



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

SEP 30 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Minor Updates to Property Requirements and other Provisions of the 2014 CERCLA Model Remedial Design/Remedial Action Consent Decree

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

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

I. Introduction

The purpose of this memorandum is to update Section VIII (Property Requirements) of the 2014 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Model Remedial Design/Remedial Action Consent Decree ("RD/RA CD" or "CD")¹ and to make other minor changes to the CD. All changes are explained in Section II below, and a compare version showing all changes from the 2014 CD is attached. Although the changes are largely editorial in nature, because they include significant restructuring of Section VIII, I am announcing them by this memorandum. All changes were developed in consultation with the Environmental Enforcement Section of the Environment and Natural Resources Division at DOJ (EES/ENRD/DOJ).

This memorandum and its attachment is available on the U.S. Environmental Protection Agency's (EPA) website at <http://www2.epa.gov/enforcement/memorandum-updates-model-cercla-rdra-cd-property-requirements-and-other-provisions>. The CD, with all updates announced by this memorandum, is available to download in Word format from EPA's Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>.

II. Explanation of Changes

All changes to the RD/RA CD are shown in the attached compare file. The explanation for the changes is as follows:

¹ The 2014 RD/RA CD was issued on September 29, 2014. See *Issuance of 2014 CERCLA Model Remedial Design/Remedial Action Consent Decree and Statement of Work*, available at <http://www2.epa.gov/enforcement/guidance-2014-cercla-rdra-cd-and-sow>. Three typographical errors were corrected and posted on the internet on February 27, 2015. See http://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81.

A. Changes to Section VIII (Property Requirements)

- The order of Paragraphs 20 (Agreements Regarding Access and Non-Interference) and 21 (Proprietary Controls (PCs)), was reversed. This is because all RD/RA CDs require site access, but not all require placement of PCs, and it was cumbersome for the drafter to edit the section for the non-PC situation.
 - The Section VIII introductory note was split into shorter notes before Paragraphs 20 and 21. The note before new Paragraph 21 (recommending that complicated or time-consuming PCs be implemented pursuant to an “Institutional Controls Implementation and Assurance Plan” (ICIAP) as part of the Statement of Work (SOW), rather than under Paragraph 21, was clarified to add: “The RPM [Remedial Project Manager] may consider including ¶ 21’s provisions in the ICIAP, including the requirement to use best efforts (as defined in ¶ 22) to secure Non-Settling Owner’s cooperation in executing and recording PCs.”
 - The last clause of the introductory portion of new Paragraph 20 (relating to use restrictions) was bracketed for use only if the CD contains such restrictions, and a similar note was added before Paragraph 20.b.
 - Editorial and formatting changes were made to new Paragraph 20.
- All instances in which Section VIII said “SDs [and Owner SD],” “SDs [and Owner SD, as applicable],” “SDs [or Owner SD],” or “SDs, Owner SDs, if any” were changed to “SDs” or “any SD” because the defined term “Settling Defendants (SDs)” includes the defined term “Owner SD,” and the original phrasing might create ambiguity as to whether this is the case.
- Paragraphs 20.h and 21.b, both of which discuss Transfer of Affected Property by Owner SD, were combined into (new) Paragraph 23.
- The note that preceded (2014) Paragraph 21, which advised that agreements regarding access and non-interference need only be used if the case team is not confident that PCs will be implemented by the time that access or non-interference is needed, was deleted. This is because it is very difficult to predict when PCs will be in place, so it is prudent to require agreements in all cases.
- (New) Paragraph 20.a(11) adds the following redlined text for clarity: “Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions [if applicable: and Institutional Controls (ICs).”
- (New) Paragraph 21.a (Grantees), second sentence, was clarified as follows: “Proprietary Controls in the nature of a Uniform Environmental Covenants Act (UECA) document granted to persons other than the United States must include a designation that [for UECA states: EPA (and/or the State as appropriate) is either an “agency” or a party] [for non-UECA states: EPA (and/or the State as appropriate) is a “third-party beneficiary”] expressly granted the right of access and the right to enforce the covenants ~~[for non-UECA states: a “third-party beneficiary”]~~ allowing EPA [and/or the State] to maintain the right to enforce the Proprietary Controls without acquiring an interest in real property.”
- Paragraph 22 (Best Efforts) was clarified to 1) replace “agreements” with “access and/or or use restriction agreements” or “access and/or use restrictions,” and 2) include brackets around text that should only be used with CDs containing PCs.

- (New) Paragraph 26 was changed as follows: “In the event of any Transfer of the Affected Property, unless the United States otherwise consents in writing, SDs shall continue to comply with their obligations under the CD, including their obligation to ~~provide and/or~~ secure access, and ensure compliance with any land, water, or other resource use restrictions regarding the Affected Property [include if ICs: , and to implement, maintain, monitor, and report on Institutional Controls, ~~and to abide by such Institutional Controls.]~~” These changes 1) more accurately describe SDs’ obligations after “Transfer” of any “Affected Property” (both are defined terms in the CD), and 2) set apart the portion of the paragraph that should be used only for CDs with ICs.
- (New) Paragraph 27 was changed as follows: “Notwithstanding any provision of the CD, Plaintiff[s] retain[s] all of its [their] access authorities and rights, as well as all of its [their] right[s] to require land, water, or other resource use restrictions and Institutional Controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.”

B. Other Minor Changes to CD

- Section IV (Definitions) was modified as follows:
 - The definition of “Future Response Costs” was clarified to conform to revised Section VIII as follows: “Future Response Costs” shall mean . . . the costs incurred pursuant to . . . Section VIII (Property Requirements) (including the cost of attorney time and any monies paid to secure or enforce access or land, water, or other resource use restrictions and/or to secure, implement, monitor, maintain, or enforce Institutional Controls. . . .”
 - The optional definition of “Tribe” was changed from “an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe,” to “the _____ Tribe,” as this definition is meant to identify the specific tribe that has a role with regard to the site.
- Section X (Payments for Response Costs) was modified as follows:
 - (New) Paragraph 36 (Payments by SDs for Future Response Costs), was amended to add the following redlined headers to subparagraphs 36.b (Shortfall Payments), 36.c (Periodic Bills), and 36.e (Unused Amounts) and to use those headers parenthetically in all cross-references to those subparagraphs.
 - (New) Paragraph 39 (Contesting Future Response Costs), was clarified to state that establishment and funding of an escrow account to hold disputed Future Response Costs is a precondition to pursuing a dispute: “. . . If SDs submit a Notice of Dispute, SDs shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to the United States [and all uncontested State Future Response Costs to the State] ~~within 30 days after SDs’ receipt of the bill requiring payment, and~~ (b): Simultaneously, SDs shall establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC), and remit to that escrow account

funds equivalent to the amount of the contested Future Response Costs [or State Future Response Costs].”

- Section XIV (Stipulated Penalties), (New) Paragraph 64.b (Compliance Milestones), was modified as follows: “NOTE: List compliance milestones including due dates for payments and for establishing escrow accounts to hold disputed Future Response Costs.”
- Section VI (Performance of the Work) was clarified as follows:
 - Paragraph 9.b (Supervising Contractor) adds text to make the Supervising Contractor requirements consistent with the Paragraph 9.a(1) Project Coordinators requirements: “SDs’ proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system”
- Editorial corrections were made to:
 - Section IV (Definitions): “Performance Standards” or “PS” means. . . .” because “PS” is used in the SOW.
 - Section VI (Performance of the Work):
 - Paragraph 9.a (Project Coordinators): “(2) EPA shall designate and notify the SDs of ~~its~~ EPA’s Project Coordinator[s] and Alternate Project Coordinator[s].”
 - Paragraph 12 (Community Involvement (CI)): “SDs shall conduct [CI] activities . . . in accordance with Section 2 (Community Involvement) of the SOW.”
 - Section IX (Financial Assurance):
 - (New) Paragraph 33 (Modification of Amount, Form, or Terms of Financial Assurance), third sentence: “EPA will notify SDs of its decision to ~~accept or reject~~ approve or disapprove a requested reduction or change pursuant to this Paragraph.”
 - (New) Paragraph 34 (Release, Cancellation, or Discontinuation of Financial Assurance), last clause: “resolving such dispute under ~~to~~ Section XIV (Dispute Resolution).”
 - Section X (Payments for Response Costs), (New) Paragraph 41 (Interest): Deleted “under this Paragraph” because the words are unnecessary and potentially confusing, and added red brackets, both as shown: “. . . The Interest on Past Response Costs [, prepaid Future Response Costs,] [and State Past Response Costs] under this Paragraph shall begin to accrue on the Effective Date. . . . Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff[s]. . . .”
 - Section XIV (Dispute Resolution), (New) Paragraph 59.c: Changed “which ¶ Paragraph is applicable.”

III. Effective Date/Contacts

The revisions to the RD/RA CD announced herein are effective upon the date of this memorandum. They should be used for all new RD/RA negotiations and should be incorporated into RD/RA CDs currently in negotiations to the extent feasible.

Please direct any questions about this memorandum to Janice Linett, U.S. Environmental Protection Agency (EPA), Office of Site Remediation Enforcement (202-564-5131, linett.janice@epa.gov) or to Mark Gallagher, U.S. Department of Justice (DOJ), Environmental Enforcement Section (202-514-5405, mark.gallagher@usdoj.gov).

IV. Disclaimer

This memorandum and the documents referenced herein are intended as guidance for EPA employees. They are not rules and do not create any legal obligations. The extent to which EPA applies them in a particular case will depend on the facts of the case.

Attachment

cc: James Woolford, Director, OSWER/OSRTI
David Kling, Director, OECA/FFEO
John Michaud, Acting Associate General Counsel, OGC/SWERLO
Superfund Regional Counsel Branch Chiefs, EPA Regions 1-10
Superfund Remedial Branch Chiefs, EPA Regions 1-10
IC Coordinators Work Group
Lead Region Settlements Work Group
Stacy Murphy, Enforcement Lead Region Coordinator, EPA Region 6
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Deputy Chiefs, Assistant Chiefs, EES/DOJ
Deputy Chief, Assistant Chiefs, EDS/DOJ

UNITED STATES DISTRICT COURT
DISTRICT OF _____
_____ DIVISION

----- x
UNITED STATES OF AMERICA
[and STATE OF _____]

Plaintiffs,

Civil Action No. _____

v.

Defendants.

----- x

MODEL REMEDIAL DESIGN/REMEDIAL ACTION

CONSENT DECREE

(For Use with ~~September 2014~~ Model RD/RA Statement of Work)

September 2015

[Contains Minor Updates to Section VIII (Property Requirements) and other Provisions of 2014 CERCLA Model RD/RA CD]

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 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.

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I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9606 and 9607.

B. The United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (DOJ) for response actions at the _____ Superfund Site in [**City, State**] (“Site”), together with accrued interest; and (2) performance of response actions by the defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (NCP).

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of _____ (the “State”) on _____, 20____, of negotiations with potentially responsible parties (PRPs) regarding the implementation of the remedial design and remedial action (RD/RA) for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree (CD).

D. [The State has also filed a complaint against the defendants [**if Settling Federal Agencies, insert:** and the United States] in this Court alleging that the defendants [and Settling Federal Agencies (SFAs)] are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [**list state laws cited in the State’s complaint**], for: _____.]

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the [**insert name of relevant federal natural resource trustee(s)**] on _____, 20____, of negotiations with PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this CD.

F. The defendants that have entered into this CD (“Settling Defendants” or “SDs”) do not admit any liability to Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s], nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment. [SFAs do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim asserted by SDs [or any claim by the State].]

G. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List (NPL), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on _____, 20____, ___ Fed. Reg. _____.

NOTE: For Superfund Alternative Approach settlements, delete ¶ G.

H. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, EPA [or SDs, other PRPs at the Site, or the State] commenced on _____, 20____, a Remedial Investigation and Feasibility Study (RI/FS) for the Site pursuant to 40 C.F.R. § 300.430.

I. EPA [or SDs, other PRPs at the Site, or the State] completed a Remedial Investigation (RI) Report on _____, 20__, and EPA [or SDs, other PRPs at the Site, or the State] completed a Feasibility Study (FS) Report on _____, 20__.

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on _____, 20__, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator [or Regional delegatee, if any], EPA Region __, based the selection of the response action.

K. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision (“ROD”), executed on _____, 20__ [on which the State had a reasonable opportunity to review and comment/on which the State has given its concurrence.] The ROD includes [EPA’s explanation for any significant differences between the final plan and the proposed plan as well as] a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

L. Based on the information presently available to EPA [and the State], EPA [and the State] believe[s] that the Work will be properly and promptly conducted by SDs if conducted in accordance with this CD and its appendices.

M. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the remedy set forth in the ROD and the Work to be performed by SDs shall constitute a response action taken or ordered by the President for which judicial review shall be limited to the administrative record.

N. The Parties recognize, and the Court by entering this CD finds, that this CD has been negotiated by the Parties in good faith and implementation of this CD will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this CD is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. 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). This Court also has personal jurisdiction over SDs. Solely for the purposes of this CD and the underlying complaint[s], SDs waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. SDs shall not challenge the terms of this CD or this Court’s jurisdiction to enter and enforce this CD.

III. PARTIES BOUND

2. This CD is binding upon the United States [and the State] and upon SDs and their [heirs,] successors, and assigns. Any change in ownership or corporate or other legal status of a

SD including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such SD's responsibilities under this CD.

3. SDs shall provide a copy of this CD to each contractor hired to perform the Work and to each person representing any SD with respect to the Site or the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this CD. SDs or their contractors shall provide written notice of the CD to all subcontractors hired to perform any portion of the Work. SDs shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work in accordance with the terms of this CD. With regard to the activities undertaken pursuant to this CD, each contractor and subcontractor shall be deemed to be in a contractual relationship with SDs within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided in this CD, terms used in this CD 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 CD or its appendices, the following definitions shall apply solely for purposes of this CD:

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

"Affected Property" shall mean all real property at the Site and any other real property where EPA determines, at any time, that access, land, water, or other resource use restrictions, and/or ~~ICs~~Institutional Controls are needed to implement the Remedial Action, 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" or "CD" shall mean this consent decree and all appendices attached hereto (listed in Section XXIII). In the event of conflict between this CD and any appendix, this CD shall control.

"Day" or "day" shall mean a calendar day. In computing any period of time under this CD, 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 United States Department of Justice and its successor departments, agencies, or instrumentalities.

"Effective Date" shall mean the date upon which the approval of this CD is recorded on the Court's docket.

"EPA" shall mean the United States 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.

[“_____” shall mean the [insert name of State pollution control agency or environmental protection agency] and any successor departments or agencies of the State.]

NOTE: If EPA determines that it is appropriate for the CD to provide orphan share compensation through forgiveness of RD/RA oversight costs, insert the following “Future Oversight Costs” definition in addition to the standard “Future Response Costs” definition that follows and see ¶ 36 (Payments by SDs for Future Response Costs) to understand use of the terms in context.

