



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

NOV 21 2017

MEMORANDUM

SUBJECT: Sample CWA/CERCLA Memorandum of Understanding for Regions, States, Tribes, and Other Federal Agencies

FROM: John Goodin, Acting Director
Office of Wetlands, Oceans and Watersheds
Office of Water

Handwritten signature of John Goodin in blue ink.

Cynthia L. Mackey, Director
Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assistance

Handwritten signature of Cynthia L. Mackey in blue ink.

Deborah G. Nagle, Acting Director
Office of Science and Technology
Office of Water

Handwritten signature of Deborah G. Nagle in blue ink.

Andrew D. Sawyers, Ph.D., Director
Office of Wastewater Management
Office of Water

Handwritten signature of Andrew D. Sawyers in blue ink.

James Woolford, Director
Office of Superfund Remediation and Technology Innovation,
Office of Land and Emergency Management

Handwritten signature of James Woolford in blue ink.

TO: Superfund National Program Managers, Regions 1-10
National Water Program Managers, Regions 1-10
Regional Counsels, Regions 1-10

Contaminated sediment sites continue to be a significant environmental and public health problem. Work on a contaminated sediment site can raise complicated issues under both the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Given that roles and responsibilities under both statutes often are shared by the Environmental Protection Agency (EPA), states, and federally-recognized Indian tribes, as well as other federal agencies in certain circumstances, close collaboration with these governmental entities is crucial when addressing contaminated sediments and their associated waters.

This memorandum encourages Regions, states, tribes, and/or other federal agencies to use this site-specific sample Memorandum of Understanding (MOU) at appropriate contaminated sediment sites. EPA has issued extensive regulations, policies, and guidance addressing contaminated sediment sites, and this memorandum and attached sample MOU are not intended to supersede, limit, or change these preexisting authorities and tools. Rather, this memorandum and the sample MOU provide additional guidance to help further key goals at these sites, including source control and the prevention of recontamination of remediated sediments. The MOU is designed to be site-specific, non-binding, and unenforceable. It is not intended to be used as a funding mechanism. Finally, this memorandum and attached MOU are consistent with and works toward achieving some of the goals reflected in EPA's *Superfund Task Force Recommendations*, released July 25, 2017, including but not limited to Recommendations Nos. 12, 19, and 42.

I. Background

The attached sample MOU stems from the direction and encouragement of our three program offices. On February 12, 2015, the Assistant Administrators of the Office of Enforcement and Compliance Assurance (OECA), the Office of Solid Waste and Emergency Response (now Office of Land and Emergency Management (OLEM)), and the Office of Water (OW) signed a memorandum titled, "Promoting Water, Superfund and Enforcement Collaboration on Contaminated Sediments" ("3AA Memo").¹ The 3AA Memo recognized the importance of cross-program collaboration at contaminated sediment sites and encouraged EPA's enforcement, Superfund, and water programs to improve communication, coordination, and collaboration across these programs. In addition to improving working relationships within the Agency, the 3AA Memo encouraged EPA's Regions to improve coordination beyond the Agency by further engaging state, tribal, and local entities, as well as other federal agencies, early in the process and over the long-term to facilitate collaborative solutions at these sites.

The 3AA Memo expressly encouraged opportunities to implement cross-program collaboration efforts. Some of the points that the three Assistant Administrators specifically addressed include the following:

- (1) early and frequent sharing of monitoring data and information about contaminant sources;
- (2) sharing mapping capabilities among EPA programs, states, and tribes;
- (3) coordinating actions and schedules under different legal authorities (to the extent practicable);
- (4) sharing knowledge of upland or upstream sources and/or background contamination; and
- (5) identifying appropriate terms and conditions in National Pollutant Discharge Elimination System (NPDES) permits that address issues of concern at Superfund sites within the waterbody.

¹ *Promoting Water, Superfund and Enforcement Collaboration on Contaminated Sediments* (OECA/OLEM/OW Feb. 2015), available at <https://semsub.epa.gov/work/HQ/720523.pdf>.

II. Site-Specific Sample MOU

In furtherance of the 3AA Memo, we have developed the attached sample MOU which may be appropriate for use at a contaminated sediment Superfund site. Regions are encouraged to consider this sample language as a starting point and to revise and expand it to reflect site-specific circumstances. Optimally, the MOU process should be considered once EPA begins to explore remedy selection for the site, as the collaboration recommended by the MOU is intended to create cohesion and efficiency in effective remedy selection, implementation, and sustainability. At the same time, this MOU could be effective to enhance communications between parties at any point in the remediation process. What follows is an explanation about the sample MOU and its various provisions.

A. *Parties and Authority*

This serves as a sample for Regions to consider using at contaminated sediment sites where states, tribes, and/or other federal agencies are involved. Thus, the MOU expressly contemplates that all three of these governmental entities can – and should, where appropriate – enter into an MOU at a site. Moreover, where a state and a tribe are both interested stakeholders at the site, Regions are encouraged to consider entering into a single MOU with both the state and the tribe to the extent possible and appropriate.

