disposed of on, in, or at the facility.'' [10] Thus, in the subdivision scenario described above, the current landowner might still qualify for the Section 107(b)(3) defense if he or she did not know or have reason to know that the original landowner had disposed of hazardous substances elsewhere on the larger parcel.

2. Settlements Under Section 122(g)(1)(B)

To address concerns that strict liability under Section 107(a)(1) could cause inequitable results with respect to landowners who had not been involved in hazardous substance disposal activities, Congress authorized the Agency to enter into *de minimis* settlements with certain property owners under Section 122(g)(1)(B) of CERCLA, 42 U.S.C. 9622 (g)(1)(B). Under this Section, when the Agency determines that a settlement is ''practicable and in the public interest,'' it ''shall as promptly as possible reach a final settlement'' if the settlement ''involves only a minor portion of the response costs at the facility concerned'' and the Agency determines that the potentially responsible party: ''(i) is an owner of the real property on or in which the facility is located; (ii) did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the facility; and (iii) did not contribute to the release or threat of release * * * through any act or omission.'' [11]

The requirements which must be satisfied in order for the Agency to consider a settlement with landowners under the *de minimis* settlement provisions of Section 122(g)(1)(B) are substantially the same as the elements which must be proved at trial in order for a landowner to establish a third party defense under Section 107(b)(3), as described above.[12]

D. Use of the Policy

This Policy does not constitute rulemaking by the Agency and is not intended and cannot be relied on to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. Furthermore, the Agency may take action at variance with this Policy.

For further information concerning this Policy, please contact Ellen Kandell in the Office of Site Remediation Enforcement at (703) 603–8996.

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BILLING CODE 6560–50–P

[10] Section 101(35)(A) also excludes from the definition of ''contractual relationship'' certain acquisitions of property by government entities and certain acquisitions by inheritance or bequest, so long as the other requirements of Section 101(35)(A) are met. See 42 U.S.C. 101(35)(A) (ii) and (iii).

[11] A detailed discussion of each of these components of Section 122(g)(1)(B) and guidance on structuring settlements under this Section are provided in the Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, *supra* note 2.

[12] *Id.*

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5252–1]

Announcement and Publication of Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement

SUMMARY: The new prospective purchaser guidance supersedes previous Agency policy on when the Agency will provide a covenant not to sue a prospective purchaser of contaminated property under CERCLA. Previous guidance, issued in June 1989, entitled ''Guidance on Landowner Liability under Section 107(a) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property'' (OSWER Directive No. 9835.9 and 54 FR 34235 (Aug. 18, 1989), had two separate parts, including a model administrative order and a model consent decree for *de minimis* landowner settlements. The first part of the previous guidance, landowner liability/the innocent landowner defense and the Agency's use of *de minimis* landowner settlements including model agreements to use in such settlements remains Agency Policy. The section of the guidance dealing with prospective purchasers is changed by new guidance approved May 24, 1995.

In an effort to promote cleanup for the beneficial reuse and development of contaminated properties, EPA is expanding the criteria by which it will consider entering into prospective purchaser agreements. EPA will consider such agreements if the agreement results in either (1) a substantial direct benefit to the Agency in terms of cleanup or funds for cleanup or (2) a substantial indirect benefit to the community coupled with a lesser direct benefit to the Agency. Additionally, the new guidance should enable the Agency to enter into more prospective purchaser agreements by expanding the universe of eligible sites. A model prospective purchaser agreement has also been developed and is part of the new guidance.

FOR FURTHER INFORMATION CONTACT: Additional information on the prospective purchaser policy is available from Lori Boughton ((703) 603–8959) or Elisabeth Freed ((703) 603–8936) in the Office of Site Remediation Enforcement, 402 M St., S.W., 2273–G, Washington, D.C. 20460. Information regarding the model prospective purchaser agreement and site specific prospective purchaser inquiries should be directed to Helen Keplinger ((202) 260–7116) in the Office of Site Remediation Enforcement, 401 M St. S.W., 2272, Washington, D.C. 20460.