“Future Oversight Costs” shall mean that portion of Future Response Costs that EPA incurs in monitoring and supervising SDs’ performance of the Work to determine whether such performance is consistent with the requirements of this CD, including costs incurred in reviewing deliverables submitted pursuant to this CD, as well as costs incurred in overseeing implementation of the Work; however, Future Oversight Costs do not include, *inter alia*: the costs incurred by the United States pursuant to ¶ 11 (Emergencies and Releases), Section VII (Remedy Review), Section VIII (Property Requirements), and ¶ 32 (Access to Financial Assurance), or the costs incurred by the United States in enforcing this CD, including all costs incurred pursuant to Section XIV (Dispute Resolution), and all litigation costs.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing deliverables submitted pursuant to this CD, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this CD, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to ¶ 11 (Emergencies and Releases), ¶ 12 (Community Involvement) (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), ¶ 32 (Access to Financial Assurance), Section VII (Remedy Review), Section VIII (Property Requirements) (including the cost of attorney time and any monies paid to secure access or enforce access or land, water, or other resource use restrictions and/or to secure, implement, monitor, maintain, or enforce Institutional Controls including the amount of just compensation), and Section XIV (Dispute Resolution), and all litigation costs. Future Response Costs shall also include all Interim Response Costs, [and] all Interest on those Past Response Costs SDs have agreed to pay under this CD that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from [insert the date identified in the Past Response Costs definition] to the Effective Date [include the following text if ATSDR is currently conducting activities or anticipates doing so in the future: , and Agency for Toxic Substances and Disease Registry (ATSDR) costs regarding the Site].

“Institutional Controls” or “ICs” shall mean Proprietary Controls and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that:

- (a) limit land, water, or other resource use to minimize the potential for human exposure to Waste Material at or in connection with the Site;
- (b) limit land, water, or other resource use to implement, ensure non-interference with, or ensure the protectiveness of the RA; and/or
- (c) provide information intended to modify or guide human behavior at or in connection with the Site.

“Interim Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, (a) paid by the United States in connection with the Site between **[insert the date identified in the Past Response Costs definition]** and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

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

NOTE: If the CD includes provisions under which SDs will receive disbursement from an EPA special account, keep the following three definitions. If it does not include a disbursement, but does require payments to be made to the Site’s Special Account, keep only the second definition.

“Interest Earned” shall mean interest earned on amounts in the **[Site name]** Disbursement Special Account, which shall be computed monthly at a rate based on the annual return on investments of the EPA Hazardous Substance Superfund. The applicable rate of interest shall be the rate in effect at the time the interest accrues.

“**[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 **[identify prior settlement under which EPA established the special account]**.

“**[Site name]** Disbursement 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 ¶ 42 (Creation of **[Site Name]** Disbursement Special Account).

NOTE: If including provisions for SDs and SFAs, if any, to prepay Future Response Costs in accordance with ¶ 36 (Payments by SDs for Future Response Costs), keep the following definition.

“**[Site name]** Future Response Costs 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 ¶ 36.a (Prepayment of Future Response Costs).

NOTE: If including ¶ 88.a(2) (MSW Waiver), keep the following definition.

“Municipal Solid Waste” or “MSW” shall mean waste material: (a) generated by a household (including a single or multifamily residence); or (b) generated by a commercial, industrial, or institutional entity, to the extent that the waste material (1) is essentially the same as waste normally generated by a household; (2) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (3) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

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

NOTE: Include next definition if any Affected Property is owned or controlled by persons other than any SD.

“Non-Settling Owner” shall mean any person, other than a SD, that owns or controls any Affected Property, including [insert names]. The clause “Non-Settling Owner’s Affected Property” means Affected Property owned or controlled by Non-Settling Owner.

“Operation and Maintenance” or “O&M” shall mean all activities required to operate, maintain, and monitor the effectiveness of the RA as specified in the SOW or any EPA-approved O&M Plan.

NOTE: Include next definition if some or all of the “Affected Property” is owned or controlled by any SD.

“Owner SD” shall mean any SD that owns or controls any Affected Property, including [insert names]. The clause “Owner SD’s Affected Property” means Affected Property owned or controlled by Owner SD.

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

“Parties” shall mean the United States [, the State of _____,] and SDs.

“Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through [insert the date of the most recent cost update], plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

“Performance Standards” or “PS” shall mean the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the ROD.

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

“Proprietary Controls” shall mean easements or covenants running with the land that (a) limit land, water, or other resource use and/or provide access rights and (b) are created pursuant to common law or statutory law by an instrument that is recorded in the appropriate land records office.

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

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the [Site or Operable Unit at the Site] signed on _____, 20__, by the Regional Administrator, EPA Region __, or his/her delegate, and all attachments thereto. The ROD is attached as Appendix A.

NOTE: Modify ROD definition to reference any ROD Amendments or any Explanations of Significant Differences issued prior to the Effective Date.

“Remedial Action” or “RA” shall mean the remedial action selected in the ROD.

“Remedial Design” or “RD” shall mean those activities to be undertaken by SDs to develop final plans and specifications for the RA as stated in the SOW.

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

“Settling Defendants” or “SDs” shall mean those Parties identified in Appendix D.

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

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

“Site” shall mean the _____ Superfund Site, [encompassing approximately __ acres, located at [address or description of location] in [city], _____ County, [state], and depicted generally on the map attached as Appendix C.]

NOTE: The definition of “Site” affects the scope of the covenants not to sue. The definition should conform with the intended scope of the covenants and the general reservations provided in Section XVI (Covenants by Plaintiff[s]).

NOTE: Definitions relating to Special Accounts are located after “Interest Earned” above.

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

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

“Statement of Work” or “SOW” shall mean the document describing the activities SDs must perform to implement the RD, the RA, and O&M regarding the Site, which is attached as Appendix B.

“Supervising Contractor” shall mean the principal contractor retained by SDs to supervise and direct the implementation of the Work under this CD.

“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.

NOTE: Substitute the following definition of “Tribe” for the definition of “State” if the Site is entirely on tribal land. Add a definition for “Tribe” in addition to the definition of “State” if both have a role at or interest in the Site. Additional changes will be needed throughout the CD to either add and/or substitute the Tribe for the State.

“Tribe” shall mean ~~an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian~~ _____ Tribe.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA, [the SFAs,] [and any federal natural resource trustee].

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any [“hazardous material”] under [**insert appropriate State statutory terminology and citation**].

“Work” shall mean all activities and obligations SDs are required to perform under this CD, except the activities required under Section XX (Retention of Records).

V. GENERAL PROVISIONS

5. **Objectives of the Parties.** The objectives of the Parties in entering into this CD are to protect public health or welfare or the environment by the design and implementation of response actions at the Site by SDs, to pay response costs of Plaintiff[s], and to resolve the claims of Plaintiff[s] against SDs [**if SFAs, insert:** and the claims of the [State and] SDs that have been or could have been asserted against the United States with regard to this Site] as provided in this CD.

6. Commitments by SDs [and SFAs].

a. SDs shall finance and perform the Work in accordance with this CD and all deliverables developed by SDs and approved or modified by EPA pursuant to this CD. SDs shall pay the United States for its response costs [and the State for its response costs] as provided in this CD. [SFAs shall pay EPA for its response costs, [the State for its response costs,] [and SDs for their response costs,] as provided in this CD.]

b. SDs’ obligations to finance and perform the Work, including obligations to pay amounts due under this CD, are joint and several. In the event of the insolvency of any SD or the failure by any SD to implement any requirement of this CD, the remaining SDs shall complete all such requirements.

7. **Compliance with Applicable Law.** Nothing in this CD limits SDs’ obligations to comply with the requirements of all applicable federal and state laws and regulations. SDs must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this CD, if approved by EPA, shall be deemed to be consistent with the NCP as provided in Section 300.700(c)(3)(ii) of the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, SDs shall

submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. SDs may seek relief under the provisions of Section XIII (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in ¶ 8.a and required for the Work, provided that they have submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.

c. This CD is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

VI. PERFORMANCE OF THE WORK

9. Coordination and Supervision.

a. Project Coordinators.

(1) SDs' Project Coordinator must have sufficient technical expertise to coordinate the Work. SDs' Project Coordinator may not be an attorney representing any SD in this matter and may not act as the Supervising Contractor. SDs' Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.

(2) EPA shall designate and notify the SDs of ~~its~~EPA's Project Coordinator[s] and Alternate Project Coordinator[s]. EPA may designate other representatives, which may include its employees, contractors and/or consultants, to oversee the Work. EPA's Project Coordinator/Alternate Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the NCP. This includes the authority to halt the Work and/or to conduct or direct any necessary response action when he or she determines that conditions at the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material.

(3) [The State shall designate and notify EPA and the SDs of its Project Coordinator[s] and Alternate Project Coordinator[s]. The State may designate other representatives, including its employees, contractors and/or consultants to oversee the Work. For any meetings and inspections in which EPA's Project Coordinator participates, the State's Project Coordinator also may participate. SDs shall notify the State reasonably in advance of any such meetings or inspections.]

(4) SDs' Project Coordinators shall meet with EPA's [and the State's] Project Coordinator[s] at least [monthly].

b. **Supervising Contractor.** SDs' proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system that complies with ANSI/ASQC E4-2004, Quality Systems for Environmental Data and Technology Programs: Requirements with Guidance for Use (American National Standard).

c. Procedures for Disapproval/Notice to Proceed.

(1) SDs shall designate, and notify EPA, within [10] days after the Effective Date, of the name[s], contact information, and qualifications of the SDs' proposed Project Coordinator and Supervising Contractor.

(2) EPA, after a reasonable opportunity for review and comment by the State, shall issue notices of disapproval and/or authorizations to proceed regarding the proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval, SDs shall, within [30] days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. EPA shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. SDs may select any coordinator/contractor covered by an authorization to proceed and shall, within [21] days, notify EPA of SDs' selection.

(3) SDs may change their Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of ¶¶ 9.c(1) and 9.c(2).

NOTE: Include ¶ 9.c(4) if EPA has already accepted SDs' Project Coordinator/Supervising Contractor.

(4) Notwithstanding the procedures of ¶¶ 9.c(1) through 9.c(3), SDs have proposed, and EPA has authorized SDs to proceed, regarding the following Project Coordinator and Supervising Contractor: [**name and contact information**].

10. **Performance of Work in Accordance with SOW.** SDs shall: (a) develop the RD; (b) perform the RA; and (c) operate, maintain, and monitor the effectiveness of the RA; all in accordance with the SOW and all EPA-approved, conditionally-approved, or modified deliverables as required by the SOW. All deliverables required to be submitted for approval under the CD or SOW shall be subject to approval by EPA in accordance with ¶ [7.6] (Approval of Deliverables) of the SOW.

11. **Emergencies and Releases.** SDs shall comply with the emergency and release response and reporting requirements under ¶ [4.4] (Emergency Response and Reporting) of the SOW. Subject to Section XVI (Covenants by Plaintiff[s]), nothing in this CD, including ¶ [4.4] of the SOW, limits any authority of Plaintiff[s]: (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site. If, due to SDs' failure to take appropriate response action under ¶ [4.4] of the SOW, EPA [or, as appropriate, the State] take[s] such action instead, SDs shall reimburse EPA [and the State] under Section X (Payments for Response Costs) for all costs of the response action.

12. **Community Involvement.** If requested by EPA, SDs shall conduct community involvement activities under EPA's oversight as provided for in, and in accordance with, [Section \[2\] \(Community Involvement\)](#) of the SOW. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator [**insert, if provided for in the SOW**: and implementation of a technical assistance plan]. Costs incurred by the United States

under this Section constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

13. Modification of SOW or Related Deliverables.

a. If EPA determines that it is necessary to modify the work specified in the SOW and/or in deliverables developed under the SOW in order to achieve and/or maintain the Performance Standards or to carry out and maintain the effectiveness of the RA, and such modification is consistent with the Scope of the Remedy set forth in ¶ [1.3] of the SOW, then EPA may notify SDs of such modification. If SDs object to the modification they may, within 30 days after EPA's notification, seek dispute resolution under Section XIV.

b. The SOW and/or related work plans shall be modified: (1) in accordance with the modification issued by EPA; or (2) if SDs invoke dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this CD, and SDs shall implement all work required by such modification. SDs shall incorporate the modification into the deliverable required under the SOW, as appropriate.

c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this CD.

14. Nothing in this CD, the SOW, or any deliverable required under the SOW constitutes a warranty or representation of any kind by Plaintiff[s] that compliance with the work requirements set forth in the SOW or related deliverable will achieve the Performance Standards.

VII. REMEDY REVIEW

NOTE: Include ¶ 15 in all CDs. Include ¶¶ 16-19 if the CD addresses the sole or final OU at the Site (i.e., if it grants a "Site" covenant subject to the "standard reopeners" regarding new information/unknown conditions under ¶¶ 77-78). However, ¶¶ 18 and 19 may be omitted for SDs: (i) whose liability has been established by court order or judgment; or (ii) who agree to admit or not to contest liability in the event that the United States institutes an action for further relief under the standard reopeners.

15. **Periodic Review.** SDs shall conduct, in accordance with ¶ [~~7.7(k)~~4.8] (Periodic Review Support Plan) of the SOW, studies and investigations to support EPA's reviews under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and applicable regulations, of whether the RA is protective of human health and the environment.

16. **EPA Selection of Further Response Actions.** If EPA determines, at any time, that the RA is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

17. **Opportunity to Comment.** SDs and, if required by Sections 113(k)(2) or 117 of CERCLA, 42 U.S.C. § 9613(k)(2) or 9617, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

18. **SDs' Obligation to Perform Further Response Actions.** If EPA selects further response actions relating to the Site, EPA may require SDs to perform such further response actions, but only to the extent that the reopener conditions in ¶ 77 or 78 (United States' Pre- and Post-Certification Reservations) are satisfied. SDs may invoke the procedures set forth in Section XIV (Dispute Resolution) to dispute (a) EPA's determination that the reopener conditions of ¶ 77 or 78 are satisfied, (b) EPA's determination that the RA is not protective of human health and the environment, or (c) EPA's selection of the further response actions. Disputes regarding EPA's determination that the RA is not protective or EPA's selection of further response actions shall be resolved pursuant to ¶ 60 (Record Review).

19. **Submission of Plans.** If SDs are required to perform further response actions pursuant to ¶ 18, they shall submit a plan for such response action to EPA for approval in accordance with the procedures of Section VI (Performance of the Work by SDs). SDs shall implement the approved plan in accordance with this CD.

VIII. PROPERTY REQUIREMENTS

NOTE: ~~Include ¶ if Proprietary Controls (PCs) are required as part of the RA.~~ NOTE: Here and in other places in this Section, optional text to be used if there is an Owner SD is set off in brackets.

20. **Agreements Regarding Access and Non-Interference.** SDs shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by SDs and by Plaintiff[s], providing that such Non-Settling Owner [, and Owner SD shall, with respect to Owner SD's Affected Property]: (i) provide Plaintiff[s] and the other SDs, and their representatives, contractors, and subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the CD, including those listed in ¶ 20.a (Access Requirements); and (ii) refrain from using such Affected Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action [**use if applicable:** , including the restrictions listed in ¶ 20.b (Land, Water, or Other Resource Use Restrictions)].

a. **Access Requirements.** The following is a list of activities for which access is required regarding the Affected Property:

NOTE: Augment this list as appropriate.

