

Brownfields

**Using State and Federal Programs to Develop
Contaminated Real Estate.**

By

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Introduction

What are Brownfields?

Brownfields have been defined as “abandoned, idled or underused industrial and commercial properties where expansion or redevelopment is complicated by real or perceived contamination.” Regardless of the definition, you know brownfields as the vacant gas station on the corner, the industrial building on the edge of town that is being used as a warehouse, or the old railroad yard. Sometimes development occurs around a brownfields, but because of the reputation of the site development skips the brownfields, and sometimes the actual or feared condition of the property depresses the entire area.

The Perspective of the Owner:

From the perspective of the property owner, old industrial or commercial properties can be an ongoing liability. Not only is the property owner faced with the potential for an expensive cleanup, but the owner may be worried about getting sued for allowing contaminants on his property to infiltrate neighboring wells, water supplies, basements, and lakes rivers and streams. If this owner tries to sell the property, the offers may not cover the debt on the property. Mergers and acquisitions may encourage successor companies to try to exclude certain industrial or commercial properties from the asset acquisition list, leaving the property abandoned, with no discernable owner. This fear is based upon cases in which successors have been found to be liable for remediation costs. Attorneys for the owner may worry that any development of the property will only encourage intrusive governmental attention and initiate an expensive cleanup.

The Perspective of the Lender:

Lenders may be very hesitant to take old commercial or industrial properties as collateral for loans, fearing that if a foreclosure is necessary it will be equally difficult to market and sell. There is also the fear among bankers, not entirely unfounded, that by taking possession of the property the bank or lender will be subject to corporate liability for the cost of the cleanup. Organic Chemicals Site PRP Group v. Total Petroleum, Inc., 6 F.Supp.2d 660 (W.D. Mich. 1998). Counsel for lenders will likely argue that additional collateral may be necessary in order to protect the lender. This necessarily restricts the availability of capital for owners or developers of brownfields.

The Perspective of the Buyer or Developer:

The potential buyer or developer is justifiably worried about potential liability should the industrial or commercial property be purchased. Many federal laws that regulate various hazardous chemicals impose liability on persons or companies regardless of negligence. Mere ownership may be enough to trigger millions of dollars in environmental response and cleanup costs. Comprehensive Environmental Response,

Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601-9675. CERCLA has been interpreted to impose strict, joint and several liability for releases of hazardous substances. This means that each party with any responsibility (including ownership) is liable for the entire cost of the remediation effort if the harm that each party caused is indivisible from the harm caused by other parties. Even if other responsible parties can be found who can afford and are willing to conduct a remediation, the remediation effort itself may render the real estate useless for its intended purpose.

The Perspective of the Local Municipality and County:

The local municipality and County are understandably concerned about the impact that a brownfields can have on a city. Because of the inability or difficulty in selling affected industrial or commercial properties, the fair market value of the property is lower. This in turn reduces the assessed value of the property. Boekeloo v. Board of Review of City of Clinton, 529 N.W.2d 275 (Iowa 1995). The obvious result of lower property values will be lower tax receipts. An underutilized and lower-value property in turn affects the value and desirability of other properties in the area. A single large facility or a large number of such properties can begin a “death spiral” of lower property values, lower taxes, and increasing demands on city resources.

The Perspective of Regulators:

In the past, the regulators took the firm position that they had no responsibility to assist developers, owners or local governments with what they perceived as a request to “ease” the regulatory burden on properties and their owners. Their job was to enforce the environmental laws so that the environment would be protected—with no regard for cost. Several recent initiatives at both the federal and state level have slowly worked to create flexibility where there was none before.

The Problem:

The perception that contamination will result in an expensive remediation effort is what creates brownfields. The Government Accounting Office (GAO) estimates the number of potential brownfields at 450,000 sites. Approximately 10% of brownfields are considered for the National Priorities List with less than 1% actually placed. Therefore, at least 99% of potential brownfields across the country will not require federal Superfund action. However, there is a perception that liability is almost assured. Despite the EPA’s comments to the contrary, this perception is based on some well-publicized problems with the EPA’s Superfund Program, the most notable federal program which exemplifies this “clean at any cost” attitude. A very interesting report was published under the auspices of a joint effort by the American Enterprise Institute and the Brookings Institution by James T. Hamilton and W. Kip Viscusi, two professors from Sanford Institute of Public Policy at Duke and Harvard Law School. Entitled "*Are Risk Regulators Rational? Evidence from Hazardous Waste Cleanup Decisions*", the report provides ample evidence that the Superfund program is extraordinarily expensive for the lives saved and cancer cases averted. Lest one assume that this report is an industry white-wash, it is worth noting that

funding was provided from the U.S. EPA Office of Policy, Planning, and Evaluation. A working paper version is available on the web at <http://www.aei.brookings.org/publications/topics.asp?topicID=21>. Perhaps the most amazing conclusion is that the "mean cost per case of cancer averted at the sample of 130 EPA sites is \$11.7 billion." That is eleven billion dollars. That is billion with a "B." Even using the EPA's own risk assumptions and no latency period, the median cost spent to avert each cancer case is more than 400 million dollars. The study also found a huge disparity in the way the money is spent. About 95% of the costs are spent to address only 1% of the risk.

I. The EPA's Brownfields Program.

A. Background

Many people involved in real estate development, whether acting in the role of a developer, city, or regulator, have at least a passing familiarity with the Environmental Protection Commission's Brownfields Initiative. The EPA launched the Brownfields Initiative to "empower States, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields." (EPA's Frequently Asked Questions Brownfields Document). Brownfields are defined as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination." (Id.)

The need for a coordinated federal response to the problem of brownfields arises from the difference between the perceptions of liability and risk outlined above and the true liabilities. In fact, most brownfields sites are not currently being targeted by any state or federal agencies for enforcement.

One curious aspect of the EPA's brownfields program is its slim statutory support. There is no "Brownfields Law." The EPA's statutory authority is limited to §§ 104(a) and 104(b) of CERCLA which grant to the EPA broad authority to take response actions to address releases and threatened releases of hazardous substances, pollutants, and contaminants and the authority to undertake a variety of studies and investigations, including monitoring, surveys, testing, planning, and other information-gathering activities.

