



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG - 1 2019

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of Model Memorandum of Understanding Regarding the Oversight and Enforcement of Remaining Response Actions Under State Law at Post-Enforcement Superfund Sites

FROM: Cynthia L. Mackey, Director
Office of Site Remediation Enforcement

Rafael Dejeu
for

TO: Superfund National Program Managers, Regions 1-10
Regional Counsels, Regions 1-10

I. Introduction

Attached is a model memorandum of understanding (MOU) for use, if applicable, when a state or tribe¹ requests to assume responsibility for the oversight and enforcement of remaining response actions at a site under state or tribal law where the U.S. Environmental Protection Agency (EPA) already has a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) enforcement action with potentially responsible parties (PRPs).

One of the EPA's main goals for this model is to maintain our commitment to the affected community that the ongoing response will result in a cleanup that, at a minimum, achieves the same level of protectiveness as actions that the EPA would have taken if it maintained oversight and enforcement. To accomplish this goal and determine the MOU's applicability to a site, the EPA considers many factors as part of a significant multi-step process. This memorandum and attached model MOU explain the factors and process used to provide transparency and national consistency.

This memorandum and model MOU do not supersede, limit, or change CERCLA policy and guidance, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), or any preexisting policy or guidance document. The MOU is site-specific and non-binding. The model MOU does not transfer any enforcement authority under CERCLA to a state, nor is it a funding

¹ In appropriate circumstances, and where a tribal government demonstrates it has a cleanup program with oversight and enforcement authorities to ensure a CERCLA-protective cleanup, consistent with this MOU a tribal government may take the lead on overseeing and enforcing the PRP-lead cleanup under the tribe's program, statute, and authorities. References to "state" and "state agency" in this memorandum and model are intended to include tribes and tribal agencies in such circumstances.

mechanism. The attached model MOU is consistent with and works toward achieving the goal reflected in EPA's Superfund Task Force Recommendation No. 19.²

II. Background

Over the past several years, there have been Superfund sites where the EPA has entered into a CERCLA enforcement agreement with the PRP and, for a variety of reasons, a state has subsequently sought to address the site under its own state authority rather than have the site cleanup conclude under CERCLA. These scenarios are not directly addressed under current policy and guidance, which led to the development of this model MOU.

This model MOU applies to situations where the EPA has already taken a CERCLA enforcement action at a site that is not listed on the National Priorities List (NPL). Sites that are already listed on the NPL are not eligible candidates for use of this MOU; EPA and states may use Superfund state contracts and cooperative agreements to document required state assurances and delineate lead and support agency roles at NPL sites. This memorandum and model MOU do not, in any way, change or supersede these other tools.

This MOU is not intended for transferring to states sites affecting tribes or tribal interests, including tribal treaty rights.

III. Purpose and Scope of MOU

When a state seeks to have a site removed from CERCLA enforcement and oversight and placed under a state enforcement and oversight authority (thereby curtailing the EPA's role at the site), there are many factors to consider in determining whether such a transition is feasible and appropriate. This model MOU and memorandum provide clarity on those factors and describe the process necessary to effectuate such a significant change. EPA's intent is to be transparent and consistent in the factors and process that apply when these situations arise. Because it is more efficient for the EPA and a state to agree on how a site will be addressed *before* a CERCLA enforcement action is taken, EPA anticipates that it will be an infrequent occurrence for a state to seek to use its authority to address oversight and enforcement *after* EPA has taken an enforcement action.

This model MOU is applicable to sites:

- (1) where remedial action under CERCLA is anticipated;
- (2) that are NPL caliber (i.e., proposed to the NPL and/or have a SAA agreement, and/or have achieved a HRS of 28.5 or higher with cleanup attention needed); and
- (3) where EPA has entered into a CERCLA enforcement agreement with a PRP (e.g., administrative settlement agreement and order on consent for performance of remedial investigation/feasibility study (RI/FS) by PRP).

Based on the site characteristics above, these sites are excluded from the definition of an eligible response site (i.e., Brownfields site) under CERCLA § 101(41)(C)(i).³

² The Superfund Task Force was commissioned on May 22, 2017. For more information about the Task Force, please visit <https://www.epa.gov/superfund/superfund-task-force>.

³ For more information on eligible response sites, see *Regional Determinations Regarding Eligible Response Sites*, available at <https://www.epa.gov/enforcement/guidance-regional-determinations-regarding-eligible-response-sites>.

When considering if using the model MOU is appropriate, all parties should recognize that there are features unique to CERCLA that will no longer apply at the site should the state address the site using its authorities in lieu of CERCLA, including, but not limited to: the permit waiver provided in Section 121(e)(1) of CERCLA; the pre-enforcement review bar provided in Section 113(h); and the waiver of applicable or relevant and appropriate requirements (ARARs) provided in Section 121(d)(4).

IV. MOU Thresholds

In determining whether the EPA should terminate its efforts at a post-enforcement site so that a state can assume responsibility for the oversight and enforcement of remaining response actions, these factors related to the following stakeholders must be considered, including:

- (1) **State:** the state's cleanup program (including cleanup and enforcement authorities) must be capable of providing a CERCLA-protective cleanup⁴ that includes the statutory and regulatory authority to successfully negotiate an enforceable agreement between the state and PRP for a CERCLA-protective cleanup. The 1995 *Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions* (OSWER 9375.6-11, May 3, 1995) discusses state program elements in Section 1.a and 1.b.
- (2) **PRP:** the PRP (a) has a good compliance history at the site, (b) is willing to enter into a cleanup agreement with the state, (c) is willing to enter into a cost recovery agreement with EPA, and (d) can perform a CERCLA-protective cleanup if the site is transferred to the state.
- (3) **Affected Community:** the affected community is made aware of the state's intent to assume responsibility for oversight and enforcement of remaining response actions under the state's law and is given the opportunity to express any concerns with the proposed transfer to the state.

Community acceptance of the state assuming responsibility for oversight and enforcement under the state's law should be obtained before any transfer takes place.