States, tribes, and other federal agencies may become involved at such sites due to (1) their roles or responsibilities under the CWA or CERCLA; (2) state or tribal law providing authority to respond to releases of hazardous substances at the site; (3) their role as a natural resource trustee; and/or (4) other federal statutes, treaties, executive orders, or other similar authorities. Overall, the MOU is aimed at being as inclusive as possible, and Regions are encouraged to involve these other governmental entities when their interests may be affected or implicated at the site.

B. *Purpose*

The purpose of the MOU, as stated in Section II of the MOU, is to “foster more effective communication and to help facilitate short- and long-term coordination between the Parties when working together to achieve (1) the cleanup of contaminated sediments; (2) the reduction of the site load to impaired waters to attain water quality standards; and (3) the protection of the remediated sediments at the site, as well as the associated watershed and habitat.”

To effectuate this purpose, the MOU seeks to aid the involved governmental entities at the site with “(1) identifying those activities that foster communication, collaboration, and transparency by each Party in carrying out its roles and responsibilities, consistent with CERCLA, the CWA, CWA regulations, the NCP, subpart O, and existing EPA CERCLA and CWA guidance; (2) taking such other steps that may help facilitate effective means of carrying out the Parties’ statutory and regulatory authorities; and (3) pursuing effective coordination and cooperation to optimize federal, state, and tribal government expertise and available resources.”

The MOU may be used at any contaminated sediment site; recognizing, however, that it may not be appropriate at every such site and Regions should use their discretion regarding when to use

this tool. The MOU is crafted as a framework to provide consistency and uniformity where appropriate, in light of various statutes and regulations. At the same time, however, the MOU is created to allow as much flexibility as possible, thereby permitting the parties to adapt the MOU to fit the specific circumstances of the site.

In addition, the MOU is not meant to modify or supersede any CWA or CERCLA guidance, preexisting CERCLA § 120 interagency agreements, CERCLA § 104(d) agreements (such as Superfund state contracts (SSCs) or cooperative agreements), Superfund memoranda of agreement (SMOAs), or settlement agreements, judicial orders, consent decrees, or other related enforcement documents for the site. The MOU, rather, supplements these other items and instruments, in particular SSCs, cooperative agreements, and SMOAs.

Even where an SSC, cooperative agreement, and/or SMOA is in place for a site, there are differences between these instruments and the MOU such that the MOU could still provide some utility for the governmental entities involved. SSCs, cooperative agreements, and SMOAs all have particularly delineated purposes that are different from an MOU. Moreover, these other instruments are all specific to CERCLA and CERCLA-related activities, whereas the MOU is cross-programmatic and specifically intended to incorporate aspects of the CWA so that considerations under both statutes and programs – across all of the governmental entities involved – are addressed in one document. To this end, although not binding or enforceable, the MOU typically would be broader and would reach farther than an SSC, cooperative agreement, or SMOA. In addition, these other instruments are all two-party agreements; in contrast, the MOU is specifically contemplated to include multiple parties where appropriate.

C. Site Background

Section III of the MOU provides the opportunity to give details about the site, including a physical description of the site, principal contaminants of concern to both the Superfund and CWA programs, sources of contamination, ownership, etc. Also, if any other agreements are in effect at the site, such as an interagency agreement with another federal agency, a Superfund state contract or cooperative agreement, settlement agreement, consent decree, or other enforcement-related document, this is the section to describe those instruments. This section also provides an opportunity to describe, among other things, whether the related waterbodies at the site are not meeting applicable water quality standards and are on the state's 303(d) list as impaired, to describe whether there are total maximum daily loads in place, and to describe if there are NPDES permitted outfalls.

D. Parties' Intentions

In Section IV of the MOU, the intentions of the parties are clarified around representation, frequency of communication between parties, methods of collaboration, and notification of response activities. The section also includes optional language concerning efforts to advance transparency and allow the Parties to more easily monitor and evaluate compliance with applicable requirements.

Subsection (a)(i) is intended to encourage an annual meeting (in person, by phone, or virtually) to help facilitate the participation of parties involved in the remediation. This may include not only the MOU Representative, but also supporting members from each party including attorneys, eco assessors, community relations, etc. This meeting can serve to inform parties of the major concerns for the site as well as progress in remediation. Alternately, subsection (a)(iv) is intended to help develop a schedule of regular communication by the representatives of each party throughout the year and throughout the remediation process.

Under subsection (a)(iii), representatives from each party can be identified as the point of contact for communication and collaboration throughout the MOU process. Parties should choose representatives that are involved in the information gathering and decision-making processes for the site remediation. From EPA, a recommended point of contact would be the remedial project manager for the site. State and tribal equivalents to a site project manager would be appropriate representatives.

E. Confidentiality

The MOU contemplates the confidentiality of information that may be shared between parties during the collaboration process. The intention of the MOU is to share information for the purposes of creating a more comprehensive approach to sediment site remedies. At the same time, EPA recognizes that some information that is useful to that end may require confidentiality due to existing confidential business information (CBI), confidentiality of cultural resource information that a state or tribe may identify as sensitive, or documents that are considered deliberative. EPA understands that public records laws vary from jurisdiction to jurisdiction and some jurisdictions may provide broader access to documents than the federal Freedom of Information Act. Therefore, the MOU encourages the clear assertion of privilege to those materials being shared that are not for public release.