Dated: June 21, 1995.

Bruce M. Diamond,

Director, Office of Site Remediation Enforcement.

Memorandum

Subject: Guidance on Agreements with Prospective Purchasers of Contaminated Property

From: Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance

To: Regional Administrators, Regions I–X; Regional Counsel, Region I–X; Waste Management Division Directors, Regions I–X

This memorandum transmits the guidance and model agreement concerning prospective purchasers of contaminated Superfund property. The attached guidance supersedes the Agency policy issued in June 1989, entitled ''Guidance on Landowner Liability under Section 107(a) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property'' (OSWER Directive No. 9835.9 and 54 FR 34235 (Aug. 18, 1989). The 1989 guidance limited the use of these covenants to situations where the Agency planned to take an enforcement action, and where the Agency received a substantial benefit for cleanup of the site by the purchaser, not otherwise available. In an effort to promote cleanup for the beneficial reuse and development of these properties, EPA is expanding the circumstances under which it will consider entering into prospective purchaser agreements.

Additional information on this policy is available from Lori Boughton ((703) 603–8959) or Elisabeth Freed ((703) 603–8936) in the Office of Site Remediation Enforcement. Information regarding the model agreement and site specific inquiries should be directed to Helen Keplinger ((202) 260–7116) in the Office of Site Remediation Enforcement.

GUIDANCE ON SETTLEMENTS WITH PROSPECTIVE PURCHASERS OF CONTAMINATED PROPERTY

I. Purpose

This document supersedes EPA's policy on agreements with prospective purchasers of contaminated property as set forth in the June 6, 1989, policy document entitled ''Guidance on

Landowner Liability under Section 107(a) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property'' [1] (''the 1989 guidance''). This revised guidance reflects both Agency experience in implementing the 1989 guidance and changes to that guidance that EPA believes are needed.

During the past several years, EPA has entered into a number of prospective purchaser agreements to enable purchasers to buy contaminated property for cleanup, redevelopment or reuse. The 1989 guidance required EPA to receive substantial benefits in terms of work or reimbursement of response costs that otherwise would not have been available. While some agreements required performance of cleanup work on contaminated parcels prior to their redevelopment, others provided covenants not to sue for purchase of uncontaminated portions of larger Superfund sites. EPA's experience has demonstrated that prospective purchaser agreements might be both appropriate and beneficial in more circumstances than contemplated by the 1989 guidance. The Agency now believes that it may be appropriate to enter into agreements resulting in somewhat reduced benefits to the Agency through cleanup or response costs or in benefits that also may be available from other parties. These agreements in turn should provide substantial benefits to the community through the creation or retention of jobs, productive use of abandoned property, or revitalization of blighted areas.

While this new guidance restates much of the 1989 guidance, it revises two of the original criteria used to determine whether a prospective purchaser agreement is appropriate. The revised criteria allow the Agency greater flexibility to consider agreements with covenants not to sue to encourage reuse or development of contaminated property that would have substantial benefits to the community (*e.g.*, through job creation or productive use of abandoned property), but also would be safe, consistent with site remediation, and have direct benefits to the Agency. A ''model'' prospective purchaser agreement, which should be used as a starting point for negotiation of agreements, is attached.

II. Statement of Policy

Because of the clear liability which attaches to landowners who acquire property with knowledge of contamination, the Agency has received numerous requests for covenants not to sue from prospective purchasers of contaminated property.[2] It is the Agency's policy not to become involved in private real estate transactions. However, an agreement with a covenant not to sue a prospective purchaser might appropriately be considered if it will have substantial benefits for the government and if the prospective purchaser satisfies other criteria.[3]

The Agency recognizes that entering into an agreement containing a covenant not to sue with a prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a payment for cleanup or a commitment to perform a response action. EPA's experience has shown that prospective purchaser agreements have also benefitted the community where the site is located by encouraging the reuse or redevelopment of property at which the fear of Superfund liability may have been a barrier. The Agency believes that it is necessary to provide greater flexibility in offering covenants not to sue. Through this guidance, the Agency adopts a policy which expands the circumstances under which prospective purchaser agreements may be considered.

