**MODEL REMEDIAL DESIGN/REMEDIAL ACTION CONSENT DECREE**

**April 2024**

**UNITED STATES DISTRICT COURT**

**DISTRICT OF [name of Federal District]**

|  |  |
| --- | --- |
| UNITED STATES OF AMERICA and STATE OF [name of State], Plaintiffs, v.[name of first Settling Defendant in alphabetical order], et al., Defendants. |  Civil Action No. \_\_\_\_\_\_ |

**CONSENT DECREE**

**INSTRUCTIONS**

● This model document contains all provisions needed for an RD/RA consent decree including optional text for: (a) an “OU” or “Site” covenant; (b) for participation by settling federal agencies; (c) participation by a state; (d) an NPL or Superfund Alternative Site; (e) provisions for prepayment of future costs; (f) provisions for disbursement from a Special Account. Follow the instructions in the footnotes to create the document you need.

● 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 and the U.S. Department of Justice. They do not constitute rulemaking by EPA and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA may take action at variance with this model or its internal implementing procedures.

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● Left and right brackets signify beginning and end of editable text. Text between the brackets describe expected content and/or text options. Delete the brackets after editing the text.

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● To insert a new paragraph or Section heading, move the cursor to where you wish to add the new paragraph, and press Enter to add a new paragraph. Then assign the correct outline level to your new paragraph: Go to the Home tab, and within the Styles box, click “LVL 1”, “LVL 2,” etc. or “Section Head.”

● To add an updateable section or paragraph cross-reference: (1) Move cursor to where you wish to insert a cross-reference; (2) Click the “References” tab; (In the “Captions” box) click “Cross-reference;” (3) In the pop-up menu that appears: (a) change the “Reference type” to “Numbered item,” (b) change “Insert reference to” to “Paragraph Number (full context)” (c) change “For which numbered item” field” to the desired section or paragraph you wish to cross-reference; and (d) Click “Insert.”

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● After creating a PDF, remove active web links before filing the PDF with the Court, as follows: Open PDF; Click “Tools”; Click “Edit PDF”; Click “Links”; Click “Remove Web Links”; choose “All.”

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# BACKGROUND

1. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter under sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).[[1]](#footnote-1)
2. The United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (“DOJ”) for response actions at the [name of Site] Superfund Site in [name of State] (“Site”), together with accrued interest; and (2) performance by the defendants of a response action at the Site consistent with the National Contingency Plan, 40 C.F.R. part 300 (“NCP”).
3. In accordance with the NCP and section 121(f)(1)(F) of CERCLA, EPA notified the State of [name of State] (“State”) on [date], of negotiations with potentially responsible parties (“PRPs”) regarding the implementation of the remedial design and remedial action (“RD/RA”) for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and to be a party to this Consent Decree (“Decree”).
4. The State has also filed a complaint against the defendants [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, and [list state laws cited in the State’s complaint], for: [describe relief sought in State’s complaint].[[2]](#footnote-2)
5. In accordance with section 122(j)(1) of CERCLA, EPA notified the [**name(s) of** **relevant federal natural resource trustee(s)**] on [date], of negotiations with PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Decree.
6. The defendants that have entered into this Decree (“Settling Defendants”)[[3]](#footnote-3) do not admit any liability to Plaintiffs[[4]](#footnote-4) arising out of the transactions or occurrences alleged in the complaints, nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment. Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim or crossclaim asserted by Settling Defendants or any claim by the State.[[5]](#footnote-5)
7. In accordance with section 105 of CERCLA, EPA listed the Site on the National Priorities List (“NPL”), set forth at 40 C.F.R. part 300, Appendix B, by publication in the Federal Register on [date], [Federal Register cite for NPL listing].
8. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, [EPA, Settling Defendants, other PRPs at the Site, or the State] completed a Remedial Investigation for the Site on [date], and a Feasibility Study for the Site on [date], in accordance with 40 C.F.R. § 300.430.
9. In accordance with section 117 of CERCLA and 40 C.F.R § 300.430(f), EPA published notice of the completion of the Feasibility Study and of the proposed plan for remedial action on [date], in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting and comments received are available to the public as part of the administrative record upon which the Regional Administrator [or Regional delegatee, if any], EPA Region [number of Region], based the selection of the response action.
10. EPA selected a remedial action to be implemented at the Site, which is embodied in a final Record of Decision (“Record of Decision”), executed on [date], on which the State had a reasonable opportunity to review and comment / on which the State has given its concurrence.[[6]](#footnote-6) The Record of Decision includes a summary of responses to the public comments [and a description of any significant changes to the proposed remedy]. Notice of the final plan was published in accordance with section 117(b) of CERCLA.
11. Based on the information currently available, EPA and the State each[[7]](#footnote-7) has determined that the Work will be properly and promptly conducted by Settling Defendants if conducted in accordance with this Decree.
12. The Parties recognize, and the Court by entering this Decree finds, that this Decree has been negotiated by the Parties in good faith, that implementation of this Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Decree is fair, reasonable, in the public interest, and consistent with CERCLA.

 NOW, THEREFORE, it is hereby **ORDERED** and **DECREED** as follows:

# JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1367,[[8]](#footnote-8) and 1345, and section 113(b) of CERCLA, and personal jurisdiction over the Parties. Venue lies in this District under section 113(b) of CERCLA and 28 U.S.C. §§ 1391(b), and 1395(a), because the Site is located in this judicial district. This Court retains jurisdiction over the subject matter of this action and over the Parties for the purpose of resolving disputes arising under this Decree, entering orders modifying this Decree, or effectuating or enforcing compliance with this Decree. Settling Defendants may not challenge the terms of this Decree or this Court’s jurisdiction to enter and enforce this Decree.

# PARTIES BOUND

1. This Decree is binding upon the United States and the State and upon Settling Defendants and their successors [and heirs].[[9]](#footnote-9) Unless the United States otherwise consents, (a) any change in ownership or corporate or other legal status of any Settling Defendant, including any transfer of assets, or (b) any Transfer of the Site or any portion thereof, does not alter any of Settling Defendants’[[10]](#footnote-10) obligations under this Decree. Settling Defendants’ responsibilities under this Decree cannot be assigned except under a modification executed in accordance with ¶ 96.
2. In any action to enforce this Decree, Settling Defendants may not raise as a defense the failure of any of their officers, directors, employees, agents, contractors, subcontractors, or any person representing Settling Defendants to take any action necessary to comply with this Decree. Settling Defendants shall provide notice of this Decree to each person representing Settling Defendants with respect to the Site or the Work. Settling Defendants shall provide notice of this Decree to each contractor performing any Work and shall ensure that notice of the Decree is provided to each subcontractor performing any Work.

# DEFINITIONS

1. Terms not otherwise defined in this Settlement have the meanings assigned in CERCLA or in regulations promulgated under CERCLA. Whenever the terms set forth below are used in this Decree, the following definitions apply:

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

“Consent Decree” or “Decree” means this consent decree, and all appendixes attached hereto (listed in Section XX). If there is a conflict between a provision in Sections I through XXV and a provision in any appendix, the provision in Sections I through XXV controls.

 “Day” or “day” means a calendar day. In computing any period under this Decree, the day of the event that triggers the period is not counted and, where the last day is not a working day, the period runs until the close of business of the next working day. “Working day” means any day other than a Saturday, Sunday, or federal or State holiday.

 “DOJ” means the United States Department of Justice.

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

“EPA” means the United States Environmental Protection Agency.

“FDIC” means the Federal Deposit Insurance Corporation.

“Fund” means the Hazardous Substance Superfund established under section 9507 of the Internal Revenue Code, 26 I.R.C. § 9507.

“Future Response Costs” means all costs (including direct, indirect, payroll, contractor, travel, and laboratory costs) that the United States: (a) pays between [**same cutoff date as in PRC definition**] and the Effective Date; and (b) pays after the Effective Date in implementing, overseeing, or enforcing this Decree, including: (i) in developing, reviewing and approving deliverables generated under this Decree; (ii) in overseeing Settling Defendants’ performance of the Work; (iii) in assisting or taking action to obtain access or use restrictions under ¶ 24.e; (iv) in securing, implementing, monitoring, maintaining, or enforcing Institutional Controls, including any compensation paid; (v) in taking action under ¶ 34 (Access to Financial Assurance); (vi) in taking response action described in ¶ 73 because of Settling Defendants’ failure to take emergency action under ¶ [**5.5**] of the SOW; (vii) in implementing a Work Takeover under ¶ 21; (viii) in implementing community involvement activities including the cost of any technical assistance grant provided under section 117(e) of CERCLA; (ix) in enforcing this Decree, including all costs paid under Section XIII (Dispute Resolution) and all litigation costs; [and] (x) in conducting periodic reviews in accordance with section 121(c) of CERCLA. Future Response Costs also includes all Interest accrued after [**same cutoff date as in PRC definition**] on EPA’s unreimbursed costs (including Past Response Costs) under section 107(a) of CERCLA.[[11]](#footnote-11)

“Including” or “including” means “including but not limited to.”

“Institutional Controls” means: (a) Proprietary Controls (*i.e*., easements or covenants running with the land that (i) limit land, water, or other resource use, provide access rights, or both, and (ii) are created under common law or statutory law by an instrument that is recorded, or for which notice is recorded, in the appropriate land records office); and (b) state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that: (i) limit land, water, or other resource use to minimize the potential for human exposure to Waste Material at or in connection with the Site; (ii) limit land, water, or other resource use to implement, ensure noninterference with, or ensure the protectiveness of the Remedial Action; (iii) provide information intended to modify or guide human behavior at or in connection with the Site; or (iv) any combination thereof.

“Interest” means interest at the rate specified for interest on investments of the Fund, as provided under section 107(a) of CERCLA, compounded annually on October 1 of each year. The applicable rate of interest will 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. As of the date of lodging of this Decree, rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“National Contingency Plan” or “NCP” means the National Oil and Hazardous Substances Pollution Contingency Plan promulgated under section 105 of CERCLA, codified at 40 C.F.R. part 300, and any amendments thereto.[[12]](#footnote-12)

[“Oversight Costs ” means all costs (including direct, indirect, payroll, contractor, travel, and laboratory costs) that the United States pays after the Effective Date: (i) in developing, reviewing, and approving deliverables generated under this Decree; and (ii) in overseeing Settling Defendants’ performance of the Work.][[13]](#footnote-13)

[**Add, if applicable**] “Owner Settling Defendant” means the following Settling Defendant who owns or controls all or a portion of the Site: [name of Owner Settling Defendant].

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

“Parties” means the United States, the State, and Settling Defendants.

“Past Response Costs” means all costs (including direct, indirect, payroll, contractor, travel, and laboratory costs) that the United States paid in connection with the Site through [**insert a cutoff date; may be the date of the most recent cost update**], plus all interest on such costs accrued under section 107(a) of CERCLA through such date.[[14]](#footnote-14)

“Performance Standards” means the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the Record of Decision.

“Plaintiffs” means the United States and the State.

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

“Record of Decision” means the EPA decision document that memorializes the selection of the remedial action relating to the [Site or Operable Unit at the Site] signed on [date], by the Regional Administrator [or Regional delegatee, if any], EPA Region [number of Region], and all attachments thereto. The Record of Decision is attached as Appendix A.[[15]](#footnote-15)

“Remedial Action” means the remedial action selected in the Record of Decision.

“Remedial Design” means those activities to be undertaken by Settling Defendants to develop plans and specifications for implementing the Remedial Action as set forth in the SOW.

“RPM” means the EPA Remedial Project Manager.

“Scope of the Remedy” means the scope of the remedy set forth in ¶ [**1.3**] of the SOW.

“Section” means a portion of this Decree identified by a Roman numeral.

“Settling Defendants” means /the settling defendants identified in Appendix D. As used in this Decree, this definition means all settling defendants, collectively, and each settling defendant, individually.

“Settling Federal Agency” means DoD including its past and present components. DoD means the Department of Defense as described in 10 U.S.C. § 111.

“Settling Federal Agency” means DoD acting by and through the [**insert names of DoD service branches (and DLA) addressed in DoD’s investigation, e.g. Air Force, Army, Marine Corps, Navy, as applicable**]. DoD means the Department of Defense as described in 10 U.S.C. § 111.

