



August 12, 2003

**MEMORANDUM**

**SUBJECT:** Issuance of Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree and Administrative Order on Consent and New Model Ability to Pay Provisions for Use in *De Minimis* Settlements

**FROM:** Susan E. Bromm, Director /s/  
Office of Site Remediation Enforcement  
U.S. Environmental Protection Agency

Bruce S. Gelber, Chief /s/  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice

**TO:** Addressees

We are pleased to issue the final “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent,” “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree,” and the new “Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay Parties Only” and “Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay and Non-Ability to Pay Parties.” The revised *de minimis* contributor administrative order on consent (AOC) and consent decree (CD) supersede the September 25, 1995 versions of these models, and the model ability to pay (ATP) provisions supply language for entering into ability to pay settlements with qualifying *de minimis* parties in accordance with Section 122(g)(7) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. § 9266(g)(7).

Two changes are included in the revised models in recognition of the statutory amendments to Section 122(g). First, the waiver of claims by settling parties has been broadened from claims against “each other” to claims against all other site potentially responsible parties as required by Section 122(g)(8)(A), 42 U.S.C. § 9622(g)(8)(A). (This waiver is consistent with the standard waiver contained in our peripheral party settlements and

parallels the waiver of claims against previously-settling *de minimis* parties contained in the remedial design/remedial action model as well.) Second, the certification provision has been changed to state expressly that the settlor has “and will” comply fully with any EPA information requests in recognition of Section 122(g)(8)(C), 42 U.S.C. § 9622(g)(8)(C). (This waiver explicitly recognizes the continuing obligation that we believe existed already under the 1995 models.)

The new model ability to pay provisions provide language to be used when negotiating ATP *de minimis* settlements under Section 122(g)(7) of the CERCLA amendments. Two sets are provided: one for use where all settlers are ATP parties; and one for use where there are both ATP and non-ATP *de minimis* settling parties. The language in both is adapted from previously issued ATP models, specifically the September 30, 1998 ATP cashout administrative agreement and the January 11, 2001 ATP cashout CD. Issuance of these two sets of model language does not represent a change in EPA policy or practice: *de minimis* parties have always been able to make a showing of inability to pay their allotted share of site costs. The model language will simply facilitate such agreements and maintain consistency in their terms.

We request that the Regions, EPA Headquarters, and Department of Justice staff use these models as guidance when drafting and negotiating Section 122(g)(1)(A) administrative and judicial *de minimis* settlements. We encourage CERCLA staff to conform as closely as possible to the terms of these models, subject to modifications needed to address site-specific circumstances.

We thank the Regional attorneys who carefully reviewed and provided valuable input into these models. Please direct any questions you may have about these models to Janice Linett of OSRE’s Regional Support Division at 202/564-5131 or Patricia McKenna of the Environmental Enforcement Section at 202/616-6517.

#### Attachments (4)

Addressees: Director, Office of Site Remediation and Restoration, Region I  
Director, Emergency and Remedial Response Division, Region II  
Director, Hazardous Site Cleanup Division, Region III  
Director, Waste Management Division, Region IV  
Directors, Superfund Division, Regions V, VI, VII and IX  
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII  
Director, Office of Environmental Cleanup, Region X  
Director, Office of Environmental Stewardship, Region I  
Director, Environmental Accountability Division, Region IV  
Regional Counsel, Regions II, III, V, VI, VII, IX, and X  
Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Region VIII  
Assistant Section Chiefs, Environmental Enforcement Section, U.S. Department of Justice  
Chief, Environmental Defense Section, U.S. Department of Justice

Assistant Section Chiefs, Environmental Defense Section, U.S. Department of  
Justice

cc: Earl Salo, Acting Associate General Counsel for Solid Waste and  
Emergency Response  
Juliette McNeil, Director, Financial Management Division  
Office of Regional Counsel Branch Chiefs, Regions I-X  
CERCLA Settlement Lead Region Workgroup

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND  
UNITED STATES DEPARTMENT OF JUSTICE REVISED  
MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS* CONTRIBUTOR  
ADMINISTRATIVE ORDER ON CONSENT**

**August 2003**

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Department of Justice and U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA or DOJ uses them in a particular case will depend upon the facts of the case.

**REVISED MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS* CONTRIBUTOR  
ADMINISTRATIVE ORDER ON CONSENT**

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**REVISED MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS* CONTRIBUTOR  
ADMINISTRATIVE ORDER ON CONSENT**

IN THE MATTER OF:	)	
	)	U.S. EPA Docket No. _____
[Insert Site Name and Location]	)	
	)	
Proceeding under Section 122(g)(4)	)	
of the Comprehensive Environmental	)	<b>ADMINISTRATIVE ORDER</b>
Response, Compensation, and	)	<b>ON CONSENT</b>
Liability Act of 1980, as amended,	)	
42 U.S.C. 9622(g)(4)	)	
	)	

**I. JURISDICTION**

1. This Administrative Order on Consent (“Consent Order” or “Order”) is issued pursuant to the authority vested in the President of the United States by Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9622(g)(4), to reach settlements in actions under Section 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607. The authority vested in the President has been delegated to the Administrator of the United States Environmental Protection Agency (“EPA”) by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to the Regional Administrators of EPA by EPA Delegation No. 14-14-E [insert reference to Regional redelegation, if any].

2. This Administrative Order on Consent is issued to the persons, corporations, or other entities identified in Appendix A (“Respondents”). Each Respondent agrees to undertake all actions required by this Consent Order. Each Respondent further consents to and will not contest EPA's jurisdiction to issue this Consent Order or to implement or enforce its terms.

3. EPA and Respondents agree that the actions undertaken by Respondents in accordance with this Consent Order do not constitute an admission of any liability by any Respondent. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Consent Order, the validity of the Statement of Facts or Determinations contained in Sections IV and V, respectively, of this Consent Order.

**II. STATEMENT OF PURPOSE**

**[NOTE: As drafted, this Statement of Purpose assumes that all respondents are making a cash payment, which includes a premium amount, in exchange for a full and final**

**settlement with EPA for all civil liability under CERCLA Sections 106 and 107 with respect to the site as a whole. This Statement of Purpose will need to be amended if the settlement is of narrower scope with respect to some or all respondents because, *e.g.*, it relates to only one operable unit, or it includes a reservation of rights for cost overruns. When using this or any other Statement of Purpose, be sure that the provision is consistent with the Covenant Not to Sue, the Reservations of Rights, and the definition of “matters addressed” in the Contribution Protection provision.]**

4. By entering into this Consent Order, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows Respondents to make a cash payment, including a premium, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a [substantial] number of potentially responsible parties from further involvement at the Site; and

c. to obtain settlement with Respondents for their fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, and to provide for full and complete contribution protection for Respondents with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

### **III. DEFINITIONS**

5. Unless otherwise expressly provided herein, terms used in this Consent Order that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Order, the following definitions shall apply:

a. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. “Consent Order” or “Order” shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this Order and any appendix, the Order shall control.

c. “Day” shall mean a calendar day. In computing any period of time under this Consent Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. “EPA” shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

e. “EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

f. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.<sup>1</sup>

g. “Paragraph” shall mean a portion of this Consent Order identified by an Arabic numeral.

h. “Parties” shall mean EPA and the Respondents.

i. “Respondents” shall mean those persons, corporations, or other entities listed in Appendix A. **[NOTE: Instead of listing the name of each Respondent in Appendix A and the amount of payment by each Respondent in Appendix C, Regions may choose to create one Appendix to serve both purposes.]**

j. “Response costs” shall mean all costs of “response” as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

k. “Section” shall mean a portion of this Consent Order identified by a Roman numeral.

l. “Site” shall mean the \_\_\_\_\_ Superfund Site, encompassing approximately \_\_\_\_ acres, located [insert address or description of location] in [insert City, County, State] and [insert either “generally shown on the map attached as Appendix B” or “generally designated by the following property description: \_\_\_\_\_.”]

m. “United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **IV. STATEMENT OF FACTS**

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<sup>1</sup> The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at [http://www.epa.gov/budget/finstatement/superfund/int\\_rate.htm](http://www.epa.gov/budget/finstatement/superfund/int_rate.htm).



