

US EPA ARCHIVE DOCUMENT

**PROJECT XL FINAL PROJECT AGREEMENT  
FOR THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION  
GOLD TRACK PROGRAM FOR ENVIRONMENTAL PERFORMANCE**

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## **I. Introduction To The Agreement**

### **A. Project Description and Purpose**

The New Jersey Department of Environmental Protection (the Department or NJDEP) has taken the lead in detailed stakeholder discussions to frame the Silver and Gold Track Program for Environmental Performance since the summer of 1999. This program was initiated in November 1996 as one element of the New Jersey Chemical Industry Project (NJCIP), a joint public and private sector project that focused on developing and implementing creative approaches to achieving more efficient and effective environmental performance. New Jersey's Silver and Gold Program is designed as a tiered system, requiring an increased level of commitment in return for concomitant regulatory flexibility. The first or baseline tier, Silver Track, requires participating entities to meet certain core criteria: certifying current compliance with all applicable environmental rules and regulations, a historically acceptable compliance record, and an agreement to establish both a community outreach program, and implement an Operational and Environmental Compliance plan within one year of acceptance into the program. The baseline incentives offered under Silver Track include: recognition as a top-performing company, via a NJDEP seal/flag, inclusion in a Silver Track category on the Department's web page, a single point of contact in the Department to expedite and coordinate permitting needs, consolidated reporting (when available) of routine emission and discharge statements, among others, and research, development and demonstration project (RD&D) flexibility. Each participating entity's commitments and incentives will be memorialized in a five-year covenant with accountability mileposts that will be jointly developed with the facility and the Department. The commitments and incentives under Silver Track were intended to be consistent with and authorized by existing regulations, and so were not implemented through rule changes. The Silver Track portion of the program was implemented in September of 1999.

Silver Track II, the second tier of the program, maintains the original core requirements of the baseline tier, as well as some additional commitments. Participants must commit to attaining agreed-upon emission reductions of CO<sub>2</sub> or Greenhouse Gas equivalents. In turn, participants will not have to seek certain pre-construction air permits for sources that emit less than prescribed de minimis emission levels. Silver Track II was initiated in May 2000. The Department is developing State rules to implement the incentives offered in Silver Track II, and anticipates publishing a formal rule proposal by the end of 2000. Neither Silver Track nor Silver Track II are the subject of this Final Project Agreement (Agreement).

The third and highest tier, Gold Track, which is covered by this Agreement, represents the highest degree of commitment by participating entities and additional incentives offered by the Department. One of the goals of Gold Track is to achieve reductions in releases of air pollutants and hazardous waste by providing incentives for participants to go beyond baseline compliance. For example, in the area of air pollution, one way of implementing this goal would be to establish emission caps for criteria and hazardous air pollutants, and to require participants to commit to further emission reductions over time. The requirements and incentives offered under Gold Track follow in detail.

Implementing Gold Track requires both federal and state rule changes, which are being pursued through the U.S. Environmental Protection Agency's (USEPA's) Project XL Program, and through the Department's own Administrative Authority.

The USEPA, with the cooperation of State and local authorities, has initiated Project XL to work with interested companies, communities and other potential Project Sponsors to develop innovative approaches to environmental protection. Gold Track has been designed to satisfy Project XL's intent of advancing the nation's environmental goals more effectively and efficiently than is possible under current regulations, policies or procedures.

The Department is seeking to act as the sponsor of this XL Project, and to include regulatory flexibility as an incentive under Gold Track. NJDEP is seeking to obtain "State-wide XL status", whereby the Department would be responsible for oversight of the participating facilities and would be empowered to administer, to the extent possible, all of the innovations contained in Gold Track. The Department seeks this status in view of its proven track record of being in the forefront of environmental initiatives that strive to attain and maintain superior environmental performance.

In summary, Silver Track, Silver Track II and Gold Track offer different degrees of regulatory flexibility and oversight for qualifying entities. Acceptance into any of the tiers of the program signifies a commitment by the Department and the participants to demonstrable, measurable, improved environmental performance, coupled with an appropriate level of monitoring, reporting and oversight by the Department.

## **B. Description of Geographic Area**

New Jersey is the fifth smallest state in the nation with 7,419 square miles of land area. On its borders are Delaware to the south, Pennsylvania to the west, New York to the north and the Atlantic Ocean to the east. The state is home to the Pinelands National Reserve, a unique ecosystem of over 1 million acres containing the internationally recognized "pygmy pine forests." The state currently has over 900,000 acres of publicly owned open space, more than 2,000 species of native plants and at least 800 species of native wildlife including such rare animals as the Pine Barrens tree frog, which is seldom found outside of New Jersey. New Jersey also boasts approximately 6,670 river and border river miles, 1,871 square miles of freshwater and coastal wetlands, bays, estuaries, freshwater lakes and ponds, as well as 127 miles of Atlantic Ocean coastline. New Jersey's farms produce over 80 varieties of fruits, vegetables and other commodities annually.

New Jersey faces numerous environmental management challenges related to its industrial history, the nature of its economy, the paradox of its high population density and sprawling land development patterns, and its many legal/political subdivisions. With a population of 8 million in 1998, the state had an estimated population density of 1,077 people per square mile, making it the most densely populated state in the nation. Based on an estimated average growth rate of 0.5% per year, it is projected that, by the year 2010, New Jersey's population will reach 8,583,550.

New Jersey has a rich industrial history that lives on today. New Jersey ranks 10<sup>th</sup> nationally in the manufacture of durable and non-durable goods and is 14<sup>th</sup> in exports by state of origin. There are approximately 700 manufacturing industries in such diverse fields as pharmaceuticals, agricultural fertilizers, solvents, cleaners and paints in New Jersey. In addition, five major petroleum refineries produce gasoline, motor oil, asphalt and lubricants in New Jersey. Construction, transportation, utilities, wholesale and retail trade, finance, insurance, real estate, agriculture and the military services are all major employers within New Jersey and all create potential stresses to the state's air, water and natural resources.

### **C. Purpose of the Agreement**

This Agreement is a joint statement of the plans, intentions and commitments of the USEPA and the NJDEP to carry out the Gold Track tier of NJDEP's Silver and Gold Track Program. The Gold Track tier will be implemented under USEPA's Project XL program to develop innovative approaches to environmental protection.

This Agreement does not create legal rights or obligations and is not an enforceable contract or a regulatory action such as a permit or a rule. This applies to both the substantive and the procedural provisions of this Agreement. While USEPA and NJDEP fully intend to follow these provisions, they are not legally obligated to do so.

NJDEP envisions that Gold Track will be multi-media in scope. This Agreement will serve as an "umbrella document" to define basic criteria and processes for Gold Track. The media-specific Addenda submitted with this agreement will define the specific State and Federal media-specific flexibilities to be granted, and commensurate superior environmental performance required by participants in Gold Track and Project XL. The parties intend that the Federal and State flexibility and commitments described in this Agreement and the attached media-specific Addenda will be implemented and become enforceable through rulemaking, the permitting process, or any other appropriate legal implementing mechanism. Covenants will be a mechanism to memorialize specific commitments and flexibilities made by the NJDEP and Gold Track participants. Covenants, however, shall have no legal effect and shall not be enforceable in a court of competent jurisdiction, including the administrative courts.

