UNITED STATES DISTRICT COURT

DISTRICT OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_

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UNITED STATES OF AMERICA :

[and STATE OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], :

:

Plaintiff[s], :

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

v. :

:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, :

:

Defendant. :

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**MODEL CERCLA PERIPHERAL PARTY CASHOUT CONSENT DECREE**

**NOT BASED ON ABILITY TO PAY**

**March 2023**

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| This document contains automatic section and paragraph numbers and automatic section and paragraph cross references. 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. |

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

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# BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the U.S. Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Section[(s) 106 and] 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended, seeking [injunctive relief and] reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the [**insert Site name**] in [**insert City, County, State**] (“the Site”).

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

C. 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 (PRPs) may be included.**]

D. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.

E. The United States alleges that Settling Defendants are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred and to be incurred at the Site.

F. The defendants that have entered into this Consent Decree (“Settling Defendants”) do not admit any liability to Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s].[[1]](#footnote-2) [**If SFAs, insert:** Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim asserted by Settling Defendants [or any claim by the State].]

G. The United States [, the State,] and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter without further litigation and without the [any further] admission or adjudication of any issue of fact or law is appropriate and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

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

# JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 [**if State is a Party and asserts State law claims in its complaint insert:** , 1367] and 1345 and 42 U.S.C. §§ [9606,] 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint[s], Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge entry or the terms of this Consent Decree or this Court’s jurisdiction to enter and enforce this Consent Decree.

# PARTIES BOUND

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

# DEFINITIONS

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

[NOTE: Insert the following definition if Paragraph 11 (Payment of Additional Response Costs) is included in the Consent Decree.]

[“Additional Response Costs” shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA [or any other person][[2]](#footnote-3) incurs and pays at or in connection with the Site, to the extent such costs exceed $\_\_\_\_\_\_ [**insert total response cost estimate upon which Settling Parties’ [and Settling Federal Agencies’] payment is based.**]”]

[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. If land use restrictions are included, see introductory note in Section XII (Property Requirements).]

“Affected Property” means all real property at the Site and any other real property, owned or controlled by Owner Settling Defendant, 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, as amended.

“Consent Decree” shall mean this Consent Decree [and all appendices attached hereto]. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

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

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

“Effective Date” shall mean the date upon which approval of this Consent Decree is recorded on the Court’s docket.

“EPA” shall mean the U.S. Environmental Protection Agency.

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

“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 <https://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.

[NOTE: Insert the following definition if any Settling Defendant is a Site owner.]

[“Owner Settling Defendant” shall mean \_\_\_\_\_\_.]

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

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

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

“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 Consent Decree identified by a Roman numeral.

“Settling Defendants” shall mean [**insert names of settling non-Federal Agency parties, or if numerous:** those parties identified in Appendix \_\_.]

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

[NOTE: If SFAs, insert the following definition.][[3]](#footnote-4)

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

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

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

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

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

# STATEMENT OF PURPOSE

[EXPLANATORY NOTE ON SETTLEMENT OPTIONS UNDER THIS MODEL: In exchange for the covenants provided in Section VIII of this Decree, peripheral party cashout settlements should address the risk of cost overruns during performance of response action at the Site through one of three means:

1) payment of an up-front premium;

2) agreement to pay a percentage of actual future costs upon receipt of one or more future bills, if total response costs exceed the estimate upon which Settling Defendants’ [and SFAs’] payment is based, as shown in the optional Payment of Additional Response Costs paragraphs in Section VI (Payment of Response Costs); or

3) inclusion of the cost overrun reservation of rights shown in Paragraph 21.g, which preserves the United States’ ability to seek additional response costs or performance of response action from Settling Defendants [and SFAs] if total response costs at the Site exceed the estimate upon which Settling Defendants’ [and SFAs’] payment is based.]

1. By entering into this Consent Decree, the mutual objective of the Parties is for Settling Defendants [and Settling Federal Agencies] to make a cash payment [, which includes a premium,] [and, for Owner Settling Defendant, to implement land use restrictions] to resolve their alleged civil liability with regard to the Site under Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a) [, and under Section 7003 of RCRA, 42 U.S.C. § 6973], as provided in the Covenants by Plaintiff[s] in Section VIII, subject to the Reservations of Rights by United States in Section IX [**if SFAs, insert:** , and as provided in the Covenants by Settling Defendants in Section X].