V. MOU Companion Documents

When a state assumes responsibility for the oversight and enforcement of remaining response actions under state law, the MOU between the EPA Region and the state is the *final* component memorializing the understanding between the two governments. Before the MOU is signed, the PRP and EPA Region must execute an agreement to resolve any of EPA's past costs and potential future costs at the site. Also, depending on the stage of the remedial process at the site prior to transfer, the PRP and the state must either execute, or commit to execute, an agreement enforceable by the state, that governs the remaining response actions at the site to be performed by the PRP. The enforceable agreement between the PRP and the state should incorporate the relevant provisions from the MOU. Such provisions include, but are not limited to, the requirements to maintain financial assurance (section IV.I. of the MOU), implement a CERCLA protective remedy, (described below and in section IV.K. of the MOU), provide a remedial action report, (section VII.B. of the MOU), and involve the community (section VI of the MOU).

⁴ Sites where EPA already has an enforcement action with a PRP should not be transferred to state voluntary cleanup programs (VCP), which are generally determined to be appropriate for addressing brownfields and similarly less complex or less contaminated properties. Regions that are considering whether a state VCP is capable of successfully completing a CERCLA-protective cleanup at an NPL-caliber site should consult with OSRE.

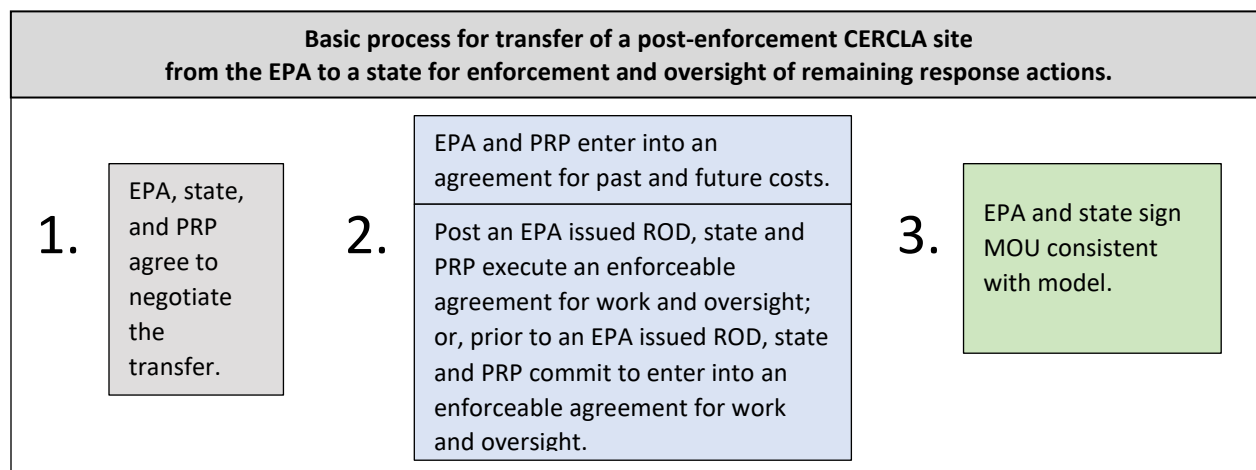
It is most likely that these agreements will be developed concurrently, however, the MOU should only be signed after the other documents are signed.

If the EPA Region, state, and PRP agree to transfer a site to the state (i.e., the state assumes responsibility for the oversight and enforcement of remaining response actions), the transfer should take place at one of the following key points in the Superfund remedial process:

After:

- the PRP completes the remedial investigation and feasibility study (RI/FS);
- the EPA issues the record of decision (ROD); or
- the PRP completes the remedial design.

Transferring sites at one of these key points should help ensure the transfer is more efficient. Transfers should not occur once the remedial action has begun.



VI. Remedy Selection

If the site is transferred prior to the issuance of an EPA ROD, then the state will issue a ROD equivalent in accordance with its own statute and regulations. The state’s remedy should be protective of human health and the environment, which for purposes of the MOU is described as:

- For known or suspected carcinogens: as concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10^{-4} and 10^{-6} using information on the relationship between dose and response and using 10^{-6} risk level as the point of departure for determining remediation goals for alternatives when ARARs are not available;
- For non-carcinogens: a Hazard Index of 1 or less; and
- No significant adverse impacts to ecological receptors.

The state should select a remedy comparable to that which would have been achieved under CERCLA. For example, for remedies addressing groundwater contamination, a return to beneficial use is expected.

If the transfer takes place after the EPA has issued the ROD, then the enforceable agreement between the state and the PRP should require the PRP to implement the remedy selected by EPA and obtain the performance standards as set forth in the ROD. If the EPA has issued the ROD,

and a subsequent remedy modification is necessary, then EPA will issue and sign the modification (e.g., explanation of significant differences, ROD amendment).

VII. EPA and State Roles Post-Transfer

The model MOU section on “Procedures,” (Section V) provides a framework for how the EPA Region and state will address the specific roles and responsibilities of each agency. The general presumption is that, in assuming responsibility for the oversight and enforcement of any remaining response actions, the state will be conducting the majority of oversight related activities at the site. The MOU also recognizes that there will be only a limited role for the EPA Region once the site is transferred.

If the site was pre-ROD at the time of transfer, the EPA, in general, will review certain documents including the state’s certification that the remedy is complete and then will confirm the state’s certification or identify any deficiencies in the certification. If the site is transferred after EPA has issued the ROD for the site, then additional EPA activities will include, but may not be limited to, performing any necessary five-year reviews if waste is left in place.

VIII. Community Involvement and Technical Assistance

A critical component of this MOU process is community involvement and providing, where requested, independent technical assistance to the community. The affected community’s involvement throughout the transfer process is articulated in different provisions of the model MOU. As reflected in Section IV.D., and prior to signing an MOU, the state will develop a proposal of how it will ensure a CERCLA-protective cleanup. This proposal will be made available to the public for review and will provide the public the opportunity to express, on the record, any concerns with the transfer. Opposition to the state’s proposed plan and inability to address such opposition may result in a determination by the EPA Region that the site is not appropriate to address under state authority.

Section VI (“Community Involvement and Independent Technical Assistance”) of the model provides that the state will bear primary responsibility for ensuring the affected community is involved in the remaining response actions. Specifically, under the model MOU, the state will perform the same steps as those that EPA would take during oversight and enforcement of the site under CERCLA.

