



Community Engagement Initiative

Compilation of EPA's Activities Encouraging Community Engagement in Superfund Enforcement

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I. Introduction

The U.S. Environmental Protection Agency (EPA) is issuing this compilation of activities it has taken to encourage more meaningful involvement of communities in the past in the Superfund enforcement process. This listing of activities can be considered for use, as appropriate, in future cases.

In developing this compilation, EPA Headquarters asked the Regional offices to provide examples of activities they have used to engage communities in enforcement cases. The Agency prepared a preliminary compilation of relevant activities, organized according to different types of Superfund enforcement activities. During the spring of 2013, the Agency sought input from external stakeholders (including community groups, national environmental groups, potentially responsible parties (PRPs), and state, tribal and local governments) about these activities and any others that might prove beneficial. EPA considered the input received and is now issuing this final compilation of practices.

This compilation is merely a listing of the types of actions that some case teams have implemented. It is not a policy or guidance and does not present any recommendations or establish any requirements. These activities represent possible options for the future. Agency personnel can review this listing and determine (in their sole discretion) whether it's appropriate to implement any of them in their particular case.

II. Background

a. **Background on Community Engagement Initiative:** In late 2009, EPA announced the Community Engagement Initiative (CEI) to promote greater community engagement in Superfund and other waste programs. In May 2010, the Agency publicly issued an "Implementation Plan" for the initiative which set forth 16 actions. (See <http://www.epa.gov/oswer/engagementinitiative>.) Action 5 identified several steps that EPA would undertake to promote community engagement in **enforcement** actions stemming from EPA's waste programs. One of these steps (5.E) called for preparation of a compendium of practices for successfully engaging communities in enforcement.¹

b. **Background on Superfund enforcement:** For a general overview of the Superfund enforcement process, see <http://www2.epa.gov/enforcement/superfund-enforcement>. Below is a summary of the process, beginning with the discovery of contaminated sites.

¹ EPA took this CEI commitment to develop such a compendium and subsequently adopted it as a commitment for its initiative on Environmental Justice (EJ) as well. See the discussion of activity #4.3 on page 75 of EPA's implementation plan for the "Plan EJ 2014" initiative at <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf>.

The Superfund law requires a person in charge of a facility to notify federal authorities if a hazardous substance is released in an amount that exceeds a specified level. (See CERCLA § 103(a).) EPA can take an enforcement action against persons who fail to provide such notifications (or who fail to provide notification in a timely manner).

Relying on these notifications or other reports, EPA initiates steps to determine whether the releases have resulted in contamination of a site. Under the Superfund law, EPA has two methods for addressing sites contaminated with hazardous substances. One involves EPA pursuing the parties responsible for the contamination in an effort to have them conduct the cleanup themselves, with Agency oversight. The other involves EPA and its contractors using Superfund monies to clean up such sites; this may be followed by the Agency's efforts to pursue any viable responsible parties to recover the monies that EPA has spent.

The Agency begins any Superfund cleanup enforcement effort with a search for the parties responsible for the contamination. This Potentially Responsible Party (PRP) search effort often involves EPA issuing requests to parties to provide records, documents and other information. In addition, the Agency invariably requests access to properties in order to assess site conditions, conduct sampling and perform other response activities. Persons who do not comply with such requests for information or access may be subject to an enforcement action.

After identifying the parties responsible for the contamination, EPA typically attempts to negotiate settlements that require these parties to study the conditions at the site. For a longer-term permanent cleanup, which is known as a remedial action (RA), such studies are referred to as a remedial investigation (RI) and a feasibility study (FS). The remedial investigation is intended to determine the nature and extent of the contamination, while the feasibility study is an evaluation of the cost and performance of technologies that could be used to clean up the site. If a settlement agreement cannot be reached for such studies, EPA may issue an order unilaterally to a party to conduct the studies or the Agency may work with the Department of Justice (DOJ) to seek a judicial order requiring the party to perform the studies. Alternatively, EPA has the authority to perform the RI/FS itself and seek to recover its costs from the responsible parties. Since 2000, PRPs have conducted slightly more than half of the RI/FSs (mostly through negotiated agreements known as Administrative Settlement Agreements and Orders on Consent (ASAOCs)).

Once the RI/FS is complete, EPA goes through a public comment process before selecting the remedial action. The process that the Agency uses to select the cleanup for a site is transparent and subject to public review and comment. In its record of decision (ROD), the Agency spells out the reasons underlying its selection of the cleanup. The ROD also includes a summary of the Agency's analyses of, and responses to, the public comments it received when it first proposed the cleanup.

After the cleanup is selected, the Agency typically attempts to negotiate a judicial consent decree (CD) requiring the PRPs to conduct the cleanup (which is known as the Remedial Design and Remedial Action (RD/RA)) under EPA’s oversight. Again, if an agreement cannot be reached, then EPA might issue a unilateral administrative order (UAO) for the cleanup or work with DOJ to seek a judicial order requiring the cleanup. Since the inception of the program, PRPs have started more than 70% of the RD/RAs (mostly via judicial consent decrees).

For sites needing “removal” actions (which generally involve shorter-term cleanups that need to be started sooner than a remedial action), Agency policy calls for case teams to follow the same enforcement path where possible. In emergency situations, however, EPA typically undertakes the response itself (or at least the initial portion) and then takes enforcement action later for recovery of its costs. But for some removals (especially the non-time-critical removals), the Agency generally follows a course of trying to get the PRPs to do the cleanup themselves, preferably via settlement. In the event a cleanup is a non-time-critical removal, EPA may initially attempt to negotiate a settlement for a study known as an Engineering Evaluation/Cost Analysis (EE/CA). As with RI/FS and RD/RA, the Agency does not negotiate with the PRPs on what the removal will entail or what the cleanup standards will be. If negotiations for such studies or the physical removal activities appear infeasible or prove unsuccessful, the Agency may issue a UAO obligating the recipients to perform the activity. EPA issues the majority of its UAOs for removal actions.

