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

DEC 22 1998

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Circulation of Corrected Copy of "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority"

FROM: Sandra L. Connors, Director
Regional Support Division
Office of Site Remediation Enforcement

TO: 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
Director, 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
Regional Counsel, Regions II, III, IV, V, VII, IX, and IX
Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Bruce S. Gelber, Principal Deputy Chief, Environmental Enforcement Section, U.S. Department of Justice
Assistant Chiefs, Environmental Enforcement Section, U.S. Department of Justice

Attached to this memorandum is a corrected copy of the September 30, 1998 "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority." The copy distributed to you previously does not contain Subsection II(C) (Scope of Contribution Protection in Administrative Response Cost Agreements), which is a part of the guidance. The five appendices to the guidance are not affected by this error. Please substitute the attached memorandum into the earlier package.

I apologize for this error and regret any inconvenience this may cause you or your staff. If you have any questions, please contact Janice Linett of the Regional Support Division at 202-564-5131 or Tom Mariani of the Environmental Enforcement Section at 202-514-4620.

cc: Office of Regional Counsel CERCLA Branch Chiefs
CERCLA Program Branch Chiefs
Earl Salo, Assistant General Counsel for Superfund
Linda Boornazian, Director, Policy, Planning and Evaluation Division

SEP 30 1998

MEMORANDUM

SUBJECT: Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority

FROM: Barry Breen, Director
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U.S. Environmental Protection Agency

Bruce S. Gelber, Principal Deputy Chief
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Environment and Natural Resources Division
U.S. Department of Justice

TO: 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
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I. PURPOSE OF GUIDANCE AND ATTACHED MODELS

The purpose of this memorandum and its attachments is to provide guidance on administrative response cost settlements entered under Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), and on administrative "cashout" settlements with peripheral parties under Section

122(h)(1) of CERCLA and the authority of the Attorney General. Part I of this memorandum provides an overview of the guidance and explains the context in which the attached model settlements should be used. Part II of this memorandum explains the statutory provision, defines relevant terms, discusses the various types of administrative response cost settlements and the scope of covenants not to sue and reservations of rights in those settlements, provides guidance on amount of payment and use of premiums in future cost settlements, and briefly discusses contribution protection clauses in such settlements. Part III outlines how administrative response cost settlements should be documented by the Regions and, when necessary, reviewed and approved by the Department of Justice ("DOJ" or "the Department") and/or the Office of Enforcement and Compliance Assurance in EPA Headquarters ("OECA"). Part IV explains the public comment requirements for administrative response cost settlements. Finally, Part V addresses enforcement of such settlements. This guidance is not intended to describe the full scope of these settlement authorities. Rather, it is intended to address how EPA and DOJ will use their authorities to foster these types of settlements.

This memorandum includes five appendices. Appendix A is the September 29, 1995 "Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs," published at 60 FR 62446 (Dec. 6, 1995). Appendix B is the "Model CERCLA Section 122(h)(1) Cashout Agreement for Ability to Pay Peripheral Parties." Appendix C is the "Model CERCLA Section 122(h)(1) Agreement for Peripheral Party Settlements Not Based upon Ability to Pay." Appendix D is a "Model Federal Register Notice for CERCLA Section 122(h) Agreements," and Appendix E is a "Model Responsiveness Summary for CERCLA Section 122(h) Agreements."

Section 122(h) is used primarily as a tool for administrative collection of past response costs. Section 122(h) also may be used, sometimes in conjunction with Attorney General authority, for collection of past and projected future costs of response in what is commonly referred to as a "cashout" settlement.[1] Issuance of Section 122(h) "cashout" models, however, does not represent a change in EPA's enforcement policy. EPA's central goal has been and continues to be obtaining performance of site cleanups from potentially responsible parties ("PRPs"). Most Superfund sites have multiple PRPs, and such parties are encouraged by EPA to join together and undertake response action cooperatively pursuant to a judicial consent decree ("CD" or "judicial CD") or, in instances where removal action is involved, an administrative order on consent ("AOC"). "Cashout" settlements are an additional CERCLA settlement tool limited to situations in which EPA believes the settling PRP is not in a position to undertake performance of response action either individually or collectively with other PRPs, but is able to make a cash payment to address past and future response costs at the site.

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[1] A "cashout" settlement is one that includes a cash payment in resolution of liability for both past and future costs. "Cashout" settlements may offer a high level of finality, such as is commonly found in de minimis and de micromis settlements. They also may offer less finality and contain standard reservations of rights, but require the settling party to make an advance payment for response action, rather than taking on the obligation to perform such work.

The guidance on "cashout" settlements included in this memorandum and its appendices is designed for Section 122(h) settlements with parties and sites fitting within the categories described in Part II(B)(3) below. The guidance provided herein is not applicable to other classes of parties or situations. EPA and the Department retain their discretion to decline to enter into an administrative "cashout" settlement notwithstanding that a party or site meets the criteria outlined in Part II(B)(3) below. Finally, the principles outlined in this guidance and its appendices are designed for settlements only; they should not be applied in the context of litigation.

II. SECTION 122(h)(1) SETTLEMENT AUTHORITY

A. Background and Definition of Statutory Terms

Section 122(h)(1) of CERCLA provides as follows:

> The head of any department or agency with authority to undertake a response action under this Act pursuant to the national contingency plan may consider, compromise, and settle a claim under Section 107 for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action. In the case of any facility where the total response costs exceed $500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

This provision authorizes EPA to enter independently, i.e., without Attorney General approval, into administrative settlements of claims[2] for cost reimbursement under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), if two conditions are met: 1) the claim has not been "referred" to DOJ for further action; and 2) the total response costs of the United States for the site do not exceed $500,000, excluding interest. When response costs exceed this amount, EPA may not compromise the claim administratively without the prior written approval of the Attorney General or her designee ("AG").

Section 122(h)(1) settlements are typically memorialized as administrative cost reimbursement agreements rather than as AOCs. The Agency and Department adopted the administrative agreement format in the September 29, 1995 "Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs" (Appendix A), and an agreement format is used in the Appendix B and C models as well. The Regions are encouraged to use an agreement rather than an AOC, unless the settlement calls for performance of removal action as well as payment of costs.

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[2] "Claim" is defined by Section 101(4) of CERCLA, 42 U.S.C. § 9601(4), as "a demand in writing for a sum certain."

To understand the scope of the authority granted EPA by Section 122(h)(1), one must define: 1) when a claim has been "referred" to DOJ; 2) what costs must be included in "total response costs;" and 3) what constitutes a "compromise" of a claim. Each of these concepts is addressed below.

1. Definition of "Referred" Claim

Section 122(h)(1) authorizes administrative settlement of claims that have not been "referred" to DOJ. Once a claim has been "referred" to DOJ or filed, decisions regarding administrative resolution of the claim must be coordinated with DOJ. Referrals that are "pending" at DOJ (referred but not yet filed) may be resolved using Section 122(h) authority if the referral is either withdrawn by the Region or returned by DOJ. In such cases, the administrative settlement should not be signed by the Regional Administrator or his/her delegatee or otherwise made effective until the referral has been formally withdrawn or returned. For claims that have been filed, administrative settlement may be pursued in appropriate cases using Section 122(h) in conjunction with the AG's settlement authority.

2. Definition of "Total Response Costs"

EPA may enter into an administrative settlement under Section 122(h)(1) without AG approval if EPA is able to determine, based on currently available information, that the "total response costs" incurred and to be incurred by the United States at the site will not exceed $500,000. In order to make this determination, site information must be sufficient to support a reasonably accurate future cost projection.

For purposes of determining whether the $500,000 cost ceiling has been exceeded, "total response costs" includes all costs of "response," as defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), incurred and to be incurred in connection with a site by EPA, DOJ, and any other Federal agency or department, as well as costs incurred by another governmental agency, such as a State agency, to the extent it uses Hazardous Substance Superfund money under Section 104(d) of CERCLA, 42 U.S.C. § 9604(d). "Total response costs" includes all costs of investigation, studying, information gathering, planning and implementing response action, administration, enforcement, litigation and indirect costs. "Total response costs" does not include interest, which is specifically excluded by Section 122(h)(1),[3] and does not include damages for injury to natural resources or costs of natural resource assessments. "Total response costs" also does not include costs incurred by parties other than the governmental parties identified above.

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[3] Interest is, however, a recoverable response cost under Section 107 which should be sought in negotiations and considered when determining the appropriate compromise amount.

Prior to entering independently into an administrative settlement, EPA should calculate the "total response costs" of the United States by preparing an itemized cost summary of EPA's past costs at the site, including direct and indirect costs, and by obtaining summaries of response costs from other Federal agencies for the site as well. EPA should also determine, based upon site-specific information sufficient to support a reasonably accurate future cost projection, that the United States will not incur any additional response costs at the site, or that any future costs will not bring the total to over $500,000, excluding interest, but including the costs associated with negotiating any CERCLA settlements at the site.[4]

When Section 122(h) past and/or future oversight cost reimbursement provisions are included in settlements calling for performance of removal action by PRPs, the Region must evaluate whether the total past and future response costs of the United States at the site will exceed $500,000, excluding interest. Costs to be incurred by the PRPs should not be included. If the United States' costs will exceed this amount, and the settlement compromises a claim as explained in Part II(A)(3) below, then the Region must obtain the advance written approval of the AG.

3. Definition of "Compromise"

For purposes of this memorandum, "compromise" means entering into a Section 122(h)(1) administrative agreement with one or more PRPs at a site in which EPA recovers less than 100% of its claim for response costs and waives its right to recover all or part of the remainder of the claim from the settling PRPs. This definition applies whether or not there are viable, non-settling PRPs from whom the government could recover the balance of its claim for response costs, because each PRP, assuming indivisible harm, is jointly and severally liable for the total response costs incurred and to be incurred at the site.

EPA may "compromise" a Section 107 claim in a Section 122(h) agreement without DOJ approval if total response costs of the United States do not exceed the statutory dollar ceiling. EPA may also collect costs (without regard to whether costs exceed $500,000 or not) using Section 122(h) without DOJ approval if the agreement does not "compromise" a claim. Agreements that do not "compromise" a claim fall into two categories.