F. General Provisions

The General Provisions section (Section VI) describes some of the legal limitations of the MOU, as well as clarifying provisions that may be tailored to fit the specific facts for the site. Some provisions that normally should appear in an MOU include sections (a) through (h) which address standard considerations such as reservation of rights of the parties and the assertion that this document is not a fund obligating agreement. Subsection (i) contains provisions that should be tailored to the site specific circumstances in consideration of tribal involvement.

G. Signatures

Pursuant to EPA Delegation No. 1-11 (Interagency Agreements and Memoranda of Understanding, October 7, 2010), the authority to enter into an MOU between EPA and other federal agencies, or state, tribal or local governments, is delegated to the Regional Administrator. This authority may be redelegated through intervening supervisory levels to the Division Director. Given the collaborative intent of the MOU, it is reasonable that the Division Director for the Regional Superfund program and the Division Director of the appropriate Regional Clean Water program, together, would sign the MOU on behalf of the Region. The authority to sign or

enter into an MOU, however, may not be exercised unless the Regional Counsel, or their designee, concurs in the MOU.² States and tribes that are signatories to an MOU can determine the appropriate level for signature within their organizations.

III. Non-Binding Determination

This memorandum and MOU are intended solely as guidance and do not impose any legally binding requirements on EPA, states, tribes, or other entities. The statutory provisions and EPA regulations referenced herein may contain legally binding requirements; however, this document is not a regulation itself, nor does it alter or substitute for those provisions and regulations. This memorandum and attached sample MOU do not confer legal rights or impose legal obligations upon any member of the public. In the event of a conflict between the discussion in this document and any statute or regulation, this memorandum would not be controlling.

This memorandum and sample MOU may not apply to a particular situation based upon site-specific circumstances. Interested parties are free to raise questions about the substance of this guidance and the appropriateness of the application of this guidance to a particular situation. EPA and other decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from those described in this guidance.

IV. Conclusion

By working collaboratively, EPA and other governmental entities can more effectively and efficiently achieve our shared environmental goals. It is important to EPA to engage states, tribes, and other federal agencies in cross-program collaborations that benefit site cleanups through a comprehensive look at site remediation and water quality. For more information and resources regarding contaminated sediments, please visit OLEM's Contaminated Sediments web page.³

Coordination between programs can be challenging, but we are confident that the sample language and recommended framework provided in this MOU can serve to improve integration and collaboration among all parties who have an interest in the success of cleanups at contaminated sediment sites. To get a sense of the utility of this tool moving forward, we are requesting that the EPA Regions notify us when the sample MOU is used and to share a copy of the signed MOU. To make it as easy to use as possible, the sample MOU is available for download in Word format from the Cleanup Enforcement Model Documents and Sample Language Database at <https://cfpub.epa.gov/compliance/models/>.

² See also *Memoranda of Understanding and Similar Agreements* (Marcus Peacock, Deputy Administrator, June 2008) (encouraging the involvement of Office of General Counsel or Office of Regional Counsel in the MOU drafting process).

³ U.S. EPA, Office of Land and Emergency Management, Superfund: Contaminated Sediments web page, available at <https://www.epa.gov/superfund/superfund-contaminated-sediments>.

Our sincere gratitude and appreciation to all of the people in the Regions and at headquarters who contributed to the development of this sample MOU, as well as to the states and tribes that provided comments on the draft sample MOU. If you have questions about this sample MOU, or to notify when the MOU is used, please contact Nancy Browne (202-564-4219, browne.nancy@epa.gov) in OECA's Office of Site Remediation Enforcement.

Attachment

cc: Wendy Blake, OGC/GLO
John Michaud, OGC/SWERLO
Steven Neugeboren, OGC/WLO
Kenneth Redden, OGC/CRFLO
Carol Ann Siciliano, OGC/CCILO
Superfund Remedial Program Branch Chiefs
Superfund Regional Counsel Branch Chiefs
Clean Water Act Program Branch Chiefs
Jonathan Binder, OECA
Karen Gude, OW
Jessica Snyder, OLEM

[Sample Language for a Site-Specific]

MEMORANDUM OF UNDERSTANDING

between

U.S. ENVIRONMENTAL PROTECTION AGENCY – REGION [NUMBER]

and

[NAME OF STATE]
[NAME OF FEDERALLY RECOGNIZED INDIAN TRIBE]
[OTHER FEDERAL AGENCY]

for

[SITE NAME, SITE LOCATION]

[NOTE: This sample language is intended to ensure that an MOU will be consistent with CERCLA, the CWA, the NCP (40 CFR Part 300), CWA regulations, and existing EPA CERCLA and CWA guidance. An MOU developed using this guidance will not serve as a Superfund Memorandum of Agreement, cooperative agreement, a Superfund state contract, a CERCLA § 120 interagency agreement, or any other enforceable agreements provided for in CERCLA or the subpart O regulations.]

I. PARTIES AND AUTHORITY

[NOTE: Include a brief explanation of the context for the MOU and each signatory’s interest in the activities covered by the MOU.]