# PAYMENT OF RESPONSE COSTS

1. **Payment by Setting Defendants for Response Costs**. Within 30 days after the Effective Date, Settling Defendants shall pay to EPA $\_\_\_\_\_\_, plus an additional sum for Interest on that amount calculated from [**insert date, e.g., date of lodging or entry**] through the date of payment. [**NOTE: As an alternative to calculation and payment of interest directly to EPA, the following alternative language may be used if Settling Defendants agree to place the payment amount (plus accrued Interest from the date that would have been inserted above through the date the escrow account is created) into an interest-bearing escrow account to be disbursed to EPA upon entry of the Decree:** Within 7 days after Settling Defendants receive notice from the United States that this Consent Decree has been lodged, Settling Defendants shall deposit $\_\_\_\_\_\_ into an interest-bearing escrow account in a duly chartered bank or trust company that is insured by the Federal Deposit Insurance Corporation (the “Escrow Account”). If the Consent Decree is not entered by the Court, and the time for any appeal of that decision has run, or if the Court’s denial of entry is upheld on appeal, the monies placed in escrow, together with accrued interest thereon, shall be returned to Settling Defendants. If the Consent Decree is entered by the Court, Settling Defendants shall, within 15 days after the Effective Date, cause the monies in the Escrow Account, together with accrued interest thereon, to be paid to EPA in accordance with Paragraphs 6 and 8 (Notice of Payment).]
2. Settling Defendants shall make payment[s] by Fedwire Electronic Funds Transfer (EFT) in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit (FLU) of the U.S. Attorney’s Office for the District of \_\_\_\_\_\_ after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (CDCS) number, Site/Spill ID Number \_\_\_\_\_\_\_, and DJ Number \_\_\_\_\_, which shall be used to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

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

on behalf of Settling Defendants. Settling Defendants may change the individual to receive payment instructions on their behalf by providing written notice of such change to DOJ and EPA in accordance with Section XV (Notices and Submissions).]

[NOTE ABOUT SPECIAL ACCOUNTS: The Decree should specify whether payments made under Paragraph 5 should be deposited in the EPA Hazardous Substance Superfund, or in a site-specific special account within the EPA Hazardous Substance Superfund, or should be split between the Superfund and the Special Account (and should specify the split).][[4]](#footnote-5)

1. **Deposit of Payment**. [**Insert one of the following three sentences here.**] [The total amount to be paid pursuant to Paragraph 5 shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [The total amount to be paid pursuant to Paragraph 5 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 to be paid pursuant to Paragraph 5, [“$\_\_\_” or “\_\_\_%”] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [“$\_\_\_” 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 payment, Settling Defendants shall send to EPA and DOJ in accordance with Section XV (Notices and Submissions), a notice of this payment including references to the CDCS Number, Site/Spill ID Number \_\_\_\_\_\_, and DJ Number \_\_\_\_\_\_.

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

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

[**Insert address provided by State**]]

[If SFAs are making payments, insert the following paragraph.]

1. [**Payments by Settling Federal Agencies**
   1. As soon as reasonably practicable after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall:
      1. Pay to EPA $\_\_\_\_\_\_. [**Insert one of the following three sentences.**] [The total amount to be paid on behalf of Settling Federal Agencies pursuant to this Paragraph shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [The total amount to be paid on behalf of Settling Federal Agencies pursuant to this Paragraph shall be deposited by EPA in the [**Site name**] Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.] [Of the total amount to be paid on behalf of Settling Federal Agencies pursuant to this Paragraph, [“$\_\_\_” or “\_\_\_%”] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [“$\_\_\_” or “\_\_\_%”] shall be deposited by EPA in the [**Site name**] Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.]
      2. Pay to the State $\_\_\_\_\_\_, in payment of State Past Response Costs and State Future Response Costs, by Automated Clearinghouse (ACH) Electronic Funds Transfer in accordance with instructions provided by the State.
      3. Pay to Settling Defendants $\_\_\_\_\_\_, in payment of Settling Defendants’ Past Response Costs and Settling Defendants’ Future Response Costs, by Automated Clearinghouse (ACH) Electronic Funds Transfer in accordance with instructions provided by Settling Defendants.
   2. **Interest**. In the event that any payment required by Paragraph 10.a is not made within 120 days after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay Interest on the unpaid balance, with such Interest commencing on the 121st day after the Effective Date and accruing through the date of the payment.
   3. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.]

