressed”).]**

**[NOTE: If SFAs, insert Paragraph 95 using Alternative 1 for site-wide (final OU) consent decrees and Alternative 2 for non-final OU consent decrees.]**

95. Covenant for Settling Federal Agencies.

**[Alternative 1 (for final OU decrees):** In consideration of the payments that will be made by the United States on behalf of Settling Federal Agencies under this Consent Decree, and except as specifically provided in Paragraphs 96, 97 (United States’ Pre- and Post-Certification Reservations), and 99 (General Reservations of Rights), EPA covenants not to take administrative action against Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA] relating to the Site. Except with respect to future liability, EPA’s covenant shall take effect upon the receipt by EPA of the payment[s] required by Paragraph 56.a (Payment to EPA) [**if prepaid Future Response Costs add:** and Paragraph 55.c (Prepayment of Future Response Costs)] and any Interest due thereon under Paragraph 56 (Payments by Settling Federal Agencies). With respect to future liability, EPA’s covenant shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 50.b of Section XIV (Certification of Completion). EPA’s covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. EPA’s covenant extends only to Settling Federal Agencies and does not extend to any other person.]

**[Alternative 2 (for non-final OU decrees):** In consideration of the payments that will be made by the United States on behalf of Settling Federal Agencies under this Consent Decree, and except as specifically provided in Paragraph 99 (General Reservation of Rights), EPA covenants not to take administrative action against Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA] for the Work **[if addressed: , Past Response Costs, and Future Response Costs]**. EPA's covenant shall take effect upon the receipt by EPA of the payment[s] required by Paragraph 56 (Payments by Settling Federal Agencies) **[if prepaid Future Response Costs add:** and Paragraph 55.c (Prepayment of Future Response Costs)] and any Interest due thereon under Paragraph 56. EPA's covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. EPA's covenant extends only to Settling Federal Agencies and does not extend to any other person.]

**[NOTE: In some instances EPA's covenant may also be extended to a federal PRP contractor where the federal PRP settlement includes the contractor. This generally occurs where the contractor is indemnified by the United States under the contract.]**

96. United States' Pre-Certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel Settling Defendants [, and EPA reserves the right to issue an administrative order seeking to compel Settling Federal Agencies,] to perform further response actions relating to the Site and/or to pay the United States for additional costs of response if, (a) prior to Certification of Completion of the Remedial Action, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

97. United States' Post-Certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel Settling Defendants [, and EPA reserves the right to issue an administrative order seeking to compel Settling Federal Agencies,] to perform further response actions relating to the Site and/or to pay the United States for additional costs of response if, (a) subsequent to Certification of Completion of the Remedial Action, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

98. For purposes of Paragraph 96 (United States' Pre-Certification Reservations), the information and the conditions known to EPA will include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the ROD for the Site and the administrative record supporting the ROD. For purposes of Paragraph 97 (United

States' Post-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action and set forth in the ROD, the administrative record supporting the ROD, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

**[NOTE: Include the next paragraph in all consent decrees.]**

99. General Reservations of Rights. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants [, and EPA and the federal natural resource trustee [and the State] reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies,] with respect to all matters not expressly included within Plaintiff's covenant[s]. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants [, and EPA and the federal natural resource trustees [and the State] reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies,] with respect to:

- a. liability for failure by Settling Defendants [or Settling Federal Agencies] to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based on the ownership of the Site by Settling Defendants [or Settling Federal Agencies] when such ownership commences after signature of this Consent Decree by Settling Defendants [or Settling Federal Agencies];
- d. liability based on the operation of the Site by Settling Defendants when such operation commences after signature of this Consent Decree by Settling Defendants and does not arise solely from Settling Defendants' performance of the Work [and liability based on the operation of the Site by Settling Federal Agencies when such operation commences after signature of this Consent Decree by Settling Federal Agencies];
- e. liability based on Settling Defendants' [or Settling Federal Agencies'] transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by Settling Defendants [or Settling Federal Agencies];
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- g. criminal liability;

h. liability for violations of federal or state law that occur during or after implementation of the Work; and

i. liability, [**for final OU consent decrees (and, consistent with Regional practice, for non-final OU consent decrees in which a Certification of Completion of the Remedial Action is used):** prior to Certification of Completion of the Remedial Action,] [**for non-final OU consent decrees in which a Certification of Completion of the Remedial Action is not used:** prior to achievement of Performance Standards in accordance with Paragraph 13:] for additional response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, but that cannot be required pursuant to Paragraph 14 (Modification of SOW or Related Work Plans);]