6. [In one or more paragraphs, insert site name, location, description, NPL status and brief statement of historical hazardous substance activity at the site.]

7. Hazardous substances have been or are threatened to be released at or from the Site. **[NOTE: Additional information about specific hazardous substances present on- or off-site may be included.]**

8. As a result of the release or threatened release of hazardous substances, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake response actions in the future. **[OPTIONAL: Insert brief description of response actions undertaken at the site to date by EPA or other persons, noting whether a removal, RI/FS or ROD(s) have been completed. Describe briefly any prior settlements for performance of work at the site.]**

9. In performing these response actions, EPA has incurred and will continue to incur response costs at or in connection with the Site. **[NOTE: The dollar amount of costs incurred as of a specific date should be included. Describe briefly any previous cost recovery settlements under which any of these costs have been reimbursed to EPA by site PRPs.]**

10. [Identify each respondent and its relationship to the site. If respondents are numerous, state generally that “Each Respondent listed on Appendix A arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by such Respondent, by any other person or entity, at the Site, or accepted a hazardous substance for transport to the Site which was selected by such Respondent.”]

11. [In one or more paragraphs, present in summary fashion the factual basis for EPA's determination in Section V below that the amount of hazardous substances contributed to the site by each respondent and the toxic or other hazardous effects of the substances contributed to the site by each respondent are minimal in comparison to other hazardous substances at the site. The language will vary depending upon the criteria established for the particular settlement. An example follows:

“The amount of hazardous substances contributed to the Site by each Respondent does not exceed [insert either “\_\_\_% of the hazardous substances at the Site,” or “\_\_\_ pounds/gallons of materials containing hazardous substances,”] and the hazardous substances contributed by each Respondent to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.”] **[NOTE: Where practicable, an attachment listing the volume and general nature of the hazardous substances contributed to the site by each respondent, to the extent available, may be included as an appendix. The total estimated volume of hazardous substances at the site should be noted on the attachment, if one is used.]**

12. EPA estimates that the total response costs incurred and to be incurred at or in

connection with the Site by the EPA Hazardous Substance Superfund and by other persons is [insert either “\$ \_\_\_\_\_” or “between \$ \_\_\_\_\_ and \$ \_\_\_\_\_”]. The payment required to be made by each Respondent pursuant to this Consent Order is a minor portion of this total amount.

**[NOTE: The dollar figure inserted should include the total response costs incurred to date as well as the Agency's projection of the total response costs to be incurred during completion of the remedial action at the site. The response cost total should include costs of the United States and any other person at the Site.]**

## **V. DETERMINATIONS**

13. Based upon the Statement of Facts set forth above and on the administrative record for this Site, EPA has determined that:

- a. The [insert site name] site is a “facility” as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b. Each Respondent is a “person” as that term is defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- c. Each Respondent is a “potentially responsible party” within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).
- d. There has been an actual or threatened “release” of a “hazardous substance” from the Site as those terms are defined in Section 101(22) and (14) of CERCLA, 42 U.S.C. § 9601(22) and (14).
- e. The actual or threatened “release” caused the incurrence of response costs.
- f. Prompt settlement with each Respondent is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).
- g. As to each Respondent, this Consent Order involves only a minor portion of the response costs at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).
- h. The amount of hazardous substances contributed to the Site by each Respondent and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Respondent are minimal in comparison to other hazardous substances at the Site within the meaning of Section 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A).

**[NOTE: If Attorney General approval is not required for this settlement because total past and projected response costs of the United States at the site are not expected to exceed \$500,000, insert the following Paragraph 13(i).]**

[i. The total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.]

## **VI. ORDER**

14. Based upon the administrative record for the Site and the Statement of Facts and Determinations set forth above, and in consideration of the promises and covenants set forth herein, the following is hereby AGREED TO AND ORDERED:

## **VII. PAYMENT**

15. Within 30 days after the effective date of this Consent Order, each Respondent shall pay to the EPA Hazardous Substance Superfund [insert either: “the amount set forth below” or “the amount set forth in Appendix C to this Consent Order”].

16. Each Respondent's payment includes an amount for: a) past response costs incurred at or in connection with the Site; b) projected future response costs to be incurred at or in connection with the Site; and [insert, if a premium is included in the settlement, “c) a premium to cover the risks and uncertainties associated with this settlement, including but not limited to, the risk that total response costs incurred or to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, or by any other person, will exceed the estimated total response costs upon which Respondents' payments are based.”] **[NOTE: If some respondents are paying a premium and some are not, Paragraph 16 will need to be redrafted to indicate that there are both premium and non-premium settling respondents.]**

17. Each payment shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” Each check, or a letter accompanying each check, shall identify the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number \_\_\_\_\_, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

The total amount to be paid by Respondents pursuant to Paragraph 15 shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

18. At the time of payment, each Respondent shall send notice that such payment has been made to:

[Insert name and address of Regional Attorney and/or Remedial Project Manager and Regional Financial Management Officer]

**[NOTE ON REQUIRING ONE COLLECTIVE PAYMENT: If the settlement involves a large number of respondents, it may be appropriate to include alternative instructions under which the respondents are to establish a short-term trust or escrow account to receive their individual payments and to make one collective payment to the Superfund at the address noted in Paragraph 17. In such event, the cost of the trust or escrow account may be funded from interest earned by the account or through other appropriate means.]**

**[NOTE ON USE OF SPECIAL ACCOUNT PAYMENTS: Payments made under Paragraph 15 may be deposited in the Hazardous Substance Superfund or in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”). The consent order should include clear instructions indicating which portion of the payment will be placed in the Hazardous Substance Superfund and which portion will be deposited in a special account. Under Paragraph 17 as written, 100% of the payment will be deposited in a special account. The following language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.]<sup>2</sup>**

**[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:]**

“The total amount to be paid by Respondents pursuant to Paragraph 15 shall be deposited by EPA in the EPA Hazardous Substance Superfund.”

**[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]**

“Of the total amount to be paid by Respondents pursuant to Paragraph 15, [‘\$\_\_\_\_\_’ or ‘\_\_\_\_\_%’] shall be deposited by EPA in the EPA Hazardous Substance Superfund, and [‘\$\_\_\_\_\_’ or ‘\_\_\_\_\_%’] shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”]

### **VIII. FAILURE TO MAKE PAYMENT**

19. If any Respondent fails to make full payment within the time required by Paragraph 15, that Respondent shall pay Interest on the unpaid balance. In addition, if any Respondent fails to make full payment as required by Paragraph 15, the United States may, in addition to any other available remedies or sanctions, bring an action against that Respondent seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(I) of CERCLA, 42

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<sup>2</sup> When PRPs are performing the response action at the Site, payments to be made by Respondents may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account.

U.S.C. § 9622(l), for failure to make timely payment.

### **IX. CERTIFICATION OF RESPONDENT**

20. By signing this Consent Order, each Respondent certifies, individually, that, to the best of its knowledge and belief, it:

a. has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. has and will comply fully with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e) [insert, if applicable “, and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927”].