On January 25, 1995, EPA Administrator Carol Browner announced the Brownfields Action Agenda. This agenda outlined the EPA's plans to help States and localities implement and realize the benefits of the Brownfields Initiative. In May of 1997 the EPA announced the Brownfields National Partnership Action Agenda. This later effort attempts to bring more than fifteen different federal agencies into the Brownfields program. The 1999 program is called the "Brownfields Economic Redevelopment Initiative." The efforts outlined in the various Brownfields agendas can be grouped into several categories:

1. **Brownfields Pilots.** The EPA created a program to select at least fifty States, cities, towns, counties, and Tribes for Brownfields pilots by the end of 1996. The pilots, each funded at up to \$200,000 over two years, are described by the EPA as designed to test “redevelopment models, special efforts toward removing regulatory barriers without sacrificing protectiveness, and facilitate coordinated public and private efforts at the Federal, State, and local levels.” Sites in Cedar Rapids, Clinton, Council Bluffs, and Des Moines were among the sites to receive funding in 1997 and 1998. In addition, Des Moines received supplemental assistance in 2000, while Clinton received supplemental assistance in 2001.

2. **BROWNFIELDS CLEANUP REVOLVING LOAN FUND PILOTS.** One of the most recent and important Brownfields initiatives is the award of cooperative agreements to states, political subdivisions (including cities, towns, and counties), and Indian tribes to capitalize Brownfields Cleanup Revolving Loan Fund (BCRLF) pilots. The purpose of the pilots is to enable States, political subdivisions, and Indian tribes to make low interest loans to facilitate the cleanup and redevelopment of brownfields properties. Those entities eligible for grants in 1999 had to already be participants in either the Brownfields Assessment Demonstration Pilots or targeted brownfields assessments (formerly called targeted site assessments). The targeted property must have an actual release or substantial threat of release of a hazardous substance. BCRLF loans may not be used for activities at any site: (1) listed (or proposed for listing) on the National Priorities List; (2) at which a removal action must be taken within six months; (3) where a federal or state agency is planning or conducting a response enforcement action. A revolving loan fund charges interest on the loans, generally at a low interest rate. It is revolving because it uses loan repayments (principal, plus interest and fees) to make new loans for the same authorized purposes. Both Des Moines and Cedar Rapids received large grants in 1999, and Sioux City and Waterloo received large grants in 2001.

3. **Clarification of Liability and Cleanup Issues.** The EPA has developed and issued guidance documents that help clarify the liability of prospective purchasers, lenders, property owners, and others regarding their association with and activities at a site.
 - A. **Guidance on Agreements with Prospective Purchasers of Contaminated Property.** One of the more important guidance documents is the Guidance on Agreements with Prospective Purchasers of Contaminated Property. This particular guidance document is important enough that it is discussed separately in Section IV of this outline. In basic terms, it eliminates much of the "retroactive liability" concern associated with purchasing contaminated or previously contaminated property where some evidence of Federal environmental interest exists. This document can be found at <http://www.epa.gov/swerosps/bf/html-doc/purchase.htm>

- B. Policy Toward Owners of Property Containing Contaminated Aquifers.** The EPA issued a Policy Toward Owners of Property Containing Contaminated Aquifers in May 1995. The policy statement provides assurance that EPA does not anticipate suing the property owner for groundwater contamination if the owner did not cause or contribute to the contamination. This can be vital to developers seeking to purchase real estate in a “brownfields” part of a town that is adjacent to potentially contaminated land. The text of this document can be found at www.epa.gov/brownfields/html-doc/aquifer.htm
- C. Policy on CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily** (Issued September 1995). The EPA and the Department of Justice (DOJ) jointly issued a memo explaining their policy on CERCLA enforcement against lenders and government entities that acquire property involuntarily. The EPA and DOJ will not pursue cleanup costs from those lenders that provide money to an owner or developer of a contaminated property, but do not actively participate in daily management of the property. This document can be found at www.epa.gov/brownfields/html-doc/involun.htm
4. **Brownfields Tax Initiative.** On August 5, 1997, the Taxpayer Relief Act (HR 2014/PL 105-34) was enacted. It includes the “Brownfields Tax Incentive,” a new tax incentive to spur the cleanup and redevelopment of Brownfields. Eligible taxpayers can deduct, in the year incurred, qualified environmental cleanup expenses incurred at eligible properties. Deductible expenses reduce a taxpayer's taxable income and thus generally reduce their income tax liability. To be eligible, the taxpayer must spend the funds in one of four types of properties: (1) Census tracts with poverty rates of 20% or more; (2) Census tracts with populations of less than 2,000 where more than 75% of the tract is zoned for commercial or industrial use, and the tracts are next to other census tract(s) with poverty rates of 20% or more; (3) Federally-designated Empowerment Zones and Enterprise Communities; and (4) U.S. EPA-designated Brownfields Pilot sites announced before February 1, 1997. The expenses must be incurred prior to January 1, 2001. This document can be found at www.epa.gov/brownfields/html-doc/taxlaw2.htm
5. **Policy on the Issuance of Comfort/Status Letters.** The "Policy on the Issuance of Comfort/Status Letters" is designed primarily to assist parties who seek to cleanup and reuse brownfields. EPA headquarters and regional offices often receive requests from parties for some level of "comfort" that if they purchase, develop, or operate on brownfield property, EPA will **not** pursue them for the costs to clean up any contamination resulting from the previous use. The majority of the concerns raised by these parties can be addressed through the dissemination of information known by EPA about a specific property and an explanation of what the information means to EPA. The comfort/status letters are intended solely for informational purposes and relate only to EPA's intent to exercise its response

and enforcement authorities under Superfund at a property based upon the information presently known to EPA. The policy does not encourage EPA involvement in typical private real estate transactions. This document can be found at www.epa.gov/brownfields/html-doc/comfply.htm

II. EPA's USTfields.

"USTfields" applies to abandoned or underused industrial and commercial properties where redevelopment is complicated by real or perceived environmental contamination from federally-regulated underground storage tanks (USTs). Of the estimated 450,000 brownfields sites in the U.S., approximately 100,000-200,000 contain abandoned underground storage tanks or are impacted by petroleum leaks from them. However, petroleum contamination is generally excluded from coverage under CERCLA and is not, therefore, covered under EPA's Brownfields program. EPA's Office of Underground Storage Tanks (OUST) is undertaking an USTfields initiative to address petroleum contamination from abandoned tanks generally excluded from Brownfields redevelopment. The USTfields program will provide grants to states for community pilot projects to plan cleanups, stop contamination of groundwater, protect public health, and allow for future economic development of the sites.