While this Agreement is intended to clearly define the environmental objectives of the Gold Track and provide a mechanism for meaningful collaboration between NJDEP and USEPA Region II, USEPA and DEP agree that developing any innovative program is an evolutionary process. USEPA and DEP will strive for a high level of cooperation, communication and coordination to assure successful implementation of the Agreement and the Gold Track Program.

### **D. List of the Parties that Will Sign the Agreement**

This Agreement is entered into by the U.S. Environmental Protection Agency and the New Jersey Department of Environmental Protection and will be signed by the Regional Administrator for

Region 2 and Commissioner, respectively. It will guide the working relationship of both agencies in fulfilling the promise of Gold Track.

**E. List of Project Contacts**

**NJDEP**

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**II. Detailed Description Of The Project**

**A. Summary of the Project**

The Gold Track tier will offer the greatest operational/regulatory flexibilities and require the greatest environmental commitments from participants in the NJDEP's Silver and Gold Track Program. For Gold Track participation, regulated entities will be required to meet set core eligibility requirements above and beyond those required for Silver Track and Silver Track II. These eligibility requirements are explained in detail below. Gold Track will be conducted initially as a pilot program and will be limited to no more than nine participants.

The additional requirements for Gold Track participation include: establishment and implementation of an environmental management system and community outreach program prior to acceptance into Gold Track, and a willingness to commit to further specific environmental actions that are commensurate to the flexibilities granted for each media, as appropriate. These environmental actions are described in the attached media-specific Addenda. Participating facilities will negotiate covenants with NJDEP following their acceptance into Gold Track. These covenants, while of no legal effect and not enforceable, will reflect the commitments made by the Gold Track participants and the concomitant flexibilities offered by the Department. The Department recognizes that certain regulatory changes may be necessary to authorize it to enter into these covenants. The Department also recognizes that existing permits may have to be modified to carry out the terms of the covenants. Regulatory changes will be accomplished through the rulemaking process governed by N.J.S.A 52:14B-1 *et seq.*; permit modifications will be made in accordance with applicable laws and regulations. See Section III. G, below. Regulatory changes and permit modifications must be consistent with applicable federal and state law.

## B. Description of the Gold Track Entry Requirements

Gold Track participants will be required to meet the basic eligibility criteria established for the Silver Track tier, as well as the additional commitments established for Silver Track II. Gold Track's enhanced entry requirements are summarized in the following text. Further commitments to media-specific superior environmental performance as well as descriptions of commensurate incentives and flexibilities are included in the media-specific Addenda

### **The Gold Track entry requirements consist of the following:**

1. As part of the application process, applicants must certify that they are currently in compliance with all environmental obligations and confirm participation in programs that promote responsible environmental practices. The certification submitted to the Department with the application will affirm that all participants meet certain base criteria.
2. The applicant must demonstrate good environmental performance. To meet this requirement, an applicant must have a "historically good environmental record." This means that an applicant must have no criminal or significant civil, significant, or non-minor administrative violations and must maintain up-to-date facility or institutional environmental plans.

A "historically good environmental record" will be determined based on present and historical compliance. To determine whether an applicant has a "historically good environmental record," the Department will conduct a 5-year review of the enforcement history of the applicant, in conjunction with the certification submitted in the application package. The Department will review the list of permits and environmental plans submitted with the application in conjunction with Department records, including, but not limited to: Discharge Monitoring Reports (DMRs), Compliance Evaluation Reports, Air Emission Reports and Land Use Investigation Reports. The review will also include informal and formal enforcement actions taken against the applicant, ongoing investigations, and pending court actions. In addition, NJDEP will coordinate with EPA to review the compliance status with federal laws and regulations using the EPA's Project XL compliance screening guidance (Attachment A). For example, if a facility were the subject of an ongoing federal or State investigation or pending court action, it would be ineligible to participate in the Gold Track Program until these actions were resolved.

In determining whether an applicant has a "historically good environmental record," the applicant must have no significant violations or non-minor violations, as defined in EPA regulatory requirements, New Jersey Fast Track Law, N.J.S.A. 13:1D-129, and New Jersey statutes and regulations. Any significant or non-minor violation in any media within five years of implementation of Gold Track will result in an automatic exclusion from this tier. For entities with New Jersey Pollutant Discharge System (NJPDES) permits, an applicant, within three years of implementation of Gold Track, cannot have

been a Significant Noncomplier, as defined in the New Jersey Water Pollution Control Act, with its NJPDES or Stormwater Permit, if applicable, and the required Stormwater Pollution Prevention Plan (SPPP). If an applicant has been a Significant Noncomplier within this time period, it will be ineligible to participate in Gold Track. A permit issued by publicly owned treatment works (POTWs) is considered a NJPDES permit.

In addition, the Department will examine minor violations within the five-year period on a case-by-case basis to determine eligibility and to establish whether there is a pattern of recurring violations. Patterns of recurring minor violations may be grounds for exclusion from Gold Track. However, the existence of minor violations that have been corrected does not necessarily preclude eligibility in Gold Track. In determining eligibility, the Department will consider the size and scope of the facility, as well as extenuating circumstances and mitigation efforts taken by the applicant regarding certain minor violations.

The Department will consider the conduct of the applicant in responding to violations. In cases where the applicant has entered into an Administrative Consent Order (ACO) NJDEP, at a minimum, expects there to be compliance with all milestones and terms that are contained in the ACO. An entity that is accepted into Gold Track will continue to have a duty to comply with the terms of a valid ACO, if applicable.

The Department will review the application and certification and coordinate with the New Jersey Division of Criminal Justice to determine if an applicant in New Jersey has a criminal record. USEPA will coordinate a national criminal screen of applicants pursuant to Project XL.

3. The Department will review the application package in conjunction with the Department's records, permits and regulations. In addition, the Department will specifically consider the following where currently required by regulation, permit or other legally applicable mechanism:
  - **Pollution Prevention:** Covered entities must have a Pollution Prevention (P2) plan in place, with schedules for implementation of definitive non-product output (NPO) and/or use reduction goals. P2 plans that have an NPO/use reduction goal of zero for targeted processes must demonstrate to the Department that they have examined all feasible pollution prevention measures for those covered processes and cannot reduce their NPO beyond current levels.
  - **Stormwater Pollution Prevention Plan (SPPP):** Covered entities must have SPPP plans on-site and be implementing all aspects of the plan as well as any specified upgrades.