III. Criteria for Entering Into Covenants Not To Sue With Prospective Purchasers of Contaminated Property

The following criteria should be met before the Agency considers entering into agreements with prospective purchasers. These criteria are intended to reflect EPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment. The Agency may also reject any offer if it determines that entering into an agreement with a prospective purchaser is not sufficiently in the public interest to warrant expending the resources necessary to reach an agreement. Regions should consider the following criteria when evaluating prospective purchaser agreements.

1. An EPA Action at the Facility Has Been Taken, Is Ongoing, or Is Anticipated To Be Undertaken by the Agency

This criterion is meant to ensure that EPA does not become unnecessarily involved in purely private real estate transactions or expend its limited resources in negotiations which are unlikely to produce a sufficient benefit to the public. EPA, however, recognizes the potential gains in terms of clean up and public benefit that may be realized with broader application of prospective purchaser agreements. Therefore, this criterion has been expanded beyond the limitation in the 1989 guidance to sites where enforcement action is anticipated, to now include sites where federal involvement has occurred or is expected to occur.

Accordingly, when requested, the Agency may consider entering into prospective purchaser agreements at sites listed or proposed for listing on the National Priorities List (NPL), or sites where EPA has undertaken, is undertaking, or plans to conduct a response action. If the Agency receives a request for a prospective purchaser agreement at a site where EPA has not yet become involved, Regions should first evaluate the realistic possibility that a prospective purchaser may incur Superfund liability when determining the appropriateness of entering into a prospective purchaser agreement. This evaluation should clearly show that EPA's covenant not to sue is essential to remove Superfund liability barriers and allow the private party cleanup and productive use, reuse, or redevelopment of the site.

The Agency should consider the following factors when evaluating the appropriateness of entering into an agreement with a prospective purchaser at any site:

a. Whether information regarding releases or potential releases of hazardous substances at the site indicates that there is a substantial likelihood of federal response or enforcement action at the site that would justify EPA's involvement in entering into the prospective purchaser agreement. EPA should consider information that is available through EPA's data systems, such as the Comprehensive Environmental Response, Compensation, and Liability Information System (''CERCLIS''), a state agency, or through submissions from the prospective purchaser, such as the results of an environmental audit or site assessment.

b. Whether other available avenues (*e.g.*, private indemnification

[1] OSWER Directive No. 9835.9 and 54 FR 34235 (Aug. 18, 1989).

[2] Since settlements with typical prospective purchasers (*i.e.*, those who do not currently own the property, are not otherwise involved with the site, and are, therefore, not yet liable under Section 107) will not be reached under Section 122, the procedures and restrictions in that section, such as those relating to covenants not to sue, will not apply.

[3] This guidance is also applicable to persons seeking prospectively to operate or lease contaminated property. Agreements with prospective lessees/operators will be evaluated using the criteria set forth in this guidance, and will require the current owner's signature.

agreements) may exist to sufficiently alleviate the threat of Superfund liability at the site without the need for EPA involvement. In most cases EPA will decline to consider an agreement at a site that is currently undergoing cleanup through a state program, since future EPA activity at such a site is extremely unlikely.

Prospective purchaser agreements generally will not be appropriate at sites screened out using the above criteria. For example, sites designated by EPA as No Further Response Action Planned (NFRAP) and removed from CERCLIS will rarely be deemed appropriate for a prospective purchaser agreement. Even at such sites, however, EPA may, in extremely unusual circumstances, consider a prospective purchaser agreement if it is in the public interest and the agreement is essential to achieve a very significant public benefit.

2. The Agency Should Receive a Substantial Benefit Either in the Form of a Direct Benefit for Cleanup, or as an Indirect Public Benefit in Combination With a Reduced Direct Benefit to EPA

A cornerstone of the Agency's evaluation process under this policy is the measurement of environmental benefit, in the form of direct funding, or cleanup, or a combination of reduced direct funding or cleanup and an indirect public benefit. The Agency believes that its past practice of limiting prospective purchaser agreements to those situations where substantial benefit was measured only in terms of cost reimbursement or work performed may have decreased the effectiveness of this tool.