An USTfields is a site or portion of a site that has actual or perceived contamination, as well as an active potential for redevelopment or reuse. Special consideration is given in the awarding of grants to cities experiencing problems from MTBE contamination. MTBE is a fuel additive that fulfills a provision required by Congress under the Clean Air Act, but poses special risks to groundwater. The new USTfields program will allow EPA to work with states and cities to address water-contamination problems arising from the use of MTBE.

In November 2000, the EPA announced grants for 10 communities to receive \$100,000 each for assessment and clean-up of the abandoned tanks. EPA plans to select 40 more USTfields pilot projects in 2001. Up to \$40 million will be made available for this phase of the project.



For further information:

www.epa.gov/swerust1/ustfield/

III. The EPA's Prospective Purchaser Agreements.

A. Introduction.

Sometimes public funding for Brownfields may either not be available or may be inappropriate. In other instances, there may be private companies or individuals who are very interested in providing the necessary funding for a Brownfields site. What holds back a prospective purchaser is potential liability from the EPA. This is especially true in circumstances in which the contaminates involved are regulated by the EPA instead of the Iowa Department of Natural Resources. The EPA has stated that:

It is the Agency's policy not to become involved in private real estate transactions. However, an agreement with a covenant not to sue a prospective purchaser might appropriately be considered if it will have substantial benefits for the government and if the prospective purchaser satisfies other criteria.

One way to allow development to go forward is to use a Prospective Purchaser Agreement. This is a contract between the EPA and the prospective purchaser allowing the purchase of the property free of the usual liability concerns. It does not, however, take into account third party actions from neighbors or others who may be claiming some sort of injury. The Agreement does, however, give the buyer a release from the EPA. This allows the buyer to go forward with the planned development.

B. Regulatory Background

On June 6, 1989, the EPA issued a "Guidance on Landowner Liability under Section 107(a) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property" ("the 1989 guidance"). In May of 1995 the EPA issued a revision of that policy. Generally, it provides the following guidelines for anyone wanting to enter into this type of agreement with the EPA. What follows is a slightly edited extraction from the guidance document:

1. An EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the Agency.

This criterion is meant to ensure that EPA does not become unnecessarily involved in purely private real estate transactions or expend its limited resources in negotiations, which are unlikely to produce a sufficient benefit to the public. Accordingly, when requested, the Agency may consider entering into prospective purchaser agreements at sites listed or proposed for listing on the National Priorities List (NPL), or sites where EPA has undertaken, is undertaking, or plans to conduct a response action.

2. The Agency should receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA

This guidance encourages a balanced evaluation of both the direct and indirect benefits of a prospective purchaser agreement to the government and the public. EPA recognizes that indirect benefits to a community is an important consideration and may justify the commitment of the Agency's resources necessary to negotiate a prospective purchaser agreement, even where there are reduced direct benefits to the Agency in terms of cleanup and cost reimbursement. The EPA Regions may also consider negotiating prospective purchaser agreements that will result in substantial indirect benefits to the community as long as there is still some direct benefit to the Agency.

3. The continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with EPA's response action.

If the prospective purchaser plans to undertake new operations or development of the property, comprehensive information regarding these plans should be provided to EPA. If the planned activities of the prospective purchaser are likely to aggravate or contribute to the existing contamination or generate new contamination, EPA generally will not enter into an agreement, or will include restrictions in the agreement which prohibit those operations or portions of those operations which are likely to aggravate or contribute to the existing contamination or interfere with the remedy.

4. The continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site.
5. The prospective purchaser is financially viable.

A settling party, including a prospective purchaser of contaminated property, should demonstrate that it is financially viable and capable of fulfilling any obligation under the agreement. In appropriate circumstances, EPA may structure payment or work to be performed to avoid or minimize an undue financial burden on the purchaser.

6. The EPA should obtain adequate consideration.

As a matter of law, it is necessary for EPA to obtain adequate consideration when entering into a prospective purchaser agreement. In determining what constitutes adequate consideration, Regions should consider a number of factors, including the amount of past and future response costs expected to be incurred at the site, whether there are other potentially responsible parties who can perform the work or reimburse EPA's costs, whether there is likely to be a shortfall in recovery of costs at the site and the purchase price to be paid by the prospective purchaser. The EPA will also look at the market value of the property, the value of

any lien on the property under Section 107(1) of CERCLA, whether the purchaser is paying a reduced price due to the condition of the property, and if so, the likely increase in the value of the property attributable to the cleanup (e.g. compare purchase price or market price with the estimated value of the property following completion of the response action). Finally, the EPA will consider the size and nature of the prospective purchaser and the proposed use of the site (e.g. whether the purchaser is a large commercial or industrial venture, a small business, a non-profit or community-based activity).

IV. OTHER RELATED ISSUES.

A. Insurance. Pollution Legal Liability coverage protects the insured against suits brought for damages for bodily injury and/or property damage caused by the migration of contamination from the insured's site to a neighboring property. The pathway for the migration can be either through the air – such as air or odor emissions from a plant, the groundwater, or the soil. The increasing activism among many concerned citizens groups has led to hundreds of class action suits alleging bodily injury and related health problems. Pollution Legal Liability may also cover more veiled exposures such as suits from neighboring sites for diminution of property value from the alleged or real contamination associated with an insured's operation. Types of available insurance include:

- *Property Transfer Insurance*—protects an insured against on-site cleanup costs of unknown, pre-existing, or new conditions, and against third-party claims for off-site cleanup costs that result from on-site pollution.
- *Cleanup Cost Cap/Stop Loss Insurance*—protects an insured against a cleanup project that runs substantially over budget.
- *Owner-Controlled Insurance*—allows an owner or prime contractor undertaking cleanup to determine the desired scope of insurance protection against the acts or omissions of other parties involved in the cleanup.