- **Community Right to Know (CRTK):** Covered employers must have an up-to-date survey on file with the Department, appropriate police and fire departments, and with the Local Emergency Planning Committee (LEPC).
  - **Toxic Catastrophe Prevention Act (TCPA):** Covered entities must have an approved risk management program.
  - **Discharge Prevention, Containment and Countermeasures (DPCC), Discharge Cleanup and Removal Plan (DCR):** Covered entities must have an approved DPCC/DCR plan on site and on file with the Department.
  - **Solid Waste:** Covered entities and transporters must have in place specified approvals and/or permits to operate for their particular waste types. In addition, covered entities must certify that materials collected are consistent with local recycling laws/ordinances and the applicable county Solid Waste Management Plan (SWMP).
  - **Hazardous Waste:** Hazardous waste must be properly managed in accordance with all applicable regulations. In addition, associated paperwork such as manifests, contingency plans and personnel training must be up to date.
  - **Underground Storage Tanks (USTs):** All USTs must be in compliance with the upgrade/replacement requirements or be properly closed. Where required by regulation, all USTs must be monitored for leaks. In addition, Federal financial responsibility must be met and all associated record keeping must be up to date.
  - **Site Remediation:** All entities subject to site remediation actions must comply with all applicable requirements of any ACOs or comparable oversight documents.
4. **Community Outreach:** Applicants must have an advanced community outreach program in place prior to acceptance into Gold Track. While the Department believes the community outreach program should contain, at a minimum, the following components, facility-specific tailoring equivalent to these components, can be negotiated through the covenant.
- A written policy that articulates a commitment to two-way, open communication with employees and the community;
  - A “Plain Language” summary of what the facility does (operations), the environmental impacts of those operations, and how the facility maintains compliance with all applicable environmental laws;

- Establishment of a Community Outreach Citizen Advisory Panel (COCAP), with a minimum of quarterly meetings to be conducted each year;
  - Clearly articulated objectives and goals for interacting with the community;
  - Preparation and distribution to the COCAP, of an annual report on environmental performance;
  - Conduct an annual public meeting where changes in facility operations and environmental compliance issues are discussed;
  - A process to continually evaluate the effectiveness and relevancy of the outreach program;
5. **Environmental Management Systems (EMS):** Applicants must have an EMS in place, with an independent third party and self audit review component, or have ISO14000 certification, prior to acceptance into Gold Track. There are many EMS systems that may be used as a model, including ISO14000, American Chemistry Council (formerly the Chemical Manufacturers Association) Responsible Care, National Association of Chemical Distributors (NACD) and National Standards Foundation.

For acceptance into Gold Track, an EMS shall contain, at a minimum, the following components. Facility-specific tailoring, equivalent to these components may be negotiated through the covenant.

- Environmental policy with commitment from top management;
- Commitment to continuous environmental improvement;
- Targets and objectives set based on environmental impact and legal requirements;
- Community outreach/communication;
- Monitoring and measurement;
- Self audit;
- Independent third party audit, performed by an independent professional auditor or a corporate official, not from the Gold Track participating facility. See Section III. H, 4, below.

### III. How the Project Will Meet the Project XL Acceptance Criteria

**A. Anticipated Superior Environmental Performance**

Reinventing environmental protection is more than fine-tuning the current regulatory system. It involves looking to the future and exploring and testing different approaches to environmental regulation that can help maximize resources to achieve enhanced environmental performance. To a large degree, these approaches will stem from technology advancements, the need for operational flexibility and from a desire by many regulated facilities to move "beyond compliance" and achieve truly superior environmental performance. Gold Track represents New Jersey's attempt to frame a new regulatory approach that strives to acknowledge and reward those facilities that achieve and maintain a high level of environmental performance. This Agreement outlines the baseline general commitments and incentives that will be used to evaluate the achievement of superior environmental performance. Media-specific commitments and incentives are contained in the media-specific Addenda.

**The General Commitments Participants in Gold Track Must Agree to Include:**

1. Incorporation of enhanced pollution prevention and/or source reduction in day-to-day operations;
2. Establishment of a comprehensive facility monitoring and consolidated targeted environmental tracking and reporting, which is discussed in detail in Section III.G. below, and in the media-specific Addenda;
3. Procurement of Advanced Technology/Alternative Fuel Vehicles

Participants in Gold Track that own or operate a fleet of 10 or more light duty motor vehicles shall commit to purchasing advanced technology and/or alternative fuel vehicles whenever vehicle replacements are warranted. Advanced technology vehicles (ATVs) are motor vehicles that meet or exceed California Air Resources Board (CARB) ultra-low emission vehicles (ULEV) standards for the applicable model year; they operate primarily on alternative fuels, or are hybrid-electric or fuel cell vehicles powered by conventional or alternative fuels. Alternative fuel vehicles (AFVs) are motor vehicles that operate primarily on non-petroleum fuels such as natural gas, propane, electricity, hydrogen, and bio-diesel. These advanced technology/alternative fuel vehicles shall comprise the percentages of the entire number of light duty motor vehicles acquired in any year according to the schedule listed below.

<b>Advanced Technology/Alternative Fuel Vehicles Implementation Schedule</b>	
<b>Number of Years in Gold Track</b>	<b>Minimum Percent of Vehicles Replaced</b>

	--
3	10-30
6	30-50
9	50-70
12	70-90

As alternatives to purchasing AT/AF vehicles, participants may opt to:

- Implement an employee trip reduction program;
- Subsidize employee purchasing or leasing of an equal number of AT/AF vehicles in accordance with the percentages described above;
- Subsidize a non-profit or charitable organization purchase of an equal number of AT/AF vehicles.

4. Procurement of Cleaner Energy

Beginning in calendar year 2001, regulated entities participating in Gold Track shall exercise their right to choose their electricity supplier as provided for through the Electric Discount and Energy Competition Act (EDECA), taking into account the impact of their decisions on New Jersey's air quality. At a minimum, Gold Track participants will:

a. Either procure power such that the emissions associated with the electricity are at or below the New Jersey benchmark for CO<sub>2</sub>, NO<sub>x</sub>, and SO<sub>2</sub> (New Jersey Benchmark values are established in Appendix C of the New Jersey Board of Public Utilities' order on "Environmental Information Disclosure", issued July 1999; or (if the emissions associated with the electricity are above the New Jersey benchmark) use emission credits to compensate for the amount the emissions are above the benchmark; and

b. Ensure a percentage of the total amount of electricity consumed at their facility(s) each year is from renewable energy resources. This percentage shall equal or exceed the percentages required of electricity suppliers by EDECA (or by renewable energy portfolio standards established by the New Jersey Board of Public Utilities).

Or

c. Commit at the time of their next procurement of energy, either individually or within an aggregate contract to purchase power that is at or below the New Jersey emissions benchmark for CO<sub>2</sub>, SO<sub>2</sub> and NO<sub>x</sub> and above the renewable portfolio standard.

5. GHG Emission Reductions:

- Develop a publicly available management plan to reduce actual GHG

emissions. GHG emissions would need to be reduced by a minimum of 3.5 percent below their 1990 baseline levels, by 2005. Based on trends of GHG emissions, which have continued to escalate, on average, this equates to a 14 percent reduction from year 2000 levels;

- For participating entities that do not have adequate data going back to 1990, the Department will structure modified goals, through the covenant, that are consistent with the above 3.5 percent benchmark;
- Reduce or maintain current emission levels of GHGs per unit of output;
- Annual reporting of GHG emissions, both actual and per unit of output;

Any increases in GHG emissions due to a Federal or State mandate, such as installing an air pollution control device to comply with a Maximum Achievable Control Technology (MACT) standard shall be incorporated into the facility's GHG baseline.

