

required to perform further response actions under the Decree if these reopener conditions develop. However, in recognition that the main purpose of this provision is to avoid disputes over liability in "reopener litigation" (which are likely to be complicated by loss of evidence over time), the revised Model recognizes that there may be cases in which this provision is not necessary or the problem it addresses can be resolved by an alternative provision.

A number of other important revisions to the Model have also been adopted relating to such issues as stipulated penalties, EPA review of submissions, indemnification, force majeure, and a waiver of contribution claims against very small ("*de micromis*") contributors. Additional modifications have been made to clarify certain provisions and to correct technical errors.

Consultation Procedures

A memorandum accompanying the 1991 version of the Model required Regional offices to consult with EPA Headquarters before offering to PRPs consent decree language significantly at variance with language contained in 10 identified provisions of the Model. In light of Regional experience with the Model to date and in an effort to further streamline the process of finalizing and entering RD/RA consent decrees, OECA has decided to waive this advance consultation requirement.

In lieu of consulting with the Regions in advance of adopting a variant provision, OECA will perform a periodic review of selected provisions from final RD/RA consent decrees to ensure that such provisions remain protective of the interests of the public. Notwithstanding the elimination of the advance consultation requirement, the Regions should continue to comply with the pre-existing delegations (as modified by a recent memorandum entitled "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases" (May 19, 1995). Those delegations require Headquarters' concurrence in settlements which significantly deviate from written EPA policy. Headquarters also expects Regions to engage in timely and effective communication concerning issues that arise in use of the revised Model, and to refrain from development of regional models that can have the effect of producing inconsistency across the country.

In addition, Regions must continue to consult and work with the Department of Justice in drafting and negotiating all consent decrees.

Effective Date

The revised Model is effective immediately on the date of this memorandum. It should be used as the basis for all consent decrees which accompany special notice letters sent to the PRPs after that date. In cases where a special notice letter for the site or an initial version of the consent decree has been conveyed to the PRPs prior to the date of this memorandum, but settling defendants have not signed a consent decree as of that date, the government negotiation team will have discretion as to whether to employ the old Model or the revised Model as guidance. In cases where the old Model is used, the United States generally will entertain proposals from PRPs for inclusion of language from the revised Model only to the extent that such proposals do not upset the balance struck in the negotiations between the parties up to that point and do not unduly extend or delay negotiation of the final settlement.

The United States will not renegotiate any RD/RA consent decree which has been signed by settling defendants as of the date of this memorandum.

If you have any questions regarding the revised Model Consent Decree, please contact Steve Botts of OECA's Regional Support Division ((202) 260-5787) or Susan Boushell of OECA's Policy and Program Evaluation Division ((703) 603-9063).

cc:

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United States Environmental Protection Agency Model CERCLA RD/RA Consent—Decree July, 1995

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

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In the United States District Court for the District of _____ Division

United States of America [and State of _____] Plaintiffs, v. *_____, Inc.*, Defendants. Civil Action No. _____

Consent Decree

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, 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the _____ Superfund Site in _____, _____, together with accrued interest; and (2) performance of studies and response work by the defendants at the Site consistent with the National Contingency Plan, 40 CFR Part 300 (as amended) ("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 _____, 19____ of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such