- a. The following governmental parties are signatories (“Parties”) to the Memorandum of Understanding (MOU):
[list of signatories]:
- b. The United States Environmental Protection Agency (EPA) enters into this MOU to further the purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9627, [the Federal Water Pollution Control Act (the “Clean Water Act” or CWA), 33 U.S.C. §§ 1251-1387, [and **other applicable federal laws**]]. The **[insert name of other parties to the MOU, e.g., state agency, other federal agency, and/or federally recognized Indian tribe]** (hereinafter referred to as “[state]/[federal agency]/[tribe]”) enter[s] into this MOU in accordance with **[applicable federal, state, and/or tribal laws and/or tribal rights or responsibilities established pursuant to authority as a natural resource trustee under CERLCA and/or pursuant to applicable treaties, other federal statutes, executive orders and court decisions]**.
- c. Pursuant to CERCLA, EPA has broad, discretionary authority to respond to releases and threatened releases of hazardous substances, as well as pollutants and

- contaminants that pose or may pose an imminent and substantial danger to the public health and environment. **[NOTE: Where the Site involves a federal facility listed on the NPL, the other federal agency would be acting pursuant to its CERCLA response authorities under EPA’s oversight. Add the following if the site is a federal facility:** Pursuant to CERCLA and Executive Order 12580, the other federal agency has been delegated response authorities.]
- d. [Pursuant to **[applicable state law]**, the [state] has express statutory authority to **[insert appropriate language, for example:** respond to releases of hazardous substances] related to the Site.]
 - e. [Pursuant to **[applicable tribal law]**, the [tribe] has authority **[insert appropriate language, for example:** respond to releases of hazardous substances] related to the Site.]
 - f. **[Determine if the state, tribe, and/or other federal agency is/are Natural Resource Trustees. If applicable:** The [state][,] [tribe][,] [and] [other federal agency] [has/have] express authority as Natural Resource Trustee[s] under CERCLA, and [has/have] rights and responsibilities set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. 42 U.S.C. § 9607(f); the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300, subpart G; Executive Order 12580.]
 - g. **[Insert name of permitting authority, either EPA/state/authorized tribe]** has permitting authority under the CWA, pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) permit program authorizing EPA and authorized states or tribes to issue NPDES permits allowing for the discharge of pollutants by point sources into navigable waters subject to specific terms and conditions. EPA has authorized the [state/tribe], through the [state/tribal agency], to issue NPDES permits pursuant to Section 402(b) of the CWA.
 - h. **[NOTE: the first sentence of paragraph (h) is written broadly to recognize eligible tribes that have “treatment in a similar manner as states” (TAS) status for adopting water quality standards (WQS) for CWA purposes, as well as tribes that do not, but have adopted tribal water quality standards not applicable under the CWA. The sentences that follow apply only to states and tribes with TAS for WQS.]** **[Insert name of party, either EPA/state/tribe]** has adopted water quality standards for surface waters within its jurisdiction. Where those waters do not attain standards that are applicable for CWA purposes, those waters generally must be listed as impaired under Section 303(d) of the CWA, 33 U.S.C. § 1313. Once listed as impaired, a total maximum daily load (TMDL) must be established for any relevant pollutant(s) at levels necessary to attain and maintain the applicable water quality standards in the impaired waters.
 - i. **[NOTE: A CWA § 401 certification is usually issued by the state in which the discharge originates, but it could be issued by a tribe if the discharge occurs on a reservation and the tribe has TAS authority to issue certifications. EPA has, on occasion, issued CWA § 401 certifications on reservations where the tribe lacks authority to do so.]** The [state][,] [tribe][,] [and/or] [EPA] [has/have] authority to issue certifications pursuant to Section 401(a)(1) of the CWA, 33 U.S.C § 1341(a)(1). Section 401(a)(1) requires the applicant for a federal license or permit to conduct any

activity that may result in a discharge into the navigable waters to provide the licensing or permitting agency with a certification from the [state/tribe] in which such discharge originates that the discharge will comply with specifically identified sections of the CWA, including Section 303, 33 U.S.C. § 1313 (water quality standards). Without such certification (or its waiver) the license or permit may not be granted. This requirement allows each [state/tribe] to review, accept, reject, or place conditions upon federally licensed or permitted projects that may discharge into its waters (rivers, streams, lakes, and wetlands), i.e., to ensure the projects will comply with [state/tribal] water quality standards and other appropriate requirements of [state/tribal] law.

II. PURPOSE

[NOTE: Purpose should be set forth clearly and concisely so that all involved have a clear understanding of what is intended to be accomplished.]

