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

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OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

OSWER - 9242.3-18

MEMORANDUM

SUBJECT: Issuance of 2015 Model Superfund State Contract Provisions

FROM: James E. Woolford, Director
Office of Superfund Remediation and Technology Innovation

TO: Superfund National Policy Managers
Regions 1 – 10

PURPOSE

This memorandum transmits new national model provisions for use in Superfund State Contracts (SSCs). The 2015 Model SSC Provisions supersede the 1990 "Classic Two-Party Superfund State Contract Model Clauses." The 2015 Model SSC Provisions were developed by a joint EPA and state workgroup, and represent several months of in-depth discussions, analyses and revisions to reflect the experience and recommendations of EPA regional and state officials who have negotiated SSCs. With this transmittal, regions are expected to begin using the new model language. Regions and states may alter these provisions or add other provisions deemed necessary by all parties to facilitate the activities conducted under an SSC. Alterations or additions may require consultation with the OSRTI SSC Team, and must comply with statutory and regulatory requirements set forth in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended; 40 CFR 35, Subpart O; the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300 (NCP); appropriation laws and regulations; and applicable state statutes or rules.

BACKGROUND

In 1990, EPA issued generic model SSC clauses consistent with the structure and content of Subpart O and the NCP to be used as the basis for the generation of SSCs. Since that time, regions and states have modified these provisions or added new ones to handle site- and state-specific situations. In 2014, the OSRTI SSC Team reviewed SSCs from all ten regions to assess how SSC provisions have evolved over time. Overall, the OSRTI SSC Team found that many SSCs were still based on the 1990 model clauses and that most variants were in accord with EPA

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policy and regulations. However, the Team also determined that many of the 1990 clauses themselves do not accurately reflect current EPA and state relationships in the Superfund remedial program. In some cases, clauses are no longer consistent with how EPA implements its program or do not adequately protect EPA or state interests.

I tasked the OSRTI SSC Team to convene a workgroup of EPA and state representatives to update the model SSC provisions, and to clarify some of the issues noted during the 2014 SSC review (see *Memorandum: Results of OSRTI Review of SSCs and Amendments and Next Steps,* January 16, 2015).

Workgroup members from EPA headquarters and regions developed an initial draft of model provisions for the joint EPA and state workgroup to consider. EPA workgroup members represented a variety of roles including headquarters and regional Superfund, counsel, enforcement, and finance offices. EPA invited state representatives, who are members of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Remedial Action Focus Group and represent states within each EPA region, to participate in the joint workgroup and reach out to other state colleagues for feedback. By the end of the workgroup process, more than 20 states either joined the weekly workgroup calls, or submitted written comments on versions of the draft model provisions.

HIGHLIGHTS OF THE 2015 MODEL SSC PROVISIONS

The new 2015 Model Provisions represent extensive collaboration between EPA headquarters, regional and state workgroup members. The draft provisions were discussed, analyzed, and revised to address workgroup member concerns, while still meeting statutory and regulatory requirements. The new model provisions address most common scenarios that regions and states may encounter when establishing new SSCs, though there are areas where EPA was unable to fully accommodate state concerns. Overall, the new provisions enhance flexibility, clarity, and protection of EPA and state interests in several ways:

- Cost share assurance provisions—EPA recognizes that state agencies cannot make cost share payment assurances on behalf of their state legislatures. The cost share assurance language has been modified to require the state agency to seek sufficient funding to pay cost share and provides for a cost share payment schedule. Additional language also reinforces EPA's policy that the SSC cost estimate represents a spending ceiling; an SSC amendment is required to increase the ceiling before EPA can continue to Fund-finance a remedial action.

- Effect of cost recoveries on cost share—The use of cost recovery proceeds is primarily addressed in two SSC provisions, "30. Litigation," and "17.C. Cost Share Conditions, Settlement Proceeds." These provisions describe EPA and the state's rights to pursue enforcement actions against potentially responsible parties (PRPs) and explain whether and how EPA's use of cost recovery funds affects the state's cost share assurance. We have made certain changes in the provisions because the 1990 model SSC clauses did not accurately delineate the distinctions between recoveries of past costs and EPA's use of those recovered funds to conduct future remedial action work at a site.

The 1990 model clauses on litigation:

- Direct EPA and the state to cooperate in recovery efforts and keep each other informed before settling with, or entering into proceedings against, a PRP.

- Explain that EPA and the state do not have the authority to recover costs on each other's behalf and that such authority is prohibited.

- Explain that if EPA or the state recover remedial action costs from PRPs, the funds shall reduce the amount of cost share the state owes.

We concluded that the third provision did not correctly characterize the impact of cost recovery on cost share. In particular, EPA workgroup members were concerned that the third provision conflicts with the second provision barring the parties from recovering costs on each other's behalf. We revised this provision to clarify that, because EPA only recovers its own costs, recovery of EPA past costs does not affect the amount of cost share a state owes. A state must enter into its own settlement, or join with EPA, to recover its own costs. We also added another provision which states that the state will not owe cost share for future remedial action work that EPA may conduct using cost recovery (i.e., special account) funds. Some state workgroup participants mentioned that they do not have the capacity to pursue settlements with PRPs, and they are concerned that this clarification is not consistent with the idea that states only owe cost share on the Fund-financed remedial action. However, any arrangement to reimburse a state or reduce state cost share would result in EPA recovering less than its own costs. EPA encourages states to join in settlements to obtain recoveries of their own past costs, including their past cost share payments to EPA, and, to that end, the 2015 SSC model includes provisions for EPA and state collaboration in pursuing cost recovery.

- Communication—The model adds periodic financial review, clear language about the ability to revise payment schedules, language regarding when SSC amendments are needed, an improved issue resolution process, and a commitment for EPA to provide states with initial reconciliation documentation within a year of the operational and functional (O&F) determination. By specifying these communication processes within the SSC, EPA and states will be in a better position to avoid misunderstandings and more effectively plan for future activities and the associated costs.

