UNITED STATES DISTRICT COURT

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

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

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

:

Plaintiff[s], :

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

v. :

:

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

:

:

Defendant. :

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - x

**MODEL CERCLA PERIPHERAL PARTY ABILITY TO PAY CASHOUT**

**CONSENT DECREE**

**September 2014**

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

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

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

TABLE OF CONTENTS

I. BACKGROUND 1

II. JURISDICTION 2

III. PARTIES BOUND 2

IV. DEFINITIONS 2

V. STATEMENT OF PURPOSE 4

VI. PAYMENT OF RESPONSE COSTS 5

VII. FAILURE TO COMPLY WITH CONSENT DECREE 11

VIII. JUDGMENT AND NOTICE OF LIEN 13

IX. COVENANTS BY PLAINTIFF[S] 13

X. RESERVATION OF RIGHTS BY UNITED STATES 14

XI. COVENANTS BY SETTLING DEFENDANT 15

XII. EFFECT OF SETTLEMENT/CONTRIBUTION 16

XIII. PROPERTY REQUIREMENTS 17

XIV. ACCESS TO INFORMATION 20

XV. RETENTION OF RECORDS 21

XVI. NOTICES AND SUBMISSIONS 22

XVII. RETENTION OF JURISDICTION 22

XVIII. INTEGRATION[/APPENDICES] 22

XIX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT 23

XX. SIGNATORIES/SERVICE 23

XXI. FINAL JUDGMENT 23

# BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the U.S. Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Section[(s) 106 and] 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § [§ 9606 and] 9607 (CERCLA), seeking [injunctive relief and] reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the [**insert Site name**] in [**insert City, County, State**] (“the Site”).

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

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

C. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and [will/may] undertake additional response actions in the future. [**NOTE: A brief description of the release or threatened release and of the response actions taken or to be taken by EPA or potentially responsible parties may be included.**]

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

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

F. The defendant that has entered into this Consent Decree (“Settling Defendant”) does not admit any liability to Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s].[[1]](#footnote-1)

G. The United States has reviewed the Financial Information and Insurance Information submitted by Settling Defendant to determine whether Settling Defendant is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information and Insurance Information, the United States has determined that Settling Defendant has limited financial ability to pay for response costs incurred and to be incurred at the Site.

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

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

# JURISDICTION

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

# PARTIES BOUND

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

# DEFINITIONS

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

[NOTE: In the following definition, it is generally sufficient to describe the property using the street address or the tax parcel ID number, but you also may use the legal property description. Legal property descriptions can be lengthy. It is common in conveyance documents to include the legal property description in an attachment. If using a legal property description, it should be the kind found in a deed. If land use restrictions are included, see introductory note in Section XIII (Property Requirements).]

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

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

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

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

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

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

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

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

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

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

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

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

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

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

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

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

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

[NOTE: Insert the following definition if Paragraph 9 (Payment of Net Proceeds of Sale of Property), is used. Modify definition if property to be sold is not part of the Site.]

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

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

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

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

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

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

“State” shall mean the State (or Commonwealth) of \_\_\_\_\_\_.

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

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

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

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

# STATEMENT OF PURPOSE

1. By entering into this Consent Decree, the mutual objective of the Parties is for Settling Defendant to make a cash payment [and to implement land use restrictions] to resolve its alleged civil liability for the Site under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607 [, and under Section 7003 of RCRA, 42 U.S.C. § 6973], as provided in the Covenants by Plaintiff[s] in Section IX, and subject to the Reservations of Rights by United States in Section X.

# PAYMENT OF RESPONSE COSTS

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

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

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

1. Settling Defendant shall make payment[s] at [**NOTE: choose one method after consulting with Settling Defendant:** [at <https://www.pay.gov>] [by Fedwire Electronic Funds Transfer EFT]] to the U.S. Department of Justice account, in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit (FLU) of the U.S. Attorney’s Office for the District of \_\_\_\_\_\_ after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (CDCS) number, which shall be used to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

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

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

[NOTE: Payment by check is highly disfavored. If necessary, contact DOJ’s Environmental Enforcement Section to obtain current instructions for payment by check.]

