

Order; and (b) the veracity of the information provided to EPA by Respondent relating to Respondent's involvement with the Site. This covenant not to sue extends only to Respondents and does not extend to any other person.

#### XI. Reservations of Rights by United States

22. The covenant not to sue by the United States set forth in Paragraph 21 does not pertain to any matters other than those expressly specified in Paragraph 21. The United States reserves, and this Consent Order is without prejudice to, all rights against Respondents with respect to all other matters including, but not limited to:

- a. liability for failure to meet a requirement of this Consent Order;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;<sup>4</sup> or
- d. liability arising from any future arrangement for disposal or treatment of a hazardous substance, pollutant or contaminant at the Site after the effective date of this Consent Order.

23. Notwithstanding any other provision in this Consent Order, the United States reserves, and this Consent Order is without prejudice to, the right to institute judicial or administrative proceedings against any individual Respondent seeking to compel that Respondent to perform response actions relating to the Site, and/or to reimburse the United States for additional costs of response, if:

- a. information is discovered which indicates that such Respondent contributed hazardous substances to the Site in such greater amount or of such greater toxic or other hazardous effects that such Respondent no longer qualifies as a *de minimis* party at the Site because [insert volume and toxicity criteria from Paragraph 11 of the Statement of Facts, e.g., "such Respondent contributed greater than \_\_\_\_\_% of the hazardous substances at the Site, or contributed hazardous substances which are significantly more toxic or are of significantly greater

hazardous effect than other hazardous substances at the Site"]; or

[Note: The cost overrun reopener in Paragraph 23(b) below should only be included with respect to any respondent who is not paying a premium in lieu of this reopener.]

- [b. total response costs at or in connection with the Site exceed \$ \_\_\_\_\_ [insert dollar amount of cost ceiling].

[Note: If some respondents are paying a premium in lieu of the cost overrun reopener and some are not, insert: "This Paragraph 23(b) shall not apply to those Respondents identified [insert "in Paragraph \_\_\_\_\_" or "in Appendix \_\_\_\_\_"] who have elected to pay a premium pursuant to Paragraphs 15 and 16."]

#### XII. Covenant not to Sue by Respondents

24. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site or this Consent Order including, but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claims arising out of response activities at the Site;<sup>5</sup> and
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613, relating to the Site.<sup>6</sup>

25. Nothing in this Consent Order shall be deemed to constitute preauthorization or approval of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. 9611, or 40 CFR 300.700(d).

<sup>5</sup> If the consent order does not resolve respondents' liability for the site as a whole, the scope of Paragraph 24 (b) and (c) may be narrowed to conform to the scope of EPA's covenant not to sue. For example, if the consent order resolves respondents' liability for defined "Past Response Costs" and for a defined "Operable Unit I," Paragraph 24 (b) and (c) could be limited to "any claim arising out of response actions at the Site for which the Past Response Costs were incurred and any claim arising out of Operable Unit I."

<sup>6</sup> The settlement should, wherever possible, release or resolve any claims by respondents against the United States related to the site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Settlement of any federal liability will require additional revisions to this document, and model language will be provided separately. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

26. Respondents covenant not to sue and agree not to assert any claims or causes of action against each other with regard to the Site<sup>7</sup> pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613.

#### XIII. Effect of Settlement/Contribution Protection

27. Nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Order. The United States and Respondents each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which 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.

28. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondents 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 in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Paragraph 21.

29. The Parties agree that each Respondent is entitled, as of the effective date of this Consent Order, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Order. The "matters addressed" in this Consent Order are [all response actions taken by the United States and by private parties, and all response costs incurred and to be incurred by the United States and by private parties, at or in connection with the Site].<sup>8</sup>

#### XIV. Parties Bound

30. This Consent Order shall apply to and be binding upon EPA and upon Respondents and their [heirs,]

<sup>7</sup> If the consent order does not resolve respondents' liability for the site as a whole, the scope of respondents' covenant not to sue each other may be narrowed so as to conform to the scope of the United States' covenant.

<sup>8</sup> This definition of "matters addressed" assumes that this consent order is designed to resolve fully respondents' liability at the site. If the intended resolution of liability is narrower in scope, then the definition of "matters addressed" will need to be narrowed.

<sup>4</sup> This natural resource damage reservation must be included unless the Federal Natural Resource Trustee[s] has/have agreed to a covenant not to sue pursuant to Section 122(j)(2) of CERCLA. In accordance with Section 122(j)(1) of CERCLA, where the release or threatened release of any hazardous substances at the site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal Natural Resource Trustee[s] of the negotiations and encourage the Trustee[s] to participate in the negotiations.