[NOTE: If Settling Defendants (or SFAs) have agreed to pay a percentage of actual future costs upon receipt of one or more future bills (option 2 of the Explanatory Note in Section V (Statement of Purpose)), insert the following Additional Response Costs Paragraphs 11 and 12.]

1. [**Payment of Additional Response Costs**]
   1. Settling Defendants shall pay to EPA [\_\_\_%] [**if SFAs, insert:** , and the United States on behalf of Settling Federal Agencies shall pay \_\_\_%] of Additional Response Costs not inconsistent with the National Contingency Plan. If Additional Response Costs are incurred, EPA will send Settling Defendants [and Settling Federal Agencies] one or more bills requiring payment [**of the specified percentage**], which include a [**insert name of standard Regionally-prepared cost summary**], which includes direct and indirect costs incurred by EPA, its contractors, and DOJ. Settling Defendants shall make all payments within 30 days after receipt of each bill requiring payment, except as otherwise provided in Paragraph 12 (Resolution of Disputes). Settling Defendants shall make all payments to EPA under this Paragraph in accordance with Paragraphs 14 (Stipulated Penalty) (except that each payment shall be identified as “payment of Additional Response Costs” and shall be deposited by EPA in accordance with Paragraph 7 (Deposit of Payment) [**insert alternative special account deposit instructions if necessary**].[[5]](#footnote-6)

[If SFAs, insert the following Paragraph.]

* 1. [The United States, on behalf of Settling Federal Agencies, shall make all Additional Response Cost payments as soon as reasonably practicable after receipt of each bill requiring payment, in the manner provided and consistent with Paragraph 10.a (Payments by Settling Federal Agencies) [**insert alternative special account deposit instructions if necessary**] and subject to the limitations in Paragraph 10.c. In the event that an Additional Response Costs payment is not made by Settling Federal Agencies within 120 days after receipt of any bill, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), with such Interest commencing on the 121st day after the date of the bill and accruing through the date of payment. Provided, that in the event any such Additional Response Costs are disputed by Settling Defendants in accordance with Paragraph 12 (Resolution of Disputes), the United States shall pay only that portion of the payment required under this Paragraph 11 that is attributable to the costs that are undisputed by Settling Defendants. The remaining portion of the amounts payable under this Paragraph 11 that are attributable to disputed costs as to which the United States prevails pursuant to Paragraph 12, shall be paid as soon as reasonably practicable after the dispute is resolved, and any such delayed payment shall include Interest as provided in this Paragraph 11.b from the 121st day after the date of the original bill through the date of payment.]

1. **Resolution of Disputes with Settling Defendants Concerning Payment of Additional Response Costs**

[NOTE: Consider whether any ADR options should be included here.]