[NOTE ON SPECIAL ACCOUNTS: The Decree should specify whether payments made under Paragraph 5 and any other payment paragraphs should be deposited in the EPA Hazardous Substance Superfund, or in a site-specific special account within the Hazardous Substance Superfund, or should be split between the Superfund and the Special Account (and should specify the split).][[2]](#footnote-2)

1. **Deposit of Payment**. [**Insert one of the following three sentences.**] [The total amount [**if installment payments, insert:** of each payment] to be paid pursuant to Paragraph 5 (Payment of Response Costs) [and Paragraph 9 (Payment of Net Proceeds of Sale of Property)] shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [The total amount [of each payment] to be paid pursuant to Paragraph 5 (Payment of Response Costs) [and Paragraph 9 (Payment of Net Proceeds of Sale of Property)] shall be deposited by EPA in the [**Site name**] Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.] [Of the total amount [of each payment] to be paid pursuant to Paragraph 5 (Payment of Response Costs) [and Paragraph 9 (Payment of Net Proceeds of Sale of Property)], [“$\_\_\_” or “\_\_\_%”] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [“$\_\_\_” or “\_\_\_%”] shall be deposited by EPA in the [**Site name**] Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.]
2. **Notice of Payment**. At the time of [**if installment payments, insert:** each] payment, Settling Defendant shall send notice that payment has been made [(a) to EPA in accordance with Section XVI (Notices and Submissions),] (b) to DOJ in accordance with Section XVI; and (c) to the EPA Cincinnati Finance Center (CFC) at:

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

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

26 W. Martin Luther King Drive

Cincinnati, Ohio 45268

Such notice shall reference the CDCS Number, Site/Spill ID Number \_\_\_\_\_\_, and DJ Number \_\_\_\_\_\_.

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

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

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

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

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

* 1. [**Rental Income**. Rental income from the Property may be used to pay expenses described in Paragraph 9.b (Maintenance of the Property). [All / \_\_% of the] rental income earned from the date of Settling Defendant’s signature on this Consent Decree until the sale of the Property to the extent not required to pay the expenses described in Paragraph 9.b shall be deemed to be proceeds from the sale of the Property and shall be disbursed pursuant to Paragraph 9.h. Settling Defendant shall not enter into any lease or rental agreement for the Property unless the agreement allows a purchaser of the Property to terminate the lease or rental agreement within [90 days] of taking title to the Property.]
  2. **Marketing of the Property**. Within [30] days after the date of the appraisal, Settling Defendant shall commence using best efforts to sell the Property. [**Optional:** Settling Defendant shall use best efforts to sell the Property.] “Best efforts” for purposes of this Paragraph includes: (i) entering into a listing agreement, for the purpose of marketing and selling the property, with a real estate broker, dealer, or agent licensed in the State of \_\_\_\_\_\_ who customarily deals with real property similar to the Property; (ii) advertising the Property for sale in appropriate publications; (iii) listing the Property with appropriate real estate listing services; (iv) maintaining the Property in a condition suitable for showing to prospective buyers; and (v) providing access to the Property, at reasonable times, to real estate brokers, dealers or agents and prospective buyers. [**Optional:** Settling Defendant shall submit to EPA reports regarding Settling Defendant’s efforts to market the Property. The first such report shall be due three months after commencement of efforts to sell the Property, and successive reports shall be due quarterly thereafter.]
  3. If the proposed contract for the sale of the Property provides for Settling Defendant to receive all cash, is for at least [90%] of the appraised value of the Property, and provides for the property sale to occur within [60] days after the date of execution of the sales contract, then Settling Defendant may execute the contract without EPA’s prior written approval. Otherwise, Settling Defendant shall provide to EPA a copy of the proposed Property sales contract, and must obtain EPA’s written approval before executing the contract. [**Optional:** Settling Defendant shall provide to EPA a copy of any offer to purchase the Property within 48 hours after receipt of such offer in order to give EPA an opportunity to review and object to the offer. If EPA does not object to the offer within [10] days after receipt of a copy of the offer, then Settling Defendant may execute the contract for sale of the Property.] Settling Defendant shall provide to EPA a copy of the executed contract within [7] days after signing the contract.