For further information:

EPA Sources of Information:

Revolving Loan Fund Model Terms and Conditions (October 1998),
The Brownfields Economic Redevelopment Initiative: Proposal Guidelines for
Brownfields Cleanup Revolving Loan Fund (January 1999),
Brownfields Cleanup Revolving Loan Fund Administrative Manual (May 1998),
Brownfields Cleanup Revolving Loan Fund Model Terms & Conditions (October 1998)
located on the EPA Brownfields website at www.epa.gov/swerosps/bf/rflflocat.htm

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IOWA FEDERAL BROWNFIELDS PROJECTS

With the exception of the Prospective Purchaser Case Study for Kanawha, the information below is extracted largely from EPA publications available on the web.

Case Study: Clinton, Iowa

The Clinton Brownfields Pilot is focusing on a 220-acre area known as Liberty Square, which includes a 40-acre rail yard, a solid waste transfer station, and former retail and manufacturing facilities. Clinton will use its EPA grant to perform Phase I site assessments, develop cleanup and revitalization plans for selected sites, and conduct community outreach activities to engage local stakeholders in the Pilot project.

Date of Announcement: July 1998

Amount: \$200,000

BACKGROUND

Clinton's population has been declining steadily for years. The economic problems caused by general population loss were recently compounded by Union Pacific's decision to close its repair and maintenance facility in south Clinton, resulting in the loss of 250 jobs. The Brownfields Pilot will target a 220-acre area known as Liberty Square, located within a State-certified Enterprise Zone. Liberty Square's 3,520 residents have a per capita income of \$9,281, and 17% of families are below the national poverty level. Of all residents 25 years and older, only 41% graduated from high school and only 14% have a college degree. The area's unemployment rate is 15%.

Liberty Square includes a 40-acre rail yard, a solid waste transfer station, and former retail and manufacturing facilities. The area contains abandoned and unused building space that is estimated to take up hundreds of thousands of square feet. Despite the high demand to develop the land, fear of contamination has hindered development on all the properties in and adjacent to the target area. In addition, the City believes that the underlying aquifer is contaminated with pesticides, heavy metals, and volatile organic compounds. The Mississippi River and the City's water supply are at risk from this contamination.

OBJECTIVES

Clinton's objective is to create a corridor of properties in the Liberty Square area that is attractive to prospective commercial and light manufacturing companies. The City expects the project to serve as a model for stimulating economic redevelopment. Pilot funding will primarily be used to investigate environmental contamination and to conduct community outreach activities.

ACCOMPLISHMENTS AND ACTIVITIES

Activities planned as part of this Pilot include:

- Performing Phase I environmental assessments on targeted properties;
- Developing cleanup and revitalization plans for those sites with the most redevelopment potential; and
- Conducting community outreach activities to educate and engage stakeholders in the Pilot project.

Supplemental Assistance

EPA selected Clinton to receive supplemental assistance for its Brownfields Assessment Demonstration Pilot. The supplemental assistance will be used for the same 220-acre area for Phase I and Phase II environmental assessments, continuing the activities of the original Pilot.

Date of Announcement: April 2001

Amount: \$150,000

BACKGROUND

The 100-year old repair and maintenance facility of Union Pacific Railroad is part of the area's extensive industrial history that is a cause for concerns about environmental contamination. As the city looks for land for future industrial development, it is limited to active farmland, vacant land in residential areas, and the brownfields areas. The Pilot's efforts complement the city's broader land use planning efforts, which include the city's formal land use plan for Liberty Square. The city is also working with the Iowa Department of Transportation to include infrastructure improvements in the redevelopment plans.

OBJECTIVES

The original Pilot conducted Phase I environmental assessments on 36% of the targeted sites. The Pilot will use supplemental funding to double that figure with a second round of Phase I assessments in addition to Phase II assessments to be carried out on selected sites. The city's objective remains the same – to remove concerns over real and perceived contamination in the target area through assessment and cleanup of brownfields to facilitate the redevelopment of the Liberty Square area.

ACCOMPLISHMENTS AND ACTIVITIES

Activities planned as part of this Pilot include:

- Conducting community outreach to enhance the participation of residents, property owners, partners, and other stakeholders in the brownfields project;

- Conducting a second round of Phase I environmental assessments on sites originally targeted by the Pilot;
 - After the Phase I assessments have been completed on those sites, ranking the sites for Phase II assessment prioritization; and
 - Conducting Phase II environmental assessments of the prioritized sites.
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Case Study: Des Moines, Iowa

Date of Announcement: September 1997

Amount: \$100,000

BACKGROUND

EPA Region 7 selected on September 1997 the City of Des Moines for a Regional Brownfields Pilot. Des Moines is a financial, agribusiness, and retail trade center in the Midwest. In 1996, the unexpected closure of a beef processing plant in the City's central core resulted in approximately 1,300 lay-offs and widespread negative economic impact. The plant closure focused the community's attention on the environmental contamination that may be associated with chemical plants, salvage operations, and agribusinesses. The City has estimated that it has 50 brownfields, ranging in size from less than one acre to more than five acres. Private property owners have been hesitant to investigate these brownfields because of potential liability and cleanup expenses.

The City and its partners are responding to these challenges in a variety of ways, including the planning of the Des Moines Agribusiness Park, which is the target of this Pilot. This 1,200-acre tract of industrialized land has a history of environmental contamination. Suspected contaminants include lead, chromium, volatile organic compounds, and PCBs. Many of the parcels within this area may be considered brownfields. The City recognizes that successful redevelopment of this area is not possible until the known or perceived environmental contamination is addressed.

OBJECTIVES

The Pilot seeks to redevelop the under-used industrial sites within the Des Moines Agribusiness Park that are or have been threatened by environmental contamination. The area is well supported by easy highway access and current infrastructure sufficient to support the planned uses. Existing businesses in the Park currently employ about 300 people. It is anticipated that a majority of the workers for the new facilities will come from the local Hispanic and Asian populations. Many of these workers were laid off as a result of the beef processing plant closure in 1996. The Pilot has identified several specific objectives to ensure successful attainment of this goal, including: removing real or perceived barriers to redevelopment, especially those related to the environmental condition of the properties; securing new business investment in the Park; creating livable

wage employment opportunities for Des Moines residents, especially those laid off by the beef processing plant; certifying the area under the State's Agribusiness Enterprise Zone; developing a quality assurance management plan; exploring liability issues with the State; and exploring implementation of a pollution prevention plan to prevent the creation of future brownfields.