- a. For purposes of this MOU, “Site” means the _____ Superfund Site, [encompassing approximately __ acres, located at [address or description of location] in [city], _____ County, [state], [as well as within [identify and depicted generally on the map attached as Appendix __]. **[NOTE: If the site is located in part or in whole on an Indian reservation or in Indian country, the Parties should identify that here. Similarly, if tribal treaty or other similar rights may be impacted at the Site, the Parties should consider identifying those here, as well.] [NOTE: Define “site” broadly enough to allow flexibility if additional contamination is found.]**
- b. The purpose of this MOU is to foster more effective communication and to help facilitate short- and long-term coordination between the Parties when working together to achieve (1) the cleanup of contaminated sediments; (2) the reduction of the site load to impaired waters to attain water quality standards; and (3) the protection of the remediated sediments at the Site, as well as the associated watershed and habitat. This greater communication and coordination may also help in the establishment of a TMDL and help ensure that the CERCLA cleanup assists in delisting impaired waterbodies from the CWA § 303(d) list. Collaboration between the Parties with statutory and regulatory responsibilities for these co-located media can help address the physical interaction between contaminated sediments and the impaired water. **[NOTE: Where the Site involves a federal facility listed on the NPL, the other federal agency would be acting pursuant to its CERCLA response authorities under EPA’s oversight.]** At [insert name of Site], EPA [OR the [other federal agency], under EPA’s oversight,] is taking a CERCLA response action to address the contaminated sediments; at the same time, [EPA/state/tribe, select as appropriate] has legal authorities related to protecting suspended and bedded sediment quality and the impaired water. Collaboration through any of the following can help facilitate the reduction of the site load to impaired waters to attain water quality standards and help address the potential for recontamination from point and nonpoint sources: drafting and reviewing NPDES permits, pursuant to CWA § 402;

- the listing of surface waters not attaining water quality standards, pursuant to CWA § 303(d); and establishing and implementing TMDLs, pursuant to CWA § 303(d).
- c. Accordingly, this MOU sets forth how the Parties intend to cooperate and coordinate to help facilitate the remediation and to prevent the recontamination of remediated sediment at the Site, as well as help facilitate the reduction of the site load to impaired waters, in a number of ways, including: (1) identifying those activities that foster communication, collaboration, and transparency by each Party in carrying out its roles and responsibilities, consistent with CERCLA, the CWA, CWA regulations, the NCP, subpart O, and existing EPA CERCLA and CWA guidance; (2) taking such other steps that may help facilitate effective means of carrying out the Parties' statutory and regulatory authorities; and (3) pursuing effective coordination and cooperation to optimize federal, state[, and tribal] expertise and available resources.
 - d. This MOU does not modify or supersede any existing CWA or CERCLA guidance, nor does it affect, modify, or supersede any existing [CERCLA § 120 interagency agreement,] CERCLA § 104(d) agreements, Superfund Memoranda of Agreement, or settlement agreements or enforcement orders with potentially responsible parties (PRPs) pertaining to this Site. All actions taken under this MOU should be consistent with any and all of the following related to this Site:
 - i. the CWA, CERCLA, the NCP, and related CWA and CERCLA regulations;
 - ii. existing CERCLA and CWA guidance;
 - iii. [any existing CERCLA § 120 interagency agreement;] and
 - iv. any existing CERCLA § 104(d) agreements, entered into pursuant to 40 C.F.R. Part 35, Subpart O, or Superfund Memoranda of Agreement.

III. SITE BACKGROUND

- a. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List (NPL), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on _____, 20__, __ Fed. Reg. _____. **[NOTE: If the Site has been proposed but not listed, include the FR citation for the proposed listing. An MOU can be useful at sites using the Superfund Alternative Approach and at sites that have not been proposed or listed on the NPL.]** [The Site was added to the [state NPL] on [date].]
- b. **[Insert description of other statutory authorities, such as the CWA, if relevant.]**
- c. **[Insert description of CERCLA and/or CWA enforcement and response efforts to date, if applicable.]**
- d. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, NPDES permits must comply with all relevant requirements of the CWA defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), so as "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."
- e. [Pursuant to Section 303(d) of the CWA, 33 U.S.C § 1313(d), the [state, tribe] identified [waterbody(ies) affected by the site] as not meeting applicable water quality standards and placed [it/them] on the [state's, tribe's] 303(d) list of impaired waters on [enter date of the listing], requiring establishment of [a] TMDL[s]]. **[NOTE: Insert description of any TMDL(s) already established for waterbody(ies) affected by the site.]**

- f. [Pursuant to Section 104(d) of CERCLA, 42 U.S.C. §9604(d), the NCP (e.g., 40 C.F.R. § 300.515), and the Subpart O regulations, EPA and [state/tribe] entered into a [cooperative agreement, dated **[insert date,]]** [or a] [Superfund state contract, dated **[insert date,]]** pertaining to the Site.] [Consistent with 40 C.F.R. § 300.505, EPA and [state/tribe] entered into a Superfund Memorandum of Agreement, dated **[insert date]**, pertaining to the nature and extent of EPA and [state/tribal] interaction during EPA-lead and [state-/tribe-] lead response.] [Pursuant to Section 120 of CERCLA, 42 U.S.C. § 9620, EPA and the [other federal agency] entered into an interagency agreement, dated **[insert date]**, pertaining to the Site.]
- g. **[Insert description of any administrative settlement agreement and order on consent, settlement agreement, consent decree, or order applicable at this Site.]**

IV. EPA AND [STATE/OTHER FEDERAL AGENCY/TRIBE] INTENTIONS

For the activities described in this section, the Parties should act consistent with the CWA, CERCLA, CWA regulations, [and] the NCP [, and those documents identified in Section III.f. and III.g. above].

