

1995, Contact: Al Murphy (509) 682-2576.

EIS No. 950323, Draft Supplement, FHW, ME, Sears Island Marine Dry Cargo Terminal and Access Road Construction, Funding, COE Section 404 and 10 Permits, Waldo County, ME, Due: September 29, 1995, Contact: Paul Lariviere (207) 622-8487.

EIS No. 950324, Final EIS, NOA, 1995 Regulatory Amendment for the Western Atlantic Bluefin Tuna Fishery, Implementation, Contact: Richard B. Stone (301) 713-2347.

Under Section 1506.10(d) of the Council on Environmental Quality Regulations For Implementing The Procedural Provisions of the National Environmental Policy Act a 30-day Waiver of the Prescribed Period has been Granted.

EIS No. 950325, Draft EIS, NPS, VA, Richmond National Battlefield Park General Management Plan and Land Protection Plan, Implementation, Hanover, Henrico and Chesterfield Counties, VA, Due: September 11, 1995, Contact: John H. Reber (303) 969-2418.

EIS No. 950326, Draft Supplement, NIH, MD, William H. Natcher Building, Phase II Construction and Consolidation, Updated Information, Located on National Institutes of Health Bethesda Campus, Funding and NPDES Permit, Montgomery County, MD, Due: September 11, 1995, Contact: Janyce Hedetniemi (301) 496-3931.

EIS No. 950327, Final EIS, DOE, SC, Savannah River Site Waste Management Facilities, Implementation, Aiken, Allendale and Barnwell Counties, SC, Due: August 28, 1995, Contact: Arthur B. Gould, Jr. 1-(800)-242-8269.

#### Amended Notices

EIS No. 950232, Draft Supplement, FHW, NC, US 117 Corridor Improvement Project, US 13/70 at Goldsboro, North to US 301 in Wilson, Funding and COE Section 404 Permit, Updated and Additional information, Wayne and Wilson Counties, NC, Due: July 24, 1995, Contact: Nicholas L. Graf (919) 856-4346.

Published FR-6-09-95 Correction of Document Status from Final to Draft Supplemental EIS.

EIS No. 950315, Draft EIS, EPA/COE, NJ, Hackensack Meadows District (HMD) Special Area Management Plan (SAMP), Development and Implementation, COE Section 10 and 404 Permit Issuance, NJ, Due:

September 18, 1995, Contact: Roberta W. Hargrove (212) 637-3495.

Published FR-07-21-95 The US Environmental Protection Agency and the US Army Corps of Engineers (COE) are Joint Lead Agencies for this Project. The COE contact is Joseph J. Seebode, Phone Number (212) 264-3993.

Dated: July 25, 1995.

**William D. Dickerson,**

*Director, Office of Federal Activities.*

[FR Doc. 95-18624 Filed 7-27-95; 8:45 am]

BILLING CODE 6560-50-U

[FRL-5266-6]

#### Marsh Management Subcommittee; Public Meeting; Cancellation

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of meeting cancellation.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, Public Law 92-463, notice of cancellation is hereby given for the two day meeting of the Marsh Management Subcommittee under the Ecosystem Sustainable Economies Committee of the National Advisory Council for Environmental Policy and Technology (NACEPT). The meeting notice was announced in the **Federal Register** on July 17, 1995, published at 60 FR 36414.

*Previously Announced Time and Date of Meeting:* The Subcommittee was scheduled to meet on August 2-3, 1995.

*Previously Announced Location of Meeting:* Corps of Engineers New Orleans District Office located at the Foot of Prytania, 7400 Leake Avenue, New Orleans, LA 70118.

*Changes in the Meeting:* EPA has not scheduled a new meeting. The new date and location for the meeting will be announced in the **Federal Register** after determination.

**FOR FURTHER INFORMATION CONTACT:** Connie Cahanap, Wetlands Division, OWOW, Mail Code 4502F, U.S. Environmental Protection Agency, Washington, DC 20460, (202) 260-6531.

Dated: July 25, 1995.

**Robert H. Wayland III,**

*Director, Office of Wetlands, Oceans and Watersheds.*

[FR Doc. 95-18738 Filed 7-27-95; 8:45 am]

BILLING CODE 6560-50-M

[FRL-5265-1]

#### Superfund Program; Revised Model CERCLA RD/RA Consent Decree

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** The Agency is today publishing a revised version of the Model CERCLA RD/RA Consent Decree. The revised Model, which will supersede the 1991 interim Model, has been jointly modified by EPA and the Department of Justice on the basis of experience to date. The principal impetus behind the important substantive changes contained in the revised Model has been a desire to enhance the fairness and increase the number of settlements in which potentially responsible parties agree to implement government-selected remedies at Superfund sites. By publishing the revised Model EPA seeks to broadly inform affected members of the public of changes in the federal government's policy with respect to settlements for the performance of remedial design/remedial action (RD/RA).

**FOR FURTHER INFORMATION CONTACT:** Steve Botts, Mail Code 2272, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260-5787.

**Steven A. Herman,**

*Assistant Administrator, Office of Enforcement and Compliance Assurance.*

#### Memorandum

Subject: Final Revised Model CERCLA RD/RA Consent Decree From:

Steven A. Herman, Assistant Administrator for Enforcement, and Compliance Assurance  
Lois Schiffer, Assistant Attorney General for Environment and Natural Resources, U.S. Department of Justice

To: Regional Administrators, Regions I-X

Attached is the final version of the revised Model CERCLA RD/RA Consent Decree. This document supplants the Interim Model CERCLA RD/RA Consent Decree published in the July 8, 1991 **Federal Register** (56 FR 30996).

#### Summary

The Model has been successful in achieving, as one of its main goals, a reduction in the amount of time spent on drafting and negotiating individual consent decrees, allowing settlements to be reached more quickly and with fewer transaction costs. The Model also has been effective in ensuring that consent decrees for remedial design/remedial action protect the interests of the public and assure the accomplishment of the important cleanup objectives of the Superfund program.

However, there have been persistent complaints from potentially responsible

parties ("PRPs") that the Model is overly stringent in certain respects. At a number of sites PRPs have indicated that the Model was an impediment to settlement, contributing to an increase in the need to use unilateral orders to accomplish cleanup. Since settlement requires agreement by both sides, we have taken seriously comments by PRPs regarding provisions that they claim create serious obstacles to settlement.

The revised Model represents a major effort to respond to PRP concerns and to protect the interests of the people of the United States. The revised Model also clarifies provisions whose meaning was unclear and brings the Model RD/RA Consent Decree into conformity with other model settlement documents being developed by EPA and the Department of Justice. The new Model decree reflects the sustained efforts of a Headquarters/Region/ DOJ workgroup and considerable input from numerous regional personnel.