Section VI also discusses how independent technical assistance will be arranged for the affected community. Like the steps for community involvement, the specific activities for technical assistance are the same as those that the EPA would undertake if the state were not assuming responsibility for the oversight and enforcement under state law of remaining response actions. If the site has been proposed for listing on the NPL, then the community at the site may be eligible to apply to the EPA for a Technical Assistance Grant (TAG) even after the MOU is signed.

IX. Completion of State Response Action

Section VII (“Completion of State Response Action”) of the model MOU describes the steps that the state and EPA Region will take once the PRP completes the remedy construction activities. The state will conduct an inspection of the remedy and then the PRP will submit its draft remedial action report. The report should include, among other matters described in the model, applicable contents listed in Exhibit 2-5, “Recommended Remedial Action Report Contents,” from EPA’s *Close Out Procedures for National Priorities List Sites* (OSWER Dir. 9320.2.22, May 2011). Once the state determines that the response action is complete, the state

will certify to the EPA and the affected community that the remedy was successfully completed and intended cleanup levels achieved.

At this point, the EPA will play a minimal role by:

- (1) confirming that the response was completed;
- (2) requesting additional information from the state; or
- (3) identifying a deficiency in the state's certification and documentation which needs to be corrected.

Once the EPA confirms the response at the site as complete, the EPA does not intend for the site to be further evaluated for NPL listing unless the Agency receives information of a release or potential release that poses a threat to human health or the environment or receives information that the response actions completed pursuant to the MOU are not CERCLA-protective. If the site was proposed to the NPL and it meets the criteria for removing a site from proposed to the NPL, the EPA will announce the removal of the site from proposed to the NPL in a rule published in the *Federal Register*.

X. General Provisions and EPA Headquarters Role

EPA Regions should follow the national delegation for signing MOUs found at <http://intranet.epa.gov/ohr/rmpolicy/ads/dm/1-11.pdf> and determine if there have been any regional re-delegations.

EPA Regions should seek prior written approval (PWA) from the Office of Site Remediation Enforcement (OSRE) on the first two MOUs in each Region developed after the issuance of this model MOU and, thereafter, consult with OSRE on any omissions or significant deviations from the model or its intended application.

If you have questions about this model MOU, or to notify when the MOU is used, please contact Nancy Browne (202-564-4219, browne.nancy@epa.gov), Matt Sander (202-564-7233, sander.matthew@epa.gov), or Anthony Austin (202-564-6943, austin.anthony@epa.gov) in OECA's Office of Site Remediation Enforcement.

Attachment

cc: Susan Bodine, Assistant Administrator, OECA
Peter Wright, Assistant Administrator, OLEM
Larry Starfield, Principal Deputy Assistant Administrator, OECA
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Steven Cook, Deputy Assistant Administrator, OLEM
James Woolford, OLEM/OSRTI
John Michaud, OGC/SWERLO
Superfund Remedial Program Branch Chiefs
Superfund Regional Counsel Branch Chiefs

MODEL
MEMORANDUM OF UNDERSTANDING
BETWEEN
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION __
AND
[NAME OF STATE AGENCY]¹
REGARDING THE OVERSIGHT & ENFORCEMENT
OF REMAINING RESPONSE ACTIONS UNDER STATE LAW
AT THE
[NAME OF SITE],
A POST-ENFORCEMENT CERCLA SITE

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

¹ In appropriate circumstances, and where a tribal government demonstrates it has a cleanup program with oversight and enforcement authorities to ensure a CERCLA-protective cleanup, consistent with this MOU a tribal government may take the lead on overseeing and enforcing the PRP-lead cleanup under the tribe's program, statute, and authorities. References to "state" and "state agency" in this model are intended to include tribes and tribal agencies in such circumstances.

[NOTE: This site-specific model memorandum of understanding (MOU) is intended for use by EPA regional offices and states to memorialize their understanding of how the state intends to assume responsibility for oversight and enforcement of remaining response actions using state law at certain remedial sites where the EPA has taken enforcement action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This MOU also memorializes those limited activities that EPA intends to undertake.

This model MOU may address remedial sites (1) that are proposed to the National Priorities List, (NPL), and/or have a Superfund Alternative Approach (SAA) agreement, and/or have achieved a hazard ranking score of 28.5 or higher; and (2) where EPA has been conducting oversight and enforcement actions under CERCLA as evidenced by an enforcement agreement with a potentially responsible party (PRP) at the Site (e.g., administrative settlement agreement and order on consent for performance of remedial investigation/feasibility study (RI/FS) by PRP). This model MOU does not address the use of CERCLA § 104(d) authority to enter into a cooperative agreement between EPA and the state for purposes of carrying out CERCLA response authorities. It is also does not apply to sites that are final on the NPL or sites that may be considered for cleanup under a state's voluntary cleanup program.

This MOU between an EPA regional office and a state represents: (1) an acceptable demonstration by the state that it has the capabilities, resources, and authorities to oversee and enforce a PRP's CERCLA-protective cleanup of this remedial site as described in its formal request to assume responsibility for oversight and enforcement of remaining response actions and in any other supplemental information; (2) the state's agreement to achieve a CERCLA-protective cleanup and otherwise address the criteria specified in this MOU; and (3) the consideration of the affected community's and Natural Resource trustees' concerns, if any, on the state's proposal to achieve a CERCLA-protective cleanup and otherwise address the site in a manner substantially similar to actions that would otherwise be taken under CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and, if applicable, to address any differences between CERCLA and the state's cleanup program. This MOU does not imply approval for any purposes outside of this MOU or this Site.]