If a facility has already achieved the required GHG emission reductions listed above, that facility will be given credit for those reductions. However, the Department will work with the applicant in the covenant process to agree upon implementation of additional GHG sustainability action plan strategies for renewable energy. These additional strategies are contained in the New Jersey Sustainability Green House Gas Action Plan.

#### 6. Ozone Action Partnership

Gold Track Participants must be willing to sign on as Ozone Action Partners, which includes the following:

- Notifying employees, clients, customers regarding Ozone Alerts and Ozone Action Days
- Take steps to reduce ozone creation such as:
  - Distribute Ozone Action Partnership information to employees, customers and clients;
- Post Ozone Action Day announcement;
- Encourage employees to reduce ground-level ozone by ride sharing or taking public transportation;
- Make Ozone Action Days casual dress days to encourage employee participation;
- Sponsor brown bag lunch programs on Ozone Action Days to maximize employees staying on-site during lunch periods;
- Include Ozone Action articles in employee newsletters or with paychecks;
- Limit daytime driving;
- Encourage car pooling whenever possible;
- Refuel carefully; don't top off the tank;
- Refuel after 6:00 p.m.;
- Consider telecommuting or flex time for employees;

Participants must commit to becoming Ozone Action Partners; however, flexibility in implementing specific commitments will be provided, with agreements between the participant and the Department set out in the covenant.

#### 7. Watershed Partners

Within one year of acceptance into Gold Track, participants must agree to become a watershed partner. Participants shall attend and become active members in local watershed public advisory committees (PACs) and shall share their technical expertise in local watershed technical advisory committees (TACs)

Participants shall select and implement at least one additional initiative from the following categories/activities:

- **Good Neighborhood Category**  
Participants assist/influence local municipalities in becoming actively involved in watershed management.
- **Education Category**  
Participants “host” watershed awareness days for their employees, local schools or community groups.
- **Best Management Category**  
Participants develop and implement plans to address their campus’ contribution to non-point source pollution, increasing aquifer recharge, etc.
- **Open Discussion Category**  
Participants develop and present their own watershed management process improvements to their local or statewide watershed partners.

Flexibility in implementing specific commitments will be provided, with agreements between the participant and the Department set out in the covenant document.

#### 8. Sustainability

Gold Track participants must agree to sign a statement in the covenant that says that they support the New Jersey Sustainable State Goals and Indicators. In conjunction with this statement, participants shall monitor and track at least five of the 41 sustainable state indicators, as contained in the New Jersey Future Living with the Future in Mind 1999 Sustainable State Project report, which can best be addressed by the unique operations of each participant.

A discussion of efforts to advance these sustainability goals should be included as part of the annual covenant report.

## B. Anticipated Benefits to Gold Track Participants

The base Gold Track incentives that will be used to encourage superior environmental performance are listed below: Additional media-specific benefits will be detailed in the media-specific addenda.

1. **Recognition:** All entities that obtain Gold Track designation will be presented with a special Gold Track Departmental Seal and/or flag, which recognizes the regulated entity's commitment to advanced environmental protection.
2. **Single Point of Contact:** Gold Track designated entities would have future single media and multi-media permit applications and renewals reviewed with a single point of contact within the Department. The Department will also commit to the assignment of a single "case manager" to multiple site remediation projects ongoing for the same entity.
3. **Expedited Permit Processing:** A permitting schedule that reflects the critical path of sequential permitting activities will be offered to Gold Track participants. Mutually agreed upon application submission and review schedules will be developed jointly, through detailed pre-application discussions, chaired and coordinated by a single contact from the Department. This coordinated permitting process will benefit participants by reducing uncertainty and enhancing their ability to get new products to market more quickly.
4. **Priority Consolidated Reporting:** A major component of the Gold Track Program is the streamlining of the permitting process by migrating to electronic submittals of permit and permit modification applications, as well as monitoring and reporting data. Until appropriate electronic reporting conditions and parameters are worked out on the Federal level with USEPA, taking into consideration applicable state and federal requirements, electronic reporting will be limited to "state-only" monitoring data, reporting data, and permit/permit modification application information. If, in the future, NJDEP chooses to apply to EPA for expanded federal-state electronic reporting, it is anticipated that such provisions may need to be incorporated by state/federal rulemakings, SIP revision and/or permit modifications. The specific regulatory or permit changes necessary to implement federal-state electronic reporting have not yet been identified or assessed. This Agreement does not describe or commit to any future steps that may be necessary to institute federal-state electronic reporting.

The Department is currently developing the New Jersey Environmental Management System (NJEMS), a Department-wide computer database which will link the individual media program databases into one holistic system. A completely integrated Department database for all programs is expected to be functional by February 2001. The Department will be using Electronic Data Input (EDI) software such as RADIUS and Internet applications, to facilitate the electronic submittal of permit applications and

reports. RADIUS, which is fully functional, enables applicants to submit Air Quality general permit applications electronically. Currently, Right to Know (RTK) surveys can be accessed via the Internet, and the Department anticipates that the capability to submit RTK surveys electronically will be available in early 2001. NJPDES permitting, Land Use, NJPDES and Water Enforcement and Laboratory Certification programs have been implemented. The remaining program implementation schedule is as follows:

Site Remediation Program – January 2001

Water Supply – February 2001

While it is expected that entities will use these electronic processes to help streamline our operations and reduce their reporting burden, the Department recognizes that the universe of regulated facilities is very diverse - from large corporations with information technology and environmental units, to “Mom and Pop”-type operations. The Department is committed to developing flexible solutions that can be easily utilized by the broad spectrum of entities in New Jersey.

**5. Research, Development and Demonstration (RD&D) Project Flexibility:**

Gold Track participants will be allowed to conduct RD&D projects with an expedited review process. Research and Development facilities as defined under Title V of the Clean Air Act will not be eligible for RD&D flexibility under Gold Track. Each RD&D Project will consist of the following guiding principles, which will be embodied in subsequent rulemaking:

- 30-Day Department Review on Complete RD&D Applications;
- Protocol Approvals;
- Set Applicability Levels;
- Set Demonstration Timeframes, not to Exceed One Year;

**C. Stakeholder Involvement and Support**

Gold Track is the culmination of joint public and private sector discussions conducted over the past several years. Starting in 1996, the New Jersey Chemical Industry Project identified and evaluated opportunities to implement creative solutions for more efficient and effective environmental performance. The stakeholders participating in the NJCIP included representatives from the batch chemical industry, trade associations, community and public interest groups, USEPA and the NJDEP. A subset of this group and additional experts and non-governmental organizations (NGOs) formed the Flexible Track Team, which developed the framework and many of the details which NJDEP adopted for the Silver and Gold Track Program. The establishment of Gold Track is the direct outgrowth of proposals identified by these stakeholders.

There are three tiers for Gold Track stakeholder involvement depending upon their level of participation. These include direct stakeholders, commentators, and trackers; a structure that closely mirrors USEPA's Project XL's recommended stakeholder tiering system.