- Institutional Controls (ICs)—The workgroup discussed IC implementation details. EPA maintains the position that O&F determinations are made for the engineered components of the constructed remedial action. ICs are non-engineered instruments that are implemented separately. Therefore, transfer of remedial action components to long-term response action or operation and maintenance (O&M) would not be affected by IC implementation status. The O&M model provision clarifies that, once ICs identified in an SSC have been implemented, the state assures that the ICs will be maintained and enforced as specified in the O&M Plan or Institutional Control Implementation and Assurance Plan.

- SSC conclusion—The model creates a pathway to enable EPA and the state to come to final terms with the implementation and cost of the remedy while keeping the SSC active with respect to O&M implementation.

IMPLEMENTATION

OSRTI expects new SSCs to reflect the model provisions as they provide the necessary protections for both EPA and state interests; they are also the product of extensive regional and state input. However, since each Superfund remedial cleanup is unique, there may be site- or state-specific situations that may require alteration of the model provisions or inclusion of additional provisions. When appropriate, regions and states may alter these model provisions or add other provisions deemed necessary by all parties to facilitate the response activities under the SSC. Such alterations or additions may require consultation with the OSRTI SSC Team, and must comply with statutory and regulatory requirements set forth in CERCLA, as amended; 40 CFR 35, Subpart O; the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300 (NCP); appropriation laws and regulations; and applicable state statutes or rules.

The OSRTI SSC Team will reach out to EPA regions to offer assistance when regions are drafting new SSCs. EPA regions should also contact the Team to address unique circumstances or whenever a proposed provision modification or addition may put EPA or the state at risk of being inconsistent with policy, regulations, CERCLA or state laws or regulations. The new model provisions also do not address EPA/tribal agreements or when political subdivisions take the lead to implement the remedial action. The OSRTI SSC Team is also available to provide assistance to regions in developing or modifying provisions to address these situations.

The OSRTI SSC Team will use upcoming training opportunities, webinars, standing monthly EPA regional conference calls, as well as state meetings, to ensure EPA and state officials are familiar with the 2105 model SSC provisions.

CONCLUSION

I appreciate the active engagement of the many EPA and state participants in this workgroup process. If you have any questions, please contact me, or your staff may contact Ellyn Fine at fine.ellyn@epa.gov or 703-603-8714.

Attachment: 2015 Model SSC Provisions

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Superfund State Contract Model Provisions
November 2015

This document contains model provisions for use in standard Superfund State Contracts (SSCs). When appropriate, regions and states may alter these provisions to suit their agreements, and, pursuant to 40 CFR 35.6805(s), may add other provisions deemed necessary by all parties to facilitate the response activities. However, alterations or additions may require consultation with EPA Headquarters and must comply with statutory and regulatory requirements set forth in CERCLA, as amended (herein referred to as "CERCLA"), 40 CFR 35, Subpart O, and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300 (NCP) and any applicable state statute or rule.

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Superfund State Contract (SSC) Model Provisions
November 2015

1. General Authorities [CERCLA §104; 40 CFR 300.515(a); 40 CFR Part 35, Subpart O; 2 CFR Parts 200 & 1500]

This Superfund State Contract ("Contract" or "SSC") is entered into pursuant to Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq*., as amended (herein referred to as "CERCLA"); the National Oil and Hazardous Substances Pollution Contingency Plan, 55 F.R. 8666 *et seq*. (40 CFR Part 300, March 8, 1990, hereinafter referred to as the "NCP"); other applicable Federal regulations including 40 CFR Part 35, Subpart O, and 2 CFR Parts 200 and 1500. **[Cite State law/authority applicable to response.]**

2. Purpose of the SSC [40 CFR 300.180 & 300.510(a); 40 CFR 35.6805(b)]

This SSC is an agreement between the United States Environmental Protection Agency (EPA) and the State of **[State name]**. The Governor has designated the **[State agency name entering into this Contract pursuant to 40 CFR 300.180]** to work in partnership with EPA on behalf of **[State name]** ("the State") concerning remedial **[or "**response**"]** actions to be conducted at **[name of Site, City, County, and EPA NPL Site Identification number]** ("the Site" or "this Site"). This SSC documents the responsibilities of EPA and the State and includes provisions that outline the basic purpose, scope, and administration of the SSC, as well as those activities described in the attached Statement of Work (SOW), Appendix **[number]**. For the purposes of this SSC, the term "remedial action" does not include operation and maintenance.

3. Duration of the SSC

This Contract shall become effective upon execution by EPA and the State and shall remain in effect until terminated (See Termination provision) or the terms for final SSC conclusion of the Contract are met (See Conclusion of this SSC provision).

This Contract constitutes an **["**initial SSC**" or "**amendment to an existing SSC**"]**.

4. Negation of Agency Relationship between the Signatories [40 CFR 35.6805(c)]

Nothing contained in this Contract shall be construed to create, either expressly or by implication, the relationship of agency between EPA and the State. EPA (including its employees, agents, and contractors) is not authorized to represent or act on behalf of the State in any matter relating to the subject matter of this Contract and the State (including its employees, agents, and contractors) is not authorized to represent or act on behalf of the EPA in any matter relating to the subject matter of this Contract.

5. Emergency Response Activities [40 CFR 300.415 & 300.525]

Any emergency response activities, emergency circumstances or removal actions conducted pursuant to the NCP shall not be restricted by the terms of this Contract. However, remedial activities may be suspended until the emergency activities are concluded, in which case, the SSC may be subject to amendment.

6. Site Description [40 CFR 300.430(f); 40 CFR 35.6105(a)(2)(i) & 35.6805(d)]

A description of the Site, including a discussion of the location of the Site, its physical characteristics (site geology and proximity to drinking water supplies), the nature of the release (contaminant type and affected media), past response actions, and the response actions that are still required, and their expected benefits, is attached in Appendix [number].

7. Site-specific Statement of Work [40 CFR 300.430(f) & 300.435(b); 40 CFR 35.6105(a)(2)(ii) & 35.6805(e)]

A site-specific Statement of Work (SOW) for all remedial (or other response) actions provided under this SSC, including estimated costs per task, and a standard task to ensure that a sign is posted at the Site providing the appropriate contacts for obtaining information on activities being conducted at the Site, and for reporting suspected criminal activities, is attached in Appendix **[number]**.