Regardless of what type of response activity (RI/FS, RD/RA, or removal) is the subject of EPA’s negotiations with the responsible parties, such negotiations are usually conducted in confidential sessions. Community members may not participate in the negotiations unless all of the litigants agree to allow such participation. (One relevant scenario, discussed further below in section IV.b.ii, involves meetings with

community members relating to technical issues. These are not negotiations, but rather separate discussions focused on explaining technical information and soliciting feedback.) The

Elements of Cleanup Settlement Agreements

In some cases, it might be important for EPA to reassure the public that it does not negotiate the cleanup standards or selected cleanup with the PRPs behind closed doors. For such sites, the Agency should be clear that it merely negotiates the *terms obligating the PRPs to carry out the cleanup*. These terms can include:

- EPA’s promise not to sue the PRPs again if they perform the specified cleanup and attain the cleanup standards,
- the penalties the PRPs will have to pay if they violate the settlement in the future,
- the process they can use if they believe that EPA is asking for unreasonable steps beyond the ROD,
- their legal protection from lawsuits by other PRPs, and
- the arrangement wherein EPA can periodically send them a bill for the costs incurred in overseeing their work.

confidentiality of statements made during negotiations is a well-established principle of the American legal system and is intended to promote a thorough and frank discussion of the issues between the parties in an effort to resolve differences. Confidentiality ensures that offers and counter-offers, made during negotiations, will not be used by one party against the other in any ensuing litigation. Parties may be unwilling to negotiate without a guarantee of confidentiality, fearing public disclosure of sensitive issues that may damage their potential litigation position.²

Finally, a common enforcement-related thread for these different types of Superfund response activities (RI/FS, RD/RA, removal) is EPA's monitoring of PRPs' compliance after the enforcement instrument (e.g., administrative or judicial settlement, UAO or court injunction) takes effect. The Agency oversees the PRPs' activities to ensure that they are in compliance with their obligations. This oversight process includes the PRPs' submittal of draft work plans and other deliverables, EPA review of such documents, and the PRPs' revisions to incorporate EPA's requested changes.

c. Background on community engagement in Superfund enforcement: The public can sometimes provide input to EPA on specific enforcement activities. Some of the steps that EPA takes to involve communities in its Superfund enforcement activities are required by statute or regulation. For example, when the Department of Justice submits a Superfund cleanup settlement on EPA's behalf to a federal court for the judge's approval, the law requires that the public have an opportunity to review and comment on the settlement. The steps required by statute or regulation are often sufficient to ensure robust involvement by the community.

This compilation is not limited to what is legally required. It focuses on activities that have gone beyond these legal requirements. For example, some types of administrative Superfund settlement agreements are not required to undergo a public notice-and-comment process before taking effect. Nevertheless, site-specific circumstances have led several EPA case teams to go beyond the legal minimum and provide communities with opportunities to provide input on such settlements.

III. Scope of compilation

The scope of this compilation is generally limited to Superfund enforcement involving non-federal facilities. EPA is addressing community engagement in other waste program contexts separately. For example, for Superfund federal facility enforcement, the Agency has been hosting Federal Facility Cleanup Dialogue meetings. Similarly, EPA is addressing community engagement for RCRA Subtitle C enforcement as part of its overall effort to promote community involvement in RCRA; see Action #3 of OSWER's CEI. EPA is also addressing

² See "Restrictions on Communicating with Outside Parties Regarding Enforcement Actions," dated March 8, 2006 and signed by Granta Y. Nakayama, Assistant Administrator for Enforcement and Compliance Assurance, <http://www2.epa.gov/enforcement/restrictions-communicating-outside-parties-regarding-enforcement-actions>.

community engagement for underground storage tank (UST) enforcement separately, as part of its overall effort for UST; see CEI Action #2.

This compilation does not directly address CERCLA enforcement for natural resource damages (NRD). The CERCLA statute authorizes certain federal, state and tribal trustees to seek damages when natural resources are lost or destroyed. EPA generally does not have jurisdiction to take such enforcement actions; instead, any Agency role tends to be secondary. For example, some CERCLA settlements address both cleanup and NRD. In those cases, DOJ represents EPA with respect to the cleanup and the federal trustee with respect to NRD issues. Any steps that EPA takes to involve the public in such settlements might have a secondary effect of raising their awareness of the NRD issues. The issue of community involvement in such enforcement has been raised separately with the various trustees,³ and EPA encourages the trustees to involve the public in such enforcement where appropriate.

Finally, the compilation generally doesn't cover CERCLA criminal enforcement, which is not addressed by OSWER's CEI. The CERCLA statute contains criminal enforcement authorities (see, e.g., section 103(d)'s provision for illegal destruction of records) and citizens can sometimes get involved with such efforts, e.g., by providing information leading to the arrest and conviction of any person for a CERCLA criminal violation (see section 109(d)) or by providing a victim impact statement as part of any CERCLA criminal sentencing process.

IV. Activities that encouraged community engagement in Superfund enforcement

Below are descriptions of activities that EPA Regions have used to engage communities in the Superfund enforcement process. These actions represent possible activities that Regions could take, as appropriate, in the future. Superfund enforcement cases vary greatly and there is no one-size-fits-all when it comes to activities for involving communities in such cases. EPA HQ advises case teams to continue exercising discretion and to consider employing the activities described below only as appropriate given the specific circumstances of their particular site. Case teams should consider consulting their Regional managers especially for any activities that have the potential to delay the response.

³ See, e.g., <http://www.darrp.noaa.gov/partner/cap/pdf/CAPpubrole.pdf>.

a. Community engagement with PRP searches

Possible activity: Solicit information from the public for the PRP search. EPA can actively solicit information from the public as to the identity of PRPs and their waste-handling practices. For example, for the Operating Industries site, Region 9 placed advertisements in local newspapers (in both English and Spanish) asking anyone who had ever worked for certain PRP companies to call an Agency toll-free number and provide information on the disposal practices. For the Anodyne Plating site in Florida, Region 4 asked a local reporter who was writing an article about the site to include a request for former employees to contact the Agency with any relevant information. In some cases, the requests are not necessarily focused on former employees or a specific company, but rather worded more broadly. For example, a Region 9 newspaper advertisement for the San Gabriel Valley site asked for information from anyone who may have witnessed the disposal of industrial solvents in the area. Additionally, EPA may include its request on its webpage for the particular site or Regional staff may use other social media to seek such input.

Advertisement: Outreach to the community

EPA has placed similar ads for many other sites, including (but not limited to) the Ottawa Township Flat Glass site in Illinois, the Camp Perry Landfill site in Ohio, the Tucson International Airport site in Arizona, and the Petroleum Products site in Florida.

Agency personnel sometimes ask community members more directly for information relating to PRPs. For example, EPA’s civil investigators occasionally canvass door-to-door in order to obtain PRP information. For the Ottawa Township Flat Glass site, Region 5’s investigator conducted a house to house canvass, asking residents for enforcement-related information. EPA’s Community Involvement Coordinators (CICs) conduct interviews that typically focus on soliciting community members’ views on the cleanup. In interviews for some sites, CICs assist enforcement personnel and also ask for information relating to PRPs and their waste handling practices.

b. Community engagement with enforcement for RI/FSs

i. Relevant provisions in EPA’s model administrative settlement agreement and order on consent (ASAOC) for RI/FS (issued in 2004)⁴

When EPA negotiates a settlement agreement for RI/FS, it generally seeks to include several provisions relating to community engagement. Two of these provisions take activities

⁴ See <http://www2.epa.gov/enforcement/model-aoc-rifs>, as revised by the EPA/DOJ’s joint 8/3/2005 memorandum, “Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection under Section 113(f),” and the 9/26/2014 “Revisions to 2009 ARC Memo and Issuance of Revised CERCLA Past Cost, Peripheral, De Minimis, De Micromis, and Municipal Solid Waste Settlement Models.”

contained in Superfund's primary regulation, the National Contingency Plan (NCP), and make them potentially binding obligations for the respondents. Paragraph 34.b of EPA's model ASAOC for RI/FS requires the respondents, at EPA's request, to provide information supporting the Agency's community relations plan and to participate in the preparation of such information for dissemination to the public and in public meetings. This echoes the NCP provision in 40 CFR § 300.430(c)(3). Similarly, paragraph 102 of the model requires the respondents, at EPA's direction, to establish a community information repository near the site, to house one copy of the site's administrative record. This requirement tracks 40 CFR 300.430(c)(2)(iii).