* 1. The dispute resolution procedures set forth in this Paragraph shall be the exclusive mechanism for resolving disputes regarding Settling Defendants’ obligation to pay EPA for Additional Response Costs. The dispute resolution procedures in this Paragraph are limited to disputes regarding recovery of Additional Response Costs. Nothing in this Paragraph shall be deemed to create a right to pre-enforcement review of response actions taken by EPA.
  2. Settling Defendants may dispute all or part of a bill for Additional Response Costs if they determine that EPA has made a mathematical error or included a cost item that is not within the definition of Additional Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the National Contingency Plan.
  3. Any objection to the payment of Additional Response Costs shall be made in writing by Settling Defendants within 30 days after receipt of the bill requiring the payment and must be sent to EPA pursuant to Section XV (Notices and Submissions). Any such objection (hereinafter referred to as the “Notice of Objection”) shall specifically identify the contested Additional Response Costs and the basis for objection.
  4. In the event of an objection to some but not all Additional Response Costs billed, Settling Defendants shall, within 30 days after receipt of the bill requiring payment, pay all uncontested amounts to EPA in accordance with the instructions in Paragraph 11 (Payment of Additional Response Costs).
  5. Within 30 days after receipt of the bill requiring payment, Settling Defendants shall establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation, and remit to that escrow account funds equivalent to the amount of the contested portion of the Additional Response Costs billed. Settling Defendants shall send to EPA 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.
  6. Any dispute with respect to Additional Response Costs shall in the first instance be the subject of informal negotiations between EPA and Settling Defendants. The period for informal negotiations shall not exceed 20 days from EPA’s receipt of the Notice of Objection, unless such time limit is modified by written agreement of EPA and Settling Defendants. If the dispute is resolved by informal negotiations, the agreement shall be reduced to writing, which, upon signature by EPA and Settling Defendants, shall be incorporated into and become an enforceable part of this Consent Decree. Within 7 days after the execution of the agreement, Settling Defendants shall pay to EPA from the escrow account any amount owed to EPA pursuant to the agreement, plus accrued interest.
  7. **Statements of Position**
     1. If the dispute is not resolved by informal dispute resolution, the position advanced by EPA shall be considered binding unless Settling Defendants, within 10 days after the conclusion of the informal dispute resolution period, commence formal dispute resolution by serving on the United States a Notice of Formal Dispute Resolution along with a written Statement of Position on the matter in dispute, which shall include, but not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by Settling Defendants. The Statement of Position shall specify Settling Defendants’ position as to whether formal dispute resolution should proceed under Paragraph 12.h or 12.i.
     2. Within \_\_ days after receipt of Settling Defendants’ Statement of Position, EPA shall 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 12.h or 12.i. Within \_\_ days after receipt of EPA’s Statement of Position, Settling Defendants may submit a Reply.
     3. If there is disagreement between EPA and Settling Defendants as to whether dispute resolution should proceed under Paragraph 12.h or 12.i, the parties to the dispute shall follow the procedures determined by EPA to be applicable. However, if Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 12.h or 12.i.
  8. 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 12.h. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of any provision in any record of decision issued by EPA for the Site.
     1. EPA shall maintain an administrative record of the dispute, which shall include the disputed bill and cost summary sent by EPA to Settling Defendants, the Notice of Objection served by Settling Defendants, the Notice of Formal Dispute Resolution, the Statements of Position, including supporting documentation, and Settling Defendants’ Reply, if any, submitted pursuant to this Paragraph. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.
     2. The [**insert correct title, e.g., Director of the Waste Management Division**], EPA Region \_\_, will issue a final administrative decision resolving the dispute based upon the administrative record described in Paragraph 12.h(1). This decision shall be binding upon Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 12.h(3).
     3. Any administrative decision made by EPA pursuant to Paragraph 12.h(2) shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendants with the Court and then served on all Parties within 10 days after receipt of EPA’s decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested [, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree.] The United States may file a response to Settling Defendants’ motion.
     4. In any proceeding on any dispute governed by this Paragraph 12.h, Settling Defendants shall have the burden of demonstrating that the decision of the [**insert correct title, e.g., Director of the Waste Management Division**], EPA Region \_\_, was 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 12.h(1).
  9. 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.
     1. The [**insert correct title, e.g., Director of the Waste Management Division**], EPA Region \_\_, will issue a final decision resolving the dispute based on the statements of position, and reply (if any), served under Paragraph 12.g (Statements of Position). This decision shall be binding upon Settling Defendants unless, within 10 days after receipt of EPA’s decision, Settling Defendants file with the Court and serve on the parties a motion for judicial review of the decision settling 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 this Consent Decree and response action at the Site.] The United States may file a response to Settling Defendants’ motion.
     2. Judicial review of any dispute governed by this Paragraph 12.i shall be governed by applicable principles of administrative law.
  10. If EPA prevails in the dispute, within 7 days after resolution of the dispute, Settling Defendants shall pay the amount due under the final decision plus associated accrued interest that has accrued between the date the payment was due under Paragraph 11 (Payment of Additional Response Costs) through the date of payment. Payment shall be made from the escrow account in accordance with Paragraph 11. Any amounts remaining in the escrow account after payment to EPA shall be disbursed to Settling Defendants.
  11. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Settling Defendants not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed payment shall continue to accrue, but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the date payment was originally due. In the event that Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VII (Failure to Comply with Consent Decree).

# FAILURE TO COMPLY WITH CONSENT DECREE

1. **Interest on Late Payments**. If any Settling Defendant fails to make any payment required by Paragraph 5 (Payment by Setting Defendants for Response Costs) [**also reference State payment and Additional Response Costs payment, if applicable**] by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.
2. **Stipulated Penalty**
   1. If any amounts due under Paragraph 5 (Payment by Setting Defendants for Response Costs) [**also reference State payment and Additional Response Costs payment, if applicable**] are not paid by the required due date, Settling Defendants shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 13 (Interest on Late Payments), $\_\_\_\_\_\_ per violation per day that such payment is late.