I. PURPOSE

- A. This Memorandum of Understanding (MOU) between the United States Environmental Protection Agency, Region __ (EPA) and the [**Name of State Agency (State Agency abbreviation)**] reflects the understanding between the two parties for how [State Agency] intends to assume responsibility under state law for the enforcement and oversight of remaining response actions undertaken by [name of potentially responsible party (PRP)] at the [**Name of Site**] (“Site”), using the state’s or [PRP’s] resources.
- B. This MOU memorializes the understanding of the EPA and [State Agency] that the response actions taken at the Site will achieve the same level of protectiveness as would be achieved if the response work continued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).
- C. While the response actions at the Site are being undertaken under state law and consistent with this MOU, the EPA intends to defer considering the Site for listing on the National Priorities List (NPL). Once the Site response action is completed (see Section VII, *Completion of State Response Action*, below), the EPA anticipates that it should have no further interest in listing the Site on the NPL, unless the EPA receives information of a release or potential release that poses or may pose an actual or potential threat to human health or the environment or receives information that the response actions completed pursuant to state law at this Site are not CERCLA-protective as discussed in [**select appropriate option based on whether the site is pre- or post-Record of Decision (ROD):** Section IV(C) “Cleanup Levels/CERCLA-Protective Cleanup” or Section IV(K) “Remedy”] of this MOU. [Once the response action is completed under state law, as discussed in Section VII, *General Provisions*, below, the EPA may determine it is appropriate to withdraw its prior proposal to add the Site to the NPL,² and if the EPA so determines, it is anticipated that the EPA will announce the removal of the Site from proposal to the NPL in a rule published in the *Federal Register*. If the Site is not currently proposed to the NPL, it is expected EPA will reassign the Site to the Archive site inventory in EPA’s Superfund Enterprise Management System (SEMS).]
- D. This MOU reflects policy recommendations discussed in EPA’s *Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions*, OSWER Directive 9375.6-11 (May 3, 1995) (“Deferral Guidance”) and *Modifications to the State Deferral Program in Response to Office of the Inspector General Report No. E1SFF8-11-0020-8100234 “State Deferrals: Some Progress, but Concerns for Long-Term Protectiveness Remain,”* OSWER Directive 9375.6-11A (April 12, 2002).

II. BACKGROUND

² See *Guidelines for Withdrawing a Proposal to List a Site on the NPL (De-Proposal)*, U.S. EPA (OSWER Nov. 12, 2002), available at <https://semspub.epa.gov/work/HQ/174022.pdf>.

- A. [NOTE: This paragraph should provide a physical description of the Site, including location, contaminants, media contaminated, etc.]
- B. [NOTE: This paragraph should provide a chronology or description of response actions and enforcement actions taken at the Site to date. The description should identify PRPs involved at the Site, investigations performed, orders issued, or agreements signed, and whether the lead at the Site changed.]
- C. [NOTE: This paragraph should describe the specific circumstances at the Site that are giving rise to the transfer of enforcement and oversight of remaining response actions. References to correspondence between the State and the EPA regarding formal requests for transfer of the Site may be raised here; such correspondence may be attached to this MOU. This paragraph could also discuss any agreements among the state, PRP(s), and/or the EPA that are anticipated before or concurrent with this MOU (e.g., orders or agreements between the state and PRP; past cost agreements between the EPA and PRP). These other agreements could be included as attachments to the MOU.]
- D. [NOTE: This paragraph should: 1) describe outreach efforts by the State to the affected community regarding the proposed transfer of the Site from the EPA to the State program; and 2) document the community's acceptance of the proposed transfer. If the community objects to the transfer, describe how the objections were addressed (e.g., elevation, additional meetings, added assurances).]

III. DEFINITIONS

[NOTE: The definition of "Site" should be included if the Site transfer is occurring prior to the ROD being issued. If the Site is being transferred post-ROD, the ROD's description of the Site should be used.

A general statement of definitions at a minimum should be used, e.g., Unless otherwise expressly provided in this MOU, terms used in this MOU that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations.

EPA Regions and/or States may find it beneficial to define certain terms, recognizing that there is inconsistent terminology between CERCLA and state cleanup laws and regulations. Terms that the parties to this MOU may find beneficial to define include: State, State program, State law, State Agency, community, performance standard, source, etc. It is anticipated that any past or future costs incurred by the EPA will be addressed in a separate agreement with the PRPs and, therefore, defining them in the MOU is unnecessary.]

IV. IMPLEMENTATION

- A. **State Program:** [State Agency] is authorized under [**insert name of state’s hazardous substance cleanup program**] to address hazardous substances at the Site and ensure that the response actions at the Site are carried out and are protective of human health and the environment. Furthermore, [State Agency] has sufficient capabilities, resources, and authorities to ensure that a CERCLA-protective cleanup, as defined in [**select appropriate option based on whether the site is pre- or post-ROD: Section IV(C) “Cleanup Levels/CERCLA-Protective Cleanup” or Section IV(K) “Remedy”**] of this MOU, is conducted, and to coordinate with the EPA, other interested agencies, and the public on different phases of implementation.
- B. **Eligibility of Site for Transfer to the State:** The State has requested to implement and oversee the response at the Site under state law. [State Agency] agrees to pursue response actions at the Site in a timely manner. The EPA and [State Agency] agree that a transfer should address the Site sooner than, and at least as quickly as, the EPA would expect to complete its response under CERCLA. The Site is included in the SEMS Active site inventory and has been assessed and determined to be eligible for listing on the NPL, **or** is proposed for listing on the NPL and/or has a Superfund Alternative Approach (SAA) agreement. This MOU is not a funds-obligating document and does not authorize any transfer of funds from the EPA to the State or other entity relating to this Site.
- EPA and [State Agency] agree that the Site is not an “eligible response site” as defined under CERCLA § 101(41).³
- C. **[NOTE: If pre-ROD, then include the following language: Cleanup Levels/CERCLA-Protective Cleanup:** The response action will be protective of human health and the environment, which for purposes of this MOU is described as follows: for known or suspected carcinogens, as concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10^{-4} and 10^{-6} using information on the relationship between dose and response and using 10^{-6} risk level as the point of departure for determining remediation goals for alternatives when applicable or relevant and appropriate requirements (ARARs) are not available⁴; for non-carcinogens, a Hazard Index of 1 or less⁵; and no significant adverse impacts to ecological receptors. [State Agency] will give preference to solutions that will be reliable over the long term.⁶ In addition, [State Agency] will select a remedy at the Site comparable to that which the EPA would have selected in accordance with CERCLA and the NCP.]
- D. **[State Agency] Public Notice of Intent to Implement and Oversee the Response at the Site Under State Authority:** [State Agency] developed a proposal that described its capabilities, resources, expertise, and authorities to ensure a CERCLA-

³ As defined in 42 U.S.C. § 9601(41).

⁴ 40 C.F.R. § 300.430(e).

⁵ See 40 C.F.R. § 300.430(e); EPA’s *Risk Assessment Guidance for Superfund, Volume 1, Human Health Evaluation Manual* (Part A); and *Rules of Thumb for Superfund Remedy Selection*, OSWER 9355.069, August 1997. <https://semspub.epa.gov/work/HQ/174931.pdf>.