### Specific Revisions From Old Model

#### *Additional Response Actions*

The "Additional Response Actions" section in the old Model has been the subject of by far the most frequent and vociferous criticism by PRPs. This provision required the settling defendants to undertake any additional response actions that EPA may later determine to be necessary in the event that the original remedial action fails to meet the "performance standards" specified in the Decree. PRPs characterized this obligation as a "blank check" that unfairly subjected them to potentially large and unknown costs. Some PRPs indicated that, although they recognize the need for EPA to reserve its rights to seek additional work in the event of remedy failure, it is unfair and unduly burdensome to require PRPs to accept the obligation to perform such unknown work as an affirmative obligation under the Decree.

We are addressing this concern by deleting the "Additional Response Actions" section of the Interim Model, in favor of two new provisions addressing the questions of remedy failure and modifications of the remedial action plan that may be needed as the remedy is implemented.

#### *Modification of the Statement of Work*

First, a new paragraph entitled "Modification of the Statement of Work or Related Work Plans" has been added to Section VI of the Model ("Performance of the Work by settling defendants"). This provision will enable EPA to require the settling defendants to implement modifications to the

Statement of Work or "SOW" (usually attached to the consent decree), or to work plans submitted under the decree, if such modifications become necessary as the remedy is implemented. Such modifications, however, may be required only to the extent they are "consistent with the scope of the remedy selected in the ROD" (Record of Decision) that the settling defendants have agreed to implement. In order to assure that there is clarity and a common understanding about the scope of the settling defendants' obligations under this provision, the revised Model calls for a site-specific definition of "the scope of the remedy selected in the ROD" to be drafted and negotiated in each decree. This definition should be crafted in terms of the remedial approach stated in the ROD, and not in terms of performance standards or other general remedial goals.

#### *Reservation of Rights*

Second, the revised Model contains a new provision in the "General Reservations of Rights" paragraph in Section XXI (Covenants Not To Sue by Plaintiffs), that allows the government to seek, in new litigation, additional response actions necessary to achieve performance standards that are beyond the scope of the remedy selected in the ROD. This reservation is significantly different from the "Additional Response Actions" provision of the current model, in that it does not impose the obligation to perform such response actions as an affirmative obligation under the Decree. This new reservation is accompanied by a footnote stating that it may be omitted in appropriate circumstances, such as in exchange for a premium or other consent decree provision(s), taking into account the risk (of remedy failure) being assumed by EPA.

These revisions represent a significant departure from the approach of the "Additional Response Actions" Section of the old Model. We believe they strike a careful balance between the public's interest in achieving successful remediation of Superfund sites through consent decrees, and the settling defendants' interest in obtaining reasonable certainty regarding the scope of the affirmative obligations they are accepting in entering into a settlement. The revisions address the "blank check" objection to the old Model by limiting the modifications to the work that EPA can require under the Decree to modifications that are consistent with the scope of the remedy set forth in the ROD. By focusing negotiations on the site-specific definition of this term, the revised Model is intended to afford

settling defendants certainty regarding the breadth of their affirmative obligations.

Where the new reservation of rights provision is used, settling defendants retain all defenses to liability, as well as their ability to challenge EPA's remedial determinations. Thus, instead of requiring settling defendants to perform additional, unknown response actions, this provision simply reserves the rights and arguments of both sides with respect to liability for additional response actions, beyond the scope of the ROD, that are necessary to achieve performance standards.

Moreover, the Regions will have substantial discretion to omit this reservation in appropriate circumstances, taking into account the risk being assumed by the agency. The magnitude of this risk depends on such factors as the nature and extent of the contamination, physical site conditions, and the reliability of the selected remedial technology. In many cases, this risk may not be substantial, and the considerations (such as a premium or other consent decree provisions) that the government should obtain in consideration for its deletion should reflect this circumstance. Conversely, in those cases where the risk is particularly acute, it may be necessary to retain the reservation or to require a more substantial premium or other consideration in return for its deletion.

In EPA's experience, there have been few situations in which it has been necessary to seek further response actions that go beyond the scope of the remedy selected in the ROD. As the agency's experience with various site conditions, contaminants, and remedial technologies increases, we expect these situations to become even more rare. The ultimate consideration in omitting the new reservation will be whether the final decree, taken as a whole, represents an appropriate settlement in light of all relevant factors, including the risk being accepted by the government on behalf of the American public.

#### *Other Revisions*

As required by Section 122(f)(6) of CERCLA, the standard reservations of liability contained in paragraphs 80 and 81 of the old Model (the "reopeners" for "unknown conditions" and "new information") are retained. In addition, the revised Model retains the provision of Paragraph 22 of the old Model (in the "Periodic Review" provision),<sup>1</sup> pursuant to which Settling defendants can be

<sup>1</sup> This section is renumbered as Section VII of the revised Model, titled "Remedy Review."

required to perform further response actions under the Decree if these reopener conditions develop. However, in recognition that the main purpose of this provision is to avoid disputes over liability in "reopener litigation" (which are likely to be complicated by loss of evidence over time), the revised Model recognizes that there may be cases in which this provision is not necessary or the problem it addresses can be resolved by an alternative provision.

A number of other important revisions to the Model have also been adopted relating to such issues as stipulated penalties, EPA review of submissions, indemnification, force majeure, and a waiver of contribution claims against very small ("*de micromis*") contributors. Additional modifications have been made to clarify certain provisions and to correct technical errors.

#### Consultation Procedures

A memorandum accompanying the 1991 version of the Model required Regional offices to consult with EPA Headquarters before offering to PRPs consent decree language significantly at variance with language contained in 10 identified provisions of the Model. In light of Regional experience with the Model to date and in an effort to further streamline the process of finalizing and entering RD/RA consent decrees, OECA has decided to waive this advance consultation requirement.

In lieu of consulting with the Regions in advance of adopting a variant provision, OECA will perform a periodic review of selected provisions from final RD/RA consent decrees to ensure that such provisions remain protective of the interests of the public. Notwithstanding the elimination of the advance consultation requirement, the Regions should continue to comply with the pre-existing delegations (as modified by a recent memorandum entitled "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases" (May 19, 1995). Those delegations require Headquarters' concurrence in settlements which significantly deviate from written EPA policy. Headquarters also expects Regions to engage in timely and effective communication concerning issues that arise in use of the revised Model, and to refrain from development of regional models that can have the effect of producing inconsistency across the country.

In addition, Regions must continue to consult and work with the Department of Justice in drafting and negotiating all consent decrees.