[**NOTE: If the Decree includes any non-payment obligations for which a stipulated penalty is due, including Section XII (Property Requirements), insert:** “If Settling Defendants do not comply with [**insert reference to any non-payment obligations**], Settling Defendants shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, $\_\_\_\_\_\_ per violation per day of such noncompliance.” **Escalating penalty payment schedules may be used for payment or non-payment obligations. Regions may include a more detailed stipulated penalties provision the individual requirements of Section XII.**]

* 1. Stipulated penalties are due and payable within 30 days after the date of the demand for payment of the penalties by EPA [or the State]. Settling Defendants shall make all payments at <https://www.pay.gov> using the “EPA Miscellaneous Payments Cincinnati Finance Center” link, and including references to the Site/Spill ID and DJ numbers listed in Paragraph 6 and shall send notice of such payments in accordance with the procedures under Paragraph 8 (Notice of Payment). Settling Defendants shall indicate in the comment field on the <https://www.pay.gov> payment form that the payment is for stipulated penalties.

[NOTE: If applicable, insert State payment instructions for stipulated penalties for failure to pay State Past Response Costs.]

* 1. Penalties shall accrue as provided in this Paragraph regardless of whether EPA [or the State] has notified Settling Defendants of the violation or made a demand for payment but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [**if non-payment obligations, 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 Consent Decree shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

1. If the United States [or the State] brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States [and the State] for all costs of such action, including but not limited to costs of attorney time.
2. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff[s] by virtue of Settling Defendants’ failure to comply with the requirements of this Consent Decree.
3. The obligations of Settling Defendants to pay amounts owed the United States [and the State] under this Consent Decree are joint and several. In the event of the insolvency of any Settling Defendant or the failure by any Settling Defendant to make the payments required under this Consent Decree, the remaining Settling Defendants shall be responsible for such payments.[[6]](#footnote-7)
4. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendants from payment as required by Section VI (Payment of Response Costs) or from performance of any other requirements of this Consent Decree.

# COVENANTS BY PLAINTIFF[S]

1. **Covenants for Settling Defendants by United States**. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendants 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,][[7]](#footnote-8) with regard to the Site.[[8]](#footnote-9) 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 Defendants of their obligations under this Consent Decree. These covenants extend only to Settling Defendants and do not extend to any other person.

[NOTE: If SFAs are making payments and qualify for peripheral party status at the Site, insert the following covenant. If they do not qualify for peripheral party status, the scope of the covenant will require case-specific discussion.]

1. [**Covenant for Settling Federal Agencies by EPA**. Except as specifically provided in Section IX (Reservation of Rights by United States), EPA covenants not to take administrative action against Settling Federal Agencies 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,] with regard to the Site.[[9]](#footnote-10) With respect to present and future liability, this covenant shall take effect upon the Effective Date. This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. This covenant extends only to Settling Federal Agencies and does not extend to any other person.][[10]](#footnote-11)

# RESERVATION OF RIGHTS BY UNITED STATES

1. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants [**if SFAs, insert:** , and EPA and the federal natural resource trustees reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies,] with respect to all matters not expressly included within Paragraph 19 (Covenants for Settling Defendants by United States) [**if SFAs, insert:** and Paragraph 20 (Covenant for Settling Federal Agencies by EPA).] Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants [**if SFAs, insert:** and EPA and the federal natural resource trustees reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies,] with respect to:
   1. liability for failure of Settling Defendants [or Settling Federal Agencies] to meet a requirement of this Consent Decree;
   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 Defendants [or Settling Federal Agencies] when such ownership or operation commences after signature of this Consent Decree by Settling Defendants [or Settling Federal Agencies];
   5. liability based on Settling Defendants’ [or Settling Federal Agencies’] 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 Consent Decree by Settling Defendants [or Settling Federal Agencies]; [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[.] [; and]

[NOTE: Insert Paragraph 21.g if Settling Defendants (or SFAs) have not agreed in Section VI (Payment of Response Costs) to compensate EPA for the costs described in Paragraph 21.g through a premium payment or an Additional Response Costs billing provision as shown in the optional Payment of Additional Response Costs paragraphs in Section VI (Payment of Response Costs).]