8. Statement of Intention to Follow EPA Policy and Guidance [40 CFR 300.430(f)(5)(ii)(B); 40 CFR 35.6805(f)]

In addition to the requirements specified in CERCLA and the NCP, EPA and the State intend to follow all policy and guidance pertinent to this remedy, including those identified in the Administrative Record and/or stated here. [Optional: Include document titles and directive numbers.]

9. Project Schedule [40 CFR 35.6805(g)]

A general description of the project schedule/milestones–either by calendar year or Federal Fiscal year–which includes a summary of deliverables, as specified in the SOW, is attached as Appendix **[number]**.

10. Designation of Primary Contacts and their Responsibilities [40 CFR 300.120(f) & 300.180(a); 40 CFR 35.6805(h)]

A. EPA Designation

EPA has designated the following person to serve as the Remedial Project Manager (RPM) and act on behalf of EPA in the implementation of this Contract.

[Name of Remedial Project Manager]
[Address]
[Email]
[Telephone number]

The designated RPM may be changed by written notification in a timely manner to the State signatories, and incorporated by reference herein without amending this Contract.

B. State Designation

The State has designated the following person to serve as the State Project Manager (SPM) and act on behalf of the State in the implementation of this Contract.

[Name of State Project Manager]
[Address]
[Email]
[Telephone number]

The designated SPM may be changed by written notification in a timely manner to the Federal (EPA) signatories, and incorporated by reference herein without amending this Contract.

C. Authority to Approve Minor Modifications

The RPM and the SPM have joint authority to approve minor modifications to the SOW, including minor schedule delays, without the need for amendment of the Contract, provided the modifications do not require a change in the selected remedy addressed under this Contract or cause the project cost to exceed the remedial action cost estimate. **[Optional: EPA and the State may identify here the scope of minor changes that EPA and State agree do not require amendment.]** Such modifications must be in writing and approved by the RPM and SPM.

11. CERCLA Assurance: Operation and Maintenance [CERCLA §104(c)(3)(A); 40 CFR 300.435(f)] & 300.510(c)(1); 40 CFR 35.6105(b)(1) & 35.6805(i)(1)]

In accordance with CERCLA §104(c)(3)(A), and 40 CFR 300.510 (c)(1), the State hereby assures that the operation and maintenance (O&M) of implemented remedial actions addressed under this Contract will remain in effect for the expected life of such actions. The State also guarantees, pursuant to 40 CFR 35.6105(b)(1), that, if the designated agent, **[name State Agency or designee]**, conducting O&M on behalf of the State, defaults, the State will be responsible for assuming all O&M activities.

In addition, when applicable, once institutional controls identified in this contract have been implemented, the State assures that the institutional controls will be maintained and enforced as specified in the O&M Plan or Institutional Control Implementation and Assurance Plan (ICIAP).

In accordance with 40 CFR 300.510(c)(1), the State and EPA shall consult on a plan for O&M prior to the initiation of each remedial action addressed under this Contract. The draft O&M Plan will continue to be refined during the remedial action, and the O&M Plan will be updated by the State and/or EPA as conditions change during the **[“**long-term response action and**”]** O&M. As applicable, an ICIAP may also be developed. **[Optional: “**At the present time, O&M or institutional controls are not anticipated for the remedial action addressed under this Contract. If, in the future, O&M or institutional controls are required, the Record of Decision and the provisions of this Contract may be amended.**”]**

12. <u>CERCLA Assurance: Twenty-Year Waste Capacity</u> [CERCLA §104(c)(9); 40 CFR 300.510(e); 40 CFR 35.6105(b)(3) & 35.6805(i)(2)]

EPA’s 2014 National Capacity Assessment shows that there is adequate national capacity for the treatment and disposal of hazardous waste through calendar year 2039. This assessment included data provided by the State for the 2011 National Biennial RCRA Hazardous Waste Report.

Based upon the assessment and other data, EPA expects that there will be adequate national hazardous treatment and disposal capacity during the 20-year period following signature of this Contract. Based on EPA’s expectation, the State hereby assures the availability of hazardous waste treatment or disposal facilities for the next 20 years, following signature of this Contract, pursuant to CERCLA §104(c)(9).

In order to ensure the continued availability of capacity for the treatment and disposal of hazardous waste, the State agrees to work with EPA to meaningfully participate in the national capacity planning process.

13. <u>CERCLA Assurance: Off-Site Storage, Treatment, or Disposal</u> [CERCLA §§104(c)(3)(B) & 121(d)(3); 40 CFR 300.510(d); 40 CFR 35.6105(b)(4) & 35.6805(i)(3)]

Pursuant to CERCLA §§104(c)(3)(B) & 121(d)(3), EPA and the State have determined that off-site treatment, storage, or disposal of hazardous substances **[“**is**” or “**is not**”]** required for this response action. **[If off-site disposal is required, include, “**EPA or its representative, in its invitation for bids for remedial action, shall require respondents to provide adequate capacity for waste disposal at a facility (or facilities) that, at a minimum, meet(s) the requirements of Subtitle C of the Solid Waste Disposal Act. The State's acceptance of EPA's selection shall constitute this assurance.**”]**

14. Out-of-State Transfers of CERCLA Waste [40 CFR 35.6120 & 35.6805(v)]

The EPA or the State must provide written notification of out-of-state shipments in accordance with 40 CFR 35.6120.

15. CERCLA Assurance: Real Property Acquisition [CERCLA §104(j); 40 CFR 300.510(f); 40 CFR 35.6105(b)(5) & 35.6400 & 35.6805(i)(4); 2 CFR 200.311; 49 CFR Part 24]

EPA may determine that an interest in real property must be acquired in order to conduct a response action. However, EPA may acquire an interest in real estate in order to conduct a remedial action only if the State in which the interest to be acquired is located provides assurances that the State will accept transfer of the interest upon completion of the remedial action.

