\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

IN THE MATTER OF: ) SETTLEMENT AGREEMENT

)

[Site Name] ) U.S. EPA Region \_\_\_

[City, County, State] ) CERCLA Docket No. \_\_\_

)

[Name of Settling Party] ) PROCEEDING UNDER SECTION

SETTLING PARTY ) 122(h)(1) OF CERCLA,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ) 42 U.S.C. § 9622(h)(1)

**MODEL CERCLA SECTION 122(h)(1) CASHOUT SETTLEMENT AGREEMENT FOR**

**ABILITY TO PAY PERIPHERAL PARTIES**

**September 2014**

|  |
| --- |
| This document contains automatic section and paragraph numbers and automatic section and paragraph cross references, and an automated Table of Contents. If you add or delete sections or paragraphs, DO NOT attempt to manually renumber any sections or paragraphs or cross references. See instructions at the end for more details. |

|  |
| --- |
| This model is designed to be used in conjunction with the “Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority” (signed Sept. 30, 1998; corrected copy issued Dec. 22, 1998; available at <http://www.epa.gov/enforcement/guidance-superfund-settlements-administrative-response-cost-and-cashout-peripheral>), which describes appropriate candidates for peripheral party cashouts (in Subsection II.B.3.a), outlines the basic terms of such settlements (in Subsections II.B.3.b and II.C), and explains when such settlements should be embodied in a judicially-approved consent decree rather than in an administrative settlement (in Subsection II.B.3.a). CERCLA ability to pay settlements should be supported by an ability to pay analysis developed in accordance with the “General Policy on Superfund Ability to Pay Determinations” (Sept. 30, 1997; available at <http://www.epa.gov/enforcement/guidance-superfund-ability-pay-determinations>). |

|  |
| --- |
| 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

I. JURISDICTION 1

II. BACKGROUND 1

III. PARTIES BOUND 2

IV. STATEMENT OF PURPOSE 2

V. DEFINITIONS 2

VI. PAYMENT OF RESPONSE COSTS 4

VII. FAILURE TO COMPLY WITH SETTLEMENT AGREEMENT 11

VIII. COVENANTS BY EPA 12

IX. RESERVATIONS OF RIGHTS BY EPA 13

X. COVENANTS BY SETTLING PARTY 14

XI. EFFECT OF SETTLEMENT/CONTRIBUTION 15

XII. PROPERTY REQUIREMENTS 17

XIII. ACCESS TO INFORMATION 19

XIV. RETENTION OF RECORDS 20

XV. NOTICES AND SUBMISSIONS 21

XVI. INTEGRATION [/APPENDICES] 22

XVII. PUBLIC COMMENT 22

XVIII. EFFECTIVE DATE 22

# JURISDICTION

1. This Settlement Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D (Cost Recovery Non-Judicial Agreements and Administrative Consent Orders) [**insert reference to any Regional redelegation**]. This Settlement Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to [**check with DOJ contact to determine appropriate DOJ official**].

[NOTE: If one or more federal potentially responsible parties (PRPs) are included as settling parties, consult the “Model CERCLA Section 122(h) Cashout Settlement Agreement for Peripheral Party Settlements Not Based on Ability to Pay” for model “Settling Federal Agency” settlement provisions.]

1. This Settlement Agreement is made and entered into by EPA and [**insert name**] (“Settling Party”). Settling Party consents to and will not contest the authority of the United States to enter into this Settlement Agreement or to implement or enforce its terms.

# BACKGROUND

1. This Settlement Agreement concerns the [**insert Site name**] (“Site”) located in [**insert Site location**]. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
2. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and [will/may] undertake additional response actions in the future. [**NOTE: A brief description of the release or threatened release and of the response actions taken or to be taken by EPA or potentially responsible parties may be included.**]
3. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.
4. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred and to be incurred at the Site.
5. EPA has reviewed the Financial Information and Insurance Information submitted by Settling Party to determine whether Settling Party is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information and Insurance Information, EPA has determined that Settling Party has limited financial ability to pay for response costs incurred and to be incurred at the Site.
6. EPA and Settling Party recognize that this Settlement Agreement has been negotiated in good faith and that this Settlement Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Party in accordance with this Settlement Agreement do not constitute an admission of any liability. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the facts or allegations contained in this Section.

# PARTIES BOUND

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

# STATEMENT OF PURPOSE

1. By entering into this Settlement Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Party to make a cash payment [and to implement land use restrictions][[1]](#footnote-1) to address its alleged civil liability for the Site as provided in the Covenants by EPA in Section VIII, subject to the Reservations of Rights by EPA in Section IX.

# DEFINITIONS

1. Unless otherwise expressly provided in this Settlement Agreement, terms used in this Settlement Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or its appendices, the following definitions shall apply:

[NOTE: In the following definition, it is generally sufficient to describe the property using the street address or the tax parcel ID number, but you also may use the legal property description. Legal property descriptions can be lengthy. It is common in conveyance documents to include the legal property description in an attachment. If using a legal property description, it should be the kind found in a deed.]

“Affected Property” shall mean all real property at the Site and any other real property, owned or controlled by Settling Party, where EPA determines, at any time, that access or land, water, or other resource use restrictions are needed to implement response actions at the Site, including, but not limited to, the following properties [**insert property descriptions**].

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

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

“Effective Date” shall mean the effective date of this Settlement Agreement as provided by Section XVIII.

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

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

[NOTE: This model uses the capitalized “Financial Information” and “Insurance Information” when referencing the specific documents listed in Appendices to this Agreement. In all other circumstances, small letter “financial information” and “insurance information” are used.]

“Financial Information” shall mean those financial documents identified in Appendix \_\_.

“Insurance Information” shall mean those insurance documents identified in Appendix \_\_.

[NOTE: The negotiating team should request and review copies of any applicable insurance policies and any other information relating to potential insurance coverage (including sending Settling Party specific CERCLA § 104(e) information requests targeted at insurance coverage), and should consult with the Office of Site Remediation Enforcement’s (OSRE’s) insurance team with questions regarding approaches to recovery under applicable insurance policies.]