* 1. liability for performance of response action or for reimbursement of response costs if total response costs incurred or to be incurred at or in connection with the Site by the United States or any other person exceed $\_\_\_\_\_\_ [**insert total response cost estimate upon which Settling Defendants’ and Settling Federal Agencies’, if any, payment is based.**]

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

# COVENANTS BY SETTLING DEFENDANTS [AND SETTLING FEDERAL AGENCIES]

1. **Covenants by Settling Defendants**. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States[[11]](#footnote-12) [or the State], or its [their] contractors or employees, with respect to the Site[[12]](#footnote-13) and this Consent Decree, including but not limited to:
   1. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
   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.
2. [**Covenant by Settling Federal Agencies**. Settling Federal Agencies agree not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112, 113 or any other provision of law with respect to the Site and this Consent Decree. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as lead or support agency under the NCP.]
3. Except as provided in Paragraph 26 (claims against other PRPs) and Paragraph 31 (res judicata and other defenses), the covenants in this Section shall not apply in the event the United States [or the State] brings a cause of action or issues an order pursuant to any of the reservations in Section IX (Reservations of Rights by United States), other than in Paragraph 21.a (liability for failure to meet a requirement of the Consent Decree) or 21.b (criminal liability), but only to the extent that Settling Defendants’ claims arise from the same response action or response costs that the United States [or the State] is seeking pursuant to the applicable reservation.
4. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).
5. Settling Defendants agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for 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 a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant. [**NOTE: If a Settling Defendant asserts that it has a claim against a PRP within the scope of this waiver that is unrelated to the PRP’s 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 Defendant [**insert name**]’s contractual indemnification claim against [**insert name**].]

# EFFECT OF SETTLEMENT/CONTRIBUTION

1. Except as provided in Paragraph 26 (claims against other PRPs), 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. Except as provided in Section X (Covenants by Settling Defendants [and Settling Federal Agencies]), each of the Parties expressly 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 Consent Decree diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).
2. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially-approved settlement pursuant to which Settling Defendants [and Settling Federal Agencies] have, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person, except for the State;[[13]](#footnote-14) provided, however, that if the United States exercises rights under the reservations in Section IX (Reservations of Rights by United States), other than in Paragraph 21.a (liability for failure to meet a requirement of the Consent Decree) or 21.b (criminal liability), the “matters addressed” in this Consent Decree will no longer include those response costs or response actions [**if the Decree includes a natural resource damages settlement add:** or natural resource damages] that are within the scope of the exercised reservation.[[14]](#footnote-15)
3. The Parties further agree, and by entering this Consent Decree this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which each Settling Defendant [and each Settling Federal Agency] 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. Each Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify EPA and DOJ [and the State] in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify EPA and DOJ [and the State] in writing within 10 days after service of the complaint or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ [and the State] 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 Consent Decree.
5. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants [**if SFAs and the State are parties, insert:** (and, with respect to a State action, Settling Federal Agencies)] shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States [or the State] in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiff[s] set forth in Section VIII.

# PROPERTY REQUIREMENTS

[NOTE: This Section should be used if a Settling Defendant 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 Defendant, use Paragraph 32.a. If land, water, or other resource use restrictions are needed on real property owned or controlled by a Settling Defendant, use Paragraph 32.b. If EPA has issued a record of decision or an action memorandum that provides for institutional controls (ICs) on real property owned by a Settling Defendant, then relevant provisions from the remedial design/remedial action consent decree or the removal administrative settlement agreement and order on consent, as appropriate, relating to ICs implementation, plan review and approval, payment of future oversight costs, dispute resolution, etc., may be needed and should be adapted for use in this model. 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**. Owner Settling Defendant 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 action 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 Owner Settling Defendant or its agents, consistent with Section XIII (Access to Information);
    6. Assessing Owner Settling Defendant and any Performing Party’s compliance with the Consent Decree;
    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 Consent Decree; 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. 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, Owner Settling Defendant shall cooperate with EPA’s [and the State’s] efforts to secure and ensure compliance with such institutional controls.
2. **Notice to Successors-in-Title**
   1. Owner Settling Defendant 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. Owner Settling Defendant 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. Owner Settling Defendant 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.
3. In the event of any Transfer of the Affected Property, unless the United States otherwise consents in writing, Owner Settling Defendant shall continue to comply with its obligations under the Consent Decree.
4. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its [their] access authorities and rights, as well as all of its [their] rights to require institutional controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

# ACCESS TO INFORMATION

[NOTE: This Section may be omitted if Settling Defendants have not been and will not be involved in cleanup efforts at the Site and if they do not possess any information beyond that already provided that may assist the Agency in its cleanup or enforcement efforts.]