An integral part of Gold Track is the requirement that as part of their community outreach program, participants will conduct quarterly meetings with the local community outreach citizen advisory panel. These meetings are envisioned as an extension of the State-level stakeholder process to the local level.

The Department invited all stakeholders including environmental groups, NGOs, industry representatives, and other interested parties to participate in the development of Gold Track, and the negotiation of this Agreement.

To further encourage input, the Department public-noticed the meeting schedule for the February 15, March 2, and March 16, 2000 Gold Track stakeholder meetings. The announcement was published in the Star Ledger, the Courier Post, and the Asbury Park Press, on or about the 11<sup>th</sup> of February. The Department also posted a legal advertisement for the March 16, 2000 meeting published in the March 6, 2000 New Jersey Register. Additional stakeholder meetings were completed by the end of June 2000. All Gold Track Stakeholder meeting schedules were posted on NJDEP's website at <http://www.state.nj.us/dep/opppc/>.

#### **D. Innovative Approach and Multi-media Pollution Prevention**

Gold Track will seek to establish an innovative performance based approach to achieving superior environmental performance. Along with initiatives begun in other states, Gold Track is being used as a model for the USEPA's National Performance Track Program. As stated in A. above, all Gold Track participants will be required to incorporate pollution prevention/source reduction into day-to-day operations. In addition, Gold Track will incorporate pollution prevention performance limits into the permitting process. This is explained in detail in the air-specific Addendum.

#### **E. Transferability**

The ultimate goal of the Gold Track Program is to minimize permit modifications for minor changes and move towards greater back-end monitoring where environmental performance can be tracked and verified. This goal can be achieved through basic concepts that can be adopted, modified and implemented by other interested states. These concepts include:

1. Wider use of incentives and voluntary partnerships to encourage better environmental performance;
2. Use of environmental management systems;
3. Development of a "performance track" to motivate and reward top environmental performers;
4. Development of more flexible permitting policies for protecting the environment more efficiently;

5. Expedited review and issuance of environmental permits; and
6. Building leadership capacity in communities to participate in local environmental problem solving, by enhancing through the community outreach component a community's leadership potential.

NJDEP will document and share all appropriate findings with USEPA and regulators from other states. NJDEP, in the spirit of Project XL, encourages other states to observe the Gold Track process set forth in this Agreement and the media-specific Addenda.

#### **F. Feasibility**

The Department's mission statement, strategic plan and participation in the National Environmental Performance Partnership System (NEPPS) all align to commit the Department to assisting the residents of New Jersey in preserving, restoring, sustaining, protecting and enhancing the environment to ensure the integration of high environmental quality, public health and economic vitality. Toward that end, the Department has implemented a results-based environmental management system that utilizes long-term goals and indicators to measure environmental progress. The Department's Strategic Plan embraces strategies to revitalize New Jersey's cities, preserve open space, enhance personal responsibility and improve the environment. Six broad goals help to define NJDEP's objectives and focus resources to achieve our mission: Clean Air, Clean and Plentiful Water, Safe and Healthy Communities, Healthy Ecosystems, Abundant Open Space, and Open and Effective Government. The Department is committed to achieving these goals by encouraging innovation and compliance, by assuring that pollution is prevented in the most efficient and practicable ways possible, and by assuring that the best technology is planned and applied. In the Gold Track Program, the Department is affirming its dedication to a higher quality of life for New Jersey residents and its partnership with similarly committed public and private entities.

#### **G. Evaluation, Monitoring and Accountability**

A covenant will be used as an instrument to memorialize the environmental commitments made by each Gold Track participant and the flexibilities offered by the Department. Each Gold Track covenant shall be for a total of fifteen years, renewable by mutual consent of the Department and the Gold Track participant every five years. For each Gold Track participant, the covenant will detail the development of the environmental goals and milestones that are mutually agreed upon by the Department and the Gold Track entity. It will also document the specific measures to be used to track progress and measure performance in meeting these goals and milestones. The term covenant is the preferred term of the Department because it embodies the spirit of the Gold Track Program to have participating companies' reach beyond minimum regulatory requirements through voluntary agreements to achieve higher environmental goals in return for increased flexibility. The specific commitments and flexibilities, as documented in a covenant, will have no legal effect and will not be enforceable in any court, including the Office of Administrative Law. However, the commitments and flexibilities described in a covenant may be used to develop a permit or other legally effective and enforceable mechanism, following applicable substantive requirements and administrative procedures. The Department does not intend to initiate a judicial process in any court

of competent jurisdiction to compel compliance with the terms of the covenant. Rather, the Department envisions the remedy for facility non-compliance with its covenant to be termination of the covenant or removal of the company from the Gold Track Program in accordance with the terms of Section XI. The Department and USEPA may enforce the terms of permits, regulations or other legal implementing mechanisms for the project as provided under applicable law.

The major achievements for the Gold Track facilities that the Department will evaluate in determining the success of the Program are the levels of release reductions achieved and/or resources saved by each participant and by the program as a whole for specific periods (yearly, every five, ten, fifteen years). Other indicators that the Department will measure include number of participants, extent of resources saved as a result of pollution prevention, and cost savings realized by the participants, as well as, by the Department.

The Department envisions that the following reporting provisions will be required of all Gold Track participants. The Department will attempt to coordinate these general provisions with existing reporting requirements and any media-specific reporting requirements contained in the media-specific Addenda.

- Annual Emission Statement;
- Annual report on covenant commitments;
- Self-reporting on problems with meeting commitments;
- Common-sense community outreach reports;
- GHG emission reduction annual report;
- Five year emission trends/covenant reassessment report;

These provisions along with media-specific requirements are described in detail in the media-specific Addenda.

## **H. Compliance and Enforcement**

This section discusses how the Department intends to exercise its enforcement authority and discretion, and is not binding upon or endorsed by USEPA.

Participation in the Gold Track program is not relevant to any issue of law or fact in any legal enforcement proceeding for violations of environmental regulations.

### **1. Inspections and Penalty Assessments**

- A voluntary, facility-requested multi-media inspection will be conducted at any facility participating in Gold Track that wishes to avail itself of such an option. This inspection will be conducted at a frequency yet to be determined (but considering once every three years to five years). The Department will make all efforts to insure all programs will be available at the time of this multi-media inspection. In addition, USEPA Region II and appropriate county agencies will also be contacted to attend the inspection, if available. County agency personnel will not be included if the facility is a Title

V major facility or a Research and Development (R&D) facility as defined in the Clean Air Act. However, this inspection will not preclude the Department or USEPA from any other inspection that the Department or USEPA determines is necessary or required by permit condition/requirement, rule or law or to otherwise meet the Department's or USEPA's obligation to insure protection of public health, welfare and the environment. Gold Track facilities will not be targeted for increased enforcement inspections solely based on participation in the Gold Track Program.

- The voluntary facility-requested multi-media inspection will be conducted upon advance notice to the facility so that the facility will have the resources available on the date of the planned inspection. The Department may not provide advance notice for any other inspection that the Department determines is necessary or required by permit condition/requirement, rule or law, or to otherwise meet the Department's obligation to insure protection of public health, welfare and the environment.
- Violations determined during the multi-media inspection will take the normal compliance and enforcement course.