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at <http://www.epa.gov/superfund/superfund-interest-rates>.

“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.

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

“Parties” shall mean EPA and Settling Party.

[NOTE: Insert the following definition if Paragraph 16 (Payment of Net Proceeds of Sale of Property), is used. Modify definition if property to be sold is not part of the Site.]

[“Property” shall mean that portion of the Site that is owned by Settling Party as of [insert date]. The Property is located at [insert address] in [insert City, County, State], and is designated by the following property description: \_\_\_\_\_\_.]

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

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

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

“Settling Party” shall mean [**insert name**].

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

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

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

[NOTE: Insert the following definition if the Section XII (Property Requirements) is included in the Settlement Agreement.]

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

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.

# PAYMENT OF RESPONSE COSTS

[NOTE: This section provides model language for lump-sum payments and for installment payment plans. This section also includes optional language for recovery of proceeds from Settling Party’s future sale of the Site or other real property. If Settling Party has a claim relating to the Site for contractual indemnification, the negotiating team should consider whether a provision should be included under which EPA receives a percentage or a fixed amount of any potential recovery. If Settling Party has a claim relating to the Site for insurance coverage, the negotiating team should discuss with OSRE’s insurance team whether a provision should be included under which EPA receives a percentage or a fixed amount of any potential recovery (e.g., a confession of judgment for future costs to be paid from insurance proceeds), or the United States receives an assignment of rights from Settling Party to pursue its insurance coverage. The team should further consider whether financial circumstances exist that would justify inclusion of additional conditional payments, such as payment of a percentage of future earnings or a percentage of the proceeds of a future sale of assets (or equity/ownership interests) other than the Site or other real property.]

1. Payment of Response Costs. Settling Party shall pay to EPA the principal amount of $\_\_\_\_\_\_. [**Include next sentence if making payment in a lump sum.**] [The payment shall be made within 30 days after the Effective Date and, if timely paid, shall include no Interest.] [**Include remainder of paragraph if making payment in installments.**] [Payment of the principal amount shall be made in \_\_ installments. The first installment payment of $\_\_\_\_\_\_ is due within 30 days after the Effective Date and, if timely paid, shall include no Interest. The subsequent installment payments of $\_\_\_\_\_\_ are due [**insert schedule for payments, such as**: “three months, six months and nine months after the Effective Date” or “on each anniversary of the Effective Date” or “on [January 2] of each year following the Effective Date”]. Each installment payment shall also include an additional sum for Interest accrued on the unpaid portion of the principal amount calculated from the date of the prior payment until the date of payment. EPA shall send a calculation of the Interest due for each payment to Settling Party after the Effective Date. Settling Party may pay any installment payment prior to the due date, but must contact [**insert name and address of contact in region**] in advance for a determination regarding the amount of Interest to be included with the payment. In the event any installment payment includes an overpayment, the amount of the overpayment shall be applied to the remaining principal.]

[NOTE: The Regional attorney should discuss all proposed installment payment plans with the Regional Financial Management Office, including the minimum payment that may be processed, the minimum interval between payments, the maximum length of the payment schedule, and the calculation of interest. When drafting an installment payment plan, keep in mind that Interest is a defined term.]

1. Settling Party’s payment(s) shall be made to EPA by Fedwire Electronic Funds Transfer (EFT) to:

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York, NY 10045

Field Tag 4200 of the Fedwire message should read “D 68010727

Environmental Protection Agency”

The payment shall reference Site/Spill ID Number \_\_\_\_\_\_ and the EPA docket number for this action.

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

**For ACH payment:**

Settling Party shall make payment[s] to EPA by Automated Clearinghouse (ACH) to:

PNC Bank

808 17th Street, NW

Washington, DC 20074

Contact – Jesse White 301-887-6548

ABA = 051036706

Transaction Code 22 - checking

Environmental Protection Agency

Account 310006

CTX Format

The payment shall reference Site/Spill ID Number \_\_\_\_\_\_ and the EPA docket number for this action.

**For online payment:**

Settling Party’s shall make payment[s] at <https://www.pay.gov> to the U.S. EPA account in accordance with instructions to be provided to Settling Party by EPA.]

[**NOTE: If Settling Party has difficulty making EFT or online payments, you may substitute the following**: Settling Party’s shall make payment(s) by official bank check made payable to “EPA Hazardous Substance Superfund.” [The/Each] check, or a letter accompanying [the/each] check, shall identify the name and address of the party making payment, the Site name, Site/Spill ID Number \_\_\_\_\_\_, and the EPA docket number for this action, and shall be sent to:

U.S. Environmental Protection Agency

Superfund Payments

Cincinnati Finance Center

P.O. Box 979076

St. Louis, MO 63197-9000]

[NOTE ON SPECIAL ACCOUNTS: The Settlement Agreement should specify whether payments made under Paragraph 12 and any other payment paragraphs should be deposited in the EPA Hazardous Substance Superfund, or in a site-specific special account within the Hazardous Substance Superfund, or should be split between the Superfund and the Special Account (and should specify the split).][[2]](#footnote-2)

1. Deposit of Payment. [**Insert one of the following three sentences.**] [The total amount [**if installment payments, insert:** of each payment] to be paid pursuant to Paragraph 12 (Payment of Response Costs) [and Paragraph 16 (Payment of Net Proceeds of Sale of Property)] shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [The total amount [of each payment] to be paid pursuant to Paragraph 12 (Payment of Response Costs) [and Paragraph 16 (Payment of Net Proceeds of Sale of Property)] shall be deposited by EPA in the [**Site name**] Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.] [Of the total amount [of each payment] to be paid pursuant to Paragraph 12 (Payment of Response Costs) [and Paragraph 16 (Payment of Net Proceeds of Sale of Property)], [“$\_\_\_” or “\_\_\_%”] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [“$\_\_\_” or “\_\_\_%”] shall be deposited by EPA in the [**Site name**] Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.]
2. Notice of Payment. At the time of [each] payment, Settling Party shall also send notice that such payment has been made: [(a) to EPA in accordance with Section XV (Notices and Submissions); and (b)] to the EPA Cincinnati Finance Center (CFC) by email or by regular mail at:

**EPA CFC by email**: cinwd\_acctsreceivable@epa.gov

**EPA CFC by regular mail**: EPA Cincinnati Finance Center

26 W. Martin Luther King Drive

Cincinnati, Ohio 45268

Such notice shall reference the Site/Spill ID Number and EPA docket number for this action.