The first category is agreements under which EPA accepts a partial payment from the settling party and provides the settling party with a mere "receipt" for the amount paid with no assurance that EPA will forgive any unpaid costs. (The "receipt" would take the form of a

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[4] The most likely scenario under which total past and future response costs will not exceed $500,000 is where EPA has performed a removal action at a cost of no greater than $500,000 and does not anticipate that any further response action will be needed for the site. Total costs may also fall below this limit at enforcement-lead, removal-only sites where PRPs have performed the removal and EPA costs are primarily oversight. It is also possible that EPA might perform a remedial investigation and feasibility study ("RI/FS") and select a no action alternative in the record of decision for the site at a total cost of no greater than $500,000.

standard Section 107 covenant not to sue for response costs paid, and the United States' ability to recover all unpaid past and future costs and to invoke Section 106 would be expressly reserved.)[5]

The second category is agreements under which EPA recovers 100% of its costs. In any such agreement, EPA must be certain that it not only recovers 100% of the response costs at issue in the negotiations, but also that it does not compromise the ability of the United States to recover any other costs or assert any other claims against the settling party. If, for example, EPA recovered 100% of its past costs in exchange for releasing the settling party for all or part of its future oversight costs, then this would be a compromise of the future oversight costs. Similarly, if EPA recovered 100% of the principal amount of its past costs, but did not collect the interest accrued on those past costs, then this, too, would be a compromise of the interest. In both of these examples, DOJ approval of the compromise would be required if total site costs of the United States exceed $500,000. An example of a 100% recovery which does not involve a compromise is the standard removal AOC provision requiring payment of 100% of future response or oversight costs upon receipt of a bill in the future. This is not a compromise even if the settling party is given the traditional right to dispute the amount billed.

B. Types of Section 122(h) Agreements and Scope of Covenants Not to Sue and Reservations of Rights in Those Agreements

1. Past Cost Agreements

The most common type of Section 122(h) agreement is an agreement for recovery of past response costs. As shown in the Appendix A model, Section 122(h) past cost compromises normally include a covenant not to sue under Section 107 of CERCLA covering "Past Response Costs" as defined by the agreement.[6] Settlements involving sites where all response action has been completed should be resolved as past cost settlements using this model. Settlements for recovery of pasts costs at sites where work is ongoing should also be resolved in accordance with Appendix A.

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[5] When contemplating use of a "receipt" settlement of this kind, the Region should determine the first potential statute of limitations for the claim and consider whether a tolling agreement or a more complete settlement should be used.

[6] Past cost settlements do not include a Section 106 covenant not to sue covering performance of the work which gave rise to EPA's past costs. Such a covenant is unnecessary because EPA could not possibly seek to have the settling party perform work that has already been performed. Moreover, the United States' practice is to resolve only the cause of action that would be asserted in a complaint if one were filed. On these facts, the United States would bring a Section 107 action for recovery of past costs, not a Section 106 action for performance of a removal action that has already been performed by EPA.

2. Agreements for Discrete Future Response Actions

Section 122(h) may also be used to partially "cash out" a PRP for a discrete future response action, such as a time-critical removal action. Although rare, situations arise in which a PRP is able to fund, but not to perform, a response action, and EPA believes it is in the public interest to "cash out" the PRP for the specific action. In such a case, the PRP normally receives a covenant not to sue under Sections 106 and 107 for the defined future response action (with all other claims reserved), with a premium payment for cost overruns during completion of the specific action and/or a reservation of rights permitting EPA to seek additional costs if the actual costs of the defined action exceed an agreed-upon amount. Agreements of this kind should be issued jointly by EPA, under its Section 122(h) authority, and by the AG, under her general authority to compromise claims of the United States, whenever a Section 106 covenant not to sue is included.[7]

3. Agreements for Broad, Site-Wide "Cashouts" with Peripheral Parties

a. Appropriate Candidates for Peripheral Party "Cashouts"

The most common site-wide "cashout" settlement is the de minimis contributor CD or AOC authorized by Section 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A), under which PRPs who have contributed a minimal amount of hazardous substances (the toxic or other hazardous effects of which are also minimal) each make a relatively small payment to resolve their liability at the site at issue. "Cashouts" with non-de minimis parties are much less common and, as stated in Part I, are reserved for situations in which EPA believes the standard work settlement approach is not feasible or appropriate for particular sites or PRPs.

"Cashouts" with non-de minimis parties may be embodied in a judicial CD or, in certain situations, in an administrative settlement. CDs generally should be used when: 1) the United States has initiated CERCLA cost recovery litigation at the site (see Part II(A)(1) above); 2) a PRP has commenced contribution litigation at the site; or 3) the settling "cashout" party has requested a judicially-approved settlement. CDs must be used when the "cashout" settlement is included within a larger settlement with another party or parties who will be performing remedial action.[8] An administrative settlement is an option in all other situations, but is best suited to the particular situations described below.

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[7] The grant of settlement authority to EPA under Section 122(h) does not disturb the Department's general settlement authority. See United States v. Hercules, 961 F.2nd 798, 799 (8th Cir. 1992) (Section 122 is not a clear and unambiguous limitation on the Attorney General's authority to compromise and settle litigation involving the United States).

[8] Section 122(d)(1) requires agreements for performance of remedial action to be embodied in judicial CDs.

EPA and DOJ believe that an administrative settlement is often an appropriate vehicle for "cashing out" parties who for equitable, financial or other reasons are not the primary focus of Superfund enforcement activities at the site. These parties are "peripheral players" in the Superfund process who should be afforded early settlements so as to reduce their transaction costs, provide them with a high degree of repose, and create greater fairness in the Superfund program. Settlements with PRPs of this type tend to produce smaller recoveries, and an administrative settlement process is often advantageous because it is usually quicker and less resource-intensive than settlement by judicial CD.

There are two categories of peripheral parties for whom administrative resolution is particularly appropriate. The first category is PRPs with a documented inability to pay. A model for this type of settlement is provided in Appendix B.[9] The second category is PRPs for whom unresolved CERCLA liability would be an extreme burden and for whom equitable or public interest considerations argue in favor of speedy settlement, such as surviving spouses or beneficiaries of PRPs who did not themselves take part in the activity which gave rise to the CERCLA liability. Consistent with the policy favoring PRP-lead cleanups, EPA and DOJ may identify additional peripheral party candidates for whom an administrative "cashout" is appropriate on a case-by-case basis. A model for administrative "cashout" settlements not based upon an inability to pay is included as Appendix C.

b. Covenant Not to Sue, Reservations of Rights, and Amount of Payment in Site-Wide "Cashout" Agreements

When an administrative agreement is used to accomplish a broad, site-wide "cashout" with a non-ability to pay peripheral party who meets the criteria for settlement described in Part II(B)(3)(a) above, the party should pay an appropriate amount of the total past and projected costs at the site given the facts and circumstances of the case.[10] The settling party will, upon full payment, generally receive an immediately effective covenant not to sue for the site under Sections 106 and 107 of CERCLA.[11] The agreement will, as a matter of policy, be issued jointly

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[9] CERCLA ability to pay settlements with parties other than municipalities and not-for-profit entities should be developed in accordance with the September 30, 1997 "General Policy on Superfund Ability to Pay Determinations," which outlines the ability to pay process, the ability to pay analysis, and the acceptable terms for an ability to pay settlement.

[10] The amount recovered in an administrative "cashout" settlement should be sufficient to justify EPA's determination under Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), that the settlement is "not inappropriate, improper, or inadequate." A settlement will generally meet this standard if it satisfies the standard of review imposed by the courts for CERCLA consent decrees, that the settlement be "fair, reasonable, and consistent with the goals of CERCLA." United States v. Charter International Oil Co., 83 F.3rd 510, 520 (1st Cir. 1996); United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990).

[11] At multiple operable unit sites where the final record of decision has not been issued, there may be rare

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by EPA, under its Section 122(h) authority, and by the AG, under her general authority to compromise claims of the United States.[12]

The covenant not to sue in such an agreement must be limited in all cases by certain standard reservations of rights (e.g., criminal liability and natural resource damages[13]) as shown in the Appendix B and C models. Although Section 122(f)(6) of CERCLA, 42 U.S.C. § 9622(f)(6), the statutory unknown conditions reopener,[14] is not legally mandated for settlements in which the settling parties are paying money rather than performing response action, as a matter of policy EPA and DOJ secure this same reopener in agreements with "cashout" parties in order to protect the public by ensuring that all appropriate PRPs will be available if, based upon unknown conditions or new information, EPA finds that additional response action is needed at a site. To simplify settlements with peripheral parties, EPA and DOJ will afford peripheral parties the option of satisfying their liability for potential, additional response actions at the site through a premium payment or a future billing provision that addresses:

1) cost overruns during performance of the remedy selected in the record of decision ("ROD") or amendments thereto (to the extent total costs exceed EPA's estimate); and

2) costs of further response actions resulting from an EPA determination that the remedy selected in the ROD or amendments thereto is not protective of human health and the environment (i.e., remedy failure),

or through a cost overrun reopener that addresses the settling party's liability for payment of additional costs (or performance of response action) if total response costs at or in connection

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situations in which it will be appropriate to grant a narrower covenant not to sue despite EPA's and DOJ's preference for granting broad, site-wide covenants to peripheral parties. When the Region believes the facts of a case justify narrowing the standard site-wide covenant to one covering only past costs and one or more designated operable units, it should discuss the situation with OECA.

[12] Although peripheral party cashout settlements generally will be issued jointly by EPA and DOJ under these terms, there may be unusual instances in which it will be appropriate for EPA to enter independently into a narrower Section 122(h) cashout settlement with a covenant not to sue only under Section 107. Where a Region believes a narrower settlement of this kind may be appropriate, it should contact OECA to discuss the specific situation, including the proposed scope of the covenant not to sue and contribution protection. Where total response costs of the United States at the site exceed $500,000, the Region should also contact DOJ because DOJ prior written approval ultimately will be required.

[13] A natural resource damages covenant may be given in a settlement jointly issued by EPA and DOJ when the relevant Federal trustee and DOJ on behalf of the trustee have approved the covenant in writing.

[14] The unknown conditions reopener is stated in full in Section XXI (Covenants Not to Sue by Plaintiff[s]), Paragraphs 81-83, of the "Final Revised Model CERCLA RD/RA Consent Decree" issued on July 13, 1995, and published at 60 FR 38817 (July 28, 1995).

with the site exceed the estimate upon which the peripheral party's payment is based.[15] EPA's and the Department's preference is to achieve finality in "cashout" agreements with all types of peripheral parties by using a premium or future billing mechanism rather than a cost overrun reopener, whenever sufficient information about the site exists upon which to develop a premium or reach agreement on a future payment plan.

Many of the administrative "cashout" settlements with peripheral parties (as described in Part II(B)(3)(a) above) will not require either a premium or a cost overrun reopener based upon extraordinary circumstances-type factors as enumerated in Section 122(f)(6)(B) of CERCLA, 42 U.S.C. § 9622(f)(6)(B). Settlements with parties who have a documented inability to pay generally will not require a premium or a cost overrun reopener based upon the "ability to pay" factor. "Extreme burden" parties may not require a premium or a cost overrun reopener based upon "inequities or aggravating factors" (other factors may be applicable as well). "Cashout" settlements with other peripheral parties may also not require a premium or a cost overrun reopener, as determined on a case-by-case basis, based upon any applicable Section 122(f)(6)(B) factor(s).

At sites where the response action is or will be performed by PRPs pursuant to a CD or, for removal action, an AOC, the Agency and the Department may structure "cashout" agreements to provide for funds to be used by the performing PRPs, either through distribution from an EPA special account or through payment directly to a PRP-managed trust fund or escrow account established pursuant to a settlement with the United States.