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States
[or the State];
- (3) Conducting investigations regarding contamination at or near the
Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional
response actions at or near the Site;

(6) Assessing implementation of quality assurance and quality control practices as defined in the approved construction quality assurance quality control plan as provided in the SOW;

(7) Implementing the Work pursuant to the conditions set forth in ¶ 81 (Work Takeover);

~~(7)~~(8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by SDs or their agents, consistent with Section XIX (Access to Information);

~~(8)~~(9) Assessing SDs' compliance with the CD;

~~(9)~~(10) 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 CD; and

(11) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions [if applicable: and Institutional Controls].

NOTE: Include ¶ 20.b if land, water, or other resource use restrictions are needed.

b. **Land, Water, or Other Resource Use Restrictions.** The following is a list of land, water, or other resource use restrictions applicable to the Affected Property:

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

(1) Prohibiting the following activities that could interfere with the RA: _____;

~~(1)~~(2) Prohibiting use of contaminated groundwater;

(3) Prohibiting the following activities that could result in exposure to contaminants in subsurface soils and groundwater: _____;

(4) Ensuring that any new structures on the Site will not be constructed in the following manner that could interfere with the RA: _____; and

(5) Ensuring that any new structures on the Site will be constructed in the following manner that will minimize potential risk of inhalation of contaminants: _____.

NOTE: Include ¶ 21 if Proprietary Controls (PCs) are required under the RA. If implementation, maintenance, and enforcement of PCs is likely to be complicated or time-consuming, it is recommended that they be implemented pursuant to an "Institutional Controls Implementation and Assurance Plan" (ICIAP) as part of the SOW, rather than under this Section, and that ¶ 21. In that case ¶¶ and can be omitted be omitted. The RPM may consider including ¶ 21's provisions in the ICIAP, including the requirement to use best efforts (as defined in ¶ 22) to secure Non-Settling Owner's cooperation in executing and recording PCs.

20.21. Proprietary Controls. SDs shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure Non-Settling Owner's cooperation in executing and recording [; and Owner SD shall, with respect to Owner SD's Affected Property, execute and record], in accordance with the procedures of this ¶ 21, Proprietary Controls that: (i) grant a right of access to conduct any activity regarding the CD, including those activities listed in ¶ 20.a (Access Requirements); and (ii) grant the right to enforce the land, water, or other resource use restrictions set forth in ¶ 20.b (Land, Water, or Other Resource Use Restrictions).

a. ~~Access Requirements.~~ The following is a list of activities for which access is required regarding the Affected Property:

~~NOTE: Augment this list as appropriate.~~

- ~~(1) Monitoring the Work;~~
- ~~(2) Verifying any data or information submitted to the United States [for the State];~~
- ~~(3) Conducting investigations regarding contamination at or near the Site;~~
- ~~(4) Obtaining samples;~~
- ~~(5) Assessing the need for, planning, or implementing additional response actions at or near the Site;~~
- ~~(6) Assessing implementation of quality assurance and quality control practices as defined in the approved construction quality assurance quality control plan as provided in the SOW;~~
- ~~(7) Implementing the Work pursuant to the conditions set forth in ¶ (Work Takeover);~~
- ~~(8)(7) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by SDs or their agents, consistent with Section XIX (Access to Information);~~
- ~~(9)(8) Assessing SDs' compliance with the CD;~~
- ~~(10)(9) 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 CD; and~~

~~Implementing, monitoring, maintaining, reporting on, and enforcing any Institutional Controls;~~

b. ~~Land, Water, or Other Resource Use Restrictions.~~ The following is a list of land, water, or other resource use restrictions applicable to the Affected Property:

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

- ~~(1) Prohibiting the following activities which could interfere with the RA: _____;~~

~~(2)(1) 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 Site will not be constructed in the following manner which could interfere with the RA: _____; and~~

~~(5) Ensuring that any new structures on the Site will be constructed in the following manner which will minimize potential risk of inhalation of contaminants: _____.~~

c. **Grantees.** The Proprietary Controls must be granted to one or more of the following persons and their representatives, as determined by EPA: the United States, the State, SDs, ~~Owner SDs, if any,~~ and other appropriate grantees. Proprietary Controls in the nature of a Uniform Environmental Covenants Act (UECA) document granted to persons other than the United States must include a designation that [for UECA states: EPA (and/or the State as appropriate) is either an “agency” or a party] [for non-UECA states: EPA (and/or the State as appropriate) is a “third-party beneficiary”] expressly granted the right of access and the right to enforce the covenants ~~[for non-UECA states: a “third-party beneficiary”]~~ allowing EPA [and/or the State] to maintain the right to enforce the Proprietary Controls without acquiring an interest in real property.

NOTE: “Agency” is a defined term in the statutes of states that have adopted UECA. For UECA states that have defined “agency” to exclude EPA (such as Delaware) and non-UECA states, the case team can usually substitute the term “third-party beneficiary.” However, the case team should review state law to make sure that the term used will ensure that the United States will acquire the rights it needs, i.e., access and rights to enforce land use restrictions that are not real property interests, but that, similar to real property interests, run with the land and are enforceable against both present and future owners. If the interest EPA needs cannot be acquired through being designated as a third-party beneficiary, then it may be necessary for EPA to acquire an interest in real property. See the following note. For more specific information, see “Institutional Controls: Third Party Beneficiary Rights in Proprietary Controls” (Apr. 19, 2004), available at <http://www2.epa.gov/enforcement/guidance-third-party-beneficiary-rights-proprietary-institutional-controls>.

NOTE: EPA prefers that the PCs be prepared so that the United States does not acquire an interest in real property. If the PCs grant an interest in real property to the United States, such as a right of access or the right to enforce land use restrictions, 40 U.S.C. § 3111 mandates that the conveyance documents and the title evidence be reviewed and approved, prior to recording, by the Attorney General (or his/her delegatee). Guidance on this title review process may be obtained from the Title Unit, Land Acquisition Section, Environment and Natural Resources Division (ENRD), DOJ, at 202-305-0316. When the PCs grant an interest in real property to any person other than the United States, but also give the United States, and perhaps others, rights, such as the right to enforce PCs that are defined as not being an interest in real property (as is often the structure found in state versions of UECA, and as may be the effect in non-UECA instruments designating the United States, and perhaps others, as “third-party beneficiaries”), the mandate of 40 U.S.C.

§ 3111 for the review of the title by the Attorney General does not apply. However, EPA should conduct its own title review. The interest EPA acquires is not an interest in real property by definition in UECA, but it functions like an interest in real property, so it is essential that a title review be conducted to determine that the rights have been properly created so as to be enforceable under the applicable state UECA law, and so that liens and encumbrances that could defeat or interfere with the EPA interest are identified and released, subordinated, or otherwise addressed prior to EPA acquiring its interest. Furthermore, CERCLA § 104(j), 42 U.S.C. § 9604(j), requires that the State accept transfer of the property interest following completion of the RA. If the State will not provide the essential cooperation required under Section 104(j), then the PCs must be prepared so that the United States will not acquire an interest in real property.

d. **Initial Title Evidence.** ~~SDs [and Owner SD, as applicable,]~~SDs shall, within [45] days after the Effective Date:

(1) **Record Title Evidence.** Submit to EPA a title insurance commitment or other title evidence acceptable to EPA that: (i) names the proposed insured or the party in whose favor the title evidence runs, or the party who will hold the real estate interest, or if that party is uncertain, names the United States, the State, the SD, or “To Be Determined;” (ii) covers the Affected Property that is to be encumbered; (iii) demonstrates that the person or entity that will execute and record the Proprietary Controls is the owner of such Affected Property; (iv) identifies all record matters that affect title to the Affected Property, including all prior liens, claims, rights (such as easements), mortgages, and other encumbrances (collectively, “Prior Encumbrances”); and (v) includes complete, legible copies of such Prior Encumbrances; and

(2) **Non-Record Title Evidence.** Submit to EPA a report of the results of an investigation, including a physical inspection of the Affected Property, which identifies non-record matters that could affect the title, such as unrecorded leases or encroachments.

NOTE: For general guidance on both record and non-record forms of title evidence acceptable to the United States, see the U.S. Department of Justice Title Standards 2001, available at http://www.justice.gov/enrd/Current_topics.html.

e. **Release or Subordination of Prior Liens, Claims, and Encumbrances.**

(1) ~~SDs [and Owner SD]~~ shall secure the release, subordination, modification, or relocation of all Prior Encumbrances on the title to the Affected Property revealed by the title evidence or otherwise known to ~~the SDs [or Owner SD, as applicable]~~any SD, unless EPA waives this requirement as provided under ¶¶ 20.e21.c(2)-(4).

(2) ~~SDs [and Owner SD]~~ may, by the deadline under ¶ 21.b, (Initial Title Evidence), submit an initial request for waiver of the requirements of ¶ 21.c(1) regarding one or more Prior Encumbrances, on the grounds that such Prior Encumbrances cannot defeat or adversely affect the rights to be granted by the Proprietary Controls and cannot interfere with the remedy or result in unacceptable exposure to Waste Material.

(3) SDs ~~{and Owner SD}~~ may, within [90] days after the Effective Date, or if an initial waiver request has been filed, within [45] days after EPA's determination on the initial waiver request, submit a final request for a waiver of the requirements of ¶ 21.c(1) regarding any particular Prior Encumbrance on the grounds that SDs ~~{or Owner SD, as applicable,}~~ could not obtain the release, subordination, modification, or relocation of such Prior Encumbrance despite best efforts.

NOTE: Paragraph 21.c provides for an “initial” waiver request that addresses the issue of whether the Prior Encumbrance can adversely affect the PC, and then a “final” waiver request that addresses the issue of whether SDs used best efforts. This is intentional and is for the purpose of streamlining and expediting the process. If the SDs demonstrate to EPA that a particular Prior Encumbrance will not adversely affect the PC, then SDs do not need to expend further time and effort to secure the release of such Prior Encumbrance.

(4) The initial and final waiver requests must include supporting evidence including descriptions of and copies of the Prior Encumbrances and maps showing areas affected by the Prior Encumbrances. The final waiver request also must include evidence of efforts made to secure release, subordination, modification, or relocation of the Prior Encumbrances.

(5) SDs ~~{and Owner SD}~~ shall complete ~~its~~ ~~{their}~~ obligations under ¶ 21.c(1) regarding all Prior Encumbrances: within [180] days after the Effective Date; or if an initial waiver request has been filed, within [135] days after EPA's determination on the initial waiver request; or if a final waiver request has been filed, within [90] days after EPA's determination on the final waiver request.

f. Update to Title Evidence and Recording of Proprietary Controls.

(1) ~~SDs {and Owner SD, as applicable}~~SDs shall submit to EPA for review and approval, by the deadline specified in ¶ 21.c(5), all draft Proprietary Controls and draft instruments addressing Prior Encumbrances. [The Proprietary Controls must be in substantially the form attached hereto as Appendix E.]

(2) Upon EPA's approval of the proposed Proprietary Controls and instruments addressing Prior Encumbrances, SDs ~~{and Owner SD, as applicable}~~ shall, within [15] days, update the original title insurance commitment (or other evidence of title acceptable to EPA) under ¶ 21.b, (Initial Title Evidence). If the updated title examination indicates that no liens, claims, rights, or encumbrances have been recorded since the effective date of the original commitment (or other title evidence), SDs ~~{and Owner SD}~~ shall secure the immediate recordation of the Proprietary Controls and instruments addressing Prior Encumbrances in the appropriate land records. Otherwise, SDs ~~{and Owner SD}~~ shall secure the release, subordination, modification, or relocation under ¶ 21.c(1), or the waiver under ¶¶ 21.c(2)-(4), regarding any newly-discovered liens, claims, rights, and encumbrances, prior to recording the Proprietary Controls and instruments addressing Prior Encumbrances.

NOTE: The appropriate land records are most commonly in the county(ies) where the Affected Property is located.

(3) If SDs submitted a title insurance commitment under ¶ 21.b(1), (Record Title Evidence), then upon the recording of the Proprietary Controls and instruments addressing Prior Encumbrances, SDs ~~[and Owner SD, as applicable]~~ shall obtain a title insurance policy that: (i) is consistent with the original title insurance commitment; (ii) is for \$100,000 or other amount approved by EPA; (iii) is issued to the United States, SDs, or other person approved by EPA; and (iv) is issued on a current American Land Title Association (ALTA) form [**in Texas**: “Texas Land Title Association (TLTA) form”] or other form approved by EPA.

NOTE: The \$100,000 amount of the title insurance coverage in the policy was selected by EPA as appropriate and adequate. If there are questions or concerns the case team may consult with the Civil Rights and Finance Law Office of EPA’s Office of General Counsel, 202-564-5461, concerning this issue.

(4) ~~SDs [and Owner SD, as applicable]~~SDs shall, within [30] days after recording the Proprietary Controls and instruments addressing Prior Encumbrances, or such other deadline approved by EPA, provide to the United States and to all grantees of the Proprietary Controls: (i) certified copies of the recorded Proprietary Controls and instruments addressing Prior Encumbrances showing the clerk’s recording stamps; and (ii) the title insurance policy(ies) or other approved form of updated title evidence dated as of the date of recording of the Proprietary Controls and instruments.

g. SDs shall monitor, maintain, enforce, and [annually] report on all Proprietary Controls required under this CD.

NOTE: Include ¶ if there is an Owner SD.

~~h. — [Owner SD shall not Transfer its Affected Property until it has executed and recorded all Proprietary Controls and instruments addressing Prior Encumbrances regarding such Affected Property in accordance with this ¶.]~~

NOTE: PCs, which “run with the land,” are preferred over agreements regarding access and restricted use. If the case team is confident that the PCs will be implemented by the time that access or non-interference will be needed, ¶ may be deleted. Otherwise, keep ¶. If the case team intends to delete ¶ (for example, if SDs will implement ICs under an ICIAP under the SOW), but keep ¶, insert ¶¶ and after ¶ (the ¶’s will renumber automatically), and delete the rest of ¶.

~~21. — **Agreements Regarding Access and Non-Interference.**~~

~~a. — SDs shall, with respect to any Non-Settling Owner’s Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by SDs and by Plaintiff[s], providing that such Non-Settling Owner [, and Owner SD shall, with respect to Owner SD’s Affected Property]:~~

~~(1) — Provide Plaintiff[s] and the other SDs, and their representatives, contractors, and subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the CD, including those listed in ¶ (Access Requirements); and~~

~~(2) — Refrain from using such 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 Waste Material, or (ii) interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action. The restrictions include those listed in ¶ (Land, Water, or Other Resource Use Restrictions).~~

NOTE: Include ¶ if there is an Owner SD.

~~b. — [Owner SD shall not Transfer its Affected Property without first securing EPA’s approval of, and transferee’s consent to, an agreement that: (i) is enforceable by SDs and Plaintiff[s]; and (ii) requires the transferee to provide access to and to refrain from using the Affected Property to the same extent as is provided under ¶.]~~

22. **Best Efforts.** As used in this Section, “best efforts” means the efforts that a reasonable person in the position of SDs ~~[and Owner SD, as applicable,]~~ would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restriction agreements [include if PCs: Proprietary Controls, agreements, releases, subordinations, modifications, or relocations of Prior Encumbrances that affect the title to the Affected Property, as applicable.]. If SDs ~~[and Owner SD, as applicable,]~~ are unable to accomplish what is required through “best efforts” in a timely manner, they shall notify the United States [EPA], and include a description of the steps taken to comply with the requirements. If the United States deems it appropriate, it may assist SDs ~~[or Owner SDs],~~ or take independent action, in obtaining such access and/or use restrictions [include if PCs: Proprietary Controls, agreements, releases, subordinations, modifications, or relocations of Prior Encumbrances that affect the title to the Affected Property, as applicable.]. All costs incurred by the United States in providing such assistance or taking such action, including the cost of attorney time and the amount of monetary consideration or just compensation paid, constitute Future Response Costs to be reimbursed under Section X (Payments for Response Costs).