Other model RI/FS ASAOC provisions reflect the public's rights to certain records or notifications. For example, while model paragraph 51.b notes the respondents' rights to claim confidentiality as to certain documents, it also notes that if there is no issue of confidentiality for certain site-related documents, then the public may be given access to them without further notice to the respondents. Additionally, if the ASAOC contains a cost-recovery compromise, then the model ASAOC notes that EPA is required to publish notice of the proposed settlement in the *Federal Register* in order to provide persons who are not parties to the proposed settlement an opportunity to comment on this component. (See the optional "Public Comment" section of the model ASAOC.)

ii. Community engagement activities relating to RI/FS enforcement

Possible activity: Require PRPs to assist with EPA's community involvement efforts. One possible option for case teams is to invoke the provisions described above that require the PRPs to assist with EPA's community involvement efforts. Doing so can help CICs leverage their own limited resources. Region 10 relied on such a provision in the RI/FS ASAOC for the Lower Duwamish Waterway site to obtain the PRPs' assistance in reaching diverse communities.

Possible activity: Issue a site-specific fact sheet that explains the settlement negotiations. Another idea for case teams to consider is issuing a site-specific fact sheet about the settlement negotiations themselves in order to "de-mystify" the enforcement process for the public. Region 5 issued a fact sheet several years ago for its settlement negotiations with Dow Chemical for the RI/FS and removal at the Tittabawassee River site.⁵ In that case, some community members were concerned that EPA might negotiate the cleanup standard with the PRP behind closed doors. Region 5's fact sheet explained in general terms what topics would be covered by the settlement negotiations and, more importantly, what topics would **not** be covered. This helped to reassure the community that cleanup standards would not be a topic of negotiation.

Possible activity: Distribute generic fact sheet on the Superfund enforcement process (and/or present generic workshop on Superfund). One simple variation of the

⁵ See June 2009 fact sheet at the site's webpage at www.epa.gov/region5/cleanup/dowchemical.

concept above is to make a generic fact sheet about Superfund enforcement available to a particular community. EPA HQ has previously issued a generic fact sheet titled, “The Superfund Enforcement Process: How It Works” (August 1988).⁶ CICs can make hard-copies of this fact sheet, along with the other general background materials on the Superfund program, available for community members at any public meetings EPA holds before and during the negotiations. Another variation involves EPA presenting a generic workshop that explains the basics of the Superfund program (including the enforcement components) to an interested community. EPA HQ has previously developed materials for such a presentation, titled, “Introduction to Superfund: A Public Awareness Workshop.”⁷

Possible activity: Provide opportunity for public comment on administrative settlements for RI/FS. Another possible option is to give the public an opportunity to comment on an ASAOC for RI/FS before it goes into effect even if it does not contain a cost-recovery compromise. To date, EPA has done this only in very rare situations (primarily because of the potential for delay in initiating the RI/FS). Region 5 did this in the Tittabawassee River case; after the PRPs had signed the administrative agreement (but before EPA signed it), the Region solicited public comment on the proposed settlement. Under the statute, EPA is required to take public comment only on RI/FS ASAOCs that include a compromise of an EPA cost-recovery claim. Even in that rare scenario, given CERCLA § 122(i)’s focus on cost-recovery compromises, EPA’s model ASAOC for RI/FS advises case teams to invite comment only on the cost-recovery compromise element and not on other aspects of the proposed ASAOC (e.g., the proposed scope of the RI/FS).

⁶ See <http://www2.epa.gov/enforcement/fact-sheet-how-superfund-enforcement-process-works>. Pursuant to CEI action 5D, EPA plans to slightly revise this fact sheet (e.g., to emphasize that EPA does not negotiate remedies with PRPs).

⁷ The workshop materials, which were developed by EPA’s Office of Emergency and Remedial Response in 1995, are not currently available online.

Possible activity: Put the RI/FS settlement in a consent decree to allow opportunity for public comment. A variation of the concept above is to put the RI/FS settlement agreement in the form of a judicial consent decree, which necessarily goes through a public comment process and a review by an independent third party (i.e., the district court judge), rather than in the form of an administrative agreement. To date, EPA has done this in only rare situations (given the additional time and resources that this activity usually requires). It can be useful in situations where the community mistrusts EPA and needs significant assurance that the Agency and the PRPs have negotiated at arms' length.

Examples of RI/FS consent decrees: In the Anniston PCBs Superfund case, Region 4 negotiated with Pharmacia Corporation and Solutia Inc. for a consent decree that covered RI/FS and removal activities. The public submitted comments on the proposed decree. The Region and DOJ reviewed and considered the comments and revised the decree accordingly. The district court subsequently undertook its own independent review of the decree before ultimately approving it. Other case teams have also done this; Region 7, e.g., recently negotiated an RI/FS consent decree with U.S. Borax, Inc. for the Armour Road site.

Possible activity: Explicitly reserve EPA's right to request modifications to an administrative agreement in light of later public comments. Yet another variation of this idea is for EPA to explicitly reserve its right to seek modifications to the final ASAOC in the event that, during the subsequent public comment period, it receives public comments that disclose facts or considerations which indicate that the ASAOC is inappropriate, improper, or inadequate.⁸ This is what Region 4 did in its 2009 administrative settlement with the Tennessee Valley Authority (TVA) for the coal ash release in Kingston, Tennessee. Although the Region wanted to expedite TVA's response, it also wanted to extend the opportunity for the public to provide input. Accordingly, in order not to delay the PRP's initiation of response activities, EPA finalized the ASAOC but explicitly reserved its right to seek modifications later based on input it received during the public comment period. Similar to above, it has been unusual for EPA to obtain such settlement language.

Possible activity: Conduct outreach to solicit public input on proposed settlements. Another measure that was employed in the Tittabawassee River case involved Region 5's heightened efforts to solicit public input on the proposed settlement. In public meetings and on the site's webpage, the Region repeatedly notified the public of the opportunity to provide comments. As a result, the Agency subsequently received public comments on virtually every

⁸ This is different than the provision in the model ASAOC for RI/FS, which provides (in paragraph 103, the Effective Date and Subsequent Modification section) that if the settlement includes a cost-recovery compromise, then the ASAOC does not take effect until EPA notifies the Respondents that the public comments (if any) received do not require the Agency to modify the order or withdraw from it. The model ASAOC also provides (paragraph 104) that the order may be amended by mutual agreement of EPA and the Respondents.

aspect of the proposed settlement, including provisions that rarely draw public comment such as stipulated penalties and the conclusions of law and findings of fact.