“Settling Federal Agency” means [name of Settling Federal Agency].[[16]](#footnote-16)

“Site” means the [name of Site] Superfund Site, [comprising approximately [acreage of Site] acres, located at [**address or description of location**] in [name of city], [name of County], [name of state], and depicted generally on the map attached as Appendix C.][[17]](#footnote-17)

“Special Account” means the special account, within the Fund, established for the Site by EPA under section 122(b)(3) of CERCLA.[[18]](#footnote-18)

“State” means the State [or Commonwealth] of [name of State or Commonwealth].[[19]](#footnote-19)

“Statement of Work” or “SOW” means the document attached as Appendix B, which describes the activities Settling Defendants must perform to implement and maintain the effectiveness of the Remedial Action.

“Transfer” means 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.[[20]](#footnote-20)

“United States” means the United States of America and each department, agency, and instrumentality of the United States, including EPA, and the Settling Federal Agencies.[[21]](#footnote-21)

“Waste Material” means (a) any “hazardous substance” under Section 101(14) of CERCLA; (b) any pollutant or contaminant under section 101(33) of CERCLA; (c) any “solid waste” under section 1004(27) of RCRA; and (d) any [“hazardous material”] under [**insert appropriate state or tribal statutory terminology and citation**].

“Work” means all obligations of Settling Defendants under Sections VI (Performance of the Work) through IX (Indemnification and Insurance).

“Work Takeover” means EPA’s assumption of the performance of any of the Work in accordance with ¶ 23.

# OBJECTIVES

1. The objectives of the Parties in entering into this Decree are to protect public health and welfare and the environment through the design, implementation, and maintenance of a response action at the Site by Settling Defendants, to pay response costs of Plaintiffs, and to resolve and settle the claims of Plaintiffs against Settling Defendants and the claims of the State and Settling Defendants that were or could have been asserted against the United States with regard to this Site[[22]](#footnote-22) as provided in this Decree.

# PERFORMANCE OF THE WORK

1. Settling Defendants shall finance, develop, implement, operate, maintain, and monitor the effectiveness of the Remedial Action all in accordance with the SOW, any modified SOW and all EPA-approved, conditionally approved, or modified deliverables as required by the SOW or modified SOW.
2. Nothing in this Decree and no EPA approval of any deliverable required under this Decree constitutes a warranty or representation by EPA or the State that completion of the Work will achieve the Performance Standards.
3. Settling Defendants’ obligations to finance and perform the Work and to pay amounts due under this Decree are joint and several. In the event of the insolvency of any Settling Defendant or the failure by any Settling Defendant to participate in the implementation of the Decree, the remaining Settling Defendants shall complete the Work and make the payments.
4. Modifications to the Remedial Action and Further Response Actions
	1. Nothing in this Decree limits EPA’s authority to modify the Remedial Action or to select further response actions for the Site in accordance with the requirements of CERCLA and the NCP. Nothing in this Decree limits Settling Defendants’ rights, under sections 113(k)(2) or 117 of CERCLA, to comment on any modified or further response actions proposed by EPA.
	2. If EPA modifies the Remedial Action in order to achieve or maintain the Performance Standards, or both, or to carry out and maintain the effectiveness of the Remedial Action, and such modification is consistent with the Scope of the Remedy, then, upon receipt of notice from EPA and subject to their right to initiate dispute resolution under Section XII within 30 days, Settling Defendants shall implement the modification as provided in ¶ 21.d.
	3. If EPA selects a further response action for the Site because a reopener condition in ¶ 71 is satisfied, then, upon receipt of notice from EPA and subject to their right to initiate dispute resolution under Section XII within 30 days, Settling Defendants shall implement the further response action as provided in ¶ 21.d.[[23]](#footnote-23)
	4. Settling Defendants shall implement the modification or further response action,[[24]](#footnote-24) subject to their right to initiate dispute resolution. Settling Defendants shall modify the SOW, or related work plans, or both in accordance with the Remedial Action modification, further response action, or final resolution of the dispute, whichever applies. The Remedial Action modification or further response action, the approved modified SOW, and any related work plans will be deemed to be incorporated into and enforceable under this Decree.
	5. Notwithstanding any other provision in ¶ 21, any modification to implement an amendment to the Record of Decision that “fundamentally alters the basic features” of the Remedial Action within the meaning of 40 C.F.R. § 300.435(c)(2)(ii) shall be considered a material modification under, and may only be implemented in accordance with, ¶ 96.
5. **Compliance with Applicable Law**. Nothing in this Decree affects Settling Defendants’ obligations to comply with all applicable federal and state laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the Record of Decision and the SOW. The activities conducted in accordance with this Decree, if approved by EPA, will be deemed to be consistent with the NCP as provided under section 300.700(c)(3)(ii).
6. Work Takeover
	1. If EPA determines that Settling Defendants: (i) have ceased to perform any of the Work required under this Section; (ii) are seriously or repeatedly deficient or late in performing the Work required under this Section; or (iii) are performing the Work required under this Section in a manner that may cause an endangerment to public health or welfare or the environment, EPA may issue a notice of Work Takeover to Settling Defendants, including a description of the grounds for the notice and a period of time (“Remedy Period”) within which Settling Defendants must remedy the circumstances giving rise to the notice. The Remedy Period will be [20] days, unless EPA determines in its unreviewable discretion that there may be an endangerment, in which case the Remedy Period will be 10 days.
	2. If, by the end of the Remedy Period, Settling Defendants do not remedy to EPA’s satisfaction the circumstances giving rise to the notice of Work Takeover, EPA may notify Settling Defendants and, as it deems necessary, commence a Work Takeover.
	3. EPA may conduct the Work Takeover during the pendency of any dispute under Section XIII but shall terminate the Work Takeover if: (i) Settling Defendants remedy, to EPA’s satisfaction, the circumstances giving rise to the notice of Work Takeover; or (ii) upon the issuance of a final determination under Section XIII (Dispute Resolution) that EPA is required to terminate the Work Takeover.

# PROPERTY REQUIREMENTS

1. Agreements Regarding Access and Noninterference
	1. As used in this Section, “Affected Property” means any real property, including the Site, where EPA determines, at any time, that access; land, water, or other resource use restrictions; Institutional Controls; or any combination thereof, are needed to implement the Remedial Action.
	2. Settling Defendants shall use best efforts to secure from the owner(s) [**if including ¶ 25, add**: , other than an Owner Settling Defendant,] of all Affected Property, an agreement, enforceable by Settling Defendants and by Plaintiffs, requiring such owner to provide Plaintiffs and Settling Defendants, and their respective representatives, contractors, and subcontractors with access at all reasonable times to such owner’s property to conduct any activity regarding the Decree, including the following:
		1. implementing the Work and overseeing compliance with the Decree;
		2. conducting investigations of contamination at or near the Site;
		3. assessing the need for, planning, or implementing additional response actions at or near the Site;
		4. determining whether the Site is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Decree; and
		5. implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions [**if applicable:** and Institutional Controls].
	3. Further, each agreement required under ¶ 24.b must commit the owner to refrain from using its property in any manner that EPA determines will pose an unacceptable risk to public health or welfare or the environment as a result of exposure to Waste Material, or will interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action [**use if applicable:** , including the following:
		1. engaging in the following activities that could interfere with the Remedial Action: [describe activities];
		2. using contaminated groundwater;
		3. engaging in the following activities that could result in human exposure to contaminants in soils and groundwater: [describe activities];
		4. constructing new structures that may interfere with the Remedial Action: [describe structures that may interfere with the Remedial Action]; and
		5. constructing new structures that may cause an increased risk of inhalation of contaminants: [describe structures that may cause an increased risk of inhalation of contaminants].
	4. As used in this Section, “best efforts” means the efforts that a reasonable person in the position of Settling Defendants would use to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restriction agreements.
	5. Settling Defendants shall provide to EPA and the State a copy of each agreement required under ¶ 24.b. If Settling Defendants cannot accomplish what is required through best efforts in a timely manner, they shall notify EPA, and include a description of the steps taken to achieve the requirements. If the United States deems it appropriate, it may assist Settling Defendants, or take independent action, to obtain such access or use restrictions.
2. **Access and Noninterference by Owner Settling Defendant**. The Owner Settling Defendant shall: (a) provide Plaintiffs and the Settling Defendants, and their representatives, contractors, and subcontractors with access at all reasonable times to the Site to conduct any activity regarding the Decree, including those listed in ¶ 24.b; and (b) refrain from using the Site in any manner that EPA determines will pose an unacceptable risk to public health or welfare or the environment because of exposure to Waste Material, or will interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action [**add if applicable:** , including the restrictions listed in ¶ 24.c].[[25]](#footnote-25)
3. 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 appropriate, Settling Defendants shall cooperate with EPA’s and the State’s efforts to secure and ensure compliance with such Institutional Controls.
4. Notice to Successors-in-Title[[26]](#footnote-26)
	1. Owner Settling Defendant shall, within 15 days after the Effective Date, submit for EPA approval a notice to be recorded regarding its property at the Site in the appropriate land records. The notice must: (1) include a proper legal description of the property; (2) provide notice to all successors-in-title: (i) that the property is part of, or affected by, the Site; (ii) that EPA has selected a remedy for the Site; and (iii) that potentially responsible parties have entered into a Decree requiring implementation of such remedy; and (3) identify the U.S. District Court in which the Decree was filed, the name and civil action number of this case, and the Effective Date of the Decree. 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 any of its property that is part of the Site, or 60 days prior to a Transfer of such property, whichever is earlier:
		1. notify the proposed transferee that EPA has selected a remedy regarding the Site, that potentially responsible parties have entered into a Consent Decree requiring implementation of such remedy, and that the United States District Court has entered the Decree (identifying the name and civil action number of this case and the date the Court entered the Decree); 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 notice that it provided to the proposed transferee.
5. Notwithstanding any provision of the Decree, EPA and the State retain all of their access authorities and rights, as well as all of its rights to require land, water, or other resource use restrictions and Institutional Controls, including related enforcement authorities, under CERCLA, RCRA, and any other applicable statute or regulations.