⁶ See U.S. EPA, OSWER Directive 9375.6-11, *Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions* (May 3, 1995).

protective cleanup at the Site and is attached as Appendix [XX]. The proposal also described how the [State Agency] will address the EPA's expectations or criteria for the Site under State law or under an enforceable agreement between [State Agency] and [PRP]. [State Agency] presented its proposal to the public and Natural Resources Trustees, if any, for a period of 30 days. During that time, the affected community, including Natural Resources Trustees, was provided the opportunity to express any concerns they may have had with the transfer of the Site. **[Select appropriate option:** [State Agency] did not receive any comments, **or** To assure that community concerns were addressed fairly, [State Agency] documented the comments received and if applicable [State Agency's] response to the comments received.]

- E. **[NOTE: If pre-ROD, then include the following language] Proposed Plan for Remedial Action:** [State Agency] agrees to develop a proposed plan that briefly summarizes the remedial action alternatives studied in the detailed analysis phase of the remediation investigation and feasibility study (RI/FS), and highlights the key factors and information that led to identifying the preferred alternative. [State Agency] agrees to provide to the EPA a final draft of the proposed plan at least **[30]** days before [State Agency] presents the proposed plan to the public. Following the EPA's review, [State Agency] agrees to present the proposed plan to the public in accordance with Section VII.B, as well as to the EPA. At a minimum, the [State Agency] agrees that the proposed plan will: (1) include a brief summary of the remedial alternatives evaluated in the analysis; (2) identify and provide a discussion of the rationale to support the preferred alternative; and (3) provide a summary explanation of any comments received from the EPA.
- F. **[NOTE: If pre-ROD, then include the following language] Record of Decision:** [State Agency] agrees to prepare the record of decision (ROD) and give the EPA the opportunity to review and comment on the ROD.
- G. **[NOTE: Include this paragraph if remedial design will be addressed separately from an agreement for remedial action] Enforceable Agreement for Remedial Design:** [State Agency] agrees to enter into an enforceable agreement under state law with [PRP] for performance of a remedial design and payment of response costs incurred by [State Agency] at or in connection with the Site.
- H. **Natural Resources Trustees:** [State Agency] will promptly notify the appropriate trustees for natural resources of discharges and releases at the Site that are injuring or may injure natural resources, and include the trustees, as appropriate, in activities at the Site.
- I. **Enforceable Agreement for [choose applicable option depending on whether agreement is for both RD/RA or just RA: Remedial Design and Remedial Action or Remedial Action]:** **[NOTE: If pre-ROD, then include the following language]** [State Agency] agrees to enter into an enforceable agreement with [PRP] under state law **[choose applicable scope of agreement(s):** for remedial design and remedial action **or** remedial action] that incorporates the relevant provisions from this MOU and agrees to take appropriate compliance and enforcement actions to implement the agreement as necessary. This agreement

between [State Agency] and [PRP] will require the [PRP] to establish and maintain financial assurance in the amount of \$ _____ for the benefit of [State Agency]. [State Agency] will place the proposed agreement between [State Agency] and [PRP] on public notice for a period of 30 days prior to final signature. **[NOTE: If post-ROD, then include the following language]** [State Agency] and the [PRP] have entered into an enforceable agreement under state law for **[choose applicable scope of agreement: remedial design and remedial action or remedial action]** that incorporates the relevant provisions from this MOU and is attached as Appendix [X]. The agreement between [State Agency] and [PRP] requires [PRP] to establish and maintain financial assurance in the amount of \$ _____ for the benefit of [State Agency]. [State Agency] placed the proposed agreement between [State Agency] and [PRP], along with information pertaining to the proposed transfer, on public notice for a period of 30 days prior to final signature. During that time, the affected community was provided the opportunity to express any concerns it may have had with the transfer of the Site.

- J. **[Off-Site Disposal]: [NOTE: If the proposed or selected remedy anticipates off-site disposal, include the following language:** [State Agency] agrees to review and approve off-Site disposal location(s) proposed by [PRP] prior to use. Such off-Site disposal locations will comply with State regulations, consistent with 40 C.F.R. § 300.440, as well as any applicable federal regulations. In the absence of an authorized state program in the state accepting the offsite shipment, such off-Site disposal locations will comply with applicable federal regulations.]
- K. **[NOTE: If the EPA has issued the ROD – and this Site is being transferred post-ROD – then include the following provisions where appropriate.]**
Remedy: [State Agency] agrees to require [PRP] to implement the remedy selected by the EPA in the ROD, including attainment of performance standards, and that any explanation of significant differences or amendment to the ROD must be signed by the EPA. Implementing the remedy selected by the EPA in the ROD will be considered to result in a CERCLA-protective cleanup. **[If additional response action beyond the remedy is required by the state, include the following:** [State Agency] agrees that required additional response action to be taken under state law authority, if any, will not delay or prevent implementation of the remedy and will not be inconsistent with the remedy.]
- L. **Oversight:** [State Agency] agrees to provide oversight of remedial action consistent with [State Agency’s] enforcement and hazardous substance cleanup authorities. The EPA intends to have minimal involvement and oversight at the Site. **[NOTE: The EPA and the State should determine the extent of EPA’s intended oversight post-transfer. Specific activities or items that EPA may intend to review or oversee include the following: the opportunity to review the implementation schedule for the remedial action; tracking cleanup progress at the Site; being present at the post-construction final inspection; reviewing any modifications of work plans and other deliverables;**

conducting a completeness review of the Remedial Action (RA) Report; and conducting five-year reviews of the Site under CERCLA § 121(c).^{7]}

V. PROCEDURES

A. **Roles and Responsibilities:** [NOTE: Regions may want to add site-specific language regarding particular roles and responsibilities that the state and/or EPA may undertake given site nuances: [State Agency] has responsibility to provide for a timely CERCLA-protective cleanup under state authority and to support the public’s right of participation in the decision-making process. The EPA intends for its role to generally include reviewing the documents and reports referenced in Paragraph V.C. of this MOU[,] [and] those activities referenced in Paragraph VII.B. of this MOU [**include the following if EPA had not already issued the ROD:** and consultation on the proposed remedy]. The EPA may request reports, data, or other documentation related to the remedial activities at the Site, as it deems appropriate, or arrange for [State Agency] to provide certain draft documents for the EPA’s review, as they are prepared. Nothing in this MOU affects EPA’s non-discretionary and non-delegable responsibilities under CERCLA.