1. Settling Defendants shall provide to EPA [and the State], upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within their possession or control or that of their contractors or agents relating to activities at the Site [**if needed, include:** or to the implementation of this Consent Decree], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Site.
2. **Privileged and Protected Claims**
   1. Settling Defendants may assert that all or part of a Record is privileged or protected as provided under federal law, provided they comply with Paragraph 38.b, and except as provided in Paragraph 38.c.
   2. If Settling Defendants assert a claim of privilege or protection, they shall provide Plaintiff[s] 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 Defendants shall provide the Record to Plaintiff[s] in redacted form to mask the privileged or protected information only. Settling Defendants shall retain all Records that they claim to be privileged or protected until the United States has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the Settling Defendants’ favor.
   3. Settling Defendants 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 Defendants are required to create or generate pursuant to this Consent Decree.
3. **Business Confidential Claims**. Settling Defendants may assert that all or part of a Record submitted to Plaintiff[s] 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 Defendants shall segregate and clearly identify all Records or parts thereof submitted under this Consent Decree for which Settling Defendants assert a business confidentiality claim. Records that Settling Defendants claim to be confidential business information will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA [and the State], or if EPA has notified Settling Defendants that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such Records without further notice to Settling Defendants.
4. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its [their] information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.]

# 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, each Settling Defendant 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 Settling Defendants who are potentially liable as owners or operators of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.
2. After the conclusion of the document retention period in the preceding paragraph, Settling Defendants shall notify EPA and DOJ [and the State] at least 90 days prior to the destruction of any such Records, and, upon request by EPA or DOJ [or the State], except as provided in Paragraph 38 (Privileged and Protected Claims), Settling Defendants shall deliver any such Records to EPA [or the State].

[**NOTE: If Access to Information section is not used, insert the text of Paragraphs 38 (Privileged and Protected Claims) and 39 (Business Confidential Claims) here.**]

1. Each Settling Defendant certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any [Records] [**if “Records” term not previously introduced, insert:** records, reports, documents, or other 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 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.

[If SFAs, insert the following paragraph.]

1. [The United States acknowledges that each Settling Federal Agency (a) is subject to all applicable Federal record retention laws, regulations, and policies; and (b) has certified that it has fully complied with any and all EPA and State requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(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.]

# NOTICES AND SUBMISSIONS

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

**As to DOJ:**  eescdcopy.enrd@usdoj.gov

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

**[If SFAs, insert:]**

**[and:**  [mailprocessing\_eds.enrd@usdoj.gov](mailto:mailprocessing_eds.enrd@usdoj.gov)

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

**As to EPA:** [**Insert name and email address of Regional Attorney and/or Remedial Project Manager or Project Coordinator**]

**[As to the State:]** [**Insert name, address, and email address]**

**As to Settling Defendants:** [**Insert name, address, and email address]**

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

# RETENTION OF JURISDICTION

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

# INTEGRATION[/APPENDICES]

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

# LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

1. This Consent Decree shall be lodged with the Court for a period of at least 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.
2. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

# SIGNATORIES/SERVICE

1. Each undersigned representative of a Settling Defendant and the Assistant Attorney General,[[15]](#footnote-16) U.S. Department of Justice, Environment and Natural Resources Division, or his/her designee [and **insert State official**] certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.
2. Each Settling Defendant agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.
3. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree.[[16]](#footnote-17) Settling Defendants agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. [**Unless a complaint has already been filed and answered insert:** The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.]

# FINAL JUDGMENT

1. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between [and among] the United States [, the State,] and Settling Defendants. The Court [**if this Consent Decree is a partial judgment, i.e., it resolves fewer than all claims alleged in the complaint and/or fewer than all parties named in the complaint, insert:** finds that there is no just reason for delay and therefore] enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_\_\_\_\_\_ DAY OF \_\_\_\_\_\_\_\_\_, 20\_\_\_.