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

* 1. Settling Defendant shall submit to EPA, at least [10] days prior to the date of the sale of the Property, a notice of the sale, Settling Defendant’s calculation of the net sales proceeds, and all documentation regarding the values used in the calculation, including: (i) copies of all documents to be executed regarding the sale; (ii) documentation of the amounts to be paid to holders of any liens listed as a Permitted Encumbrance in Appendix \_\_; (iii) documentation of the amounts of closing costs to be paid; (iv) documentation of any broker’s fees regarding the sale; and (v) documentation of the amounts of state and/or municipal transfer taxes to be paid regarding the sale of the Property. Settling Defendant may request that EPA approve the calculation of net sales proceeds prior to the sale. In that event, EPA’s approval shall be binding in any subsequent dispute between the United States and Settling Defendant regarding whether Settling Defendant has complied with Paragraph 9.h.
  2. [**OPTIONAL SUNSET CLAUSE:** If within [three] years after commencement of efforts to market the Property, Settling Defendant has not executed a contract for the sale of the Property, upon receipt of notice from EPA, Settling Defendant shall commence best efforts to sell the Property to the highest bidder at a public auction. For purposes of this Paragraph, best efforts shall mean engaging the services of a professional auctioneer who will advertise the auction in at least two local newspapers for at least 30 days prior to the auction and who will conduct other marketing activities as appropriate. The agreement with the professional auctioneer shall be provided to EPA for review and approval. [**NOTE: When reviewing the agreement, EPA should pay particular attention to the terms that relate to delay or cancellation of the auction so that reasonable opportunities to maximize the value of the property may be pursued and to insure that the costs of any such delay or cancellation shall not be borne by the United States.**]]
  3. At the time of the sale, Settling Defendant shall pay to the United States \_\_\_% of the net sales proceeds of the sale of the Property [**if the potential recovery may exceed EPA’s unrecovered response costs, insert:** or $\_\_\_\_\_\_, whichever is less]. “Net sales proceeds” shall mean, for purposes of this Paragraph, all consideration received by Settling Defendant from the sale of the Property, not including: (i) any payment in consideration of the release of any lien listed as a Permitted Encumbrance in Appendix \_\_; (ii) any reasonable closing costs paid regarding the sale; (iii) any reasonable broker’s fees regarding the sale; (iv) any state and/or municipal transfer taxes regarding the sale [and (v) any net rental income described in Paragraph 9.c]. [**Optional:** Provided that the amount of “net sales proceeds” is acceptable, EPA shall arrange for the execution or delivery, at the time of the sale, of a release of the federal lien filed regarding the Property on [**insert date the federal CERCLA lien was filed or other identifying information**] and a release of any judgment lien imposed under Paragraph 16.] Settling Defendant shall make payment to EPA by official bank check made payable to EPA Hazardous Substance Superfund.

[NOTE: In general, the United States’ interest regarding the Property will be protected pending the Property sale if a CERCLA § 107(*l*) federal lien exists regarding the Property and the lien has been perfected by the filing of a notice under Section 107(*l*)(3). Otherwise, the United States should file a judgment lien regarding the Property. Any such Section 107(*l*) federal lien, notice of federal lien, and/or judgment lien will need to be released in order for the Property sale to occur. In general, an EPA representative should attend the closing to execute documents releasing the federal lien, federal lien notice, and/or judgment lien. Alternatively, EPA may execute a release of the federal lien, federal lien notice, and/or judgment lien and deliver such release to the title company prior to the sale, with instructions for the title company to collect the net sales proceeds on EPA’s behalf. If no Section 107(*l*) federal lien exists and the United States does not plan to file a judicial lien, e.g., where the Property is not part of the Site, then there will be no lien to release. In that case, since the payment can be made after, rather than at the time of, the sale, modify the first sentence of Paragraph 9.h to delete the first clause (“At the time of the sale,”), delete the last two sentences of Paragraph 9.h, and cross-reference instructions for making payment to EPA as follows (or include instructions here): Within \_\_ days after the sale, Settling Defendant shall make payment to EPA in accordance with Paragraphs 12.c and 12.d (except that the payment should not be identified as stipulated penalties), and EPA shall deposit the payment in accordance with Paragraph 7 (Deposit of Payment) [insert alternative special account deposit instructions if necessary].]