[NOTE: Use the following “net sales proceeds” paragraph if Settling Party is to sell property it owns and is to pay the proceeds of such sale to the United States. This paragraph includes optional provisions to address either one of two situations: (1) the property is to be marketed and sold promptly; or (2) the property is to be marketed and sold at some future time. The latter situation generally applies when a cleanup is underway at the property and, in order to maximize the recovery, EPA desires that the property be sold after the cleanup is substantially complete.]

1. [Payment of Net Proceeds of Sale of Property.
   1. Appraisal of Property. [**Insert either**: “Within [30] days after the Effective Date” or “Within [30] days after receipt of a written request from EPA” or “Prior to any sale of the Property”], Settling Party shall submit to EPA the names of one or more appraisers. The appraisers identified shall be certified to meet the Uniform Standards of Professional Appraisal Practice by a nationally recognized organization of professional real estate appraisers. EPA may, within [30] days thereafter, disapprove the proposed appraiser(s). If all proposed appraisers are disapproved by EPA, Settling Party shall, within [15] days after such disapproval, submit names of additional appraisers, which shall be subject to EPA’s disapproval as provided above. Any appraisers not disapproved by EPA shall be deemed to be approved. Settling Party shall, within [60] days after the deadline for EPA’s disapproval of the proposed appraisers, obtain an appraisal of the Property. The appraisal shall be performed by any appraiser deemed to be approved. Settling Party shall be responsible for all appraisal fees. Settling Party shall submit a copy of the appraisal to EPA. If the Property is not sold within one year of the date of the appraisal, and if EPA so requests, Settling Party shall obtain a new appraisal of the Property, in accordance with this Paragraph.

[NOTE: If the appraisal is unusually expensive or if the Property is difficult to value, the Region may omit the appraisal requirement.]

* 1. Maintenance of the Property. Until the Property is sold, Settling Party shall, at its own expense: (i) maintain and make necessary repairs to the Property; (ii) keep the Property insured against loss from casualty and liability; (iii) timely pay or cause to be paid all real property taxes; and (iv) timely pay all water and sewer bills regarding the Property.

[NOTE: Insert the following subparagraph if you expect rental income from the Property and that income was not considered in assessing Settling Party’s ability to pay EPA’s response costs.]

* 1. [Rental Income. Rental income from the Property may be used to pay expenses described in Paragraph 16.b (Maintenance of Property). [All / \_\_% of the] rental income earned from the date of Settling Party’s signature on this Settlement Agreement until the sale of the Property to the extent not required to pay the expenses described in Paragraph 16.b shall be deemed to be proceeds from the sale of the Property and shall be disbursed pursuant to Paragraph 16.g. Settling Party shall not enter into any lease or rental agreement for the Property unless the agreement allows a purchaser of the Property to terminate the lease or rental agreement within [90 days] of taking title to the Property.]
  2. Marketing of the Property. Within [30] days after the date of the appraisal, Settling Party shall commence using best efforts to sell the Property. [**Optional**: Settling Party shall use best efforts to sell the Property.] “Best efforts” for purposes of this Paragraph includes: (i) entering into a listing agreement, for the purpose of marketing and selling the property, with a real estate broker, dealer, or agent licensed in the State of \_\_\_\_\_\_ who customarily deals with real property similar to the Property; (ii) advertising the Property for sale in appropriate publications; (iii) listing the Property with appropriate real estate listing services; (iv) maintaining the Property in a condition suitable for showing to prospective buyers; and (v) providing access to the Property, at reasonable times, to real estate brokers, dealers or agents and prospective buyers. [**Optional**: Settling Party shall submit to EPA reports regarding Settling Party’s efforts to market the property. The first such report shall be due three months after commencement of efforts to sell the Property, and successive reports shall be due quarterly thereafter.]
  3. If the proposed contract for the sale of the Property provides for Settling Party to receive all cash, is for at least [90%] of the appraised value of the Property, and provides for the property sale to occur within [60] days after the date of execution of the sales contract, then Settling Party may execute the contract without EPA’s prior written approval. Otherwise, Settling Party shall provide to EPA a copy of the proposed Property sales contract, and must obtain EPA’s written approval before executing the contract. [**Optional**: Settling Party shall provide to EPA a copy of any offer to purchase the Property within 48 hours after receipt of such offer in order to give EPA an opportunity to review and object to the offer. If EPA does not object to the offer within [15] days after receipt of a copy of the offer, then Settling Party may execute the contract for sale of the Property.] Settling Party shall provide to EPA a copy of the executed contract within [7] days after signing the contract.

[NOTES: (1) EPA should understand the bases for the appraisal and, when necessary, allow for a sale that may be substantially less than the appraised value. (2) It is common for contracts for the purchase of industrial property to have a due diligence period (such as for one year) so the purchaser can seek needed zoning and/or sub-division changes. (Some contracts also give the purchaser the option to extend the due diligence period for an additional payment.) The purchaser can withdraw from the contract if the municipality does not grant the needed approvals. Purchasers are generally willing to pay more for the property if the contract provides for a due diligence period. In determining whether to approve the Settling Party’s execution of a contract containing a due diligence period, the case team should balance the competing goals of maximizing the proceeds and expediting the property sale. These competing goals also should be considered when deciding whether to approve a sale that is for substantially less than the appraised value.]