Possible activity: Have the Community Involvement Plan reviewed by the Regional attorney. Another possible option is to increase awareness among the Region's community involvement personnel and technical staff about PRP obligations to provide assistance with the EPA's community involvement activities. PRPs are typically obligated by an enforcement instrument to provide such assistance, subject to EPA's discretion and oversight. Such obligations should be discussed in the Agency's Community Involvement Plan (CIP), which EPA is required, to the extent practicable, to have in place before remedial investigation field activities start. (See 40 CFR 300.430(c)(2).) Regional attorneys are familiar with the legal provisions that require PRPs to assist with community involvement activities. Thus, they are well-positioned to review draft CIPs and help Regional program personnel identify opportunities for PRP involvement and reassure such personnel that the PRPs' activities will be subject to EPA direction.

Possible activity: Make deliverables submitted by PRPs available to the public. Another concept is to make more documents stemming from Superfund enforcement available to the public. This includes, e.g., RI/FS work plans and other deliverables submitted by PRPs. EPA already has a policy encouraging this activity.⁹ Moreover, this idea builds on the pilot projects that the Regions conducted in 1995 as part of EPA's administrative reform aimed at increasing community involvement in the Superfund enforcement process.¹⁰ Several of those pilot projects resulted in EPA taking the remedial design work plans it received from the PRPs and sharing them with the public while undergoing Agency review. One project involved giving community representatives an opportunity to review treatability study documents prepared by PRPs.

EPA is also taking steps to publicly release information about upcoming site activities by PRPs or the Agency. Specifically, in 2012-13, the EPA piloted a web-based tool that provided information to the public on the schedule for the next planned activity at certain Superfund sites. Three Regions piloted the tool. An example of the information made available to the public could be seen (as of 9/30/2013) in the "Next Activities" section of Region 1's webpage for the Davis Liquid site. It showed that the PRP-lead RD for the groundwater cleanup was scheduled to be completed in September 2013.¹¹ EPA plans to adopt this tool for other sites after it completes upgrades to its standard webpage template of Superfund site-specific data.

⁹ See pages H-24 and H-25 of EPA's November 1990 policy encouraging Regions to make Superfund documents more available to the public, at http://www.epa.gov/superfund/community/cag/pdfs/directives/public_docs.pdf. This policy applies to Fund-lead response actions as well, but this compilation focuses on PRP-lead responses.

¹⁰ See www.epa.gov/superfund/programs/reforms/reforms/2-6.htm.

¹¹ See <http://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0101283>.

Possible activity: Facilitate the process of making enforcement-related information available. There are other techniques for improving public access to enforcement-related information. EPA could, for example, routinely add relevant documents to the “site file” (which is broader than the site’s administrative record on its response selection). To boost transparency, case teams could also post site documents in Regional online Freedom of Information Act (FOIA) “reading rooms.”¹² Additionally, in filed cases where EPA faces discovery requests, the Agency could exercise restraint when considering whether to invoke the deliberative process privilege.¹³ EPA personnel are directed to exercise similar restraint on invoking exemptions when facing FOIA requests. Specifically, per DOJ guidance¹⁴, EPA offices should exercise their discretion in favor of disclosing documents whenever possible under FOIA. In sum, such transparent practices can lead to increased public access to Superfund enforcement-related information.

Possible activity: Meet with the public about technical issues while confidential settlement negotiations are ongoing. Another possibility, arising during settlement negotiations, is to allow community members to participate in sessions that focus on the cleanup’s technical issues. As discussed above, EPA usually conducts negotiations with PRPs in confidential sessions. The Agency and the PRPs can, however, agree to meet with the public on technical issues while negotiations are ongoing. Specifically, the relevant NCP provision states: “The lead agency may conduct technical discussions involving PRPs and the public. These technical discussions may be held separately from, but contemporaneously with, the negotiations/settlement discussions.” (40 CFR 300.430(c)(4).) This activity can be a valuable opportunity to engage the community on cleanup implementation issues that are significant to them.

Possible activity: Remind the public that PRP activities are subject to EPA oversight and approval. Another measure can be to ensure that EPA’s periodic fact sheets about ongoing response activity note that the Agency is overseeing the PRPs’ activities to ensure correct performance. This issue arose at the Ringwood Mines/Landfill site in New Jersey where residents expressed concern as to whether EPA was ensuring that the PRP was adequately performing the response.¹⁵ Region 2 subsequently increased its communications with the residents about its various efforts to oversee the PRP’s site activities (including, e.g., information

¹² See, e.g., Region 4’s FOIA electronic reading room <http://www.epa.gov/region4/foiapgs/readingroom/index.htm>.

¹³ Memorandum from Administrator William D. Ruckelshaus, “Guidance for Assertion of Deliberative Process Privilege” (October 3, 1984): “... [I]t is EPA policy that the Agency will not assert the [deliberative process] privilege in every case where it applies. The Agency has a responsibility to the public to provide the relevant facts which underlie a particular policy. This responsibility suggests that we disclose data and the reasons supporting a policy on occasion which might otherwise fall within the scope of the privilege...”

¹⁴ U.S. Attorney General Eric Holder memorandum (3/19/2009) transmitting new FOIA guidelines.

¹⁵ OIG Report 2007-P-00016, “Environmental Justice Concerns and Communication Problems Complicated Cleaning Up Ringwood Mines/Landfill Site” (April 2, 2007), page 8.

about EPA’s reviews of PRP-submitted plans and changes to such plans as the result of the Agency’s reviews).

Possible activity: Include a technical assistance plan as a provision of the settlement.

Finally, another practice can be the inclusion of settlement provisions calling for a Technical Assistance Plan (TAP).¹⁶ Such provisions are required for settlements using the Superfund Alternative Approach¹⁷, which typically is employed first at the RI/FS stage. A TAP provision in a settlement obligates the PRPs, at EPA’s request, to arrange at their own expense for a community group to obtain the services of an independent technical advisor and share information with others in the community. EPA has secured TAP provisions in approximately sixty settlements to date (mostly ASAOCs for RI/FS), and more than a dozen have been triggered thus far. Pursuant to EPA oversight, the responsible parties have arranged for these communities to receive more than \$1 million in independent technical assistance and information-sharing resources.

Jacksonville Ash Superfund site TAP

Pursuant to a TAP provision in a 2008 consent decree for RD/RA, the PRP is providing \$200,000 to enable several community groups to obtain assistance from their own independent technical advisors.