- a. Communication Between the Parties
 - i. EPA and the [state/tribe/other federal agency] intend to confer and/or meet at least [annually] to discuss implementation of this MOU at the Site, for example: **[insert site-specific priorities here]**.
 - ii. EPA and the [state/tribe/other federal agency] intend to encourage intra-agency communication within their respective offices or programs that may have a significant impact on the interests or objectives of this MOU.
 - iii. Representatives
 - 1. In carrying out this MOU, EPA and the [state/tribe/other federal agency] intend to coordinate and communicate as much as is feasible. To accomplish this, EPA and the [state/tribe/other federal agency] have designated the following persons to act as their representative for purposes of this MOU:
 - a. EPA Representative: **[name, address, phone, email]**
 - b. [State/tribe/other federal agency Representative: **name, address, phone, email]**
 - 2. If EPA or the [state/tribe/other federal agency] change their representatives, the Party making the change intends to notify the other Parties in writing within 10 days of the change.
 - iv. The EPA representative and the [state/tribe/other federal agency] representative intend to strive to communicate regularly. The Parties intend to hold status calls concerning the activities identified in this MOU no less frequently than [insert] or at such other regular interval as determined by the EPA representative and the [state/tribe/other federal agency representative], based on need and the level of site activities. **[Optional:** In addition to the EPA representative and [state/tribe/other federal agency] representative, other parties may be included when appropriate.]

- v. To reaffirm the importance of promoting source control, the Parties intend to share existing data and information about the Site and affected impaired waters with one another and with their respective NPDES permitting or permit review authorities and water quality assessment authorities so that such authorities may make fully informed decisions when developing permit conditions or establishing and implementing TMDLs. The Parties further intend to coordinate such data gathering and sharing in formats that are accessible to all the Parties. Sharing such data and information may also inform better decisions in the CERCLA response process in light of the water quality goals and needs. **[NOTE: Examples of data and information about the Site and affected impaired waters may include, but is not limited to, data regarding contaminants of concern, surface water-related data, pollutant concentrations in surface water, and sources of contamination to surface water.]**
- b. Collaboration Between the Parties
 - i. The Parties intend to work together to establish a schedule of communication about Site conditions in a manner that allows the Parties time to consider relevant information in their decision-making process. The Parties recognize that each operate under different statutes, mandates, and directives, which may induce variations in the timing of activities at the Site or affected water bodies.
 - ii. The Parties recognize the following with regard to the Party that may act as “lead agency” for the entire cleanup or a certain phase or portion of the Site. At the Site, the lead agency is **[name of the Party]**, as defined in the NCP, 40 C.F.R. § 300.5[, and further addressed in the existing [cooperative agreement/Superfund state contract] between **[list the parties]** effective on **[insert date the 104(d) agreement became effective]**]. Pursuant to CERCLA and the NCP [, as well as the CERCLA § 120 interagency agreement at the Site], responsibilities of the lead agency may include: **[insert site specific list, addressing for example:**
 - 1. Providing the remedial project manager (RPM) to plan and implement CERCLA response actions with regard to the Site, consistent with CERCLA, Executive Order 12580, the NCP, and EPA CERCLA guidance.
 - 2. Conducting work at the following phases of cleanup: **[specify]**.
 - 3. Providing a schedule of CERCLA response activities.
 - 4. Identifying potentially applicable or relevant and appropriate requirements (ARARs) under Section 121(d) of CERCLA, including more stringent state environmental requirements, standards, or levels of control, in particular those promulgated pursuant to the CWA.
 - iii. The EPA representative and the [state/tribe/other federal agency] representative intend to notify each other of regulatory activities each may undertake that may relate to the Site and to provide each other with electronic copies of draft and final documents when appropriate, consistent with CERCLA, the NCP, EPA CERCLA guidance, and any applicable and existing

Superfund state contract (SSC), Superfund Memorandum of Agreement, or CERCLA § 120 interagency agreement.

1. Documents prepared in carrying out CERCLA response actions (e.g., removal and remedial actions) may include: **[modify list as appropriate]**
 - a. Engineering Evaluation and Cost Analysis;
 - b. Remedial Investigation and Feasibility Study;
 - c. Action Memoranda, or Records of Decision (RODs) (including proposed plans);
 - d. Remedial Design (RD);
 - e. Certification of Completion or Construction Completion and Preliminary Close Out Report;
 - f. Enforcement documents, such as Administrative Settlement Agreements and Orders on Consent, Consent Decrees, or Unilateral Administrative Orders; and
 - g. Community involvement plans (including public notices and public meetings).
2. Response activities and documents prepared in carrying out the CWA may include: **[insert site specific list, addressing for example:**
 - a. Determining eligibility for coverage under a general permit where those discharges may be to or upstream of the Site;
 - b. Development of adaptive management requirements within any new permits that may impact the Site;
 - c. Notification of new permits that may impact the Site;
 - d. Data on current permits;
 - e. Identification and listing of impaired waters (those waters not meeting water quality standards) and sources of impairments;
 - f. Information and data on current and anticipated water quality standards (criteria and use designations) and TMDLs; and
 - g. Enforcement documents, such as consent decrees and administrative orders, as well as a description and schedule of pollution control measures that is anticipated to address non-compliance, such as Long Term Control Plan control measures that will reduce combined sewer overflows.]