**[NOTE: Paragraphs 99.j and 99.k below, should be used when the Paragraph 94, Alternative 2 (non-final OU), covenant is used.]**

j. [liability for additional operable units at the Site or the final response action;]

k. [liability for costs that the United States will incur regarding the Site but that are not within the definition of Future Response Costs;]

**[NOTE: Paragraph 99.l should be used when the United States is reserving its right to recover any defined Past Response Costs that are not being collected under the Consent Decree.]**

l. [previously incurred costs of response above the amounts paid pursuant to Paragraph 54.a (Payment of Past Response Costs) [and Paragraph 56 (Payments by Settling Federal Agencies)]];]

**[NOTE: Paragraph 99.m should be added if any agencies of the United States have incurred (or are expected to incur) costs at the Site that are not being resolved under this Consent Decree.]**

m. [Liability for costs incurred or to be incurred by [**insert name of Department or Agency**] regarding the Site.]

100. Work Takeover.

a. In the event EPA determines that Settling Defendants have (1) ceased implementation of any portion of the Work, or (2) are seriously or repeatedly deficient or late in their performance of the Work, or (3) are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to Settling Defendants. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Settling Defendants a

period of ten days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the ten-day notice period specified in Paragraph 100.a, Settling Defendants have not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary ("Work Takeover"). EPA will notify Settling Defendants in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 100.b. Funding of Work Takeover costs is addressed under Paragraph 48.

c. Settling Defendants may invoke the procedures set forth in Paragraph 79 (Record Review), to dispute EPA's implementation of a Work Takeover under Paragraph 100.b. However, notwithstanding Settling Defendants' invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 100.b until the earlier of (1) the date that Settling Defendants remedy, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, or (2) the date that a final decision is rendered in accordance with Paragraph 79 (Record Review) requiring EPA to terminate such Work Takeover.

101. Notwithstanding any other provision of this Consent Decree, the United States [and the State] retain[s] all authority and reserve[s] all rights to take any and all response actions authorized by law.

**[NOTE: If the State is a Co-plaintiff, insert the State's Covenant for Settling Defendants (and Settling Federal Agencies, if any) and Reservation of Rights.]**

### XXIII. COVENANTS BY SETTLING DEFENDANTS [AND SETTLING FEDERAL AGENCIES]

102. Covenants by Settling Defendants. Subject to the reservations in Paragraph 105, Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States [or the State] with respect to

**[for final OU consent decrees: the Site]**

**[for non-final OU consent decrees: the Work, past response actions regarding the Site, [if addressed: Past Response Costs, Future Response Costs,] [if State is a Party and is recovering costs from Settling Defendants, insert as appropriate: State Past Response Costs, State Future Response Costs,] [if SFAs are making payments for Settling Defendants' response costs, insert as appropriate: Settling Defendants' Past Response Costs, Settling Defendants' Future Response Costs]]**

**[for all consent decrees: , and this Consent Decree, including, but not limited to:]**

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA Sections 106(b)(2), 107, 111, 112 or 113, or any other provision of law;

b. any claims under CERCLA Sections 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a), or state law regarding **[for final OU consent decrees: the Site]** **[for non-final OU decrees: the Work, past response actions regarding the Site, [if addressed: Past Response Costs, Future Response Costs, State Past Response Costs, State Future Response Costs, Settling Defendants' Past Response Costs, Settling Defendants' Future Response Costs,]]** and this Consent Decree; or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. §1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

**[NOTE: If the Consent Decree includes a provision under which Settling Defendants will receive disbursements from an EPA special account, Paragraph 102.d(1) below should be used. If the Decree contains a Future Response Cost prepayment provision under which Settling Defendants may receive a return of unused amounts under option 3 of Paragraph 55.f, Paragraph 102.d(2) should be used. If the Decree contains both, Paragraphs 102.d(1) and d(2) should be used.]**

d. [any direct or indirect claim for (1) disbursement from the [Site Name] Special Account or [Site Name] Disbursement Special Account, except as provided in Section XVII (Disbursement of Special Account Funds), or (2) return of unused amounts from the [Site Name] Future Response Costs Special Account, except for unused amounts that EPA determines shall be returned to Settling Defendants in accordance with Paragraph 55.f.]