ACCOMPLISHMENTS AND ACTIVITIES

The Pilot will:

- Complete a land development assessment to determine the opportunities and challenges for redeveloping the Park, that will include research on land use, zoning, property ownership, infrastructure, and flood plain status;
- Conduct Phase I environmental assessments of all lands in the Park to identify specific brownfields sites;
- Conduct Phase II environmental assessments on a minimum of five sites in the Park that appear to pose the greatest threat of contamination and would be the most readily developed;
- Secure public involvement in all aspects of the assessment, cleanup, and redevelopment of the Park, including holding public meetings to discuss potential cleanup plans, creating communications products to keep the public informed about the project, and developing an Internet home page;
- Develop cleanup budgets and implementation plans, including site prioritization, cleanup strategies, land use, ownership transfer, and innovative financing; and
- Develop and adopt an urban revitalization plan and tax increment financing district which includes the Park.

Supplemental Assistance

EPA awarded Des Moines supplemental assistance for its Brownfields Assessment Demonstration Pilot. The city will focus on the 300-acre Riverpoint West area located just south of the central business district.

Date of Announcement: March 2000

Amount: \$150,000

BACKGROUND

The area is characterized by underused industrial parcels, a number of deteriorated structures, and real and perceived contamination from years of use for rail yards, newspaper and magazine printing, paint manufacturing, foundry operations, asphalt paving, and industrial chemical manufacturing operations. Phase I environmental assessments conducted across the targeted area indicate potential soil and groundwater contamination. The area is located in a census tract that has a family poverty rate of 37.8 percent. It also has several designations (e.g. urban renewal area, tax increment finance

district, urban revitalization tax abatement area, and Gateway Enterprise Zone) that offer an array of economic development incentives to revitalize the community.

OBJECTIVES

The Pilot will coordinate these supplemental assessment efforts with the other city initiatives – including a major transportation project and cleanup of other contaminated properties – to convert the area into a vibrant urban village and help support sustainable growth in the downtown area. The project seeks to utilize existing infrastructure and will provide low-rise residential and office space, a large public open space, and a pedestrian-friendly design to encourage walking and biking to the downtown area and to nearby natural resources such as Gray's Lake and the Water Works Park. The city will partner with the Des Moines Development Corporation (DMDC) to accomplish these objectives. The city will address environmental concerns and public infrastructure to serve the area and the DMDC will acquire the needed property and prepare it for redevelopment.

ACCOMPLISHMENTS AND ACTIVITIES

Activities planned as part of this Pilot include:

- Conduct Phase II environmental assessments on properties totaling approximately 175 acres in the Riverpoint West area;
- Prepare cleanup cost estimates and a cleanup implementation plan;
- Coordinate with the DMDC to leverage a redevelopment feasibility study, draft a property acquisition plan, develop a land use redevelopment plan, and create a flow of ownership plan; and
- Encourage active community involvement in the decision-making process regarding assessment and cleanup of the area.

Brownfields Showcase Community

In October 2000, the Brownfields National Partnership selected Des Moines, Iowa as a Brownfields Showcase Community to demonstrate the benefits of collaborative activity on brownfields.

Community Profile

The City of Des Moines has put together an impressive coalition of public and private entities focusing its brownfields redevelopment efforts on creating residential, commercial, industrial and recreational developments in the Agribusiness Park and Riverpoint West projects. The city is developing an area-wide redevelopment strategy to assemble private property and has made significant progress in identifying the extent of contamination in these areas.

Background

The city identified about 250 brownfields sites throughout Des Moines, located primarily in the following targeted redevelopment areas: the 1,200-acre Agribusiness Park, the 300-acre Riverpoint West area, and the city's federally designated Enterprise Community. All three of the targeted areas have higher concentrations of minorities and families living below the poverty level than the rest of the city. The highest rates are in the Enterprise Community: 29.7 percent minority population, compared with the city average of 10.8 percent, and 32.9 percent poverty rate, compared with the city's rate of 9.5 percent. Redevelopment of the three targeted revitalization areas will create approximately 8,000 new jobs and add approximately \$400 million to the city's tax base.

Current Activities and Achievements

In the Agribusiness Park, which contains salvage yards, an agricultural chemical manufacturer, and other industrial facilities, the city has conducted Phase I site assessments on 94 properties and found that 61 do not require further cleanup. The city completed Phase II assessments on 12 of the remaining 33 properties, and no soil or groundwater contamination was found that required cleanup. Phase I site assessments were also conducted in the Riverpoint West area, former home to foundries, rail yards, and an industrial chemical manufacturing facility. Fifty-eight properties were assessed and 19 were found to not require cleanup. The other 39 properties, comprising 175 acres, require further investigation, and the city is in the process of preparing for Phase II assessments.

The City of Des Moines has a number of brownfields redevelopment projects underway in partnerships with EPA, the U.S. Army Corps of Engineers, the U.S. Department of Transportation, the U.S. Department of Housing and Urban Development, and many others. One leading example of these partnerships is the Federal Home Financing Board's \$2 million equity commitment for the Riverpoint West project, a breakthrough step for the Federal Home Loan Bank System. In addition, the community has invested nearly \$200 million in local funds for brownfields redevelopment in the downtown, northeast Des Moines, the Agribusiness Park, and the federal Enterprise Community.

EPA has awarded Des Moines a Brownfields Assessment Demonstration Pilot for the Agribusiness Park, a Supplemental Assessment Demonstration Pilot for the Riverpoint West project, and a Brownfields Cleanup Revolving Loan Fund Pilot for brownfields redevelopment in the city.

Additionally, strong community involvement from citizen, environmental, and civic and governmental groups in the Des Moines brownfields redevelopment project has helped revitalize the targeted areas. These include, but are not limited to Des Moines Neighbors (a coalition of 49 neighborhood associations), the Enterprise Community Steering Committee, the Good Neighbor Task Force, the City of Des Moines, Polk County, and the State of Iowa. Several business, lending, educational, and local labor organizations are also involved. The city also solicits community input in drafting urban renewal plans and identifying redevelopment opportunities, and uses public forums to help keep the public well informed of the nature and extent of contamination at the sites targeted for redevelopment.