* 1. Settling Party shall submit to EPA, at least [10] days prior to the date of the sale of the Property, a notice of the sale, Settling Party’s calculation of the net sales proceeds, and all documentation regarding the values used in the calculation, including: (i) copies of all documents to be executed regarding the sale; (ii) documentation of the amounts to be paid to holders of any liens listed as a Permitted Encumbrance in Appendix \_\_; (iii) documentation of the amounts of closing costs to be paid; (iv) documentation of any broker’s fees regarding the sale; and (v) documentation of the amounts of State and/or municipal transfer taxes to be paid regarding the sale of the Property. Settling Party may request that EPA approve the calculation of net sales proceeds prior to the sale. In that event, EPA’s approval shall be binding in any subsequent dispute between the United States and Settling Party regarding whether Settling Party has complied with Paragraph 16.g.

[**OPTIONAL SUNSET CLAUSE**: If within [three] years after commencement of efforts to market the Property, Settling Party has not executed a contract for the sale of the Property, upon receipt of notice from EPA, Settling Party shall commence best efforts to sell the Property to the highest bidder at a public auction. For purposes of this Paragraph, “best efforts” shall mean engaging the services of a professional auctioneer who will advertise the auction in at least two local newspapers for at least 30 days prior to the auction and who will conduct other marketing activities, as appropriate. The agreement with the professional auctioneer shall be provided to EPA for review and approval. [**NOTE: When reviewing the agreement, EPA should pay particular attention to the terms that relate to delay or cancellation of the auction so that reasonable opportunities to maximize the value of the property may be pursued and to insure that the costs of any such delay or cancellation shall not be borne by the United States.**]]

* 1. At the time of the sale, Settling Party shall pay to the United States \_\_\_% of the net sales proceeds of the sale of the Property [**if the potential recovery may exceed EPA’s unrecovered response costs, insert:** or $\_\_\_\_\_\_, whichever is less]. “Net sales proceeds” shall mean, for purposes of this Paragraph, all consideration received by Settling Party from the sale of the Property, not including: (i) any payment in consideration of the release of any lien listed as a Permitted Encumbrance in Appendix \_\_, hereto; (ii) any reasonable closing costs paid regarding the sale; (iii) any reasonable broker’s fees regarding the sale; (iv) any State and/or municipal transfer taxes regarding the sale [and (v) any net rental income described in Paragraph 16.c]. Settling Party shall make payment to EPA by official bank check made payable to “EPA Hazardous Substances Superfund.” Provided that the amount of “net sales proceeds” is acceptable, EPA shall arrange for the execution or delivery, at the time of the sale, of a release of any federal lien regarding the Property.

[NOTE: In general, the United States’ interest regarding the Property will be protected pending the Property sale if a CERCLA § 107(*l*) federal lien exists regarding the Property and the lien has been perfected by the filing of a notice under Section 107(*l*)(3). Any such Section 107(*l*) federal lien and notice of federal lien will need to be released in order for the Property sale to occur. In general, an EPA representative should attend the closing to execute documents releasing the federal lien and federal lien notice. Alternatively, EPA may execute a release of the federal lien and federal lien notice and deliver such release to the title company prior to the sale, with instructions for the title company to collect the net sales proceeds on EPA’s behalf. If no Section 107(*l*) federal lien exists, e.g., where the Property is not part of the Site, then there will be no lien to release. In that case, since the payment can be made after, rather than at the time of, the sale, modify the first sentence of Paragraph 16.g to delete the first clause (“At the time of the sale,”), delete the last two sentences of Paragraph 16.g, and cross-reference instructions for making payment to EPA as follows (or include instructions here): Within \_\_ days after the sale, Settling Party shall make payment to EPA in accordance with Paragraphs 13 and 15, and EPA shall deposit the payment in accordance with Paragraph 14 [insert alternative special account deposit instructions if necessary].]

[NOTE: The appendix listing “Permitted Encumbrances” should list all liens on the Property that are senior to (i.e., in most cases, filed before) the federal lien (if already filed). Settling Party will need to pay the holders of these liens in order to sell the Property and, therefore, the “net sales proceeds” is subject to these liens. If the Property has no liens/encumbrances then modify the paragraph accordingly. If the claims underlying the senior liens/encumbrances exceed the fair market value of the Property, then we do not need to require the Settling Party to sell the Property.]

* 1. Settling Party shall not be required to comply with this Paragraph with respect to the Property or a portion of the Property, in the event the Property or such portion thereof is transferred involuntarily by operation of law, including foreclosure or its equivalent of any lien which is listed as a Permitted Encumbrance in Appendix \_\_, or is transferred by deed or other assignment in lieu of foreclosure due to a default on indebtedness secured by the Property or such portion thereof.

[NOTE: EPA may wish to file a lien regarding the Property in order to protect its security interest in the Property to the extent feasible. In that event, use the peripheral party ATP judicial consent decree model, which includes provisions for filing a judgment lien, instead of this administrative settlement model.]

* 1. In the event of a sale or other transfer of the Property or any portion thereof, Settling Party shall continue to be subject to all terms, conditions and benefits of this Settlement Agreement, except for Section XII (Property Requirements), to the extent it requires Settling Party to provide access to, or to abide by any land, water, or other resource use restrictions regarding the Property or portion thereof that was sold or transferred. Settling Party shall continue to be subject to the requirement to enforce any agreements, pursuant to Section XII, for the new owner to provide access to the Property or portion thereof that was sold.]

# FAILURE TO COMPLY WITH SETTLEMENT AGREEMENT

1. Interest on Payments [**if installments:** and Accelerated Payments]. [**Insert the following sentence if the payment under Paragraph 12 is a lump sum.**] [If Settling Party fails to make the payment required by Paragraph 12 (Payment of Response Costs) by the required due date, Interest shall accrue on the unpaid balance from the Effective Date through the date of payment.] [**Insert the following alternative language if the payment under Paragraph 12 is to be made in installments.**] [If Settling Party fails to make any payment required by Paragraph 12 (Payment of Response Costs) by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure, and if the first payment is not timely made, Interest shall accrue from the Effective Date. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.] [**Insert the following sentence if Paragraph 16 (Payment of Net Proceeds of Sale of Property) or any other contingent payments, such as insurance proceeds, are included.**] [If Settling Party fails to make the payment required by Paragraph 16 (Payment of Net Proceeds of Sale of Property) by the required due date under Paragraph 16.g [**also reference any other contingent payments**], Interest shall continue to accrue on the unpaid balance from the date payment was due through the date of payment.]
2. Stipulated Penalty.
   1. If any amounts due to EPA under Paragraph 12 (Payment of Response Costs) [and Paragraph 16 (Payment of Net Proceeds of Sale of Property)] [**also reference any other payment paragraphs**] are not paid by the required date, Settling Party shall be in violation of this Settlement Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 17 (Interest on Payments), $\_\_\_\_\_\_ per violation per day that such payment is late.