C. Scope of Contribution Protection in Administrative Response Cost Agreements

Sections 122(h)(4) and 113(f)(2) of CERCLA, 42 U.S.C. 9622(h)(4) and 9613(f)(2), provide that PRPs who resolve their liability to the United States through an administrative cost agreement shall not be liable for contribution regarding "matters addressed" in the agreement. Each of the attached models contains a sample contribution protection provision. Further guidance on drafting contribution protection clauses in various types of settlements, including past cost and "cashout" settlements, is available in "Defining 'Matters Addressed' in CERCLA Settlements" (memorandum from Bruce Gelber and Sandra Connors, March 14, 1997).[16]

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[15] On a case-by-case basis, EPA and DOJ may consider using an unknown conditions reopener in a peripheral party settlement. Because use of this reopener presents case-specific drafting issues and represents a departure from the recommended approach for peripheral party settlements, Regions should contact OECA when considering this alternative.

[16] Note that one court has addressed the issue of contribution protection in a Section 122(h) settlement. Waste Management of Pennsylvania, Inc. V. City of York, 910 F. Supp. 1035 (M.D. Penn. 1995) (Section 122(h) AOC cannot provide settling party with contribution protection for response costs incurred by third party because 122(h) authorizes compromises of United States government costs, not third-party costs). In light of this decision, with which the United States does not agree, when EPA intends to afford contribution protection for PRP-incurred

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In exchange for receiving broad contribution protection, peripheral parties who are "cashing out" pursuant to this guidance and its attached models will be required to waive their right to seek contribution from other persons relating to the site. This waiver of claims may be narrowed, if appropriate, based on the facts of the case, but should always include the standard waiver of claims against de micromis parties.

III. DOCUMENTATION FOR ADMINISTRATIVE RESPONSE COST SETTLEMENTS

A. Documentation for Settlements Not Requiring DOJ Approval or Headquarters Review

EPA Regional Administrators ("RAs") or their delegatees are authorized to enter independently into Section 122(h)(1) administrative settlements: 1) that do not compromise a claim, regardless of the amount of costs incurred or to be incurred at the site; or 2) that compromise a claim for past response costs at sites at which the total past and projected response costs of the United States do not exceed $500,000, excluding interest. Settlements within these two categories are fully delegated and do not require DOJ approval or Headquarters review of any kind. These settlements should, however, be documented by the Region as explained immediately below and should be based upon the model past cost recovery agreement provided in Appendix A.

1. Documenting Settlements that Do Not Compromise a Claim

For settlements that do not compromise a claim, the Region should prepare a short memorandum, signed by the RA or his/her delegatee, that explains (or attaches existing documents that explain) why the settling party is a PRP under Section 107(a) of CERCLA and how the Region determined that the settlement does not compromise a claim. If the 100% collection is included within a removal AOC, the Region may include this information in the memorandum recommending approval of the AOC. The memorandum should be supported by an itemized summary of EPA's past response costs at the site (along with cost summaries from other Federal agencies, if any), which includes direct and indirect costs and pre-judgment interest. The Region should also notify the appropriate Regional financial management official of the settlement and enter the settlement into CERCLIS and any other tracking systems used to monitor cost recovery compliance.

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[16](...continued)
response costs, it may be prudent to use a vehicle other than an administrative settlement based solely on 122(h) authority, such as a consent decree or an administrative settlement based upon EPA's 122(h) authority and the AG's general settlement authority.

2. Documenting Settlements that Compromise a Past Costs Claim at Sites at which Total Costs Do Not Exceed $500,000

For settlements that compromise a claim for past response costs at sites at which past and projected response costs of the United States do not exceed $500,000 (the second fully delegated category), the Region should prepare a settlement evaluation in the form of a memorandum, signed by the RA, or his/her delegatee, that explains (or attaches existing documents that explain) 1) why the settling party is a PRP under Section 107(a) of CERCLA, and 2) the justification for the compromise using the settlement criteria normally included in the Ten Point Settlement Analysis (see Part IV of the Interim CERCLA Settlement Policy, 50 FR 5034, Feb. 5, 1985) to the extent the criteria are applicable to the settlement. The length and level of detail of the settlement evaluation may vary depending upon the amount of the claim and the degree to which the claim is compromised. The memorandum should also include documentation to support the Region's determination that past and projected response costs do not exceed $500,000, excluding interest. This would include an itemized summary of EPA's past response costs at the site, which includes direct and indirect costs and pre-judgment interest, as well as an itemized projection, to the extent possible, of EPA's future response costs at the site. It would also include itemized summaries and future projections from other Federal agencies performing CERCLA response action at the site. If the past cost compromise is included within a removal AOC, the Region may include all of the above information in the memorandum recommending approval of the AOC.

The Region should also: 1) comply with the public comment requirements of Section 122(i) (see Part IV below); and 2) notify the appropriate Regional financial management official of the settlement and enter the settlement into CERCLIS and any other tracking systems used to monitor cost recovery compliance.

B. Compromises Requiring OECA and/or DOJ Review

1. Summary of Categories Requiring DOJ and/or OECA Review

The Agency will obtain the prior written approval of DOJ when 1) a Section 122(h) settlement compromises a Section 107 claim and concerns a site at which total response costs of the United States exceed $500,000, excluding interest, or 2) an administrative agreement is issued jointly under EPA's Section 122(h) authority and the authority of the AG.

The OECA role varies depending upon the nature of the settlement as explained in the September 30, 1998 "Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas." As noted in that memorandum, consultation with the Director of the Regional Support Division, Office of Site Remediation Enforcement ("Director/RSD"), is required when a Region is contemplating a compromise of future costs in a Section 122(h) settlement. Prior written approval ("PWA") of OECA also may be required if the proposed Section 122(h) settlement triggers any of the PWA categories included in that memorandum.

2. **Approval Process**

When DOJ approval and/or OECA review (consultation or PWA) is required, as explained in Part III(B)(1) above, the Region should prepare and send to DOJ (and/or OECA, as appropriate) a CERCLA Administrative Response Cost Settlement Summary and a draft agreement (as explained in Part III(B)(3) below) thirty days prior to submitting the draft agreement to the PRP.[17] The report should be signed by a Branch Chief in the Region's legal and program offices (consistent with the Region's organizational structure) and directed to the appropriate Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division ("EES"), if DOJ review is required, and to the appropriate OECA official as outlined above, if OECA review is required.

As soon as possible, but no later than thirty days after receipt of a complete Settlement Summary, DOJ and OECA will identify a contact person for the case and provide to the Region written comments, or comments by telephone later confirmed in writing. (DOJ and OECA will also make every reasonable effort to assign the settlement to a staff person and to contact the Region for initial discussions within fourteen days.) Written comments may be sent by confidential EPA/DOJ electronic mail or may be in the form of marginal notes on the Settlement Summary and draft agreement. DOJ and OECA must clearly identify and explain any concerns, and all such issues should be resolved prior to releasing the draft to the PRP. Unless DOJ and the Region agree otherwise, the initial round of DOJ comments (those provided within thirty days) will be from an Assistant Section Chief or Senior Attorney of EES. Comments from OECA will be from the Director/RSD, if OECA PWA is required, and from the Branch Chief or Senior Counsel level, if consultation is required.

During the negotiations, the Region will inform DOJ and OECA of new information relating to the site and of changes from the pre-approved draft, particularly if changes relate to key terms, such as bottom-line settlement figures, covenants not to sue, reservations of rights, or contribution protection. Successive drafts should be provided to DOJ and OECA if requested. DOJ and OECA will make every reasonable effort to respond to proposed changes within seven days.

After reaching settlement in principle, the Region will submit a final draft agreement to DOJ and OECA for review. DOJ and OECA will respond with any final comments within fifteen days. After addressing the comments, if any, the Region may circulate the agreement to the PRP for signature. As soon as the Region has an agreement which has been signed by the PRP and a Ten Point Settlement Analysis ready to submit to the RA, the agreement and Ten

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[17] Whenever a Federal PRP is involved at the site, the Region should notify the Environmental Defense Section at DOJ using standard procedures.

Point should be sent to DOJ and OECA so that they may begin their approval processes. After the PRP and the Region[18] have signed, the Region should send the final agreement with a cover letter and Ten-Point Settlement Analysis to DOJ and to OECA, if OECA approved the agreement on condition of resubmission of the final document for concurrence. DOJ and OECA will make every reasonable effort to give a final decision on the proposed agreement within, respectively, thirty and twenty-one days, after receiving the final package. If the agreement is based on the AG's general settlement authority, DOJ will sign the agreement itself rather than concurring by letter; OECA will use a concurrence memorandum in all cases. After receiving DOJ's concurrence (and OECA's if needed), the Region should obtain public comment as provided in Part IV below.

3. Content of the CERCLA Administrative Response Cost Settlement Summary

The CERCLA Administrative Response Cost Settlement Summary should include a brief summary and analysis of the case, including the items listed below. If the required information is contained in an existing document, the Region may attach and reference the document:

a. Background Information on Site and PRPs

i. Site History: Name, location, and NPL status of the site, and a brief description of the hazards posed by the site and the enforcement history of the site, including a brief summary of response actions undertaken and to be undertaken at the site and any settlements or administrative orders issued or anticipated at the site.

ii. Cost Information: Total response costs of the United States incurred to date (including EPA, DOJ and any other Federal agencies who have/are expected to undertake response action at the site); an estimate, to the extent possible, of future response costs of the United States, if any further response action is anticipated; and an estimate of total response costs incurred by PRPs. Costs should be broken down by broad category, e.g., removal costs, RI/FS costs, oversight costs, or may be supported by itemized cost summaries.

iii. PRP Identification: Names of all PRPs at the site, including Federal PRPs, and, for those PRPs to whom the Region intends to submit an offer, the basis of each PRP's liability.

iv. Statute of Limitations: Date of the first and any subsequent potential statute of limitations.

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[18] The delegated Regional official may sign the agreement prior to submitting it to DOJ and/or OECA for approval or may wait until after the public comment period to sign, consistent with Regional practice.

v. OECA Role: If OECA consultation or PWA is or may be required, an explanation of the basis for the requirement. If the Region expects that OECA PWA will be needed, the request for such approval may be made here.

b. Proposed Settlement Strategy

i. Recovery of Costs: Proposed settlement strategy setting forth the objectives of the settlement as to recovery of past and/or projected costs and premiums, if any. If the Region recommends structuring the settlement so that a payment is to be made to a PRP performing work at the site, this payment should be described as well.

ii. Response Action (if any): Brief description of the work, if the cost recovery compromise is included within a removal AOC.

iii. Deviations from Settlement Model: Identification of and explanation for any significant deviations from the relevant model.

iv. Settlement Justification:

1. Peripheral Party "Cashout" Settlements: a) an explanation why the party qualifies as a peripheral party under the criteria outlined in Section II(B)(3)(a) above (ability to pay, extreme burden, or other); b) the justification for the proposed settlement amount; and c) whether the Region believes that the party exhibits extraordinary circumstances-type factors, and, if not, a proposed premium payment amount and an explanation of how it was derived.