TAPs perform the same functions as EPA’s Technical Assistance Grants (TAGs), namely providing resources for community groups to obtain technical assistance and to facilitate communication with other community members, respectively. TAPs and TAGs generally rely on the same or similar criteria for which community groups can be eligible, which activities are covered (e.g., review of technical documents), which expenditures are not covered (e.g., litigation, political lobbying), etc. There can, however, be differences between the two. For example, while Community Advisory Groups (CAGs) are typically ineligible to receive TAGs, they might (depending on the circumstances) be eligible to receive a TAP. (The Roane County CAG, for example, received a TAP for the TVA Kingston site in Region 4.) In addition, TAPs typically have the potential to reduce the administrative burden facing interested community groups. For example, unlike with TAGs, a TAP may not necessarily require a community group to incorporate.

¹⁶ EPA’s interim guidance on TAPs, which is dated September 3, 2009, is available at <http://www2.epa.gov/enforcement/interim-guidance-opportunities-independent-technical-assistance-superfund-settlements>.

¹⁷ EPA’s updated guidance on the Superfund Alternative Approach, dated September 28, 2012, is available at <http://www2.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>.

c. Community engagement with enforcement for RD/RA

i. Relevant provisions in EPA’s model CD and Statement of Work for RD/RA (issued 9/29/2014)¹⁸

Similar to the model ASAO for RI/FS, EPA’s model consent decree for RD/RA and the accompanying Statement of Work (SOW) contain provisions obligating settling defendants to assist with community involvement if requested by EPA. It also contains several other provisions relevant to community engagement. See Appendix A for the exact language of these provisions.

ii. Community engagement activities relating to RD/RA enforcement

Many of the possible activities discussed in the RI/FS-enforcement section above are also potentially applicable to RD/RA enforcement:

- Invoke CD/UAO provisions that obligate PRPs to assist EPA with its community involvement efforts
- Issue fact sheets about the RD/RA negotiations themselves
- During RD/RA decree negotiations, invite the public to attend separate concurrent sessions and discuss technical issues (per 40 CFR 300.430(c)(4))
- Conduct outreach to inform community members of their opportunity to provide comments on an RD/RA decree after it is lodged with the court (and before the U.S. seeks the judge’s approval)
- In the pre-RD review of the existing Community Involvement Plan, ensure that it discusses PRP obligations to provide assistance with community involvement activities (subject to EPA’s oversight)
- Make more documents stemming from RD/RA enforcement (e.g., deliverables submitted by PRPs) available to the public
- Ensure that EPA’s fact sheets about ongoing RD/RA activity note that the Agency is overseeing the PRPs’ activities to ensure that they are being performed correctly
- Include provisions for TAPs in RD/RA consent decrees, especially those using the Superfund Alternative Approach.

Outreach to EJ Communities
Especially for EJ communities, EPA should consider how best to alert the public (e.g., by outreach to tribes or faith-based organizations). This is true for many of the activities in this compilation --- while the activity might be applicable for both EJ and non-EJ communities, EPA should consider whether a particular activity ought to be implemented differently in an EJ community.

¹⁸ See http://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81.

Possible activity: Conduct additional outreach to alert public to proposed settlements. The Superfund law requires the Justice Department to provide an opportunity for the public to comment on an RD/RA consent decree before the court enters it as a final judgment. (CERCLA § 122(d)(2)(B).) This is effectuated via a notice in the *Federal Register*. (See 40 CFR 300.430(c)(5)(ii) and 28 CFR 50.7.) EPA occasionally goes further and (either alone or jointly with the Justice Department) issues a press release when the CD is submitted to the court for its review. For example, Region 1 routinely issues a press release whenever DOJ lodges an RD/RA CD with the court on its behalf.¹⁹ Such press releases can sometimes be more effective than a *Federal Register* notice in reaching community members affected by the settlement.

Possible activity: As in the RI/FS stage, the Regional attorney may review the Community Involvement Plan. The Regional attorney will be familiar with the requirements of the community involvement activities required at this stage of the cleanup and may be able to facilitate additional community engagement efforts. The NCP requires EPA to re-visit the existing Community Involvement Plan prior to initiating the remedial design and “determine whether it should be revised to describe further public involvement activities during RD/RA that were not already addressed” by the CIP. (40 CFR 300.435(c).) In this context, one idea is to have Regional attorneys participate in this review in order to help, e.g., in identifying opportunities for PRP involvement (subject to EPA’s oversight) in community involvement activities.

d. Community engagement with enforcement for removals

- i. Relevant provisions in EPA’s model administrative settlement agreement and order on consent (ASAOC) for removal (issued 2007)²⁰

EPA’s model administrative settlement agreement and order on consent for removal actions contains several provisions relating to community engagement. These reflect what is legally required or provided. For example, if the agreement contains a cost-recovery compromise, then EPA is required to publish notice of the proposed settlement in the *Federal Register* to provide persons who are not parties to the proposed settlement an opportunity to comment on this component. (See model paragraph 82.) In addition, model paragraph 26 notes that certain site documents may be made available to the public without further notice to the Respondents if they do not assert any rights of confidentiality.

¹⁹ See, e.g., the press release that Region 1 issued to alert the public of the opportunity to review and comment on the RD/RA consent decree lodged for the Blackburn & Union site at <http://yosemite.epa.gov/opa/admpress.nsf/6d651d23f5a91b768525735900400c28/f93be493b6f86ee28525776e006f605e!OpenDocument>.

²⁰ See <http://www2.epa.gov/enforcement/model-administrative-settlement-agreement-and-order-consent-removal-actions>, as revised by the 9/29/2014 “Revisions to 2009 ARC Memo and Issuance of Revised CERCLA Past Cost, Peripheral, De Minimis, De Micromis, and Municipal Solid Waste Settlement Models.”

ii. Community engagement activities relating to removal enforcement

Similar to above, some of the possible activities discussed in the RI/FS-enforcement section are also potentially applicable to removal enforcement. These include:

- Solicit public input on the proposed ASAOC before and/or during removal settlement negotiations
- Give the public an opportunity to comment on a removal ASAOC before it goes into effect
- Put the removal settlement agreement in the form of a judicial consent decree, rather than in an ASAOC
- Ensure that any Community Involvement Plan includes a discussion of any PRP obligations to provide assistance with community involvement activities (subject to EPA's oversight)
- Make more documents stemming from enforcement (e.g., deliverables submitted by PRPs) available to the public
- During negotiations, allow community members to participate in separate concurrent sessions focused on technical issues (consistent with 40 CFR 300.430(c)(4))
- Ensure that EPA's fact sheets note that the Agency is overseeing the PRPs' activities to ensure that they are being performed correctly.