This guidance encourages a more balanced evaluation of both the direct and indirect benefits of a prospective purchaser agreement to the government and the public. EPA recognizes that indirect benefits to a community is an important consideration and may justify the commitment of the Agency's resources necessary to negotiate a prospective purchaser agreement, even where there are reduced direct benefits to the Agency in terms of cleanup and cost reimbursement.

Therefore, EPA may continue to consider entering into prospective purchaser agreements where there is a substantial direct benefit to EPA in terms of a commitment to conduct the cleanup or to reimburse EPA's cost of cleanup. Furthermore, Regions may now consider negotiating prospective purchaser agreements that will result in substantial indirect benefits to the community as long as there is still some direct benefit to the Agency. Both direct and indirect benefits should be measurable to enable EPA to evaluate them effectively and to ensure they are substantial. Examples of indirect benefits to the community include measures that serve to reduce substantially the risk posed by the site, creation or retention of jobs, development of abandoned or blighted property, creation of conservation or recreation areas, or provision of community services (such as improved public transportation and infrastructure.) Examples of reduced but measurable benefits to EPA include partial cleanup or compensation.

While this policy is intended to provide greater flexibility in providing prospective purchaser agreements, EPA is not reducing its commitment to environmental protection or environmental justice. The Agency intends to carefully weigh the public interest considerations of creating jobs in the inner city, where older contaminated industrial properties are often located, against the possibility of further environmental degradation of industrial property in mixed industrial/residential areas. EPA is committed to working with purchasers of such property, to the extent possible, to ensure proper cleanup and promote responsible land use.

3. The Continued Operation of the Facility or New Site Development, With the Exercise of Due Care, Will Not Aggravate or Contribute to the Existing Contamination or Interfere With EPA's Response Action

Information which should be considered by the Agency to evaluate the effect of new site development or continued operation of the facility could include site assessment data and the Engineering Evaluation Cost Analysis (EE/CA) or remedial investigation/feasibility study (RI/FS), if available, and all other information relevant to the condition of the facility. If the prospective purchaser intends to continue the operations of an existing facility, the prospective purchaser should submit information sufficient to allow the Agency to determine whether the continued operations are likely to aggravate or contribute to the existing contamination or interfere with the remedy. If the prospective purchaser plans to undertake new operations or development of the property, comprehensive information regarding these plans should be provided to EPA. If the planned activities of the prospective purchaser are likely to aggravate or contribute to the existing contamination or generate new contamination, EPA generally will not enter into an agreement, or will include restrictions in the agreement which prohibit those operations or portions of those operations which are likely to aggravate or contribute to the existing contamination or interfere with the remedy.

The Agency will determine on a case-by-case basis whether the available information is sufficient for purposes of this evaluation. One key factor to be considered is whether the remedial investigation or other site evaluation has been completed and the extent of information which has been generated in that process. EPA may not enter into an agreement if the available information is insufficient for purposes of evaluating the impact of the proposed activities.

4. The Continued Operation or New Development of the Property Will Not Pose Health Risks to the Community and Those Persons Likely To Be Present at the Site

EPA believes it is important to consider the environmental implications of site operations on the surrounding community and to those likely to be present or have access to the site.

5. The Prospective Purchaser Is Financially Viable

A settling party, including a prospective purchaser of contaminated property, should demonstrate that it is financially viable and capable of fulfilling any obligation under the agreement. In appropriate circumstances, EPA may structure payment or work to be performed to avoid or minimize an undue financial burden on the purchaser.