2. Ability to Pay Settlements: the proposed settlement amount, timing of payment(s), and an explanation of how the amount was derived. If the proposal deviates from the September 30, 1997 "General Policy on Superfund Ability to Pay Determinations" (if applicable), an explanation of why such deviation is necessary.

3. Other Settlements: A justification for the proposed settlement amount.

c. Name and Telephone Number of Regional Legal and Technical Contact Person

d. Draft Agreement

IV. PUBLIC COMMENT REQUIREMENTS FOR SECTION 122(h)(1) AGREEMENTS

Section 122(i)(1) of CERCLA requires that notice of all proposed claim compromises under Section 122(h)(1), regardless of the size of EPA's claim or the amount recovered, be published in the Federal Register. After an agreement has been signed by the settling PRPs and

the Region and approved, if necessary, by DOJ and/or OECA, the Region should publish notice of the proposed agreement in the Federal Register.[19] Such notice should identify the facility concerned and the parties to the proposed agreement, see Section 122(i)(1), and should afford persons who are not parties to the agreement a thirty-day period in which to file written comments relating to the agreement, see Section 122(i)(2). A Model Federal Register Notice for CERCLA Section 122(h) Agreements is attached as Appendix D. The model includes instructions for formatting and publishing the notice. When the notice is published, a copy of the proposed agreement should be made available to the public, and the Region may wish to make available a fact sheet providing publicly-available background information about the site and the agreement.

Section 122(i)(3) of CERCLA requires the Agency to consider any comments received and permits the Agency to modify or withdraw its consent to the agreement "if such comments disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate." The Region should consider all comments filed and prepare a responsiveness summary in which EPA summarizes and replies to the comments and sets forth whether it believes any comment received triggers the statutory standard quoted above. A Model Responsiveness Summary for CERCLA Section 122(h) Agreements is attached as Appendix E.[20]

The Region should discuss all significant comments with OSRE/RSD, if OECA consultation or PWA was required for the agreement, and with DOJ, if DOJ approval was required for the agreement. DOJ should also be given an opportunity to review the draft responsiveness summary if it had an approval role on the settlement. If the Region believes that substantive modification of or withdrawal from the agreement is appropriate based upon public comment, then the Region should seek written concurrence from OSRE (if OSRE PWA was originally required) and/or written approval from DOJ (if DOJ approval was originally required). If the agreement is based on AG authority and DOJ believes that substantive modification of or withdrawal from the agreement is appropriate based on public comment, then DOJ should seek concurrence from the Region and OSRE, if OSRE had an approval role on the settlement. If modifications are made, the agreement should be redrafted and resigned by all parties.

A copy of the final responsiveness summary should be sent to the settling parties and to all commenters. A copy of the proposed settlement, fact sheet (if any), Federal Register notice, all filed comments, and the responsiveness summary should be placed in the information repository at or near the site and in the public docket located in the Regional office.

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[19] The Region may elect to have the RA, or his/her delegatee, sign the agreement after the public comment period, rather than before as stated here. The Regions should not, however, commence the public comment period prior to obtaining DOJ and/or OECA approval, if such approvals are necessary.

[20] The model responsiveness summary includes a reminder to the settling parties of the due date for payment.

V. ENFORCEMENT OF SECTION 122(h)(1) AGREEMENTS

If a settling party fails to make any payment required by a Section 122(h)(1) agreement, or otherwise fails to comply with any term or condition of the agreement, the Region should issue a demand for payment, including interest and stipulated penalties, pursuant to the terms of the agreement. The Region is encouraged, but is not required, to discuss the terms of the demand with the DOJ attorney prior to issuance because the Department will be asked to enforce the demand judicially if payment is not received. (If a DOJ attorney has not been assigned, the Region should contact the Senior Lawyer or the Assistant Chief.)

Section 122(h)(3) of CERCLA expressly authorizes EPA to refer claims for non-payment of monies due under a Section 122(h)(1) agreement to the Attorney General for civil action "to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of the settlement." Section 122(h)(3) further provides that "[i]n such an action, the terms of the settlement shall not be subject to [judicial] review." If non-compliance continues despite a demand for payment, the Region should refer the case to DOJ for collection. Typically, the referral would seek payment of the amount agreed upon in the settlement, plus accrued interest, accrued stipulated penalties, and enforcement costs, including attorney's fees. The United States could also seek collection of the full underlying claim pursuant to Section 122(h)(3), but this would involve proving all elements of the Section 107 cause of action. We do not advise that civil penalties under Sections 109 and 122(*i*) of CERCLA, 42 U.S.C. §§ 9609 and 9622(*i*), be sought for violation of a 122(h) agreement. Section 122(h) contains its own enforcement mechanism in 122(h)(3), and stipulated penalties should be built into the agreements as provided in the attached models.

VI. CONTACT PERSONS

Questions about the guidance and attached models may be directed to Janice Linett of EPA's Regional Support Division, Office of Site Remediation Enforcement, at 202-564-5131, or to Tom Mariani of DOJ's Environmental Enforcement Section, Environment and Natural Resources Division, at 202-514-4620.

VII. DISCLAIMER

This memorandum and any internal office procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They do not constitute rulemaking by the Agency or Department and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency or Department may take action at variance with this memorandum or its internal implementing procedures.

Attachments (5)

APPENDIX A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
MODEL CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS

[Note: This document was issued in final on September 29, 1995, and was published at 60 FR 62446 on December 6, 1995. Because the font has been changed, the page numbers are different in this printing.]

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

MODEL CERCLA SECTION 122(h)(1) AGREEMENT FOR RECOVERY OF PAST RESPONSE COSTS

TABLE OF CONTENTS

I.	JURISDICTION	3
II	BACKGROUND	3
III.	PARTIES BOUND	4
IV.	DEFINITIONS	4
V.	REIMBURSEMENT OF RESPONSE COSTS	6
VI.	FAILURE TO COMPLY WITH AGREEMENT	6
VII.	COVENANT NOT TO SUE BY EPA	7
II	RESERVATIONS OF RIGHTS BY EPA	8
IX.	COVENANT NOT TO SUE BY SETTLING PARTIES	8
X.	EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION	9
XI.	RETENTION OF RECORDS	10
XII.	NOTICES AND SUBMISSIONS	11
XIII.	INTEGRATION[/APPENDICES]	11
XIV.	PUBLIC COMMENT	12
__.	[ATTORNEY GENERAL APPROVAL]	12
XV.	EFFECTIVE DATE	12

MODEL CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS

IN THE MATTER OF:	)	AGREEMENT FOR RECOVERY
	)	OF PAST RESPONSE COSTS
[Site Name]	)	
[City, County, State]	)	U.S. EPA Region ____
	)	CERCLA Docket No. ____
[Names of Settling Parties]	)	
SETTLING PARTIES	)	PROCEEDING UNDER SECTION
	)	122(h)(1) OF CERCLA
	)	42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 6922(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D. **[NOTE: Also reference any internal Regional redelegations of authority under 14-14-D.]**

2. This Agreement is made and entered into by EPA and the [insert names or reference attached appendix listing settling parties] ("Settling Parties"). Each Settling Party consents to and will not contest EPA's jurisdiction to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the [insert Site name] ("Site") located in [insert Site location]. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. **[NOTE: A brief description of the release or threatened release and of the response actions undertaken may be included.]**

5. In performing this response action, EPA incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred at or in connection with the Site.

[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, excluding interest, insert the following paragraph and renumber all subsequent paragraphs.]

[__. The Regional Administrator of EPA Region ____, or his/her delegatee, has determined that 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.]

7. EPA and Settling Parties desire to resolve Settling Parties' alleged civil liability for Past Response Costs without litigation and without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

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

IV. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, 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. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, 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 of the United States.

e. "Interest" shall mean interest at the current rate specified for interest on investments of the 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).[1]

f. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and the Settling Parties.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through [insert date], plus accrued Interest on all such costs through such date.[2]

i. "Section" shall mean a portion of this Agreement identified by a roman numeral.

j. "Settling Parties" shall mean [insert names of settling parties, or if very numerous, "those parties identified in Appendix __."]

k. "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 "depicted more

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[1] The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Superfund Accounting Branch, at (202) 260-6465.

[2] If the past costs settlement is partial, it may be necessary to continue the definition with a brief description of the past response action(s) which are being paid for or compromised, such as: ". . . for the response action described in the Record of Decision for the First Operable Unit at the Site dated _____" or "for the removal action described in the action memorandum for the Site dated _____." Exercise care in describing the activities covered, as this description may affect the scope of the covenant not to sue and contribution protection. For clarity, the description of the past response action may need to indicate which response actions are not included within the definition of Past Response Costs. Check to be sure that the date used in the definition of Past Response Costs does not inadvertently include costs that are outside the scope of the definition. In some cases, it may be useful to attach a standard, Regionally-prepared cost summary listing the costs that are within the scope of the definition. This may be done: 1) to be sure that no confusion arises as to which costs are being compromised; or 2) to indicate which outstanding past cost claims are being resolved through the settlement, i.e., to indicate that the recovered costs are to be applied to particular portions of the debt.

clearly on the map included in Appendix __" or "designated by the following property description: _____."]

1. "United States" shall mean the United States of America, including it departments, agencies and instrumentalities.

V. REIMBURSEMENT OF RESPONSE COSTS

10. Within 30 days of the effective date of this Agreement, the Settling Parties shall pay to the EPA Hazardous Substance Superfund $_____ in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from the date set forth in the definition of Past Response Costs through the date of payment.[3]

11. Payments shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." Each check shall reference the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number _____ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], and the EPA docket number for this action, and shall be sent to:

EPA Superfund
[Insert Regional Superfund lockbox number and address]

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

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

VI. FAILURE TO COMPLY WITH AGREEMENT

13. In the event that any payment required by Paragraph 10 is not made when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. If any amounts due to EPA under Paragraph 10 are not paid by the required date, Settling Parties shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 13, $____ per violation per day that such payment is late.

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[3] As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, settling parties may agree to place the amount agreed upon into an interest-bearing escrow account to be disbursed to EPA upon the effective date of the Agreement. If this method is used, accrued interest from the Past Response Costs date through the date the escrow account is created should be calculated and included in the escrow deposit.

[[[NOTE: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, "If Settling Parties do not comply with [reference sections containing non-payment obligations], Settling Parties shall pay to EPA, as a stipulated penalty, $____ per violation per day of such noncompliance." Escalating penalty payment schedules may be used for payment or non-payment obligations.]]

15. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall made in accordance with Paragraphs 11 and 12.

16. Penalties shall accrue as provided above regardless of whether EPA has notified the Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after performance is due, or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

17. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties' failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with any term or condition of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

18. The obligations of Settling Parties to pay amounts owed to EPA under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

19. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement.