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

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

[NOTE: The United States should file a lien regarding the Property in order to protect its security interest in the Property to the extent feasible. Any recovery in a foreclosure proceeding pursuant to the United States’ lien will be subject to any senior liens (prior filed liens), State law regarding foreclosure proceedings, and the market value of the Property. In any event, we do not need to prevent a foreclosure, as long as our lien has been filed.]

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

[NOTE: If payment is to be made to a State, keep the following paragraph.]

1. [**Payment of State Response Costs**. Within 30 days after the Effective Date, Settling Defendant shall pay to the State $\_\_\_\_\_\_, in the form of an official bank check. The check shall be made payable to \_\_\_\_\_\_ and shall reference [**insert name of case**]. Settling Defendant shall send the check to: [**Insert address provided by State**].]

# FAILURE TO COMPLY WITH CONSENT DECREE

1. **Interest on Payments [if installments: and Accelerated Payments**]. [**Insert the following sentence if the payment under Paragraph 5 is a lump sum.**][If Settling Defendant fails to make the payment required by Paragraph 5 (Payment of Response Costs) by the required due date, Interest shall accrue on the unpaid balance from the Effective Date through the date of payment.] [**Insert the following alternative language if the payment under Paragraph 5 is to be made in installments.**] [If Settling Defendant fails to make any payment required by Paragraph 5 (Payment of Response Costs) by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure, and if the first payment is not timely made, Interest shall accrue from the Effective Date. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.] [**Insert the following sentence if Paragraph 9 (Payment of Net Proceeds of Sale of Property) or any other contingent payments, such as insurance proceeds, are included.**] [If Settling Defendant fails to make the payment required by Paragraph 9 (Payment of Net Proceeds of Sale of Property) by the required due date under Paragraph 9.h [**also reference any other contingent payments**], Interest shall continue to accrue on the unpaid balance from the date payment was due through the date of payment.]
2. **Stipulated Penalty**
   1. If any amounts due to EPA under Paragraph 5 (Payment of Response Costs) [**also reference State payment, if any, and any other payment provision**] are not paid by the required date, Settling Defendant shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 11 (Interest on Payments), $\_\_\_\_\_\_ per violation per day that such payment is late.

[NOTE: If Paragraph 9 (Payment of Net Proceeds of Sale of Property) is included and you wish to include stipulated penalties for failure to use best efforts to sell the Property, insert the following Paragraph 12.b. Additional paragraphs for other non-payment obligations may be added, including Section XIII (Property Requirements). Escalating penalty payment schedules may be used for payment or non-payment obligations. Regions may include a more detailed stipulated penalties provision to capture the individual requirements of Sections XIII.]

* 1. If Settling Defendant fails to use best efforts to sell the Property in accordance with Paragraph 9 (Payment of Net Proceeds of Sale of Property), Settling Defendant shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, $\_\_\_\_\_\_ per day for each day of failure to use best efforts to sell the Property.]
  2. Stipulated penalties are due and payable within 30 days after the date of the demand for payment of the penalties by EPA [or the State]. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by Fedwire EFT to:

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York, NY 10045

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

Environmental Protection Agency”

Each payment shall reference the CDCS Number, Site/Spill ID Number \_\_\_\_\_\_, and DJ Number \_\_\_\_\_\_.

[NOTE: Regions may substitute instructions for payment by Automated Clearinghouse or online payment through <https://www.pay.gov>. If Settling Defendants have difficulty making EFT or online payments, Regions may substitute the following.] Settling Defendant shall identify all payments to EPA under this Paragraph as “stipulated penalties” and shall pay them by official bank check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall identify the name and address of the party making payment, the Site name, Site/Spill ID Number \_\_\_\_\_\_, and the CDCS Number, and shall be sent to:

U.S. Environmental Protection Agency

Superfund Payments

Cincinnati Finance Center

P.O. Box 979076

St. Louis, MO 63197-9000

* 1. At the time of payment, Settling Defendants shall send notice that payment has been made to EPA and DOJ in accordance with Paragraph 8 (Notice of Payment).