Possible activity: Provide opportunity for public comment on administrative settlement for removal. An example of soliciting public input on a proposed removal administrative settlement occurred during Region 1's negotiations with Aerovox Corporation for a non-time-critical removal (demolition of a vacant contaminated building) at a site in New Bedford, Massachusetts. The case team worked with the PRP to seek input from the community on its concerns. Residents provided a wide range of input, including a concern about the risk of fire as a result of vandals seeking to salvage copper piping from the building. The PRP responded by voluntarily providing site security before the settlement was finalized. Community members also expressed concern about the risk of fire associated with the planned demolition (and the need for an evacuation plan). EPA and the PRP addressed this concern as well. EPA and the PRP also reached out and met with representatives from two industrial facilities that abutted the site. Like the residents, these businesses also had concerns, e.g., about the dust and potential airborne contaminants that the demolition would cause. They provided information about their respective workforces and the timings of the different shifts. The Region and the PRP considered these concerns and agreed to stringent standards for air monitoring and management of water runoff as part of the settlement that was finalized in April 2010.

As noted above, another possible idea might be to provide an opportunity for public review and comment on a Superfund removal settlement before it takes effect. To date, EPA has done this only rarely. In the Tittabawassee River case, the administrative settlement that Region 5 negotiated with the PRP covered both RI/FS activities and removal activities. The Region went

beyond the legal requirement and solicited public comment on the proposed agreement before deciding whether to sign it.

Possible activity: Memorialize the removal settlement in a consent decree to allow opportunity for public comment. A variation of this concept is to put the removal settlement agreement in the form of a judicial consent decree, which necessarily goes through a review by the public and the district court, rather than in the form of an administrative agreement. Region 10 did this in the Coeur d’Alene Basin case, negotiating a removal consent decree with Union Pacific Railroad. The public submitted numerous comments on the proposed decree. Region 10 reviewed and considered the comments before the district court ultimately approved the decree in 2000.²¹

Possible activity: Have the Community Involvement Plan reviewed by the Regional attorney. For longer-term removal actions, EPA is required to prepare a community involvement plan (CIP). (40 CFR 300.415(n)(3),(4).) Similar to RI/FS and RD/RA, one activity is to ensure that such CIPs discuss PRP obligations to provide assistance with EPA’s community involvement activities. This may be potentially facilitated by having Regional attorneys review the draft CIP and help in identifying opportunities for PRP involvement subject to EPA direction.

Other examples of use of consent decree for removal action

For the Anniston PCBs site, Region 4 memorialized the settlement involving RI/FS and removal activities in a consent decree rather than administratively. Other case teams have also done this. See, e.g., Region 6’s consent decree in 2010 obligating ConocoPhillips Company and Sasol North America, Inc. to conduct a removal for the Bayou Verdine site in Louisiana. See also Region 7’s consent decree with the Blue Tee Corporation in 2007 for a removal at the Newton County Mine Tailings site.

- e. Community engagement with enforcement for cost recovery only

Over the years, EPA has largely assumed that community interest in this type of enforcement (and, hence, the need for measures by EPA to engage the public) was relatively minimal. Cost-recovery enforcement tends to focus on how much of the cleanup costs should be borne by the PRPs and how much should be borne by EPA. It was presumed that the public is primarily interested in the cleanup itself and how it was implemented (e.g., schedule, specific methods) and that cost-recovery enforcement didn’t affect those concerns. Accordingly, over the years, EPA hasn’t emphasized community involvement with cost-recovery enforcement.

²¹ “Cleaning Up at the Tracks: Superfund Meets Rails-to-Trails,” Clifford J. Villa, 25 Harv. Envtl. L. Rev. 481, 531-533 (2001). While a majority of commenters expressed support for the proposed consent decree, one group (Citizens Against Rails-to-Trails, “CART”) expressed strong opposition. Its objections essentially related, however, to the substance of EPA’s removal selection decision (which had previously undergone a separate notice-and-comment process), not the proposed decree itself.

In recent years, however, EPA has faced significant community concern with several bankruptcy settlements that were for cost recovery only and with other cashout settlements where response activities remained to be performed. Given the limited Superfund Trust Fund monies available to EPA, some community members have expressed interest in whether such settlements ensure that sufficient monies will be available to carry out the response actions in the future. EPA has increasingly realized that cost-recovery settlements can have a significant impact on the timing of future response activities (and the pace). Thus, one possible activity is to have EPA provide interested communities with information about cost-recovery enforcement and the resultant resources (PRP and/or EPA) available for future response activities. For example, for the Libby Asbestos site, Region 8 provided information to the community about its future plans for using the monies it received from the W.R. Grace bankruptcy settlement.²²

f. Community engagement with enforcement for Superfund noncompliance

Sometimes a party may fail to comply with a Superfund-related obligation. For example, a party might not report a release of hazardous substances, or it may fail to conduct studies or cleanups required by a UAO. Potentially responsible parties may not respond satisfactorily to an Agency request for relevant information or access to property needed for sampling or other cleanup activities. Such noncompliance can give rise to claims for CERCLA statutory penalties. In negotiating a settlement for such penalty claims, EPA can sometimes negotiate a provision for a Supplemental Environmental Project (SEP).²³ The Agency and the violator may seek public input on possible SEPs. EPA has a policy encouraging such outreach.²⁴

EPA case teams often negotiate SEPs in settlements of Superfund penalty cases and typically consider community concerns when doing so. It is not uncommon, e.g., for the Agency to include a SEP provision in a settlement of a CERCLA § 103 reporting violation²⁵ --- and to consider community concerns when negotiating such a provision. Similarly, EPA has often considered community input in SEPs stemming from other types of Superfund enforcement. For example, Region 3 relied on community input in crafting the SEP provision of the settlement resolving a Superfund penalty claim for a violation involving the cleanup of the Centre County Kepone site.²⁶ Similarly, Region 9 took the concerns of the local municipality and others into

²² See the FAQ at <http://www.epa.gov/region8/superfund/libby/askepa.html>.

²³ Final Supplemental Environmental Projects Policy (4/10/1998) at <http://www2.epa.gov/enforcement/policy-issuance-final-supplemental-environmental-projects>.

²⁴ Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 FR 35584 (6/17/2003) at <http://www2.epa.gov/enforcement/environmental-protection-agency-federal-register-notice-interim-guidance-community>.

²⁵ Information about specific CERCLA SEPs can be found in the Enforcement Compliance History Online (ECHO) at <http://www.epa-echo.gov/cgi-bin/ideaotis.cgi>. A search of ECHO shows that EPA has included SEPs in more than 150 settlements resolving CERCLA § 103 reporting violations in recent years.

²⁶ 67 Fed. Reg. 54463 (August 22, 2002).

account when negotiating a SEP provision worth \$1 million in a 2006 settlement with several PRPs for their violation of a Superfund UAO covering the cleanup of the Phoenix-Goodyear Airport site.²⁷ Region 8 took community concerns into account when it negotiated the largest public-health SEP in the Agency's history in the Superfund case against W.R. Grace for its refusal to provide access to property needed for the Libby Asbestos site cleanup.²⁸

Another possibility might be for the Agency to proactively invite the public to submit ideas for possible projects before any noncompliance has occurred. EPA can then consider those ideas as SEPs in the future if noncompliance occurs. Region 3 did this for the Elizabeth River watershed, compiling project ideas from the public upfront. It subsequently incorporated one of the ideas into a settlement (albeit as a provision of a criminal plea agreement and not as a SEP in a Superfund civil enforcement action).