- iv. **[NOTE: The tools discussed in this subsection represent efforts to incorporate innovative compliance approaches in the remediation of contaminated sediment sites and the continued protection of such sites and associated water bodies. For additional information on innovative compliance, including collections of examples of these approaches implemented at cleanup sites, please visit EPA's web page at: <https://www.epa.gov/compliance/next-generation-compliance>.]** [The Parties intend to consider incorporating the following tools, where appropriate, to advance transparency and allow the Parties to more easily monitor and ensure compliance with applicable federal and [state/tribal] requirements: **[Edit the list accordingly based on site-specific circumstances]**

1. Public accountability through increased transparency of compliance data (e.g., posting relevant information on websites);
 2. Electronic reporting of deliverables and submissions as appropriate;
 3. Advanced pollutant monitoring for point source discharges;
 4. Ambient monitoring in water bodies, both upstream and downstream from the Site; and
 5. Independent third-party verification of compliance with environmental requirements.]
- v. The Parties intend to use the Region's and/or [state's/tribe's/other federal agency's] geographic information systems (GIS) tools, or other mapping or registry systems, to (1) locate and map the Site and, for purposes of carrying out CWA-related activities, make the related data available to their respective NPDES permitting or permit review offices and water quality assessment office(s); and (2) locate and map [point source discharges/permitted discharges] near the Site, and make that data available to their respective site assessment and site cleanup offices.

V. CONFIDENTIALITY

[NOTE: Particularly at high-profile sites, a Region should consider entering into a separate, more thorough confidentiality agreement and/or joint prosecution agreement. State public records laws may provide broader access to records than the federal Freedom of Information Act. Relevant public records laws should be assessed and discretion exercised when sharing documents in accordance with provided exemptions and in consideration of maintaining the confidentiality of work product.]

- a. The Parties recognize that in order to effectively and efficiently carry out the activities under this MOU, their counsel, employees, and consultants may exchange communications, information, and documents as part of their deliberative and decision-making processes. The Parties further recognize that some aspects of their collaboration may benefit from confidentiality to permit candid discussion of the issues. Therefore, to the extent provided for or allowed by the laws and regulations applicable to each Party, except as provided in paragraph V.b., and subject to paragraph V.c., the Parties intend to maintain as confidential, and not to release in oral or written form, all communications, information, and documents exchanged between the Parties or prepared jointly as part of the activities carried out under this MOU. [To the extent practicable and in accordance with applicable law, and except as provided in paragraph V.b., the Parties also intend to maintain the confidentiality of cultural resource information that a signatory tribe identifies as sensitive.]
- b. Information claimed as, or determined to be, confidential business information may be entitled to confidential treatment. Accordingly, the EPA representative will share confidential business information with other parties only in a manner that is consistent with 40 C.F.R. part 2, subpart B, including but not limited to 40 C.F.R. §§ 2.209(c) and (e), 2.302(h)(3), and 2.310(h)(3). Furthermore, this MOU is not intended to prohibit the disclosure or use of the following communications,

- information, or documents: those already lawfully within the public domain; those determined by EPA to be subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552; those determined by [state/tribe] to be subject to disclosure under [insert appropriate state/tribal FOIA laws]; and those that need to be disclosed in order to protect public health, welfare, or the environment as permitted by law.
- c. Each Party intends to properly label as privileged each document for which it could assert any privilege. Each Party intends to mark privileged materials with a header, in boldfaced type, on the first page of each such document to read as follows: “Not for Public Release; Exempt from Disclosure.” Each Party intends to label all pre-decisional drafts of studies, reports, or analyses as “Draft.” Each Party understands that failure to so mark information developed or shared under this MOU, or an inadvertent disclosure of such information, does not preclude the Parties from asserting the protections under the Freedom of Information Act or [state/tribal] law, or from asserting privileges and exceptions in seeking to protect the information from discovery.

VI. GENERAL PROVISIONS

- a. Notwithstanding any provision of this MOU, EPA and [state/tribe/other federal agency] reserve their rights and authorities under CERCLA or the CWA. Nothing in this MOU affects any provisions in regulations, including the NCP, or applicable Executive Orders. No provision of this MOU may be used to create or limit the rights and authorities of any Party or to prejudge what those rights and authorities may be. Similarly, nothing in this MOU determines, limits, or otherwise affects the potential CERCLA liability of any Party to this MOU. This MOU in no way restricts EPA or the [state/tribe/other federal agency] from participating in similar activities with other public or private agencies, organizations, or individuals.
- b. The Parties recognize that if a conflict arises between the language of this MOU and the language contained in CERCLA; the CWA; federal regulations, including the NCP; or a document listed in Sections III.f. or III.g., then CERCLA, the CWA, the regulations, or the language in the documents listed in Sections III.f. or III.g. will control.
- c. This MOU does not create any right, responsibility, or benefit, substantive or procedural, enforceable by law or equity by persons who are and who are not party to this MOU, against [state/tribe/other federal agency] or EPA, their officers or employees, or any other person. This MOU does not direct or apply to any person outside of [state/tribe/other federal agency] and EPA.
- d. Nothing contained in this MOU is intended to be construed, either expressly or by implication, to make EPA or [state/tribe/other federal agency] the other’s agent.
- e. Funding
 - i. The Parties understand that this MOU is not a fund-obligating document and does not authorize any transfer of funds relating to this Site between Parties or between a Party and another entity. **[NOTE: This MOU is not an appropriate vehicle for transfers of funds to/from EPA.]**
 - ii. EPA and the [state/tribe/other federal agency] intend to handle their own activities, and use their own resources, including the expenditure of their own