### **X. COVENANT NOT TO SUE BY UNITED STATES**

21. In consideration of the payments that will be made by Respondents under the terms of this Consent Order, and except as specifically provided in Section XI (Reservations of Rights by United States), the United States<sup>3</sup> covenants not to sue or take administrative action against any of the Respondents pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,]<sup>4</sup> relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for each Respondent upon receipt of that Respondent's payment as required by Section VII. With respect to each Respondent, individually, this covenant not to sue is conditioned upon:

- a) the satisfactory performance by Respondent of all obligations under this Consent Order; and
- b) the veracity of the information provided to EPA by Respondent relating to Respondent's

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<sup>3</sup> If any agency other than EPA or DOJ, such as Coast Guard or Federal Emergency Management Agency, has or may incur response costs at the site, such costs must either be addressed in the settlement or must be excluded from the scope of the covenant not to sue.

<sup>4</sup> Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

involvement with the Site. This covenant not to sue extends only to Respondents and does not extend to any other person.

### **XI. RESERVATIONS OF RIGHTS BY UNITED STATES**

22. The United States reserves, and this Consent Order is without prejudice to, all rights against Respondents with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 21. Notwithstanding any other provision of this Consent Order, the United States reserves all rights against Respondents with respect to:

- a. liability for failure to meet a requirement of this Consent Order;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments,<sup>5</sup> or
- d. liability based upon the ownership or operation of the Site, or upon the transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Order by Respondent.

23. Notwithstanding any other provision in this Consent Order, the United States reserves, and this Consent Order is without prejudice to, the right to institute judicial or administrative proceedings against any individual Respondent seeking to compel that Respondent to perform response actions relating to the Site, and/or to reimburse the United States for additional costs of response, if:

- a. information is discovered which indicates that such Respondent contributed hazardous substances to the Site in such greater amount or of such greater toxic or other hazardous effects that such Respondent no longer qualifies as a *de minimis* party at the Site because [insert volume and toxicity criteria from Paragraph 11 of the Statement of Facts, *e.g.*, “such Respondent contributed greater than \_\_\_% of the hazardous substances at the Site, or contributed hazardous substances which are significantly more toxic or are of significantly greater hazardous effect than other hazardous substances at the Site”]; or

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<sup>5</sup> This natural resource damage reservation must be included unless the Federal Natural Resource Trustee[s] has/have agreed to a covenant not to sue pursuant to Section 122(j)(2) of CERCLA. In accordance with Section 122(j)(1) of CERCLA, where the release or threatened release of any hazardous substances at the site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal Natural Resource Trustee[s] of the negotiations and encourage the Trustee[s] to participate in the negotiations.

**[NOTE: The cost overrun reopener in Paragraph 23(b) below should only be included with respect to any respondent who is not paying a premium in lieu of this reopener.]**

**[b. total response costs incurred or to be incurred at or in connection with the Site by the United States or any other person exceed \$\_\_\_\_ [insert total response costs estimate upon which Respondents' payments are based]. [NOTE: If some respondents are paying a premium in lieu of the cost overrun reopener and some are not, insert: "This Paragraph 23(b) shall not apply to those Respondents identified [insert "in Paragraph \_\_\_\_" or "in Appendix \_\_\_\_"] who have elected to pay a premium pursuant to Paragraphs 15 and 16."]**

## **XII. COVENANT NOT TO SUE BY RESPONDENTS**

24. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site or this Consent Order<sup>6</sup> including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the State [Commonwealth] of \_\_\_\_\_, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.<sup>7</sup>

Except as provided in Paragraph 26 (Waiver of Claims) and Paragraph 28 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 22 (c) or (d) or Paragraph 23, but only to the extent that Respondents' claims arise

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<sup>6</sup> If the consent order does not resolve respondents' liability for the site as a whole, the scope of Paragraph 24 may be narrowed to conform to the scope of EPA's covenant not to sue.

<sup>7</sup> The settlement should, consistent with Paragraph 26, release any claims by Respondents against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues, either in this settlement or a future settlement. Settlement of any federal liability will require additional revisions to this document.

from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

25. Nothing in this Consent Order shall be deemed to constitute preauthorization or approval of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

26. Respondents agree not to assert any claims or causes of action (including claims for contribution under CERCLA) that they may have for all matters relating to the Site against each other or any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts or has asserted a claim or cause of action relating to the Site against such Respondent.

### **XIII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

27. Except as provided in Paragraph 26 (Waiver of Claims), nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Order. Except as provided in Paragraph 26 (Waiver of Claims), the United States and Respondents each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

28. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondents shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Paragraph 21.

29. The Parties agree that each Respondent is entitled, as of the effective date of this Consent Order, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for “matters addressed” in this Consent Order. The “matters addressed” in this Consent Order are [all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person.]<sup>8</sup>

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<sup>8</sup> This definition of “matters addressed” assumes that this consent order is designed to resolve fully respondents' liability at the site. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed.



#### **XIV. PARTIES BOUND**

30. This Consent Order shall apply to and be binding upon EPA and upon Respondents and their [heirs,] successors and assigns. Any change in ownership or corporate or other legal status of a Respondent, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Respondent's responsibilities under this Consent Order. Each signatory to this Consent Order certifies that he or she is authorized to enter into the terms and conditions of this Consent Order and to execute and bind legally the party represented by him or her.

#### **XV. INTEGRATION/APPENDICES**

31. This Consent Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Order. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Order. The following appendices are attached to and incorporated into this Consent Order:

“Appendix A” is [the list of Respondents].

“Appendix B” is [the map of the Site].

“Appendix C” is [the payment schedule].

**[NOTE: List any additional appendices.]**

#### **XVI. PUBLIC COMMENT**

32. This Consent Order shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, 42 U.S.C. § 9622(i)(3), EPA may withdraw or withhold its consent to this Consent Order if comments received disclose facts or considerations which indicate that this Consent Order is inappropriate, improper, or inadequate.

#### **XVII. ATTORNEY GENERAL APPROVAL**

**[NOTE: This Section should be used if Attorney General approval is required for this settlement because total past and projected response costs at the site will exceed \$500,000, excluding interest. The Region should consult with DOJ during the negotiations process and should obtain written DOJ approval of the settlement before publishing notice of the proposed consent order in the Federal Register pursuant to Section 122(i) of CERCLA. The Region should discuss with DOJ any significant comments received during the public comment period. If the Region believes that the consent order should be modified based upon public comment, the Region should discuss with the DOJ attorney assigned to the case**

**whether the proposed change will require formal re-approval by DOJ.]**

33. The Attorney General or [his/her] designee has approved the settlement embodied in this Consent Order in accordance with Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4).

**XVIII. EFFECTIVE DATE**

34. The effective date of this Consent Order shall be the date upon which EPA issues written notice to Respondents that the public comment period pursuant to Paragraph 32 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order.

IT IS SO AGREED AND ORDERED:

U.S. Environmental Protection Agency

By: \_\_\_\_\_ [Name] \_\_\_\_\_ [Date]  
Regional Administrator, Region \_\_\_\_

**[NOTE: If the Regional Administrator has redelegated authority to enter into *de minimis* settlements, insert name and title of delegated official.]**

THE UNDERSIGNED RESPONDENT enters into this Consent Order in the matter of [insert U.S. EPA docket number], relating to the [insert site name and location]:

FOR RESPONDENT: \_\_\_\_\_  
[Name]

\_\_\_\_\_  
[Address]

By: \_\_\_\_\_                      \_\_\_\_\_  
[Name]                                      [Date]

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND  
UNITED STATES DEPARTMENT OF JUSTICE REVISED  
MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS* CONTRIBUTOR  
CONSENT DECREE**

**August 2003**

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Department of Justice and U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA or DOJ uses them in a particular case will depend upon the facts of the case.