# FINANCIAL ASSURANCE[[27]](#footnote-27)

1. To ensure completion of the Work required under Section VI, Settling Defendants shall secure financial assurance, initially in the amount of $[number] (“Estimated Cost of the Work”), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA and be satisfactory to EPA. As of the date of lodging of this Decree, the sample documents can be found under the “Financial Assurance - Settlements” category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>. Settling Defendants may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, insurance policies, or some combination thereof. The following are acceptable mechanisms:
	1. a surety bond guaranteeing payment, performance of the Work, or both, that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;
	2. an irrevocable letter of credit, payable to EPA or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;
	3. a trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;
	4. a policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;
	5. a demonstration by one or more Settling Defendants that they meet the relevant test criteria of ¶ 30 [, accompanied by a standby funding commitment[[28]](#footnote-28) that requires the affected Settling Defendants to pay funds to or at the direction of EPA, up to the amount financially assured through the use of this demonstration in the event of a Work Takeover]; or
	6. a guarantee to fund or perform the Work executed in favor of EPA by a company: (1) that is a direct or indirect parent company of a Settling Defendant or has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with a Settling Defendant; and (2) demonstrates to EPA’s satisfaction that it meets the financial test criteria of ¶ 30.
2. Settling Defendants seeking to provide financial assurance by means of a demonstration or guarantee under ¶ 29.e or 29.f must, within 30 days after the Effective Date:
	1. demonstrate that:
		1. the affected Settling Defendant or guarantor has:
			1. two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
			2. net working capital and tangible net worth each at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
			3. tangible net worth of at least $10 million; and
			4. assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; or
		2. the affected Settling Defendant or guarantor has:
			1. a current rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor’s or Aaa, Aa, A or Baa as issued by Moody’s; and
			2. tangible net worth at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
			3. tangible net worth of at least $10 million; and
			4. assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
	2. submit to EPA for the affected Settling Defendant or guarantor: (1) a copy of an independent certified public accountant’s report of the entity’s financial statements for the latest completed fiscal year, which must not express an adverse opinion or disclaimer of opinion; and (2) a letter from its chief financial officer and a report from an independent certified public accountant substantially identical to the sample letter and reports available from EPA. As of the date of lodging of this Decree, a sample letter and report is available under the “Financial Assurance - Settlements” subject list category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>.
3. Settling Defendants providing financial assurance by means of a demonstration or guarantee under ¶ 29.e or 29.f must also:
	1. annually resubmit the documents described in ¶ 30.b within 90 days after the close of the affected Settling Defendant’s or guarantor's fiscal year;
	2. notify EPA within 30 days after the affected Settling Defendant or guarantor determines that it no longer satisfies the relevant financial test criteria and requirements set forth in this Section; and
	3. provide to EPA, within 30 days of EPA’s request, reports of the financial condition of the affected Settling Defendant or guarantor in addition to those specified in ¶ 30.b; EPA may make such a request at any time based on a belief that the affected Settling Defendant or guarantor may no longer meet the financial test requirements of this Section.
4. Settling Defendants have selected, and EPA has found satisfactory, a [**insert type**] as an initial form of financial assurance.][[29]](#footnote-29) [Settling Defendants shall, within [number] days after the Effective Date, seek EPA’s approval of the form of Settling Defendants’ financial assurance.] Within 30 days after [the Effective Date / such approval], Settling Defendants shall secure all executed or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the Regional Financial Management Officer, to DOJ, to EPA, and to the State.
5. Settling Defendants shall diligently monitor the adequacy of the financial assurance. If any Settling Defendant becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, such Settling Defendant shall notify EPA of such information within [seven] days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the affected Settling Defendant of such determination. Settling Defendants shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for the affected Settling Defendant, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed [60] days. Settling Defendants shall follow the procedures of ¶ 35 in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Settling Defendants’ inability to secure financial assurance in accordance with this Section does not excuse performance of any other requirement of this Decree.
6. Access to Financial Assurance
	1. If EPA issues a notice of a Work Takeover under ¶ 23.b, then, in accordance with any applicable financial assurance mechanism [**if a standby funding commitment requirement is included in ¶ 29.e, insert**: including the related standby funding commitment], EPA may require that any funds guaranteed be paid in accordance with ¶ 34.d.[[30]](#footnote-30)
	2. If EPA is notified that the issuer of a financial assurance mechanism intends to cancel the mechanism, and the affected Settling Defendant fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 34.d.
	3. If, upon issuance of a notice of a Work Takeover under ¶ 23.b, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism [including the related standby funding commitment], whether in cash or in kind, to continue and complete the Work; or (2) the financial assurance is a demonstration or guarantee under ¶ 29.e or 29.f, then EPA is entitled to demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. Settling Defendants shall, within [number] days after such demand, pay the amount demanded as directed by EPA.
	4. Any amounts required to be paid under this ¶ 34 must be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the Fund or into the 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 Fund.
7. **Modification of Amount, Form****, or Terms of Financial Assurance**. Beginning after the first anniversary of the Effective Date, and no more than once per calendar year, Settling Defendants may submit a request to change the form, terms, or amount of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with ¶ 32, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify Settling Defendants of its decision regarding the request. Settling Defendants may initiate dispute resolution regarding EPA’s decision [**alternative**: by the earlier of 30 days after receipt of EPA’s decision or [180] days after EPA’s receipt of the request]. Settling Defendants may modify the form, terms, or amount of the financial assurance mechanism only: (a) in accordance with EPA’s approval; or (b) in accordance with any resolution of a dispute under Section XIII. Settling Defendants shall submit to EPA, within 30 days after receipt of EPA’s approval or consistent with the terms of the resolution of the dispute, documentation of the change to the form, terms, or amount of the financial assurance instrument.
8. **Release, Cancellation, or Discontinuation of Financial Assurance**. Settling Defendants may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA issues a Certification of Work Completion under ¶ [**5.10**] of the SOW; (b) in accordance with EPA’s approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation or discontinuance of any financial assurance, in accordance with the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XIII.

# INDEMNIFICATION AND INSURANCE

1. Indemnification
	1. Plaintiffs do not assume any liability by entering into this Decree or by virtue of any designation of Settling Defendants as EPA’s and the State’s authorized representatives under section 104(e)(1) of CERCLA. Settling Defendants shall indemnify and save and hold harmless Plaintiffs and their officials, agents, employees, contractors, subcontractors, and representatives for or from any claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on Settling Defendants’ behalf or under their control, in carrying out activities under this Decree, including any claims arising from any designation of Settling Defendants as EPA’s and the State’s authorized representatives under section 104(e)(1) of CERCLA. Further, Settling Defendants shall pay Plaintiffs all costs they incur including attorneys’ fees and other expenses of litigation and settlement arising from, or on account of, claims made against Plaintiffs based on negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control in carrying out activities under with this Decree. Plaintiffs may not be held out as parties to any contract entered into by or on behalf of Settling Defendants in carrying out activities under this Decree. The Settling Defendants and any such contractor may not be considered an agent of Plaintiffs.
	2. Each[[31]](#footnote-31) Plaintiff shall give Settling Defendants notice of any claim for which such Plaintiff plans to seek indemnification in accordance with this ¶ 37, and shall consult with Settling Defendants prior to settling such claim.
2. Settling Defendants covenant not to sue and shall not assert any claim against Plaintiffs for damages or reimbursement or for set-off of any payments made or to be made to Plaintiffs, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work or other activities on or relating to the Site, including claims on account of construction delays. In addition, Settling Defendants shall indemnify and save and hold Plaintiffs harmless with respect to any claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of work at or relating to the Site, including claims on account of construction delays.
3. **Insurance**. Settling Defendants shall secure, by no later than 15 days before commencing any on-site Work, the following insurance: (a) commercial general liability insurance with limits of liability of $1 million per occurrence; (b) automobile liability insurance with limits of liability of $1 million per accident; and (c) umbrella liability insurance with limits of liability of $5 million in excess of the required commercial general liability and automobile liability limits. The insurance policy must name Plaintiffs as additional insureds with respect to all liability arising out of the activities performed by or on behalf of Settling Defendants under this Decree. Settling Defendants shall maintain this insurance until the first anniversary after [issuance of EPA’s Certification of Remedial Action Completion under ¶ [**5.8**] of the SOW[[32]](#footnote-32). In addition, for the duration of this Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker’s compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Decree. Prior to commencement of the Work, Settling Defendants shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Settling Defendants shall ensure that all submittals to EPA under this Paragraph identify the [**Site name, city, state**] and the civil action number of this case.

# PAYMENTS FOR RESPONSE COSTS

1. **Payment for Past Response Costs**. Within 30 days after the Effective Date, Settling Defendants shall pay EPA, in reimbursement of Past Response Costs in connection with the Site, $[number]. The Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District of [name of Federal Court District for this case] shall send Settling Defendants instructions for making this payment, including a Consolidated Debt Collection System (“CDCS”) reference number. Settling Defendants shall make such payment by Fedwire Electronic Funds Transfer (“EFT”) in accordance with the FLU’s instructions, including references to the CDCS Number. Settling Defendants shall send notices of this payment to DOJ and EPA. If the payment required under this Paragraph is late, Settling Defendants shall pay, in addition to any stipulated penalties owed under Section XIV, an additional amount for Interest accrued from the Effective Date until the date of payment.
2. **Payments by Settling Defendants for Future Response Costs**
	1. **Prepayment of Future Response Costs**. Within 30 days after the Effective Date, Settling Defendants shall pay to EPA $[number] as a prepayment of [**if the ¶ 41.b (Shortfall Payments) optional provision for replenishment is used substitute**: as an initial payment toward] Future Response Costs. Settling Defendants shall make payment in accordance with ¶ 41.e.
	2. **Shortfall Payments**. If at any time prior to the date EPA sends Settling Defendants the first bill under ¶ 41.d (Periodic Bills), or one year after the Effective Date, whichever is earlier, the balance in the Future Response Costs Special Account falls below $[number], EPA will so notify Settling Defendants. Settling Defendants shall, within 30 days after receipt of such notice, pay $[number] to EPA. Settling Defendants shall make payment in accordance with ¶ 41.e.
	3. EPA will deposit the amounts paid under ¶¶ 41.a and 41.b into the [**Site name**] Future Response Costs Special Account (“Future Response Costs Special Account”). EPA will retain and use these funds to conduct or finance future response actions at or in connection with the Site.[[33]](#footnote-33)
	4. **Periodic Bills**. On a periodic basis, EPA will send Settling Defendants a bill for Future Response Costs[[34]](#footnote-34) including an “e-Recovery Report” listing direct costs paid by EPA and DOJ, and related indirect costs. Settling Defendants may initiate dispute resolution regarding a Future Response Cost billing, but only if the dispute relates to one or more of the following issues: (i) whether EPA has made an arithmetical error; (ii) whether EPA has included a cost item that is not within the definition of Future Response Costs; or (iii) whether EPA has paid excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP.[[35]](#footnote-35) Settling Defendants must specify in the Notice of Dispute the contested costs and the basis for the objection.
	5. **Payment of Bill**. Settling Defendants shall pay the bill, or if they initiate dispute resolution, the uncontested portion of the bill, if any, within 30 days after receipt of the bill. Settling Defendants shall pay the contested portion of the bill determined to be owed, if any, within 30 days after the determination regarding the dispute. Each payment for: (i) the uncontested bill or portion of bill, if late, and; (ii) the contested portion of the bill determined to be owed, if any, must include an additional amount for Interest accrued from the date of receipt of the bill through the date of payment. Settling Defendants shall make payment at <https://www.pay.gov>[[36]](#footnote-36) using the “EPA Miscellaneous Payments Cincinnati Finance Center” link, and including references to the Site/Spill ID and DJ numbers listed in ¶ 94 and the purpose of the payment. Settling Defendants shall send notices of this payment to DOJ and EPA.
	6. **Unused Amount**. After EPA issues the Certification of Remedial Action Completion under ¶ [**5.8**] of the SOW and a final accounting of the Future Response Costs Special Account (including crediting Settling Defendants for any amounts received under ¶ 41.a (Prepayment of Future Response Costs) [, ¶ 41.b (Shortfall Payments),] or ¶ 41.e (Payment of Bill), EPA may, in its unreviewable discretion, [choose one or more of the following three clauses: “offset the next Future Response Costs bill by the unused amount paid by Settling Defendants under ¶ 41.a (Prepayment of Future Response Costs) [or ¶ 41.b (Shortfall Payments),];” “apply any unused amount paid by Settling Defendants under ¶ 41.a (Prepayment of Future Response Costs) [or 41.b (Shortfall Payments),] to any other unreimbursed response costs or response actions remaining at the Site;” or “remit and return to Settling Defendants any unused amount of the funds paid by Settling Defendants under ¶ 41.a (Prepayment of Future Response Costs) [or ¶ 41.b (Shortfall Payments)]”].

Insert a provision for payments to State if needed.

1. Payments by Settling Federal Agencies.[[37]](#footnote-37)
	1. As soon as reasonably practicable after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay:
		1. To EPA [number], in payment of Past Response Costs and Future Response Costs;
		2. To the State $[number] [**insert as appropriate**: in payment of State Past Response Costs and State Future Response Costs] by Automated Clearing House (“ACH”) Electronic Funds Transfer in accordance with instructions provided by the State; and
		3. To Settling Defendants $[number] [**insert as appropriate**: in payment of Settling Defendants’ Past Response Costs and Settling Defendants’ Future Response Costs] by Automated Clearing House (“ACH”) Electronic Funds Transfer in accordance with instructions provided by Settling Defendants.
	2. **Interest**. If any payment required by ¶ 42.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 Settling Federal Agencies’ payment[s] under this Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Decree constitutes 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.
2. **Deposit of Payments**. EPA may, in its unreviewable discretion, deposit the amounts paid under ¶ 40, [and] ¶ 41.e, and ¶ 42.a(1)[[38]](#footnote-38) in the Fund, in the Special Account, or both.[[39]](#footnote-39) EPA may, in its unreviewable discretion, retain and use any amounts deposited in the Special Account to conduct or finance response actions at or in connection with the Site, or transfer those amounts to the Fund.