VII. COVENANT NOT TO SUE BY EPA

20. Except as specifically provided in Paragraph 21 (Reservations of Rights by EPA), EPA covenants not to sue Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Reimbursement of Response Costs) and Section VI, Paragraphs 13 (Interest on Late Payments) and 14 (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not

to sue extends only to Settling Parties and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

21. The covenant not to sue by EPA set forth in Paragraph 20 does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all other matters, including but not limited to:

a. liability for failure of Settling Parties to meet a requirement of this Agreement;

b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;

c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

d. criminal liability; and

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

22. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

IX. COVENANT NOT TO SUE BY SETTLING PARTIES

23. Settling Parties agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, 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 claims arising out of the response actions at the Site for which the Past Response Costs were incurred; 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 Past Response Costs.[4]

24. Nothing in this Agreement 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).

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

25. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA and Settling Parties 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.

26. EPA and Settling Parties agree that the actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability by any Settling Party. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

27. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

28. Each Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA

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[4] The settlement should, wherever possible, release or resolve any claims by settling parties 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 in the settlement. Settlement of any federal liability will require additional revisions to this document, and model language will be provided separately. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

29. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Parties 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 case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Paragraph 20.

XI. RETENTION OF RECORDS

30. Until __ years after the effective date of this Agreement, each Settling Party shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

31. After the conclusion of the document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Settling Parties shall deliver any such records or documents to EPA. Settling Parties may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records and documents that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor.

32. By signing this Agreement, each Settling Party certifies individually that, to the best of its knowledge and belief, it has:

a. 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. 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 the Settling Party regarding the Site; and

c. fully complied 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."]

XII. NOTICES AND SUBMISSIONS

33. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

As to EPA:

[Insert names and addresses of EPA Regional contacts, usually the ORC attorney and the RPM or Project Coordinator]

As to Settling Parties:

[Insert name of one person who will serve as the contact for all Settling Parties]

XIII. INTEGRATION[/APPENDICES]

34. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. [The following appendices are attached to and incorporated into this Agreement: "Appendix A is _____; etc."]

XIV. PUBLIC COMMENT

35. This Agreement 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, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

__. 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, and the agreement compromises a claim (i.e., recovers less than 100% of past costs, including accrued interest). If Attorney General approval is required, 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 agreement 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 agreement 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. If this section is used, renumber the Effective Date section and paragraph.]

[[__. The Attorney General or [his/her] designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).]]

XV. EFFECTIVE DATE

36. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 35 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: _____ _____
[Name] [Date]
Regional Administrator, Region __

[NOTE: If the Regional Administrator has redelegated authority to enter into Section 122(h) settlements, insert name and title of delegated official.]

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

FOR SETTLING PARTY: _____
[Name]

_____
[Address]

By: _____ _____
[Name] [Date]

APPENDIX B 

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES DEPARTMENT OF JUSTICE MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT FOR ABILITY TO PAY PERIPHERAL PARTIES

This model 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 do not constitute rulemaking by the Agency or Department and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency or Department may take action at variance with this model or its internal implementing procedures.

MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT FOR ABILITY TO PAY PERIPHERAL PARTIES

TABLE OF CONTENTS

I.	JURISDICTION	3
II.	BACKGROUND	3
III.	PARTIES BOUND	4
IV.	STATEMENT OF PURPOSE	4
V.	DEFINITIONS	5
VI.	REIMBURSEMENT OF RESPONSE COSTS	7
VII.	FAILURE TO COMPLY WITH AGREEMENT	10
__.	[RELEASE OF NOTICE OF FEDERAL LIEN]	12
VIII.	COVENANT NOT TO SUE BY EPA	12
IX.	RESERVATIONS OF RIGHTS BY EPA	13
X.	COVENANT NOT TO SUE BY SETTLING PARTY	14
XI.	EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION	14
__.	[SITE ACCESS]	15
__.	[ACCESS TO INFORMATION]	16
XII.	RETENTION OF RECORDS	17
II	CERTIFICATION	17
XIV.	NOTICES AND SUBMISSIONS	18
XV.	INTEGRATION/APPENDICES	18
XVI.	PUBLIC COMMENT	19
IV	EFFECTIVE DATE	19

MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT FOR ABILITY TO PAY PERIPHERAL PARTIES

IN THE MATTER OF:	)	AGREEMENT
	)	
Site Name]	)	U.S. EPA Region ___
[City, County, State]	)	CERCLA Docket No. ___
	)	
[Name of Settling Party]	)	PROCEEDING UNDER SECTION
SETTLING PARTY	)	122(h)(1) OF CERCLA
	)	42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D [insert reference to any internal Regional redelegation]. This Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to [insert as appropriate, "the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice ("DOJ")" or "the [Chief/Deputy Chief] of the Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice ("DOJ")].

2. This Agreement is made and entered into by EPA and [insert name] ("Settling Party"). Settling Party consents to and will not contest the authority of the United States to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the [insert Site name] ("Site") located in [insert Site location]. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and [will/may] undertake additional response actions in the future. **[NOTE: A brief description of the release or threatened release and of the response actions taken or to be taken by EPA or potentially responsible parties may be included.]**

5. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.

6. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred and to be incurred at the Site.

7. EPA has reviewed the Financial Information submitted by Settling Party to determine whether Settling Party is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, EPA has determined that Settling Party is able to pay the amounts specified in Section VI without undue financial hardship.

8. EPA and Settling Party recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Party in accordance with this Agreement do not constitute an admission of any liability. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Section.

III. PARTIES BOUND

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

IV. STATEMENT OF PURPOSE

10. By entering into this Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Party to make a cash payment to resolve its alleged civil liability under Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a)[, and Section 7003 of RCRA, 42 U.S.C. § 6973], for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, subject to the reservations of rights included in Section IX (Reservations of Rights by EPA).[1]

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[1] This statement of purpose assumes that Settling Party's liability for the Site as a whole is being resolved through the agreement, subject to the reservations of rights included in Section IX. If the intended scope of the agreement is narrower, this statement of purpose must be redrafted.

V. DEFINITIONS

11. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

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

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, 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 of the United States.

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.] [__. "Fair Market Value" shall, except in the event of a foreclosure or transfer by deed or other assignment in lieu of foreclosure, mean the price at which the Property would change hands between a willing buyer and a willing seller under actual market conditions, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. In the event of a transfer by foreclosure, "Fair Market Value" shall mean the amount obtained at the foreclosure sale. In the event of a transfer by a deed or other assignment in lieu of foreclosure, "Fair Market Value" shall mean the balance of Settling Party's mortgage on the Property at the time of the transfer.]

e. "Financial Information" shall mean those financial documents identified in Appendix ___.

f. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).[2]

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[2] The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Program and Cost Accounting Branch, at (202) 260-4972.

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.] [__. "Net Sales Proceeds" shall mean the total value of all consideration for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) less i) the balance of Settling Party's mortgage on the Property, ii) closing costs limited to those reasonably incurred and actually paid by Settling Party associated with the Transfer of the Property, and iii) federal and state taxes owed on the proceeds. Settling Party shall provide EPA and the State with documentation sufficient to show the total value of all consideration for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) at the time of each Transfer, the amount of the proceeds of the Transfer, and the amounts corresponding to items i) through iii) above. This documentation shall include, but not be limited to, the report of an appraisal paid for by Settling Party, performed by an appraiser satisfactory to the Parties, upon appraisal assumptions satisfactory to the Parties. The documentation must also include, either as part of the report or separately, 1) a tax statement showing the assessed valuation of the Property for each of the three years immediately preceding the Transfer, and 2) a schedule showing all outstanding indebtedness on the Property.]

g. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

h. "Parties" shall mean EPA and Settling Party.

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used. Modify definition if property to be sold is not part of the Site.] [__. "Property" shall means that portion of the Site that is owned by Settling Party as of [insert date]. The Property is located at [insert address] in [insert City, County, State], and is designated by the following property description: _____."]

i. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, et seq. (also known as the Resource Conservation and Recovery Act).

j. "Section" shall mean a portion of this Agreement identified by a roman numeral.

k. "Settling Party" shall mean [insert name].

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 included in Appendix __" or "generally designated by the following property description: _____."]

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.] [__. "Transfer" shall mean each sale, assignment,

transfer or exchange by Settling Party (or its heirs) of the Property, or any portion thereof, or of the entity which owns the Property, where title to the Property or any portion or interest thereof (or the entity owning the Property) i) is transferred and Fair Market Value is received in consideration, or ii) is transferred involuntarily by operation of law, including foreclosure and its equivalents following default on the indebtedness secured, in whole or in part, by the Property, including, but not limited to, a deed or other assignment in lieu of foreclosure. A Transfer does not include a transfer pursuant to an inheritance or a bequest.]

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

VI. REIMBURSEMENT OF RESPONSE COSTS

12. **[NOTE: Use this first Paragraph 12 when the Agreement requires one lump-sum payment.]** Within 30 days of the effective date of this Agreement as defined by Paragraph 36, Settling Party shall pay to the EPA Hazardous Substance Superfund $_____ [, plus an additional sum for Interest on that amount calculated from [insert date, e.g., date of last cost summary] through the date of payment]. **[NOTE: The following language should be used if the payment amount is above $10,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Settling Party by EPA Region __, and shall be accompanied by a statement identifying the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____ , and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below $10,000.]** Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____ , and the EPA docket number for this action, and shall be sent to:

EPA Superfund
[Insert Regional Superfund lockbox number and address]

At the time of payment, Settling Party shall send notice that such payment has been made to:

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

12. **[NOTE: This alternative Paragraph 12 may be used when the Agreement includes an installment payment plan. 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 a defined term.]** Settling Party 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 [insert date, e.g., date of last cost summary]. The first payment of $_____ shall be due within 30 days of the effective date of this Agreement as defined by Paragraph 36. 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 Party may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly. **[NOTE: The following language should be used if the payment amount is above $10,000.]** Payment shall be made by Electronic Funds Transfer ("EFT") in accordance with instructions to be provided to Settling Party by EPA Region __, and shall be accompanied by a statement identifying the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below $10,000.]** Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund
[Insert Regional Superfund lockbox number and address]

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

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

13. **[NOTE ON DIRECTING PAYMENTS TO HAZARDOUS SUBSTANCE SUPERFUND AND/OR TO SITE-SPECIFIC SPECIAL ACCOUNT: Payments made under either Paragraph 12 may be placed in the Hazardous Substance Superfund to offset the United States' past response costs at the Site or may be placed in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a "reimbursable account") to be retained and used for response actions at or in connection with the Site.[3] The agreement should include clear instructions indicating which portion of the payment is to be placed in the Hazardous Substance Superfund to defray the United States' past costs and which portion of the payment is to be retained in a special account. Sample instructions for the three possible payment options (past only, special account only, combined past/special account) for inclusion at the end of the first Paragraph 12 follow. The payment instructions stated in Paragraph 12**

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[3] When PRPs are performing the response action at the Site, payments for future response costs 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.

are correct for all three options. For installment payment plans, the sample language provided below will need to be amended to provide instructions for each installment.]