**REVISED MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS*  
CONTRIBUTOR CONSENT DECREE**

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**REVISED MODEL CERCLA SECTION 122(g)(4) DE MINIMIS  
CONTRIBUTOR CONSENT DECREE**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF [\_\_\_\_\_] ]  
[\_\_\_\_\_] DIVISION<sup>1</sup>

_____ )		
UNITED STATES OF AMERICA, )	)	
Plaintiff, )	)	
v. )	)	Civil Action No. ____
[DEFENDANTS] )	)	Judge _____
Defendants. )	)	
_____ )	)	

**CONSENT DECREE**

**I. BACKGROUND**

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to [insert causes of action and relief sought, e.g., “Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9606 and 9607, seeking injunctive relief regarding the cleanup of the [insert site name] in [insert City, County, State] (“Site”), and recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Site.”]

B. As a result of the release or threatened release of hazardous substances, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake response actions in the future. In performing these response actions, EPA has incurred and will continue to incur response costs at or in connection with the Site. **[NOTE: Insert brief description of response actions undertaken at the site to date by EPA or other persons. Describe briefly any previous settlements for performance of work**

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<sup>1</sup> Follow local rules for caption format.

or recovery of costs.]

C. EPA has determined the following:

1. prompt settlement with each Settling Defendant is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1);

2. the payment to be made by each Settling Defendant under this Consent Decree involves only a minor portion of the response costs at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1), based upon EPA's estimate that the total response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund and by other persons is [insert either "\$ \_\_\_\_" or "between \$ \_\_\_\_ and \$ \_\_\_\_"]; and

**[NOTE: The dollar figure inserted in Subparagraph C(2) above should include the total response costs incurred to date as well as the Agency's projection of the total response costs to be incurred during completion of the remedial action at the site. The response costs total should include costs of the United States and any other person at the site.]**

3. the amount of hazardous substances contributed to the Site by each Settling Defendant and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Settling Defendant are minimal in comparison to other hazardous substances at the Site within the meaning of Section 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A). This is because [insert volume and toxicity criteria used to qualify as a *de minimis* party under this consent decree, *e.g.*: "the amount of hazardous substances contributed to the Site by each Settling Defendant does not exceed [insert either "\_\_\_% of the hazardous substances at the Site," or "\_\_\_ pounds/gallons of materials containing hazardous substances,"] and the hazardous substances contributed by each Settling Defendant to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site." ] **[NOTE: Where practicable, an attachment listing the volume and general nature of the hazardous substances contributed to the site by each settling defendant, to the extent available, may be included as an appendix. The total estimated volume of hazardous substances at the site should be noted on the attachment, if one is used.]**

D. The Settling Defendants do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

E. The United States and Settling Defendants agree that settlement without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action with respect to Settling Defendants.

THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED, and DECREED:

## **II. JURISDICTION**



1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9613(b), and also has personal jurisdiction over Settling Defendants. Settling Defendants consent to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

### **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States and upon Settling Defendants and their [heirs,] successors and assigns. Any change in ownership or corporate or other legal status of a Settling Defendant, including but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

### **IV. STATEMENT OF PURPOSE**

**[NOTE: As drafted, this Statement of Purpose assumes that all settling defendants are making a cash payment, which includes a premium amount, in exchange for a full and final settlement with the United States for all civil liability under CERCLA Sections 106 and 107 with respect to the site as a whole. This Statement of Purpose will need to be amended if the settlement is of narrower scope with respect to some or all settling defendants because, e.g., it relates to only one operable unit, or it includes a reservation of rights for cost overruns. When using this or any other Statement of Purpose, be sure that it is consistent with the Covenant Not to Sue, the Reservations of Rights, and the definition of “matters addressed” in the Contribution Protection provision.]**

3. By entering into this Consent Decree, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows Settling Defendants to make a cash payment, including a premium, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a [substantial] number of potentially responsible parties from further involvement at the Site; and

c. to obtain settlement with Settling Defendants for their fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, and to provide for full and complete contribution protection for Settling Defendants with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

## V. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.
- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.
- e. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.
- f. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.<sup>2</sup>
- g. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.
- h. "Parties" shall mean the United States and the Settling Defendants.
- i. "Response costs" shall mean all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).
- j. "Section" shall mean a portion of this Consent Decree identified by a Roman

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<sup>2</sup> The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at [http://www.epa.gov/budget/finstatement/superfund/int\\_rate.htm](http://www.epa.gov/budget/finstatement/superfund/int_rate.htm).

numeral.

k. “Settling Defendants” shall mean those persons, corporations or other entities listed in Appendix A. **[NOTE: Instead of listing the name of each Settling Defendant in Appendix A and the amount of payment by each Settling Defendant in Appendix C, Regions may choose to create one Appendix to serve both purposes.]**

l. “Site” shall mean the \_\_\_\_\_ Superfund Site, encompassing approximately \_\_\_\_ acres, located at [insert address or description of location] in [insert City, County, State] and [insert either “generally shown on the map attached as Appendix B” or “generally designated by the following property description: \_\_\_\_\_.”]

m. “United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

## **VI. PAYMENT**

5. Within 30 days after entry of this Consent Decree, each Settling Defendant shall pay to the EPA Hazardous Substance Superfund [insert either “the amount set forth below” or “the amount set forth in Appendix C to this Consent Decree”].

6. Each Settling Defendant's payment includes an amount for: a) past response costs incurred at or in connection with the Site; b) projected future response costs to be incurred at or in connection with the Site; and [insert, if a premium is included in the settlement, “c) a premium to cover the risks and uncertainties associated with this settlement, including but not limited to, the risk that total response costs incurred or to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, or by any other person, will exceed the estimated total response costs upon which Settling Defendants' payments are based.”] **[NOTE: If some settling defendants are paying a premium and some are not, Paragraph 6 will need to be redrafted to indicate that there are both premium and non-premium settling defendants.]**

7. Each payment shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” Each check, or a letter accompanying each check, shall identify the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number \_\_\_\_\_, and DOJ Case Number \_\_\_\_\_ and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

The total amount to be paid by Settling Defendants pursuant to Paragraph 5 shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

8. At the time of payment, each Settling Defendant shall send notice that such payment has been made to:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
DJ No. \_\_\_\_\_  
P.O. Box 7611  
Washington, D.C. 20044-7611

[Insert name and address of Regional Attorney and/or Remedial Project Manager and Regional Financial Management Officer]

**[NOTE ON REQUIRING ONE COLLECTIVE PAYMENT: If the settlement involves a large number of settling defendants, it may be appropriate to include alternative instructions under which the settling defendants are to establish a short-term trust or escrow account to receive their individual payments and to make one collective payment to the Superfund at the address noted in Paragraph 7. In such event, the cost of the trust or escrow account may be funded from interest earned by the account or through other appropriate means.]**

**[NOTE ON USE OF SPECIAL ACCOUNT PAYMENTS: Payments made under Paragraph 5 may be deposited in the Hazardous Substance Superfund or in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”). The consent decree should include clear instructions indicating which portion of the payment will be placed in the Hazardous Substance Superfund and which portion will be deposited in a special account. Under Paragraph 7 as written, 100% of the payment will be deposited in a special account. The following language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.<sup>3</sup>**

**[If the entire payment will be deposited in the EPA Hazardous Substance Superfund.]**

**“The total amount to be paid by Settling Defendants pursuant to Paragraph 5 shall be deposited by EPA in the EPA Hazardous Substance Superfund.”**

**[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]**

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<sup>3</sup> When PRPs are performing the response action at the Site, payments to be made by Settling Defendants may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account.