NOTE: Include ¶ 23 if there is an Owner SD.

23. [Owner SD shall not Transfer its Affected Property unless it has: (a) first secured EPA’s approval of, and transferee’s consent to, an agreement that: (i) is enforceable by SDs and Plaintiff[s]; and (ii) requires the transferee to provide access to and to refrain from using the Affected Property to the same extent as is provided under ¶ 20.a (Access Requirements) and ¶ 20.b (Land, Water, or Other Resource Use Restrictions) [include if PCs: ; and (b) executed and recorded all Proprietary Controls and instruments addressing Prior Encumbrances regarding such Affected Property in accordance with ¶ 21 (Proprietary Controls).]

23.24. 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, SDs shall cooperate with EPA’s [and the State’s] efforts to secure and ensure compliance with such Institutional Controls.

NOTE: Include ¶ 25 (Notice to Successors-in-Title) if there is an Owner SD, no PCs have been recorded on the Affected Property, and the case team believes no PCs will be recorded on the Affected Property within a year after the Effective Date. In the absence of PCs, these

requirements will put potential buyers on notice that the property is part of, or related to, the Site.

24.25. [Notice to Successors-in-Title.

a. Owner SD shall, within 15 days after the Effective Date, submit for EPA approval a notice to be filed regarding Owner SD's 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 has selected a remedy for the Site; and (iii) that potentially responsible parties have entered into a CD requiring implementation of such remedy; and (3) identify the U.S. District Court in which the CD was filed, the name and civil action number of this case, and the date the CD was entered by the Court. Owner SD 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.

b. Owner SD shall, prior to entering into a contract to Transfer Owner SD's Affected Property, or 60 days prior to Transferring Owner SD's Affected Property, whichever is earlier:

(1) Notify the proposed transferee that EPA has selected a remedy regarding the Site, that potentially responsible parties have entered into a Consent Decree requiring implementation of such remedy, and that the United States District Court has entered the CD (identifying the name and civil action number of this case and the date the CD was entered by the Court); and

(2) Notify EPA [and the State] of the name and address of the proposed transferee and provide EPA [and the State] with a copy of the notice that it provided to the proposed transferee.]

25.26. In the event of any Transfer of the Affected Property, unless the United States otherwise consents in writing, SDs shall continue to comply with their obligations under the CD, including their obligation to ~~provide and/or secure access, and ensure compliance with any land, water, or other resource use restrictions regarding the Affected Property [include if ICs: , and to implement, maintain, monitor, and report on Institutional Controls, and to abide by such Institutional Controls.].~~

26.27. Notwithstanding any provision of the CD, Plaintiff[s] retain[s] all of its [their] access authorities and rights, as well as all of its [their] rights to require land, water, or other resource use restrictions and Institutional Controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

IX. FINANCIAL ASSURANCE

NOTES ON ¶¶ 28 AND 29: Case teams should negotiate and finalize the form, substance, and value of SDs' financial assurance well before the lodging of the CD so that the final financial assurance mechanism can take effect within 30 days after the Effective Date. Such review should ensure, among other things, that an instrument or account is established (or can be established) to receive financial assurance resources when needed. Case teams should also ensure that entities providing a demonstration or guarantee pursuant to ¶ 28.e

or ¶ 28.f have: (1) submitted all required documentation well in advance of the lodging of the CD so that EPA can determine whether such financial assurance is adequate; and (2) fully and accurately reflected in their submission all of their financial assurance or “performance guarantee” obligations (under CERCLA, RCRA, the Underground Injection Control Program, the Toxic Substances Control Act, and any other federal, state, or tribal environmental obligation) to the United States or other governmental entities so all such obligations have been properly accounted for in determining whether any such entity meets the financial test criteria. When reviewing which of the permissible financial assurance mechanisms set forth in ¶ 28 may be appropriate for inclusion in the CD, case teams should consider, as part of the facts and circumstances of each case, the estimated cost of the Work to be performed, the estimated time to complete the Work, the nature and extent of contamination at the Site, the financial health of the SDs, and the industry sector(s) in which the SDs operate. The Regions have discretion, for example, to require that SDs provide the financial assurance through a liquid mechanism rather than through a demonstration or guarantee pursuant to ¶ 28.e or 28.f. If an SD is a municipality, contact financial assurance team members within the Office of Site Remediation Enforcement for assistance.

NOTE FOR SETTLEMENTS USING THE SUPERFUND ALTERNATIVE APPROACH (“SA Approach”): Superfund Trust Fund monies cannot be used for remedial actions at sites not listed on the NPL. Therefore, for CDs using the SA Approach, case teams should ensure that parties provide an amount of the financial assurance through one or more liquid mechanism(s) at least equal to the amount of funds estimated to be necessary to keep cleanup work going through the listing process, in the event the Site needs to be listed. Based on case-specific circumstances, case teams may require SDs to provide liquid financial assurance mechanism(s) for the entire amount of the Estimated Cost of the Work. Acceptable liquid financial assurance instruments include those listed at ¶¶ 28.a through 28.d. For more specific information, see “Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach,” OSWER 9200.2-125 (Sep. 28, 2012), available at <http://www2.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>.

27-28. In order to ensure completion of the Work, SDs shall secure financial assurance, initially in the amount of \$[_____] (“Estimated Cost of the Work”), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from the “Financial Assurance” category on the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. SDs may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

a. A surety bond guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;

e. A demonstration by one or more SDs that each such SD meets the relevant financial test criteria of 40 C.F.R. § 264.143(f) and reporting requirements of this Section for the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee [, accompanied by a standby funding commitment, which obligates SDs to pay funds to or at the direction of EPA, up to the amount financially assured through the use of this demonstration in the event of a Work Takeover]; or

NOTE: A sample of a standby funding commitment is available via the link in ¶ ~~27~~28.

f. A guarantee to fund or perform the Work executed in favor of EPA by one of the following: (1) a direct or indirect parent company of a SD; or (2) a company that has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with a SD; provided, however, that any company providing such a guarantee must demonstrate to EPA’s satisfaction that it meets the relevant financial test criteria of 40 C.F.R. § 264.143(f) and reporting requirements of this Section for the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee.

~~28.29.~~ **[If the case team and the SDs have already negotiated the form of the FA, use this text:** SDs have selected, and EPA has found satisfactory, as an initial financial assurance a **[insert type]** in the form attached as Appendix __. Within 30 days after the Effective Date, SDs shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the form of financial assurance attached as Appendix __]

[Otherwise, use this text: SDs have selected, and EPA has found satisfactory, as an initial financial assurance a **[insert type]** prepared in accordance with ¶ 28. Within 30 days after the Effective Date, or 30 days after EPA’s approval of the form and substance of SDs’ financial assurance, whichever is later, SDs shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance]

[Keep following text with either option] and shall submit such mechanisms and documents to the **[insert “Regional Financial Management Officer” or an alternative recipient such as “Regional financial assurance specialist”]**, to the United States, and to EPA [and the State] as specified in Section XXI (Notices and Submissions).

~~29.30.~~ If SDs provide financial assurance by means of a demonstration or guarantee under ¶ 28.e or 28.f, the affected SDs shall also comply and shall ensure that their guarantors comply with the other relevant criteria and requirements of 40 C.F.R. § 264.143(f) and this Section, including, but not limited to: (a) the initial submission to EPA of required documents

from the affected entity's chief financial officer and independent certified public accountant no later than 30 days after the Effective Date; (b) the annual resubmission of such documents within 90 days after the close of each such entity's fiscal year; and (c) the notification of EPA no later than 30 days, in accordance with ¶ 31, after any such entity determines that it no longer satisfies the relevant financial test criteria and requirements set forth at 40 C.F.R. § 264.143(f)(1). SDs agree that EPA may also, based on a belief that an affected entity may no longer meet the financial test requirements of ¶ 28.e or 28.f, require reports of financial condition at any time from such entity in addition to those specified in this Paragraph. For purposes of this Section, references in 40 C.F.R. Part 264, Subpart H, to: (1) the terms "current closure cost estimate," "current post-closure cost estimate," and "current plugging and abandonment cost estimate" include the Estimated Cost of the Work; (2) the phrase "the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates" includes the sum of all environmental obligations (including obligations under CERCLA, RCRA, and any other federal, state, or tribal environmental obligation) guaranteed by such company or for which such company is otherwise financially obligated in addition to the Estimated Cost of the Work under this CD; (3) the terms "owner" and "operator" include each SD making a demonstration or obtaining a guarantee under ¶ 28.e or 28.f; and (4) the terms "facility" and "hazardous waste management facility" include the Site.

~~30.31.~~ 31. SDs shall diligently monitor the adequacy of the financial assurance. If any SD becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, such SD shall notify EPA of such information within [7] days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the affected SD of such determination. SDs shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for the affected SD, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed [60] days. SDs shall follow the procedures of ¶ 33 (Modification of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. SDs' inability to secure and submit to EPA financial assurance in accordance with this Section shall in no way excuse performance of any other requirements of this CD, including, without limitation, the obligation of SDs to complete the Work in accordance with the terms of this CD.

NOTE REGARDING ¶ 32 (Access to Financial Assurance): Case teams should make sure that the "trigger" for obtaining funds and/or work under the financial assurance mechanism is consistent with the trigger in the CD, e.g., if the CD allows EPA to access the funds in the event of a Work Takeover or an SD's failure to provide alternative financial assurance 30 days prior to an impending mechanism cancellation, the mechanism should contain equivalent language.

~~31.32.~~ 32. **Access to Financial Assurance.**

a. If EPA issues a notice of implementation of a Work Takeover under ¶ 81.b, then, in accordance with any applicable financial assurance mechanism [**if a standby**

funding commitment requirement is included in ¶ 28.e, insert: and/or related standby funding commitment], EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with ¶ ~~31~~32.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel such mechanism, and the affected SD fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ ~~31~~32.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 81.b, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism [and/or related standby funding commitment], whether in cash or in kind, to continue and complete the Work; or (2) the financial assurance is provided under ¶ 28.e or 28.f, then EPA may demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. SDs shall, within ___ days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this ¶ 32 shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the [Site name] Special Account within the EPA Hazardous Substance Superfund 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.

e. All EPA Work Takeover costs not paid under this ¶ 32 must be reimbursed as Future Response Costs under Section X (Payments for Response Costs).

~~32.33.~~ **Modification of Amount, Form, or Terms of Financial Assurance.** SDs may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with ¶ 29, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify SDs of its decision to ~~accept~~approve or ~~reject~~disapprove a requested reduction or change pursuant to this Paragraph. SDs may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XIV (Dispute Resolution). Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall be made in EPA's sole and unreviewable discretion, and such decision shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, SDs shall submit to EPA

documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with ¶ 2829.

33.34. **Release, Cancellation, or Discontinuation of Financial Assurance.** SDs may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA issues a Certification of Work Completion under ¶ [4.89] (Certification of Work Completion) of the SOW; (b) in accordance with EPA’s approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation or discontinuance of any financial assurance, in accordance with the agreement, final administrative decision, or final judicial decision resolving such dispute under ~~to~~ Section XIV (Dispute Resolution).

X. PAYMENTS FOR RESPONSE COSTS

34.35. **Payment by SDs for United States [and State] Past Response Costs.**

a. Within 30 days after the Effective Date, SDs shall pay to EPA \$_____ in payment for Past Response Costs. Payment shall be made in accordance with ¶ 38.a (instructions for past response cost payments).

NOTE ON DIRECTING PAYMENTS TO EPA HAZARDOUS SUBSTANCE SUPERFUND AND/OR TO SITE-SPECIFIC SPECIAL ACCOUNT: Payments made under ¶ 35.a may be deposited in the EPA Hazardous Substance Superfund or may be deposited in a site-specific Special Account within the EPA Hazardous Substance Superfund. The CD should include clear instructions indicating which portion of the payment is to be deposited in the EPA Hazardous Substance Superfund and which portion of the payment is to be deposited in a special account. Sample instructions for the three possible deposit options (EPA Hazardous Substance Superfund, Special Account, or split between the EPA Hazardous Substance Superfund and Special Account) follow.

b. **Deposit of Past Response Costs Payment.** [Insert one of the following three sentences here.] [If the entire payment will be deposited in the EPA Hazardous Substance Superfund (HSS): The total amount to be paid by SDs pursuant to ¶ 35.a shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [If the entire payment will be deposited in a special account: The total amount to be paid by Setting Defendants pursuant to ¶ 35.a 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.] [If the payment will be split between the HSS and a special account: Of the total amount to be paid by SDs pursuant to ¶ 35.a, [“\$___” 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.]

c. [Within 30 days after the Effective Date, SDs shall pay to the State \$_____ by official bank check(s) made payable to _____, in payment of State Past Response Costs. SDs shall send the bank check(s) to _____.]

35.36. **Payments by SDs for Future Response Costs.** SDs shall pay to EPA all Future Response Costs not inconsistent with the NCP [If EPA determines that it is appropriate for this CD to provide orphan share compensation to SDs through forgiveness of RD/RA oversight costs, insert the following clause: , excluding the first \$[insert amount of future oversight compromise] of Future Oversight Costs].