The State shall not acquire any interest in real property without prior written concurrence by EPA.

[Choose the appropriate text below]

If an interest in real property is required, EPA shall acquire such interest consistent with CERCLA §104(j) and pursuant to 40 CFR 300.510(f), and 40 CFR 35.6105(b)(5) & 35.6805(i)(4). The State assures it will accept the transfer of such interest, including institutional controls restricting the use of the real property, on or before completion of the remedial action. The State provides this assurance even if it intends to transfer this interest to a third party, or to allow a political subdivision to accept transfer on behalf of the State. If the political subdivision is accepting the transferred interest in real property, the State guarantees that it will accept transfer of such interest in the event of default by the political subdivision. If the State or political subdivision disposes of the transferred real property, it shall comply with the requirements for real property in 2 CFR 200.311.

[and/or]

If an interest in real property is required, the State assures it shall acquire such interest, pursuant to a Cooperative Agreement **[include cooperative agreement in List of Cooperative Agreements provision]**, and consistent with CERCLA §104(j) and pursuant to 40 CFR 300.510(f), and 40 CFR 35.6105(b)(5) & 35.6805(i)(4). The State shall comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and its implementing regulations, set forth at 49 CFR Part 24, in acquiring any interests in real property. The State provides this assurance even if it intends to transfer this interest, including institutional controls restricting the use of the real property, to a third party. If a political subdivision is accepting the interest in real property, the State guarantees that it will accept transfer of such interest in the event of default by the political subdivision. If the State or political subdivision disposes of the transferred real property, it shall comply with the requirements for real property in 2 CFR 200.311. The direct, out-of-pocket expenditures

incurred by the State, if any, for acquiring any such interest in real property shall be accepted, after being submitted by the State and verified by EPA, as credit to satisfy the State's cost-share requirements in this Contract.

16. CERCLA Assurance: Provision of State Cost Share [CERCLA §§104(c)(3) & 104(d)(1); 40 CFR 300.510(b)(1); 40 CFR 35.6105(b)(2) & 35.6805(i)(5)]

A. Determination of Cost Share

Pursuant to CERCLA §§104(c)(3) & 104(d)(1), EPA must determine whether the State or political subdivision performed operations at the Site at the time of release in order to determine the State's cost share.

[Use the following language for 10% cost share]

This Site was not operated by the State or political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances at the facility. Therefore the State's cost share for the remedial action **["**and long-term response action**"]** provided under this Contract is 10 percent.

[Use the following language for 50% cost share]

This Site was operated by the State or political subdivision, either directly or through contractual relationship or otherwise, at the time of any disposal of hazardous substances at the facility. Therefore, the State must provide 50 percent (or such greater share as EPA may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) of the cost of removal, remedial planning, remedial action, and long-term response action, if any.

B. Cost Share Assurance

Pursuant to CERCLA §104(c)(3), the State assures it will seek sufficient funding to pay its State cost share as set forth in the Payment Schedule subparagraph of the Cost Share Conditions provision of this Contract. Payments or encumbrance of funds shall be subject to the availability of funds appropriated by the State legislature. No provision herein shall be interpreted to require obligation or payment of funds in violation of applicable State law.

If the State is unable to make all or part of any payment required as set forth in the Payment Schedule subparagraph of the Cost Share Conditions provision of this Contract, the State shall notify EPA of that fact as soon as practicable, but no later than **[number]** days before the **["**due**" or "**billing**"]** date for the given payment. EPA and the State may revise the payment schedule in this Contract to allow the State additional time to pay its full cost share, but only to the extent consistent with law, and EPA regulation, and in consideration of EPA policy and guidance. Any agreement between EPA and the State to revise the

payment schedule must be documented in an amendment to this Contract. If a new payment schedule cannot be agreed upon, EPA may be required to suspend some or all work at the Site or may seek to terminate this Contract (See Termination of this SSC provision) and enforce the payment terms associated with EPA's expenditures, including costs incurred by EPA as a result of suspending or terminating work.

If EPA does not have the necessary funds available to continue the remedial action at any given time during the term of this Contract, EPA will notify the State as soon as practicable, and will meet with the State to determine the appropriate action, including modifying the payment schedule or terminating the Contract, given the absence of, or a reduction in, funding.

17. Cost Share Conditions

A. Cost Estimate [40 CFR 35.6805(j)(1)]

[Optional: "The overall cost of the remedy for this Site is estimated to be $**[amount]**. This Contract only addresses the portion of the remedy addressed in the Site-specific Statement of Work provision of this Contract. Before work is commenced on additional portions of the remedy, this Contract will be amended accordingly.**"]**

The estimated cost of the remedial action(s) **["**and long-term response action(s)**"]** provided under this Contract is $**[amount].** This estimate excludes EPA's intramural (i.e., payroll and travel) and indirect costs. **[If EPA has used special account funds for a portion of this remedial action, add the following phrase: "**EPA has used approximately $**[amount] i**n special account funds to conduct a portion of this remedial action (final amount to be determined during final financial reconciliation). As a result, the estimated cost of the response action that is cost shareable is $**[amount]**.**"]** The estimated State cost share is $**[amount]. [Provide further information on costs associated with removal, remedial planning, and remedial design if cost share is 50%. Estimates for the cost of O&M may also be included here but are not required pursuant to Subpart O.]**

EPA may not expend appropriated funds in excess of this cost estimate nor shall the State's assurance exceed the cost share amount identified in this provision. Any increase in the cost estimate for this remedial action, the State's share, or modifications that exceed the SOW for this Contract require an amendment to this Contract.

B. Basis for Calculating Cost Estimate [40 CFR 35.6805(j)(2)]

The estimated cost is derived from the **[identify source of estimate]** and includes contingencies for change orders, which may or may not be executed, and construction management services. **[Provide further information on cost calculations and assumptions, as appropriate.]**

C. Settlement Proceeds

If EPA expends funds from a settlement (or other instrument) with potentially responsible parties (PRPs) to perform work provided under this SSC, such expenditures will not require State cost share, but will not alter the percentage (i.e., 10% or 50%) owed by the State as cost share for the portion of the future work conducted that is cost shareable. The use of such funds to conduct any portion of the work under this SSC must be addressed no later than during final financial reconciliation (See Final Financial Reconciliation provision).