# DISBURSEMENT OF SPECIAL ACCOUNT FUNDS[[40]](#footnote-40)

1. **Creation of the Disbursement Special Account**[[41]](#footnote-41) **and Agreement to Disburse Funds to Settling Defendants**. Within 30 days after the Effective Date, EPA will establish the [Site name] Disbursement Special Account (“Disbursement Special Account”) and shall transfer $[number] from the Special Account to the Disbursement Special Account.[[42]](#footnote-42) Subject to the terms and conditions set forth in this Section, EPA agrees to make the funds in the Disbursement Special Account, including Interest Earned on the funds in the Disbursement Special Account, available for disbursement to Settling Defendants as partial reimbursement for performance of the Work [or specify the activity for which the special account funds are to be disbursed]. EPA shall disburse funds from the Disbursement Special Account to Settling Defendants in accordance with the procedures and milestones for phased disbursement set forth in this Section. For purposes of this Paragraph, “Interest Earned” means interest earned on amounts in the [Site name] Disbursement Special Account, which will be computed monthly at a rate based on the annual return on investments of the EPA Hazardous Substance Superfund. The applicable rate of interest will be the rate in effect at the time the interest accrues.
2. Timing and Amount of Disbursements. Within [number] days after EPA’s receipt of a Cost Summary and Certification, as defined by ¶ 47.b, or if EPA has requested additional information under ¶ 47.b or a revised Cost Summary and Certification under ¶ 47.d, within [number] days after receipt of the additional information or revised Cost Summary and Certification, and subject to the conditions set forth in this Section, EPA shall disburse the funds from the Disbursement Special Account at the completion of the following milestones, and in the amounts set forth below:[[43]](#footnote-43)

|  |  |
| --- | --- |
| Milestone | Funds to be Disbursed |
| EPA approval of RD Work Plan | $[number] or [number]% of funds |
| EPA approval of the [insert task] | $[number] or [number]% of funds |
| EPA Cert. of RA Completion | Remainder of funds |

1. EPA shall disburse the funds from the Disbursement Special Account to Settling Defendants in the following manner: [Insert name and address for payment or instructions for electronic funds transfer.]
2. Requests for Disbursement of Special Account Funds
	1. Within [number] days after issuance of EPA’s written confirmation that a milestone of the Work, as defined in ¶ 45, has been satisfactorily completed, Settling Defendants shall submit to EPA a Cost Summary and Certification, as defined in ¶ 47.b, covering the Work performed up to the date of completion of that milestone. Settling Defendants shall not include in any submission costs included in a previous Cost Summary and Certification following completion of an earlier milestone of the Work if those costs have been previously sought or reimbursed in accordance with ¶ 45.
	2. Each Cost Summary and Certification must include a complete and accurate written cost summary and certification of the necessary costs incurred and paid by Settling Defendants for the Work covered by the particular submission, excluding costs not eligible for disbursement under ¶ 48. Each Cost Summary and Certification must contain the following statement signed by the [insert “Chief Financial Officer of a Settling Defendant,” “Independent Certified Public Accountant,” or title of other specified independent person acceptable to EPA]:

To the best of my knowledge, after thorough investigation and review of Settling Defendants’ documentation of costs incurred and paid for Work performed in accordance with this Decree [insert, as appropriate: “up to the date of completion of milestone 1,” “between the date of completion of milestone 1 and the date of completion of milestone 2,” or “between the date of completion of milestone 2 and the date of completion of the milestone 3,”] I certify that the information contained in or accompanying this submission is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment.

* 1. The [insert “Chief Financial Officer of a Settling Defendant,” “Independent Certified Public Accountant,” or title of other specified independent person acceptable to EPA] shall also provide EPA a list of the documents that they reviewed in support of the Cost Summary and Certification. Upon request by EPA, Settling Defendants shall submit to EPA any additional information that EPA deems necessary for its review and approval of a Cost Summary and Certification.
	2. If EPA finds that a Cost Summary and Certification includes a arithmetical error, costs excluded under ¶ 48, costs that are inadequately documented, or costs submitted in a prior Cost Summary and Certification, it will notify and provide Settling Defendants with an opportunity to cure the deficiency by submitting a revised Cost Summary and Certification. If Settling Defendants fail[s] to cure the deficiency within [number] days after being notified of, and given the opportunity to cure, the deficiency, EPA will recalculate Settling Defendants’ costs eligible for disbursement for that submission and disburse the corrected amount to Settling Defendants in accordance with the procedures in ¶ 45. Settling Defendants may dispute EPA’s recalculation under this Paragraph in accordance with Section XIII. In no event may Settling Defendants be disbursed funds from the Disbursement Special Account in excess of amounts properly documented in a Cost Summary and Certification accepted or modified by EPA.
1. Costs Excluded from Disbursement. The following costs are excluded from, and may not be sought by Settling Defendants for, disbursement from the Disbursement Special Account: (a) response costs paid in accordance with Section X; (b) any other payments made by Settling Defendants to the United States in accordance with this Decree, including any Interest or stipulated penalties paid in accordance with Sections X or XIV; (c) attorneys’ fees and costs, except for reasonable attorneys’ fees and costs necessarily related to [insert reference to any requirements under the Decree for which legal services are essential, such as obtaining access or institutional controls] as required by Section VII; (d) costs of any response activities Settling Defendants perform that are not required under, or approved by EPA under, this Decree; (e) costs related to Settling Defendants’ litigation, settlement, development of potential contribution claims, or identification of defendants; (f) internal costs of Settling Defendants, including salaries, travel, or in-kind services, except for those costs that represent the work of employees of Settling Defendants directly performing the Work; (g) any costs incurred by Settling Defendants before the Effective Date [if Remedial Design or other response activity performed under this Decree is commenced prior to the Effective Date insert: except for approved Work completed in accordance with this Decree]; or (h) any costs incurred by Settling Defendants under Section XIII.
2. Termination of Disbursements. EPA’s obligation to disburse funds from the Disbursement Special Account under this Decree terminates upon EPA’s determination that Settling Defendants: (a) have knowingly submitted a materially false or misleading Cost Summary and Certification; (b) have submitted a materially inaccurate or incomplete Cost Summary and Certification, and have failed to correct the materially inaccurate or incomplete Cost Summary and Certification within [number] days after being notified of, and given the opportunity to cure, the deficiency; or (c) failed to submit a Cost Summary and Certification as required by ¶ 47 within [number] days (or such longer period as EPA agrees) after being notified that EPA intends to terminate its obligation to make disbursements under this Section because of Settling Defendants’ failure to submit the Cost Summary and Certification as required by ¶ 47. EPA’s obligation to disburse funds from the Disbursement Special Account also terminates upon EPA’s assumption of performance of any portion of the Work in accordance with ¶ 21, when such assumption of performance of the Work is not challenged by Settling Defendants or, if challenged, is upheld under Section XIII. Settling Defendants may dispute EPA’s termination of special account disbursements under Section XIII.
3. Recapture of Disbursements. Upon termination of disbursements from the Disbursement Special Account under ¶ 49, if EPA has previously disbursed funds from the Disbursement Special Account for activities specifically related to the reason for termination, e.g., discovery of a materially false or misleading submission after disbursement of funds based on that submission, EPA shall submit a bill to Settling Defendants for those amounts already disbursed from the Disbursement Special Account specifically related to the reason for termination, plus Interest on that amount covering the period from the date of disbursement of the funds by EPA to the date of repayment of the funds by Settling Defendants. Within [number] days after receipt of EPA’s bill, Settling Defendants shall reimburse the Fund for the total amount billed. Payment must be made in accordance with ¶ 41.e. Upon receipt of payment, EPA may, in its sole discretion, deposit all or any portion thereof in the Special Account, the Disbursement Special Account, or the Fund.
4. Balance of Special Account Funds. After EPA issues its written Certification of Remedial Action Completion in accordance with this Decree [or if Certification of Remedial Action Completion is not used substitute: After the Remedial Action has been performed in accordance with this Decree and the Performance Standards have been achieved], and after EPA completes all disbursement to Settling Defendants in accordance with this Section, if any funds remain in the Disbursement Special Account, EPA may, in its sole discretion, transfer such funds to the Special Account or to the Fund.]

# FORCE MAJEURE

1. “Force majeure,” for purposes of this Decree, means any event arising from causes beyond the control of Settling Defendants, of any entity controlled by them, or of their contractors that delays or prevents the performance of any Work despite Settling Defendants’ best efforts. Given the need to protect public health and welfare and the environment, the requirement that Settling Defendants exercise “best efforts” to perform the Work includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that any adverse effects are minimized to the greatest extent possible. “Force majeure” does not include financial inability to complete the Work or a failure to achieve the Performance Standards.
2. Claims of Force Majeure
	1. If any event occurs for which Settling Defendants will or may claim a force majeure, they shall notify EPA’s Project Coordinator by email. The deadline for the notice is [three] days after Settling Defendants first knew or should have known that the event would likely delay or prevent performance. Settling Defendants are deemed to know of any circumstance of which any contractor of, subcontractor of, or entity controlled by them knew or should have known.
	2. To assert a claim of force majeure Settling Defendants must submit, within [seven] days after the notice under ¶ 53.a, a further notice that includes: (1) a description of the event and its effect on the implementation of the Work; (2) a description of all actions taken or to be taken to minimize the adverse effects of the event; (3) a description of and an explanation for the requested excuse or extension; (4) a statement as to whether, in the opinion of Settling Defendants, the event may cause or contribute to an endangerment to public health or welfare or the environment; and (5) all available proof supporting the claim of force majeure.
	3. Failure to submit timely or complete notices under ¶ 53.a or ¶ 53.b regarding an event precludes Settling Defendants from asserting a claim of force majeure regarding that event, provided, however, that EPA may, in its unreviewable discretion, excuse such failure, if it is able to assess to its satisfaction whether the event is a force majeure and whether Settling Defendants have exercised their best efforts under ¶ 52.
3. EPA, after a reasonable opportunity for review and comment by the State, will notify Settling Defendants of its determination whether they are entitled to relief under ¶ 52, and, if so, the excuse of or extension of time for performance of the portion of the Work affected by the force majeure. Any such excuse or extension does not, of itself, excuse or extend the time for performance of any other Work. Settling Defendants may initiate dispute resolution regarding EPA’s determination. In any such proceeding, Settling Defendants have the burden of proving that they are entitled to relief under ¶ 52 and that their proposed excuse or extension is warranted under the circumstances.
4. The failure by EPA to timely complete any activity under the Decree is not a violation of the Decree, provided, however, that if such failure prevents Settling Defendants from timely completing any Work, they may seek relief under this Section.