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

* 1. Penalties shall accrue as provided in this Paragraph regardless of whether EPA [or the State] has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [**if non-payment obligations, insert:** or performance] is due [**if non-payment obligations are included, insert:** or the day a violation occurs,] and shall continue to accrue through the date of payment [**if non-payment obligations are included, insert:** or the final day of correction of the noncompliance or completion of the activity.] Nothing in this Consent Decree shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

1. If the United States [or the State] brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States [and the State] for all costs of such action, including but not limited to costs of attorney time.
2. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff[s] by virtue of Settling Defendant’s failure to comply with the requirements of this Consent Decree.
3. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section VI (Payment of Response Costs) or from performance of any other requirements of this Consent Decree.

# JUDGMENT AND NOTICE OF LIEN

[NOTE: If the Consent Decree provides for the sale of property, and there is a federal lien on the property, in most cases the federal lien should protect our interest in the property until the property is sold. If no federal lien has been filed (for example, if the property is not part of the Site), and we seek to protect our interest in the property by filing a judgment lien, keep the following paragraph.]

1. Settling Defendant consents to the entry of a judgment in favor of the United States for $\_\_\_\_\_\_, plus Interest running from the Effective Date until the date of payment. [**Optional:** Settling Defendant consents to the filing by the United States in the Recorder’s Office [or Registry of Deeds or other appropriate office], County of \_\_\_\_\_\_, State of \_\_\_\_\_\_, of a notice of judgment lien regarding the Property based on the judgment in favor of the United States.]

# COVENANTS BY PLAINTIFF[S]

1. Except as specifically provided in Section X (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,][[3]](#footnote-3) regarding the Site.[[4]](#footnote-4) With respect to present and future liability, these covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree[.] [**for installment payment plans or future sale of property obligations, continue sentence with:** , including but not limited to, payment of all amounts due under Section VI (Payment of Response Costs), and any Interest or stipulated penalties due thereon under Section VII (Failure to Comply with Consent Decree).] These covenants are also conditioned upon the veracity and completeness of the Financial Information and the Insurance Information provided to EPA by Settling Defendant and the financial, insurance, and indemnity certification made by Settling Defendant in Paragraph 40. These covenants extend only to Settling Defendant and do not extend to any other person.

# RESERVATION OF RIGHTS BY UNITED STATES[[5]](#footnote-5)

1. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within Paragraph 17 (Covenants by Plaintiff[s]). Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:
   1. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;
   2. criminal liability;
   3. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
   4. liability based on the ownership or operation of the Site by Settling Defendant when such ownership or operation commences after signature of this Consent Decree by Settling Defendant;
   5. liability based on Settling Defendant’s transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendant; and
   6. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.
2. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information or the Insurance Information provided by Settling Defendant, or the financial, insurance, or indemnity certification made by Settling Defendant in Paragraph 40, is false or, in any material respect, inaccurate.

[NOTE: If the State is a co-plaintiff, insert separate paragraphs for the State’s covenant not to sue Settling Defendant and reservation of rights.]