103. Covenant by Settling Federal Agencies. Settling Federal Agencies agree not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA Sections 106(b)(2), 107, 111, 112, or 113, or any other provision of law with respect to **[for final OU consent decrees: the Site]** **[for non-final OU decrees: the Work, past response actions regarding the Site, [if addressed: Past Response Costs, Future Response Costs, Settling Defendants' Past Response Costs, Settling Defendants' Future Response Costs,]]** and this Consent Decree. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as lead or support agency under the National Contingency Plan (40 C.F.R. Part 300).]

104. Except as provided in [Paragraph 107 (Claims Against MSW Generators and Transporters),] **[for sites using the SA Approach, add: Paragraph 109 (Claims Against De Micromis Parties),]** [Paragraph 111 (Claims Against *De Minimis* and Ability to Pay Parties) and] Paragraph 117 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States [or the State] brings a cause of action or issues an order pursuant to any of the reservations in Section XXII (Covenants by Plaintiff[s]), other than in Paragraphs 99.a (claims



for failure to meet a requirement of the Consent Decree), 99.g (criminal liability), and 99.h (violations of federal/state law during or after implementation of the Work), but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States [or the State] is seeking pursuant to the applicable reservation.

105. Settling Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Settling Defendants' plans, reports, other deliverables or activities. **[If SFAs, insert:** Settling Defendants also reserve, and this Consent Decree is without prejudice to, contribution claims against Settling Federal Agencies in the event any claim is asserted by the United States [or the State] against Settling Defendants pursuant to any of the reservations in Section XXII (Covenants by Plaintiff[s]) other than in Paragraphs 99.a (claims for failure to meet a requirement of the Consent Decree), 99.g (criminal liability), and 99.h (violations of federal/state law during or after implementation of the Work), but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States [or the State] is seeking pursuant to the applicable reservation.]

106. Nothing in this Consent Decree shall be deemed to constitute 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: Use the following two paragraphs if there is MSW at the Site.]**

107. [Claims Against MSW Generators and Transporters. Settling Defendants agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site 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 MSW at the Site, if the volume of MSW disposed, treated, or transported by such person to the Site did not exceed 0.2 percent of the total volume of waste at the Site.

108. The waiver in Paragraph 107 (Claims Against MSW Generators and Transporters) shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person meeting the criteria in Paragraph 107 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 that: (a) the MSW contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; (b) the person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. § 9604(e) or § 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927; or (c) the person impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site. **[NOTE: If a Settling Defendant asserts that it has a claim against a PRP within the scope of this waiver that is unrelated to the PRP's MSW CERCLA liability at the Site, e.g., a claim for contractual indemnification, insert exception for such claim, such as: Further, this waiver shall not apply to Settling Defendant [insert name]'s contractual indemnification claim against [insert name].]**

**[NOTE: Use the following two paragraph de micromis waiver in all settlements.]**

109. [Claims Against De Micromis Parties]. Settling Defendants agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site 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 by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

110. The waiver in Paragraph 109 (Claims Against De Micromis Parties) shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person meeting the criteria in Paragraph 109 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 criteria in Paragraph 109 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 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. **[NOTE: If a Settling Defendant asserts that it has a claim against a PRP within the scope of this waiver that is unrelated to the PRP's de micromis CERCLA liability at the**

Site, e.g., a claim for contractual indemnification, insert exception for such claim, such as: Further, this waiver shall not apply to Settling Defendant [insert name]'s contractual indemnification claim against [insert name].]

[NOTE: Paragraph 111 below should be used if there are known or potential *de minimis* and/or ability to pay (“ATP”) PRPs at the Site. Include bracketed reference to *de minimis* party settlement, ATP party settlement, or both as appropriate given Site facts. Use the bracketed “[or in the future enters]” if there are known or potential *de minimis* and/or ATP PRPs with whom the United States has not yet settled. Please note that inclusion of the future component of the waiver does not affect Settling Defendants’ right to oppose entry of any such future settlements through the public comment process. The scope of the waiver should generally track the scope of the “matters addressed” in the contribution provision. Normally, this means that the scope will be “response costs” as included below. However, if the settlement includes natural resource damages, also include “natural resource damages and assessment costs,” and if the settlement is not site-wide, limit the scope as appropriate. Also, if the “[or in the future enters]” bracket is used and the scope of the future settlement is likely to be different from the past settlement(s), please redraft as necessary.]