Showcase Community Objectives and Planned Activities

As a Showcase Community, Des Moines' brownfields revitalization plans focus on residential, commercial, industrial, and recreational redevelopment in three targeted areas: the Agribusiness Park, Riverpoint West, and the federal Enterprise Community area. Through partnerships with many federal, state, and local government and private sector entities, Des Moines is creating a model for other urban centers in America's heartland. The Agribusiness Park will attract new value-added agricultural enterprises and create about 7,000 jobs. The reuse plan will also encourage the use of more environmentally conscious development approaches. The Riverpoint West will be developed into a mixed-use urban village with 1,000 townhouses, 850,000 square feet of office space, and environmental and recreational improvements are expected to create approximately 8,000 jobs. The urban design of the development will encourage people to walk to work. In the Enterprise Community, about 20 brownfields sites will be redeveloped for residential and commercial use.

Brownfields Cleanup Revolving Loan Fund Pilot

Case Study: Des Moines, Iowa

Date of Announcement: May 25, 1999

Amount: \$500,000

BACKGROUND

In 1996, a beef processing facility abruptly closed in Des Moines, and approximately 1,300 workers lost their jobs. To spur business growth, the City of Des Moines, Iowa has designated a portion of its southeast region area as the Agribusiness Enterprise Zone. The State of Iowa certified the area as an enterprise zone. The area contains deteriorated structures, vacant lots, and environmental contamination, and has high poverty levels, and unemployment rates. Part of the zone — the 1,200-acre Des Moines Agribusiness Park — is designated as a Brownfields Assessment Pilot. A Phase I environmental assessment has been completed, highlighting the need for further investigation of 230 acres, and the City is obtaining Phase II environmental results. In January 1998, the City adopted an urban renewal plan and created a tax increment finance (TIF) district for the Agribusiness Enterprise Zone.

BCRLF OBJECTIVES

The City's BCRLF will provide loans for the environmental cleanup of sites within the Agribusiness Enterprise Zone. Information from public meetings and interviews with agribusinesses, the State of Iowa, and Iowa State University will assist in creating a comprehensive redevelopment plan for agribusiness reuse. The City hopes to address barriers to brownfield redevelopment and develop a process in which residents, businesses, and the City work together to facilitate community growth, create

development sites that discourage sprawl; attract additional seed capital for redevelopment; assume a leadership role in Iowa's new VCP; and assist other communities implementation of similar programs.

FUND STRUCTURE AND OPERATIONS

The City's Office of Economic Development, which currently manages two other City revolving loan funds, will serve as the lead agency and fund manager. The City's Engineering Department will serve as the BCRLF site manager. The maximum loan amount will be \$100,000 with the term and interest rate negotiated on a case-by-case basis.

LEVERAGING

Des Moines will provide in-kind environmental, banking, and legal resources for the BCRLF program. In addition, the City has leveraged up to a \$1 million of State resources from the Iowa Physical Infrastructure Assistance Fund. The Iowa PIAF is a loan and/or loan guarantee program that can be used for environmental remediation projects involving substantial capital investment, the creation of high wage, quality jobs, and positive statewide impact. The City also will explore the potential of leveraging funds with the local banking community. In addition, the Des Moines Action Loan Fund and the Iowa Community Economic Betterment Account will provide long-term fixed asset financing. The Enterprise Zone Program offers job training, corporate tax incentives, and a refund on sales, service, and use taxes on materials used in construction contracts. Community Reinvestment Act objectives will be stressed. Finally, the City has established a tax increment financing district for the Agribusiness Enterprise Zone.

Case Study: Sioux City, Iowa

Date of Announcement: April 2001

Amount: \$1.0 million

BACKGROUND

Sioux City was once the commercial center of the Upper Missouri River region. Much of the economic activity in Sioux City was related to the processing and distribution of livestock and was centered in an area known as "the Yards," which is a low-lying, 215-acre tract of land near the confluence of the Floyd and Missouri Rivers. In the 1920s, the Sioux City Yards was recognized as one of the world's largest stockyards and was the center of the Midwest livestock trade. Since the 1950s, however, the area has been in decline, primarily due to changes in the livestock industry. Several large meatpacking plants left Sioux City in the 1970s and 1980s. Since then, the per capita

income has fallen, poverty rates have increased, and housing units have been left abandoned.

Today, a few viable packing plants remain active in the area. However, many businesses have closed, leaving derelict buildings, abandoned livestock pens, and underutilized rail lines. High levels of unemployment and poverty prevail in the surrounding areas, which have been designated as State Enterprise Zones. Recently, Sioux City spent approximately \$1.5 million to remove many of the former meat packing buildings that were vacant and dilapidated.

BCRLF OBJECTIVES

The Sioux City BCRLF program will provide critical gap financing for brownfields cleanup of the Yards and other brownfields sites within Sioux City. The cleanup of Sioux City's brownfields is the first step towards redevelopment. Eventually, the City hopes that brownfields redevelopment will foster the creation and retention of quality businesses, create living wage jobs, expand the tax base, and prevent urban sprawl.

The focus of the Sioux City BCRLF program is on the cleanup of the stockyards area, now known as the Yards Biotech, Business, & Industrial Park. To date, Sioux City has identified seven potential borrowers. The Yards' proximity to rivers, railroads, and highways makes the area an ideal location for redevelopment.

FUND STRUCTURE AND OPERATIONS

The City of Sioux City is the cooperative agreement recipient and will serve as the lead agency, site manager, and fund manager.

LEVERAGING OTHER RESOURCES

The City has budgeted more than \$15 million for the revitalization and redevelopment of the Yards. Along with the BCRLF funds, the City will attract additional federal funding from the Department of Housing and Urban Development in the form of Community Development Block Grants. Available state and local funding sources include the Sales Tax Economic Development Fund, Tax Increment Financing, Property Tax Exemptions, and the tax advantages implicit in the Enterprise Zone designation. Funding from private organizations, such as the Siouxland Economic Development Corporation, the Siouxland Initiative, and MidAmerican Energy Corp., will also be made available.

Case Study: Waterloo, Iowa

Date of Announcement: April 2001

Amount: \$1.0 million

BACKGROUND

The City of Waterloo was once known as the "Factory City of Iowa." Covering approximately 62 square miles of Black Hawk County, the City's economy was tied to the region's agriculture industry. Many of Waterloo's businesses failed in the 1980s, as a result of the agricultural crisis, rising labor costs, and the city's outdated facilities. Many residents left the city (nearly 1,000 have left each year since 1980), and many properties were left vacant or abandoned.