D. Periodic Financial Review

EPA and the State are both responsible for reviewing cumulative expenditures for the work provided under this SSC on a **[specify time frequency]** basis. Such a review may also include a review of credits and in-kind services, use of contingency funds, cost share payments, and SSC cost estimates. Once expenditures incurred are **["**$**[amount]" or "[number]**% of the estimate**"]**, the parties agree to consult on the necessity to amend the cost estimate. Failure to consult does not preclude amendments to this Contract to amend the cost estimate.

E. In-kind Services [40 CFR 35.6815(a)(1); 2 CFR 200.306]

The Support Agency (State) may provide equipment and services (in-kind services) to satisfy its cost share requirements, which is documented in a Support Agency Cooperative Agreement (SACA) with EPA. The use of the SACA as a vehicle for providing cost share must be documented in the SSC. The recipient must comply with applicable requirements regarding in-kind and donated services pursuant to 2 CFR 200.306. In-kind services are not credit and cannot be reimbursed to the State nor used to satisfy cost share requirements at another site. **[Add in-kind service documentation, as appropriate, and reference in List of Support Agency Cooperative Agreements provision].**

F. Credit [CERCLA §§101(24) & 104(c)(5); 40 CFR 300.510(b)(2); 40 CFR 35.6285(c) & 35.6805(j)(2)]

Credit may be used to satisfy the State's cost-share requirements in this Contract. Credits are limited to State, site-specific, expenses that EPA determines to be reasonable, documented, direct, out-of-pocket expenditures of non-Federal funds for remedial action, as defined in CERCLA §101(24), that have not been previously applied or reimbursed, and that are consistent with a permanent remedy at the Site. Documented excess credit cannot be reimbursed to the State but may be used to satisfy cost share requirements at another site (See Final Financial Reconciliation provision).

[Include one or more of the following provisions, as appropriate:]

i. The State does not intend to submit a claim for credit for expenditures incurred at the Site. Through amendment to this Contract, the State, in the future, may use EPA approved credit at this Site, based on EPA prior authorization for the State to incur expenditures for remedial action at this Site, or by directing EPA to use excess credit earned at another site.

ii. EPA has authorized the State to incur expenditures for remedial action provided under this SSC **[specify ceiling amount, as applicable]** to obtain credit. **[Add reference to credit documentation as applicable]**. After EPA verifies the State's claim for CERCLA credit pursuant to 40 CFR 35.6285(c)(2), this Contract will be amended to use the credit to satisfy the State's cost-share requirements in this Contract.

iii. The State has submitted a claim for CERCLA credit of $**[amount]** for expenditures incurred at this Site pursuant to 40 CFR 35.6285(c)(2). The State acknowledges that the credits are subject to verification by EPA. In the event that verification reveals that the amount of available credit is less than originally claimed, then the State shall pay the difference, which shall be documented in an amendment to this Contract. Excess credit cannot be reimbursed, but with EPA approval, excess credit may be used at another site.

iv. EPA has verified that the State has a CERCLA credit of $**[amount]** for remedial action expenditures incurred at **[“**this Site**” or Name of another site]** that will be used to satisfy the State’s cost-share requirements in this Contract.

G. Payment Schedule [40 CFR 35.6285 & 35.6805(j)(3) & 35.6815(a)]

[Due to the site-specific nature of payment schedule negotiations, provisions may vary significantly. Payment schedule provisions also should include any approved regulation deviations to required payment timeframes, if appropriate.]

[**If a political subdivision is providing the cost share, alter the text accordingly and add the statemen**t, “The State shall guarantee payment of the cost share in the event of default by the political subdivision.**”]**

[Select the appropriate paragraphs below to indicate a lump-sum or incremental payment option.]

The State shall submit to EPA by **[date]**, a lump-sum payment of $**[amount]** for the State's share. The State assures its cost-share obligation for actual remedial action **[“**and long-term response action**”]** costs, the final payment for which shall be settled at final financial reconciliation (See Final Financial Reconciliation provision).

[or]

The State will make incremental payments for the work provided under this SSC during the course of activity and ending before the technical completion of the activities in the SOW of this Contract. Final payments (or reimbursements) will be settled at final financial reconciliation (See Final Financial Reconciliation provision). Cost share payments pursuant to the schedule below shall be based on EPA billings for expenditures **[“**to be**”]** incurred during the performance period **[specify dates, as appropriate] [and/or based on achievement of specific milestones, e.g., award of construction contract]. [Optional: “**Billing documentation shall include**” [specify required supporting documentation.]**

Payment Date (and/or Milestone)	Payment Amount
[Example] Annually **[or other incremental time period]**, within **[number]** days from date of invoice, expected within **[number]** months of completion of the performance period.	
Total Payment Amount:	

All State payments shall be made payable to EPA and sent to the Regional Financial Management Office as specified below:

United States Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

In the event the EPA does not receive an annual payment or acceptable credit within 1 year of the due date, interest shall accrue from the due date in accordance with 2 CFR 200.345. Interest will be charged at the rate established for the Superfund Trust fund.

The due date is the date or dates specified in this Contract unless the State invokes the Issue Resolution provision set forth in this Contract. If issue resolution is invoked, for purposes of interest calculation, interest will accrue on the unpaid portion of the final resolution amount beginning on the established invoice date above, unless otherwise provided for in the final dispute resolution decision.

18. Site Access [CERCLA §§104(e) & 121(e); 40 CFR 300.400(d); 40 CFR 35.6805(p)]

EPA and the State shall each make best efforts to secure their own separate access to the Site and adjacent properties as well as all rights-of-way, leases, easements, and other instruments

necessary to implement the response actions and O&M described in the SOW of this Contract. EPA and the State will each attempt to secure access to the Site, as appropriate, for itself, its agents and representatives, and for contractors performing the work under the SOW of this Contract.