# COVENANTS BY SETTLING DEFENDANT

1. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States [or the State], or its [their] contractors or employees, with respect to the Site[[6]](#footnote-6) and this Consent Decree, including but not limited to:
   1. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
   2. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or
   3. any claim pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law, relating to the Site.[[7]](#footnote-7)
2. Except as provided in Paragraph 23 (claims against other PRPs) and Paragraph 28 (Res Judicata and other Defenses), these covenants shall not apply in the event the United States [or the State] brings a cause of action or issues an order pursuant to any of the reservations set forth in Section X (Reservations of Rights by United States), other than in Paragraph 18.a (liability for failure to meet a requirement of the Consent Decree) or 18.b (criminal liability), but only to the extent that Settling Defendant’s claims arise from the same response action or response costs that the United States [or the State] is seeking pursuant to the applicable reservation.
3. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).
4. Settling Defendant agrees not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that it may have for response costs [**if NRD claims are being resolved through this settlement, insert:** and for natural resource damages and assessment costs] relating to the Site against [**if multiple settlors, insert:** each other or] any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that [**if multiple settlors, insert:** a] Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against [**if multiple settlors, insert:** such] Settling Defendant. [**NOTE: If Settling Defendant asserts that it has a claim against a PRP within the scope of this waiver that is unrelated to the PRP’s CERCLA liability at the Site, e.g., a claim for contractual indemnification, add an exception for such claim such as the following:** This waiver also shall not apply to Settling Defendant’s contractual indemnification claim against [**insert name**].]

# EFFECT OF SETTLEMENT/CONTRIBUTION

1. Except as provided in Paragraph 23 (claims against other PRPs), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Section XI (Covenants by Settling Defendant), each of the Parties expressly reserves any and all rights (including, but not limited to, under Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).
2. The Parties agree, and by entering this Consent Decree this Court finds, that this settlement constitutes a judicially-approved settlement pursuant to which Settling Defendant has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and 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 Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person, except for the State;[[8]](#footnote-8) provided, however, that if the United States exercises rights under the reservations in Section X (Reservations of Rights by United States), other than in Paragraphs 18.a (liability for failure to meet a requirement of Consent Decree) or 18.b (criminal liability), the “matters addressed” in this Consent Decree will no longer include those response costs or response actions [**if the Decree includes a natural resource damages settlement include:** or natural resource damages] that are within the scope of the exercised reservation.[[9]](#footnote-9)
3. The Parties further agree, and by entering this Consent Decree this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which Settling Defendant has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).
4. Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify EPA and DOJ [and the State] in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify EPA and DOJ [and the State] in writing within 10 days after service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ [and the State] within 10 days after service or receipt of any Motion for Summary Judgment, and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.
5. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States [or the State] in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiff[s] set forth in Section IX.

# PROPERTY REQUIREMENTS

[NOTE: This Section should be used if Settling Defendant is a Site owner or otherwise controls access to the Site and access and/or use restrictions are needed. If access is needed to real property owned or controlled by Settling Defendant, use Paragraph 29.a. If land, water, or other resource use restrictions are needed on real property owned or controlled by Settling Defendant, use Paragraph 29.b. If EPA has issued a record of decision or an action memorandum that provides for institutional controls (ICs) on real property owned by Settling Defendant, then relevant provisions from the remedial design/remedial action consent decree or the removal administrative settlement agreement and order on consent, as appropriate, relating to ICs implementation, plan review and approval, payment of future oversight costs, dispute resolution, etc., may be needed and should be adapted for use in this model. Additional changes to this section of the model will be needed in the event that access or land, water, or other resource use restrictions are needed on or affect a federal facility.]

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

[NOTE: Augment this list as appropriate.]

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

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

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

1. If EPA determines in a decision document prepared in accordance with the NCP that institutional controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices are needed regarding the Affected Property, Settling Defendant shall cooperate with EPA’s [and the State’s] efforts to secure and ensure compliance with such institutional controls.
2. **Notice to Successors-in-Title**
   1. Settling Defendant shall, within 15 days after the Effective Date, submit for EPA approval a notice to be filed regarding the Affected Property in the appropriate land records. The notice must: (1) include a proper legal description of the Affected Property; (2) provide notice to all successors-in-title: (i) that the Affected Property is part of, or related to, the Site; (ii) that EPA [performed / has selected] a response action for the Site [**if applicable:** ; and (iii) that potentially responsible parties are required to implement the response action]; and (3) identify the document requiring implementation of the response action, including, if applicable, the name and civil action or docket number of the matter. 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. Settling Defendant shall, prior to entering into a contract to Transfer its Affected Property, or 60 days prior to Transferring its Affected Property, whichever is earlier:
      1. Notify the proposed transferee that EPA [performed / has selected] a response action regarding the Site [**if applicable:** , that potentially responsible parties are required to implement response actions regarding the Site, including information identifying the document requiring such implementation,]; and
      2. Notify EPA [and the State] of the name and address of the proposed transferee and provide EPA [and the State] with a copy of the above notice that it provided to the proposed transferee.
3. In the event of any Transfer of the Affected Property, unless the United States otherwise consents in writing, Settling Defendant shall continue to comply with its obligations under the Consent Decree.
4. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its [their] access authorities and rights, as well as all of its [their] rights to require institutional controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