# DISPUTE RESOLUTION

1. Unless otherwise provided in this Decree, Settling Defendants must use the dispute resolution procedures of this Section to resolve any dispute arising under this Decree. Settling Defendants shall not initiate a dispute challenging the Record of Decision. The United States may enforce any requirement of the Decree that is not the subject of a pending dispute under this Section.
2. A dispute will be considered to have arisen when one or more parties sends a timely written notice of dispute (“Notice of Dispute”). A notice is timely if sent within 30 days after receipt of the EPA notice or determination giving rise to the dispute, or within 15 days in the case of a force majeure determination. Disputes arising under this Decree must in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations may not exceed 20 days after the dispute arises unless the parties to the dispute otherwise agree. If the parties cannot resolve the dispute by informal negotiations, the position advanced by EPA is binding unless Settling Defendants initiate formal dispute resolution under ¶ 58. [By agreement of the parties, mediation may be used during this informal negotiation period to assist the parties in reaching a voluntary resolution or narrowing of the matters in dispute.]
3. Formal Dispute Resolution
	1. **Statements of Position**. Settling Defendants may initiate formal dispute resolution by serving on the Plaintiffs, within [20] days after the conclusion of informal dispute resolution under ¶ 57, an initial Statement of Position regarding the matter in dispute. The Plaintiffs’ responsive statements of position are due within [20] days after receipt of the initial statement of position. All statements of position must include supporting factual data, analysis, opinion, and other documentation. A reply, if any, is due within [10] days after receipt of the response. If appropriate, EPA may extend the deadlines for filing statements of position for up to [45] days and may allow the submission of supplemental statements of position.
	2. **Formal Decision**. The Director of the [Superfund & Emergency Management Division], EPA Region [number for Region], will issue a formal decision resolving the dispute (“Formal Decision”) based on the statements of position and any replies and supplemental statements of position. The Formal Decision is binding on Settling Defendants unless they timely seek judicial review under ¶ 59.
	3. **Compilation of Administrative Record**. EPA shall compile an administrative record regarding the dispute, which must include all statements of position, replies, supplemental statements of position, and the Formal Decision.
4. Judicial Review
	1. Settling Defendants may obtain judicial review of the Formal Decision by filing, within [20] days after receiving it, a motion with the Court and serving the motion on all Parties. The motion must describe the matter in dispute and the relief requested. The parties to the dispute shall brief the matter in accordance with local court rules.
	2. **Review on the Administrative Record**. Judicial review of disputes regarding the following issues must be on the administrative record: (i) the adequacy or appropriateness of deliverables required under the Decree; (ii) the adequacy of the performance of the Remedial Action; (iii) whether a Work Takeover is warranted under ¶ 23; (iv) determinations about financial assurance under Section VIII; (v) whether a reopener condition under ¶ 71 is satisfied, including whether the Remedial Action is not protective of public health or welfare or the environment; and (vi) EPA’s selection of modified or further response actions; (vii) any other items requiring EPA approval under the Decree; and (viii) any other disputes that the Court determines should be reviewed on the administrative record. For all of these disputes, Settling Defendants bear the burden of demonstrating that the Formal Decision was arbitrary and capricious or otherwise not in accordance with law.
	3. Judicial review of any dispute not governed by ¶ 59.b is governed by applicable principles of law.
5. **Escrow Account**. For disputes regarding a Future Response Cost billing, Settling Defendants shall: (a) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the FDIC; (b) remit to that escrow account funds equal to the amount of the contested Future Response Costs; and (c) send to EPA copies of the correspondence and of the payment documentation (e.g., the check) that established and funded the escrow account, including the name of the bank, the bank account number, and a bank statement showing the initial balance in the account. EPA may, in its unreviewable discretion, waive the requirement to establish the escrow account. Settling Defendants shall cause the escrow agent to pay the amounts due to EPA and the State under ¶ 41, if any, by the deadline for such payment in ¶ 41. Settling Defendants are responsible for any balance due under ¶ 41 after the payment by the escrow agent.
6. The initiation of dispute resolution procedures under this Section does not extend, postpone, or affect in any way any requirement of this Decree, except as EPA agrees, or as determined by the Court. Stipulated penalties with respect to the disputed matter will continue to accrue, but payment is stayed pending resolution of the dispute, as provided in ¶ 64.

# STIPULATED PENALTIES

1. Unless the noncompliance is excused under Section XII (Force Majeure), Settling Defendants are liable to the United States and the State [**specify percentage split**] for the following stipulated penalties:
	1. for any failure: (i) to pay any amount due under Section X; (ii) to establish and maintain financial assurance in accordance with Section VIII; (iii) to submit timely or adequate deliverables under Section [**9**] of the SOW; (iv) [**add other compliance milestones or obligations**]:[[44]](#footnote-44)

|  |  |
| --- | --- |
| Period of Noncompliance | Penalty Per Noncompliance Per Day |
| 1st through 14th day | $[number] |
| 15th through 30th day | $[number] |
| 31st day and beyond | $[number] |

* 1. for any failure to submit timely or adequate deliverables required by this Decree other than those specified in ¶ 62.a:

|  |  |
| --- | --- |
| Period of Noncompliance | Penalty Per Noncompliance Per Day |
| 1st through 14th day | $[number] |
| 15th through 30th day | $[number] |
| 31st day and beyond | $[number] |

1. **Work Takeover Penalty**. If EPA commences a Work Takeover, Settling Defendants are liable for a stipulated penalty in the amount of $[number]. This stipulated penalty is in addition to the remedy available to EPA under ¶ 34 (Access to Financial Assurance) to fund the performance of the Work by EPA.
2. **Accrual of Penalties**. Stipulated penalties accrue from the date performance is due, or the day a noncompliance occurs, whichever is applicable, until the date the requirement is completed or the final day of the correction of the noncompliance. Separate penalties may accrue simultaneously for separate noncompliances with this Decree. Stipulated penalties accrue regardless of whether Settling Defendants have been notified of their noncompliance, and regardless of whether Settling Defendants have initiated dispute resolution under Section XIII, provided, however, that no penalties will accrue as follows:
	1. with respect to a submission that EPA subsequently determines is deficient under ¶ [**8.6**] of the SOW, during the period, if any, beginning on the 31st day after EPA’s receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency;
	2. with respect to a deficient initial submission under ¶ [8.6(a)] of the SOW if the deficiency is corrected in the resubmitted submittal under ¶ [8.6(b)] of the SOW;
	3. with respect to a matter that is the subject of dispute resolution under Section XIII, during the period, if any, beginning on the 21st day after the later of the date that EPA’s Statement of Position is received or the date that Settling Defendants’ reply thereto (if any) is received until the date of the Formal Decision under ¶ 58.b; or
	4. with respect to a matter that is the subject of judicial review by the Court under ¶ 59, during the period, if any, beginning on the 31st day after the Court’s receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute.
3. **Demand and Payment of Stipulated Penalties**. EPA may send Settling Defendants a demand for stipulated penalties. The demand will include a description of the noncompliance and will specify the amount of the stipulated penalties owed. Settling Defendants may initiate dispute resolution regarding the demand. Settling Defendants shall pay the amount demanded or, if they initiate dispute resolution, the uncontested portion of the amount demanded, within 30 days after receipt of the demand. Settling Defendants shall pay the contested portion of the penalties determined to be owed, if any, within 30 days after the resolution of the dispute. Each payment for: (a) the uncontested penalty demand or uncontested portion, if late; and (b) the contested portion of the penalty demand determined to be owed, if any, must include an additional amount for Interest accrued from the date of receipt of the demand through the date of payment. Settling Defendants shall make payment at <https://www.pay.gov> using the link for “EPA Miscellaneous Payments Cincinnati Finance Center,” including references to the Site/Spill ID and DJ numbers listed in ¶ 94, and the purpose of the payment. Settling Defendants shall send a notice of this payment to DOJ and EPA. The payment of stipulated penalties and Interest, if any, does not alter any obligation by Settling Defendants under the Decree.[[45]](#footnote-45)
4. Nothing in this Decree limits the authority of the United States or the State: (a) to seek any remedy otherwise provided by law for Settling Defendants’ failure to pay stipulated penalties or interest; or (b) to seek any other remedies or sanctions available by virtue of Settling Defendants’ noncompliances with this Decree or of the statutes and regulations upon which it is based, including penalties under section 122(*l*) of CERCLA, provided, however, that the United States may not seek civil penalties under section 122(*l*) of CERCLA for any noncompliance for which a stipulated penalty is provided for in this Decree, except in the case of a willful noncompliance with this Decree.[[46]](#footnote-46)
5. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued under this Decree.

# COVENANTS BY PLAINTIFFS

1. **Covenants for Settling Defendants**. Subject to ¶ 71 and ¶ 72, the United States covenants not to sue or to take administrative action against Settling Defendants under sections 106 and 107(a) of CERCLA[[47]](#footnote-47) regarding the Site/the Work, Past Response Costs, [and] Future Response Costs.[[48]](#footnote-48)
2. **Covenants for Settling Federal Agencies**. Subject to ¶ 71 and ¶ 72, EPA covenants not to take administrative action against Settling Federal Agencies under sections 106 and 107(a) of CERCLA[[49]](#footnote-49) regarding [**Site CD**: the Site] [**OU CD**: the Work, Past Response Costs, and Future Response Costs].[[50]](#footnote-50)
3. The covenants under ¶ 68 and ¶ 69: (a) take effect upon the Effective Date, except with respect to future liability,[[51]](#footnote-51) for which these covenants take effect upon Certification of Remedial Action Completion by EPA under ¶ [**5.8**] of the SOW; (b) are conditioned, respectively, on the satisfactory performance by Settling Defendants and by the United States on behalf of the Settling Federal Agencies of the requirements of this Decree; (c) extend to the successors of each Settling Defendant but only to the extent that the alleged liability of the successor of the Settling Defendant is based solely on its status as a successor of the Settling Defendant; and (d) do not extend to any other person.
4. **United States’ Pre- and Post-certification Reservations**[[52]](#footnote-52)
	1. Notwithstanding any other provision of this Decree, the United States reserves, and this Decree is without prejudice to, the right to issue an administrative order or to institute proceedings in this action or in a new action seeking to compel Settling Defendants [, and EPA reserves the right to issue an administrative order seeking to compel Settling Federal Agencies,[[53]](#footnote-53)] to perform further response actions relating to the Site, to pay the United States for additional costs of response, or any combination thereof. The United States may bring a claim under this reservation only if, at any time, conditions at the Site previously unknown to EPA are discovered, or information previously unknown to EPA is received, and EPA determines, based in whole or in part on these previously unknown conditions or information, that the Remedial Action is not protective of public health or welfare or the environment.
	2. Before certification of Remedial Action Completion, the information and the conditions known to EPA include only that information and those conditions known to EPA as of the date the Record of Decision was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision.
	3. After certification of Remedial Action Completion, the information and the conditions known to EPA include only that information and those conditions known to EPA as of the date of Certification of Remedial Action Completion and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-Record of Decision administrative record, or in any information received by EPA in accordance with the requirements of this Decree prior to Certification of Remedial Action Completion.
5. **General Reservations**. Notwithstanding any other provision of this Decree, the United States reserves, and this Decree is without prejudice to, all rights against Settling Defendants, and EPA and the federal natural resource trustee reserve, and this Decree is without prejudice to, all rights against Settling Federal Agencies,[[54]](#footnote-54) regarding the following:
	1. liability for failure by Settling Defendants or Settling Federal Agencies[[55]](#footnote-55) to meet a requirement of this Decree;
	2. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
	3. liability based on Settling Defendants’ ownership of the Site when such ownership commences after Settling Defendants’ signature of this Decree;
	4. liability based on Settling Defendants’ operation of the Site when such operation commences after Settling Defendants’ signature of this Decree and does not arise solely from Settling Defendants’ performance of the Work;
	5. liability based on Settling Defendants’ [or Settling Federal Agencies’ ]transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, after signature of this Decree by Settling Defendants[ or on behalf of Settling Federal Agencies], other than as provided in the Record of Decision, under this Decree, or ordered by EPA;
	6. liability for additional operable units at the Site or the final response action;[[56]](#footnote-56)
	7. [**if needed**: liability for the following response costs that are not being reimbursed under ¶ 40 (Payment for Past Response Costs): [describe costs subject to this reservation];]
	8. [**if needed**: liability for costs incurred or to be incurred by [**name of U.S. Agency**] regarding the Site;
	9. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;[[57]](#footnote-57)
	10. liability, prior to achievement of Performance Standards, for additional response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the Remedial Action, but that are not covered by ¶ 21.b; and
	11. criminal liability.
6. Subject to ¶ 68 and ¶ 69[[58]](#footnote-58), nothing in this Decree limits any authority of Plaintiffs to take, direct, or order all appropriate action to protect public health and welfare and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or to request a Court to order such action.[[59]](#footnote-59)