## 2. Surrogate Monitoring Exceedances

- Exceedance of surrogate monitoring parameters which are used to demonstrate compliance with emission limits, in order to insure compliance with the facility emission cap and/or specified in permit conditions/requirements, rules or law, are subject to enforcement action specified in Section III. H1, above.
- Exceedances determined by a surrogate monitoring system that have correlated the range of operation of that surrogate monitor to actual air emissions will be assessed a penalty in accordance with the Continuous Monitoring Systems (CMS) matrix specified in the air penalty rule. Incentives to correlate the surrogate monitoring parameter to emissions include:
  - Flexibility to operate source equipment with the correlated range of the surrogate monitor.
  - CMS penalty matrix rolls back penalty to first step every calendar quarter for each source operation, rather than 5 year clean history for facility.
  - CMS penalty based on duration, magnitude and classification, rather than rule-specified penalty assessment.

- Exceedance determined by emission correlated surrogate monitors at major facilities must go through USEPA policy matrix prior to being classified as High Priority Violations (HPVs).

Penalties for exceedances determined by a surrogate monitoring system that have not been correlated to emissions will be assessed as NJAC 7:27- 8.3(e) violations.

### 3. Environmental Management Systems (EMS)

- The Department will not take any formal enforcement action in response to any deviation from the voluntary provisions found in a facility's EMS which are discovered through an EMS audit or inspection. However, any deviation that constitutes a violation of an existing permit condition, requirement, rule or law will be enforced to the extent permitted under applicable law. Repeat EMS excursions or failure to correct EMS deficiencies may subject the facility to be excluded from the Gold Track Program.
- If a participating facility chooses to voluntarily disclose to the Department results/findings of a self-audit, the Department will apply USEPA's Audit Policy, 65 FR 19618 (April 11, 2000) to those findings except as noted below. Findings must be purely the result of a voluntary self-audit, and the reporting of a violation shall not otherwise be required by any permit, regulation or statute.
  - NJDEP will not apply the USEPA Audit Policy regarding recommendation of criminal matters for prosecution. Determinations regarding the criminal nature of violations are made by the New Jersey Division of Criminal Justice.
  - If a violation is discovered as a result of the self-audit, the facility must disclose the violation to the Department within twenty one (21) days of being aware that a violation has occurred or may have occurred.
  - The facility must correct the violation within sixty (60) days or provide written notice if correction will take longer and; certify in writing that the violation has been corrected and; take appropriate measures to remedy any harm caused by the violation.
  - The violation must not be the same or closely related to any other violation that occurred at the same facility within the last three years.
  - The violation must not have resulted in serious harm nor may it have presented an imminent and substantial endangerment to public health or the environment.

#### 4. Annual Certification

- Participants shall annually submit to the NJDEP a certification following an EMS self audit in which the company certifies that it has in place and has implemented during the self review period an EMS that meets the minimum Gold Track EMS criteria and that the participant further certifies that it has timely corrected any deficiencies noted in the EMS self-audit. Participants shall also submit to the Department a certification of the participant's EMS third-party auditor which certifies that the participant has in place and has implemented during the self audit review period an EMS that meets the minimum Gold Track EMS criteria and that the participant further certifies that it has timely corrected any deficiencies noted in the EMS self-audit.
- The third-party auditor certification shall be submitted in accordance with a participant's individual third party audit frequency, but in no event less than once every 3 years. This frequency shall be determined in the participant's covenant with NJDEP.
- The certification required in 4 above, shall be in the form of the certification language required at N.J.A.C. 7:27-1.39 (including any future amendments). In addition, the required certifications shall be submitted to the Department within 90 days of the conclusion of the self-audit and third party audit, respectively.

##### I. Shifting of Risk Burden

The Department believes that there will not be any shifting of risk burden impacts under the Gold Track Program. The safeguards provided under current laws and regulations to minimize the shifting of risk burdens will be applied to Gold Track participants. This will be more fully examined as the specific regulatory flexibilities to be offered become better defined. There are many tools available that participants will be encouraged to utilize, including evaluating environmental performance at the process level, measuring total releases from an operation and materials accounting, that can serve to evaluate shifts of risk across media as well as changes in exposure and risk burdens to different populations. Additionally, the air addenda will require air emissions modeling to ensure that no adverse human health or environmental impacts occur as a result of establishing facility-wide air emissions caps.

#### IV. Description of the Requested Flexibility and the Implementing Mechanisms

##### A. Requested Flexibility

This Agreement will function as an umbrella FPA and does not describe any specific federal or state regulatory flexibility. Media-specific Addenda that describe specific federal and/or state regulatory flexibilities to be granted under the Gold Track program are attached to this umbrella

FPA. Each Addendum will identify: the flexibility negotiated by NJDEP, USEPA and the stakeholder group for a particular media, the superior environmental performance to be gained in connection with extending that media-specific flexibility, a description of the legal implementing mechanism (ie., rulemaking and/or permit modification) that will enable the granting of flexibility, and the evaluation process to judge the effectiveness and benefits gained from the granting flexibility.

If, in the future, NJDEP wishes to amend the flexibilities offered under Gold Track beyond those currently specified in the attached Addenda, NJDEP will coordinate closely with USEPA in cases where the proposed regulatory flexibility affects a federally delegated, authorized or approved program. Any future amendments to the FPA or Addenda will be developed jointly by NJDEP and EPA in conjunction with stakeholder input, as described in Section VII. of this Agreement.

### **B. Legal Implementing Mechanisms**

The Department is seeking to avoid site-specific rule making or individual federal agreements by applying for Statewide Project XL status. Once the Department obtains Project XL status for the Gold Track Program, it will need to amend specific regulations in the affected media areas through the rulemaking process to authorize it to grant flexibility from the existing regulations. The Department is in the process of drafting rule revisions, and will consult with USEPA as the drafting progresses. USEPA may need to revise its regulations and take regulatory action to approve revisions to the state's authorized or delegated programs, consistent with applicable law. With significant legal authority in place, the Department intends to negotiate covenants with the Gold Track participants, which will describe in detail the flexibility offered by the Department and the commitments to be made by the participants. Since the covenants are not legal enforceable instruments, the Department expects to modify the applicable permits issued to participants in accordance with its legal authority. The modified permits and regulations will be effective and enforceable under law.

## **V. Discussion of Intentions and Commitments for Implementing the Project**

### **A. NJDEP's Intentions and Commitments**

In order to implement the Gold Track Program, the Department intends to adopt a new rule, and modify current state rules, which would be applicable to the media areas covered under Gold Track. The Department envisions the rulemaking to include: purpose and scope of the program, application process, entry requirements, program commitments, regulatory flexibilities and incentives, covenants, and renewal, revocation and termination procedures. The Department also envisions amending existing regulations in the specific media covered by Gold Track that will give the Department the legal authority to grant the flexibility described in the attached Addenda. The Department will undertake a companion process to USEPA's process for implementing any federal

regulatory flexibility, namely, program specific rulemaking. Thus, it is anticipated that the NJDEP and USEPA rulemaking process will occur concurrently to the extent possible, and that both agencies will work together during this process. The NJDEP rulemaking effort will follow all applicable procedures outlined in the NJDEP's Rule Development Manual and Administrative Practice and Procedure Act, N.J.S.A. 52:14B-1. The rulemaking that is being developed to implement Gold Track is authorized pursuant to the NJDEP's general rulemaking authority and program-specific rulemaking authority.