Sample language where entire payment is to be applied towards past costs:

"The total amount to be paid pursuant to Paragraph 12 shall be deposited in the EPA Hazardous Substance Superfund as reimbursement for response costs incurred and paid at or in connection with the Site by the EPA Hazardous Substance Superfund."

Sample language where entire payment is to be applied toward a special account:

"The total amount to be paid pursuant to Paragraph 12 shall be deposited in the [Insert 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. Any balance remaining in the [Insert Site Name] Special Account shall be transferred by EPA to the EPA Hazardous Substance Superfund."

Sample language for combined past/special account payments:

"Of the total amount to be paid pursuant to Paragraph 12, [`$____' or `___%'] shall be deposited in the EPA Hazardous Substance Superfund as reimbursement for response costs incurred and paid at or in connection with the Site as of [insert date] by the EPA Hazardous Substance Superfund, and [`$____' or `___%' or `the remainder'] shall be deposited in the [Insert 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. Any balance remaining in the [Insert Site Name] Special Account shall be transferred by EPA to the EPA Hazardous Substance Superfund."

[NOTE: If Settling Party has a claim relating to the Site for insurance coverage or contractual indemnification, the negotiating team should consider whether a provision should be included under which EPA receives a percentage or a fixed amount of any potential recovery.]

[NOTE: The following optional paragraph may be included when appropriate if the Settling Party is the Site owner. It may also be used when appropriate for recovery of proceeds from the sale of real property which is not part of the Site. [__. Settling Party agrees that it will not sell, assign, transfer or exchange the Property except by means of a Transfer. **[NOTE: If Settling Party is obligated to attempt to sell the Property as a condition of this Agreement insert, "Settling Party shall use its best efforts to Transfer the Property within ___ [days/months] of the effective date of this Agreement."]]**

[a. In addition to the payment[s] made under Paragraph 12 [insert reference to any other payment provisions], Settling Party shall pay to EPA ___% [if potential recovery may exceed total amount sought from Settling Party insert "or $___, whichever is lesser,"] of the Net Sales Proceeds of the

Transfer of the Property. Payment shall be made within __ [e.g., 15] days of the effective date of the Transfer of the Property in the manner described in Paragraphs 12 and 13 above. **[NOTE: Alternative payment instructions may be needed here if Paragraph 12 or 13 includes an installment payment plan or inapplicable special account directions.]** At least 30 days prior to any such Transfer, Settling Party shall notify EPA of the proposed transfer, which notice shall include a description of the property to be sold, the identity of the purchaser, the terms of the transfer, the consideration to be paid, and a copy of the Transfer agreement. The proposed sales price must be at least equal to the Fair Market Value of the Property based upon an appraisal obtained within 1 year of the Transfer. Settling Party shall notify EPA of the completion of the Transfer within 10 days of the date of closing and shall include with such notification a copy of the closing binder, including final executed documentation for the conveyance and a work sheet setting forth the Net Sales Proceeds and the amount payable to EPA.

b. In the event of a Transfer of the Property or any portion thereof, Settling Party shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement, except if EPA and Settling Party modify this Agreement in writing.] **[NOTE: If Settling Party is not obligated to attempt to sell the Property as a condition of this Agreement insert, "Nothing in this Paragraph obligates Settling Party to Transfer the Property or an portion thereof."]]**

[NOTE: If financial circumstances exist which would justify inclusion of additional conditional payments, such as payment of a percentage of future earnings or a percentage of the proceeds of a future sale of assets other than the Site or other real property, such a provision may be included here.]

VII. FAILURE TO COMPLY WITH AGREEMENT

14. **[NOTE: Use this Paragraph 14 when the Agreement requires one lump-sum payment.]** If Settling Party fails to make any payment under Paragraph 12 [also reference any other payment provisions] by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. **[NOTE: Use this alternative Paragraph 14 when the Agreement includes an installment payment plan.]** If Settling Party fails to make any payment under Paragraph 12 by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received. [If other payment provisions are included insert, "If Settling Party fails to make any payment under Paragraph(s) __ by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.]

15. If any amounts due under Paragraph 12 [also reference any other payment provisions] are not paid by the required date, Settling Party shall be in violation of this Agreement and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 14, $____ per violation per day that such payment is late.

[NOTE: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, "If Settling Party does not comply with [reference sections containing non-payment obligations], Settling Party shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, $____ per violation per day of such noncompliance." Escalating penalty payment schedules may be used for payment or non-payment obligations.]

16. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments under this Paragraph shall be identified as "stipulated penalties" and shall made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund
[Insert Regional Superfund lockbox number and address]

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

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

17. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations are included, insert "or performance"] is due [if non-payment obligations are included, insert ", or the day a violation occurs,"] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, "or the final day of correction of the noncompliance or completion of the activity."] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

18. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Party's failure to comply with the requirements of this Agreement, if Settling Party fails or refuses to comply with any term or condition of this Agreement, it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

19. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Settling Party's payment of stipulated penalties shall not excuse Settling Party from payment as required by Paragraph 12 [also reference any other payment provisions] or from performance of any other requirements of this Agreement.

[NOTE: Insert the following provision if the optional provision following Paragraph 12 on sale of the Site or other real property is used, or if otherwise appropriate.]

[____. **RELEASE OF NOTICE OF FEDERAL LIEN**]

[__. Within __ days after EPA receives [if installment payment plan insert "the final"] payment required by Paragraph 12 of this Agreement [or "within ___ days prior to closing" if Agreement provides for sale of site property], EPA shall file a Release of Notice of Federal Lien in the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____. The Release of Notice of Federal Lien shall release the Notice of Federal Lien filed on [insert date and file number of lien] and shall not release any other lien or encumbrance which may exist upon the Property.]

VIII. COVENANT NOT TO SUE BY EPA

20. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Party pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,][4] with regard to the Site.[5] With respect to present and future liability, this covenant shall take effect upon receipt by EPA of [for lump sum payments, insert "all amounts required by Section VI (Reimbursement of Response Costs) and any amount due under Section VII (Failure to Comply with Agreement)."] [for installment payment plans, insert "the first payment required by Section VI, Paragraph 12 (Reimbursement of Response Costs)."] This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Agreement[.] [for installment payment plans, continue sentence with ", including but not limited to, payment of all amounts due under Section VI (Reimbursement of Response Costs) and any amount due under Section VII (Failure to Comply with Agreement)."] This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by Settling Party. If the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Party shall forfeit all payments made pursuant to this Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose EPA's right to pursue any other causes of action arising from Settling Party's false or materially inaccurate information. This covenant not to sue extends only to Settling Party and does not extend to any other person.

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[4] 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.

[5] This covenant assumes that EPA has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed.

IX. RESERVATIONS OF RIGHTS BY EPA

21. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 20. Notwithstanding any other provision of this Agreement, EPA specifically reserves all rights against Settling Party with respect to:

a. liability for failure of Settling Party to meet a requirement of this Agreement;

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;

[NOTE: The precise terms of subparagraph (d) may need to be changed if Settling Party has a continuing relationship with the Site.]

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 Agreement by Settling Party; and

e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

22. Notwithstanding any other provision of this Agreement, EPA reserves, and this Agreement is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Agreement, if the Financial Information provided by Settling Party, or the financial certification made by Settling Party in Paragraph 32(d), is false or, in an material respect, inaccurate.

23. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

X. COVENANT NOT TO SUE BY SETTLING PARTY

24. Settling Party agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site[6] or this Agreement, including but not limited to:

---

[6] If the Agreement does not cover the Site as a whole, the reference to

(continued...)

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, 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 claims arising out of response activities at the Site; 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.

25. Nothing in this Agreement 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).

26. Settling Party agrees not to assert any claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any other person [, except as provided in Paragraph __.]

[NOTE: Use bracketed language if Agreement includes a provision (following Paragraph 13) on future recovery from insurance or contractual indemnification claims concerning the Site.]

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

27. Except as provided in Paragraph 26, nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it 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. The Parties agree that Settling Party is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement 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.[7]

(...continued)
"the Site" here and in subparagraph 24(b) should be narrowed to conform to the intended scope of the Agreement.

[7] This definition of "matters addressed" assumes that this Agreement is designed to resolve fully Settling Party's liability at the Site pursuant to Sections 106 and 107(a) of CERCLA. If the intended resolution of liability is narrower in scope, then the definition of "matters addressed" will need to be narrowed.

29. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Party 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 addressed in this Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in Paragraph 20.

[__. SITE ACCESS][8]

[__. Commencing upon the effective date of this Agreement, Settling Party agrees to provide EPA and its representatives and contractors access at all reasonable times to the Site and to any other property owned or controlled by Settling Party to which access is determined by EPA to be required for the implementation of this Agreement, or for the purpose of conducting any response activity related to the Site, including but not limited to:

a. Monitoring, investigation, removal, remedial or other activities at the Site;

b. Verifying any data or information submitted to EPA;

c. Conducting investigations relating to contamination at or near the Site;

d. Obtaining samples;

e. Assessing the need for, planning, or implementing response actions at or near the Site; [and]

[f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Party or its agents, consistent with Section ___ (Access to Information).]

__. Notwithstanding any provision of this Agreement, EPA retain[s] all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.]

[__. ACCESS TO INFORMATION[9]]

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[8] Include this section if 1) access to the Site may be needed and 2) the Site owner is Settling Party or Settling Party controls access to the Site or to any other property to which access is needed.

[9] Include this section only if Settling Party has been or will be involved in cleanup efforts at the Site or if Settling Party may possess information that may assist the Agency in its cleanup or enforcement efforts.

(continued...)

[__. Settling Party shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site [if needed, include "or to the implementation of this Agreement"], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

__. Confidential Business Information and Privileged Documents.

a. Settling Party may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Documents or information determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Party that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Party.

b. Settling Party may assert that certain documents or information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege in lieu of providing documents or information, it shall provide EPA with the following: 1) the title of the document or information; 2) the date of the document or information; 3) the name and title of the author of the document or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document or information; and 6) the privilege asserted. However, no documents or information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document or information, the document or information shall be provided to EPA in redacted form to mask the privileged portion only. Settling Party shall retain all documents or information that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor.

__. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]

XII. RETENTION OF RECORDS

(...continued)

30. Until __ years after the effective date of this Agreement, Settling Party shall preserve and retain all documents or information now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions or response costs at or in connection with the Site, regardless of any corporate retention policy to the contrary.