#### Effective Date

The revised Model is effective immediately on the date of this memorandum. It should be used as the basis for all consent decrees which accompany special notice letters sent to the PRPs after that date. In cases where a special notice letter for the site or an initial version of the consent decree has been conveyed to the PRPs prior to the date of this memorandum, but settling defendants have not signed a consent decree as of that date, the government negotiation team will have discretion as to whether to employ the old Model or the revised Model as guidance. In cases where the old Model is used, the United States generally will entertain proposals from PRPs for inclusion of language from the revised Model only to the extent that such proposals do not upset the balance struck in the negotiations between the parties up to that point and do not unduly extend or delay negotiation of the final settlement.

The United States will not renegotiate any RD/RA consent decree which has been signed by settling defendants as of the date of this memorandum.

If you have any questions regarding the revised Model Consent Decree, please contact Steve Botts of OECA's Regional Support Division ((202) 260-5787) or Susan Boushell of OECA's Policy and Program Evaluation Division ((703) 603-9063).

cc:

Jean C. Nelson, General Counsel  
Kathryn S. Schmoll, Comptroller  
Stephen D. Luftig, Director, Office of  
Emergency and Remedial Response  
Regional Counsel, Regions I-X  
Waste Management Division  
Directors, Regions I-X

#### United States Environmental Protection Agency Model CERCLA RD/RA Consent—Decree July, 1995

This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

#### Table of Contents—Model CERCLA RD/RA Consent Decree

I. Background  
II. Jurisdiction  
III. Parties Bound  
IV. Definitions  
V. General Provisions  
VI. Performance of the Work by Settling Defendants

VII. Remedy Review  
VIII. Quality Assurance, Sampling, and Data Analysis  
IX. Access [and Institutional Controls]  
X. Reporting Requirements  
XI. EPA Approval of Plans and Other Submissions  
XII. Project Coordinators  
XIII. Assurance of Ability to Complete Work  
XIV. Certification of Completion  
XV. Emergency Response  
XVI. Reimbursement of Response Costs  
XVII. Indemnification and Insurance  
XVIII. Force Majeure  
XIX. Dispute Resolution  
XX. Stipulated Penalties  
XXI. Covenants Not to Sue by Plaintiff[s]  
XXII. Covenants by Settling Defendants  
XXIII. Effect of Settlement; Contribution Protection  
XXIV. Access to Information  
XXV. Retention of Records  
XXVI. Notices and Submissions  
XXVII. Effective Date  
XXVIII. Retention of Jurisdiction  
XXIX. Appendices  
XXX. Community Relations  
XXXI. Modification  
XXXII. Lodging and Opportunity for Public Comment  
XXXIII. Signatories/Service

#### In the United States District Court for the District of \_\_\_\_\_ Division

*United States of America [and State of \_\_\_\_\_] Plaintiffs, v. \_\_\_\_\_, Inc., Defendants. Civil Action No. \_\_\_\_\_.*

#### Consent Decree

##### I. Background

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to 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 for response actions at the \_\_\_\_\_ Superfund Site in \_\_\_\_\_, \_\_\_\_\_, together with accrued interest; and (2) performance of studies and response work by the defendants at the Site consistent with the National Contingency Plan, 40 CFR Part 300 (as amended) ("NCP").

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 \_\_\_\_\_, 19\_\_ of negotiations with potentially responsible parties 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 of \_\_\_\_\_ (the "State") has also filed a complaint against the defendants in this Court alleging that the defendants 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 the relevant Federal natural resource trustee(s)] on \_\_\_\_\_, 19\_\_ of negotiations with potentially responsible parties 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 the 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 or substantial endangerment to the public health or welfare or the environment.

G. Pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, EPA placed the Site on the National Priorities List, set forth at 40 CFR Part 300, Appendix B, by publication in the **Federal Register** on \_\_\_\_\_, 19\_\_, \_\_\_\_\_ Fed. Reg. \_\_\_\_.

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 the Settling Defendants, other PRPs at the Site, or the State] commenced on \_\_\_\_\_, 19\_\_, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 CFR 300.430.

I. EPA [or the Settling Defendants, other PRPs at the Site, or the State] completed a Remedial Investigation ("RI") Report on \_\_\_\_\_, 19\_\_, and EPA [or the Settling Defendants, other PRPs at the Site, or the State] completed [issued] a Feasibility Study ("FS") Report on \_\_\_\_\_, 19\_\_.

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 \_\_\_\_\_, 19\_\_, 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 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 \_\_\_\_\_, 19\_\_, [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.

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 the 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, the Remedial Action selected by the ROD and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

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 and 1345, and 42 U.S.C. 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the 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 (as defined below) 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 contemplated herein in accordance with 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 the 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 herein, terms used in this Consent Decree which 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 in the appendices attached hereto and incorporated hereunder, the following definitions shall apply: "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*

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

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

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

"\_\_\_\_\_ " shall mean the [Insert name of State pollution control agency or environmental protection agency] and any successor departments or agencies of the State. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incur[s] in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying 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 Sections VII, IX (including, but not limited to, attorneys fees and any monies paid to secure access and/or to secure institutional controls, including the amount of just compensation), XV, and Paragraph 85 of Section XXI. Future Response Costs shall also include all Interim Response Costs and all Interest on the Past Response Costs 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 date of entry of this Consent Decree.

"Interim Response Costs" shall mean all costs, including 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 of this Consent Decree, or (b) incurred prior to the effective date of this Consent Decree but paid after that date.

"Interest," shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. 9607(a).

[**Note:** The following definition should be used where the Decree contains a waiver of contribution rights against *de micromis* parties as provided in the final Paragraph of Section XXII (Covenants by Settling Defendants)].

["Municipal Solid Waste" shall mean all waste materials generated by households, including single and multi-family residences, and hotels and motels. The term also includes waste materials generated by commercial, institutional, and industrial sources, to the extent such wastes (A) are essentially the same as waste normally generated by households, or (B) are collected and disposed of with other

municipal solid waste or sewage sludge as part of normal municipal solid waste collection services and, regardless of when generated, would be considered conditionally exempt small quantity generator waste under regulations issued pursuant to Section 3001(d)(4) of the Solid Waste Disposal Act (42 U.S.C. 6921(d)(4)). Examples of Municipal Solid Waste include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste. The term does not include combustion ash generated by resource recovery facilities or municipal incinerators, or waste from manufacturing or processing (including pollution control) operations not essentially the same as waste normally generated by households.]

"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 this Consent Decree and the Statement of Work (SOW).

[**Note:** The following definition should be used where the Decree contains a waiver of contribution rights against *de micromis* parties as provided in the final Paragraph of Section XXII (Covenants by Settling Defendants)].

["Owner, Operator, or Lessee of Residential Property" shall mean a person who owns, operates, manages, or leases Residential Property and who uses or allows the use of the Residential Property exclusively for residential purposes.]

"Owner Settling Defendants" shall mean the Settling Defendants listed in Appendix E.

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

"Parties" shall mean the United States [, the State of \_\_\_\_\_,] and the 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 which 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 Section \_\_ of the ROD and Section \_\_ of the SOW [and any modified standards established by EPA pursuant to the "technical impracticability" provision of Paragraph 13].