# ACCESS TO INFORMATION

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

1. Settling Defendant shall provide to EPA [and the State], upon request, copies of all records, reports, documents, and other information (including records, reports, documents and other information in electronic form) (hereinafter referred to as “Records”) within their possession or control or that of their contractors or agents relating to activities at the Site [**if needed, include:** or to the implementation of this Consent Decree], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Site.
2. **Privileged and Protected Claims**
   1. Settling Defendant may assert that all or part of a Record is privileged or protected as provided under federal law, provided it complies with Paragraph 35.b, and except as provided in Paragraph 35.c.
   2. If Settling Defendant asserts a claim of privilege or protection, it shall provide Plaintiff[s] with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, each addressee, and of each recipient; a description of the Record’s contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Settling Defendant shall provide the Record to Plaintiff[s] in redacted form to mask the privileged or protected information only. Settling Defendant shall retain all Records that it claims to be privileged or protected until the United States has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Settling Defendant’s favor.
   3. Settling Defendant may make no claim of privilege or protection regarding:
      1. any data regarding the Site, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or
      2. the portion of any Record that Settling Defendant is required to create or generate pursuant to this Consent Decree.
3. **Business Confidential Claims**. Settling Defendant may assert that all or part of a Record submitted to Plaintiff[s] under this Section or Section XV (Retention of Records) is business confidential to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Settling Defendant shall segregate and clearly identify all Records or parts thereof submitted under this Consent Decree for which Settling Defendant asserts a business confidentiality claim. Records that Settling Defendant claims to be confidential business information will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA [and the State], or if EPA has notified Settling Defendant that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such Records without further notice to Settling Defendant.
4. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its [their] information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.]

# RETENTION OF RECORDS

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

1. Until [\_\_] years after the Effective Date, Settling Defendant shall preserve and retain all non-identical copies of [Records] [**if Access to Information is not used, insert:** records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”)] now in its possession or control, or that come into its possession or control, that relate in any manner to its liability under CERCLA with respect to the Site, provided, however, that if Settling Defendant is potentially liable as an owner or operator of the Site, Settling Defendant must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.
2. After the conclusion of the record retention period, Settling Defendant shall notify EPA and DOJ [and the State] at least 90 days prior to the destruction of any such Records, and, upon request by EPA or DOJ [or the State], except as provided in Paragraph 35 (Privileged and Protected Claims), Settling Defendant shall deliver any such Records to EPA [or the State].

[NOTE: If Access to Information Section is not used, insert Paragraphs 35 (Privileged and Protected Claims) and 36 (Business Confidential Claims) here.]

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

# NOTICES AND SUBMISSIONS

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

**As to DOJ by email**: eescasemanagement.enrd@usdoj.gov

**As to DOJ by regular mail**: EES Case Management Unit

U.S. Department of Justice

Environment and Natural Resources Division

P.O. Box 7611

Washington, D.C. 20044-7611

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

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

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

**As to Setting Defendant**: [**Insert name, address, and email]**

# RETENTION OF JURISDICTION

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

# INTEGRATION[/APPENDICES]

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

“Appendix A” is the map of the Site.

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

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

# LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

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

# SIGNATORIES/SERVICE

1. Each undersigned representative of Settling Defendant and the [Deputy Chief],[[10]](#footnote-10) U.S. Department of Justice, Environment and Natural Resources Division, Environmental Enforcement Section, [**insert State official**] certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.
2. Settling Defendant agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.
3. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendant agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. [**Unless a complaint has already been filed and answered insert:** The Parties agree that Settling Defendant need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.]