31. After the conclusion of the document retention period in the preceding paragraph, Settling Party shall notify EPA at least 90 days prior to the destruction of any such documents or information, and, upon request by EPA, Settling Party shall deliver any such documents or information to EPA. Settling Party may assert that certain documents or information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege, it shall provide EPA with the following: 1) the title of the document or information; 2) the date of the document or information; 3) the name and title of the author of the document or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document or information; and 6) the privilege asserted. However, no documents or information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document or information, the document or information shall be provided to EPA in redacted form to mask the privileged portion only. Settling Party shall retain all documents or information that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor.

XIII. CERTIFICATION

32. By signing this Agreement, Settling Party certifies that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents or information, and has fully and accurately disclosed to EPA, all documents or 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. not altered, mutilated, discarded, destroyed or otherwise disposed of any documents or 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;

c. fully complied with any and all EPA requests for documents or information regarding the Site and Settling Party's financial circumstances 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 RCRA, 42 U.S.C. § 6927;"] and

d. submitted to EPA 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 Party executes this Agreement.

XIV. NOTICES AND SUBMISSIONS

33. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Party.

As to EPA:

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

As to Settling Party:

[Insert name and address]

XV. INTEGRATION/APPENDICES

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

Appendix A is a list of the financial documents submitted to EPA by Settling Party; etc.

XVI. PUBLIC COMMENT

35. This Agreement 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, the United States may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

XVII. EFFECTIVE DATE

36. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 35 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Agreement.

IT IS SO AGREED:

[Settling Party]

By: _____ _____
[Name] [Date]

U.S. Environmental Protection Agency

By: _____ _____
[Name] [Date]

U.S. Department of Justice

By: _____ _____
[Name] [Date]

Assistant Attorney General
Environment and Natural Resources Division
P.O. Box 7611
U.S. Department of Justice
Washington, D.C. 20530

By: _____ _____
[Name] [Date]

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

APPENDIX C

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES DEPARTMENT OF JUSTICE MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT FOR PERIPHERAL PARTY SETTLEMENTS NOT BASED UPON ABILITY TO PAY

This model 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 do not constitute rulemaking by the Agency or Department and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency or Department may take action at variance with this model or its internal implementing procedures.

MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT FOR PERIPHERAL PARTY SETTLEMENTS NOT BASED UPON ABILITY TO PAY

TABLE OF CONTENTS

I.	JURISDICTION	3
II.	BACKGROUND	3
III.	PARTIES BOUND	4
IV.	STATEMENT OF PURPOSE	4
V.	DEFINITIONS	4
VI.	REIMBURSEMENT OF RESPONSE COSTS	6
VII.	FAILURE TO COMPLY WITH AGREEMENT	7
II	COVENANT NOT TO SUE BY EPA	9
IX.	RESERVATIONS OF RIGHTS BY EPA	9
X.	COVENANT NOT TO SUE BY SETTLING PARTIES	10
XI.	EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION	11
__.	[SITE ACCESS]	12
__.	[ACCESS TO INFORMATION]	12
XII.	RETENTION OF RECORDS	13
II	CERTIFICATION	14
XIV.	NOTICES AND SUBMISSIONS	14
XV.	INTEGRATION[/APPENDICES]	15
XVI.	PUBLIC COMMENT	15
IV	EFFECTIVE DATE	15

MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT FOR PERIPHERAL PARTY SETTLEMENTS NOT BASED UPON ABILITY TO PAY

IN THE MATTER OF:	)	AGREEMENT
	)	
Site Name]	)	U.S. EPA Region ___
[City, County, State]	)	CERCLA Docket No. ___
	)	
[Names of Settling Parties]	)	PROCEEDING UNDER SECTION
SETTLING PARTIES	)	122(h)(1) OF CERCLA
	)	42 U.S.C. §9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to [insert reference to any Regional redelegation]. This Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to [insert as appropriate, "the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice ("DOJ")" or "the [Chief/Deputy Chief] of the Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice ("DOJ")"].

2. This Agreement is made and entered into by EPA and [insert names or reference attached appendix listing settling parties] ("Settling Parties"). Each Settling Party consents to and will not contest the authority of the United States to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the [insert Site name] ("Site") located in [insert Site location]. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and [will/may] undertake additional response actions in the future. **[NOTE: A brief description of the release or threatened release and of the response actions taken or to be taken by EPA or potentially responsible parties may be included.]**

5. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.

6. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred and to be incurred at the Site.

7. EPA and Settling Parties recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability by any Settling Party. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Section.

III. PARTIES BOUND

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

IV. STATEMENT OF PURPOSE

9. By entering into this Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Parties to make a cash payment to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, [and under Section 7003 of RCRA, 42 U.S.C. § 6973,] for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, subject to the reservations of rights included in Section IX (Reservation of Rights by EPA).[1]

V. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

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[1] This statement of purpose assumes that Settling Parties' liability for the Site as a whole is being resolved through the Agreement, subject to the reservations of rights included in Section IX. If the intended scope of the Agreement is narrower, this statement of purpose must be redrafted.

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

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, 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 of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).[2]

[NOTE: Insert the following definition if the optional Site Access provision is used.] [__. "Owner Settling Parties" shall mean [insert names of Settling Parties who are Site owners.]

f. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and Settling Parties.

h. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901, et seq. (also known as the Resource Conservation and Recovery Act).

i. "Section" shall mean a portion of this Agreement identified by a roman numeral.

j. "Settling Parties" shall mean [insert names of Settling Parties, or if numerous, "those parties identified in Appendix __."]

k. "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 included in Appendix __" or "generally designated by the following property description: _____."]

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

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[2] The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Program and Cost Accounting Branch, at (202) 564-4972.

VI. REIMBURSEMENT OF RESPONSE COSTS

11. Within 30 days of the effective date of this Agreement as defined by Paragraph 35, Settling Parties shall pay to the EPA Hazardous Substance Superfund $_____, plus an additional sum for Interest on that amount calculated from [insert date, e.g., date of last cost summary] through the date of payment. **[NOTE: The following language should be used if the payment amount is above $10,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Settling Parties by EPA Region __, and shall be accompanied by a statement identifying the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action.] **[NOTE: following language may be used if the payment amount is below $10,000.]** Payments 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(ies) making payment, the Site name, the EPA Region and Site/Spill ID # ____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund
[Insert Regional Superfund lockbox number and address]

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

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

12. **[NOTE ON DIRECTING PAYMENTS TO HAZARDOUS SUBSTANCE SUPERFUND AND/OR TO SITE-SPECIFIC SPECIAL ACCOUNT: Payments made under Paragraph 11 may be placed in the Hazardous Substance Superfund to offset the United States' past response costs at the Site or may be placed in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a "reimbursable account") to be retained and used for response actions at or in connection with the Site.[3] The agreement should include clear instructions indicating which portion of the payment is to be placed in the Hazardous Substance Superfund to defray the United States' past costs and which portion of the payment is to be retained in a special account. Sample instructions for the three possible payment options (past only, special account only, combined past/special account) follow. The instructions stated in Paragraph 11 are correct for all three options.]**

Sample language where entire payment is to be applied towards past costs:

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[3] When PRPs are performing the response action at the Site, payments for future response costs and premiums 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.

"The total amount to be paid pursuant to Paragraph 11 shall be deposited in the EPA Hazardous Substance Superfund as reimbursement for response costs incurred and paid at or in connection with the Site by the EPA Hazardous Substance Superfund."

Sample language where entire payment is to be applied towards a special account:

"The total amount to be paid pursuant to Paragraph 11 shall be deposited in the [Insert 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. [Insert if appropriate, "The amount to be deposited in the [Insert Site Name] Special Account includes a premium in the amount of [$____] to compensate EPA for the risk that total response costs at or in connection with the Site will exceed [insert dollar amount of cost ceiling]."] Any balance remaining in the [Insert Site Name] Special Account shall be transferred by EPA to the EPA Hazardous Substance Superfund."

Sample language where payment is for combined past/special account costs:

"Of the total amount to be paid pursuant to Paragraph 11 of this Agreement, [`$____' or `___%'] shall be deposited in the EPA Hazardous Substance Superfund as reimbursement for response costs incurred and paid at or in connection with the Site as of [insert date] by the EPA Hazardous Substance Superfund, and [`$____' or `___%' or `the remainder'] shall be deposited in the [Insert 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. [Insert if appropriate, "The amount to be deposited in the [Insert Site Name] Special Account includes a premium in the amount of [$____] to compensate EPA for the risk that total response costs at or in connection with the Site will exceed [insert dollar amount of cost ceiling]."] Any balance remaining in the [Insert Site Name] Special Account shall be transferred by EPA to the EPA Hazardous Substance Superfund."

VII. FAILURE TO COMPLY WITH AGREEMENT

13. If Settling Parties fail to make any payment under Paragraph 11 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. If any amounts due under Paragraph 11 are not paid by the required date, Settling Parties shall be in violation of this Agreement and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 13, $____ per violation per day that such payment is late.

[NOTE: If the agreement includes any non-payment obligations for which a stipulated penalty is due, insert, "If Settling Parties do not comply with [reference sections containing non-payment obligations], Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, $____ per violation per day of such noncompliance." Escalating penalty payment schedules may be used for payment or non-payment obligations.]

15. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments under this Paragraph shall be identified as "stipulated penalties" and shall made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund
[Insert Regional Superfund lockbox number and address]

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

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office].

16. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations are included, insert "or performance"] is due [if non-payment obligations are included, insert ", or the day a violation occurs,"] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, "or the final day of correction of the noncompliance or completion of the activity."] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

17. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Parties' failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with any term or condition of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

18. The obligations of Settling Parties to pay amounts owed to EPA under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

19. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Settling Parties' payment of stipulated penalties shall not excuse Settling Party from payment as required by Section VI or from performance of any other requirements of this Agreement.

VIII. COVENANT NOT TO SUE BY EPA

20. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Parties pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. 6973,][4] with regard to the Site.[5] With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all amounts required by Section VI (Reimbursement of Response Costs) and any amount due under Section VII (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

IX. RESERVATIONS OF RIGHTS BY EPA

21. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 20. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Parties with respect to:

a. liability for failure of Settling Parties to meet a requirement of this Agreement;

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;

[NOTE: The precise terms of subparagraph (d) may need to be changed for any Settling Party who has a continuing relationship with the Site.]

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 Agreement by Settling Parties; and

e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site; [and]

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[4] 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.

[5] This covenant assumes that EPA has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed.

[NOTE: Insert subparagraph (f) if Settling Parties have not agreed in Section VI (Reimbursement of Response Costs) to compensate EPA for the costs described in subparagraph (f) through a premium payment or through an alternative future cost billing procedure.] [f. liability for performance of response action or for reimbursement of response costs if total response costs at or in connection with the Site exceed $_____ [insert dollar amount of cost ceiling].

22. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

X. COVENANT NOT TO SUE BY SETTLING PARTIES

23. Settling Parties agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site[6] or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, 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 claims arising out of response activities at the Site; 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.