[If the EPA has issued the ROD, then include the following language:

Because the EPA has issued the ROD for this Site, [State Agency] agrees that, under CERCLA § 121(c), five-year reviews, signed by the EPA, are required for the Site. The EPA will conduct the five-year reviews and the [State Agency] agrees to cooperate on the reviews.

Current Protectiveness: If the EPA determines, as a result of any five-year review, that the Remedial Action is not protective of human health and the environment, or that there is not enough information to make a determination of the protectiveness, [State Agency] agrees to (1) require further Response Action by [PRP] at the Site consistent with the ROD to address EPA’s determination; (2) consult with the EPA to determine what additional work is needed to achieve protectiveness and [State Agency] will implement or require [PRP] to implement that work; and/or (3) consult with the EPA to determine what additional information, data, or analysis is needed to determine the protectiveness.

Long-term Protectiveness: Regardless of EPA’s protectiveness determination, the EPA may make additional recommendations to ensure long-term protectiveness of the remedy. The [State Agency] may require [PRP] to implement those recommendations or may require [PRP] to implement alternate approaches to ensure long-term protectiveness of the remedy.⁸

⁷ CERCLA § 121(c) requires that “[i]f the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action *no less often than each five years* after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented.” This requirement is commonly referred to as the “five-year review,” although it may take place sooner, or more often, than every five-years.

⁸ Additional work or alternate approaches might include institutional controls, sampling, increased inspections, removal action, or ROD amendment.

- B. **Schedule for Performance:** A proposed schedule of events for the Site cleanup is set forth in the following table. The dates in the table are subject to change. [State Agency] will notify the EPA of a change in Target Completion Date as soon as [State Agency] becomes aware that such a change is necessary or unavoidable.] [State Agency] has responsibility for ensuring that cleanup activities are completed in a timely manner and for taking appropriate compliance and enforcement actions for deficiencies as necessary.

Task	Target Completion Date

- C. **Documentation Submissions and Reporting to the EPA:** [NOTE: If the EPA issued the ROD prior to transfer of the Site, then the EPA will conduct the five-year review under CERCLA § 121(c) at the Site after the transfer. Depending on the level of oversight, however, some of the following language may be relevant (e.g., sentences regarding CBI) regardless of whether the EPA issued the ROD. [State Agency] agrees to make available or require [PRP] to provide the EPA with copies of all periodic remedial action progress reports and final work plans, in electronic format, so that the EPA can track cleanup progress at the Site for purposes of conducting five-year reviews, including initiation and completion of on-Site construction. Within 90 days after [PRP] completes construction activities per the remedial design, [State Agency] agrees to make available or require [PRP] to provide the EPA with the remedial action report (“RA Report”). [State Agency] will make available all [if including the language at the beginning of Section C, include the following: other] Site data, reports, and other documentation to the EPA upon request. Subject to [State’s FOIA or sunshine law], any assertion of business confidentiality or privileges or claims by [PRP] will not prevent [State Agency] from sharing these documents with the EPA. The EPA will protect the confidentiality of CERCLA confidential business information, including records, reports, or other financial information as set forth in EPA’s regulations at 40 C.F.R. Part 2, subpart B.

[State Agency] will provide written reports to the EPA at least annually on whether the expectations of this MOU are being met and the progress in the investigation, assessment, and response actions. In addition, [State Agency] will report to the EPA at least semi-annually on any difficulties that it is having meeting the expectations of this MOU. Following the submission of the report(s) to EPA, the EPA may request a briefing or meeting with [State Agency] to discuss the report(s).

- D. **Past and Future Costs:** The EPA and [PRP] have entered or will enter into a settlement agreement for the recovery of all past [and future] response costs. [NOTE: If the site transfer occurs after the EPA has issued the ROD, then future costs, if any, will vary. Past costs may include, but are not limited to, direct and indirect costs, plus accrued interest on all costs that the United States paid at or in connection with the Site from [insert date], through the

date of the transfer, including all such costs associated with drafting and reviewing all documents related to the site transfer that the EPA has incurred. Future costs may include, but are not limited to, direct and indirect costs, plus accrued interest on all such costs associated with EPA's oversight activities at the Site post-transfer, including conducting five-year reviews of the remedial action under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c); reviewing the implementation schedule for the remedial action; tracking cleanup progress at the Site; being present at the post-construction final inspection; reviewing any modifications of work plans and other deliverables; conducting a completeness review of the RA Report; providing oversight for a technical assistance plan (TAP); and costs associated with technical assistance grants.]

- E. **Deliverable Review and Approval:** [NOTE: Depending on the stage in the Superfund cleanup process that the Site is transferred to the State, the EPA and the PRP may have already executed certain work plans (e.g., Sampling and Analysis Plan, Quality Assurant Project Plan, Health and Safety Plan, Institutional Control Implementation and Assurance Plan, Technical Assistance Plan). The EPA and the State will have to determine how these plans will carry forward after the transfer and EPA's role with regard to any post-transfer changes to the plans.] [State Agency] will review and consider, for future decisions and actions at the Site, deliverables submitted to the EPA by [PRP] that have been reviewed and commented on, but have not been incorporated into a response action or order or directive at the time that this MOU is executed will be reviewed and considered by [State Agency] in future decisions and actions at the Site. The EPA will transfer deliverables that have been submitted to the EPA by [PRP] and have not been reviewed or commented on by the EPA at the time this MOU is executed, to [State Agency] for further action. The EPA will submit or arrange for [PRP] to submit deliverables scheduled to be submitted to the EPA after this MOU is executed to [State Agency] for further action on the same scheduled dates the deliverables were due to be submitted to the EPA.