IV. Consideration

As a matter of law, it is necessary for EPA to obtain adequate consideration when entering into a prospective purchaser agreement. In determining what constitutes adequate consideration, Regions should consider a number of factors. Initially, Regions should examine the amount of past and future response costs expected to be incurred at the site, whether there are other potentially responsible parties who can perform the work or reimburse EPA's costs, and whether there is likely to be a shortfall in recovery of costs at the site. Regions should then consider the purchase price to be paid by the prospective purchaser, the market value of the property, the value of any lien on the property under Section 107(1) of CERCLA, whether the purchaser is paying a reduced price due to the condition of the property, and if so, the likely increase in the value of the

property attributable to the cleanup (*e.g.* compare purchase price or market price with the estimated value of the property following completion of the response action). Finally, Regions should consider the size and nature of the prospective purchaser and the proposed use of the site (*e.g.* whether the purchaser is a large commercial or industrial venture, a small business, a non-profit or community-based activity). The analysis of any benefits received by the Agency also should contemplate any projected ''windfall'' profit to the purchaser when the government has unreimbursed response costs, and whether it is appropriate to include in the agreement some provision to recoup such costs. This analysis should be coupled with an examination of any indirect benefit that the Agency may receive (*e.g.*, demolition of structures, implementation of institutional controls) in determining whether a prospective purchaser agreement provides a substantial benefit.

V. Public Participation

In light of EPA's new policy of accepting indirect public benefit as partial consideration, and the fact that the prospective purchaser agreements will provide contribution protection to the purchaser, the surrounding community and other members of the public should be afforded opportunity to comment on the settlement, wherever feasible. Because settlements with prospective purchasers are not expressly governed by CERCLA Section 122, there is no legal requirement for public notice and comment. Whenever practicable, however, Regions should publish notices in the **Federal Register** to ensure adequate notification of the agreement to all interested parties. Notice of a proposed settlement, in the **Federal Register** alone, however, will rarely be sufficient to appropriately involve a community in the process concerning an agreement with a prospective purchaser. Particularly in urban communities and at facilities where environmental justice is an issue, Regions should provide sufficient opportunities for public information dissemination and facilitate public input. Seeking cooperation with state and local government may also facilitate public awareness and involvement. Additionally, Regions should make a case-by-case determination of the need and level of additional measures to ensure meaningful community involvement with respect to the agreement. Because of business considerations some prospective purchaser agreements may be subject to relatively short deadlines. In these circumstances, Regions should allow sufficient time for appropriate approvals and public comment prior to the deadline.

VI. Process

A mandatory consultation with the Director of the Regional Support Division, Office of Site Remediation Enforcement, is required for any agreement entered with a prospective purchaser of contaminated property. Any prospective purchaser agreement can only be entered into with the express concurrence of the Assistant Attorney General. It is important that Regions involve EPA Headquarters and the Department of Justice at an early point in the process, and keep them involved throughout the negotiations. In particular, any draft settlement document should be forwarded to Headquarters and the Department of Justice prior to being sent to a prospective purchaser. When seeking approval for a settlement, it is important to explain the consideration for the covenant not to sue, whether direct or a combination of direct and indirect benefits, how it was determined, and why the Region considers it to be adequate.

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency and creates no substantive rights in any persons. Case specific inquiry should be directed to the Regional Support Division. Additional information on this policy is available from Lori Boughton ((703) 603–8959), Elisabeth Freed ((703) 603–8936) in the Policy and Program Evaluation Division, and Helen Keplinger ((202) 260–7116) in the Regional Support Division.

Region _____

In the matter of: [name] [Docket Number] under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, *et seq.*, as amended. [state law, if appropriate] Agreement and Covenant Not To Sue [Insert Settling Respondent's Name]

I. Introduction

This Agreement and Covenant Not to Sue (''Agreement'') is made and entered into by and between the United States Environmental Protection Agency (''EPA'') [state of _____] and _____ [insert name of Settling Respondent] (collectively the ''Parties'').

EPA enters into this Agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. § 9601, *et seq.* [If the state is a party, insert ''The State of _____, enters into this Agreement pursuant to [cite relevant state authority.]'' and make appropriate reference to state with respect to affected provisions, including payment or work to be performed].