[NOTE: If Paragraph 16 (Payment of Net Proceeds of Sale of Property) is included and you wish to include stipulated penalties for failure to use best efforts to sell the Property, insert the following Paragraph 18.b. Additional paragraphs for other non-payment obligations may be added, including Section XII (Property Requirements). Escalating penalty payment schedules may be used for payment or non-payment obligations. Regions may include a more detailed stipulated penalties provision to capture the individual requirements of Section XII.]

* 1. [If Settling Party fails to use best efforts to sell the Property in accordance with Paragraph 16 (Payment of Net Proceeds of Sale of Property), Settling Party shall be in violation of this Settlement Agreement and shall pay, as a stipulated penalty, $\_\_\_\_\_\_ per day for each day of failure to use best efforts to sell the Property.]
  2. All penalties accruing under this Section shall be due and payable to EPA within 30 days after Settling Party’s receipt from EPA of a demand for payment of the penalties. Settling Party shall make all payments required by this Section to EPA by Fedwire EFT to:

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York, NY 10045

Field Tag 4200 of the Fedwire message should read “D 68010727 Environmental Protection Agency”

and shall reference stipulated penalties, Site/Spill ID Number \_\_\_\_\_\_, and the EPA docket number for this action. [**NOTE: Regions may substitute instructions for payment by ACH or online payment, and if Settling Party has difficulty making payments by other methods, by check. See Paragraph 13 for text.**]

* 1. At the time of each payment, Settling Party shall send notice that payment has been made as provided in Paragraph 15 (Notice of Payment).
  2. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [**if non-payment obligations are included, insert:** or performance] is due [**if non-payment obligations are included, insert:** , or the day a violation occurs,] and shall continue to accrue through the date of payment [**if non-payment obligations are included, insert:** or the final day of correction of the noncompliance or completion of the activity.] Nothing in this Settlement Agreement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

1. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Party’s failure to comply with the requirements of this Settlement Agreement, if Settling Party fails or refuses to comply with any term or condition of this Settlement Agreement, it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Settlement Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.
2. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Settlement Agreement. Settling Party’s payment of stipulated penalties shall not excuse Settling Party from payment as required by Section VI (Payment of Response Costs) or from performance of any other requirements of this Settlement Agreement.

# COVENANTS BY EPA

1. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Party pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,][[3]](#footnote-3) with regard to the Site.[[4]](#footnote-4) With respect to present and future liability, these covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by Settling Party of its obligations under this Settlement Agreement[.] [**for installment payment plans or future sale of property obligations, continue sentence with:** , including but not limited to, payment of all amounts due under Section VI (Payment of Response Costs) and any Interest or stipulated penalties due thereon under Section VII (Failure to Comply with Settlement Agreement).] These covenants are also conditioned upon the veracity and completeness of the Financial Information and the Insurance Information provided to EPA by Settling Party and the financial, insurance, and indemnity certification made by Settling Party in Paragraph 47. These covenants extend only to Settling Party and do not extend to any other person.

# RESERVATIONS OF RIGHTS BY EPA

1. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within Paragraph 21 (Covenants by EPA).[[5]](#footnote-5) Notwithstanding any other provision of this Settlement Agreement, EPA reserves all rights against Settling Party with respect to:
   1. liability for failure of Settling Party to meet a requirement of this Settlement Agreement;
   2. criminal liability;
   3. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
   4. liability, based on the ownership or operation of the Site by Settling Party when such ownership or operation commences after signature of this Settlement Agreement by Settling Party;
   5. liability based on Settling Party’s transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Settlement Agreement by Settling Party; and
   6. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.
2. Notwithstanding any other provision of this Settlement Agreement, EPA reserves, and this Settlement Agreement is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Settlement Agreement, if the Financial Information or the Insurance Information provided by Settling Party, or the financial, insurance, or indemnity certification made by Settling Party in Paragraph 47, is false or, in any material respect, inaccurate.
3. Nothing in this Settlement Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Settlement Agreement.

# COVENANTS BY SETTLING PARTY

1. Settling Party covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site[[6]](#footnote-6) and this Settlement Agreement, including but not limited to:
   1. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
   2. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law; or
   3. any claim pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law, relating to the Site.[[7]](#footnote-7)
2. Except as provided in Paragraph 28 (claims against other PRPs) and Paragraph 33 (res judicata and other defenses), these covenants shall not apply in the event EPA brings a cause of action or issues an order pursuant to any of the reservations in Section IX (Reservations of Rights by EPA), other than in Paragraph 22.a (liability for failure to meet a requirement of the Settlement Agreement) or 22.b (criminal liability), but only to the extent that Settling Party’s claims arise from the same response action or response costs that EPA is seeking pursuant to the applicable reservation.
3. Nothing in this Settlement Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).
4. Settling Party agrees not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) or 113 of CERCLA) that it may have for response costs [**if NRD claims are being resolved through this settlement, insert:** and for natural resource damages and assessment costs] relating to the Site against [**if multiple settlors, insert:** each other or] any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that [**if multiple settlors, insert:** a] Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against [**if multiple settlors, insert:** such] Settling Party. [**NOTE: If Settling Party asserts that it has a claim against a PRP within the scope of this waiver that is unrelated to the PRP’s CERCLA liability at the Site, e.g., a claim for contractual indemnification, add an exception for such claim such as the following:** This waiver also shall not apply to Settling Party’s contractual indemnification claim against [**insert name**].]

