

property attributable to the cleanup (e.g. compare purchase price or market price with the estimated value of the property following completion of the response action). Finally, Regions should consider the size and nature of the prospective purchaser and the proposed use of the site (e.g. whether the purchaser is a large commercial or industrial venture, a small business, a non-profit or community-based activity). The analysis of any benefits received by the Agency also should contemplate any projected "windfall" profit to the purchaser when the government has unreimbursed response costs, and whether it is appropriate to include in the agreement some provision to recoup such costs. This analysis should be coupled with an examination of any indirect benefit that the Agency may receive (e.g., demolition of structures, implementation of institutional controls) in determining whether a prospective purchaser agreement provides a substantial benefit.

V. Public Participation

In light of EPA's new policy of accepting indirect public benefit as partial consideration, and the fact that the prospective purchaser agreements will provide contribution protection to the purchaser, the surrounding community and other members of the public should be afforded opportunity to comment on the settlement, wherever feasible. Because settlements with prospective purchasers are not expressly governed by CERCLA Section 122, there is no legal requirement for public notice and comment. Whenever practicable, however, Regions should publish notices in the **Federal Register** to ensure adequate notification of the agreement to all interested parties. Notice of a proposed settlement, in the **Federal Register** alone, however, will rarely be sufficient to appropriately involve a community in the process concerning an agreement with a prospective purchaser. Particularly in urban communities and at facilities where environmental justice is an issue, Regions should provide sufficient opportunities for public information dissemination and facilitate public input. Seeking cooperation with state and local government may also facilitate public awareness and involvement. Additionally, Regions should make a case-by-case determination of the need and level of additional measures to ensure meaningful community involvement with respect to the agreement. Because of business considerations some prospective purchaser agreements may be subject to

relatively short deadlines. In these circumstances, Regions should allow sufficient time for appropriate approvals and public comment prior to the deadline.

VI. Process

A mandatory consultation with the Director of the Regional Support Division, Office of Site Remediation Enforcement, is required for any agreement entered with a prospective purchaser of contaminated property. Any prospective purchaser agreement can only be entered into with the express concurrence of the Assistant Attorney General. It is important that Regions involve EPA Headquarters and the Department of Justice at an early point in the process, and keep them involved throughout the negotiations. In particular, any draft settlement document should be forwarded to Headquarters and the Department of Justice prior to being sent to a prospective purchaser. When seeking approval for a settlement, it is important to explain the consideration for the covenant not to sue, whether direct or a combination of direct and indirect benefits, how it was determined, and why the Region considers it to be adequate.

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency and creates no substantive rights in any persons. Case specific inquiry should be directed to the Regional Support Division. Additional information on this policy is available from Lori Boughton ((703) 603-8959), Elisabeth Freed ((703) 603-8936) in the Policy and Program Evaluation Division, and Helen Keplinger ((202) 260-7116) in the Regional Support Division.

Region _____

In the matter of: [name] [Docket Number] under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, *et seq.*, as amended. [state law, if appropriate] Agreement and Covenant Not To Sue [Insert Settling Respondent's Name]

I. Introduction

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States Environmental Protection Agency ("EPA") [state of _____] and _____ [insert name of Settling Respondent] (collectively the "Parties").

EPA enters into this Agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of

1980, as amended ("CERCLA"), 42 U.S.C. § 9601, *et seq.* [If the state is a party, insert "The State of _____, enters into this Agreement pursuant to [cite relevant state authority.]" and make appropriate reference to state with respect to affected provisions, including payment or work to be performed].

[Provide introductory information, consistent with Definitions and Statement of Facts, about the party purchasing the contaminated property including, name ("Settling Respondent"), address, corporate status if applicable and include proposed use of the property by prospective purchaser. Provide name, location and description of Site.]

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VII, VIII, IX, and X [If this Agreement contains a separate section for Settling Respondent's reservations, add section number], the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA [and the state] of a substantial benefit, is in the public interest.

II. Definitions

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

2. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants, present or existing on or under the Site as of the effective date of this Agreement.

3. "Parties" shall mean EPA, [State of _____], and the Settling Respondent.

4. "Property" shall mean that portion of the Site which is described in Exhibit 1 of this Agreement.