NOTE ON USE OF PREPAID FUTURE RESPONSE COSTS SPECIAL ACCOUNTS: Keep ¶¶ 36.c (Periodic Bills) and 36.d ~~and~~ (Deposit of Future Response Costs Payments) for all CDs. If SDs will be prepaying any part of EPA’s Future Response Costs, also keep ¶¶ 36.a, (Prepayment of Future Response Costs), 36.b (Shortfall Payments) and 36.e- (Unused Amount). (Note that ¶ 36.b (Shortfall Payments) is an optional provision for replenishment of the Future Response Costs Special Account in the event of a shortfall in the prepayment.) For an explanation of prepaid accounts, including when prepayment is appropriate, see “Additional Guidance on Prepayment of Oversight Costs and Special Accounts” (Dec. 22, 2006), available at <http://www2.epa.gov/enforcement/guidance-prepayment-oversight-costs-and-special-accounts>.

a. **Prepayment of Future Response Costs.** Within 30 days after the Effective Date, SDs shall pay to EPA \$_____ as a prepayment of [if the ¶ 36.b (Shortfall Payments) optional provision for replenishment is used substitute: as an initial payment toward] Future Response Costs. Payment shall be made in accordance with ¶ 38.a (instructions for past response cost payments). The total amount paid shall be deposited by EPA in the [Site name] Future Response Costs Special Account. These funds shall be retained and used by EPA to conduct or finance future response actions at or in connection with the Site.

b. **Shortfall Payments.** If at any time prior to the date EPA sends SDs the first bill under ¶ 36.c, (Periodic Bills), or one year after the Effective Date, whichever is earlier, the balance in the [Site name] Future Response Costs Special Account falls below \$_____, EPA will so notify SDs. SDs shall, within 30 days after receipt of such notice, pay \$_____ to EPA. Payment shall be made in accordance with ¶ 38.b (instructions for future response cost payments). The amounts paid shall be deposited by EPA in the [Site name] Future Response Costs Special Account. These funds shall be retained and used by EPA to conduct or finance future response actions at or in connection with the Site.

c. **Periodic Bills.** On a periodic basis, EPA will send SDs a bill requiring payment that includes a [insert name of standard Regionally-prepared cost summary], which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and DOJ. SDs shall make all payments within 30 days after SDs’ receipt of each bill requiring payment, except as otherwise provided in ¶ 39, in accordance with ¶ 38.b (instructions for future response cost payments).

d. **Deposit of Future Response Costs Payments.** [Insert one of the following three sentences here.] [If the entire payment will be deposited in the EPA Hazardous Substance Superfund (HSS): The total amount to be paid by SDs pursuant to ¶ 36.c (Periodic Bills) shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [If the entire payment will be deposited in a special account: The total amount to be paid by SDs pursuant to ¶ 36.c (Periodic Bills) 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, provided, however, that EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the [Site name] Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site.] **[If the payment will be split between the HSS and a special account:** Of the total amount to be paid by SDs pursuant to ¶ 36.c. (Periodic Bills), [“\$___” 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, provided, however, that EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the [Site name] Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site.] **[If second or third sentence is used, add:** Any decision by EPA to deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum.]

e. **Unused Amount.** After EPA issues the Certification of RA Completion pursuant to ¶ [4.7] (Certification of RA Completion) of the SOW and a final accounting of the [Site name] Future Response Costs Special Account (including crediting SDs for any amounts received under ¶¶ 36.a (Prepayment of Future Response Costs) [, 36.b (Shortfall paymentPayments),] or 36.c (Periodic billBills), EPA will **[choose one or more of the following three clauses:** “offset the next Future Response Costs bill by the unused amount paid by SDs pursuant to ¶¶ 36.a (Prepayment of Future Response Costs) [, 36.b. (Shortfall Payments),] or 36.c. (Periodic Bills);” “apply any unused amount paid by SDs pursuant to ¶¶ 36.a (Prepayment of Future Response Costs) [, 36.b. (Shortfall Payments),] or 36.c (Periodic Bills) to any other unreimbursed response costs or response actions remaining at the Site;” or “remit and return to SDs any unused amount of the funds paid by SDs pursuant to ¶¶ 36.a (Prepayment of Future Response Costs) [, 36.b (Shortfall Payments),] or 36.c. (Periodic Bills)”]. **[If the second clause is used, add:** Any decision by EPA to apply unused amounts to unreimbursed response costs or response actions remaining at the Site shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum.]

f. **[Payments by SDs to State.** SDs shall pay to the State all State Future Response Costs not inconsistent with the NCP. The State will send SDs a bill requiring payment that includes a **[insert name of standard State-prepared cost summary, which includes direct and indirect costs incurred by the State and its contractors and subcontractors]** on a [periodic] basis. SDs shall make all payments within 30 days after SDs’ receipt of each bill requiring payment, except as otherwise provided in ¶ 39 (Contesting Future Response Costs). SDs shall make all payments to the State required by this Paragraph in accordance with ¶ 35.c: **[or insert alternate instructions].]**

36.37. [Payments by SFAs.

a. **Payment to EPA.**

(1) As soon as reasonably practicable after the Effective Date, the United States, on behalf of SFAs, shall pay to EPA \$_____, in payment of Past Response Costs and Future Response Costs.

(2) **[Insert one of the following three sentences here.] [If the entire payment will be deposited in the EPA Hazardous Substance Superfund:** The total amount to be paid on behalf of SFAs pursuant to this Paragraph shall be deposited by EPA in the EPA Hazardous Substance Superfund.] **[If the entire payment will be deposited in a special account:** The total amount to be paid on behalf of SFAs pursuant to this Paragraph shall be deposited by EPA in the **[Site name]** Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.] **[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:** Of the total amount to be paid on behalf of SFAs pursuant to this Paragraph, [“\$___” or “___%”] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [“\$___” or “___%”] shall be deposited by EPA in the **[Site name]** Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.]

b. **Payment to the State.** As soon as reasonably practicable after the Effective Date, the United States, on behalf of SFAs, shall pay to the State \$_____ **[insert as appropriate:** in payment of State Past Response Costs and State Future Response Costs] by Automated Clearing House (ACH) Electronic Funds Transfer in accordance with instructions provided by the State.

c. **Payment to SDs.** As soon as reasonably practicable after the Effective Date, the United States, on behalf of SFAs, shall pay to SDs \$_____ **[insert as appropriate:** in payment of SDs’ Past Response Costs and SDs’ Future Response Costs] by Automated Clearing House (ACH) Electronic Funds Transfer in accordance with instructions provided by SDs.

NOTE: Where SFAs participate in the CD, they will usually “cash out” of Past Response Costs, Future Response Costs, and SDs’ past response costs and future response costs as well. In those cases where SDs’ future response costs cannot be resolved under the CD in this manner, contact DOJ’s Environmental Defense Section to obtain an alternative “pay-as-you-go” provision addressing SDs’ future response costs and consult with the Office of Site Remediation Enforcement.

d. **Interest.** In the event that any payment required by ¶¶ 37.a, 37.b, or 37.c is not made within 120 days after the Effective Date, the United States, on behalf of SFAs, shall pay Interest on the unpaid balance, with such Interest commencing on the 121st day after the Effective Date and accruing through the date of the payment.

e. The Parties to this CD recognize and acknowledge that the payment obligations of the SFAs under this CD can only be paid from appropriated funds legally available for such purpose. Nothing in this CD shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.]

37.38. **Payment Instructions for SDs.**

a. **Past Response Costs Payments [and Future Response Costs Prepayments].**

(1) The Financial Litigation Unit (FLU) of the United States Attorney's Office for the District of _____ shall provide SDs, in accordance with ¶ 105~~104~~₂, with instructions regarding making payments to DOJ on behalf of EPA. The instructions must include a Consolidated Debt Collection System (CDCS) number to identify payments made under this CD.

(2) For all payments subject to this ¶ 38.a, SDs shall make such payment [**choose one method after consulting with SDs:** by Fedwire Electronic Funds Transfer (EFT) / at <https://www.pay.gov>] to the U.S. DOJ account, in accordance with the instructions provided under ¶ 38.a(1), and including references to the CDCS Number, Site/Spill ID Number _____, and DJ Number _____.

NOTE: Payment by check is highly discouraged. If necessary, contact DOJ's Environmental Enforcement Section to obtain the current instructions for payment by check.

(3) For each payment made under this ¶ 38.a, SDs shall send notices, including references to the CDCS, Site/Spill ID, and DJ numbers, to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with ¶ ~~104~~105.

b. **Future Response Costs Payments [other than Future Response Costs Prepayments] and Stipulated Penalties.**

NOTE: Choose one of the four options below for payment by EFT, by ACH, online, or by check.

(1) For all payments subject to this ¶ 38.b, SDs shall make such payment by Fedwire EFT, referencing the Site/Spill ID and DJ numbers. The Fedwire EFT payment must be sent as follows:

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"

(2) For all payments subject to this ¶ 38.b, SD shall make such payment by Automated Clearinghouse (ACH) payment as follows:

PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact ■ Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

(3) For all payments subject to this ¶ 38.b, SD shall make such payment at <https://www.pay.gov> to the U.S. EPA account in accordance with instructions to be provided to SDs by EPA following lodging of the CD.

(4) For all payments subject to this ¶ 38.b, SD shall make such payment by official bank check(s) made payable to “EPA Hazardous Substance Superfund,” referencing the name and address of the party making the payment. SDs shall send the check(s) to:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

NOTE: Keep next ¶ for all CDs.

(5) For all payments made under this ¶ 38.b, SDs must include references to the Site/Spill ID and DJ numbers. At the time of any payment required to be made in accordance with ¶ 38.b, SDs shall send notices that payment has been made to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with ¶ 105. All notices must include references to the Site/Spill ID and DJ numbers.

38.39. Contesting Future Response Costs. SDs may submit a Notice of Dispute, initiating the procedures of Section XIV (Dispute Resolution), regarding any Future Response Costs [or any State Future Response Costs] billed under ¶ 36 (Payments by SDs for Future Response Costs) [if prepayment paragraphs are used reference only 36.c.] (Periodic Bills) if they determine that EPA [or the State] has made a mathematical error or included a cost item that is not within the definition of Future Response Costs [or State Future Response Costs], or if they believe EPA [or the State] incurred excess costs as a direct result of an EPA [or State] action that was inconsistent with a specific provision or provisions of the NCP. Such Notice of Dispute shall be submitted in writing within 30 days after receipt of the bill and must be sent to the United States [(if the United States’ accounting is being disputed) or the State (if the State’s accounting is being disputed)] pursuant to Section XXI (Notices and Submissions). Such Notice of Dispute shall specifically identify the contested Future Response Costs [or State Future Response Costs] and the basis for objection. If SDs submit a Notice of Dispute, SDs shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to the United States [and all uncontested State Future Response Costs to the State] within 30 days after SDs’ receipt of the bill requiring payment. Simultaneously, SDs shall, and (b)

establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC), and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs [or State Future Response Costs]. SDs shall send to the United States [or the State, as appropriate], as provided in Section XXI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs [or State Future Response Costs], and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If the United States [or the State] prevails in the dispute, SDs shall pay the sums due (with accrued interest) to the United States [or the State, if State costs are disputed] within 7 days after the resolution of the dispute. If SDs prevail concerning any aspect of the contested costs, SDs shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States [or the State, if State costs are disputed] within 7 days after the resolution of the dispute. SDs shall be disbursed any balance of the escrow account. All payments to the United States under this Paragraph shall be made in accordance with ¶¶ 38.b (instructions for future response cost payments). The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding SDs' obligation to reimburse the United States [and the State] for its [their] Future Response Costs.

NOTE: If a prepayment provision is used, include ¶ 40 regarding disputes concerning the final accounting issued under ¶ 36.e- (Unused Amount).

~~39.40.~~ SDs may contest the final accounting of the [Site name] Future Response Costs Special Account issued under ¶ 36.e (Unused Amount) if they determine that the United States has made a mathematical error. Such objection shall be made in writing within [30] days after receipt of the final accounting and must be sent to the United States pursuant to Section XXI (Notices and Submissions). Any such objection shall specifically identify the alleged final mathematical error and the basis for objection. EPA will review the alleged mathematical error and either affirm the initial accounting or issue a corrected final accounting [within __ days]. If a corrected final accounting is issued, EPA will take such action as may be necessary to correct the final disposition of unused amounts paid in accordance with ¶ 36.e- (Unused Amount). If SDs disagree with EPA's decision, SDs may, within [7] days after receipt of the decision, appeal the decision to the Director of the Waste Management Division, EPA Region __. The Director of the Waste Management Division will issue a final administrative decision resolving the dispute, which shall be binding upon SDs and shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum.

NOTE: If there are SFAs and they are reimbursing future costs after they are incurred, modify ¶ 39 and ¶ ~~39~~40 as appropriate.

~~40.41.~~ **Interest.** In the event that any payment for Past Response Costs or for Future Response Costs required under this Section is not made by the date required, SDs shall pay Interest on the unpaid balance. The Interest on Past Response Costs [, prepaid Future Response Costs,] [and State Past Response Costs] ~~under this Paragraph~~ shall begin to accrue on the Effective Date. The Interest on [if prepaid Future Response Costs add: all subsequent] Future Response Costs shall begin to accrue on the date of the bill [if prepaid Future Response Costs

add: or on the date of the prepayment shortfall notice pursuant to ¶ 36.b]. ~~(Shortfall Payments)].~~ The Interest shall accrue through the date of SDs' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to ~~Plaintiffs~~ Plaintiff[s] by virtue of SDs' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to ¶ 64 (Stipulated Penalty Amounts – Work).

XI. DISBURSEMENT OF SPECIAL ACCOUNT FUNDS

NOTE ON DISBURSEMENT OF SPECIAL ACCOUNT FUNDS: Keep this Section when EPA agrees to disburse special account funds to SDs who are performing Work under this CD. The decision to disburse funds is within EPA's sole discretion and should be done consistent with the "Interim Final Guidance on Disbursement of Funds From EPA Special Accounts to CERCLA Potentially Responsible Parties" (Nov. 3, 1998), available at <http://www2.epa.gov/enforcement/guidance-disbursements-funds-special-accounts-cercla-prps>, and the "Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts" (Oct. 4, 2002), available at <http://www2.epa.gov/enforcement/guidance-establishment-management-and-use-superfund-special-accounts>.

41.42. **[Creation of [Site name] Disbursement Special Account and Agreement to Disburse Funds to SDs.** Within 30 days after the Effective Date, EPA shall establish the [Site name] Disbursement Special Account and shall transfer \$_____ from the [Site name] Special Account to the [Site name] Disbursement Special Account. **[NOTE: If, as part of the CD, there are cashout parties whose funds will be deposited into a special account and then disbursed to SDs, contact the Office of Site Remediation Enforcement to consult on appropriate language.]** Subject to the terms and conditions set forth in this Section, EPA agrees to make the funds in the [Site name] Disbursement Special Account, including Interest Earned on the funds in the [Site name] Disbursement Special Account, available for disbursement to SDs as partial reimbursement for performance of the Work **[or specify the activity for which the special account funds are to be disbursed]**. EPA shall disburse funds from the [Site name] Disbursement Special Account to SDs in accordance with the procedures and milestones for phased disbursement set forth in this Section.

42.43. **Timing, Amount, and Method of Disbursing Funds From the [Site name] Disbursement Special Account.** Within __ days after EPA's receipt of a Cost Summary and Certification, as defined by ¶ 44.b, or if EPA has requested additional information under ¶ 44.b or a revised Cost Summary and Certification under ¶ 44.c, within __ days after receipt of the additional information or revised Cost Summary and Certification, and subject to the conditions set forth in this Section, EPA shall disburse the funds from the [Site name] Disbursement Special Account at the completion of the following milestones, and in the amounts set forth below:

NOTE: The CD should outline a phased payment plan that typically lists two to four milestones of the Work. The completion of a milestone will trigger the right to request disbursement of a set amount or percentage of funds from the Disbursement Special Account in partial reimbursement for Work performed up to the date of completion of that milestone. In most situations the appropriate milestones will be (1) completion of all

activities in the EPA-approved RD Work Plan, (2) completion of one or two components of the EPA-approved RA Work Plan, and (3) Certification of RA Completion. Sample language follows.