Waterloo's economy has become increasingly diversified, and a number of large companies have made substantial investments in the city. However, many of the residential, commercial, and industrial buildings in Waterloo still bear the scars of the economic decline. The Rath Neighborhood Area, a 350-acre tract located immediately south of the Central Business District, is particularly derelict and has been targeted for environmental cleanup and redevelopment. This area is home to many of Waterloo's low-income families and is a state-designated Enterprise Zone. Fifteen percent of residents in this area are unemployed, and almost a third of the households receives some form of public assistance. The average per-capita income in this area is only \$5,800.

BCRLF OBJECTIVES

Waterloo's BCRLF program will provide a needed source of funds for environmental cleanup. By cleaning up and redeveloping brownfields, Waterloo hopes to foster economic revitalization and sustainability, remove environmental contamination, preserve neighborhood identity, and encourage community and stakeholder participation. By integrating the BCRLF program with other assistance programs, the City will possess the necessary tools to encourage cleanup and redevelopment of environmentally impaired properties.

The City anticipates that most of the potential borrowers will be located in the Rath Neighborhood Area. The BCRLF program will help to bring this area back into safe and productive use.

FUND STRUCTURE AND OPERATIONS

The City of Waterloo will be the lead agency. The U.S. Army Corps of Engineers will be the site manager. Waterloo's Community Development Department will act as the fund manager.

LEVERAGING OTHER RESOURCES

Waterloo is committed to finding public and private resources that can complement the BCRLF. To date, the City has secured \$691,750 for brownfields-related activities in the Rath Neighborhood Area. In addition, Iowa Enterprise Zone and Tax Increment Financing incentives are available to Rath Neighborhood businesses. At the federal level, the U.S. Environmental Protection Agency, Department of Housing and

Urban Development, and the U.S. Army Corps of Engineers have and will continue to commit funding towards brownfields work in Waterloo. The City will contribute its services to the BCRLF as necessary.

Prospective Purchaser Case Study – Kanawha

The brownfields in question was on the north end of the city of Kanawha, Hancock County, Iowa and was known as the "Triggs Trailer" site. The Triggs Trailer site was used for the fabrication and construction of fiberglass livestock and horse trailers. A Removal Assessment was conducted in 1994 and it was determined that the site was contaminated with Acetone, Toluene, Xylenes and other compounds. Following the bankruptcy of Triggs Trailer and the abandonment of the property by the trustee, the property remained vacant. The County and City were concerned about the fact that one of the largest structures in the city was vacant and that it was not contributing to the tax base for the city. A local businessman had an interest in purchasing the property and using it as a truck-tractor maintenance shop for his eight trucks. An obvious choice was the Triggs Trailer site. The existing structures were adaptable to his business with minor changes. The Triggs Trailer site is estimated to be 365,468 square feet in size. There are two commercial buildings on the site with a footprint of 7,000 and 5,000 square feet. The larger of the two buildings was a WWII-style Quonset hut in an advanced stage of decay. The second building was built in 1973 and is a metal building.

The potential buyer was concerned about the fact that the EPA had already spent more than \$100,000 assessing the site. The assessment gave rise to a potential lien by the EPA against the property. The assessment had also proven that the site did have environmental concerns.

In order to assess the potential risks, the potential buyer's attorney consulted with the County, City and the EPA to work out a Prospective Purchaser Agreement. As a part of getting the Prospective Purchaser Agreement approved, the potential buyer had to assure the EPA that he would not use the property for a purpose that might make the existing environmental problems worse. Thus, although he needed the property to maintain his truck-tractors, including changing the oil and fluid levels, and changing out basic parts such as filters, glowplugs, and batteries, he agreed that the facility would not be used or outfitted for the painting of vehicles. Only spot painting of frames and fenders would be allowed as a potential future use of the site. No engine rebuilding would be allowed.

A Prospective Purchaser Agreement was entered into which allowed the buyer to purchase the property at tax sale. A portion of what would have ordinarily gone to the County for taxes was forwarded to the EPA as consideration for the Agreement. The Agreement gave the new owner a full and complete release from liability for any past contamination.

After several months, the Agreement was signed and the transaction went through. Attached as Appendix IV a copy of the standard agreement used by the EPA. Slight changes were made prior to its execution, so this is provided for illustration and discussion purposes only. The document must be tailored to fit the needs of each situation.

APPENDIX IV

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION ____

IN THE MATTER OF: [name]) [Docket Number]
)
)
UNDER THE AUTHORITY OF THE) AGREEMENT AND
COMPREHENSIVE ENVIRONMENTAL) COVENANT NOT TO SUE
RESPONSE, COMPENSATION, AND) [Insert Settling Respondent's
LIABILITY ACT OF 1980, 42 U.S.C.) Name]
§ 9601, et seq., as amended.)
[state law, if appropriate])

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States Environmental Protection Agency ("EPA") [state of ____] and _____ [insert name of Settling Respondent] (collectively the "Parties").

EPA enters into this Agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq. [If the state is a party, insert "The State of _____, enters into this Agreement pursuant to [cite relevant state authority.]" and make appropriate reference to state with respect to affected provisions, including payment or work to be performed].

[Provide introductory information, consistent with Definitions and Statement of Facts, about the party purchasing the contaminated property including, name ("Settling Respondent"), address, corporate status if applicable and include proposed use of the property by prospective purchaser. Provide name, location and description of Site.]

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations

and limitations contained in Sections VII, VIII, IX, and X [If this Agreement contains a separate section for Settling Respondent's reservations, add section number], the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA [and the state] of a substantial benefit, is in the public interest.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
2. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants, present or existing on or under the Site as of the effective date of this Agreement.
3. "Parties" shall mean EPA, [State of _____], and the Settling Respondent.
4. "Property" shall mean that portion of the Site which is described in Exhibit I of this Agreement.
5. "Settling Respondent" shall mean _____.

6. "Site" shall mean the [Superfund] Site, encompassing approximately _____ acres, located at [address or description of location] in [name of city, county, and State], and depicted generally on the map attached as Exhibit 2. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located [provide a more specific definition of the Site where possible; may also wish to include within Site description structures, USTs, etc].

7. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

III. STATEMENT OF FACTS

8. [Include only those facts relating to the Site that are relevant to the covenant being provided the prospective purchaser. Avoid adding information that relates only to actions or parties that are outside of this Agreement.]