111. [Claims Against *De Minimis* and Ability to Pay Parties. Settling Defendants agree not to assert any claims or causes of action and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for response costs relating to the Site against any person that has entered [or in the future enters] into [a final CERCLA Section 122(g) *de minimis* settlement] [, or] [a final settlement based on limited ability to pay] [,] with EPA with respect to the Site. 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.]

[NOTE: For settlements using the SA Approach, include the following paragraph. For explanation, see “Revised Response Selection and Settlement Approach for Superfund Alternative Sites,” OSWER 9208.0-18 (June 17, 2004) available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-sas-04-trans-mem.pdf>.]

112. [Settling Defendants agree not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.]

#### XXIV. EFFECT OF SETTLEMENT; CONTRIBUTION

113. [Except as provided in] [Paragraph 107 (Claims Against MSW Generators and Transporters)] [**for sites using the SA Approach, add:** Paragraph 109 (Claims Against *De Minimis* Parties), and] [Paragraph 111 (Claims Against *De Minimis* and Ability to Pay Parties)] [,] [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] [Paragraph

107 (Claims Against MSW Generators and Transporters)] **[for sites using the SA Approach, add:** Paragraph 109 (Claims Against De Micromis Parties), and] [Paragraph 111 (Claims Against *De Minimis* and Ability to Pay Parties)] [,] [e]ach of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

114. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that each Settling Defendant [and each Settling Federal Agency] is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for “matters addressed” in this Consent Decree. **[For final OU decrees:** The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person, except for the State; **[NOTE: If the State is a party and is resolving its claims regarding the Site through the Consent Decree, delete “except for the State.” Also note that State claims do not include claims for EPA Hazardous Substance Superfund costs that have been provided to the State through a contract or cooperative agreement with EPA and for which EPA retains the responsibility for cost recovery.]** provided, however, that if the United States exercises rights **[if SFAs add:** against Settling Defendants (or if EPA or the federal natural resource trustee [or the State] assert rights against Settling Federal Agencies)] under the reservations in Section XXII (Covenants by Plaintiff[s]), other than in Paragraphs 99.a (claims for failure to meet a requirement of the Consent Decree), 99.g (criminal liability), or 99.h (violations of federal/state law during or after implementation of the Work), the “matters addressed” in this Consent Decree will no longer include those response costs or response actions **[if decree includes a natural resource damages settlement add:** or natural resource damages] that are within the scope of the exercised reservation.] **[For non-final OU decrees:** The “matters addressed” in this Consent Decree are the Work **[if addressed:** , Past Response Costs, Future Response Costs,] **[if State is a Party and is recovering costs from Settling Defendants, insert as appropriate:** State Past Response Costs, State Future Response Costs,] **[if SFAs are making payments for Settling Defendants’ response costs, insert as appropriate:** Settling Defendants’ Past Response Costs, Settling Defendants’ Future Response Costs].]

115. Each Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify the United States [and the State] in writing no later than 60 days prior to the initiation of such suit or claim.

116. Each Settling Defendant shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify in writing the United States [and the State] within ten days after service of the complaint on such Settling Defendant. In addition, each

Settling Defendant shall notify the United States [and the State] within ten days after service or receipt of any Motion for Summary Judgment and within ten days after receipt of any order from a court setting a case for trial.

117. Res Judicata and Other Defenses. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants [**if SFAs and the State are parties, insert:** (and, with respect to a State action, Settling Federal Agencies)] 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 covenants not to sue set forth in Section XXII (Covenants by Plaintiff[s]).

## XXV. ACCESS TO INFORMATION

118. Settling Defendants shall provide to EPA [and the State], upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within their possession or control or that of their contractors or agents relating to activities at the Site 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 regarding the Work. Settling Defendants shall also make available to EPA [and the State], for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

### 119. Business Confidential 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 afforded 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 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 contents of the Record; and (6) the privilege asserted by Settling Defendants. If a claim of privilege applies only to a portion of a Record, the Record shall be provided to the United States in redacted form to mask the privileged portion 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.

c. No Records created or generated pursuant to the requirements of this Consent Decree shall be withheld from the United States [or the State] on the grounds that they are privileged or confidential.