# EFFECT OF SETTLEMENT/CONTRIBUTION

1. Except as provided in Paragraph 28 (claims against other PRPs), nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement Agreement. Except as provided in Section X (Covenants by Settling Party), each of the Parties reserves any and all rights (including, but not limited to, under Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613 (f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).
2. The Parties agree that this Settlement Agreement constitutes an administrative settlement pursuant to which Settling Party has, as of the Effective Date, resolved liability to the United States within the meaning of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Settlement Agreement. The “matters addressed” in this Settlement Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person, except for the State;[[8]](#footnote-8) provided, however, that if EPA exercises rights under the reservations in Section IX (Reservations of Rights by EPA), other than in Paragraphs 22.a (liability for failure to meet a requirement of the Settlement Agreement) or 22.b (criminal liability), the “matters addressed” in this Settlement Agreement will no longer include those response costs or response actions [**if the settlement includes a natural resource damages settlement include:** or natural resource damages] that are within the scope of the exercised reservation.[[9]](#footnote-9)
3. The Parties further agree that this Settlement Agreement constitutes an administrative settlement pursuant to which Settling Party has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).
4. Settling Party shall, with respect to any suit or claim brought by it for matters related to Settlement Agreement, notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Settling Party also shall, with respect to any suit or claim brought against it for matters related to this Settlement Agreement, notify EPA in writing within 10 days after service of the complaint or claim upon Settling Party. In addition, Settling Party shall notify EPA within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Settlement Agreement.
5. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party 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 in the subsequent proceeding were or should have been addressed in this Settlement Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by EPA set forth in Section VIII.
6. Effective upon signature of this Settlement Agreement by [**if multiple settlors, insert:** a] Settling Party, [**if multiple settlors, insert:** such] Settling Party agrees that the time period commencing on the date of its signature and ending on the date EPA receives from [such] Settling Party the payment(s) required by Section VI (Payment of Response Costs) and, if any, Section VII (Failure to Comply with Settlement Agreement) shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the United States related to the “matters addressed” as defined in Paragraph 30, and that, in any action brought by the United States related to the “matters addressed,” [such] Settling Party will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to Settling Party that it will not make this Settlement Agreement effective, the statute of limitations shall begin to run again commencing 90 days after the date such notice is sent by EPA.

# PROPERTY REQUIREMENTS

[NOTE: This Section should be used if Settling Party is a Site owner or otherwise controls access to the Site and access and/or use restrictions are needed. If access is needed to real property owned or controlled by a Settling Party, use Paragraph 35.a. If land, water, or other resource use restrictions are needed on real property owned or controlled by a Settling Party, use Paragraph 35.b. If EPA has issued a record of decision or an action memorandum that provides for institutional controls on real property owned by Settling Party, then either a remedial design/remedial action consent decree or a removal settlement agreement and order on consent should be used. Additional changes to this section of the model will be needed in the event that access or land, water, or other resource use restrictions are needed on or affect a federal facility.]

1. Agreements Regarding Access and Non-Interference. Settling Party shall, with respect to its Affected Property:
   1. Provide the United States [, the State,] potentially responsible parties who have entered or may enter into an agreement with the United States [or the State] for performance of response actions at the Site (hereinafter “Performing Parties”), and their representatives, contractors, and subcontractors with access at all reasonable times to its Affected Property to conduct any activity relating to response actions at the Site including the following activities:

[NOTE: Augment this list as appropriate.]

* + 1. Verifying any data or information submitted to the United States [or the State];
    2. Conducting investigations regarding contamination at or near the Site;
    3. Obtaining samples;
    4. Assessing the need for, planning, implementing, or monitoring response actions;
    5. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Party or its agents, consistent with Section XIII (Access to Information);
    6. Assessing Settling Party’s compliance with the Settlement Agreement;
    7. Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Settlement Agreement; and
    8. Implementing, monitoring, maintaining, reporting on, and enforcing [any institutional controls or] any land, water, or other resource use restrictions regarding the Affected Property.
  1. Refrain from using its Affected Property in any manner that EPA determines will (i) pose an unacceptable risk to human health or to the environment due to exposure to hazardous substances or (ii) interfere with or adversely affect the implementation, integrity, or protectiveness of response actions at the Site, including the following restrictions:

[NOTE: Customize and augment this list as appropriate. Be as specific as possible.]

* + 1. Prohibiting the following activities which could interfere with response actions at the Site: \_\_\_\_\_\_;
    2. Prohibiting use of contaminated groundwater;
    3. Prohibiting the following activities which could result in exposure to contaminants in subsurface soils and groundwater:\_\_\_\_\_\_;
    4. Ensuring that any new structures on the Affected Property will not be constructed in the following manner which could interfere with response actions at the Site:\_\_\_\_\_\_; and
    5. Ensuring that any new structures on the Affected Property will be constructed in the following manner which will minimize potential risk of inhalation of contaminants: \_\_\_\_\_\_.

1. Settling Party shall not Transfer its Affected Property without first securing EPA’s approval of, and transferee’s consent to, an agreement that: (i) is enforceable by EPA [and the State]; and (ii) requires the transferee to provide access to and to refrain from using the Affected Property to the same extent as is provided under Paragraph 35 (Agreements Regarding Access and Non-Interference).
2. If EPA determines in a decision document prepared in accordance with the NCP that institutional controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices are needed regarding the Affected Property, Settling Party shall cooperate with EPA’s [and the State’s] efforts to secure and ensure compliance with such institutional controls.
3. Notice to Successors-in-Title.
   1. Settling Party shall, within 15 days after the Effective Date, submit for EPA approval a notice to be filed regarding the Affected Property in the appropriate land records. The notice must: (1) include a proper legal description of the Affected Property; (2) provide notice to all successors-in-title: (i) that the Affected Property is part of, or related to, the Site; (ii) that EPA [performed / has selected] a response action for the Site [**if applicable:** ; and (iii) that potentially responsible parties are required to implement the response action]; and (3) identify the document requiring implementation of the response action, including, if applicable, the name and civil action or docket number of the matter. Settling Party shall record the notice within 10 days after EPA’s approval of the notice and submit to EPA, within 10 days thereafter, a certified copy of the recorded notice.
   2. Settling Party shall, prior to entering into a contract to Transfer its Affected Property, or 60 days prior to Transferring its Affected Property, whichever is earlier:
      1. Notify the proposed transferee that EPA [performed / has selected] a response action regarding the Site [**if applicable:** , that potentially responsible parties are required to implement response actions regarding the Site, including information identifying the document requiring such implementation,]; and
      2. Notify EPA [and the State] of the name and address of the proposed transferee and provide EPA [and the State] with a copy of the above notice that it provided to the proposed transferee.
4. In the event of any Transfer of the Affected Property, unless EPA otherwise consents in writing, Settling Party shall continue to comply with its obligations under the Settlement Agreement.
5. Notwithstanding any provision of this Settlement Agreement, EPA [and the State] retain[s] all of its [their] access authorities and rights, as well as all of its [their] rights to require institutional controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