**“Of the total amount to be paid by Settling Defendants pursuant to Paragraph 5, ['\$ \_\_\_\_ ' or ' \_\_\_\_ %' shall be deposited by EPA in the EPA Hazardous Substance Superfund, and ['\$ \_\_\_\_ ' or ' \_\_\_\_ %''] shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”]**

#### **VII. FAILURE TO MAKE PAYMENT**

9. If any Settling Defendant fails to make full payment within the time required by Paragraph 5, that Settling Defendant shall pay Interest on the unpaid balance. In addition, if any Settling Defendant fails to make full payment as required by Paragraph 5, the United States may, in addition to any other available remedies or sanctions, bring an action against that Settling Defendant seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(l) of CERCLA, 42 U.S.C. 9622(l), for failure to make timely payment.

#### **VIII. CERTIFICATION OF SETTLING DEFENDANT**

10. By signing this Consent Decree, each Settling Defendant certifies, individually, that, to the best of its knowledge and belief, it:

a. has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. has and will comply fully with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e) [insert, if applicable, “and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927”].

#### **IX. COVENANT NOT TO SUE BY UNITED STATES**

11. In consideration of the payments that will be made by Settling Defendants under the terms of this Consent Decree, and except as specifically provided in Section X (Reservations of

Rights by United States), the United States<sup>4</sup> covenants not to sue or take administrative action against any of the Settling Defendants pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,]<sup>5</sup> relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for each Settling Defendant upon receipt of that Settling Defendant's payment as required by Section VI of this Consent Decree. With respect to each Settling Defendant, individually, this covenant not to sue is conditioned upon: a) the satisfactory performance by Settling Defendant of all obligations under this Consent Decree; and b) the veracity of the information provided to EPA by Settling Defendant relating to Settling Defendant's involvement with the Site. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

#### **X. RESERVATIONS OF RIGHTS BY UNITED STATES**

12. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 11. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants with respect to:

- a. liability for failure to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;<sup>6</sup> or
- d. liability based upon the ownership or operation of the Site, or upon the transportation, treatment, storage, or disposal, or the arrangement for the transportation,

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<sup>4</sup> If any agency other than EPA or DOJ, such as Coast Guard or Federal Emergency Management Agency, has or may incur response costs at the site, such costs must either be addressed in the settlement or must be excluded from the scope of the covenant not to sue.

<sup>5</sup> Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

<sup>6</sup> The natural resource damages reservation in Paragraph 12(c) must be included unless the Federal Natural Resource Trustee[s] has/have agreed to a covenant not to sue pursuant to Section 122(j)(2) of CERCLA. In accordance with Section 122(j)(1) of CERCLA, where the release or threatened release of any hazardous substance at the site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal Natural Resource Trustee[s] of the negotiations and encourage the Trustee[s] to participate in the negotiations.

treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendants.

13. Notwithstanding any other provision in this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings against any individual Settling Defendant in this action or in a new action or to issue an administrative order to any individual Settling Defendant seeking to compel that Settling Defendant to perform response actions relating to the Site, and/or to reimburse the United States for additional costs of response, if:

a. information is discovered which indicates that such Settling Defendant contributed hazardous substances to the Site in such greater amount or of such greater toxic or other hazardous effects that such Settling Defendant no longer qualifies as a *de minimis* party at the Site because [insert volume and toxicity criteria from Section I, Paragraph C(3), *e.g.*, “Settling Defendant contributed greater than \_\_\_% of the hazardous substances at the Site, or contributed hazardous substances which are significantly more toxic or are of significantly greater hazardous effect than other hazardous substances at the Site”]; or

**[NOTE: The cost overrun reopener in Paragraph 13(b) below should only be included with respect to any settling defendant who is not paying a premium in lieu of this reopener.]**

[b. total response costs incurred or to be incurred at or in connection with the Site by the United States or any other person exceed \$ \_\_\_ [insert total response costs estimate upon which Settling Defendants’ payments are based]. [[NOTE: If some settling defendants are paying a premium in lieu of the cost overrun reopener and some are not, insert: “This Paragraph 13(b) shall not apply to those Settling Defendants identified [insert “in Paragraph \_\_\_” or “in Appendix \_\_\_”] who have elected to pay a premium amount pursuant to Paragraphs 5 and 6.”]

## **XI. COVENANT NOT TO SUE BY SETTLING DEFENDANTS**

14. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site<sup>7</sup> or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

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<sup>7</sup> If the consent decree does not resolve settling defendants' liability for the site as a whole, the scope of Paragraph 14 may be narrowed to conform to the scope of the United States' covenant not to sue.

b. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the State [Commonwealth] of \_\_\_\_\_, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.<sup>8</sup>

Except as provided in Paragraph 16 (Waiver of Claims) and Paragraph 18 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 12 (c) or (d) or Paragraph 13, but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

15. Nothing in this Consent Decree shall be deemed to constitute approval or 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).

16. Settling Defendants agree not to assert any claims or causes of action (including claims for contribution under CERCLA) that they may have for all matters relating to the Site against each other or any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts or has asserted a claim or cause of action relating to the Site against such Settling Defendant.

## **XII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

17. Except as provided in Paragraph 16 (Waiver of Claims), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 16 (Waiver of Claims), the United States and Settling Defendants each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

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<sup>8</sup> The settlement should, consistent with Paragraph 16, release any claims by Settling Defendants against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues, either in this settlement or a future settlement. Settlement of any federal liability will require additional revisions to this document.



18. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Paragraph 11.

19. The Parties agree, and by entering this Consent Decree this Court finds, that each Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. 9613(f)(2) and 9622(g)(5), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are [all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person.]<sup>9</sup>

### **XIII. RETENTION OF JURISDICTION**

20. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

### **XIV. INTEGRATION/APPENDICES**

21. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached and incorporated into this Consent Decree:

“Appendix A” is [the list of Settling Defendants].

“Appendix B” is [the map of the Site].

“Appendix C” is [the payment schedule].

**[NOTE: List any additional appendices.]**

### **XV. PUBLIC COMMENT**

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<sup>9</sup> This definition of “matters addressed” assumes that this consent decree is designed to resolve fully settling defendants' liability at the site. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed.

22. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States shall file with the Court any written comments received and the United States' response thereto. The United States reserves the right to withdraw or withhold its consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper or inadequate. Settling Defendants consent to entry of this Consent Decree without further notice, and the United States reserves the right to oppose an attempt by any person to intervene in this civil action.

**XVI. EFFECTIVE DATE**

23. The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Paragraph 22.

**XVII. SIGNATORIES/SERVICE**

24. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice, or [his/her] delegatee, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such party to this document.

25. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

26. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service including, but not limited to, service of a summons, in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court. The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the [insert site name and location]:

FOR THE UNITED STATES OF AMERICA

Date: \_\_\_\_\_

\_\_\_\_\_  
[Name]  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

\_\_\_\_\_  
[NAME]  
United States Attorney  
[Address]

\_\_\_\_\_  
[NAME]  
Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

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[Name]  
Regional Administrator, Region [ ] U.S.  
Environmental Protection Agency  
[Address]

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[Name]  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
[Address]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the \_\_\_\_\_ Superfund Site.