In entering into any access agreement, EPA will use its best efforts to negotiate for continuous and transferable access rights to all elements of the SOW of this Contract, and, upon transfer to the State, shall assign its access rights to the State. As requested by EPA, the State, to the extent of its legal authority, shall assist EPA in securing Site access and shall cooperate with EPA to satisfy all Federal, State, and local requirements for permits and approvals in accordance with CERCLA §121(e). Compliance with local requirements for permits or other local regulations shall be the responsibility of the EPA contractor(s).

The inability of EPA or the State to obtain access necessary to implement the elements of the SOW of this Contract may require an amendment to, or termination of, this SSC (See Termination of this SSC provision).

With reasonable notice to the RPM, and upon condition that they comply with any site safety plan then in effect, representatives of the State shall have access to the Site. Similarly, whenever possible, representatives of the federal government will coordinate access to the Site in advance with the SPM.

19. State Review [40 CFR 300.505(a) & 300.505(c) & 300.505(d); 40 CFR 35.6805(t)]

The State must review and comment on the response actions provided under this Contract. Unless otherwise stated in the SSC, all time frames for review must follow those prescribed in the NCP. **[Add as necessary--"**EPA and the State hereby agree to the following binding time frame for review and comments on matters relating to the implementation of the response actions provided under this Contract:**" Add language composed by signatories. Note that any consultation requirements in this Contract supersede existing Superfund Memorandum of Agreement consultation requirements.]**

20. Reports [40 CFR 35.6815(c)(1)]

EPA and the State agree to exchange reports. **[Specify the nature, detail, and frequency of reports here.]**

21. Records Access [40 CFR 35.6710 & 35.6815(d); 40 CFR Part 2, Subpart B; 2 CFR 200.326 & 200.336]

At the State's request, and to the extent allowed by federal law, EPA shall make available to the State any information in its possession concerning the Site. If any information is provided to EPA with a claim of confidentiality of business information, it will be treated in accordance with

40 CFR Part 2, Subpart B. EPA may only share confidential business information with the State if it is permitted under 40 CFR Part 2, Subpart B.

At EPA's request, and to the extent allowed by State law, the State shall make available to EPA any information in its possession concerning the Site. EPA shall not disclose information submitted by the State under a claim of confidentiality of business information unless EPA is required to do so by federal law, and has given the State advance notice of its intent to release that information. Absent notice of such claim of confidentiality of business information, EPA may make said information available to the public without further notice.

22. Records Retention [40 CFR 300.515(h)(3)(i); 40 CFR 35.6705 & 35.6710 & 35.6815(d); 2 CFR 1500.6]

Where the State must maintain records on a site-specific basis, the State must comply with the requirements regarding record retention described in 40 CFR 35.6705.

23. Inspection of the Remedy [40 CFR 300.435(f) & 300.515(g); 40 CFR 35.6805(q)]

A. Joint EPA/State Pre-final Inspection

[Optional: Insert any remedy-specific inspection factors that EPA and the State have developed related to the functioning and performance of the remedy. Application of these factors will help to determine what the inspection items are and, ultimately, O&F.]

A joint EPA/State pre-final inspection will be conducted at the conclusion of construction of each remedial action addressed by this Contract. This inspection is separate from the construction contract pre-final inspection, although both inspections may be conducted concurrently. The joint EPA/State pre-final inspection will be led by the RPM accompanied by the SPM **["**and**" list other participants, as appropriate]**. The joint EPA/State pre-final inspection generally will consist of a walk-through inspection of the constructed remedial action. This inspection will determine whether the each element of work is complete and consistent with the contract documents and the EPA approved remedy. Jointly, EPA and the State will determine if there are any outstanding construction items. An attempt shall be made to determine resolutions for all remaining items. EPA will provide an inspection report to the State for review and comment. If the EPA/State pre-final inspection results in significant outstanding items, EPA may choose to delay the determination that construction of the remedial action is complete until the significant items have been resolved.

B. Joint EPA/State Final Inspection

A joint EPA/State final inspection will be conducted to determine that each remedial action addressed under this Contract is functioning properly and performing as designed. The joint

EPA/State final inspection will be led by the RPM, accompanied by the SPM and other parties, where appropriate, from the EPA/State pre-final inspection.

The EPA/State final inspection generally will consist of a walk-through inspection of the constructed remedial action, with the inspection focusing on the items necessary to ensure the remedial action is operating properly and performing as designed. The RPM and the SPM will also confirm that all outstanding items from the EPA/State pre-final inspection have been resolved.

24. Operational and Functional [40 CFR 300.435(f) & 300.510(c)(2)]

The completion of the joint EPA/State pre-final inspection marks the point in time when construction of each remedial action is considered complete for purposes of this Contract. It is used to document the beginning of the up to one-year O&F period. Consistent with 40 CFR 300.435(f)(2), the "remedy becomes operational and functional (O&F) either one year after construction is complete, or when the remedy is determined concurrently by EPA and the State to be functioning properly and performing as designed, whichever is earlier." EPA's intention is to schedule and conduct a joint EPA/State final inspection within one year of the completion of the joint EPA/State pre-final inspection. The completion date of the EPA/State final inspection, assuming it is done within one year of the pre-final inspection, will be used as the date of the O&F determination. In the event that the joint EPA/State inspection and does not occur within one year, the NCP (40 CFR §§ 300.435(f)) provides EPA the discretion to make an O&F determination without this inspection. As discussed in §300.435(f)(2) of the NCP, "EPA may grant extensions to the one-year O&F period, as appropriate." When the O&F determination has been made, EPA will provide written notification to the State documenting the O&F determination. Since the O&F time period is part of the remedial action, the State cost share is applicable.

In accordance with 40 CFR §300.435(f)(1), the O&F determination results in the transfer of each remedial action to the State for O&M or initiation of the long-term response action (LTRA), as described in the Ground and Surface Water Restoration Provision.