# ACCESS TO INFORMATION

**[NOTE: This Section may be omitted if Settling Party has not been and will not be involved in cleanup efforts at the Site and if Settling Party does not possess any additional information beyond that already provided that may assist EPA in its cleanup or enforcement efforts.]**

1. Settling Party shall provide to EPA, upon request, copies of all records, reports, documents, and other information (including records, reports, documents and other information in electronic form) (hereinafter referred to as “Records”) within its possession or control or that of its contractors or agents relating to activities at the Site [**if needed, include:** or to the implementation of this Settlement Agreement], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Site.
2. Privileged and Protected Claims.
   1. Settling Party may assert that all or part of a Record is privileged or protected as provided under federal law, provided it complies with Paragraph 42.b, and except as provided in Paragraph 42.c.
   2. If Settling Party asserts a claim of privilege or protection, it shall provide EPA with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, each addressee, and of each recipient; a description of the Record’s contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Settling Party shall provide the Record to EPA in redacted form to mask the privileged or protected portion only. Settling Party shall retain all Records that it claims to be privileged or protected until EPA has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Settling Party’s favor.
   3. Settling Party may make no claim of privilege or protection regarding:
      1. any data regarding the Site, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or
      2. the portion of any Record that Settling Party is required to create or generate pursuant to this Settlement Agreement.
3. Business Confidentiality Claims. Settling Party may assert that all or part of a Record submitted to EPA under this Section or Section XIV (Retention of Records) is business confidential to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Settling Party shall segregate and clearly identify all Records or parts thereof submitted under this Settlement Agreement for which Settling Party asserts a business confidentiality claim. Records submitted to EPA determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA, or if EPA has notified Settling Party that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such Records without further notice to Settling Party.
4. Notwithstanding any provision of this Settlement Agreement, EPA [and the State] retain[s] all of its [their] information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

# RETENTION OF RECORDS

[NOTE: The following two paragraphs may be deleted in peripheral party settlements if the Region believes that all relevant records have already been provided to EPA. If they are deleted, change the title of this section to Certification.]

1. Until \_\_ years after the Effective Date, Settling Party shall preserve and retain all non-identical copies of [Records] [**if Access to Information is not used, insert:** records, reports, documents, and other information (including records, reports, documents and other information in electronic form) (hereinafter referred to as “Records”)] now in its possession or control, or that come into its possession or control, that relate in any manner to its liability under CERCLA with respect to the Site, provided, however, that if Settling Party is potentially liable as an owner or operator of the Site, Settling Party must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each of these requirements shall apply regardless of any corporate retention policy to the contrary.
2. At the conclusion of the document retention period, Settling Party shall notify EPA at least 90 days prior to the destruction of any such Records, and, upon request by EPA, and except as provided in Paragraph 42 (Privileged and Protected Claims), Settling Party shall deliver any such Records to EPA.]

[NOTE: If Access to Information Section is not used, insert the text of Paragraphs 42 and 43 here.]

1. Settling Party certifies that, to the best of its knowledge and belief, after thorough inquiry, it has:
   1. not altered, mutilated, discarded, destroyed or otherwise disposed of any [Records] [**if “Records” term not previously introduced, insert:** records, reports, or information (including records, reports, documents and other information in electronic form)] (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State and that it has fully complied with any and all EPA and State requests for information regarding the Site and Settling Party’s financial circumstances, including but not limited to insurance and indemnity information, pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), Section 3007 of RCRA, 42 U.S.C. § 6927, and state law;
   2. submitted to EPA financial information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the financial information was submitted to EPA and the time Settling Party executes this Settlement Agreement; and
   3. fully disclosed any information regarding the existence of any insurance policies or indemnity agreements that may cover claims relating to cleanup of the Site, and submitted to EPA upon request such insurance policies, indemnity agreements, and information.

# NOTICES AND SUBMISSIONS

1. Whenever, under the terms of this Settlement Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of this Settlement Agreement regarding such Party.

**As to EPA**: [**Insert name, address, and email of Regional Attorney**

**or Remedial Project Manager**]

**As to Settling Party**: [**Insert name and address**]

# INTEGRATION [/APPENDICES]

1. This Settlement Agreement [and its appendices] constitute[s] the final, complete, and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. [The following appendices are attached to and incorporated into this Settlement Agreement:

“Appendix A” is the map of the Site.

“Appendix B” is a list of the financial documents submitted to EPA by Settling Party.

“Appendix C” is a list of the insurance documents submitted to EPA by Settling Party.”]

# PUBLIC COMMENT

1. This Settlement Agreement shall be subject to a public comment period of at least 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Settlement Agreement if comments received disclose facts or considerations that indicate that this Settlement Agreement is inappropriate, improper, or inadequate.