120. No claim of confidentiality or privilege 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.

## XXVI. RETENTION OF RECORDS

121. Until ten years after Settling Defendants' receipt of EPA's notification pursuant to Paragraph 51.b (Completion of the Work), each Settling Defendant shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site, provided, however, that Settling Defendants who are potentially liable as owners or operators of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

**[NOTE: If SFAs, insert the following paragraph. EPA attorneys must assure that the Agency has received a written response to any information requests that it has sent to SFAs containing a certification substantially similar to that required from private PRPs.]**

122. [The United States acknowledges that each Settling Federal Agency (a) is subject to all applicable Federal record retention laws, regulations, and policies; and (b) has certified that it has fully complied with any and all EPA [and State] requests for information regarding the Site 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 [, and state law].]

123. At the conclusion of this record retention period, Settling Defendants shall notify the United States [and the State] at least 90 days prior to the destruction of any such Records, and, upon request by the United States [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 Plaintiffs with the following: (a) the title of the Record; (b) the date of the Record; (c) the name, title, affiliation (e.g., company or firm), and address of the author of the Record; (d) the name and title of each addressee and recipient; (e) a description of the subject of the Record; and (f) the privilege asserted by Settling Defendants. If a claim of privilege applies only to a portion of a Record, the Record shall be provided to the United States in redacted form to mask the privileged portion 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 Consent Decree shall be withheld on the grounds that they are privileged or confidential.

124. Each Settling Defendant 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 (other than identical copies) relating to its potential liability regarding the Site since the earlier of 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 [and State] requests for information regarding the Site 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 [, and state law].

## XXVII. NOTICES AND SUBMISSIONS

125. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other 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. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, [Settling Federal Agencies,] [the State,] and Settling Defendants, respectively. Notices required to be sent to EPA, and not to the United States, under the terms of this Consent Decree should not be sent to the U.S. Department of Justice.

As to the United States:

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

Re: DJ # \_\_\_\_\_

[If SFAs, insert:]  
and:

Chief, Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Re: DJ # \_\_\_\_\_

As to EPA:

Director, Waste Management Division  
United States Environmental Protection Agency  
Region \_\_  
[Address]

and:

[Name]  
EPA Project Coordinator  
United States Environmental Protection Agency  
Region \_\_  
[Address]

As to the Regional Financial  
Management Officer:

[Name]  
[Address]

As to the State:

[Name]  
State Project Coordinator  
[Address]

As to Settling Defendants:

[Name]  
Settling Defendants' Project Coordinator  
[Address]

## XXVIII. RETENTION OF JURISDICTION

126. This Court retains jurisdiction over both the subject matter of this Consent Decree and Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XX (Dispute Resolution).



## XXIX. APPENDICES

127. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the ROD.

“Appendix B” is the SOW.

“Appendix C” is the description and/or map of the Site.

“Appendix D” is the complete list of Settling Defendants.

[NOTE: Insert if needed: “Appendix E” is the draft form of Proprietary Controls. “Appendix F” is the performance guarantee.]

## XXX. COMMUNITY INVOLVEMENT

128. If requested by EPA [or the State], Settling Defendants shall participate in community involvement activities pursuant to the community involvement plan to be developed by EPA. EPA will determine the appropriate role for Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA [and the State] in providing information regarding the Work to the public. As requested by EPA [or the State], Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings that may be held or sponsored by EPA [or the State] to explain activities at or relating to the Site. [NOTE: For any sites at which EPA is negotiating a Technical Assistance Plan (“TAP”), which may include SA Approach settlements, modify the above paragraph to add the text below. For further explanation regarding the SA Approach, see “Revised Response Selection and Settlement Approach for Superfund Alternative Sites,” OSWER 9208.0-18 (June 17, 2004), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-sas-04-trans-mem.pdf>, and for further information on TAP provisions, see “Interim Guidance: Providing Communities with Opportunities for Independent Technical Assistance in Superfund Settlements” (Sept. 3, 2009), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-tap-sf-settle-mem.pdf>.]