9. The Settling Respondent represents, and for the purposes of this Agreement EPA [and the state] relies on those representations, that Settling Respondent's involvement with the Property and the Site has been limited to the following: [Provide facts of any involvement by Settling Respondent with the Site, for example performing an environmental audit, or if Settling Respondent has had no involvement with the Site so state].

IV. PAYMENT

10. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein [and Removal of Lien in Section XXI herein if that is part of the consideration for the agreement], Settling Respondent agrees to pay to EPA the sum of \$_____, within ___ days of the effective date of this Agreement. [A separate section should be added if the consideration is work to be performed.] The Settling Respondent shall

make all payments required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing the EPA Region, EPA Docket number, and Site/Spill ID#_____ [insert 4-digit no.; first 2 numbers represent Region, second 2 numbers are Region's Site/Spill ID no.], [DOJ case number_____, if applicable] and name and address of Settling Respondent. [insert Regional Superfund Lockbox address where payment should be sent]. Notice of payment shall be sent to those persons listed in Section XV (Notices and Submissions) and to EPA Region ___ Financial Management Officer [insert address].

11. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

[_____] [WORK TO BE PERFORMED]

[Include this section and other appropriate provisions relating to performance of the work, such as financial assurance, agency approvals, reporting, etc., where work to be performed is the consideration for the Agreement.

____. Statement of Work attached as Exhibit 3.]

V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

12. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA [and the state] its authorized officers, employees, representatives, and all other persons performing response actions under EPA [or state] oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by the Settling Respondent, for the

purposes of performing and overseeing response actions at the Site under federal [and state] law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, ("RCRA") et. seq., and any other applicable statute or regulation, including any amendments thereto.

13. Within 30 days after the effective date of this Agreement, the Settling Respondent shall record a certified copy of this Agreement with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____. Thereafter, each deed, title, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to this Agreement. A copy of these documents should be sent to the persons listed in Section XV (Notices and Submissions).

14. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees, of the Property shall provide the same access and cooperation. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement [and where appropriate, Section __ (Work to be Performed)].

VI. DUE CARE/COOPERATION

15. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA of such release or threatened release.

VII. CERTIFICATION

16. By entering into this agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA [and the state] all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. The

Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States [and the state] determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States [and the state] reserves all rights it [they] may have.

VIII. UNITED STATES' COVENANT NOT TO SUE¹

17. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment), of this Agreement [if consideration for Agreement is work to be performed, insert, as appropriate, "and upon completion of the work specified in Section __ (Work to Be Performed) to the satisfaction of EPA"], the United States [and the state] covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) [and state law cite] with respect to the Existing Contamination.

IX. RESERVATION OF RIGHTS

18. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States [and the State] reserves and the Agreement is without prejudice

¹ Since the covenant not to sue is from the United States, Regions negotiating these Agreements should advise the Department of Justice of any other federal agency involved with the Site, or which may have a claim under CERCLA with respect to the Site and use best efforts to advise such federal agency of the proposed settlement.

to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation), Section XIV (Payment of Costs, [and, if appropriate, Section __ (Work to be Performed)]);

(b) any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;

(c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;

(d) any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;

(e) criminal liability;

(f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and

(g) liability for violations of local, State or federal law or regulations.

19. With respect to any claim or cause of action asserted by the United States [or the state], the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

20. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States [or the state] may have against any person, firm, corporation or other entity not a party to this Agreement.

21. Nothing in this Agreement is intended to limit the right of EPA [or the state] to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA [or the state] in exercising its authority under federal [or state] law. Settling Respondent acknowledges that it is purchasing property where response actions may be required.

X. SETTLING RESPONDENT'S COVENANT NOT TO SUE

22. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States [or the state], its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

23. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XI. PARTIES BOUND/TRANSFER OF COVENANT

24. This Agreement shall apply to and be binding upon the United States, [and the state], and shall apply to and be binding on the Settling Respondent, its officers, directors, employees, and agents. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

25. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA [and the state] in its sole discretion.

26. The Settling Respondent agrees to pay the reasonable costs incurred by EPA [and the state] to review any subsequent requests for consent to assign or transfer the Property.

27. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement

except as EPA [the state] and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA [and the state].

XII. DISCLAIMER

28. This Agreement in no way constitutes a finding by EPA [or the state] as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA [or the state] that the Property or the Site is fit for any particular purpose.

XIII. DOCUMENT RETENTION

29. The Settling Respondent agrees to retain and make available to EPA [and the state] all business and operating records, contracts, site studies and investigations, and documents relating to operations at the Property, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, the Settling Respondent shall notify EPA [and the state] of the location of such documents and shall provide EPA [and the state] with an opportunity to copy any documents at the expense of EPA [or the state]. [Where work is to be performed, consider providing for document retention for ten years or until completion of work to the satisfaction of EPA, whichever is longer.]

XIV. PAYMENT OF COSTS

30. If the Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment), [or Section -- (Work to be Performed)] of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States [and the state] to enforce this Agreement or otherwise obtain compliance.

XV. NOTICES AND SUBMISSIONS

31. [Insert names, titles, and addresses of those to whom notices and submissions are due, specifying which submissions are required.]

XVI. EFFECTIVE DATE

32. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA [and the state] has fully executed the Agreement after review of and response to any public comments received.

XVII. ATTORNEY GENERAL APPROVAL

33. The Attorney General of the United States or her designee has issued prior written approval of the settlement embodied in this Agreement.

XVIII. TERMINATION

34. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XIX. CONTRIBUTION PROTECTION

35. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are [all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination].

36. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States [and the state] in writing no later than 60 days prior to the initiation of such suit or claim.

37. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States [and the state] within 10 days of service of the complaint on them.

XX. EXHIBITS

38. Exhibit 1 shall mean the description of the Property which is the subject of this Agreement.

39. Exhibit 2 shall mean the map depicting the Site.

[--. Exhibit 3 shall mean the Statement of Work.]

XXI. REMOVAL OF LIEN

40. [Use this provision only when appropriate.] Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment) [or upon satisfactory completion of work to be performed specified in Section __ (Work to be Performed)], EPA agrees to remove any lien it may have on the Property under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), as a result of response action conducted by EPA at the Property.

XXII. PUBLIC COMMENT

41. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.