#### **B. USEPA's Intentions and Commitments**

USEPA intends to work with NJDEP to draft project-specific rulemaking in order to implement the regulatory flexibility described in the media-specific addenda. USEPA intends that any regulatory flexibility described by the media-specific addenda to this umbrella FPA will need to be consistent with and justified under applicable Federal and State statutory requirements. This umbrella FPA neither specifies nor guarantees any particular regulatory flexibility that may be granted under the Gold Track Program. The attached addenda will describe specific flexibilities intended to be offered under Gold Track. USEPA's decision to grant the specified will be subject to applicable substantive and procedural requirements such as public notice and comment.

#### **C. Proposed Schedule and Milestones**

It is anticipated that the duration of this project will be for fifteen years. Long-term milestones (fifteen years) and short-term milestones (five years) will be set forth in the Covenant to be reviewed by the Department every five years. The five-year review coincides with the typical duration of environmental permits.

#### **D. Project Tracking, Reporting and Evaluation**

The Department is committed to tracking and reporting the State's progress in achieving the anticipated environmental benefits of this program.

Current regulatory reporting mechanisms for all regulated facilities as applicable, such as Annual Emission Statements, Pollution Prevention Progress Reports and Toxic Release Inventory Reports, will continue to be used by the Department to track trends in emission reductions. These reports, which will be submitted to the Department by each Gold Track participant, are public documents, and will serve as the basis for a Gold Track annual report to USEPA. The Department is committed, to the extent possible, under applicable state and federal requirements to allowing Internet access to the Gold Track annual report. In addition, there is a pollution prevention component of State-issued Operating Permits, whereby facilities are required to track and submit a report to the State, showing trends in annual emissions. This report will be expanded to include specific emission trends analysis for each Gold Track participant. As mentioned previously, each Gold Track participant will be encouraged to establish a system to monitor and track costs

associated with Gold Track participation. Specific monitoring, record keeping and reporting requirements are contained in the media-specific Addenda.

**E. Periodic Review by the USEPA and DEP to the Agreement**

USEPA and NJDEP will hold periodic performance review conferences to assess the State's progress in implementing this Gold Track Program. This periodic review may include an annual stakeholder meeting.

**F. Duration of the Project**

The duration of this project will be fifteen years from the date a covenant is signed, unless it is terminated earlier or extended by agreement of both USEPA and NJDEP. This corresponds to the Department's intention to include fifteen-year plans for air emission reductions, with five-year interim reviews, in operating permits, or other applicable legal implementing mechanism for Gold Track participants.

## **VI. Legal Basis for the Project**

### **A. Authority to Enter into the Agreement**

By signing this Agreement and the attached media-specific Addenda, USEPA and NJDEP acknowledge and agree that they have the respective authorities, discretion and resources to enter into this Agreement and to implement all applicable provisions of the Gold Track Program, as described in this Agreement and the attached media-specific Addenda.

### **B. Legal Effect of the Agreement**

This Agreement and the attached media-specific Addenda set forth the intentions of the USEPA and NJDEP with respect to the NJDEP's Gold Track Program. This Agreement and the attached media-specific Addenda in themselves are not legally binding or enforceable against USEPA or NJDEP, do not create or modify legal rights or obligations, and are not contracts or regulatory actions.

If needed and appropriate, USEPA along with the NJDEP intends to propose for public comment rules or other legal mechanisms needed to implement this program. Any rules, permits, permit modifications or legal mechanisms that implement the Gold Track Program will be effective and enforceable as provided under applicable law. This Agreement and the attached media-specific Addenda are not a final agency action by USEPA or NJDEP, because they do not create or modify legal rights or obligations and are not legally enforceable. Nothing USEPA or NJDEP does or does not do that deviates from a provision of this Agreement and the media-specific Addenda, or that is alleged to deviate from a provision of this Agreement and the media-specific Addenda, can serve as the basis for any claim for damages, compensation or other relief against USEPA or NJDEP.

### **C. Other Laws or Regulations That May Apply**

USEPA and NJDEP do not intend that this Gold Track Program, as described in this Agreement and the attached media-specific Addenda will modify any other existing or future laws or regulations. As a result of this Agreement and/or the attached media-specific Addenda, future rulemaking, as discussed above, may be required. Permit modifications and other legal implementing mechanisms may also result.

### **D. Retention of Rights to Other Legal Remedies**

Nothing in this Agreement and/or the attached media-specific Addenda is intended to affect or limit the USEPA's or NJDEP's legal rights. These rights may include legal, civil, criminal or administrative claims or other relief regarding the enforcement of applicable federal and state laws, rules, regulations or permits.

Although NJDEP and facilities participating in Gold Track do not intend to challenge agency actions implementing the Gold Track Program (including any rule amendments or adoptions, permit actions, or other action) that are consistent with this Agreement and the media-specific Addenda, NJDEP and facilities participating in Gold Track reserve any right they may have to appeal or otherwise challenge any USEPA, State or local action to implement the Project. With regard to future rulemaking, permit modifications or any other legal implementing mechanisms, nothing in this Agreement or the media-specific Addenda is intended to limit NJDEP's or participating facilities' rights to administrative or judicial appeal or review of those actions, in accordance with the applicable procedures for such review.

## **VII. Amendments or Modifications to the Agreement**

The Gold Track Program is being designed to test new concepts in environmental protection. As with any new program, there is always some degree of uncertainty regarding implementation and expected results. Therefore, it may be necessary to change this Agreement and/or the attached media-specific Addenda during its duration.

This Agreement and/or the media-specific Addenda may be amended by mutual agreement of USEPA or NJDEP with significant input from Gold Track stakeholders at any time during the duration of the Project. The USEPA and NJDEP recognize that amendments to this Agreement may also necessitate modification of legal implementation mechanisms or may require development of new implementation mechanisms. If the Agreement is amended, USEPA and NJDEP expect to work together with stakeholders to identify and pursue any necessary modifications or additions to the implementation mechanisms in accordance with applicable procedures. If the USEPA and NJDEP agree to make a substantial amendment to this Agreement, the general public will receive notice of the amendment and be given an opportunity to participate in the process, as appropriate.

In determining whether to amend the Agreement and/or the media-specific Addenda, USEPA and NJDEP will evaluate whether the proposed amendment meets USEPA's Project XL acceptance criteria and any other relevant considerations agreed on by USEPA and NJDEP. USEPA and NJDEP will meet within ninety (90) days following submission of any amendment proposal (or within a shorter or longer period if USEPA and NJDEP agree) to discuss evaluation of the proposed amendment. If USEPA and NJDEP support the proposed amendment, USEPA and NJDEP will (after appropriate stakeholder and public involvement if appropriate), amend the Agreement.