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

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 *et seq.* (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 \_\_\_\_\_, 19\_\_, by the Regional Administrator, EPA Region \_\_, or his/her delegate, and all attachments thereto. The ROD is attached as Appendix A.

"Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants to implement the ROD, in accordance with the SOW and the final Remedial Design and Remedial Action Work Plans and other plans approved by EPA.

"Remedial Action Work Plan" shall mean the document developed pursuant to Paragraph 12 of this Consent Decree and approved by EPA, and any amendments thereto.

"Remedial Design" shall mean those activities to be undertaken by the 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 of this Consent Decree and approved by EPA, and any amendments thereto.

[**Note:** The following definition should be used where the Decree contains a waiver of contribution rights against *de micromis* parties as provided in the final Paragraph of Section XXII (Covenants by Settling Defendants)].

["Residential Property" shall mean single or multi-family residences, including accessory land, buildings, or improvements incidental to such dwellings, which are exclusively for residential use.]

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

"Settling Defendants" shall mean those Parties identified in Appendices D (Non-Owner Settling Defendants) and E (Owner Settling Defendants).

[**Note:** The following definition should be used where the Decree contains a waiver of

contribution rights against *de micromis* parties as provided in the final Paragraph of Section XXII (Covenants by Settling Defendants)]

["Sewage Sludge" means solid, semisolid, or liquid residue removed during the treatment of municipal waste water, domestic sewage, or other waste water at or by publicly owned or federally owned treatment works.]

"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 XXI (Covenants Not to Sue by Plaintiff[s].)]

[**Note:** The following two definitions should be used where the Decree contains a waiver of contribution rights against *de micromis* parties as provided in the final Paragraph of Section XXII (Covenants by Settling Defendants)]

["Small Business" shall mean any business entity that employs no more than 100 individuals and is a "small business concern" as defined under the Small Business Act (15 U.S.C. 631 *et seq.*).

"Small Nonprofit Organization" shall mean any organization that does not distribute any part of its income or profit to its members, directors, or officers, employs no more than 100 paid individuals at the involved chapter, office, or department, and was recognized as a nonprofit organization under Section 501(c)(3) of the Internal Revenue Code of 1986.]

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

[**Note:** Where the state is a party to the consent decree, definitions of "State Past Response Costs" and "State Future Response Costs" will need to be added to this section as appropriate.]

"Statement of Work" or "SOW" shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance 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 the Settling Defendants to supervise and direct the implementation of the Work under this Consent Decree.

"United States" shall mean the United States of America.

"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), 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 citation].

"Work" shall mean all activities Settling Defendants are required to perform under this Consent Decree, except those required by Section XXV (Retention of Records).

#### V. General Provisions

##### 5. Objectives of the Parties

The objectives of the Parties entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Settling Defendants, to reimburse response costs of the Plaintiff[s], and to resolve the claims of Plaintiff[s] against Settling Defendants as provided in this Consent Decree.

##### 6. Commitments by Settling Defendants

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 herein or developed by Settling Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall also reimburse the United States [and the State] for Past Response Costs and Future Response Costs as provided in this Consent Decree.

b. The obligations of Settling Defendants to finance and perform the Work and to pay amounts owed the United States [and the State] under this Consent Decree are joint and several. In the event of the insolvency or other failure of any one or more Settling Defendants to implement the requirements 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 considered to be consistent with the NCP.

##### 8. Permits

a. As provided in Section 121(e) of CERCLA 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. The Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

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:** For Consent Decrees in which there is an Owner Settling Defendant, add Paragraph 9, below.]

##### 9. Notice of Obligations to Successors-in-Title

a. Within 15 days after the entry of this Consent Decree, the Owner Settling Defendant(s) shall record [a certified copy of this Consent Decree] [notice of the entry of this Consent Decree] 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 included in the Site shall contain a notice stating that the property is subject to this Consent Decree [and any lien retained by the United States] and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

b. The obligations of each Owner Settling Defendant with respect to the provision of access under Section IX (Access) [and the implementation of institutional controls under Section \_\_\_\_] shall be binding upon any and all such Settling Defendants and any and all persons who subsequently acquire any such interest or portion thereof (hereinafter "Successors-in-Title"). Within 15 days after the entry of this Consent Decree, each Owner Settling Defendant shall record at the Recorder's

Office [or Registry of Deeds or other appropriate office where land ownership and transfer records are maintained for the property] a notice of obligation to provide access under Section IX (Access) and related covenants, if any. Each subsequent instrument conveying an interest to any such property included in the Site shall reference the recorded location of such notice and covenants applicable to the property.

c. Any Owner Settling Defendant and any Successor-in-Title shall, at least 30 days prior to the conveyance of any such interest, give written notice of this Consent Decree to the grantee and written notice to EPA [and the State] of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree was given to the grantee. In the event of any such conveyance, the Settling Defendants' obligations under this Consent Decree, including their obligations to provide or secure access pursuant to Section IX, shall continue to be met by the Settling Defendants. In addition, if the United States [and the State] approve[s], the grantee may perform some or all of the Work under this Consent Decree. In no event shall the conveyance of an interest in property that includes, or is a portion of, the Site release or otherwise affect the liability of the Settling Defendants to comply with the Consent Decree.

#### *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), and XV (Emergency Response) of this Consent Decree 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 10 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. EPA will issue a notice of disapproval or an authorization to proceed. 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.

b. If EPA disapproves a proposed 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 of 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 of 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 the Settling Defendants from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) hereof.]

#### 11. Remedial Design

a. Within \_\_\_ days after EPA's issuance of an authorization to proceed pursuant to Paragraph 10, 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" or "RD 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 become enforceable under this Consent Decree. Within \_\_\_ days after EPA's issuance of an authorization to proceed, the Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field design activities which 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 which should be included in the Remedial Design Work Plan. This list will be based on site-specific factors and may include the following items: (1) Design sampling and analysis plan (including, but not limited to, a Remedial Design Quality Assurance Project Plan (RD QAPP) in accordance with Section VIII (Quality Assurance, Sampling and Data Analysis)); (2) a treatability study; (3) a Pre-design Work Plan; (4) a preliminary design submittal; (5) an intermediate design submittal; and (6) a pre-final/final design submittal; and (7) a Construction Quality Assurance Plan.] 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 submittal of the Health and Safety Plan for all field activities to EPA and the State, Settling Defendants shall implement the Remedial Design Work Plan. The Settling Defendants shall submit to EPA and the State all plans, submittals 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 and Other Submissions). 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 submittal 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 submittal, if required by EPA or if independently submitted by the Settling Defendants, shall be a continuation and expansion of the preliminary design. Any value engineering proposals must be identified and evaluated during this review.