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

United States District Judge

Signature Page for Consent Decree Regarding \_\_\_\_\_\_ Superfund Site

**FOR THE UNITED STATES OF AMERICA:**

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

Dated [Name]

[Assistant Attorney General/Chief/Deputy Chief][[17]](#footnote-18)

U.S. Department of Justice

Environment and Natural Resources Division

[Environmental Enforcement Section]

Washington, D.C. [20530/20044-7611]

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

[Name]

Trial Attorney

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

P.O. Box 7611

Washington, D.C. 20044-7611

**If SFAs, add**:

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

[Name]

Trial Attorney

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Defense Section

P.O. Box 7611

Washington, D.C. 20044-7611]

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

[Name]

United States Attorney

District of \_\_\_\_\_\_

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

[Name]

Assistant United States Attorney

[Address]

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

[Name][[18]](#footnote-19)

Assistant Administrator for Enforcement and

Compliance Assurance

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

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

[Name]

Regional Administrator, Region \_\_

U.S. Environmental Protection Agency

[Address]

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

[Name]

Assistant Regional Counsel

U.S. Environmental Protection Agency

[Address]

Signature Page for Consent Decree Regarding \_\_\_\_\_\_ Superfund Site

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

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

Dated [Names and addresses of State signatories]

Signature Page for Consent Decree Regarding \_\_\_\_\_\_ Superfund Site

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

[Print name of Settling Defendant]

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

Dated [Name and address of Settling Defendant’s signatory]

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

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**[NOTE: A separate signature page is required for each settlor.]**

**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. In situations where the court has entered summary judgment as to liability, we normally should preserve that result in a subsequent settlement by deleting this Paragraph F and replacing it with one that describes the summary judgment decision. [↑](#footnote-ref-2)
2. If the Settlement Agreement concerns an enforcement-lead site at which PRPs may be performing the Additional Response Action, include “or any other person” in this definition. [↑](#footnote-ref-3)
3. 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 <https://www.epa.gov/enforcement/guidance-issuing-superfund-104e2-information-requests-federal-agencies-privately-owned>. [↑](#footnote-ref-4)
4. When PRPs are performing the response action at the Site, payments made under Paragraph 5 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-5)
5. If PRPs perform the additional response action at the Site pursuant to a settlement with EPA, and Additional Response Costs are defined to include these PRP-incurred costs, it may be appropriate for some or all of these Additional Response Costs to be paid directly to the performing PRPs’ trust fund or escrow account established pursuant to the work settlement. [↑](#footnote-ref-6)
6. If multiple, wholly unrelated parties are settling with the United States in one peripheral party consent decree, then it may be appropriate to make the obligation to pay, and the consequences of non-payment (i.e., interest and stipulated penalties), individual rather than joint and several. [↑](#footnote-ref-7)
7. If including a RCRA § 7003 covenant in Paragraph 19 (and 20 if SFAs), pursuant to Section 7003(d) of RCRA, you must offer to have a public meeting regarding the settlement and hold such a meeting if requested. To do this, 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 <https://www.epa.gov/enforcement/guidance-model-language-compliance-public-participation-requirements-under-rcra-section>. [↑](#footnote-ref-8)
8. This covenant assumes that the United States 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-9)
9. *See* notes 7 and 8, *supra*. [↑](#footnote-ref-10)
10. In some instances, EPA’s covenant may also be extended to a federal PRP contractor where the federal PRP settlement includes the contractor. This generally occurs where the contractor is indemnified by the United States under the contract. [↑](#footnote-ref-11)
11. The settlement should resolve any claims by Settling Defendants against the United States related to the Site. [↑](#footnote-ref-12)
12. If the Decree does not cover the Site as a whole, the reference to “the Site” here and in Paragraphs 22.b and 22.c should be narrowed to conform to the intended scope of the Consent Decree. [↑](#footnote-ref-13)
13. If the State is a party and is resolving its claims regarding the Site through the Consent Decree, delete “except for the State.” Also, note that State claims do not include claims for 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-14)
14. This definition of “matters addressed” assumes that this Consent Decree 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-15)
15. The DOJ attorney assigned to the matter will determine who has the authority to approve the settlement under the current applicable DOJ delegations. [↑](#footnote-ref-16)
16. If Settling Defendants are numerous, consider requesting that they appoint a liaison counsel, with service through that party, as an administrative convenience. [↑](#footnote-ref-17)
17. *See supra* note 15. [↑](#footnote-ref-18)
18. Include AA-OECA signature block only if he or she has a concurrence role under current Headquarters review procedures. [↑](#footnote-ref-19)