The Superfund law authorizes any person to bring a civil enforcement action against any person who is allegedly in violation of any Superfund requirement, order, etc. (See CERCLA § 310(a)(1).) Such actions can augment the EPA's enforcement efforts and/or highlight certain violations for EPA's attention.²⁹ For example, section 310(a)(1) citizen suits, by residents and others for alleged violations of the reporting requirements under CERCLA §§ 103 or 111(g), have supplemented the Agency's own efforts to enforce these provisions.³⁰ On occasion, parties have also brought section 310(a)(1) citizen suits for alleged violations of cleanup-related orders or settlements.³¹ For example, at the Upper Columbia River site, Region 10 unilaterally issued an order under Superfund obligating a PRP to conduct studies of the contamination in the Lake Roosevelt area. Several parties subsequently brought a citizen suit alleging that the UAO recipient was violating this Agency order.³² This citizen suit contributed to EPA later reaching a

²⁷ See www.epa.gov/region09/enforcement/results/06/highlights.html.

²⁸ 66 Fed. Reg. 56859 (November 13, 2001).

²⁹ One court described the purpose of the CERCLA citizen suit provision as follows: "... The purpose of section 310 is not to reimburse citizens for out-of-pocket expenses, but to prod government agencies into vigorously enforcing CERCLA and to allow private actions to compel compliance when EPA and state still fail to act. While section 107 concerns liability and compensation for pollution, section 310 is aimed at coercing governmental enforcement of hazardous waste laws." *Regan v. Cherry Corp.*, 706 F.Supp. 145, 149 (D.R.I. 1989).

³⁰ Some of these citizen suits are noted in reported caselaw. See, e.g., *Citizens Against Pollution v. Ohio Power Co.*, 65 ERC 1374 (S.D. Ohio 2007), *Sierra Club v. Tyson Foods Inc.*, 58 ERC 1076 (W.D. Ky. 2003), *Fried v. Sungard Recovery Serv., Inc.*, 900 F.Supp. 758 (E.D. Penn. 1995), *Pape v. Menominee Paper Co.*, 911 F.Supp. 273 (W.D. Mich. 1994), *City of Toledo v. Beazer Materials and Services, Inc.*, 833 F.Supp. 646 (N.D. Ohio 1993), *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F.Supp. 1265 (E.D. Wash. 1993), *Martin v. Kansas Board of Regents*, 32 ERC 1944 (D. Kan. 1991), and *Lutz v. Chromatex, Inc.*, 718 F.Supp. 413 (M.D. Pa. 1989).

³¹ Such suits must, however, satisfy the requirements of CERCLA § 113(h), which limits courts' jurisdiction to consider certain types of suits.

³² See *Pakootas v. Teck Cominco Metals Ltd.*, No. CV04256AAM (E.D. Wash., Nov. 8, 2004), 2004 WL 2578982.

settlement agreement with the party to conduct the requisite studies.³³ There have been several other section 310(a)(1) citizen suits alleging violations of cleanup settlements/orders.³⁴

In addition to CERCLA citizen suits, there are also instances where a non-Superfund citizen suit may benefit EPA's Superfund program by triggering additional CERCLA cleanup. For example, one recent citizen suit under the Resource Conservation and Recovery Act led EPA to subsequently negotiate a Superfund administrative settlement obligating the PRP to conduct multiple removal actions.³⁵

In part to assist potential citizen-suit plaintiffs, EPA is required to make any records, reports or information obtained pursuant to CERCLA §104 available, unless such information constitutes confidential business information (CBI). (See CERCLA § 104(e)(7)(A).) As discussed earlier, the more transparent EPA is from the beginning of the Superfund process, the more information that will already be available to community members (including potential citizen-suit plaintiffs).

V. Conclusion

This compilation lists multiple activities that have been undertaken to engage communities in Superfund enforcement. As stated earlier, Superfund enforcement cases vary greatly and there is no one-size-fits-all when it comes to activities for involving communities in such cases. Case teams have discretion on whether to use certain measures, depending on the circumstances of their specific site.

Disclaimer: This compilation is not a rule or a policy and does not create any legal obligations or enforceable rights. It may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. Whether and how EPA applies the information in this compilation to any particular site will depend on the facts posed by the site. The EPA decision makers retain the discretion to adopt approaches that differ from the discussion in this compilation, where appropriate, on a case-by-case basis and in accordance with the statute and regulations. This document does not affect determinations of Superfund liability and does not provide any relief from or limitation of liability.

³³ See *Pakootas v. Teck Cominco Metals Ltd.*, 62 ERC 1705 (9th Cir. 2006).

³⁴ For example, several individuals brought a section 310(a)(1) citizen suit against a metal plating facility for its noncompliance with a CERCLA removal settlement that had been negotiated with EPA. *States v. BFG Electroplating and Mfg. Co.*, 31 ERC 1174 (W.D. Pa. 1989). See also *M.R. (Vega Alta), Inc. v. Caribe General Electric Products, Inc.*, 31 F.Supp.2d 226 (D.P.R. 1998) (CERCLA 310(a)(1) citizen suit alleging noncompliance with a CERCLA RD/RA UAO).

³⁵ See *River Village West v. Peoples Gas*, 618 F.Supp.2d 847 (N.D. Ill. 2008).

Appendix A

Relevant Excerpts from the Model Consent Decree (CD) and Statement of Work (SOW) for Remedial Design/Remedial Action (RD/RA) for Community Involvement

The most relevant portions of the RD/RA model are Section VI of the Model CD and Section 2 of the attached Model SOW, which are consistent with the NCP provision allowing PRPs to participate in the aspects of the community relations program at the discretion of, and with oversight by, EPA (see 40 CFR 300.430(c)(3)).