FOR DEFENDANT [ \_\_\_\_\_ ]

Date: \_\_\_\_\_

\_\_\_\_\_  
[Names and address of Defendant's signatories]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

## **MODEL CERCLA ABILITY TO PAY PROVISIONS FOR USE IN DE MINIMIS SETTLEMENTS WITH ABILITY TO PAY PARTIES ONLY**

This document provides recommended language for settling with ability to pay *de minimis* parties in accordance with Section 122(g)(7) of CERCLA, as amended, 42 U.S.C. § 9622(g)(7). It sets forth the specific changes to be made to the model Section 122(g) *de minimis* contributor consent decree (“CD”) and administrative order on consent (“AOC”) when entering into such a settlement with one or more ability to pay (“ATP”) potentially responsible parties. The changes set forth below may also be tailored for use in any *de minimis* landowner AOC or CD entered into with an ATP party in the event that such settlement calls for a cash payment. If a *de minimis* landowner settlement with an ATP party calls for the United States to be paid a percentage of the proceeds of the future sale of land, appropriate language may be found in the January 1, 2001 “Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree.”

All references in this document are to the language and numbering of the “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree” and the “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent” issued on the same date as this document.

All ability to pay settlements must be based on an ability to pay analysis and require payment of an appropriate ability to pay amount, as outlined in the “General Policy on Superfund Ability to Pay Determinations” (September 30, 1997).

### **1. STATEMENT OF PURPOSE**

**Make the following changes to the Statement of Purpose (Section IV, Paragraph 3, of the CD and Section II, Paragraph 4, of the AOC). Changes are shown in redline/strikeout:**

By entering into this [Consent Decree/Consent Order], the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows [Settling Defendants/ Respondents] to make a cash payment, including a premium, **[if ATP settlers are not paying a premium, delete “including a premium,”]** to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a [substantial] number of potentially responsible parties from further involvement at the Site; ~~and~~

~~c. to obtain settlement with [Settling Defendants/Respondents] for their fair share~~

~~of response costs, incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, to provide for full and complete contribution protection for [Settling Defendants/Respondents] with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).~~

c. to reach an expedited settlement with [Settling Defendants/Respondents] for their fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, reduced in consideration of their demonstration of an inability or a limited ability to pay response costs pursuant to Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and to provide for full and complete contribution protection for [Settling Defendants/Respondents] with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

## **2. DEFINITIONS**

**Add the following definition to the Definitions Section (Section V of the CD and Section III of the AOC):**

“Financial Information” shall mean those financial documents identified in Appendix \_\_\_\_.

## **3. BACKGROUND/STATEMENT OF FACTS AND DETERMINATIONS**

**If the settlement is a CD, add the following paragraph after Paragraph C in the Background Section (Section I) :**

In accordance with Section 122(g)(7) of CERCLA, EPA has reviewed the Financial Information submitted by Settling Defendants to determine whether they have an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such parties to pay response costs and still maintain their basic business operations, including their overall financial condition and demonstrable constraints on their ability to raise revenues. Based upon this Financial Information, EPA has determined that Settling Defendants qualify for a reduction in settlement amount and/or an alternative payment method within the meaning of Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and are able to make the payment(s) specified in Section VI (Payment).

**If the settlement is an AOC, add the first paragraph to the STATEMENT OF FACTS Section (Section IV), and add the second paragraph to the DETERMINATIONS Section (Section V):**

**[ADDITIONAL STATEMENT OF FACT/Insert after Paragraph 11]** The United States has reviewed the Financial Information submitted by Respondents to determine whether they have an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such parties to pay response costs and still maintain their basic business operations, including their overall financial condition and demonstrable

constraints on their ability to raise revenues.

**[ADDITIONAL DETERMINATION/Insert after Subparagraph 13(h)]** Based upon the Financial Information provided by Respondents, the United States has determined that Respondents qualify for a reduction in settlement amount and/or an alternative payment method within the meaning of Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and are able to make the payment(s) specified in Section VII (Payment).

#### **4. PAYMENT**

**If the CD or AOC includes an installment payment plan for the ATP settlor(s), rather than merely a reduced payment amount, delete Section VI, Paragraph 5, of the CD and Section VII, Paragraph 15, of the AOC and substitute a new paragraph outlining the installment payment obligations for the ATP settlor(s). The Regional attorney should discuss all proposed installment payment plans with the Regional Financial Management Office, including the minimum payment that may be processed, the minimum length of time between payments, the maximum length of the payment schedule, and the calculation of interest. When drafting an installment payment plan, keep in mind that Interest is defined in Section V, Paragraph 4(f), of the CD, and Section III, Paragraph 5(f), of the AOC.**

**For a settlement with a single ATP settlor, insert:**

[Settling Defendant/Respondent] shall pay to the EPA Hazardous Substance Superfund the principal sum of \$\_\_\_\_\_, plus an additional sum for Interest as explained below. Payment shall be made in [insert number and, if applicable, insert, *e.g.*, quarterly, yearly] installments. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from the [date of entry of this Consent Decree] [effective date of this Consent Order]. The first payment of \$\_\_\_\_\_ shall be due within 30 days of [entry of this Consent Decree] [the effective date of this Consent Order]. Subsequent payments of \$\_\_\_\_\_ shall be due on [insert due dates for all subsequent payments or, *e.g.*, "January 1 of each year thereafter until all payments have been made."] [Settling Defendant/ Respondent] may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

**For a settlement with multiple ATP settlors, insert a separate paragraph for each settlor as shown above, or if ATP settlors are too numerous (or if otherwise preferred), create a separate Appendix for the ATP payment plans and insert the reduced language that follows into the Payment provision:**

[Settling Defendants/Respondents] shall make payments to the EPA Hazardous Substance Superfund in the amounts and by the dates set forth in Appendix \_\_. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from the [date of entry of this Consent Decree] [effective date of this Consent Order]. [Settling Defendants/



Respondents] may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

## **5. FAILURE TO MAKE PAYMENT**

**Modify the Failure to Make Payment provision (Section VII, Paragraph 9, of the CD and Section VIII, Paragraph 19, of the AOC) as follows:**

If any [Settling Defendant/Respondent] fails to make full payment within the time required by Paragraph [5 of the CD/15 of the AOC], that [Settling Defendant/Respondent] shall pay Interest on the unpaid balance. **If any [Settling Defendant/Respondent] fails to make any payment under Paragraph \_\_ [reference ATP installment plan paragraph] by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure, and Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.** In addition, if any [Settling Defendant/Respondent] fails to make full payment within the time required by Paragraph [5 of the CD/15 of the AOC], the United States may, in addition to any other available remedies or sanctions, bring an action against that [Settling Defendant/Respondent] seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(l) of CERCLA, 42 U.S.C. 9622(l), for failure to make timely payment.

## **6. CERTIFICATION**

**Add the following additional paragraph to the end of the Certification provision (Section VIII, Paragraph 10, of the CD and Section IX, Paragraph 20, of the AOC):**

Each [Settling Defendant/Respondent] further certifies individually that it has submitted Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time [Settling Defendant/Respondent] executes this [Consent Decree/Consent Order].