Milestone	Disbursement of Funds
EPA approval of RD Work Plan	\$___ [or ___% of funds] from the [Site name] Disbursement Special Account
EPA approval of the [insert task]	\$___ [or ___% of remaining funds] from the [Site name] Disbursement Special Account
EPA Certification of RA Completion	Remainder of funds in the [Site name] Disbursement Special Account

EPA shall disburse the funds from the [**Site name**] Disbursement Special Account to SDs in the following manner:

[**Insert name and address for payment or instructions for electronic funds transfer.**]

43.44. **Requests for Disbursement of Special Account Funds.**

a. Within ___ days after issuance of EPA’s written confirmation that a milestone of the Work, as defined in ¶ 43 (Timing, Amount, and Method of Disbursing Funds), has been satisfactorily completed, SDs shall submit to EPA a Cost Summary and Certification, as defined in ¶ 44.b, covering the Work performed up to the date of completion of that milestone. SDs shall not include in any submission costs included in a previous Cost Summary and Certification following completion of an earlier milestone of the Work if those costs have been previously sought or reimbursed pursuant to ¶ 4243.

b. Each Cost Summary and Certification shall include a complete and accurate written cost summary and certification of the necessary costs incurred and paid by SDs for the Work covered by the particular submission, excluding costs not eligible for disbursement under ¶ 45 (Costs Excluded from Disbursement). Each Cost Summary and Certification shall contain the following statement signed by the [**insert “Chief Financial Officer of a SD,” “Independent Certified Public Accountant,” or title of other specified independent person acceptable to EPA**]:

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

The [**insert “Chief Financial Officer of a SD,” “Independent Certified Public Accountant,” or title of other specified independent person acceptable to EPA**] shall also provide EPA a list of the documents that he or she reviewed in support of the Cost Summary and Certification.

Upon request by EPA, SDs shall submit to EPA any additional information that EPA deems necessary for its review and approval of a Cost Summary and Certification.

c. If EPA finds that a Cost Summary and Certification includes a mathematical error, costs excluded under ¶ 45 (Costs Excluded from Disbursement), costs that are inadequately documented, or costs submitted in a prior Cost Summary and Certification, it will notify SDs and provide them an opportunity to cure the deficiency by submitting a revised Cost Summary and Certification. If SDs fail to cure the deficiency within ___ days after being notified of, and given the opportunity to cure, the deficiency, EPA will recalculate SDs' costs eligible for disbursement for that submission and disburse the corrected amount to SDs in accordance with the procedures in ¶ 43 (Timing, Amount, and Method of Disbursing Funds). SDs may dispute EPA's recalculation under this Paragraph pursuant to Section XIV (Dispute Resolution). In no event shall SDs be disbursed funds from the [Site name] Disbursement Special Account in excess of amounts properly documented in a Cost Summary and Certification accepted or modified by EPA.

44-45. **Costs Excluded from Disbursement.** The following costs are excluded from, and shall not be sought by SDs for, disbursement from the [Site name] Disbursement Special Account: (a) response costs paid pursuant to Section X (Payments for Response Costs); (b) any other payments made by SDs to the United States pursuant to this CD, including, but not limited to, any Interest or stipulated penalties paid pursuant to Section X (Payments for Response Costs) or XV (Stipulated Penalties); (c) attorneys' fees and costs, except for reasonable attorneys' fees and costs necessarily related to **[insert reference to any obligations under the CD for which legal services are essential, such as obtaining access or institutional controls]** as required by Section VIII (Property Requirements); (d) costs of any response activities SDs perform that are not required under, or approved by EPA pursuant to, this CD; (e) costs related to SDs' litigation, settlement, development of potential contribution claims, or identification of defendants; (f) internal costs of SDs, including but not limited to, salaries, travel, or in-kind services, except for those costs that represent the work of employees of SDs directly performing the Work; (g) any costs incurred by SDs prior to the Effective Date **[if RD or other response activity performed under this CD is commenced prior to the Effective Date insert:** except for approved Work completed pursuant to this CD]; or (h) any costs incurred by SDs pursuant to Section XIV (Dispute Resolution).

45-46. **Termination of Disbursements from the Special Account.** EPA's obligation to disburse funds from the [Site name] Disbursement Special Account under this CD shall terminate upon EPA's determination that SDs: (a) have knowingly submitted a materially false or misleading Cost Summary and Certification; (b) have submitted a materially inaccurate or incomplete Cost Summary and Certification, and have failed to correct the materially inaccurate or incomplete Cost Summary and Certification within ___ days after being notified of, and given the opportunity to cure, the deficiency; or (c) failed to submit a Cost Summary and Certification as required by ¶ 44 (Requests for Disbursement of Special Account Funds) within ___ days (or such longer period as EPA agrees) after being notified that EPA intends to terminate its obligation to make disbursements pursuant to this Section because of SDs' failure to submit the Cost Summary and Certification as required by ¶ 44. EPA's obligation to disburse funds from the [Site name] Disbursement Special Account shall also terminate upon EPA's assumption of performance of any portion of the Work pursuant to ¶ 81 (Work Takeover), when such assumption of performance of the Work is not challenged by SDs or, if challenged, is upheld

under Section XIV (Dispute Resolution). SDs may dispute EPA's termination of special account disbursements under Section XIV.

46-47. **Recapture of Special Account Disbursements.** Upon termination of disbursements from the [Site name] Disbursement Special Account under ¶ 46 (Termination of Disbursements from the Special Account), if EPA has previously disbursed funds from the [Site name] Disbursement Special Account for activities specifically related to the reason for termination, e.g., discovery of a materially false or misleading submission after disbursement of funds based on that submission, EPA shall submit a bill to SDs for those amounts already disbursed from the [Site name] Disbursement Special Account specifically related to the reason for termination, plus Interest on that amount covering the period from the date of disbursement of the funds by EPA to the date of repayment of the funds by SDs. Within __ days after receipt of EPA's bill, SDs shall reimburse the EPA Hazardous Substance Superfund for the total amount billed. Payment shall be made in accordance with ¶ 38.b (instructions for future response cost payments). Upon receipt of payment, EPA may deposit all or any portion thereof in the [Site name] Special Account, the [Site name] Disbursement Special Account, or the EPA Hazardous Substance Superfund. The determination of where to deposit or how to use the funds shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum. SDs may dispute EPA's determination as to recapture of funds pursuant to Section XIV (Dispute Resolution).

47-48. **Balance of Special Account Funds.** After EPA issues its written Certification of RA Completion pursuant to this CD [**or if Certification of RA Completion is not used substitute:** After the RA has been performed in accordance with this CD and the Performance Standards have been achieved], and after EPA completes all disbursement to SDs in accordance with this Section, if any funds remain in the [Site name] Disbursement Special Account, EPA may transfer such funds to the [Site name] Special Account or to the EPA Hazardous Substance Superfund. Any transfer of funds to the [Site name] Special Account or the EPA Hazardous Substance Superfund shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum.]

XII. INDEMNIFICATION AND INSURANCE

48-49. **SDs' Indemnification of the United States [and the State].**

a. The United States [and the State] do[es] not assume any liability by entering into this CD or by virtue of any designation of SDs as EPA's authorized representatives under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). SDs shall indemnify, save, and hold harmless the United States [and the State] and its [their] officials, agents, employees, contractors, subcontractors, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of SDs, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on SDs' behalf or under their control, in carrying out activities pursuant to this CD, including, but not limited to, any claims arising from any designation of SDs as EPA's authorized representatives under Section 104(e) of CERCLA. Further, SDs agree to pay the United States [and the State] all costs it [they] incur[s] including, but not limited to, attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States [and the State] based on negligent or other wrongful acts or omissions of SDs, their officers, directors,

employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this CD. [Neither] the United States [nor the State] shall [not] be held out as a party to any contract entered into by or on behalf of SDs in carrying out activities pursuant to this CD. Neither SDs nor any such contractor shall be considered an agent of the United States [or the State].

b. The United States [and the State, respectively,] shall give SDs notice of any claim for which the United States [or the State] plans to seek indemnification pursuant to this ¶ 49, and shall consult with SDs prior to settling such claim.

49.50. SDs covenant not to sue and agree not to assert any claims or causes of action against the United States [and the State, respectively,] for damages or reimbursement or for set-off of any payments made or to be made to the United States [or the State], arising from or on account of any contract, agreement, or arrangement between any one or more of SDs and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, SDs shall indemnify, save and hold harmless the United States [and the State] with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of SDs and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

50.51. Insurance. No later than 15 days before commencing any on-site Work, SDs shall secure, and shall maintain until the first anniversary after [issuance of EPA’s Certification of RA Completion pursuant to ¶ [4.7] (Certification of RA Completion) of the SOW **[or if Certification of RA Completion is not used substitute:** the RA has been performed in accordance with this CD and the Performance Standards have been achieved] commercial general liability insurance with limits of \$_____ million, for any one occurrence, and automobile liability insurance with limits of \$_____ million, combined single limit, naming the United States [and the State] as [an] additional insured[s] with respect to all liability arising out of the activities performed by or on behalf of SDs pursuant to this CD. In addition, for the duration of this CD, SDs shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker’s compensation insurance for all persons performing the Work on behalf of SDs in furtherance of this CD. Prior to commencement of the Work, SDs shall provide to EPA [and the State] certificates of such insurance and a copy of each insurance policy. SDs shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If SDs demonstrate by evidence satisfactory to EPA [and the State] that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, SDs need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor.

XIII. FORCE MAJEURE

51.52. “Force majeure,” for purposes of this CD, is defined as any event arising from causes beyond the control of SDs, of any entity controlled by SDs, or of SDs’ contractors that delays or prevents the performance of any obligation under this CD despite SDs’ best efforts to fulfill the obligation. The requirement that SDs exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure and best efforts to address

the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. "Force majeure" does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

52.53. If any event occurs or has occurred that may delay the performance of any obligation under this CD for which SDs intend or may intend to assert a claim of force majeure, SDs shall notify EPA's Project Coordinator orally or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Waste Management Division, EPA Region __, within [**insert period of time**] of when SDs first knew that the event might cause a delay. Within __ days thereafter, SDs shall provide in writing to EPA [and the State] an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; SDs' rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of SDs, such event may cause or contribute to an endangerment to public health or welfare, or the environment. SDs shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. SDs shall be deemed to know of any circumstance of which SDs, any entity controlled by SDs, or SDs' contractors or subcontractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude SDs from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under ¶ 52 and whether SDs have exercised their best efforts under ¶ ~~51~~52, EPA may, in its unreviewable discretion, excuse in writing SDs' failure to submit timely or complete notices under this Paragraph.

53.54. If EPA [, after a reasonable opportunity for review and comment by the State,] agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this CD that are affected by the force majeure will be extended by EPA [, after a reasonable opportunity for review and comment by the State,] for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA [, after a reasonable opportunity for review and comment by the State,] does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify SDs in writing of its decision. If EPA [, after a reasonable opportunity for review and comment by the State,] agrees that the delay is attributable to a force majeure, EPA will notify SDs in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

54.55. If SDs elect to invoke the dispute resolution procedures set forth in Section XIV (Dispute Resolution) regarding EPA's decision, they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, SDs shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that SDs complied with the requirements of ¶¶ 52 and 53. If SDs carry this burden, the

delay at issue shall be deemed not to be a violation by SDs of the affected obligation of this CD identified to EPA and the Court.

~~55.56.~~ The failure by EPA to timely complete any obligation under the CD or under the SOW is not a violation of the CD, provided, however, that if such failure prevents SDs from meeting one or more deadlines in the SOW, SDs may seek relief under this Section.

XIV. DISPUTE RESOLUTION

NOTE: The dispute resolution procedures set forth in this Section may be supplemented to provide for use of mediation in appropriate cases. Mediation provisions should contain time limits to ensure that mediation does not cause delays in dispute resolution that could delay the RA.

~~56.57.~~ Unless otherwise expressly provided for in this CD, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this CD. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of SDs that have not been disputed in accordance with this Section.

~~57.58.~~ A dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute. Any dispute regarding this CD shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute.

~~58.59.~~ Statements of Position.

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within __ days after the conclusion of the informal negotiation period, SDs invoke the formal dispute resolution procedures of this Section by serving on the United States [and the State] a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by SDs. The Statement of Position shall specify SDs' position as to whether formal dispute resolution should proceed under ¶ 60 (Record Review) or ~~6061~~.

b. Within __ days after receipt of SDs' Statement of Position, EPA will serve on SDs its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under ¶ 60 (Record Review) or 61. Within __ days after receipt of EPA's Statement of Position, SDs may submit a Reply.

c. If there is disagreement between EPA and SDs as to whether dispute resolution should proceed under ¶ 60 (Record Review) or 61, the parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if SDs ultimately appeal to the Court to resolve the dispute, the Court shall determine which ¶Paragraph is applicable in accordance with the standards of applicability set forth in ¶¶ 60 and ~~6061~~.

59-60. Record Review. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this CD, and the adequacy of the performance of response actions taken pursuant to this CD. Nothing in this CD shall be construed to allow any dispute by SDs regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Waste Management Division, EPA Region __, will issue a final administrative decision resolving the dispute based on the administrative record described in ¶ 60.a. This decision shall be binding upon SDs, subject only to the right to seek judicial review pursuant to ¶¶ 60.c and 59-60.d.

c. Any administrative decision made by EPA pursuant to ¶ 60.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by SDs with the Court and served on all Parties within 10 days after receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this CD. The United States may file a response to SDs' motion.

d. In proceedings on any dispute governed by this Paragraph, SDs shall have the burden of demonstrating that the decision of the Waste Management Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to ¶ 59-60.a.

60-61. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. The Director of the Waste Management Division, EPA Region __, will issue a final decision resolving the dispute based on the statements of position and reply, if any, served under ¶ 59. The Waste Management Division Director's decision shall be binding on SDs unless, within 10 days after receipt of the decision, SDs file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the CD. The United States may file a response to SDs' motion.

b. Notwithstanding ¶ M (CERCLA § 113(j) record review of ROD and Work) of Section I (Background), judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

~~61-62.~~ The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of SDs under this CD, except as provided in ¶ 39 (Contesting Future Response Costs), as agreed by EPA, or as determined by the Court. Stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute, as provided in ¶ 70. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this CD. In the event that SDs do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XV (Stipulated Penalties).

XV. STIPULATED PENALTIES

~~62-63.~~ SDs shall be liable for stipulated penalties in the amounts set forth in ¶¶ 64 and 65 to the United States [and the State - specify percentage split] for failure to comply with the requirements of this CD specified below, unless excused under Section XIII (Force Majeure). “Compliance” by SDs shall include completion of all activities and obligations, including payments, required under this CD, or any deliverable approved under this CD, in accordance with all applicable requirements of law, this CD, the SOW, and any deliverables approved under this CD and within the specified time schedules established by and approved under this CD.

~~63-64.~~ Stipulated Penalty Amounts - Work (Including Payments and Excluding Deliverables).

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in ¶ ~~63-64~~.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$
15th through 30th day	\$
31st day and beyond	\$

b. Compliance Milestones.

NOTE: List compliance milestones including due dates for payments and for establishing escrow accounts to hold disputed Future Response Costs.

(1) [Insert milestones.]

(2) Establishment and maintenance of financial assurance in compliance with the timelines and other substantive and procedural requirements of Section IX (Financial Assurance).

~~64-65.~~ Stipulated Penalty Amounts - Deliverables.

a. **Material Defects.** If an initially submitted or resubmitted deliverable contains a material defect, and the deliverable is disapproved or modified by EPA under ¶ [7.6(a)] (Initial Submissions) or [7.6(b)] (Resubmissions) of the SOW due to such material defect, then the material defect shall constitute a lack of compliance for purposes of ¶ 63. The provisions of Section XIV (Dispute Resolution) and Section XV (Stipulated Penalties) shall govern the accrual and payment of any stipulated penalties regarding SDs’ submissions under this CD.

b. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables pursuant to the CD:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$
15th through 30th day	\$
31st day and beyond	\$

65-66. In the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 81 (Work Takeover), SDs shall be liable for a stipulated penalty in the amount of \$_____. Stipulated penalties under this Paragraph are in addition to the remedies available under ¶¶ 32 (Access to Financial Assurance) and 81 (Work Takeover).