# EFFECTIVE DATE

1. The effective date of this Settlement Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 50 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Settlement Agreement. [**NOTE: This notice should inform Settling Party that payment is now due in accordance with Paragraph 12 (Payment of Response Costs) and should include a calculation of any Interest to be included with the Settling Party’s payment in accordance with Paragraph 12.**]

IT IS SO AGREED:

**U.S. ENVIRONMENTAL PROTECTION AGENCY**:

\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dated [Name]

Regional Administrator, Region \_\_\_

Signature Page for Settlement Agreement Regarding \_\_\_\_\_\_ Superfund Site

**U.S. DEPARTMENT OF JUSTICE**:

\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dated [Name]

Deputy Section Chief[[10]](#footnote-10)

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

Washington, D.C. 20044-7611

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Name]

Trial Attorney

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

P.O. Box 7611

Washington, DC 20044-7611

Signature Page for Settlement Agreement Regarding \_\_\_\_\_\_ Superfund Site

**FOR \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**:**

[Print name of Settling Party]

\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dated [Name]

[Title]

[Company]

[Address]

**Instructions Regarding Automated Features**

|  |  |
| --- | --- |
| Feature | Instructions |
| Inserting text copied from a different document | Text copied from a different document will usually have embedded formatting codes. Pasting the text into your document will cause the formatting codes to be inserted as well, which will create unpredictable and frustrating formatting and numbering results. **Therefore, ALWAYS use the “Paste Special” function to insert text copied from another document**. Press Ctrl-Alt-V; in the pop-up menu, click “Unformatted Text” and OK. (You can also click the Home tab, Paste, Paste Special, Unformatted Text and OK.) |
| Inserting a new paragraph | Click at the end of the ¶ immediately preceding the place where you wish to add the new **paragraph**, and press Enter. To change the new ¶'s outline level use (under the Home tab) the styles menu. For example, to change ¶12.b into ¶12.a(1), click in that ¶ and then (using the Home tab) click the "LVL 3" style. To change ¶13.a into ¶14, click in that ¶ and then (using the Home tab) click the “LVL 1” Style. Note that in consent decree models, the letters denoting each background paragraph must be manually updated. |
| Adding an updateable section or paragraph cross-reference | (a) Click where you wish to insert a cross-reference; (b) Click the “References” tab, and, in the “Captions” box, click “Cross-reference;” (c) In the pop-up menu that appears, make sure the “Reference type” field contains “Numbered item” and the “Insert reference to” field contains “Paragraph Number (full context); (d) In the “For which numbered item” field” select the numbered item (section, paragraph. or subparagraph) you wish to cross-reference, and click Insert. |
| Updating the cross-references | Press Ctrl-A (to select entire document); right click; in the pop-up menu, click “Update Field;” click OK. Note: If a numbered paragraph that has been cross-referenced elsewhere in the document is deleted, remove the obsolete paragraph cross-reference. Otherwise, when you update the cross-references, the following message will appear: “Error! Reference source not found.” |
| Updating the table of contents | Right-click in the TOC, and in the pop-up menu, left-click “Update Field.” Or click in the TOC, press F9, click Update Entire Table and OK. If you have just added a new section heading, click Update entire table before pressing Enter. |
| Inserting a new section heading | Click in the text of the new heading and assign the “SECTION” paragraph style to the text by clicking the “Home” tab, and in Styles box, clicking the “SECTION” style button.) That will add the section number, change the numbering of later sections, and ensure that the new section will be referenced in the table of contents. |
| Changing the font | Press Ctrl-A (to select entire document); right click; in the pop-up menu, click “Font;” in the “font” field, select a new font; click OK. |

1. If land use restrictions are included, see introductory note in Section XII (Property Requirements). [↑](#footnote-ref-1)
2. When PRPs are performing the response action at the Site, payments made under Paragraph 12 may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account. [↑](#footnote-ref-2)
3. If including a RCRA § 7003 covenant, pursuant to Section 7003(d) of RCRA, you must offer to have a public meeting regarding the settlement and hold such a meeting if requested. To do this, include language in the Federal Register notice providing for an opportunity for a public meeting in the affected area. For guidance regarding how to comply with this requirement, see “Revised Model Notice Language for Compliance with Public Participation Requirements of Section 7003(d) of RCRA” (Oct. 30, 1996), available at <http://www.epa.gov/enforcement/guidance-model-language-compliance-public-participation-requirements-under-rcra-section>. [↑](#footnote-ref-3)
4. This covenant assumes that EPA has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed. [↑](#footnote-ref-4)
5. On a case-by-case basis, EPA and DOJ may consider using an unknown conditions reopener in an ability to pay agreement in addition to the other reservations of rights included in this Section. Because use of this reopener presents case-specific drafting issues, Regions should contact OSRE when using this alternative. [↑](#footnote-ref-5)
6. If the Settlement Agreement does not cover the Site as a whole, the reference to “the Site” here and in Paragraphs 25.b and 25.c should be narrowed to conform to the intended scope of the Agreement. [↑](#footnote-ref-6)
7. The settlement should resolve any claims by Settling Party against the United States related to the Site. Settlement of any federal liability in the ATP settlement will require additional revisions to this document. If the Region has any information suggesting federal agency liability, such information should be provided to DOJ as soon as possible. For information regarding CERCLA § 104(e) information requests to federal agencies, review the “Guidance on Issuing CERCLA Section 104(e)(2) Information Requests to Federal Agencies at Privately-owned Superfund Sites” (June 14, 2004), available at <http://www.epa.gov/enforcement/guidance-issuing-superfund-104e2-information-requests-federal-agencies-privately-owned>. [↑](#footnote-ref-7)
8. If the State is a party and is resolving its claims regarding the Site through the Settlement Agreement, delete “except for the State.” Note that State claims do not include claims for Hazardous Substance Superfund costs that have been provided to the State through a cooperative agreement with EPA and for which EPA retains the responsibility for cost recovery. [↑](#footnote-ref-8)
9. This definition of “matters addressed” assumes that this Settlement Agreement contains a site-wide covenant not to sue by the United States pursuant to Sections 106 and 107(a) of CERCLA, subject only to the reservations of rights. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed. [↑](#footnote-ref-9)
10. The DOJ attorney assigned to the matter will determine who has the authority to approve the settlement under the current applicable DOJ delegations. Generally, with an ability-to-pay settlement, it will be the applicable EES Deputy Chief. [↑](#footnote-ref-10)