## **7. COVENANT NOT TO SUE BY UNITED STATES**

**Delete the Covenant Not to Sue by United States provision (Section IX, Paragraph 11 of the CD and Section X, Paragraph 21 of the AOC) and substitute the following:**

In consideration of the payments that will be made by [Settling Defendants/Respondents] under the terms of this [Consent Decree/Consent Order], and except as specifically provided in Section [X of the CD/XI of the AOC] (Reservations of Rights by United States), the United States covenants not to sue or take administrative action against any of the [Settling Defendants/ Respondents] pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607[, and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973], relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for

each [Settling Defendant/Respondent] upon receipt of that [Settling Defendant's/Respondent's] first payment as required by Section [VI of the CD/VII of the AOC] (Payment). With respect to [Settling Defendants/Respondents] individually, this covenant not to sue is conditioned upon: a) the satisfactory performance by [Settling Defendant/Respondent] of all obligations under this [Consent Decree/Consent Order], including but not limited to, payment of all amounts due under Section [Section VI of CD/VII of AOC] (Payment); and b) the veracity of the information provided to EPA by [Settling Defendant/Respondent] relating to [Settling Defendant's/Respondent's] involvement with the Site. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by each [Settling Defendant/Respondent]. If the Financial Information submitted by any [Settling Defendant/Respondent] is subsequently determined by EPA to be false or, in any material respect, inaccurate, that [Settling Defendant/Respondent] shall forfeit all payments made pursuant to this [Consent Decree/Consent Order] and this covenant not to sue and the contribution protection in Paragraph [19 of the CD/29 of the AOC] shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from [Settling Defendant's/Respondent's] false or materially inaccurate information. This covenant not to sue extends only to [Settling Defendants/ Respondents] and does not extend to any other person.

## **8. RESERVATIONS OF RIGHTS BY UNITED STATES**

**First, add the following paragraph to the end of the Reservations of Rights by United States provision (Section X of the CD and Section XI of the AOC):**

Notwithstanding any other provision of this [Consent Decree/Consent Order], the United States reserves, and this [Consent Decree/Consent Order] is without prejudice to, the right to reinstitute or reopen proceedings against any individual [Settling Defendant/Respondent] in this action or in a new action, or to commence a new action seeking relief other than as provided in this [Consent Decree/Consent Order], if the Financial Information provided by any such [Settling Defendant/Respondent], or the financial certification made by any such [Settling Defendant/Respondent] in Section [VIII of the CD/IX of the AOC – reference whole section so that both Certification paragraphs are included] is false or, in an material respect, inaccurate.

**Second, please note that the cost overrun reopener (in Paragraph 13(b) of the CD and 23(b) of the AOC) may be excluded for ATP settlors even if they are unable to pay a premium in the percentage required, or by the due date required, of the non-ATP settlors, if the inability to pay the premium is supported by the ATP analysis.**

## **9. INTEGRATION/APPENDICES**

**In the Integration/Appendices provision (Section XIV, Paragraph 21, of the CD and Section XV, Paragraph 31, of the AOC), include references to all additional appendices used, which may include:**

- a. the list of financial documents submitted to EPA by each [Settling Defendant/Respondent];
- b. the payment schedules for the [Settling Defendants/Respondents].

**10. DISCLAIMER**

This model language and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA and DOJ uses them in a particular case will depend upon the facts of the case.

## **MODEL CERCLA ABILITY TO PAY PROVISIONS FOR USE IN DE MINIMIS SETTLEMENTS WITH ABILITY TO PAY AND NON-ABILITY TO PAY PARTIES**

This document provides recommended language for settling with ability to pay *de minimis* parties in accordance with Section 122(g)(7) of CERCLA, as amended, 42 U.S.C. § 9622(g)(7). It sets forth the specific changes to be made to the model Section 122(g) *de minimis* contributor consent decree (“CD”) and administrative order on consent (“AOC”) when entering into such a settlement with both ability to pay (“ATP”) and non-ATP potentially responsible parties. The changes set forth below may also be tailored for use in any *de minimis* landowner AOC or CD entered into with an ATP party in the event that such settlement calls for a cash payment. If a *de minimis* landowner settlement with an ATP party calls for the United States to be paid a percentage of the proceeds of the future sale of land, appropriate language may be found in the January 1, 2001 “Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree.”

All references in this document are to the language and numbering of the “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree” and the “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent” issued on the same date as this document.

All ability to pay settlements must be based on an ability to pay analysis and require payment of an appropriate ability to pay amount, as outlined in the “General Policy on Superfund Ability to Pay Determinations” (September 30, 1997).

### **1. STATEMENT OF PURPOSE**

**Make the following changes to the Statement of Purpose (Section IV, Paragraph 3, of the CD and Section II, Paragraph 4, of the AOC). Changes are shown in redline/strikeout:**

By entering into this [Consent Decree/Consent Order], the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows [Settling Defendants/ Respondents] to make a cash payment, including a premium, [if ATP settlers are not paying a premium, delete “including a premium,” and insert “which, except for Settling ATP Defendants/ATP Respondents, includes a premium,”] to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a [substantial] number of potentially responsible parties from further involvement at the Site; ~~and~~

c. to obtain settlement with [Settling Defendants/Respondents] **who are not [Settling ATP Defendants/ATP Respondents]** for their fair share of response costs, incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, and to provide for full and complete contribution protection for [Settling Defendants/Respondents] with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5); **and**

d. **to reach an expedited settlement with [Settling ATP Defendants/ATP Respondents] for their fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, reduced in consideration of their demonstration of an inability or a limited ability to pay response costs pursuant to Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and to provide for full and complete contribution protection for [Settling ATP Defendants/ATP Respondents] with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).**

## **2. DEFINITIONS**

**Add the following two definitions to the Definitions Section (Section V of the CD and Section III of the AOC):**

“Financial Information” shall mean those financial documents identified in Appendix \_\_\_\_.

“[Settling ATP Defendants/ATP Respondents]” are those [Settling Defendants/Respondents] [insert names or “identified in Appendix \_\_\_\_”] who have submitted Financial Information demonstrating an inability or a limited ability to pay response costs and, as such, have qualified for a reduced settlement amount and/or an alternative payment method as provided in Section [VI of CD/VII of AOC] (Payment).

[Please note that the defined term “Settling Defendants/Respondents” includes both the ATP settlers and the non-ATP settlers.]

## **3. BACKGROUND/STATEMENT OF FACTS AND DETERMINATIONS**

**If the settlement is a CD, add the following paragraph after Paragraph C in the Background Section (Section I) :**

In accordance with Section 122(g)(7) of CERCLA, EPA has reviewed the Financial Information submitted by Settling ATP Defendants to determine whether they have an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such parties to pay response costs and still maintain their basic business operations, including their overall financial condition and demonstrable constraints on their ability to raise revenues. Based upon this Financial Information, EPA has determined that Settling ATP Defendants qualify for a reduction in settlement amount and/or an alternative payment method

within the meaning of Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and are able to make the payment(s) specified in Section VI (Payment).

**If the settlement is an AOC, add the first paragraph to the STATEMENT OF FACTS Section (Section IV), and add the second paragraph to the DETERMINATIONS Section (Section V):**

**[ADDITIONAL STATEMENT OF FACT/Insert after Paragraph 11]** The United States has reviewed the Financial Information submitted by ATP Respondents to determine whether they have an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such parties to pay response costs and still maintain their basic business operations, including their overall financial condition and demonstrable constraints on their ability to raise revenues.

**[ADDITIONAL DETERMINATION/Insert after Subparagraph 13(h)]** Based upon the Financial Information provided by ATP Respondents, the United States has determined that ATP Respondents qualify for a reduction in settlement amount and/or an alternative payment method within the meaning of Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and are able to make the payment(s) specified in Section VII (Payment).