66-67. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under ¶ [7.6] (Approval of Deliverables) of the SOW, during the period, if any, beginning on the 31st day after EPA’s receipt of such submission until the date that EPA notifies SDs of any deficiency; (b) with respect to a decision by the Director of the Waste Management Division, EPA Region __, under ¶ 60.b or 61.a of Section XIV (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that SDs’ reply to EPA’s Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XIV (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court’s receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing in this CD shall prevent the simultaneous accrual of separate penalties for separate violations of this CD.

67-68. Following EPA’s determination that SDs have failed to comply with a requirement of this CD, EPA may give SDs written notification of the same and describe the noncompliance. EPA [and the State] may send SDs a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified SDs of a violation.

68-69. All penalties accruing under this Section shall be due and payable to the United States [and the State] within 30 days after SDs’ receipt from EPA of a demand for payment of the penalties, unless SDs invoke the Dispute Resolution procedures under Section XIV (Dispute Resolution) within the 30-day period. All payments to the United States under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with ¶ 3738.b (instructions for future response cost payments).

NOTE: Where a State is a party and is entitled to a portion of the stipulated penalties, insert procedures for payment to the State.

69-70. Penalties shall continue to accrue as provided in ¶ 67 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement of the parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA [and the State] within 15 days after the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, SDs shall pay all accrued penalties determined by the Court to be owed to EPA [and the State] within 60 days after receipt of the Court's decision or order, except as provided in ¶ ~~69~~70.c;

c. If the District Court's decision is appealed by any Party, SDs shall pay all accrued penalties determined by the District Court to be owed to the United States [and the State] into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 60 days after receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA [and the State] or to SDs to the extent that they prevail.

~~70~~.71. If SDs fail to pay stipulated penalties when due, SDs shall pay Interest on the unpaid stipulated penalties as follows: (a) if SDs have timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to ¶ 70 until the date of payment; and (b) if SDs fail to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 69 until the date of payment. If SDs fail to pay stipulated penalties and Interest when due, the United States [or the State] may institute proceedings to collect the penalties and Interest.

~~71~~.72. The payment of penalties and Interest, if any, shall not alter in any way SDs' obligation to complete the performance of the Work required under this CD.

~~72~~.73. Nothing in this CD shall be construed as prohibiting, altering, or in any way limiting the ability of the United States [or the State] to seek any other remedies or sanctions available by virtue of SDs' violation of this CD or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided in this CD, except in the case of a willful violation of this CD.

NOTE: A provision for the United States to elect between seeking stipulated and statutory penalties for a particular CD violation may be substituted in ¶ 73 in appropriate cases by changing "for any violation for which a stipulated penalty is provided in this CD, except in the case of a willful violation" to "for any violation for which a stipulated penalty is collected pursuant to this CD."

~~73~~.74. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this CD.

XVI. COVENANTS BY PLAINTIFF[S]

NOTE: If the CD addresses the sole or final operable unit (OU) at the Site, use the “Option 1” text below which grants a “Site” covenant and use the “standard reopeners” regarding new information/unknown conditions, which are contained in ¶¶ 77-79. If the CD addresses a non-final OU, use the “Option 2” text below which does not grant Site-wide covenants and delete ¶¶ 77-7879.

74.75. Covenants for SDs by United States.

[**Option 1 for final OU CDs:** Except as provided in ¶¶ 77, 78 (United States’ Pre- and Post-Certification Reservations), and 80 (General Reservations of Rights), the United States covenants not to sue or to take administrative action against SDs pursuant to Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA, 42 U.S.C. § 6973,] relating to the Site. Except with respect to future liability, these covenants shall take effect upon the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of RA Completion by EPA pursuant to ¶ [4.7] (Certification of RA Completion) of the SOW. These covenants are conditioned upon the satisfactory performance by SDs of their obligations under this CD. These covenants extend only to SDs and do not extend to any other person.]

[**Option 2 for non-final OU CDs:** Except as provided in ¶ 80 (General Reservations of Rights), the United States covenants not to sue or to take administrative action against SDs pursuant to Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA, 42 U.S.C. § 6973,] for the Work [if addressed, add: , Past Response Costs, and Future Response Costs,] [if SFAs are making payments for SDs’ response costs, add as appropriate: SDs’ Past Response Costs, SDs’ Future Response Costs]. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by SDs of their obligations under this CD. These covenants extend only to SDs and do not extend to any other person.]

NOTE: If including a RCRA 7003 covenant in ¶ 75 (Covenants for SDs by United States) and ¶ 76 (Covenant for SFAs) (if SFAs), pursuant to Section 7003(d) of RCRA, you must offer to have a public meeting regarding the settlement and hold such a meeting if requested. To do this, include language in the Federal Register notice providing for an opportunity for a public meeting in the affected area. For guidance regarding how to comply with this requirement, see “Revised Model Notice Language for Compliance with Public Participation Requirements of Section 7003(d) of RCRA” (Oct. 30, 1996), available at <http://www2.epa.gov/enforcement/guidance-model-language-compliance-public-participation-requirements-under-rcra-section>.

NOTE: Covenants not to sue regarding the “Site” address both “present” and “future” liability. EPA interprets “present liability” to include a responsible party’s obligation to pay past response costs, to perform the Work, and to pay future response costs relating to the Work. See “Superfund Program, Covenants Not To Sue,” 52 Fed. Reg. 28038, 28040 (July 27, 1987), available at <http://www2.epa.gov/enforcement/guidance-covenants-not-sue-under-superfund>. “Future liability” refers to a responsible party’s obligation to perform any additional response activities at the Site that are necessary to protect public health and the environment. *Id.* Under CERCLA § 122(f)(3), 42 U.S.C. § 9622(f)(3), a covenant not to sue with respect to future liability shall not take effect until Certification of RA

Completion. Non-final OU CDs do not address future liability because the covenant is only for past costs and for performance of and costs relating to the Work, as explained above.

NOTE: This model contains no natural resource damages (NRD) provisions. If the covenants are to cover NRD, they must be negotiated with the NRD Trustees and DOJ. You also will need to modify ¶ 75 (Covenants for SDs by United States) and ¶ 76 (Covenants for SFAs) (if SFAs), add two new ¶¶ after ¶ 80 (General Reservations of Rights), one containing the reopener for new information and unknown conditions regarding NRD and another defining the known information and conditions, delete ¶ 80.f (reservation for NRD), and modify ¶ 83 (Covenants by SDs) and ¶ 91 (defining what constitutes “matters addressed”).

NOTE: Include ¶ 76 only if there are SFAs. Use same covenant Option 1 or 2 as is used in ¶ 74.75.

75.76. **Covenant for SFAs.**

[**Option 1 for final OU CDs:** Except as provided in ¶¶ 77, 78 (United States’ Pre- and Post-Certification Reservations), and 80 (General Reservations of Rights), EPA covenants not to take administrative action against SFAs pursuant to Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA, 42 U.S.C. § 6973,] relating to the Site. Except with respect to future liability, EPA’s covenant shall take effect upon the Effective Date. With respect to future liability, EPA’s covenant shall take effect upon Certification of RA Completion by EPA pursuant to ¶ [4.7] (Certification of RA Completion) of the SOW. EPA’s covenant is conditioned upon the satisfactory performance by SFAs of their obligations under this CD. EPA’s covenant extends only to SFAs and does not extend to any other person.]

[**Option 2 for non-final OU CDs:** Except as provided in ¶ 80 (General Reservations of Rights), EPA covenants not to take administrative action against SFAs pursuant to Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA, 42 U.S.C. § 6973,] for the Work [**if addressed:** , Past Response Costs, and Future Response Costs]. EPA’s covenant shall take effect upon the Effective Date. EPA’s covenant is conditioned upon the satisfactory performance by SFAs of their obligations under this CD. EPA’s covenant extends only to SFAs and does not extend to any other person.]

NOTE: In some instances EPA’s covenant may also be extended to a federal PRP contractor where the federal PRP settlement includes the contractor. This generally occurs where the contractor is indemnified by the United States under the contract.

76.77. **United States’ Pre-Certification Reservations.** Notwithstanding any other provision of this CD, the United States reserves, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel SDs [**if SFAs:** , and EPA reserves the right to issue an administrative order seeking to compel SFAs,] to perform further response actions relating to the Site and/or to pay the United States for additional costs of response if, (a) prior to Certification of RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the RA is not protective of human health or the environment.

77-78. **United States' Post-Certification Reservations.** Notwithstanding any other provision of this CD, the United States reserves, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel SDs [if SFAs: , and EPA reserves the right to issue an administrative order seeking to compel SFAs,] to perform further response actions relating to the Site and/or to pay the United States for additional costs of response if, (a) subsequent to Certification of RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the RA is not protective of human health or the environment.

78-79. For purposes of ¶ 77 (United States' Pre-Certification Reservations), the information and the conditions known to EPA will include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the ROD for the Site and the administrative record supporting the ROD. For purposes of ¶ 78 (United States' Post-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of RA Completion and set forth in the ROD, the administrative record supporting the ROD, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this CD prior to Certification of RA Completion.

79-80. **General Reservations of Rights.** The United States reserves, and this CD is without prejudice to, all rights against SDs [, and EPA and the federal natural resource trustee reserve, and this CD is without prejudice to, all rights against SFAs,] with respect to all matters not expressly included within Plaintiff's covenants. Notwithstanding any other provision of this CD, the United States reserves all rights against SDs [, and EPA and the federal natural resource trustees reserve, and this CD is without prejudice to, all rights against SFAs,] with respect to:

- a. liability for failure by SDs [or SFAs] to meet a requirement of this CD;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based on the ownership of the Site by SDs [or SFAs] when such ownership commences after signature of this CD by SDs [or SFAs];
- d. liability based on the operation of the Site by SDs when such operation commences after signature of this CD by SDs and does not arise solely from SDs' performance of the Work [and liability based on the operation of the Site by SFAs when such operation commences after signature of this CD by SFAs];
- e. liability based on SDs' [or SFAs'] transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this CD by SDs [or SFAs];
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- g. criminal liability;

h. liability for violations of federal or state law that occur during or after implementation of the Work; and

i. liability, prior to achievement of Performance Standards, for additional response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, but that cannot be required pursuant to ¶ 13 (Modification of SOW or Related Deliverables);]

NOTE: Include ¶¶ 80.j and 80.k when the ¶ 75 “Option 2” text (for non-final OU CDs) is used.

j. [liability for additional operable units at the Site or the final response action;]

k. [liability for costs that the United States will incur regarding the Site but that are not within the definition of Future Response Costs;]

NOTE: Include ¶ 80.l when the United States is reserving its right to recover any defined Past Response Costs that are not being collected under the CD.

l. [previously incurred costs of response above the amounts paid pursuant to ¶ 35.a (Payment by SDs for United States Past Response Costs) [and ¶ ~~3637~~ (Payments by SFAs)]];]

NOTE: Include ¶ 80.m if any agencies of the United States have incurred (or are expected to incur) costs at the Site that are not being resolved under this CD.

m. Liability for costs incurred or to be incurred by [insert name of Department or Agency] regarding the Site.

80.81. Work Takeover.

a. In the event EPA determines that SDs: (1) have ceased implementation of any portion of the Work; (2) are seriously or repeatedly deficient or late in their performance of the Work; or (3) are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to SDs. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide SDs a period of 10 days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.

b. If, after expiration of the 10-day notice period specified in ¶ 81.a, SDs have not remedied to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary (“Work Takeover”). EPA will notify SDs in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this ¶ 81.b. Funding of Work Takeover costs is addressed under ¶ 32 (Access to Financial Assurance).

c. SDs may invoke the procedures set forth in ¶ 60 (Record Review), to dispute EPA’s implementation of a Work Takeover under ¶ 81.b. However, notwithstanding SDs’ invocation of such dispute resolution procedures, and during the pendency of any such

dispute, EPA may in its sole discretion commence and continue a Work Takeover under ¶ 81.b until the earlier of (1) the date that SDs remedy, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, or (2) the date that a final decision is rendered in accordance with ¶ 60 (Record Review) requiring EPA to terminate such Work Takeover.

~~81.82.~~ Notwithstanding any other provision of this CD, the United States [and the State] retain[s] all authority and reserve[s] all rights to take any and all response actions authorized by law.

NOTE: If the State is a Co-plaintiff, add the State's Covenant for SDs (and SFAs, if any) and Reservation of Rights.

XVII. COVENANTS BY SDs [AND SFAs]

~~82.83.~~ **Covenants by SDs.** Subject to the reservations in ¶ 86, SDs covenant not to sue and agree not to assert any claims or causes of action against the United States [or the State] with respect to

[for final OU CDs: the Site]

[for non-final OU CDs: the Work, past response actions regarding the Site, [if addressed: Past Response Costs, Future Response Costs,] [if State is a Party and is recovering costs from SDs, add as appropriate: State Past Response Costs, State Future Response Costs,] [if SFAs are making payments for SDs' response costs, add as appropriate: SDs' Past Response Costs, SDs' Future Response Costs]]

[for all CDs: , and this CD, including, but not limited to:]

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112 or 113, or any other provision of law;

b. any claims under CERCLA §§ 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a), or state law regarding [for final OU CDs: the Site] [for non-final OU decrees: the Work, past response actions regarding the Site, [if addressed: Past Response Costs, Future Response Costs, State Past Response Costs, State Future Response Costs, SDs' Past Response Costs, SDs' Future Response Costs,]] and this CD; or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

NOTE: If the CD includes Section XI (Disbursement of Special Account Funds), include ¶ 83.d(1). If the CD contains a Future Response Cost prepayment provision under which SDs may receive a return of unused amounts under option 3 of ¶ 36.e, (Unused Amount), include ¶ 83.d(2). If the CD contains both provisions, include both ¶¶ 83.d(1) and ~~8283~~.d(2).

d. any direct or indirect claim for (1) disbursement from the [Site name] Special Account or [Site name] Disbursement Special Account, except as provided in Section XI

(Disbursement of Special Account Funds), or (2) return of unused amounts from the [Site name] Future Response Costs Special Account, except for unused amounts that EPA determines shall be returned to SDs in accordance with ¶ 36.e. (Unused Amount).

83-84. Covenant by SFAs. SFAs agree not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112, or 113, or any other provision of law with respect to [for final OU CDs: the Site] [for non-final OU decrees: the Work, past response actions regarding the Site, [if addressed: Past Response Costs, Future Response Costs, SDs' Past Response Costs, SDs' Future Response Costs,]] and this CD. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a SFA in the performance of its duties (other than pursuant to this CD) as lead or support agency under the NCP.]

84-85. Except as provided in ¶¶ 88 (Waiver of Claims by SDs) and 95 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States [or the State] brings a cause of action or issues an order pursuant to any of the reservations in Section XVI (Covenants by Plaintiff[s]), other than in ¶¶ 80.a (claims for failure to meet a requirement of the CD), 80.g (criminal liability), and 80.h (violations of federal/state law during or after implementation of the Work), but only to the extent that SDs' claims arise from the same response action, response costs, or damages that the United States [or the State] is seeking pursuant to the applicable reservation.