The Remedial Action Report will be prepared once each remedial action is O&F. [Optional: "The state may review and comment on the draft Remedial Action Report."] After EPA approves the Remedial Action Report, EPA will provide a copy to the State.

25. Ground and Surface Water Restoration (Long-term Response Action) [CERCLA §104(c)(6); 40 CFR 300.435(f)]

The remedial action provided under this Contract **["**includes**" or "**does not include**"]** ground or surface water restoration. Pursuant to CERCLA §104(c)(6), EPA is authorized to share in the cost

of the restoration of ground or surface water for a period of up to ten years or until the level of protectiveness, as defined in the Record of Decision, is achieved, whichever comes first. The ten-year period will adhere to the provisions provided in 40 CFR 300.435(f)(3). This ten-year period of ground or surface water restoration is referred to as long-term response action (LTRA). The O&F determination marks the initiation of the LTRA.

[If the remedy includes LTRA, choose one of the following to add]

The State has agreed to take the lead for the LTRA. EPA will share **[“**50**” or “**90**”]** percent of the cost of the LTRA through a Cooperative Agreement (CA).

[or]

The State has elected not to take the lead for the LTRA. EPA shall conduct the LTRA. The State cost share, **[“**10**” or “**50**”]** percent, shall be applicable **[Ensure the value of the LTRA is described in the response cost estimate]**.

26. <u>Personal Property</u> [40 CFR 35.6815(b)]

The State agrees that it will accept title to fixed-in place equipment, and equipment that is an integral part of services to individuals, used as all or part of the remedy. EPA shall no longer have an interest in this equipment once installed and EPA has certified that the remedy is operational and functional. The State must use, manage and dispose of equipment acquired under this Contract in accordance with state laws and procedures.

27. <u>Final Financial Reconciliation</u> [35.6285(d) & 40 CFR 35.6805(k)]

The financial settlement and final financial reconciliation of remedial action **[“**and other response**”]** costs (including all change orders, claims, total expenditures, total collections, exclusion of special account expenditures, verification and application of credit and in-kind services, final payments, refunds, or transfers of State overpayments, etc.) must be completed and documented to ensure that both EPA and the State have satisfied the CERCLA cost share requirement. Final financial reconciliation must be completed before this Contract can be administratively closed and must be documented pursuant to the Administrative Closure subparagraph of the Conclusion of this SSC provision. EPA will provide draft financial reconciliation documentation to the State within one year of the **[“**O&F determination**” or “**LTRA completion**”]** for the remedial action conducted under this Contract.

Credit and in-kind services must be used first to satisfy the State’s cost share requirements at this Site. Per the State’s request, EPA may use verified excess credit from this Site to satisfy cost share requirements at another site, but only after final financial reconciliation has been completed. Excess credit cannot be refunded to the State. In-kind services cannot be used at another site and cannot be refunded to the State. Cash overpayments will be refunded to the State, or at the State’s direction, will be used to satisfy cost-share requirements at another site.

28. SSC Amendments [40 CFR 300.510; 40 CFR 35.6805(l)]

This Contract may be amended to alter any provision of this agreement, but only to the extent consistent with federal and state laws and regulations, and in consideration of EPA policy and guidance. Amendments are required when there are changes in the selected remedy addressed under this Contract, project costs exceed the remedial action cost estimate, payment schedules are altered, to document Administrative Closure or Final SSC Conclusion, or when alterations affect the State's assurances pursuant to the NCP and CERCLA. Any amendments that affect the SOW or the remedial cost estimate under this Contract must include an updated SOW reflecting these changes. All amendments to the Contract must be agreed to, in writing, by the signatories, except as provided in this Contract (See Authority to Approve Minor Modifications subparagraph), and must be reflected in all response agreements affected by the change(s).

29. List of Support Agency Cooperative Agreements [40 CFR 35.6805(m)]

The following list includes all support agency cooperative agreements currently in effect for the Site:

Date of Agreement	Signatories
[Date of SACA, or write N/A]	**[Signatories to SACA, or write N/A]**

30. Litigation [CERCLA §§106 & 107; 40 CFR 300.520; 40 CFR 35.6805(n)]

A. No Waiver to Bring Action

This Contract does not constitute a waiver of EPA's rights or the State's rights, nor can either party waive the other party's rights, to bring an action against any person or persons for liability under CERCLA §106, to compel cleanup, or for cost recovery under CERCLA §107, or to bring an action against any person or persons under any other statutory provision or common law.

B. Asserting Claims

EPA and the State may be entitled to assert claims against a third party (herein referred to as the "potentially responsible party" or "PRP," whether one or more parties) for reimbursement of any services, materials, monies, or other things of value expended by EPA or the State for Fund-financed response activity, related to the remedial action described in the SOW under this Contract.

i. EPA and the State hereby agree that they shall cooperate in, and coordinate efforts to, recover their respective costs of response actions taken at the Site, including the

negotiation of settlements and the filing and management of any judicial actions against PRPs. EPA and the State also hereby agree that neither shall enter into a settlement with, or initiate a judicial or administrative proceeding against, a PRP for the recovery of such sums, except after having given notice in writing to the other party to this Contract **[number]** days prior to the date of proposed settlement or commencement of the proposed judicial or administrative proceedings.

ii. Neither party to this Contract shall attempt to negotiate for, or collect, reimbursement of any expenditures incurred for work performed under this Contract on behalf of the other party, and authority to do so is hereby expressly negated and denied. A State must enter its own settlement with a PRP, or be a party to an EPA settlement, in order to obtain reimbursement for its payments to EPA.

iii. Unless otherwise specified in a settlement (or judgment), any settlement for past costs that EPA enters into, to which the State is not a party, only reimburses EPA's expenditures of appropriated funds. EPA will neither reimburse the State for cost share payments it has made to EPA nor reduce the cost share owed pursuant to the Cost Share Conditions provision in this Contract based on EPA's recovery of past costs. Similarly, any settlement into which the State enters into, to which EPA is not a party, only reimburses the State's costs and does not affect the costs EPA has or will incur under this Contract nor the share owed to EPA pursuant to the Cost Share Conditions provision in this Contract.