VI. COMMUNITY INVOLVEMENT & INDEPENDENT TECHNICAL ASSISTANCE

- A. [State Agency] will bear responsibility (either on its own or via [the PRP]), with minimal EPA involvement, to facilitate and support community involvement relating to this Site. [State Agency] will be responsible for ensuring that the minimum steps that EPA would undertake if the Site was not being transferred are taken. A comprehensive list of these minimum requirements, most of which are summarized below, is set forth in appendix A of EPA's 2016 *Superfund Community Involvement Handbook*.⁹ The EPA encourages [State Agency] to consider going beyond these minimum provisions and consider taking additional steps, where appropriate (as discussed in the Handbook).
- B. The minimum Community Involvement requirements for remedial activities may include, but are not limited to, maintaining the existing Information Repository

⁹ *Superfund Community Involvement Handbook*, U.S. EPA (Jan. 2016), available at <https://www.epa.gov/superfund/superfund-community-involvement-tools-and-resources>.

(CERCLA § 117(d) and 40 C.F.R. § 300.430(c)(2)(iii)); reviewing the Community Involvement Plan (40 C.F.R. § 300.435(c)(1)); establishing an Administrative Record for any decision selecting a response action (CERCLA § 113(k)(1), 40 C.F.R. § 300.815(a), (c), and 40 C.F.R. § 430(f)(3)); publishing a notice of any proposed plan (CERCLA § 117(a)(1) and 40 C.F.R. § 300.430(f)(3)(i)(A)); providing an opportunity for comments on any proposed plan, providing an opportunity for a public meeting on any proposed plan, preparing and making available a transcript of any such meeting, preparing a written response to each significant comment received, and including its written responses in the Administrative Record (CERCLA §§ 117(a)(2) and 113(k)(2)(B)(ii), (iii) and (iv), and 40 C.F.R. § 300.430(f)(3)(i)(C), (D), and (E), and 40 C.F.R. § 300.815(b)); seek additional public comment (and respond as appropriate) if basic features of the proposed remedy change following publication of the proposed plan and the public could not have reasonably anticipated such change (40 C.F.R. § 300.430(f)(3)(ii)(A)); make the final decision on the selected remedial action publicly available before commencement of the action (CERCLA § 117(b) and 40 C.F.R. § 300.430(f)(6)(ii)); publishing notice of any subsequent significant change to the selected remedial action and, as appropriate, provide opportunity for public comment (40 C.F.R. § 300.435(c)(2), 300.825(a)(2) and § 300.825(b)); and issuing a fact sheet and provide, as appropriate, a public briefing prior to the initiation of the remedial action (40 C.F.R. § 300.435(c)(3)).

- C. The minimum Community Involvement requirements for any settlements may include providing opportunity for public comment on any proposed settlement for performance of the remedial action (CERCLA § 122(d)(2)(B) and 28 C.F.R. § 50.7); and providing opportunity for public comment on a proposed settlement with only obligations for reimbursements or payments (CERCLA § 122(i) and 40 C.F.R. § 300.430(c)(5)).
- D. The minimum Community Involvement requirements for any removal activities may include, but are not necessarily limited to, designation of a State spokesperson for any removal actions (40 C.F.R. § 300.415(n)(1)); establishing an administrative record for any decision the State makes selecting a removal action and making it publicly available (CERCLA § 113(k)(1) and 40 C.F.R. §§ 300.415(n), 300.800(a), 300.820, 300.825(c)).
- E. [State Agency]¹⁰ will arrange for the affected community to acquire independent technical assistance¹¹, consistent with 40 C.F.R. part 35, subpart M and consistent

¹⁰ If the EPA has an existing settlement with a PRP that contains a TAP provision, or receives a request for a TAP, then the EPA-State transfer MOU will need to address how best to implement (and ultimately terminate) that provision.

¹¹ If the site is currently proposed for listing on the NPL, the community at the site may be eligible to apply for a technical assistance grant (TAG), pursuant to 40 C.F.R. § 35.4020. **Similar to above, the EPA-State transfer MOU will need to address how best to address such eligibility.**

with EPA’s guidance titled *Providing Communities with Opportunities for Independent Technical Assistance in Superfund Settlements* (“Technical Assistance Guidance 2009”)¹².

The [State Agency] will:

1. Include a provision for independent technical assistance in its settlement with the PRP for post-transfer response activity. It will also notify the public of the opportunity for independent technical assistance and provide a transparent and fair application and selection process;
2. Arrange for the provision of independent technical assistance to the selected organization via an agreement that specifies: the respective duties of the organization and [State Agency]; the expenses that may be reimbursed and those that may not; and the limits (e.g., minimum requirements for technical competence) on [State Agency’s] ability to affect which independent technical advisor may be retained by the community organization;
3. If the recipient organization submits a request for additional assistance, use the criteria in the TAG regulation to determine the organization’s eligibility to receive additional assistance.

VII. COMPLETION OF STATE RESPONSE ACTION

- A. **Remedy Inspection:** Within [XX] days after [PRP] completes remedy construction activities, [State Agency] agrees to conduct an inspection and review of the completed response actions and advise [PRP] of any deficiencies in the response action.
- B. **Remedial Action Report:** Within [90] days after [State Agency] conducts the inspection, [State Agency] agrees to require [PRP] to provide an RA Report to the EPA and [State Agency]. The RA Report must contain as-built drawings of the constructed or engineered components of the response action; the applicable contents listed in Exhibit 2-5, “Recommended Remedial Action Report Contents,” from EPA’s *Close Out Procedures for National Priorities List Sites*¹³; and a certification, signed and stamped by a licensed professional engineer, that cleanup standards have been met.

The [State Agency] agrees to review the Remedial Action Report and advise [PRP] of any deficiencies in the Report.

The EPA will perform a completeness review of the PRP’s RA Report. The EPA may either (1) confirm in writing that the RA Report is complete, or (2) within

¹² *Providing Communities with Opportunities for Independent Technical Assistance in Superfund Settlements*, U.S. EPA, OSRE/OSRTI (Sept. 3, 2009), available at <https://www.epa.gov/enforcement/interim-guidance-opportunities-independent-technical-assistance-superfund-settlements>. (See also the Model Remedial Design/Remedial Action Statement of Work, providing the model TAP language, available at https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=543.)

¹³ U.S. EPA, *Close Out Procedures for National Priorities List Sites* (OSWER Dir. 9320.2-22 May 2011), available at <https://www.epa.gov/superfund/close-out-procedures-national-priorities-list-superfund-sites>.