[Within 30 days after a request by EPA, Settling Defendants also shall provide EPA with a Technical Assistance Plan (“TAP”) for arranging (at Settling Defendants’ own expense, up to \$50,000) for a qualified community group: (a) to receive services from (an) independent technical advisor(s) who can help group members understand Site cleanup issues; and (b) to share this information with others in the community during the Work conducted pursuant to this Consent Decree. The TAP shall state that Settling Defendants will provide and arrange for any additional assistance needed if the selected community group demonstrates such a need as provided in the SOW. Upon its approval by EPA, the TAP shall be incorporated into and enforceable under this Consent Decree.]

**[Insert in all decrees:]**

Costs incurred by the United States under this Section, including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e), shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Payments for Response Costs).

#### XXXI. MODIFICATION

129. Except as provided in Paragraph 14 (Modification of SOW or Related Work Plans), material modifications to this Consent Decree, including the SOW, shall be in writing, signed by the United States and Settling Defendants, and shall be effective upon approval by the Court. Except as provided in Paragraph 14, non-material modifications to this Consent Decree, including the SOW, shall be in writing and shall be effective when signed by duly authorized representatives of the United States and Settling Defendants. **[If the State is a party, insert: All modifications to the Consent Decree, other than the SOW, also shall be signed by the State, or a duly authorized representative of the State, as appropriate.]** A modification to the SOW shall be considered material if it fundamentally alters the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(ii). Before providing its approval to any modification to the SOW, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification.

**[NOTE: If the Consent Decree includes provisions covering Cashout Settling Defendants and/or *De Minimis* Settling Defendants, and such parties are numerous, include the following paragraph.]**

130. [Modifications (non-material or material) that do not affect the obligations of or the protections afforded to [Cashout Settling Defendants] [or] [*De Minimis* Settling Defendants] may be executed without the signatures of [the Cashout Settling Defendants] [or] [the *De Minimis* Settling Defendants].]

131. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Decree.

#### XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

132. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

133. If for any reason the 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.

XXXIII. SIGNATORIES/SERVICE

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

135. Each Settling Defendant 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.

136. Each Settling Defendant shall identify, on the attached signature page, the name, address, and telephone number 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. Settling Defendants 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. 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.

XXXIV. FINAL JUDGMENT

137. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the 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.

138. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States [, the State,] and Settling Defendants. The Court [**if this Consent Decree is a partial judgment, i.e., it resolves fewer than all claims alleged in the complaint and/or fewer than all parties named in the complaint, insert:** 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

Signature Page for Consent Decree regarding the \_\_\_\_\_ Superfund Site

**FOR THE UNITED STATES OF AMERICA:**

\_\_\_\_\_  
Date

\_\_\_\_\_  
[Name]  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

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

**[If SFAs, insert:]**

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

\_\_\_\_\_  
[Name]  
United States Attorney  
\_\_\_\_\_  
District of \_\_\_\_\_  
[Address]

---

[Name]  
Assistant United States Attorney  
\_\_\_\_\_ District of \_\_\_\_\_  
[Address]

Signature Page for Consent Decree regarding the \_\_\_\_\_ Superfund Site

---

[Name]  
Regional Administrator, Region \_\_  
U.S. Environmental Protection Agency  
[Address]

---

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

**[NOTE: Add signature blocks for OECA, if its  
concurrence is required]**

Signature Page for Consent Decree regarding the \_\_\_\_\_ Superfund Site

**[If State is a party, insert:]**

**FOR THE STATE OF \_\_\_\_\_**

\_\_\_\_\_  
Date

\_\_\_\_\_  
[Name]  
[Title]  
[Address]

Signature Page for Consent Decree regarding the \_\_\_\_\_ Superfund Site

**FOR \_\_\_\_\_ COMPANY, INC.**

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name (print):

Title:

Address:

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

Name (print):

Title:

Address:

Phone:

email:

**[NOTE: A separate signature page must be signed by each settlor.]**



## Instructions for Use of Automated Features

This document includes automatic section and paragraph numbers, automatic cross-references to the section and paragraph numbers, and an updateable table of contents. **Do not change any section or paragraph numbers, any cross-references, or the table of contents section and page numbers manually.** You will just create a lot more work for yourself. To take advantage of these features while editing this document, follow these steps.