31. <u>Issue Resolution</u>

In the event issues arise relating to the Site, or questions are raised about any term of this Contract, such issues, to the extent possible, will be resolved by the RPM and the SPM. Note that matters unrelated to this SSC, such as those between the State and other federal agencies, are not subject to the terms of this Contract, since the SSC is a bilateral agreement.

If any such disagreement cannot be resolved by the RPM and the SPM, it shall be referred, as necessary, to the Regional Superfund Branch Chief and **[insert State counterpart]**, the Regional Superfund Director (or designee) and **[insert State counterpart]**, the Regional EPA Administrator (or designee) and **[insert State counterpart]**, and, finally, the Assistant Administrator, OSWER, U.S. EPA (or designee) and **[insert State counterpart]**, for final agency action. EPA and the State agree that the final decisions achieved resulting from this process shall be considered final agency actions. Nothing in this agreement precludes a party from pursuing other available adjudication processes should the final agency actions not lead to a mutual agreement. Proposals to compromise debts owed to EPA under this Contract must be referred to the EPA Claims Officer or the Department of Justice, depending on the value of the compromise (40 CFR 13.31).

Contractual resolutions and final audit determinations, impacting work performed under this Contract, shall also constitute final agency actions, and may require amendment to this SSC.

Disputes associated with cooperative agreements are subject to the dispute resolution procedures described in 2 CFR Part 1500, Subpart E §§1500.12-1500.19.

32. Sanctions for Failure to Comply with Terms of this SSC [CERCLA §104(d)(2); 40 CFR 35.6805(o)]

EPA may seek to enforce this Contract or to recover any costs incurred due to a breach of the SSC in the appropriate Federal district court. If the State fails to comply with the terms of this Contract, any CERCLA assurance, and/or the negotiated payment terms, EPA may, after providing sixty days' notice, proceed under the provisions of CERCLA §104(d)(2). Other signatories to this Contract may seek remedies in the appropriate court of competent jurisdiction. **[Optional: Insert relevant State legal authority to enforce this Contract.]**

33. Exclusion of Third-Party Benefits [40 CFR 35.6805(r)]

This Contract benefits only the State and EPA. It extends no benefit or right to any third party that is not a signatory to this Contract.

34. Liability

EPA does not assume any liability to third parties with respect to losses due to bodily injury or property damages that exceed any limitations contained in applicable federal law. The State does not assume any liability to third parties with respect to losses due to bodily injury or property damages that exceed any limitations contained in applicable state law.

35. Responsible Party Activities [40 CFR 35.6805(u)]

If, at any time during the period of this Contract, performance of either all or part of the work provided under this Contract is voluntarily undertaken, or undertaken for any other reason by a PRP or entities not party to this Contract, then this Contract will be modified or terminated (See Termination of this SSC provision) as appropriate. Upon modification or termination, the parties to this agreement shall be relieved from further duties to perform those actions undertaken by PRPs or entities not party to this Contract.

36. Termination of this SSC

The parties may agree to enter into a written termination agreement, which will establish the effective date for the termination of this Contract and final financial reconciliation (See Final Financial Reconciliation provision), including the amount and date of any sums due either party. Reconciliation costs shall also include cost sharing of any costs associated with termination of

this Contract. If the parties cannot agree to enter into a termination agreement, they may engage in the process described in the Issue Resolution provision of this Contract.

37. Conclusion of this SSC [40 CFR 35.6820]

There are two components associated with the completion of this Contract: Administrative Closure and Final SSC Conclusion.

A. Administrative Closure

In order to administratively close this Contract, the signatories must concur through amendment to this Contract that EPA and the State have:

i. Satisfactorily completed the response activities under this Contract (See 40 CFR 35.6805(q) and Inspection of the Remedy provision);
ii. Completed final financial reconciliation for this Contract (See 40 CFR 35.6805(i)(5) and Final Financial Reconciliation provision);
iii. Accepted transfer of any Federal interest in real property (See 40 CFR 35.6805(i)(4) and CERCLA Assurance: Real Property Acquisition provision), as applicable; and
iv. Assumed responsibility for all future O&M (See 40 CFR 35.6805(i)(1) and CERCLA Assurance: O&M provision), as applicable.

After the administrative closure of this SSC, EPA will continue to monitor, as warranted, compliance of the State's assurance to provide for all future O&M as required by CERCLA §104(c).

B. Final SSC Conclusion

Although this Contract may be administratively closed once the criteria in the Administrative Closure subparagraph are met, this Contract, specifically the O&M assurance provision, will remain in effect as long as O&M is required at this Site, unless the Contract is terminated pursuant to this subparagraph.

The final conclusion of this SSC shall only occur once O&M is concluded pursuant to an amendment to this Contract, a PRP has taken over O&M requirements for the Site and this Contract is terminated, or this Contract is terminated for other reasons (See Termination of this SSC provision).

38. Use of Electronic Signatures

EPA agrees that the State may execute this SSC and subsequent Amendments by electronic signature. All electronically signed documents must be reproducible in a human-intelligible form and clearly indicate: (1) that the document was electronically signed; (2) who signed the document; (3) the title of the electronic signer; and (4) the date and time it was signed. The

State may deliver electronically signed documents by facsimile transmission or email to EPA **[include the exact person/ email address]** and shall be deemed original documents. After EPA's receipt of electronically signed documents, the EPA official will print and sign three copies of each document, each of which shall be deemed an original document, and will return one to the State, retain one, and deliver one to the Cincinnati Finance Office. The EPA and State acknowledge that electronic signatures carry the legal effect, validity, or enforceability of handwritten signatures. Therefore, parties shall not deny the legal effect, validity, or enforceability of records containing electronic signatures that they transmit and receive on the ground that such records, including the signature(s), are in electronic form.

39. <u>Signatures</u>

In witness whereof, the parties hereto have executed this Contract.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Date: _____

[Insert Name, Title]

STATE OF **[insert name]**

Date: _____

[Insert Name, Title]

Appendices