[XX] days of receipt and review of the RA Report a) request additional information through [State Agency], or b) identify a deficiency(ies) in the RA Report. If the EPA requests additional information through [State Agency], the EPA and [State Agency] will agree on a time frame for the EPA to complete its review and either confirm or identify a deficiency(ies) in the RA Report. If a deficiency(ies) is identified by EPA, the EPA will consult with [State Agency] to address such deficiency(ies) hindering confirmation and agree to a time frame for addressing the deficiency(ies). After [State Agency] determines that all deficiencies have been satisfactorily addressed, it will issue an approval of the Remedial Action Report.

- C. **[State Agency] Certification of Remedy Completion and Achievement of Cleanup Standards:** Once [State Agency] considers the response action at the Site to be complete, it will certify to the EPA and the affected community that the remedy has been successfully completed and intended cleanup levels achieved. As part of the certification, [State Agency] will submit to the EPA the final RA Report and [State Agency's] approval of the RA Report referenced in Section VII.B.

Upon reviewing [State Agency's] certification and approval of the RA Report, the EPA may either (1) confirm in writing that the response has been completed; or (2) within [XX] days of receipt and review of the certification and RA Report approval request additional information from [State Agency]. If EPA requests additional information from [State Agency], the EPA and [State Agency] will agree on a time frame for the EPA to complete its review and either confirm or request additional information from [State Agency].

- D. **Site NPL Status:** Once the EPA confirms the response at the Site as complete, the EPA does not intend for the Site to be further evaluated for NPL listing, unless the EPA receives information of a release or potential release that poses a threat to human health or the environment or receives information that the response actions completed pursuant to this MOU are not CERCLA-protective. If the Site is currently proposed to the NPL and the Site meets the criteria for withdrawing (removing) a site from proposal to the NPL,¹⁴ it is also expected that the EPA will announce the removal of the Site from proposal to the NPL in a rule published in the *Federal Register*. If the Site is not currently proposed to the NPL, it is expected the EPA will reassign the Site to the Archive site inventory in EPA's Superfund Enterprise Management System (SEMS). **[Include the following if the Site has an SAA agreement:** Status of Site with an SAA agreement will also be reflected on the EPA's SAA webpage.¹⁵]

¹⁴ See *Guidelines for Withdrawing a Proposal to List a Site on the NPL*, supra note 2.

¹⁵ List of sites with SAA agreements: <https://www.epa.gov/enforcement/sites-superfund-alternative-approach-agreements>.

VIII. GENERAL PROVISIONS

A. Termination

1. The EPA intends to provide 30 days' notice to [State Agency] prior to terminating this MOU. Such notice will include the basis for such termination as provided in this paragraph. Reasons that EPA may seek to terminate this MOU include the following: (a) if the response action is unreasonably delayed or inconsistent with this MOU; (b) if the response action is not CERCLA-protective; (c) if [State Agency] has not adequately addressed the concerns of the affected community regarding the response action; (d) if the [PRP] breaches its agreement with [State Agency] and [State Agency] is unable to enforce compliance or provide other sources of funding to complete the response action; (e) if there has been a material change in conditions or circumstances such that [State Agency] programs are no longer sufficient to manage the Site; and (f) if [State Agency's] actions are inconsistent with this MOU. The EPA may also terminate this MOU without prior notice to the State and implement emergency or time-critical response action if the EPA determines that such action is necessary.
2. [State Agency] intends to provide 30 days' notice to the EPA prior to terminating this MOU. Such notice will include the basis for such termination as provided in this paragraph. Reasons that [State Agency] may seek to terminate this MOU include the following: (a) if the response action is unreasonably delayed due to unforeseeable circumstances beyond [State Agency's] control; (b) if [PRP] fails to achieve a CERCLA-protective cleanup despite [State Agency's] good faith efforts to require compliance; (c) if there has been a material change in conditions or circumstances such that [State Agency] programs are no longer sufficient to manage the Site; (d) if [PRP] fails to perform Site activities as agreed to in the [agreement between State Agency and PRP] or in future consent orders, and [State Agency] and [PRP] cannot reach resolution on a dispute and [PRP] is not responsive to the State's enforcement action; and (e) if the EPA's actions are inconsistent with this MOU.
3. The EPA and [State Agency] may terminate this MOU upon mutual consent.
4. Upon termination of this MOU, the EPA will consider taking any necessary response actions, including placement of the Site on the NPL. The EPA and [State Agency] will coordinate efforts to notify the community of the termination of this MOU. At the EPA's request, [State Agency] will provide to the EPA all information in its possession regarding the Site to the extent permitted by state law.
5. **[NOTE – Add the following provision if the Site is not yet proposed for listing on the NPL:** In the event this MOU is terminated, [State Agency] agrees that it will support, to the [State authority responsible for

providing letters of support for listing sites on the NPL (e.g., Governor or State Agency director)], the listing of the [insert site name] Site on the NPL.

- B. Modification: The EPA and [State Agency] may modify this MOU at any time upon mutual consent.
- C. The EPA and [State Agency] retain their respective authorities and reserve all rights to take any and all response actions authorized by law, including without limitation, emergency and time-critical response actions, if it is determined that such action is necessary to abate an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. Nothing in this MOU affects any provisions in regulations, including the NCP. No provision of this MOU may be used to create or limit the rights and authorities of any Party or to prejudice what those rights and authorities may be. This MOU is intended solely for purposes of facilitating inter-governmental cooperation between the Parties and creates no right to judicial review.

IX. AGREEMENT APPROVALS

Effective Date: This MOU will become effective upon the date signed by the last of the Parties.

[NOTE: Pursuant to Delegation 1-11, the authority to enter into an MOU between the EPA and other federal agencies, or state, tribal or local governments, which sets forth basic roles and responsibilities regarding the collaboration or cooperation of the parties on matters of mutual interest and no transfer of funds occurs, is delegated to the Regional Administrator. This authority may be redelegated through intervening supervisory levels to the Division Director. The authority to sign or enter into an MOU, however, may not be exercised unless the Regional Counsel, or their designee, concurs in the MOU.]

For the Environmental Protection Agency:

[Insert name], [title of Regional official]
U.S. Environmental Protection Agency, Region __

Date

For the [insert name of state agency]:

[Insert name & title of representative]
[Insert name of state agency]

Date

Appendix A

Agreement Between [PRP] and [State] for [Remedial Design and Remedial Action]