85-86. SDs reserve, and this CD is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of SDs' deliverables or activities. [If SFAs, insert: SDs also reserve, and this CD is without prejudice to, contribution claims against SFAs in the event any claim is asserted by the United States [or the State] against SDs pursuant to any of the reservations in Section XVI (Covenants by Plaintiff[s]) other than in ¶¶ 80.a (claims for failure to meet a requirement of the CD), 80.g (criminal liability), and 80.h (violations of federal/state law during or after implementation of the Work), but only to the extent that SDs' claims arise from the same response action, response costs, or damages that the United States [or the State] is seeking pursuant to the applicable reservation.]

86-87. Nothing in this CD 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).

87-88. Waiver of Claims by SDs.

a. SDs agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have:

(1) **De Micromis Waiver.** For all matters relating to the Site against any person where the person's liability to SDs with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials;

NOTE: Use next Paragraph if there is MSW at the Site.

(2) **MSW Waiver.** For all matters relating to the Site against any person where the person's liability to SDs with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of MSW at the Site, if the volume of MSW disposed, treated, or transported by such person to the Site did not exceed 0.2% of the total volume of waste at the Site; and

NOTE: Use next Paragraph if there are known or potential *de minimis* and/or ability to pay (ATP) PRPs at the Site. Include bracketed reference to *de minimis* party settlement, ATP party settlement, or both as appropriate given Site facts. Use the bracketed "or in the future enters" if there are known or potential *de minimis* and/or ATP PRPs with whom the United States has not yet settled. Note that inclusion of the future component of the waiver does not affect SDs' right to oppose entry of any such future settlement through the public comment process and does not have any effect unless and until the United States enters into any such future settlement. The scope of the waiver should generally track the scope of the "matters addressed" in the contribution provision of the concluded *de minimis* or ATP settlement. Normally, this means that the scope will be "response costs" as included below. However, if the settlement included natural resource damages, also include "natural resource damages and assessment costs," and if the settlement was not site-wide, limit the scope as appropriate. Also, if the "[or in the future enters]" bracket is used and the scope of the future settlement is likely to be different from the past settlement(s), redraft as necessary.

(3) ***De Minimis/Ability to Pay Waiver.*** For response costs relating to the Site against any person that has entered [or in the future enters] into [a final CERCLA § 122(g) *de minimis* settlement] [, or] [a final settlement based on limited ability to pay] [,] with EPA with respect to the Site.

b. **Exceptions to Waiver[s].**

(1) The waiver[s] under this ¶ 88 shall not apply with respect to any defense, claim, or cause of action that a SD may have against any person otherwise covered by such waiver[s] if such person asserts a claim or cause of action relating to the Site against such SD.

NOTE: If a SD asserts that it has a claim against a PRP within the scope of the waivers that is unrelated to the PRP's CERCLA liability at the Site, e.g., a claim for contractual indemnification, add an exception for such claim such as the following:

(2) The waiver[s] under this ¶ 88 shall not apply to SD [**insert name**]'s contractual indemnification claim against [**insert name**].

(3) The waiver under ¶ 88.a(1) (De Micromis Waiver) shall not apply to any claim or cause of action against any person otherwise covered by such waiver if EPA determines that: (i) the materials containing hazardous substances contributed to the Site by such person contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; or (ii) such person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e)(3)(B) of CERCLA, 42 U.S.C. § 9604(e) or 9622(e)(3)(B), or Section 3007 of RCRA, 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site; or if (iii) such person has been convicted of a criminal violation for the conduct to which the waiver would apply and that conviction has not been vitiated on appeal or otherwise.

(4) The waiver under ¶ 88.a(2) (MSW Waiver) shall not apply to any claim or cause of action against any person otherwise covered by such waiver if EPA determines that: (i) the materials containing MSW contributed to the Site by such person contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; or (ii) such person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e)(3)(B) of CERCLA, 42 U.S.C. § 9604(e) or 9622(e)(3)(B), or Section 3007 of RCRA, 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site.

NOTE: For settlements using the SA Approach, include ¶ 89. For explanation, see “Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance),” OSWER Dir. No. 9200.2-125 (Sep. 28, 2012), available at <http://www2.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>.

~~88.89.~~ SDs agree not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.

XVIII. EFFECT OF SETTLEMENT; CONTRIBUTION

~~89.90.~~ Except as provided in ¶ 88 (Waiver of Claims by SDs), nothing in this CD shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this CD. Except as provided in Section XVII (Covenants by SDs [and SFAs]), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party 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 CD 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).

~~90.91.~~ The Parties agree, and by entering this CD this Court finds, that this CD constitutes a judicially-approved settlement pursuant to which each SD [and each Settling Federal Agency] 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 CD.

[For final OU CD, continue with: The “matters addressed” in this CD 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; provided, however, that if the United States exercises rights **[if SFAs add:** against SDs (or if EPA or the federal natural resource trustee [or the State] assert rights against SFAs)] under the reservations in Section XVI (Covenants by Plaintiff[s]), other than in ¶¶ 80.a (claims for failure to meet a requirement of the CD), 80.g (criminal liability), or 80.h (violations of federal/state law during or after implementation of the Work), the “matters addressed” in this CD will no longer include those response costs or response actions **[if decree includes a natural resource damages settlement add:** or natural resource damages] that are within the scope of the exercised reservation.]

[For non-final OU CD, continue with: The “matters addressed” in this CD are the Work **[if addressed:** , Past Response Costs, Future Response Costs,] **[if State is a Party and is recovering costs from SDs, add as appropriate:** State Past Response Costs, State Future Response Costs,] **[if SFAs are making payments for SDs’ response costs, add as appropriate:** SDs’ Past Response Costs, SDs’ Future Response Costs].]

NOTE: If the State is a party and is resolving its claims regarding the Site through the CD, delete “except for the State” from ¶ 91. Also note that State claims do not include claims for EPA 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.

~~91.92.~~ The Parties further agree, and by entering this CD 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 CD constitutes a judicially-approved settlement pursuant to which each Settling Defendant **[if SFAs insert:** and each SFA] 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).

~~92.93.~~ Each SD shall, with respect to any suit or claim brought by it for matters related to this CD, notify the United States [and the State] in writing no later than 60 days prior to the initiation of such suit or claim.

~~93.94.~~ Each SD shall, with respect to any suit or claim brought against it for matters related to this CD, notify in writing the United States [and the State] within 10 days after service of the complaint on such SD. In addition, each SD shall notify the United States [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.

94.95. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, SDs [**if SFAs and the State are parties, insert:** (and, with respect to a State action, SFAs)] 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 not to sue set forth in Section XVI (Covenants by Plaintiff[s]).

XIX. ACCESS TO INFORMATION

95.96. SDs 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 SDs’ possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this CD, 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 Work. SDs shall also make available to EPA [and the State], for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

96.97. **Privileged and Protected Claims.**

a. SDs may assert that all or part of a Record requested by Plaintiff[s] is privileged or protected as provided under federal law, in lieu of providing the Record, provided SDs comply with ¶ 97.b, and except as provided in ¶ 96.97.c.

b. If SDs assert a claim of privilege or protection, they shall provide Plaintiff[s] with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record’s contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, SDs shall provide the Record to Plaintiff[s] in redacted form to mask the privileged or protected portion only. SDs shall retain all Records that they claim to be privileged or protected until Plaintiff[s] has [have] had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the SDs’ favor.

c. SDs 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 SDs are required to create or generate pursuant to this CD.

~~97.98.~~ **Business Confidential Claims.** SDs may assert that all or part of a Record provided to Plaintiff[s] under this Section or Section XX (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). SDs shall segregate and clearly identify all Records or parts thereof submitted under this CD for which SDs assert business confidentiality claims. Records submitted to EPA determined to be confidential by EPA will be afforded 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 SDs 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 SDs.

~~98.99.~~ If relevant to the proceeding, the Parties agree that validated sampling or monitoring data generated in accordance with the SOW and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this CD.

~~99.100.~~ Notwithstanding any provision of this CD, Plaintiff[s] 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.

XX. RETENTION OF RECORDS

~~100.101.~~ Until 10 years after EPA's Certification of Work Completion under ¶ [4.89] (Certification of Work Completion) of the SOW, each SD shall preserve and retain all non-identical copies of Records (including Records in electronic form) 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 SDs who are potentially liable as owners or operators of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each SD must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each SD (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

NOTE: If SFAs, include ¶ 102. EPA attorneys must assure that the Agency has received a written response to any information requests that it has sent to SFAs containing a certification substantially similar to that required from private PRPs.

~~101.102.~~ The United States acknowledges that each SFA (a) is subject to all applicable federal record retention laws, regulations, and policies; and (b) has certified that it has fully complied with any and all EPA and State requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

~~102.103.~~ At the conclusion of this record retention period, SDs shall notify the United States [and the State] at least 90 days prior to the destruction of any such Records, and,

upon request by the United States [or the State], and except as provided in ¶ 97 (Privileged and Protected Claims), SDs shall deliver any such Records to EPA [or the State].

~~103.104.~~ Each SD certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State and that it has fully complied with any and all EPA and State requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

XXI. NOTICES AND SUBMISSIONS

~~104.105.~~ All approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, and requests specified in this CD must be in writing unless otherwise specified. Whenever, under this CD, notice is required to be given, or a report or other document is required to be sent, by one Party to another, it must be directed to the person(s) specified below at the address(es) specified below. Any Party may change the person and/or address applicable to it by providing notice of such change to all Parties. All notices under this Section are effective upon receipt, unless otherwise specified. Notices required to be sent to EPA, and not to the United States, should not be sent to the DOJ. 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 CD regarding such Party.

As to the United States:

EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
eescdcopy.enrd@usdoj.gov
Re: DJ # _____

[If SFAs, insert:] and:

Chief
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
Washington, D.C. 20044-7611
Re: DJ # _____

As to EPA:

Director, Waste Management Division
U.S. Environmental Protection Agency
Region __
[address]
[email]

and: [Name]
EPA Project Coordinator
U.S. Environmental Protection Agency
Region ___
[address]
[email]
[phone]

As to the Regional Financial Management Officer: [name]
[address]
[email]

At to EPA Cincinnati Finance Center: EPA Cincinnati Finance Center
26 W. Martin Luther King Drive
Cincinnati, Ohio 45268
cinwd_acctsreceivable@epa.gov

As to the State: [name]
State Project Coordinator
[address]
[email]

As to SDs: [name]
SDs' Project Coordinator
[address]
[email]
[phone]

XXII. RETENTION OF JURISDICTION

105.106. This Court retains jurisdiction over both the subject matter of this CD and SDs for the duration of the performance of the terms and provisions of this CD for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this CD, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIV (Dispute Resolution).

XXIII. APPENDICES

106.107. The following appendices are attached to and incorporated into this CD:

“Appendix A” is the ROD.

“Appendix B” is the SOW.

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

“Appendix D” is the complete list of SDs.

[“Appendix E” is the draft form of Proprietary Controls.]

[“Appendix F” is the financial assurance.]

XXIV. MODIFICATION

~~107.108.~~ Except as provided in ¶ 13 (Modification of SOW or Related Deliverables), material modifications to this CD, including the SOW, shall be in writing, signed by the United States and SDs, and shall be effective upon approval by the Court. Except as provided in ¶ 13, non-material modifications to this CD, including the SOW, shall be in writing and shall be effective when signed by duly authorized representatives of the United States and SDs. [If the State is a party, insert: All modifications to the CD, other than the SOW, also shall be signed by the State, or a duly authorized representative of the State, as appropriate.] A modification to the SOW shall be considered material if it implements a ROD amendment that fundamentally alters the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(ii). Before providing its approval to any modification to the SOW, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification.

NOTE: If the CD includes provisions covering cashout SDs and/or *de minimis* SDs, and such parties are numerous, include ¶ ~~108.109.~~

~~108.109.~~ [Any modification that does not affect the obligations of or the protections afforded to [cashout SDs] [or] [*de minimis* SDs] may be executed without the signatures of [the cashout SDs] [or] [the *de minimis* SDs].]

~~109.110.~~ Nothing in this CD shall be deemed to alter the Court’s power to enforce, supervise, or approve modifications to this CD.

XXV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

~~110.111.~~ This CD shall be lodged with the Court for at least 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the CD disclose facts or considerations that indicate that the CD is inappropriate, improper, or inadequate. SDs consent to the entry of this CD without further notice.

~~111.112.~~ If for any reason the Court should decline to approve this CD in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXVI. SIGNATORIES/SERVICE

~~112.113.~~ Each undersigned representative of a SD to this CD and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice [and the _____ for the State] certifies that he or she is fully authorized to enter into the terms and conditions of this CD and to execute and legally bind such Party to this document.

~~113.114.~~ Each SD agrees not to oppose entry of this CD by this Court or to challenge any provision of this CD unless the United States has notified SDs in writing that it no longer supports entry of the CD.

~~114.115.~~ Each SD shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this CD. SDs agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. SDs need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this CD.

XXVII. FINAL JUDGMENT

~~115.116.~~ This CD and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the CD. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this CD.

~~116.117.~~ Upon entry of this CD by the Court, this CD shall constitute a final judgment between and among the United States [, the State,] and SDs. The Court [**if this CD 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

FOR THE UNITED STATES OF AMERICA:

Dated

[Name]
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
Washington, D.C. 20530

[Name]
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611

[if SFAs, add:]

[Name]
[Title]
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044-7611

[Name]
United States Attorney
_____ District of _____

[Name]
Assistant United States Attorney
_____ District of _____
[Address]

Signature Page for CD regarding the _____ Superfund Site

[Name]
Regional Administrator, Region __
U.S. Environmental Protection Agency
[Address]

[Name]
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region __
[Address]

NOTE: Add signature blocks for OECA, if its concurrence is required.

Signature Page for CD regarding the _____ Superfund Site

[If State is a party, add:]

FOR THE STATE OF _____:

Dated

[Name]
[Title]
[Address]

Signature Page for CD regarding the _____ Superfund Site

FOR _____ :
[Print name of Settling Defendant]

Dated

Name (print):
Title:
Address:

Agent Authorized to Accept Service on Behalf of Above-signed Party: Name (print): _____
Title: _____
Company: _____
Address: _____
Phone: _____
email: _____

NOTE: A separate signature page must be signed by each settlor.

Instructions Regarding Automated Features

FEATURE	INSTRUCTIONS
Inserting text copied from a different document	Text copied from a different document will usually have embedded formatting codes. Pasting the text into your document will cause the formatting codes to be inserted as well, which will create unpredictable and frustrating formatting and numbering results. Therefore, ALWAYS use the “Paste Special” function to insert text copied from another document. Press Ctrl-Alt-V; in the pop-up menu, click “Unformatted Text” and OK. (You can also click the Home tab, Paste, Paste Special, Unformatted Text and OK.)
Inserting a new ¶	Click at the end of the paragraph immediately preceding the place where you wish to add the new paragraph, and press Enter. To change the new paragraph's outline level use (under the Home tab) the styles menu. For example, to change ¶ 12.b into ¶ 12.a(1), click in that paragraph and then (using the Home tab) click the "LVL 3" style. To change ¶ 13.a into ¶ 14, click in that paragraph 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 ¶ 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.