# COVENANTS BY SETTLING DEFENDANTS AND SETTLING FEDERAL AGENCIES[[60]](#footnote-60)

1. Covenants by Settling Defendants[[61]](#footnote-61)
	1. Subject to ¶ 75, Settling Defendants covenant not to sue and shall not assert any claim against the United States or the State under CERCLA, section 7002(a) of RCRA, the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, the State Constitution, State law,[[62]](#footnote-62) or at common law regarding the Site/the Work, past response actions relating to the Site, Past Response Costs, [and] Future Response Costs.[[63]](#footnote-63)
	2. Subject to ¶ 75, Settling Defendants covenant not to seek reimbursement from the Fund through CERCLA or any other law for costs regarding the Site/of the Work and past response actions regarding the Site, Past Response Costs, [and] Future Response Costs/,State Past Response Costs, State Future Response Costs] , Settling Defendants’ Past Response Costs, and Settling Defendants’ Future Response Costs].[[64]](#footnote-64)
2. **Settling Defendants’ Reservation**. The covenants in ¶ 74 do not apply to any claim brought or order issued after the Effective Date by the United States or the State to the extent such claim or order is within the scope of a reservation under ¶ 71, and ¶¶ 72.a through 72.j.
3. ***De Minimis*/Ability to Pay Waiver**. Settling Defendants shall not assert any claims and waive all claims or causes of action (including claims or causes of action under sections 107(a) and 113 of CERCLA) that they may have against any third party who enters or has entered into a *de minimis* or “ability-to-pay” settlement with EPA to the extent Settling Defendants’ claims and causes of action are within the scope of the matters addressed in the third party’s settlement with EPA, provided, however, that this waiver does not apply if the third party asserts a claim regarding the Site against the Settling Defendants. Nothing in the Decree limits Settling Defendants’ rights under section 122(d)(2) of CERCLA to comment on any *de minimis* or ability-to-pay settlement proposed by EPA.[[65]](#footnote-65)
4. **De Micromis Waiver**. Settling Defendants shall not assert any claims and waive all claims or causes of action (including claims or causes of action under sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site against any person where the person’s liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than [110] gallons of liquid materials or [200] pounds of solid materials. This waiver does not apply to any claim against any person otherwise covered by such waiver if EPA determines that: (i) the materials containing hazardous substances contributed to the Site by such person contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; or (ii) such person has failed to comply with any information request or administrative subpoena issued under sections 104(e) or 122(e)(3)(B) of CERCLA or section 3007 of RCRA, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site; or (iii) such person has been convicted of a criminal violation for the conduct to which the waiver would apply and that conviction has not been vitiated on appeal or otherwise. This waiver does not apply with respect to any defense or claim that a Settling Defendant may have against any person otherwise covered by this waiver if such person asserts a claim relating to the Site against such Settling Defendant.[[66]](#footnote-66)
5. MSW Waiver[[67]](#footnote-67)
	1. “Municipal Solid Waste” or “MSW” means waste material: (1) generated by a household (including a single or multifamily residence); or (2) generated by a commercial, industrial, or institutional entity, to the extent that the waste material (i) is essentially the same as waste normally generated by a household; (ii) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (iii) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.
	2. Settling Defendants shall not assert any claims and waive all claims or causes of action (including claims or causes of action under sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site against any person where the person’s liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of MSW at the Site, if the volume of MSW disposed, treated, or transported by such person to the Site did not exceed 0.2% of the total volume of waste at the Site. This waiver does not apply to any claim against any person otherwise covered by such waiver if EPA determines that: (i) the materials containing MSW contributed to the Site by such person contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; or (ii) such person has failed to comply with any information request or administrative subpoena issued under sections 104(e) or 122(e)(3)(B) of CERCLA or section 3007 of RCRA, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site. This waiver does not apply with respect to any defense or claim that a Settling Defendant may have against any person otherwise covered by this waiver if such person asserts a claim relating to the Site against such Settling Defendant.
6. The waiver under ¶ 76 does/waivers under ¶¶ 76, 77, and 78 do not apply to Settling Defendant [name of Settling Defendant]’s contractual indemnification claim against [name of party against whom SD has indemnification claim].[[68]](#footnote-68)
7. Settling Defendants agree not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.[[69]](#footnote-69)
8. **Covenant by Settling Federal Agencies**. Settling Federal Agencies shall not seek reimbursement from the Fund through CERCLA or any other law for [**use same items listed in ¶ 74.a**]. This covenant does not preclude demand for reimbursement from the Fund of costs incurred by a Settling Federal Agency in the performance of its duties (other than in accordance with this Decree) as lead or support agency under the NCP.[[70]](#footnote-70)

# EFFECT OF SETTLEMENT; CONTRIBUTION

1. The Parties agree and the Court finds that: (a) the complaint filed by the United States in this action is a civil action within the meaning of section 113(f)(1) of CERCLA; (b) this Decree constitutes a judicially approved settlement under which each Settling Defendant /and each Settling Federal Agency[[71]](#footnote-71) has, as of the Effective Date, resolved its liability to the United States within the meaning of sections 113(f)(2) and 113(f)(3)(B) of CERCLA; and (c) /each Settling Defendant /and each Settling Federal Agency is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the “Matters Addressed” in this Decree. The contribution protection under the preceding sentence extends to the successors of each Settling Defendant but only to the extent that the alleged liability of the successor of the Settling Defendant is based solely on its status as a successor of the Settling Defendant. The Matters Addressed in this 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[[72]](#footnote-72)/the Work, Past Response Costs, and Future Response Costs,[[73]](#footnote-73) provided, however, that if the United States bring a claim /against Settling Defendants (or if EPA or the federal natural resource trustee [or the State] assert rights against Settling Federal Agencies)[[74]](#footnote-74) under a reservation in [¶ 71 or ¶¶ 72.a through 72.j][¶¶ 72.a, 72.f, or 72.j],[[75]](#footnote-75) the Matters Addressed in this Decree do not include those response costs or response actions [or natural resource damages] that are within the scope of the claim brought under the reservation.
2. Each Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Decree, notify DOJ and EPA and the State no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant shall, with respect to any suit or claim brought against it for matters related to this Decree, notify DOJ and EPA and the State within 10 days after service of the complaint on such Settling Defendant. In addition, each Settling Defendant shall notify DOJ and EPA 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.
3. **Res Judicata and Other Defenses**. In any subsequent administrative or judicial proceeding initiated against any Settling Defendant by either Plaintiff for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants (and, with respect to a State proceeding initiated against a Settling Federal Agency, Settling Federal Agencies)[[76]](#footnote-76) shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, claim preclusion (res judicata), issue preclusion (collateral estoppel), 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.
4. Nothing in this Decree diminishes the right of the United States under section 113(f)(2) and (3) of CERCLA to pursue any person not a party to this Decree 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).

# RECORDS

1. **Settling Defendant Certification**. Each Settling Defendant certifies individually that: (a) it has implemented a litigation hold on documents and electronically stored information[[77]](#footnote-77) relating to the Site, including information relating to its potential liability under CERCLA regarding the Site, since the earlier of notification of potential liability by the United States or the State or the filing of suit against it regarding the Site; and (b) it has fully complied with any and all EPA and State requests for information under sections 104(e) and 122(e) of CERCLA, and section 3007 of RCRA, and State law. [**If needed**: Add a sentence regarding known document or data losses.]
2. **Settling Federal Agency Acknowledgment**. 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 under sections 104(e) and 122(e)(3)(B) of CERCLA, section 3007 of RCRA, and state law.[[78]](#footnote-78)
3. Retention of Records and Information
	1. Settling Defendants shall retain, and instruct their contractors and agents to retain, the following documents and electronically stored data (“Records”) until 10 years after the Certification Completion of the Work under SOW ¶ [**5.8**] (the “Record Retention Period”):[[79]](#footnote-79)
		1. All records regarding Settling Defendants’ liability under CERCLA regarding the Site;
		2. All reports, plans, permits, and documents submitted to EPA in accordance with this Decree, including all underlying research and data; and
		3. All data developed by, or on behalf of, Settling Defendants in the course of performing the Remedial Action.
	2. [**If needed**: [**name of each SD that is an owner or operator**] shall retain all Records regarding the liability of any person under CERCLA regarding the Site during the Record Retention Period.]
	3. Settling Defendants shall maintain Records that were originally created in an electronic format in their native format or in a reasonably accessible format and shall keep them reasonably organized. Unmarked paper printouts of electronic records maintained in accordance with this paragraph will be considered duplicates or convenience copies and need not be preserved.
	4. At the end of the Record Retention Period, Settling Defendants shall notify EPA that it has 90 days to request the Settling Defendants’ Records subject to this Section. Settling Defendants shall retain and preserve their Records subject to this Section until 90 days after EPA’s receipt of the notice. These record retention requirements apply regardless of any corporate record retention policy.
4. Settling Defendants shall provide to EPA and the State, upon request, copies of all Records and information required to be retained under this Section. Settling Defendants shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.
5. Privileged and Protected Claims
	1. Settling Defendants may assert that all or part of a record[[80]](#footnote-80) requested by Plaintiffs is privileged or protected as provided under federal law, in lieu of providing the record, provided that Settling Defendants comply with ¶ 90.b, and except as provided in ¶ 90.c.
	2. If Settling Defendants assert a claim of privilege or protection, they shall provide Plaintiffs 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, of 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 Plaintiffs in redacted form to mask the privileged or protected portion only. Settling Defendants shall retain all records that they claim to be privileged or protected until Plaintiffs have had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Settling Defendants’ favor.
	3. Settling Defendants shall not make any claim of privilege or protection regarding: (1) any data regarding the Site, including 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 in accordance with this Decree.
6. **Confidential Business Information Claims**. Settling Defendants are entitled to claim that all or part of a record submitted to Plaintiffs under this Section is Confidential Business Information (“CBI”) that is covered by section 104(e)(7) of CERCLA and 40 C.F.R. § 2.203(b). Settling Defendants shall segregate all records or parts thereof submitted under this Decree which they claim are CBI and label them as “claimed as confidential business information” or “claimed as CBI.” Records that Settling Defendants properly label in accordance with the preceding sentence will be afforded the protections specified in 40 C.F.R. part 2, subpart B. If any record is not properly labelled when it is submitted to EPA and the State, or if EPA notifies Settling Defendants that the record is not entitled to confidential treatment 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 record without further notice to Settling Defendants.
7. In any proceeding under this Decree, validated sampling or monitoring data generated in accordance with the SOW and reviewed and approved by EPA, if relevant to the proceeding, is admissible as evidence, without objection.
8. Notwithstanding any provision of this Decree, Plaintiffs retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

# NOTICES AND SUBMISSIONS

1. All agreements, approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, waivers, and requests specified in this Decree must be in an electronic writing. Whenever a notice is required to be given or a report or other document is required to be sent by one Party to another under this Decree, it must be sent via email as specified below. All notices under this Section are effective upon receipt. There is a rebuttable presumption that emailed notices are received on the same day that they are sent. Any Party may change the person or email address applicable to it by providing notice of such change to all Parties.

|  |  |
| --- | --- |
| As to DOJ: | eescdcopy.enrd@usdoj.gov Re: DJ # [EES DJ number] |
| As to DOJ on behalf of Settling Federal Agencies: | mailprocessing\_eds.enrd@usdoj.govRe: DJ # [EDS DJ number] |
| As to EPA: | [**Superfund & Emergency Mgmt. Div. Director’s email address**] and[**EPA Project Coordinator’s email address**]Re: Site/Spill ID # [EPA Site/Spill number] |
| As to the Regional Financial Management Officer:  | [email for Regional Financial Mgmt. Officer]Re: Site/Spill ID # [EPA Site/Spill number] |
| As to the State: | [name of representative for the State][email for the State’s representative] |
| As to Settling Defendants: | [SD Project Coordinator’s name][SD Project Coordinator’s email address] |

# APPENDIXES

1. The following appendixes are attached to and incorporated into this Decree:

“Appendix A” is the Record of Decision.

“Appendix B” is the SOW.

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

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

# MODIFICATIONS TO DECREE

1. Except as provided in ¶ 21 of the Decree and ¶ [**8.6**] of the SOW (Approval of Deliverables), nonmaterial modifications to Sections I through XXV and the Appendixes must be in writing and are effective when signed (including electronically signed) by the Parties. Material modifications to Sections I through XXV and the Appendixes must be in writing, signed (which may include electronically signed) by the Parties, and are effective upon approval by the Court.

# SIGNATORIES

1. The undersigned representative of the United States, the undersigned representative of the State, and each undersigned representative of a Settling Defendant certifies that they are fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such Party to this document.

# PRE-ENTRY PROVISIONS

1. If for any reason the Court should decline to approve this Decree in the form presented, this agreement, except for ¶ 99 and ¶ 100, is voidable at the sole discretion of any Party and its terms may not be used as evidence in any litigation between the Parties.
2. This Decree will be lodged with the Court for at least 30 days for public notice and comment in accordance with section 122(d)(2) of CERCLA and 28 C.F.R. § 50.7. The United States may withdraw or withhold its consent if the comments regarding the Decree disclose facts or considerations that indicate that the Decree is inappropriate, improper, or inadequate.
3. Settling Defendants agree not to oppose or appeal the entry of this Decree.

# INTEGRATION

1. This Decree constitutes the entire agreement among the Parties regarding the subject matter of the Decree and supersedes all prior representations, agreements, and understandings, whether oral or written, regarding the subject matter of the Decree.