#### **4. PAYMENT**

**If the CD or AOC includes an installment payment plan for the ATP settlor(s), rather than merely a reduced payment amount, modify the Payment Section (Section VI of the CD and Section VII of the AOC as follows).**

**First, if the settlement includes both ATP and non-ATP settling parties, modify Paragraph 5 of the CD and Paragraph 15 of the AOC to exclude the ATP settlor(s) from the lump sum payment obligation by adding the following redlined language:**

Within 30 days of [entry of this Consent Decree] [the effective date of this Consent Order], each [Settling Defendant/Respondent] **who is not a [Settling ATP Defendant/ATP Respondent]** shall pay to the EPA Hazardous Substance Superfund [insert either “the amount set forth below” or “the amount set forth in Appendix C to this Consent [Decree/Order”].

**Second, insert a new paragraph immediately following the above language outlining the installment payment obligations for the ATP settlors. The Regional attorney should discuss all proposed installment payment plans with the Regional Financial Management Office, including the minimum payment that may be processed, the minimum length of time between payments, the maximum length of the payment schedule, and the calculation of interest. When drafting an installment payment plan, keep in mind that Interest is defined in Section V, Paragraph 4(f), of the CD, and Section III, Paragraph 5(f), of the AOC.**

**For a settlement with a single ATP settlor, insert:**

[Settling ATP Defendant/ATP Respondent] shall pay to the EPA Hazardous Substance Superfund the principal sum of \$\_\_\_\_\_, plus an additional sum for Interest as explained below. Payment shall be made in [insert number and, if applicable, insert, *e.g.*, quarterly, yearly] installments. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from the [date of entry of this Consent Decree] [effective date of this Consent Order]. The first payment of \$\_\_\_\_\_ shall be due within 30 days of [entry of this Consent Decree] [the effective date of this Consent Order]. Subsequent payments of \$\_\_\_\_\_ shall be due on [insert due dates for all subsequent payments or, *e.g.*, "January 1 of each year thereafter until all payments have been made."] [Settling ATP Defendant/ATP Respondent] may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

**For a settlement with multiple ATP settlors, insert a separate paragraph for each settlor as shown above, or if ATP settlors are too numerous (or if otherwise preferred), create a separate Appendix for the ATP payment plans and insert the reduced language that follows into the Payment provision:**

[Settling ATP Defendants/ATP Respondents] shall make payments to the EPA Hazardous Substance Superfund in the amounts and by the dates set forth in Appendix \_\_. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from the [date of entry of this Consent Decree] [effective date of this Consent Order]. [Settling ATP Defendants/ATP Respondents] may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

**5. FAILURE TO MAKE PAYMENT****Modify the Failure to Make Payment provision (Section VII, Paragraph 9, of the CD and Section VIII, Paragraph 19, of the AOC) by adding the following redlined language:**

If any [Settling Defendant/Respondent] **who is not a [Settling ATP Defendant/ATP Respondent]** fails to make full payment within the time required by Paragraph [5 of the CD/15 of the AOC], that [Settling Defendant/Respondent] shall pay Interest on the unpaid balance. **If any [Settling ATP Defendant/ATP Respondent] fails to make any payment under Paragraph \_\_ [reference ATP installment plan paragraph] by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure, and Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.** In addition, if any [Settling Defendant/Respondent] fails to make full payment within the time required by Paragraph [5 of the CD/15 of the AOC], the United States may, in addition to any other available remedies or sanctions, bring an action against that [Settling

Defendant/Respondent] seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(l) of CERCLA, 42 U.S.C. 9622(l), for failure to make timely payment.

## **6. CERTIFICATION**

**Add the following additional paragraph to the end of the Certification provision (Section VIII, Paragraph 10, of the CD and Section IX, Paragraph 20, of the AOC):**

Each [Settling ATP Defendant/ATP Respondent] further certifies individually that it has submitted Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time [Settling ATP Defendant/ATP Respondent] executes this [Consent Decree/Consent Order].

## **7. COVENANT NOT TO SUE BY UNITED STATES**

**Make the following changes to the Covenant Not to Sue by United States provision (Section IX, Paragraph 11, of the CD and Section X, Paragraph 21, of the AOC):**

In consideration of the payments that will be made by [Settling Defendants/Respondents] under the terms of this [Consent Decree/Consent Order], and except as specifically provided in Section [X of the CD/XI of the AOC] (Reservations of Rights by United States), the United States covenants not to sue or take administrative action against any of the [Settling Defendants/ Respondents] pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607[, and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973], relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect: **a) for each [Settling Defendant/Respondent] who is not a [Settling ATP Defendant/ATP Respondent], upon receipt of that [Settling Defendant's/Respondent's] payment as required by Section [VI of the CD/VII of the AOC] (Payment) of this [Consent Decree/Consent Order]; and b) for each [Settling ATP Defendant/ATP Respondent], upon receipt of that [Settling ATP Defendant's/ATP Respondent's] first payment as required by Section [VI of the CD/VII of the AOC] (Payment) of this [Consent Decree/Consent Order].** With respect to [Settling Defendants/Respondents] individually, this covenant not to sue is conditioned upon: a) the satisfactory performance by **each [Settling Defendant/Respondent] of all obligations under this [Consent Decree/Consent Order], including but not limited to, payment of all amounts due under Section [Section VI of CD/VII of AOC] (Payment);** and b) the veracity of the information provided to EPA by [Settling Defendant/Respondent] relating to [Settling Defendant's/Respondent's] involvement with the Site. **With respect to [Settling ATP Defendants/ATP Respondents] individually, this covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by each [Settling ATP Defendant/ATP Respondent]. If the Financial Information submitted by any [Settling ATP Defendant/ATP Respondent] is subsequently determined by EPA to be false or, in any material respect, inaccurate, that [Settling ATP Defendant/ATP Respondent] shall forfeit all payments made pursuant to this [Consent**



Decree/Consent Order] and this covenant not to sue and the contribution protection in Paragraph [19 of the CD/29 of the AOC] shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from [Settling ATP Defendant's/ATP Respondent's] false or materially inaccurate information. This covenant not to sue extends only to [Settling Defendants/ Respondents] and does not extend to any other person.

## **8. RESERVATIONS OF RIGHTS BY UNITED STATES**

**First, add the following paragraph to the end of the Reservations of Rights by United States provision (Section X of the CD and Section XI of the AOC):**

Notwithstanding any other provision of this [Consent Decree/Consent Order], the United States reserves, and this [Consent Decree/Consent Order] is without prejudice to, the right to reinstitute or reopen proceedings against any individual [Settling ATP Defendant/ATP Respondent] in this action or in a new action, or to commence a new action seeking relief other than as provided in this [Consent Decree/Consent Order], if the Financial Information provided by any such [Settling ATP Defendant/ATP Respondent], or the financial certification made by any such [Settling ATP Defendant/ATP Respondent] in Section [VIII of the CD/IX of the AOC – reference whole section so that both Certification paragraphs are included] is false or, in an material respect, inaccurate.

**Second, please note that the cost overrun reopener (in Paragraph 13(b) of the CD and 23(b) of the AOC) may be excluded for ATP settlors even if they are unable to pay a premium in the percentage required, or by the due date required, of the non-ATP settlors, if the inability to pay the premium is supported by the ATP analysis.**

## **9. INTEGRATION/APPENDICES**

**In the Integration/Appendices provision (Section XIV, Paragraph 21, of the CD and Section XV, Paragraph 31, of the AOC), include references to all additional appendices used, which may include:**

- a. the list of financial documents submitted to EPA by each [Settling ATP Defendant/ATP Respondent];
- b. the list of [Settling ATP Defendants/ATP Respondents]; and
- c. the payment schedules for the [Settling ATP Defendants/ATP Respondents].

## **10. DISCLAIMER**

This model language and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and U.S.

Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA and DOJ uses them in a particular case will depend upon the facts of the case.