[Provide introductory information, consistent with Definitions and Statement of Facts, about the party purchasing the contaminated property including, name (''Settling Respondent''), address, corporate status if applicable and include proposed use of the property by prospective purchaser. Provide name, location and description of Site.]

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VII, VIII, IX, and X [If this Agreement contains a separate section for Settling Respondent's reservations, add section number], the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA [and the state] of a substantial benefit, is in the public interest.

II. Definitions

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. ''EPA'' shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

2. ''Existing Contamination'' shall mean any hazardous substances, pollutants or contaminants, present or existing on or under the Site as of the effective date of this Agreement.

3. ''Parties'' shall mean EPA, [State of _____], and the Settling Respondent.

4. ''Property'' shall mean that portion of the Site which is described in Exhibit 1 of this Agreement.

5. ''Settling Respondent'' shall mean _____.

6. ''Site'' shall mean the [Superfund] Site, encompassing approximately _____ acres, located at [address or description of location] in [name of city, county, and State], and depicted generally on the map attached as Exhibit 2. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located [provide a more specific definition of the Site where possible; may also wish to include within Site description structures, USTs, etc].

7. ''United States'' shall mean the United States of America, its departments, agencies, and instrumentalities.

III. Statement of Facts

8. [Include only those facts relating to the Site that are relevant to the covenant being provided the prospective purchaser. Avoid adding information that relates only to actions or parties that are outside of this Agreement.]

9. The Settling Respondent represents, and for the purposes of this Agreement EPA [and the state] relies on those representations, that Settling Respondent's involvement with the Property and the Site has been limited to the following: [Provide facts of any involvement by Settling Respondent with the Site, for example performing an environmental audit, or if Settling Respondent has had no involvement with the Site so state.].

IV. Payment

10. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein [and Removal of Lien in Section XXI herein if that is part of the consideration for the agreement], Settling Respondent agrees to pay to EPA the sum of $_____, within _____ days of the effective date of this Agreement. [A separate section should be added if the consideration is work to be performed.] The Settling Respondent shall make all payments required by this Agreement in the form of a certified check or checks made payable to ''EPA Hazardous Substance Superfund,'' referencing the EPA Region, EPA Docket number, and Site/Spill ID#_____ [insert 4-digit no.; first 2 numbers represent Region, second 2 numbers are Region's Site/Spill ID no.], [DOJ case number _____, if applicable] and name and address of Settling Respondent. [insert Regional Superfund Lockbox address where payment should be sent]. Notice of payment shall be sent to those persons listed in Section XV (Notices and Submissions) and to EPA Region _____ Financial Management Officer [insert address].

11. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a), compounded on an annual basis.

[_____.] [Work To Be Performed]

[Include this section and other appropriate provisions relating to performance of the work, such as financial assurance, agency approvals, reporting, etc., where work to be performed is the consideration for the Agreement.

_____. Statement of Work attached as Exhibit 3.]

V. Access/Notice to Successors in Interest

12. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA [and the state] its authorized officers, employees, representatives, and all other persons performing response actions under EPA [or state] oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by the Settling Respondent, for the purposes of performing and overseeing response actions at the Site under federal [and state] law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. 6901, (''RCRA'') *et seq.*, and any other applicable statute or regulation, including any amendments thereto.

13. Within 30 days after the effective date of this Agreement, the Settling Respondent shall record a certified copy of this Agreement with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____. Thereafter, each deed, title, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to this Agreement. A copy of these documents should be sent to the persons listed in Section XV (Notices and Submissions).

14. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees, of the Property shall provide the same access and cooperation. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement [and where appropriate, Section _____ (Work to be Performed)].

VI. Due Care/Cooperation

15. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. 9603, or any other law, immediately notify EPA of such release or threatened release.

VII. Certification

16. By entering into this agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA [and the state] all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees,

contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States [and the state] determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States [and the state] reserves all rights it [they] may have.

VIII. United States' Covenant Not To Sue [4]

17. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment), of this Agreement [if consideration for Agreement is work to be performed, insert, as appropriate, ''and upon completion of the work specified in Section _____ (Work to Be Performed) to the satisfaction of EPA''], the United States [and the state] covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. 9606 or 9607(a) [and state law cite] with respect to the Existing Contamination.