## **VIII. Transfer of the Project Benefits and Responsibilities to a New Owner**

Since the NJDEP is acting as the sponsor of this "Statewide" XL project, there will be no provision governing transfer of the project benefits and responsibilities to a new project sponsor. The rules being promulgated to implement the Gold Track Program will contain provisions for transfer of ownership of participating entities in the Gold Track Program. Should there be a transfer of

ownership of a Gold Track participating facility, the NJDEP shall conduct at a minimum, an additional screening, including applicable USEPA participation in the screening process. NJDEP will evaluate the following criteria in order to determine whether to extend Gold Track status (including all Gold Track flexibilities and benefits) to a facility that has had a transfer of ownership: a) if the new owner or operator has demonstrated adequate capability to meet the requirements for participation in Gold Track, b) is willing to take over the responsibilities in Gold Track that the existing owner or operator had committed to, and c) if the new owner or operator is otherwise an appropriate Gold Track partner.

## **IX. Process for Resolving Disputes**

Any dispute, which arises between USEPA and NJDEP under or with respect to this Agreement, will be subject to informal negotiations between USEPA and NJDEP. The period of informal negotiations will not exceed twenty (20) calendar days from the time the dispute is first documented, unless that period is extended by a written agreement by USEPA and NJDEP. The dispute will be considered documented when one party sends a written Notice of Dispute to the other party.

If the USEPA and NJDEP cannot resolve a dispute involving this Agreement through informal negotiations, the USEPA and NJDEP may invoke non-binding mediation by describing the dispute with a proposal for resolution in a letter to the Deputy Regional Administrator for EPA Region II. The Deputy Regional Administrator will serve as the non-binding mediator and may request an informal mediation meeting to attempt to resolve the dispute. The Deputy Regional Administrator will then issue a written opinion that will be non-binding and does not constitute a final USEPA action. If this effort is not successful, USEPA and NJDEP still have the option to terminate or withdraw from the Agreement, as set forth in Section X below.

For disputes that arise between NJDEP and a Gold Track Participant with respect to this Agreement or a media-specific Addendum, the NJDEP will follow its existing alternate dispute resolution (ADR) process within the Office of Dispute Resolution.

## **X. Withdrawal From or Termination of the Agreement**

### **A. Expectations**

Although this Agreement and the attached media-specific Addenda are not legally binding and USEPA or NJDEP may withdraw from the Agreement at any time, it is the desire of USEPA and DEP that the Agreement should remain in effect through the expected duration of 15 years, and be implemented as fully as possible unless one of the conditions below occurs:

Failure of USEPA and/or NJDEP to disclose material facts during development of the Agreement and the media-specific Addenda.

Failure of the Gold Track Program to provide superior environmental performance consistent with the provisions of this Agreement and the media-specific Addenda.

Enactment or promulgation of any environmental, health or safety law or regulation after execution of the Agreement and the media-specific Addenda, which renders the Project legally, technically or economically impracticable.

In addition, USEPA and NJDEP do not intend to withdraw from the Agreement if the facilities participating in the Gold Track Program do not act in accordance with this Agreement or its implementation mechanisms, unless the actions of a number of Gold Track participants, to be determined by USEPA and NJDEP constitute a material failure to act consistently with intentions expressed in this Agreement and the media-specific Addenda and its implementing mechanisms. The decision to withdraw will, of course, take the failure's nature and duration into account.

## **B. Procedures**

USEPA and NJDEP agree that the following procedures will be used to withdraw from or terminate the Gold Track Program before expiration of the Gold Track Program term. They also agree that the implementing mechanism(s) will provide for withdrawal or termination consistent with these procedures.

1. If USEPA and/or NJDEP want to terminate or withdraw from the Gold Track Program, USEPA and/or NJDEP is expected to provide written notice to the other party at least sixty (60) days before the withdrawal or termination.
2. If requested by USEPA and/or NJDEP during the sixty (60) day period noted above, the dispute resolution proceedings described in Section IX of this Agreement may be initiated to resolve any dispute relating to the intended withdrawal or termination. If, following any dispute resolution or informal discussion, USEPA and/or NJDEP still desires to withdraw or terminate, that party will provide written notice of final withdrawal or termination to the other party. Participation in the dispute resolution proceedings shall not be mandatory.
3. The procedures described in this Section apply only to the decision to withdraw or terminate participation in this Agreement. Procedures to be used in modifying or rescinding any regulations, permits or other legal implementing mechanisms will be governed by applicable law.

## **XI. Compliance After the Project is Over**

The NJDEP fully expects that the Gold Track Program will become a permanent program with rules in place to implement the program on an ongoing basis, after the term of this XL Project. However, should the program be terminated, either at the end of the fifteen year term or before, the NJDEP and USEPA intend that there be an orderly return to compliance with all rules and regulations that are generally applicable at the time of program termination.

**A. Orderly Return to Compliance with Otherwise Applicable Regulations, if the Program Term is Completed**

If, after an evaluation by NJDEP and USEPA, the Program is terminated because the term has ended, all Gold Track facilities will return to compliance with all applicable regulations and requirements that exist at the time of Program termination unless the Agreement is amended or modified in accordance with Section VII of this Agreement (Amendments or Modifications). Gold Track facilities are expected to anticipate and plan for all activities to return to compliance sufficiently in advance of the end of the Program term. NJDEP may request a meeting with USEPA to discuss the timing and nature of any actions that NJDEP will be required to take. USEPA and NJDEP should meet within thirty days of receipt of NJDEP's written request for such a discussion. At and following such a meeting, USEPA and NJDEP should discuss in reasonable good faith, which of the regulations and requirements will apply after termination of the Program.

**B. Orderly Return to Compliance with Otherwise Applicable Regulations in the Event of Early Withdrawal or Termination**

In the event of a withdrawal or termination of the Agreement not based on the end of the Program term, USEPA and NJDEP will determine an interim compliance period to provide sufficient time for the Gold Track facilities to return to compliance with any generally applicable regulations or requirements that exist at the time of program termination or withdrawal, or upon the termination of a particular facility's participation in Gold Track. The interim compliance period will begin from the date on which USEPA or NJDEP provides written notice of withdrawal or termination of the Program, in accordance with Section X of this Agreement. At the end of the interim compliance period, the Gold Track facility shall comply with all applicable requirements and regulations that exist at the time of program termination. During the interim compliance period, USEPA and NJDEP may issue an order, permit, or other legally enforceable mechanism establishing a schedule for the Gold Track facility to return to compliance with otherwise applicable regulations. This schedule cannot extend beyond six months from the date of withdrawal or termination. Gold Track facilities shall intend to be in compliance with all applicable Federal, State, and local requirements as soon as is practicable, but no later than six months from the date of withdrawal or termination of the Agreement by USEPA or NJDEP.

**XII. Signatories and Effective Date**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

\_\_\_\_\_  
**Jeanne M. Fox, Regional Administrator**  
**USEPA Region II**

\_\_\_\_\_  
Date

**STATE OF NEW JERSEY**

\_\_\_\_\_  
**Robert C. Shinn, Jr., Commissioner**  
**New Jersey Department of Environmental Protection**

\_\_\_\_\_  
Date