f. The pre-final/final design submittal shall include, at a minimum, the following: (1) Final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality Assurance Project Plan (CQAPP); (4) Field Sampling Plan (directed at measuring progress towards

meeting Performance Standards); and (5) Contingency Plan. The CQAPP, which shall detail the approach to quality assurance during construction activities at the Site, shall specify a quality assurance official ("QA 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 submittal, 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 become 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 which 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 may include the following: (1) The 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) methodology for implementation of the Construction Quality Assurance Plan; (5) a groundwater monitoring plan; (6) methods for satisfying permitting requirements; (7) methodology for implementation of the Operation and Maintenance Plan; (8) methodology for implementation of the Contingency Plan; (9) tentative formulation of the Remedial Action team; (10) construction quality control plan (by constructor); and (11) procedures and plans for the decontamination of equipment and the disposal of contaminated materials.] The Remedial Action Work Plan also shall include a schedule for

implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the 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. The Settling Defendants shall submit to EPA and the State all plans, submittals, or 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 and Other Submissions). 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. The Settling Defendants shall continue to implement the Remedial Action and O&M until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Consent Decree.

[**Note:** A "technical impracticability" provision may be inserted here in appropriate cases. If a technical impracticability provision is included, the definition of Performance Standards should be modified to incorporate any modified Performance Standards that may be issued by EPA pursuant to a technical impracticability provision.]

## 14. Modification of the SOW or Related Work Plans

a. If EPA determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, EPA may require that such modification be incorporated in the SOW and/or such work plans. Provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the ROD.

b. For the purposes of this Paragraph 14 and Paragraphs 48 and 49 only, the "scope of the remedy selected in the ROD" is: [site-specific definition to be inserted here]

c. If Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution

pursuant to Section XIX (Dispute Resolution), Paragraph 66 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendants shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

e. 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. Settling Defendants acknowledge and agree that 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. Settling Defendants shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

a. The Settling Defendants shall include in the written notification the following information, where available: (1) The name and location of the facility to which the Waste Material are to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendants shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Settling Defendants following the award of the contract for Remedial Action construction. The Settling Defendants shall provide the information required by Paragraph 16.a as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

## VII. Remedy Review

[**Note:** This Section may need to be modified or omitted in consent decrees where the

United States is not giving a full covenant not to sue subject to pre and post certification reservations (e.g., non-final operable unit consent decrees). 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 as requested by EPA, 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 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, 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 for the Site, the Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraph 81 or Paragraph 82 (United States' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 81 or Paragraph 82 of Section XXI (Covenants Not To Sue by Plaintiff[s]) are satisfied, (2) EPA's determination that the Remedial Action is not protective of human health and the environment, or (3) 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 65 (record review).

21. *Submissions of Plans.* If Settling Defendants are required to perform the further response actions pursuant to Paragraph 20, they shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendants) and shall implement the plan approved by EPA in

accordance with the provisions of this Decree.

[Alternative: The preceding two Paragraphs (20 & 21.) may be omitted (1) for Settling Defendants whose liability has been established by court order or judgment; (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 81 or 82 of the Covenant Not To Sue; or (3) in other appropriate cases.]

#### VIII. *Quality Assurance, Sampling, and Data Analysis*

22. 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 for Environmental Data Operation," (EPA QA/R5; "Preparing Perfect Project Plans," (EPA /600/9-88/087), 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. 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 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 Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the ["Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988], and any amendments made

thereto during the course of the implementation of this Decree. 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 QA/QC program. Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

23. Upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA [and the State] or 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 necessary. Upon request, EPA [and the State] shall allow the Settling Defendants to take split or duplicate samples of any samples it [they] take[s] as part of the Plaintiff[s'] oversight of the 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] hereby 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]*

26. Commencing upon the date of lodging of this Consent Decree, the Settling Defendants agree to provide the United States[, the State,] and its [their] representatives, including EPA and its contractors, access at all reasonable times to the Site and any other property to which access is required for the implementation of this Consent Decree, to the extent access to the property is controlled by Settling Defendants, for the purposes of conducting any activity related to this Consent Decree including, but not limited to:

- a. Monitoring the Work;
- b. Verifying any data or information submitted to the United States [or the State];

- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing additional response actions at or near the Site;
- f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV; and
- g. Assessing Settling Defendants' compliance with this Consent Decree.

27. To the extent that the Site or any other property to which access is required for the implementation of this Consent Decree is owned or controlled by persons other than Settling Defendants, Settling Defendants shall use best efforts to secure from such persons access for Settling Defendants, as well as for the United States [and the State] and its [their] representatives, including, but not limited to, their contractors, as necessary to effectuate this Consent Decree. For purposes of this Paragraph "best efforts" includes the payment of reasonable sums of money in consideration of access. [NOTE: It may be appropriate to delete the preceding sentence where the property to which access is needed is owned by a non-settling party who is a PRP. (See guidance entitled "Model RD/RA Consent Decree: Acceptable Modifications to Model Language (Directive No. 2)," March 25, 1992)] If any access required to complete the Work is not obtained within 45 days of the date of lodging of this Consent Decree, or within 45 days of the date EPA notifies the Settling Defendants in writing that additional access beyond that previously secured is necessary, Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps Settling Defendants have taken to attempt to obtain access. The United States [or the State] may, as it deems appropriate, assist Settling Defendants in obtaining access. Settling Defendants shall reimburse the United States [or the State], in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for all costs incurred by the United States in obtaining access.

28. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

[Add institutional controls provisions as appropriate]

#### X. Reporting Requirements

29. 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 which 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 work plans, plans 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, which 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; and (g) describe all activities undertaken in support of the Community Relations 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 the Settling Defendants pursuant to Paragraph 49.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.

30. The 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.

31. Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), 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 or 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.

32. Within 20 days of the onset of such an event, Settling Defendants shall furnish to Plaintiff[s] a written report, signed by the Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

33. Settling Defendants shall submit \_\_\_ copies of all plans, reports, and data 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 and data to the State.

34. All reports and other documents submitted by Settling Defendants to EPA (other than the [monthly] progress reports referred to above) which purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendants.

#### XI. EPA Approval of Plans and Other Submissions

35. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) Approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within \_\_\_ days, except where to do so would cause serious disruption to the

Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

36. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 35 (a), (b), or (c), Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 35(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

37. a. Upon receipt of a notice of disapproval pursuant to Paragraph 35(d), 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 item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the \_\_\_-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 38 and 39.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties under Section XX (Stipulated Penalties).

38. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Settling Defendants shall implement any such plan, report, or item as modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XIX (Dispute Resolution).

39. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants shall be deemed to have failed to submit such

plan, report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX.

40. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

#### *XII. Project Coordinators*

41. Within 20 days of lodging this Consent Decree, Settling Defendants[, the State] and EPA will notify each other, in writing, of the name, address and telephone number 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 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The 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. The Settling Defendants' Project Coordinator shall not be an attorney for any of the Settling Defendants 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 National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he 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 the Settling Defendants' Project Coordinator will meet, at a minimum, on a monthly basis.]

#### *XIII. Assurance of Ability to Complete Work*

44. Within 30 days of entry of this Consent Decree, Settling Defendants shall establish and maintain financial security in the amount of \$ [insert estimated cost of Work] in one or more of the following forms:

- (a) A surety bond guaranteeing performance of the Work;
- (b) One or more irrevocable letters of credit equalling the total estimated cost of the Work;
- (c) A trust fund;
- (d) A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of the Settling Defendants;
- (e) A demonstration that one or more of the Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f); or
- (f) [Insert any other method(s) appropriate to the particular case.].

45. If the Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 44 (d) of this Consent Decree, Settling Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendants seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 44 (d) or (e), they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. In the event that EPA[, after a reasonable opportunity for review and comment by the State,] determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendants shall, within 30 days of

receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 44 of this Consent Decree. Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

46. If Settling Defendants can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 44 above after entry of this Consent Decree, Settling Defendants may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Settling Defendants shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Settling Defendants may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

47. Settling Defendants may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendants may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### XIV. Certification of Completion

[**Note:** Paragraph 48, below, (Completion of the Remedial Action), is only required for Site-wide or Final Operable Unit Consent Decrees, in which the United States has decided to grant a full covenant not to sue (i.e., where Certification of Completion of the Remedial Action is necessary to trigger a full covenant not to sue under Sections 106 and 107 of CERCLA).]

#### 48. 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 attained, 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, the Settling Defendants still believe that the Remedial Action has been fully performed and the Performance Standards have been attained, 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 and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and the 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 the Settling Defendants' Project Coordinator:

"To the best of my knowledge, after thorough investigation, 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 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 to 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 selected in the ROD," as that term is defined in Paragraph 14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). 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 XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion 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 XXI (Covenants Not to Sue by Plaintiff[s]). Certification of Completion of the Remedial Action shall not affect Settling Defendants' obligations under this Consent Decree.

#### 49. Completion of the Work

a. Within 90 days after Settling Defendants conclude that all phases of the Work (including O & M), 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, the 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 following statement, signed by a responsible corporate official of a Settling Defendant or the Settling Defendants' Project Coordinator:

To the best of my knowledge, after thorough investigation, 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 submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, EPA, after reasonable opportunity to 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 selected in the ROD," as that term is defined in Paragraph 14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). 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 XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion 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 the Settling Defendants in writing.

#### XV. Emergency Response

50. In the event of any action or occurrence during the performance of the Work which 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 51, 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, the 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 not inconsistent with the NCP pursuant to Section XVI (Reimbursement of Response Costs).

51. 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, subject to Section XXI (Covenants Not to Sue by Plaintiff[s]).

#### XVI. Reimbursement of Response Costs

52. Within 30 days of the effective date of this Consent Decree, Settling Defendants shall:

[a. ] Pay to the EPA Hazardous Substance Superfund \$ \_\_\_\_\_, in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number \_\_\_\_\_, the EPA Region and Site/Spill ID # \_\_\_\_\_ [Insert 4-digit no.; first 2 numbers represent the Region (01-10), second 2 numbers are Region's Site/Spill Identifier number], and DOJ case number \_\_\_\_\_. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of \_\_\_\_\_ following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXVI (Notices and Submissions) and [names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

[Note: If the amount owed is less than \$10,000, the Settling Defendants should be directed to pay by check instead of EFT. In this event, use the following language for Paragraph 52.a:

[a. ] Pay \$ \_\_\_\_\_, in reimbursement of Past Response Costs, by a certified or cashier's check or checks made payable to "U.S. Department of Justice." The Settling Defendants shall forward the check(s) to [Insert the address of the Financial Litigation Unit of the U.S. Attorney's Office for the District of \_\_\_\_\_], referencing U.S.A.O. file number \_\_\_\_\_, the EPA Region and Site/Spill ID # \_\_\_\_\_ [Insert 4-digit no.; first 2 numbers represent the Region (01-10), second 2 numbers are the Region's Site/Spill ID no.], the DOJ case number \_\_\_\_\_, and the name and address of the party making payment, and shall send copies of the check(s) to the United States as specified in Section XXVI (Notices and Submissions) and [Insert the names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].]

[b. Pay to the State \$ \_\_\_\_\_ in the form of a certified check or checks made payable to \_\_\_\_\_, in

reimbursement of State Past Response Costs. The Settling Defendants shall send the certified check(s) to \_\_\_\_\_.]

53. [a. ] Settling Defendants shall reimburse the EPA Hazardous Substance Superfund for all Future Response Costs not inconsistent with the National Contingency Plan. The United States 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 and its contractors. Also insert name of DOJ-prepared cost summary which would reflect costs incurred by DOJ and its contractors, if any.] on a [periodic] basis. Settling Defendants shall make all payments within 30 days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 54. The Settling Defendants shall make all payments required by this Paragraph in the form of a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA Region and Site/Spill ID # \_\_\_\_\_ [Insert 4-digit no.; first 2 numbers represent the Region (01-10), second 2 numbers are the Region's Site/Spill Identifier number], the DOJ case number \_\_\_\_\_, and the name and address of the party making payment. The Settling Defendants shall send the check(s) to [Insert appropriate Regional Superfund Lockbox number and address] and shall send copies of the check(s) to the United States as specified in Section XXVI (Notices and Submissions) and [Insert the names and mailing addresses of any other receiving officials at EPA].

[b. Settling Defendants shall reimburse the State for all State Future Response Costs not inconsistent with the National Contingency Plan. 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 of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 54. The Settling Defendants shall make all payments to the State required by this Paragraph in the manner described in Paragraph 52.b.]

54. Settling Defendants may contest payment of any Future Response Costs under Paragraph 53 if they determine that the United States [or the State] has made an accounting error or if they

allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of 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 XXVI (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, the Settling Defendants shall within the 30 day period pay all uncontested Future Response Costs to the United States [or the State] in the manner described in Paragraph 53. Simultaneously, the Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of \_\_\_\_\_ and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendants shall send to the United States, as provided in Section XXVI (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, the Settling Defendants shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States [or the State] prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued interest) to the United States [or the State, if State costs are disputed,] in the manner described in Paragraph 53. If the Settling Defendants prevail concerning any aspect of the contested costs, the 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] in the manner described in Paragraph 53; Settling Defendants shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse the

United States [and the State] for its [their] Future Response Costs.