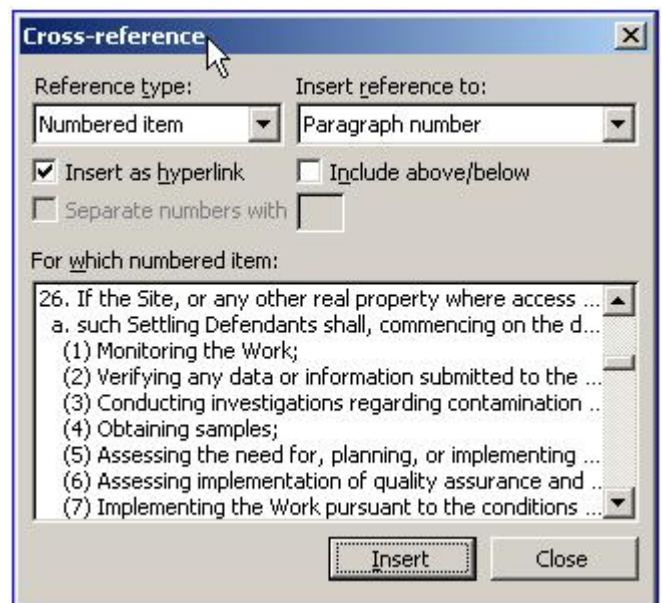
Inserting Text Copied From a Different Document. Text copied from a different document will often have embedded formatting codes. Pasting the text into your document will cause the formatting codes to be inserted as well, which will usually create unpredictable and frustrating formatting and numbering results. Therefore, please use the **Paste Special** function to insert text copied from another document. Click **Edit, Paste Special, Unformatted Text** and **OK**. For Word 2007, press **Alt-Ctrl-V**, click **Unformatted Text** and **OK**. You can also click **Home, Paste, Paste Special, Unformatted Text** and **OK**.

Inserting a New Paragraph. Click at the end of the paragraph immediately preceding the place where you wish to add the new paragraph, and press **Enter**. To increase the new paragraph's outline level press **Enter** again. To decrease the new paragraph's outline level press **Tab**. For example, pressing **Enter** a second time will change your new ¶102.b into ¶103. Pressing **Tab** will change your new ¶102.b into ¶102.a(1), or ¶103 into ¶102.a. The new paragraph's formatting also will be automatically modified. Word 2007 users also may use the **Format Painter** function. Click in any paragraph whose formatting you wish to copy. Click the **Home** tab, and then the **Format Painter** button. A paint brush icon appears. Click in your new paragraph.

### Adding an Updateable Paragraph Cross-Reference:

- Click where you wish to insert a paragraph number cross-reference.
- Click **Insert, Reference, and Cross-reference**. (If using Word 2007, click the **References** tab, and then, in the Captions box, click the **Cross-reference** button.)
- Make sure the **Reference type** field contains **Numbered item** and the **Insert reference to** field contains **Paragraph number**.
- From the list, click the paragraph or subparagraph you wish to cross-reference, and click **Insert**.

**NOTE:** To insert a cross-reference, anywhere in a paragraph, to a subparagraph that is part of the *same* paragraph (e.g., to insert a cross-reference, in ¶26.c(2), to ¶26.a, you will need to insert *two* cross-references (or possibly three), one cross-reference to the main paragraph (e.g., ¶26), and one to the subparagraph (e.g., ¶26.a). Please also manually add a period between the arabic number and the lower case letter.



Updating the Cross-References: Click **Edit** and **Select All**, and press **F9** and **Enter**. For Word 2007, press **Ctrl-A**, **F9** and **Enter**.

**Note**: If a numbered paragraph that has been cross-referenced elsewhere in the document is deleted, please remove the obsolete paragraph cross-reference. Otherwise, when you update the cross-references, the following message will appear: **Error! Reference source not found.**

Updating the Table of Contents. Click in the TOC, and press **F9** and **Enter**. If you have added a new section heading, click **Update entire table** before pressing **Enter**.

Inserting a New Section. If you add a new section, make sure you assign the “¶ Heading 1” paragraph style to it. That will add the section number, change the numbering of later sections, and ensure that the new section can be referenced in the table of contents. Click on the new section heading, click the “Home” tab, and then in Styles box, click the “¶ Heading 1” style.