- funds, in pursuing the objectives of this MOU. Each Party intends to carry out its separate activities in a coordinated and mutually beneficial manner.
- iii. Pursuant to the Anti-Deficiency Act, 31 U.S.C. §§ 1341 and 1342, **[cite to any parallel state or tribal law]** all commitments made by EPA [and state/tribe/other federal agency] in this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU obligates EPA or the [state/tribe/other federal agency] to obligate or transfer any funds. The Parties recognize that this MOU does not provide authority for specific work projects or activities that involve the transfer of funds, services, or property among the various agencies and offices of EPA and [state/tribe/other federal agency]. Such activities must be independently authorized by appropriate statutory authority and the negotiation, execution, and administration of the necessary separate agreement must comply with all applicable statutes and regulations. The [state/tribe/other federal agency] agrees not to submit a claim for compensation for services rendered to EPA in connection with any activities it carries out in furtherance of this MOU. This MOU does not exempt [state/tribe/other federal agency] from EPA policies governing competition for assistance agreements. Any transaction involving reimbursement or contribution of funds between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.
 - f. The Parties recognize that each Party reserves all rights, powers, and remedies now or hereafter existing in law or in equity, by statute, treaty, or otherwise. Nothing in this MOU is to be construed to be a waiver of the sovereignty of a signatory Party. This MOU is intended solely for purposes of facilitating inter-governmental cooperation between the Parties and creates no right to judicial review.
 - g. [State/Tribe] reserve the opportunity to request federal funds for [state/tribal]-lead removal actions and to seek cost-share credit for [state]-financed remedial actions.
 - h. Nothing in this MOU waives or supersedes any potential state or tribal rights under CERCLA or the CWA.
 - i. **[NOTE: MOUs with tribes may include additional conditions or considerations. Please contact your Region’s Indian law point-of-contact and/or OGC’s Cross-Cutting Issues Law Office.] [If appropriate, insert: Tribal Relationships**
 - i. EPA and other federal agencies have a unique legal relationship with federally recognized tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders and court decisions. Federal policies instruct EPA to have regular and meaningful consultation and coordination with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. These policies include Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments, effective January 6, 2001; Presidential memoranda of November 5, 2009, on Tribal Consultation, and April 29, 1994, on Government to Government Relations with Native American Tribal Governments; the EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984; the EPA Policy on Consultation and Coordination with Indian Tribes, May 4, 2011; and the EPA Policy on Consultation and

Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights, February 2016.

- ii. Nothing in this MOU is intended to limit or preclude in any way separate government-to-government consultation between a signatory tribe and EPA or other federal agencies consistent with federal Indian law and policies or any separate government-to-government consultation agreement(s) between EPA and a signatory tribe.
- iii. The Parties recognize the significance of cultural resources to the signatory tribe(s) and are committed to the principle that management of the Site be undertaken consistent with applicable laws related to cultural resources, which may include the National Historic Preservation Act of 1966, 54 U.S.C. § 300101, *et seq.*, the Archeological Resources Protection Act, 16 U.S.C. § 470aa, *et seq.*, the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001, *et seq.*, consistent with CERCLA and the NCP.
- iv. EPA [and other federal agency] intend[s] to consult with the tribe regarding the potential existence of cultural resources at [insert] portions of the Site, and to develop a strategy in consultation with the tribe for cooperative efforts at the Site consistent with applicable law related to cultural resources. Such efforts may include, for example, performance of cultural resource surveys and incorporation of cultural resource-related tasks in statements of work. The tribe will identify tribal laws and policies that may be applicable or relevant and appropriate. [NOTE: See “EPA Policy on Consultation and Coordination with Indian Tribes” (May 4, 2011), available at <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>, and “EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights” (February 2016), available at <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes-guidance-discussing-tribal-treaty>.]
- v. The Parties recognize that communications with the tribe regarding cultural resources may raise concerns about confidentiality. In its dealings with the tribe, the Parties intend to follow the principles laid out in Section V.
- vi. Nothing in this section regarding cultural resources is intended to enlarge, restrict, or otherwise affect any Party’s rights or obligations regarding cultural resources under any law.]

VII. EFFECTIVE DATE, DURATION, AND MODIFICATION

[NOTE: All MOUs should provide for commencement, duration, modification and termination.]