# FINAL JUDGMENT

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

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

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

United States District Judge

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

**FOR THE UNITED STATES OF AMERICA**:

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

Dated [Name]

Deputy Chief

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

P.O. Box 7611

Washington, D.C. 20044-7611

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

[Name]

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

P.O. Box 7611

Washington, D.C. 20044-7611

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [Name]

United States Attorney

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

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

[Name]

Assistant United States Attorney

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

[Address]

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

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

[Name][[11]](#footnote-11)

Assistant Administrator for Enforcement and

Compliance Assurance

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

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

[Name]

Regional Administrator, Region \_\_

U.S. Environmental Protection Agency

[Address]

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

[Name]

Assistant Regional Counsel

U.S. Environmental Protection Agency

[Address]

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

[If State is a party, insert:]

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

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

Dated [Name]

[Title]

[Address]

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

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

[Print name of Settling Defendant]

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

Date Name (print):

Title:

Address:

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

Name (print): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

Company: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

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

Phone: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Instructions Regarding Automated Features**

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

1. In situations where the court has entered summary judgment as to liability, we normally should preserve that result in a subsequent settlement by deleting Paragraph I.F and replacing it with one that describes the summary judgment decision. [↑](#footnote-ref-1)
2. When PRPs are performing the response action at the Site, payments made under Paragraph 5 may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account. [↑](#footnote-ref-2)
3. If including a RCRA § 7003 covenant, pursuant to Section 7003(d) of RCRA, you must offer to have a public meeting regarding the settlement and hold such a meeting if requested. To do this, please include language in the Federal Register notice providing for an opportunity for a public meeting in the affected area. For guidance regarding how to comply with this requirement, see “Revised Model Notice Language for Compliance with Public Participation Requirements of Section 7003(d) of RCRA” (Oct. 30, 1996), available at <https://www.epa.gov/enforcement/guidance-model-language-compliance-public-participation-requirements-under-rcra-section>. [↑](#footnote-ref-3)
4. This covenant assumes that the United States has decided to grant a full covenant for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed. [↑](#footnote-ref-4)
5. On a case-by-case basis, EPA and DOJ may consider using an unknown conditions reopener in an ability to pay consent decree in addition to the other reservations of rights included in this section. Because use of this reopener presents case-specific drafting issues, Regions should contact OSRE when considering this alternative. [↑](#footnote-ref-5)
6. If the Decree does not cover the Site as a whole, the reference to “the Site” here and in Paragraphs 21.b and 21.c should be narrowed to conform to the intended scope of the Consent Decree. [↑](#footnote-ref-6)
7. The settlement should resolve any claims by Settling Defendant against the United States related to the Site. Settlement of any federal liability in the ATP settlement will require additional revisions to this document. If the Region has any information suggesting federal agency liability, such information should be provided to DOJ as soon as possible. For information regarding CERCLA § 104(e) information requests to federal agencies, please review the “Guidance on Issuing CERCLA Section 104(e)(2) Information Requests to Federal Agencies at Privately-owned Superfund Sites” (June 14, 2004), available at <https://www.epa.gov/enforcement/guidance-issuing-superfund-104e2-information-requests-federal-agencies-privately-owned>. [↑](#footnote-ref-7)
8. If the State is a party and is resolving its claims regarding the Site through the Consent Decree, delete “except for the State.” Note that State claims do not include claims for Hazardous Substance Superfund costs that have been provided to the State through a cooperative agreement with EPA and for which EPA retains the responsibility for cost recovery. [↑](#footnote-ref-8)
9. This definition of “matters addressed” assumes that this Consent Decree contains a site-wide covenant by the United States pursuant to Sections 106 and 107(a) of CERCLA, subject only to the reservations of rights. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed. [↑](#footnote-ref-9)
10. The DOJ attorney assigned to the matter will determine who has the authority to approve the settlement under the current applicable DOJ delegations. Generally, with an ability-to-pay settlement, it will be the applicable EES Deputy Chief. [↑](#footnote-ref-10)
11. Include AA-OECA signature block only if he or she has a concurrence role under Delegation No. 14-13-B. [↑](#footnote-ref-11)