55. In the event that the payments required by Paragraph 52 are not made within 30 days of the effective date of this Consent Decree or the payments required by Paragraph 53 are not made within 30 days of the Settling Defendants' receipt of the bill, Settling Defendants shall pay interest on the unpaid balance. The interest to be paid on Past Response Costs [and State Past Response Costs] under this Paragraph shall begin to accrue 30 days after the effective date of this Consent Decree. The interest on Future Response Costs shall begin to accrue on the date of the bill. The interest shall accrue through the date of the Settling Defendant's 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. The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 53.

#### *XVII. Indemnification and Insurance*

56. a. The United States [and the State] do[es] not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendants shall indemnify, save and hold harmless the United States[, the State,] and its [their] officials, agents, employees, contractors, subcontractors, or 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, the 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 the 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 Paragraph 56.a., and shall consult with Settling Defendants prior to settling such claim.

57. Settling Defendants waive all claims 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.

58. No later than 15 days before commencing any on-site Work, Settling Defendants shall secure, and shall maintain [until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 48.b. of Section XIV (Certification of Completion)] comprehensive general liability insurance with limits of \_\_\_\_\_ million dollars, combined single limit, and automobile liability insurance with limits of \_\_\_\_\_ million dollars, combined single limit, naming the United States [and the State] as [an] additional insured[s]. 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 of this Consent Decree. 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 which is not maintained by the contractor or subcontractor.

#### *XVIII. Force Majeure*

59. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the 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 the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

60. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendants shall notify orally EPA's Project Coordinator 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 Hazardous 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; the Settling

Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. 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.

61. 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 event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event 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 event 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 event, EPA will notify the 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 event, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

62. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIX (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 event, 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 59 and 60, above. 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.

#### *XIX. 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.]

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

64. Any dispute which arises under or with respect to 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.

65. 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 the Settling Defendants.

The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 66 or Paragraph 67.

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 66 or 67. Within — days after receipt of EPA's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 66 or 67, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the 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 66 and 67.

66. 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: (1) The adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) 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 66.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 66.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 66.b. shall be reviewable by this Court,

provided that a motion for judicial review of the decision is filed by the Settling Defendants with the Court and served on all Parties within 10 days of 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 66.a.

67. 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 65, 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 the Settling Defendants unless, within 10 days of receipt of the decision, the 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 of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

68. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the 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 77. 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 the Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

XX. *Stipulated Penalties*

69. Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 70 and 71 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 XVIII (Force Majeure). "Compliance" by Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

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

<i>Penalty Per Violation Per Day</i>	<i>Period of Noncompliance</i>
--	--------------------------------

b. [List violations or compliance milestones] The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports [or other written documents] pursuant to Paragraphs \_\_\_\_\_:

<i>Penalty Per Violation</i>	<i>Per Day Period of Noncompliance</i>
------------------------------	--

72. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 85 of Section XXI (Covenants Not to Sue by Plaintiff[s]), Settling Defendants shall be liable for a stipulated penalty in the amount of \_\_\_\_\_.

73. 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: (1)

With respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), 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; (2) with respect to a decision by the Director of the Waste Management Division, EPA Region \_\_\_\_\_, under Paragraph 66.b. or 67.a. of Section XIX (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 (3) with respect to judicial review by this Court of any dispute under Section XIX (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 herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

74. 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 the 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 the Settling Defendants of a violation.

75. All penalties accruing under this Section shall be due and payable to the United States [and the State] within 30 days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to [Insert the Regional Lockbox number and address], shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # \_\_\_\_\_ [Insert 4-digit no; first 2 numbers represent the Region (01-10), second 2 numbers are the Region's Site/Spill Identifier number], the DOJ Case Number \_\_\_\_\_, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section

XXVI (Notices and Submissions), and to [Insert the names and mailing addresses of any other receiving officials at EPA.]. [Where a State is entitled to a portion of the stipulated penalties, insert procedures for payment to State.]

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

77. Penalties shall continue to accrue as provided in Paragraph 73 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA [and the State] within 15 days of 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 of receipt of the Court's decision or order, except as provided in Subparagraph c below;

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 owing to the United States [or the State] into an interest-bearing escrow account within 60 days of 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 of 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.

78. a. If Settling Defendants fail to pay stipulated penalties when due, the United States [or the State] may institute proceedings to collect the penalties, as well as interest. Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 75.

b. 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 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. 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 herein, except in the case of a willful violation of the Consent Decree.<sup>1</sup>

79. 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.

#### *XXI. Covenants Not to Sue By Plaintiff[s]*

[**Note:** The first version of Paragraph 80, below, is only used for situations in which the United States has decided not to grant a full covenant not to sue, such as non-final Operable Unit consent decrees. In such cases, Paragraphs 81-83 generally should not be used in the consent decree.]

80. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraph 84 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<sup>2</sup>] for performance of the Work [and for recovery of Past Response Costs and Future Response Costs]. These covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 52 of Section XVI (Reimbursement of Response Costs). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

[**Note:** Paragraphs 80-83, below, should only be used in Consent Decrees in which the United States has decided to grant a full covenant not to sue.]

80. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 81, 82, and 84 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

<sup>1</sup> A provision requiring EPA to elect between seeking stipulated and statutory penalties for a particular consent decree violation may be substituted here in appropriate cases.

<sup>2</sup> Note that when a 7003 covenant is included, Section 7003(d) of RCRA requires that an opportunity for a public meeting in the affected area be provided.

7003 of RCRA<sup>3</sup>] relating to the Site. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 52 of Section XVI (Reimbursement of Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 48.b of Section XIV (Certification of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

81. *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, or to issue an administrative order seeking to compel Settling Defendants (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Remedial Action:

(i) conditions at the Site, previously unknown to EPA, are discovered, or  
(ii) information, previously unknown to EPA, is received, in whole or in part, and 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.

82. *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, or to issue an administrative order seeking to compel Settling Defendants (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, subsequent to Certification of Completion of the Remedial Action:

(i) Conditions at the Site, previously unknown to EPA, are discovered, or  
(ii) Information, previously unknown to EPA, is received, in whole or in part, and 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.

83. For purposes of Paragraph 81, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 82, 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 Record of Decision, the administrative record supporting the Record of Decision, 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 Paragraph 84 in all Consent Decrees.]

84. *General reservations of rights.* The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraph 80. The United States [and the State] reserve[s], and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including but not limited to, the following:

- (1) Claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;
- (2) Liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;
- (3) Liability for future disposal of Waste Material at the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA;
- (4) Liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- (5) Criminal liability;
- (6) Liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and

[(7) Liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Modification of the SOW or Related Work Plans);]<sup>4</sup>

<sup>4</sup>The Regions may omit this reservation in appropriate circumstances, such as in exchange for a premium or other consent decree provision(s), taking into account the risk being assumed by the Agency.