IX. Reservation of Rights

18. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States [and the State] reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation), Section XIV (Payment of Costs, [and, if appropriate, Section _____ (Work to be Performed)];

(b) any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;

(c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;

(d) any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;

(e) criminal liability;

(f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and

(g) liability for violations of local, State or federal law or regulations.

19. With respect to any claim or cause of action asserted by the United States [or the state], the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

20. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States [or the state] may have against any person, firm, corporation or other entity not a party to this Agreement.

21. Nothing in this Agreement is intended to limit the right of EPA [or the state] to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA [or the state] in exercising its authority under federal [or state] law. Settling Respondent acknowledges that it is purchasing property where response actions may be required.

X. Settling Respondent's Covenant Not To Sue

22. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States [or the state], its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

23. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are 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. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. 9611, or 40 CFR 300.700(d).

XI. Parties Bound/Transfer of Covenant

24. This Agreement shall apply to and be binding upon the United States, [and the state], and shall apply to and be binding on the Settling Respondent, its officers, directors, employees, and agents. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

25. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA [and the state] in its sole discretion.

26. The Settling Respondent agrees to pay the reasonable costs incurred by EPA [and the state] to review any subsequent requests for consent to assign or transfer the Property.

27. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA [the state] and the assignor or transferor agree otherwise and modify

[4] Since the covenant not to sue is from the United States, Regions negotiating these Agreements should advise the Department of Justice of any other federal agency involved with the Site, or which may have a claim under CERCLA with respect to the Site and use best efforts to advise such federal agency of the proposed settlement.

this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA [and the state].

XII. Disclaimer

28. This Agreement in no way constitutes a finding by EPA [or the state] as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA [or the state] that the Property or the Site is fit for any particular purpose.

XIII. Document Retention

29. The Settling Respondent agrees to retain and make available to EPA [and the state] all business and operating records, contracts, site studies and investigations, and documents relating to operations at the Property, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, the Settling Respondent shall notify EPA [and the state] of the location of such documents and shall provide EPA [and the state] with an opportunity to copy any documents at the expense of EPA [or the state]. [Where work is to be performed, consider providing for document retention for ten years or until completion of work to the satisfaction of EPA, whichever is longer.]

XIV. Payment of Costs

30. If the Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment), [or Section_____ (Work to be Performed)] of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States [and the state] to enforce this Agreement or otherwise obtain compliance.

XV. Notices and Submissions

31. [Insert names, titles, and addresses of those to whom notices and submissions are due, specifying which submissions are required.]

XVI. Effective Date

32. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA [and the state] has fully executed the Agreement after review of and response to any public comments received.

XVII. Attorney General Approval

33. The Attorney General of the United States or her designee has issued prior written approval of the settlement embodied in this Agreement.

XVIII. Termination

34. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XIX. Contribution Protection

35. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are [all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination].

36. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States [and the state] in writing no later than 60 days prior to the initiation of such suit or claim.

37. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States [and the state] within 10 days of service of the complaint on them.

XX. Exhibits

38. Exhibit 1 shall mean the description of the Property which is the subject of this Agreement.

39. Exhibit 2 shall mean the map depicting the Site.

[_____. Exhibit 3 shall mean the Statement of Work.]

XXI. Removal of Lien

40. [Use this provision only when appropriate.] Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment) [or upon satisfactory completion of work to be performed specified in Section _____ (Work to be Performed)], EPA agrees to remove any lien it may have on the Property under Section 107(l) of CERCLA, 42 U.S.C. 9607(l), as a result of response action conducted by EPA at the Property.

XXII. Public Comment

41. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

It is So Agreed:
United States Environmental Protection Agency
By:

_____
Regional Administrator, Region _____
Date

It is So Agreed:
By:

_____
Name Date

[FR Doc. 95–16282 Filed 6–30–95; 8:45 am]
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