Model CD Section VI (Performance of the Work) provides, in pertinent part,

*“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, 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).”*

Correspondingly, Model SOW Section 2 provides:

“2.1 Community Involvement Responsibilities

(a) *EPA has the lead responsibility for developing and implementing community involvement activities at the Site. Previously [during the RI/FS phase], EPA developed a Community Involvement Plan (CIP) for the Site. Pursuant to 40 C.F.R. § 300.435(c), EPA shall review the existing CIP and determine whether it should be revised to describe further public involvement activities during the Work that are not already addressed or provided for in the existing CIP [, including, if applicable, [any Technical Assistance Grant (TAG), any use of the Technical Assistance Services for Communities (TASC) contract, and/or any Technical Assistance Plan (TAP)]].*

(b) *If requested by EPA, SDs shall support EPA’s community involvement activities. This may include providing online access to initial submissions and updates of deliverables to (1) Community Advisory Groups, (2) Technical Assistance Grant recipients and their advisors, and (3) other entities to provide them with a reasonable opportunity for review and comment. EPA may describe in its CIP SDs’ responsibilities for community involvement activities. All community involvement activities conducted by SDs at EPA’s request are subject to EPA’s oversight.*

(c) ***SDs’ CI Coordinator.** If requested by EPA, SDs shall, within [15] days, designate and notify EPA of SDs’ Community Involvement Coordinator (SDs’ CI Coordinator). SDs may hire a contractor for this purpose. SDs’ notice must include the name, title, and qualifications of*

the SDs' CI Coordinator. SDs' CI Coordinator is responsible for providing support regarding EPA's community involvement activities, including coordinating with EPA's CI Coordinator regarding responses to the public's inquiries about the Site."

Note also that Model SOW Section 11 (Appendix – Technical Assistance Plan Inserts), contains language for a provision for a Technical Assistance Plan (TAP). TAP provisions are utilized primarily for sites using the Superfund Alternative Approach, although such plans are occasionally used at NPL sites as well. (See discussion of TAPs in sections IV.b.ii and IV.c.ii of the compilation.)

Another significant provision in the Model CD relates to the statutorily-required opportunity for the public to review and comment on a consent decree before the district court judge decides whether to approve it.

Model Section XXV (Lodging and Opportunity for Public Comment) provides as follows:

"110. 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. 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."

Another provision of the Model CD that relates to community engagement is Section VII (Remedy Review), which acknowledges the public's statutorily-required right to an opportunity to comment on any further response actions proposed by EPA as a result of a five-year review. Specifically, the Model Section provides, in pertinent part:

*"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."*

Model SOW Section 6 covers Reporting Requirements. It provides:

*"6.1. **Progress Reports.** Commencing with the [month] following lodging of the CD and until EPA approves the RA [Remedial Action]. . . Completion, SDs shall submit progress reports to EPA on a [monthly/weekly] basis, or as otherwise requested by EPA. The reports must cover all activities that took place during the prior reporting period, including:*

(a) The actions that have been taken toward achieving compliance with the CD;

- (b) *A summary of all results of sampling, tests, and all other data received or generated by SDs;*
- (c) *A description of all deliverables that SDs submitted to EPA;*
- (d) *A description of all activities relating to RA Construction that are scheduled for the next [six weeks];*
- (e) *An updated RA Construction Schedule, together with information regarding percentage of completion, delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays;*
- (f) *A description of any modifications to the work plans or other schedules that SDs have proposed or that have been approved by EPA; and*
- (g) *A description of all activities undertaken in support of the Community Involvement Plan (CIP) during the reporting period and those to be undertaken in the next [six weeks].”*

Finally, another Model CD provision that is potentially significant to community engagement is Section XIX, which covers “Access to Information.”

“XIX. ACCESS TO INFORMATION

95. *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. *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 ¶ 96.b, and except as provided in ¶ 96.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. **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. 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. 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.”

Appendix B

Citations to background information on specific sites mentioned in compilation

For background information on a specific site mentioned in the compilation, see:

Page 5: Operating Industries Inc. site, see

<http://www.epa.gov/superfund/accomp/success/oii.html>.

Page 5: Anodyne Plating site, see

<http://www.epa.gov/region4/superfund/sites/npl/florida/anodynfl.html>.

Page 5: San Gabriel Valley site, see

<http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dec8ba3252368428825742600743733/0065ed704ae95ccc88257007005e941e!opendocument>.

Pages 5 and 6: Ottawa Township Flat Glass site, see

<http://www.epa.gov/region05/cleanup/naplate>.

Page 5: Camp Perry Landfill site, see

<http://www.epa.gov/region5/superfund/ecology/casestudies/campperry.htm>.

Page 5: Tucson-International Airport Area site, see

<http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dec8ba3252368428825742600743733/edd9fbc1531a93b788257007005e9467!OpenDocument>

Page 5: Petroleum Products site, see

<http://www.epa.gov/region4/superfund/sites/npl/florida/petroprofl.html>

Page 7: Lower Duwamish Waterway site, see

<http://yosemite.epa.gov/R10/cleanup.nsf/7d19cd587dff1eee8825685f007d56b7/d2f19fdfaf1e264885257877007377eb!OpenDocument>.

Pages 7, 8 and 14: Tittabawassee River/Saginaw River & Bay site, see

<http://www.epa.gov/region5/cleanup/dowchemical/index.htm>

Pages 7, 8 and 15: Anniston PCBs site, see

<http://www.epa.gov/region4/superfund/sites/npl/alabama/anpcbstal.html>.

Page 8: Armour Road site, see

http://www.epa.gov/region07/cleanup/npl_files/mod046750253.pdf.

Pages 8 and 11: TVA/Kingston site, see

http://www.epa.gov/region4/kingston/FINAL_TVA_EECA_FACT_SHEET051810.pdf.

Page 9: Davis Liquid Waste site, see

http://yosemite.epa.gov/r1/npl_pad.nsf/51dc4f173ceef51d85256adf004c7ec8/dae0f2b3c378472d8525692d0061823e!OpenDocument&Highlight=0,davis,liquid

Page 11: Ringwood Mines/Landfill site, see

<http://www.epa.gov/region02/superfund/npl/ringwood/index.html>

Page 11: Jacksonville Ash site, see

<http://www.epa.gov/region4/superfund/sites/npl/florida/jaxashfl.html>.

Page 14: Aerovox/New Bedford site, see <http://www.epa.gov/region1/superfund/sites/aerovox/25304.pdf>.

Page 15: Coeur d'Alene site, see http://www.epa.gov/region10/pdf/sites/bunker_hill/basin_bulletin_april_2014.pdf.

Page 15: Bayou Verdine site, see <http://www.justice.gov/opa/pr/2010/October/10-enrd-1139.html>.

Page 15: Newton County Mine Tailings site, see http://www.epa.gov/region7/cleanup/npl_files/mod981507585.pdf.

Page 16: Libby Asbestos site, see <http://www2.epa.gov/region8/libby-asbestos>.

Page 16: Centre County Kepone site, see <http://www.epa.gov/reg3hwmd/npl/PAD000436261.htm>

Page 17: Phoenix-Goodyear Airport site, see <http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dec8ba3252368428825742600743733/b54812152cbd4b5888257007005e9458!OpenDocument>

Page 17: Elizabeth River watershed initiative, see http://www.epa.gov/landrevitalization/download/factsheet_elizabeth.pdf.

Page 17: Upper Columbia River site, see <http://yosemite.epa.gov/R10/cleanup.nsf/7d19cd587dff1eee8825685f007d56b7/8e6f0f606773266088256c020066df7d!OpenDocument>