[**Note:** Subparagraphs 8 through 10, below, should be used only where appropriate.]

[(8) Previously incurred costs of response above the amounts reimbursed pursuant to Paragraph 52;]

[(9) Liability for additional operable units at the Site or the final response action;]

[(10) Liability for costs that the United States will incur related to the Site but are not within the definition of Future Response Costs.]

85. *Work Takeover.* In the event EPA determines that Settling Defendants have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 66, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Reimbursement of Response Costs).

86. 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 Not to Sue the Settling Defendants and Reservation of Rights.]

## XXII. Covenants By Settling Defendants

87. *Covenant Not to Sue.* Subject to the reservations in Paragraph 88, Settling Defendants hereby 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 CONSENT DECREES: the Site] [FOR OU DECREES: the Work, past response actions, and [IF ADDRESSED] Past and Future Response Costs as defined herein] or this Consent Decree, including, but not limited to;

a. Any direct or indirect claim 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), 107, 111, 112, 113 or any other provision of law;

[b. Any claims against the United States, including any department, agency or instrumentality of the United

<sup>3</sup>See footnote #1, *supra*.

States under CERCLA Sections 107 or 113 related to the Site,] or

c. Any claims arising out of response activities at the Site, including claims based on EPA's [and the State's] selection of response actions, oversight of response activities or approval of plans for such activities.

88. The 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, 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 while acting within the scope of his 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, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA;

89. 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).

[90. Settling Defendants agree to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against the following persons:

a. Any person (i) whose liability to Settling Defendants with respect to the Site is based solely on CERCLA Section 107(a) (3) or (4), (ii) who arranged for the disposal, treatment, or transport for disposal or treatment, or accepted for transport for disposal or treatment, of only Municipal Solid Waste or Sewage Sludge owned by such person, and (iii) who is a Small Business, a Small Non-profit Organization, or the Owner, Operator, or Lessee of Residential Property; and

b. Any person (i) whose liability to Settling Defendants with respect to the Site is based solely on CERCLA § 107(a) (3) or (4), and (ii) who arranged for the disposal, treatment, or transport for disposal or treatment, or accepted for

transport for disposal or treatment, of 55 gallons or less of liquid materials containing hazardous substances, or 100 pounds or less of solid materials containing hazardous substances, except where EPA has determined that such material contributed or could contribute significantly to the costs of response at the Site.

[Note: provision relating to *de minimis* parties, if appropriate, may be inserted here.]

#### XXIII. Effect of Settlement; Contribution Protection

91. Nothing 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. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which 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.

92. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants are entitled, as of the effective date of this Consent Decree, 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 Consent Decree. ["Matters addressed" should be defined explicitly in appropriate cases, e.g., where the scope of contribution protection may otherwise be unclear under the circumstances of the case.]

93. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States [and the State] in writing no later than 60 days prior to the initiation of such suit or claim.

94. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States [and the State] within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States [and the State] within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

95. 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 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 XXI (Covenants Not to Sue by Plaintiff[s]).

#### XXIV. Access to Information

96. Settling Defendants shall provide to EPA [and the State], upon request, copies of all documents and information 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 related to 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.

97. a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information 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 CFR 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 CFR Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA [and the State], or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the

Plaintiff[s] with the following: (1) The title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

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

#### XXV. Retention of Records

99. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 49.b of Section XIV (Certification of Completion of the Work), each Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 49.b of Section XIV (Certification of Completion), Settling Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

100. At the conclusion of this document retention period, Settling Defendants shall notify the United States [and the State] at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States [or the State], Settling Defendants shall deliver any such records or documents to EPA [or the State]. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall provide the Plaintiffs with the following: (1) The title of the document, record, or information; (2) the date of the document, record, or information;

(3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

101. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 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.

#### XXVI. Notices and Submissions

102. 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 herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, [the State,] and the Settling Defendants, respectively.

#### As to the United States:

Chief, Environmental Enforcement  
Section  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
Re: DJ # \_\_\_\_\_  
and  
Director, Waste Management Division  
United States Environmental Protection  
Agency  
Region \_\_\_\_\_

#### As to EPA:

[Name]  
EPA Project Coordinator

United States Environmental Protection  
Agency  
Region \_\_\_\_\_

#### [As to the State:

[Name]  
State Project Coordinator  
[Address]]

#### As to the Settling Defendants:

[Name]  
Settling Defendants' Project Coordinator  
[Address]

#### XXVII. Effective Date

103. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

#### XXVIII. Retention of Jurisdiction

104. This Court retains jurisdiction over both the subject matter of this Consent Decree and the 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 XIX (Dispute Resolution) hereof.

#### XXIX. Appendices

105. 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 the Settling Defendants.

["Appendix E" is the complete list of the Owner Settling Defendants.]

#### XXX. Community Relations

106. Settling Defendants shall propose to EPA [and the State] their participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the 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 which may be held or sponsored by EPA [or the State] to explain activities at or relating to the Site.

**XXXI. Modification**

107. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendants. All such modifications shall be made in writing.

108. Except as provided in Paragraph 14 ("Modification of the SOW or related Work Plans"), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendants, and the Court. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendants.

109. Nothing in this 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**

110. This Consent Decree shall be lodged with the Court for a period of not less than thirty (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 CFR 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 which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

111. 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**

112. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice 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.

113. Each Settling Defendant hereby agrees not to oppose entry of this

Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

114. 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 hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_\_\_.

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. \_\_\_\_\_, relating to 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  
Washington, D.C. 20530

[Name]  
Assistant United States Attorney  
District of \_\_\_\_\_  
U.S. Department of Justice  
[Address]  
\_\_\_\_\_

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

[Name]  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460  
[WHERE OECA CONCURRENCE REQUIRED  
OR OECA ATTORNEY IS PART OF  
NEGOTIATION TEAM]

[Name]  
Regional Administrator, Region \_\_\_\_\_

U.S. Environmental Protection Agency  
[Address]

[Name]  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region \_\_\_\_\_  
[Address]  
United States v. \_\_\_\_\_  
Consent Decree Signature Page  
FOR THE STATE OF \_\_\_\_\_  
Date: \_\_\_\_\_

[Name]  
[Title]  
[Address]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. \_\_\_\_\_, relating to the \_\_\_\_\_ Superfund Site.

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

[Name—Please Type]  
[Title—Please Type]  
[Address—Please Type]

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

Name: [Please Type] \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Tel. Number: \_\_\_\_\_

[FR Doc. 95-18482 Filed 7-27-95; 8:45 am]

BILLING CODE 6560-50-P

**FEDERAL RESERVE SYSTEM****Robert T. Heath; Change in Bank Control Notice****Acquisition of Shares of Banks or Bank Holding Companies**

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than August 11, 1995.

\*A separate signature page must be signed by each corporation, individual or other legal entity that is settling with the United States.