# FINAL JUDGMENT

1. Upon entry of this Decree by the Court, this Decree constitutes a final judgment under Fed. R. Civ. P. 54 and 58 among the Parties.[[81]](#footnote-81)

SO **ORDERED** this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

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|  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_United States District Judge |

Signature Page for Consent Decree in *U.S. v. [case caption]* (initials for Court District)

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|  |  | **FOR THE UNITED STATES:** |
| \_\_\_\_\_\_\_\_\_\_\_\_Dated |  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_[name of Assistant Attorney General]Assistant Attorney GeneralU.S. Department of JusticeEnvironment and Natural Resources Division |
|  |  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_[Name of EES Trial Attorney]Trial AttorneyU.S. Department of JusticeEnvironment and Natural Resources DivisionEnvironmental Enforcement Section[address][email and phone no. if needed] |
|  |  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_[Name of EDS Trial Attorney]Trial AttorneyU.S. Department of JusticeEnvironment and Natural Resources DivisionEnvironmental Defense Section[address][email and phone no. if needed] |
|  |  | [name of U.S. Attorney]United States AttorneyDistrict of [Name of Federal Court District] |
|  |  | [name of Assistant U.S. Attorney]Assistant United States AttorneyDistrict of [Name of Federal Court District][address of Assistant U.S. Attorney] |

Signature Page for Consent Decree in *U.S. v. [case caption]* (initials for Court District)

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|  |  | **FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:**[[82]](#footnote-82) |
|  |  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_[name of Regional Counsel]Regional CounselU.S. Environmental Protection AgencyRegion [number of Region] |
|  |  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_[name of SEMD Director]DirectorSuperfund and Emergency Management DivisionU.S. Environmental Protection AgencyRegion [number of Region][address for Director of SEMD] |
|  |  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_[name of Asst. Regional Counsel]Assistant Regional CounselU.S. Environmental Protection AgencyRegion [number of Region][address for Asst. Regional Counsel] |

Signature Page for Consent Decree in *U.S. v. [case caption]* (initials for Court District)

|  |  |  |
| --- | --- | --- |
|  | **FOR**: | [Name of Setting Defendant] |
| \_\_\_\_\_\_\_\_\_\_\_ |  | **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** |
| Dated | Name: | [Name of signatory for S.D.] |
|  | Title: | [Title of signatory] |
|  | Address: | [address of signatory] |

If the Decree is not approved by the Court within 60 days after the date of lodging, and the United States requests, this Settling Defendant agrees to execute a waiver of service of a summons under Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court. **This Settling Defendant hereby designates the agent below to execute the Rule 4 waiver of service.** This Settling Defendant understands that: (i) it does not need to file an answer to the complaint until after it has executed the waiver of service or otherwise has been served with the complaint; and (ii) the time within which this Defendant must file its answer is as set forth in the Federal Rules of Civil Procedure and any applicable local rules of this Court, or as ordered by the Court.

|  |  |
| --- | --- |
| Name: | [name of SD representative] |
| Title: | [Title of SD’s representative] |
| Company: | [employer of SD’s representative] |
| Address: | [address of SD’s representative] |
|  |  |
| Phone: | [phone number of SD’s representative] |
| email: | [email for SD’s representative] |

1. The case team should supplement the background clauses as necessary to describe additional relevant facts, e.g., that the defendants answered the complaint, that there was some litigation, or that certain facts were established through such litigation. [↑](#footnote-ref-1)
2. Keep this paragraph if the State is participating. [↑](#footnote-ref-2)
3. “Defendants” is bookmarked text. If you change this to “Defendant” the same change will be made automatically throughout the rest of the document after running the “update field” command. However, you will still need to change the verb tenses as appropriate. [↑](#footnote-ref-3)
4. Change to “Plaintiff” if the State is not participating. This is bookmarked text so the change will then be made throughout the document after running the “update field” command. However, you may still need to change the verb tense as applicable. [↑](#footnote-ref-4)
5. Delete the last sentence if no Settling Federal Agencies (SFAs) are participating. [↑](#footnote-ref-5)
6. If the State is participating keep one of these two clauses (each beginning with “on which”). [↑](#footnote-ref-6)
7. Delete “and the State each” if the State is not participating. [↑](#footnote-ref-7)
8. Keep “1367” if the State is a party and asserts state law claims in its complaint. [↑](#footnote-ref-8)
9. Include “heirs” if any Settling Defendant is both an individual and an owner of the Site. [↑](#footnote-ref-9)
10. The possessive plural “Defendants’” here is bookmarked text. If you change this to the possessive singular “Defendant’s” the change will be made throughout the document. [↑](#footnote-ref-10)
11. If EPA is incurring costs that are not within this definition, then supplement the definition to reference such costs. [↑](#footnote-ref-11)
12. If the settlement will resolve natural resource damages, add a definition for that here. See model NRD settlement, if available. A number of additional provisions addressing NRD also will be needed throughout the Decree. [↑](#footnote-ref-12)
13. Include this definition only if EPA agrees to provide orphan share compensation to Settling Defendants through forgiveness of oversight costs. [↑](#footnote-ref-13)
14. In some cases, the Army Corps of Engineers (“Corps”) may be implementing a response action at the Site under its authority as the lead agency for Formerly Utilized Defense Sites (FUDS), rather than performing work under an interagency agreement with EPA. In that case modify this definition to exclude the Corps’ “FUDS” costs. [↑](#footnote-ref-14)
15. Modify this definition to reference any ROD Amendments or Explanations of Significant Differences issued. [↑](#footnote-ref-15)
16. Preceding this footnote are three optional definitions for SFAs. Use the first SFA definition if the potential liability of DOD or one of its service branches is being resolved and DOD has duly responded to any outstanding section 104(e) information requests, and otherwise represented that it investigated the potential responsibility at the Site of all of its service branches (e.g., Air Force, Army, Marine Corps, Navy) and the Defense Logistics Agency (DLA). Use the second SFA definition if the potential liability of DoD or one of its service branches is being resolved and DoD has represented that only certain service branches were investigated for their potential liability at the Site. Use the third SFA definition for non-DoD SFAs, and generally use the name of the responsible agency component rather than the name of the agency (e.g., U.S. Forest Service rather than U.S. Department of Agriculture). If both DoD SFAs and non-DoD SFAs are involved at the Site, combine the DoD and non-DoD SFA definitions. If the SFAs are making payments to the Settling Defendants to reimburse past and/or future response costs paid 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. [↑](#footnote-ref-16)
17. The definition of “Site” affects the scope of the covenants not to sue. The definition should conform with the intended scope of the covenants and the general reservations provided in Section XIV (Covenants by Plaintiff). Note that “suitable areas in very close proximity to the contamination necessary for implementation of the response action” may be included within the boundaries of the Site as defined herein. See NCP, 40 C.F.R. § 300.400(e)(1). [↑](#footnote-ref-17)
18. If ¶ 30.c provides that payments for past or future costs be deposited into the Site’s Special Account, keep this definition. Modify as appropriate if EPA has established more than one special account, or if the special account was established under a prior settlement. [↑](#footnote-ref-18)
19. Add a definition for the State pollution control agency if needed. If the State is a party and the State’s costs are being paid, add definitions for “State Past Response Costs” and “State Future Response Costs.” [↑](#footnote-ref-19)
20. Add a definition for “Tribe” if there is one that has a role or interest at the Site: “Tribe” means the [name of Tribe]. If the Site is entirely on tribal land, substitute “Tribe” for “State” throughout the Decree. [↑](#footnote-ref-20)
21. Omit “and the Settling Federal Agencies” if no SFAs are participating. [↑](#footnote-ref-21)
22. Delete the clause “and the claims of the State and Settling Defendants that were or could have been asserted against the United States with regard to this Site” if no SFAs are participating. [↑](#footnote-ref-22)
23. Keep the “further response action” phrase throughout this paragraph only for a “Site covenant” CD. [↑](#footnote-ref-23)
24. Keep the clause “or selected a further response action as provided in ¶ 21.c” only for a “Site covenant” CD. For an OU covenant CD, delete this clause and the three instances of “or further response action” in this paragraph. [↑](#footnote-ref-24)
25. Keep this paragraph if there is an Owner Settling Defendant. [↑](#footnote-ref-25)
26. Keep this “Notice” paragraph if there is an owner settling defendant, no Proprietary Controls (“PCs”) have been recorded on the Site, and the case team believes no PCs will be recorded on the Site within a year after the Effective Date. In the absence of such PCs, the notice to be recorded under this paragraph will put potential buyers on notice that the property is part of the Site. [↑](#footnote-ref-26)
27. Case teams should negotiate and finalize the form, substance, and value of SDs’ financial assurance well before the lodging of the CD so that the final financial assurance mechanism can take effect within 30 days after the Effective Date. Such review should ensure, among other things, that an instrument or account is established (or can be established) to receive financial assurance resources when needed. Case teams can find the most current sample financial assurance documents in the “Financial Assurance - Settlements” category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>. Case teams should also ensure that entities providing a demonstration or guarantee under ¶ 17.e or ¶ 17.f have: (1) submitted all required documentation well in advance of the lodging of the CD so that EPA can determine whether such financial assurance is adequate; and (2) fully and accurately reflected in their submission all of their financial assurance or “performance guarantee” obligations (under CERCLA, RCRA, the Underground Injection Control Program, the Toxic Substances Control Act, and any other federal, state, or tribal environmental obligation) to the United States or other governmental entities so all such obligations have been properly accounted for in determining whether any such entity meets the financial test criteria. When reviewing which of the permissible financial assurance mechanisms set forth in ¶ 17 may be appropriate for inclusion in the CD, case teams should consider, as part of the facts and circumstances of each case, the estimated cost of the Work to be performed, the estimated time to complete the Work, the nature and extent of contamination at the Site, the financial health of the SDs, and the industry sector(s) in which the SDs operate. The EPA Regions have discretion, for example, to require that SDs provide the financial assurance through a liquid mechanism rather than through a demonstration or guarantee under ¶ 17.e or 17.f. If an SD is a municipality, contact financial assurance team members within the Office of Site Remediation Enforcement for assistance. For more specific information and considerations, see “Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders” (April 6, 2015), available at <https://www.epa.gov/enforcement/guidance-financial-assurance-superfund-settlements-and-orders>.