24. Nothing in this Agreement 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).

25. Settling Parties agree not to assert any claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any other person.

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

26. Except as provided in Paragraph 25, nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it 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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[6] If the Agreement does not cover the Site as a whole, the reference to "the Site" here and in subparagraph 24(b) should be narrowed to conform to the intended scope of the Agreement.

27. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement 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 by any other person.[7]

28. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Parties 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 case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in Paragraph 20.

[__. SITE ACCESS][8]

[__. Commencing upon the effective date of this Agreement, Owner Settling Parties agree to provide EPA and its representatives and contractors access at all reasonable times to the Site and to any other property owned or controlled by Settling Parties to which access is determined by EPA to be required for the implementation of this Agreement, or for the purpose of conducting any response activity related to the Site, including but not limited to:

a. Monitoring, investigation, removal, remedial or other activities at the Site;

b. Verifying any data or information submitted to EPA;

c. Conducting investigations relating to contamination at or near the Site;

d. Obtaining samples;

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[7] This definition of "matters addressed" assumes that this Agreement is designed to resolve fully Settling Parties' liability at the Site pursuant to Sections 106 and 107(a) of CERCLA. If the intended resolution of liability is narrower in scope, then the definition of "matters addressed" will need to be narrowed.

[8] Include this section if 1) access to the Site may be needed and 2) the Site owner is a Settling Party or a Settling Party controls access to the Site or to any other property to which access is needed.

e. Assessing the need for, planning, or implementing response actions at or near the Site; [and]

[f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Parties or their agents, consistent with Section ___ (Access to Information).]

__. Notwithstanding any provision of this Agreement, EPA retain[s] all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.]

[__. ACCESS TO INFORMATION[9]]

[__. Settling Parties shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site [if needed, include "or to the implementation of this Agreement"], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

__. Confidential Business Information and Privileged Documents.

a. Settling Parties may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Documents or information determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Parties that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Parties.

b. Settling Parties may assert that certain documents or information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege in lieu of providing documents or information, they shall provide EPA with the following: 1) the title of the document or information; 2) the date of the document or information; 3) the name and title of the author of the document or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document or information; and 6) the privilege asserted. However, no documents or information created or generated pursuant to the requirements of this or any other judicial or

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[9] Include this section only if Settling Parties have been or will be involved in cleanup efforts at the Site or if Settling Parties may possess information that may assist the Agency in its cleanup or enforcement efforts.

administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document or information, the document or information shall be provided to EPA in redacted form to mask the privileged portion only. Settling Parties shall retain all documents or information that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Parties' favor.

__. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]

XII. RETENTION OF RECORDS

29. Until __ years after the effective date of this Agreement, each Settling Party shall preserve and retain all documents or information now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions or response costs at or in connection with the Site, regardless of any corporate retention policy to the contrary.

30. After the conclusion of the document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such documents or information, and, upon request by EPA, Settling Parties shall deliver such records or documents to EPA. Settling Parties may assert that certain documents or information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the document or information; 2) the date of the document or information; 3) the name and title of the author of the document or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document or information; and 6) the privilege asserted. However, no documents or information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document or information, the document or information shall be provided to EPA in redacted form to mask the privileged portion only. Settling Parties shall retain all documents and information that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Parties' favor.

XIII. CERTIFICATION

31. By signing this Agreement, each Settling Party certifies individually that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents or information, and has fully and accurately disclosed to EPA, all

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

c. fully complied 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 RCRA, 42 U.S.C. § 6927."]

XIV. NOTICES AND SUBMISSIONS

32. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

As to EPA:

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

As to Settling Parties:

[Insert name and address of one person who will serve as the contact for all Settling Parties]

XV. INTEGRATION[/APPENDICES]

33. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement. [The following appendices are attached to and incorporated into this Agreement: "Appendix A is _____; etc."]

XVI. PUBLIC COMMENT

34. This Agreement 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, the United States may modify

or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

XVII. EFFECTIVE DATE

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

IT IS SO AGREED:

[Settling Parties]

By: _____ _____
[Name] [Date]

U.S. Environmental Protection Agency

By: _____ _____
[Name] [Date]

U.S. Department of Justice

By: _____ _____
[Name] [Date]
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

By: _____ _____
[Name] [Date]
Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

APPENDIX D

MODEL FEDERAL REGISTER NOTICE
FOR CERCLA SECTION 122(h) AGREEMENTS

Proper format is very important for a Federal Register notice. The format is shown in the following model. The notice should be typed on plain bond paper, not EPA letterhead stationery. Each page, including the first, should be consecutively numbered. The notice should be double-spaced and single-sided. Heading titles may not be varied. The official format requires the top, bottom and right margins to be one inch wide and the left margin to be one and a half inches wide, but minor variations in margin size will not result in rejection of the notice. Legal citations should be written as, e.g., 42 U.S.C. 9622(i) (do not include a section symbol [§] or the word "section.") The notice should be signed by a Regional official authorized to submit documents for publication in the Federal Register by EPA Delegation 1-21. The name and title of the official signing the notice should be typed on the notice. If an acting official will be signing for the authorized official, the acting official's name and the acting official's title, e.g., "Acting Regional Administrator," must be typed on the notice. The billing code should be typed or hand-written at the end of the notice below the Regional official's signature.

To publish the notice, the Region should send 1) the original signed notice, 2) three single-sided copies of the signed notice, 3) a disk containing the file for the notice, and 4) a completed Federal Register Typesetting Request (EPA Form 2340-15) to: Vickie Reed, Federal Register Liaison (Mail Code 2136), Regulation Development Branch, Regulatory Management Division, Office of Regulatory Management and Evaluation, Office of Policy, Planning and Evaluation, EPA Headquarters, 401 M St., S.W., Washington, D.C., 20460. When filling out the Federal Register Typesetting Request, publication costs should be billed to the site-specific Superfund account number. The formula for calculating publication costs on the Typesetting Request is as follows: two double-spaced pages equals one column, and one column costs $100.00 (half pages and half columns should be rounded up; if a disk is not provided, the per column cost increases to $125.00). Questions about these procedures should be directed to Vickie Reed at (202) 260-7204.

[NOTE ON USE OF MODEL: This model 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 do not constitute rulemaking by the Agency or Department and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency or Department may take action at variance with this model or its internal implementing procedures.]

ENVIRONMENTAL PROTECTION AGENCY

[ ] [NOTE: Leave brackets to left blank.]

Proposed CERCLA Administrative [Insert either "Cost Recovery" or "Cashout"] Settlement; [Insert name of settling party, or if there are multiple settling parties, insert site name -- capitalize first letter of each word]

AGENCY: Environmental Protection Agency

ACTION: Notice; request for public comment

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement for recovery of [insert either "past" or "past and projected future"] response costs concerning the [insert site name] site in [insert site location] with the following settling party(ies): [insert names here or reference list included in Supplementary Information portion of notice]. The settlement requires the settling party(ies) to pay $_____ [insert total amount to be paid under settlement] to the Hazardous Substance Superfund. [Additional information on payment terms may be included, and if settlement includes other performance obligations, insert brief description here.] The settlement includes a covenant not to sue the settling party(ies) pursuant to [insert applicable statutory references, e.g., "Section 107(a) of CERCLA," 42 U.S.C. 9607(a)."] For thirty (30) days following the date of publication of this notice, the Agency [if peripheral party cashout settlement insert "the United States" instead of "the Agency" here and in places noted below] will receive written comments relating to the settlement. [The Agency/the United States] will consider all

comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. [The Agency's/the United States'] response to any comments received will be available for public inspection at [insert address of information repository at or near site] and [insert address of Regional public docket]. [If settlement contains RCRA Section 7003 covenant, insert, "Commenters may request an opportunity for a public meeting in the affected area in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d)."]

DATES: Comments must be submitted on or before [30 days from date of publication]. [NOTE: Do not fill in date; just type DATES sentence, including bracketed portion, as it appears here.]

ADDRESSES: The proposed settlement [and a fact sheet providing additional background information relating to the settlement] [is/are] available for public inspection at [insert address of Regional public docket or other Regional office location]. A copy of the proposed settlement may be obtained from [insert name, address and telephone number of Regional docket clerk or other Regional representative]. Comments should reference the [insert site name, location] and EPA Docket No. _____ [insert EPA docket number for settlement] and should be addressed to [insert name and address of Regional docket clerk or other Regional representative].

FOR FURTHER INFORMATION CONTACT: [Insert name, address and telephone number of Regional representative].

SUPPLEMENTARY INFORMATION: [Use this optional section to, e.g., list parties too numerous to list in Summary portion of notice or to provide further details about settlement].

_____ _____[Insert

typed name and
title of Regional official]

Date

[Insert billing code]

APPENDIX E

MODEL RESPONSIVENESS SUMMARY
FOR CERCLA SECTION 122(h) AGREEMENTS

Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9622(i), requires EPA [if peripheral party cashout settlement insert "the United States" instead of "EPA" here and throughout summary] to publish in the Federal Register notice of proposed administrative settlements entered under Section 122(h) of CERCLA, 42 U.S.C. § 6922(h), and, for a 30-day period beginning on the date of publication, to provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement. Section 122(i) further requires [EPA/the United States] to consider any comments filed during the 30-day period and permits [EPA/the United States] to withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

In accordance with Section 122(i) of CERCLA, [EPA/the United States] published notice of a proposed administrative settlement, EPA Docket No. _____, concerning the [insert Site name] located in [insert city, county, state] in the Federal Register on [insert date of publication and Federal Register citation]. [If no comments were received, insert the following, "[EPA/the United States] did not receive any written comments on the proposed settlement during the 30-day period, and the proposed settlement is, therefore, final and effective upon the date of signature of [if the Regional official authorized to enter into the settlement did not sign it until after the public comment period, insert "the settlement by the Regional Administrator (or his/her delegatee) and"] this Responsiveness Summary. In accordance with Paragraph __ (Reimbursement of Response Costs) of the settlement, payment is due within __ days of the date of signature of this Responsiveness Summary."] [If comments were received, insert a summary of the comments and EPA's responses. If the comments do not require EPA to reconsider the settlement, conclude with the following, "The comments received on this proposed settlement did not disclose to [EPA/the United States] facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate. The proposed settlement is, therefore, final and effective upon the date of signature of [if the Regional official authorized to enter into the settlement did not sign it until after the public comment period, insert "the settlement by the Regional Administrator (or his/her delegatee) and"] this Responsiveness Summary. In accordance with Paragraph __ (Reimbursement of Response Costs) of the settlement, payment is due within __ days of the date of signature of this Responsiveness Summary." If the comments may require reconsideration of the proposed settlement, the issues should be discussed within the Region (and with Headquarters and/or DOJ if the settlement originally required Headquarters consultation or concurrence and/or DOJ approval).]

_____ _____

[Insert Name and Title of Regional Official] Date

[NOTE ON USE OF MODEL: This model 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 do not constitute rulemaking by the Agency or Department and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency or Department may take action at variance with this model or its internal implementing procedures.]