Superfund Trust Fund monies cannot be used for remedial actions at sites not listed on the NPL. Therefore, for CDs using the SA Approach, case teams should ensure that parties provide an amount of the financial assurance through one or more liquid mechanism(s) at least equal to the amount of funds estimated to be necessary to keep cleanup work going through the listing process, in the event the Site needs to be listed. Based on case-specific circumstances, case teams may require SDs to provide liquid financial assurance mechanism(s) for the entire amount of the Estimated Cost of the Work. Acceptable liquid financial assurance instruments include those listed at ¶¶ 17.a through 17.d. For more specific information, see “Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach,” OSWER 9200.2-125 (Sep. 28, 2012), available at: <https://www.epa.gov/sites/production/files/documents/rev-saa-2012-mem.pdf>. [↑](#footnote-ref-27)
28. A sample of a standby funding commitment is available via the link in ¶ 29. [↑](#footnote-ref-28)
29. If the parties have pre-negotiated the form of the FA, use the first sentence. Otherwise, use the second sentence. [↑](#footnote-ref-29)
30. Case teams should make sure that the “trigger” for obtaining funds and/or work under the financial assurance mechanism in ¶ 22 is consistent with the trigger in the CD, e.g., if the CD allows EPA to access the funds in the event of a Work Takeover or an SD’s failure to provide alternative financial assurance 30 days prior to an impending mechanism cancellation, the mechanism should contain equivalent language. [↑](#footnote-ref-30)
31. Delete “Each” if State is not participating. [↑](#footnote-ref-31)
32. If the Certificate of Remedial Action Completion is not used in the SOW substitute: "… the Remedial Action has been performed in accordance with this Decree and the Performance Standards have been achieved. [↑](#footnote-ref-32)
33. The first three subparagraphs are optional and cover prepayment by Settling Defendants of Future Costs. THe second paragraph (“Shortfall Payments”) is an optional provision for replenishment of the Future Response Costs Special Account in the event of a shortfall in the prepayment. For an explanation of prepaid accounts, including when prepayment is appropriate, see “Additional Guidance on Prepayment of Oversight Costs and Special Accounts” (Dec. 22, 2006), available at <https://www.epa.gov/enforcement/guidance-prepayment-oversight-costs-and-special-accounts>. [↑](#footnote-ref-33)
34. If EPA agrees to provide orphan share compensation to Settling Defendants through forgiveness of oversight costs, insert “other than Oversight Costs” after “Future Response Costs.” Modify as appropriate if EPA is forgiving only a portion of oversight costs. [↑](#footnote-ref-34)
35. If EPA agrees to provide orphan share compensation to Settling Defendants through forgiveness of oversight costs, insert “and (iv) whether EPA has included any Oversight Costs.” Modify as appropriate if EPA is forgiving only a portion of oversight costs. [↑](#footnote-ref-35)
36. The pay.gov system includes alternatives for making payment by credit card, debit card, and automatic clearinghouse (ACH). If the SDs cannot make payment using the pay.gov system, the EPA attorney should contact the Cincinnati Finance Center about alternative methods of payment. [↑](#footnote-ref-36)
37. Delete this paragraph (“Payments by Settling Federal Agencies”) if SFAs are not participating. [↑](#footnote-ref-37)
38. Delete this cross reference if SFAs are not participating. [↑](#footnote-ref-38)
39. The case team can modify this sentence to provide for different allocations between the Fund and the Special Account by replacing this sentence with one of the following or can modify one of these as appropriate: “EPA will deposit the total amounts paid under ¶¶ 28, 29.e, or 30.a(1) in the Fund.” Or “EPA will deposit the total amounts paid by under ¶¶ 28, 29.e, or 30.a(1) in the Special Account.” Or “Of the total amounts paid under ¶¶ 28, 29.e, or 30.a(1), EPA will deposit [“$[number]” or “[number]%”] in the Fund and [“$[number]” or “[number]%”] in the Special Account.” [↑](#footnote-ref-39)
40. Keep this section if the CD will provide for disbursements from a Special Account. [↑](#footnote-ref-40)
41. The decision to disburse funds is within EPA’s sole discretion and should be consistent with the “Guidance on Disbursement of Funds From EPA Special Accounts to Entities Performing CERCLA Response Actions” (Mar. 27, 2018), available at <https://semspub.epa.gov/work/HQ/100001089.pdf>, and the “Updated Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts” (Aug. 5, 2019), available at <https://semspub.epa.gov/work/HQ/100002182.pdf>. [↑](#footnote-ref-41)
42. If, as part of the Decree, there are cashout parties whose funds will be deposited into a special account and then disbursed to Settling Defendants, contact the Office of Site Remediation Enforcement to consult on appropriate language. [↑](#footnote-ref-42)
43. The Decree should outline a phased payment plan that typically lists two to four milestones of the Work. The completion of a milestone will trigger the right to request disbursement of a set amount or percentage of funds from the Disbursement Special Account in partial reimbursement for Work performed up to the date of completion of that milestone. In most situations the appropriate milestones will be (1) completion of all activities in the EPA-approved Remedial Design Work Plan, (2) completion of one or two components of the EPA-approved Remedial Action Work Plan, and (3) Certification of Remedial Action Completion. This is sample language. [↑](#footnote-ref-43)
44. For each milestone or obligation added here make sure that (a) the Decree sets forth a date for the start and/or completion of the obligation, or (b) the start or completion date can be readily ascertained after the Effective Date. For additional information see “Use of Stipulated Penalties in Hazardous Waste Consent Decrees” (September 21, 1987), available at <https://www.epa.gov/enforcement/guidance-use-stipulated-penalties-hazardous-waste-consent-decrees>. [↑](#footnote-ref-44)
45. If the State is a party and is entitled to a portion of the stipulated penalties, add procedures for payment to the State. [↑](#footnote-ref-45)
46. A provision for the U.S. to elect between seeking stipulated and statutory penalties for a particular Decree noncompliance may be substituted in this paragraph in appropriate cases by replacing this text (“provided for in this Decree, except in the case of a willful noncompliance with this Decree”) with: “collected under this Decree.” [↑](#footnote-ref-46)
47. On rare occasions, case circumstances may justify expanding the covenant by adding a reference to “section 7003 of RCRA.” Before doing so, the case team must consult the RCRA Team within the Office of Site Remediation Enforcement and discuss the considerations for and against including this covenant. If the covenant covers claims under RCRA § 7003, the Federal Register notice soliciting comments on the settlement will include an offer to have a public meeting regarding the settlement. [↑](#footnote-ref-47)
48. For a “Site” covenant CD keep “Site” here. For an OU covenant CD instead keep “the Work, Past Response Costs and Future Response Costs.” If the CD resolves SDs’ claims against SFAs, add to this paragraph, as appropriate: “Settling Defendants’ Past Response Costs and Settling Defendants Future Response Costs.” 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-48)
49. See footnote above about RCRA § 7003 covenant. [↑](#footnote-ref-49)
50. If SFAs are not participating delete this paragraph and the cross reference to it in the next paragraph. Also delete the clause “and by the United States on behalf of the Settling Federal Agencies” in the next paragraph. For an OU CD with SFAs, manually delete the first cross reference in this paragraph (which references the deleted reopener paragraph). [↑](#footnote-ref-50)
51. Covenants not to sue regarding the “Site” address both “present” and “future” liability. EPA interprets “present liability” to include the requirements to pay past response costs, to perform the Work, and to pay future response costs relating to the Work. See “Superfund Program, Covenants Not To Sue,” 52 Fed. Reg. 28,038, 28,040 (July 27, 1987), available at <https://www.epa.gov/enforcement/guidance-covenants-not-sue-under-superfund>. “Future liability” refers to the requirements to perform any additional response activities at the Site that are necessary to protect public health and welfare and the environment. Id. Under CERCLA § 122(f)(3), a covenant not to sue with respect to future liability will not take effect until Certification of Remedial Action Completion. OU CDs do not address future liability because the covenant is only for past costs and for performance of, and costs relating to, the Work. [↑](#footnote-ref-51)
52. Delete this paragraph for an OU covenant CD. [↑](#footnote-ref-52)
53. Omit this bracketed text if no SFAs are participating. [↑](#footnote-ref-53)
54. If no SFAs are participating, omit the clause “and EPA and the federal natural resource trustee reserve, and this Decree is without prejudice to, all rights against Settling Federal Agencies.” [↑](#footnote-ref-54)
55. If no SFAs are participating, omit “or Settling Agencies.” [↑](#footnote-ref-55)
56. Omit this subparagraph for a Site covenant CD. [↑](#footnote-ref-56)
57. Omit this subparagraph for a OU Covenant CD. [↑](#footnote-ref-57)
58. Omit this cross reference if no SFAs are participating. [↑](#footnote-ref-58)
59. Add separate paragraphs for State’s covenants for SDs and SFAs, and reservations, as needed. [↑](#footnote-ref-59)
60. Omit “AND SETTLING FEDERAL AGENCIES” if no SFAs are participating. [↑](#footnote-ref-60)
61. If one or more of the settlers is a government contractor that can charge back cleanup costs to DoD under a contract with DoD, and no Federal PRP is participating in the settlement, the DOJ case team must contact the General Counsel, Defense Contract Management Agency (DCMA) to notify them about this CD and the potential that the contractor may submit bills that include cleanup costs under the CD. [↑](#footnote-ref-61)
62. If the State is participating: (i) substitute references to applicable provisions of State CERCLA and RCRA laws for the term “State law;” and (ii) add to this covenant, if applicable: “State Past Response Costs and State Future Response Costs.” [↑](#footnote-ref-62)
63. Keep “the Site” for a Site covenant. Keep the Work, past response actions relating to the Site, Past Response Costs, [and] Future Response Costs” for an OU covenant CD. If SFAs are participating and are paying SDs’ past and future response costs, add to this covenant: “Settling Defendants’ Past Response Costs and Settling Defendants Future Response Costs.” [↑](#footnote-ref-63)
64. Make selection of “Site” or “Past Response Costs …” consistent with preceding paragraph. Omit “State Past Response Costs, State Future Response Costs” if the settlement does not resolve State’s claim for past costs. Keep “Settling Defendants’ Past Response Costs and Settling Defendants’ Future Response Costs” if the SFAs are paying a portion of the Settling Defendants’ costs.

For a settlement with only one private settler edit to say “Settling Defendant’s.” [↑](#footnote-ref-64)
65. Keep this paragraph if there are known or potential de minimis and/or ability to pay (“ATP”) PRPs at the Site. Do not change the scope of the waiver to something less than “the matters addressed in the third party’s settlement with EPA.” Note that this waiver will not affect Settling Defendants’ right to oppose entry of any such future de minimis or ATP settlement through the public comment process. Add “natural resource damages and assessment costs” if appropriate. [↑](#footnote-ref-65)
66. Keep this waiver only if the Site is a SAA Site. If you delete this waiver, also delete the cross reference to this paragraph that comes after the MSW Waiver paragraph. [↑](#footnote-ref-66)
67. Keep the “MSW Waiver” only if the Site is both a SAA Site and a MSW Site. If you delete this waiver, also delete the cross reference to this paragraph in the next paragraph. [↑](#footnote-ref-67)
68. Keep this paragraph if a SD asserts that it has a claim against a PRP within the scope of the waivers that is unrelated to the PRP’s CERCLA liability at the Site, e.g., a claim for contractual indemnification. [↑](#footnote-ref-68)
69. Keep this paragraph only if the Site is a SAA Site. Delete for an NPL Site. [↑](#footnote-ref-69)
70. Delete this paragraph if no SFAs are participating. [↑](#footnote-ref-70)
71. If no SFAs are participating, delete the clause “and each Settling Federal Agency” in the two instances that it appears here. [↑](#footnote-ref-71)
72. If the State is a party and is resolving its claims, delete the clause “except for the State”. Also note that State claims do not include claims for Fund 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-72)
73. If resolving State and/or PRP claims against SDs, add as appropriate: State Past and Future Response Costs and/or SDs’ Past and Future Response Costs. [↑](#footnote-ref-73)
74. Delete the clause “against Settling Defendants (or if EPA or the federal natural resource trustee [or the State] assert rights against Settling Federal Agencies)” if no SFAs are participating. [↑](#footnote-ref-74)
75. Keep the references “¶ 71 or ¶¶ 72.a through 72.j” for a Site covenant CD. Keep the references “¶¶ 72.a, 72.f, or 72.j” for an OU covenant CD. [↑](#footnote-ref-75)
76. Keep this clause “(and, with respect to a State proceeding initiated against a Settling Federal Agency, Settling Federal Agencies )” if both SFAs and the State are parties to this settlement. [↑](#footnote-ref-76)
77. The case team may replace the clause “it has implemented a litigation hold on documents and electronically stored information” with “to the best of its knowledge and belief, after thorough inquiry it has not altered, mutilated, discarded, destroyed or otherwise disposed of any documents or electronically stored information ...” [↑](#footnote-ref-77)
78. If SFAs, include this paragraph. EPA attorneys must assure that the Agency has received a written response to any information requests that it has sent to SFAs containing a certification substantially similar to that required from private PRPs. [↑](#footnote-ref-78)
79. The case team has flexibility to add to this paragraph other categories of information that the agency wants the defendant to retain during the Record Retention Period. Be specific about what the agency wants, and consider proposals to exclude categories of ESI that may be inaccessible. Consult DOJ’s e-discovery office coordinator for advice regarding inaccessible ESI. [↑](#footnote-ref-79)
80. Don’t substitute “Record” for “record” here, as this provision is not limited to “Records” referenced in ¶ 76.a. [↑](#footnote-ref-80)
81. If this settlement will be a “partial” judgment, i.e., the parties to the Decree comprise fewer than all of the parties named in the complaint, then replace this clause with “… this Decree constitutes a final judgment between and among the United States and Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as …” RD/RA Decrees that are partial judgments are rare. A Decree that resolves the PRPs’ liability for less than the full Site (e.g., a Decree that addresses a remedy for a single operable unit) is not a partial judgment. Consult with DOJ if you have any questions about this. [↑](#footnote-ref-81)
82. Include those signature blocks as needed to be consistent the Regional office practice. [↑](#footnote-ref-82)