



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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

April 30, 2008

MEMORANDUM

SUBJECT: Interim Revisions to CERCLA Notice Letters and Update of Superfund and Small Waste Contributors Brochure to Notify Potential Settlers about *Atlantic Research Corporation* Decision

FROM: Kenneth W. Patterson, Director /s/
Regional Support Division
Office of Site Remediation Enforcement

TO: Office of Regional Counsel Branch Chiefs, Regions I- X

By this memorandum, I am providing for your use interim modifications to six *de minimis*, ability to pay, and general model notice letters issued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as “Superfund”), as well as revisions to the 1993 “Superfund and Small Waste Contributors” brochure. These changes correct language, relating to the protection from contribution claims afforded by *de minimis* settlements, that is overly broad and potentially misleading after the Supreme Court’s decision in United States v. Atlantic Research Corporation, 127 S.Ct. 2331, 168 L.Ed. 2d 28 (June 11, 2007) (“ARC”). The ARC decision allows potentially responsible parties (PRPs) that have incurred site-related costs to seek recovery of those costs from other PRPs, in certain circumstances, under Section 107(a)(4)(B) of CERCLA. The decision could lead PRPs to seek such costs from settling parties despite the contribution protection afforded by Section 113(f)(2) and, for *de minimis* settlers, Section 122(g)(5).

The five affected *de minimis* and ability to pay (ATP) documents are:

- the *de minimis* and ability to pay settlement eligibility/ineligibility letters issued as appendices A, B, and D to the “Interim Guidance on the Ability to Pay and *De Minimis* Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act” (May 17, 2004);¹
- the “Model ‘First Point of Contact’ Letter for Use with *De Minimis* Parties” issued as an attachment to the “Communications Strategy for Settlements with Small Volume Waste Contributors” (“Communication Strategy”) (September 30, 1993); and

¹ Appendix A is titled “Model Notice of Eligibility to Receive a *De Minimis* Party Settlement,” Appendix B is titled “Model Notice Approving Reduction in Settlement Amount Based on Inability to Pay,” and Appendix D is titled “Model Notice Denying Reduction in Settlement Amount Based on Inability to Pay.” Appendix C is unchanged.

- the “Superfund and Small Waste Contributors” brochure (August 1993), which was also issued as an attachment to the Communications Strategy.

We have also made conforming changes to two general notice letters that discuss *de minimis* settlements as an option. They are:

- the “Sample General Notice Letter,” issued with cover memorandum, “Transmittal of Sample Demand and Notice Letters” (March 29, 2004); and
- the “Sample Potential Superfund Alternative Approach General Notice Letter” (“SAA notice letter”) (December 2004), issued with cover memorandum “Superfund Alternative Sites: Sample General Notice Letter” (January 5, 2005).

The interim *ARC* modifications to the eligibility/non-eligibility letters are based on language that has been used in several pending *de minimis* matters, and the Department of Justice (DOJ) has reviewed revisions to all of the above documents. These *ARC* modifications relate to an area of law that is quickly evolving, and further changes to the letters or brochure may be needed in the future.

Upon issuance of this memorandum, Regions should use the letters and brochure as written and may do so without case-specific RSD or DOJ approval. If a Region deviates from the interim *ARC* language in these letters or brochure, the Region should seek prior approval from the RSD Branch Chief responsible for overseeing *Aviall*- and *ARC*- related issues, currently Benjamin Lammie. To request such approval, please e-mail a copy of the draft letter to Carl Garvey (garvey.carl@epa.gov; 202-564-4236) and Christina Skaar (skaar.christina@epa.gov; 202-564-0895) in RSD. RSD will consult with DOJ and notify the Region of RSD’s and DOJ’s approval or any necessary revisions.

The SAA notice letter includes Superfund alternative approach-related changes as well as *ARC* modifications. Please direct non-*ARC* questions about the SAA notice letter to Nancy Browne (browne.nancy@epa.gov) of RSD at (202) 564-4219.

All of the affected letters are available in PDF format on EPA’s Web site in the Superfund cleanup policy and guidance document database, specifically through the “De Minimis/De Micromis Policies and Models” and “Notice/Demand Letters” subject categories, at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>. All of the model letters are available in Word format from OSRE’s intranet at <http://intranet.epa.gov/oeca/osre/documents/models.html>. The revised brochure on Superfund and small waste contributors is available on the Agency’s Web site at <http://www.epa.gov/compliance/resources/publications/cleanup/superfund/sm-waste-contrib-rev.html>. General information about EPA’s work on issues related to *ARC* is available on EPA’s Web site at <http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/aviall-faqs.html>.

Attachments

cc: Marcia E. Mulkey, Acting Director, Office of Site Remediation Enforcement
Bruce S. Gelber, Chief, Environment Enforcement Section, U.S. Department of Justice
Ann Pontius, Chief, Policy, Planning and Evaluation Division, Office of Site
Remediation Enforcement
Mary Kay Lynch, Associate General Counsel for Solid Waste and Emergency Response
Regional ARC Contacts

bcc: Elliott Gilberg, OSRE
Karen Dworkin, EES/DOJ
Leslie Allen, EES/DOJ
Susan Boushell, PPED
Earl Salo, OGC
James Bove, OGC



Appendix A

MODEL NOTICE OF ELIGIBILITY TO RECEIVE A *DE MINIMIS* PARTY SETTLEMENT

[insert date]

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[PRP Name]
[Address]
[City, State, Zip Code]

Re: Offer of *De Minimis* Settlement at the [Site Name] in [Site Location]

Dear [PRP Name]:

The United States Environmental Protection Agency (“EPA” or “the Agency”) is currently working to clean up the [site name] Site (“the Site”) located in [city, state] under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the federal “Superfund” law. Superfund is a program administered by EPA that is designed to clean up hazardous substances that may pose a threat to human health or the environment.

The purposes of this letter are to: (1) provide [you or company name] with information related to the recent federal cleanup efforts at the [site name]; and (2) inform [you or company name] that [you or it] qualify for a special *de minimis* party settlement [*if offering specific de minimis amount in this letter insert dollar amount here*] at this Site to resolve potential liability that [you or company name] may have to EPA under CERCLA. [*If offering a de minimis settlement in this letter, include the following language: “Details on the terms of this offer and how to accept it are provided below. Please note that the deadline for accepting the offer is **[insert deadline date in bold]**”]. [*If a specific de minimis offer is not included in this letter, add either of the following: “EPA intends to provide [you or company name] with a de minimis settlement offer at a later time.” or “If you would like to enter into a de minimis settlement with EPA, please contact [insert name and number of regional contact person] before **[insert date in bold]**.”*]*

Background

[*If there has not been any prior communication with the PRP, include the following paragraph: “Under sections 106(a) and 107(a) of CERCLA, potentially responsible parties*

(“PRPs”) can be required to perform cleanup actions to protect the public health, welfare, or the environment. PRPs may also be responsible for costs incurred by EPA in performing such cleanups. PRPs include current and former owners and operators of the Site and persons who arranged for treatment and/or disposal of any hazardous substances at the Site.”]

EPA has undertaken several response actions to investigate and clean up the [site name] under the authority of the Superfund program. A brief description of the response actions taken to date follows: [*insert a brief description of site activities, such as:*

- A preliminary assessment (PA) and site investigation (SI) in order to gain a basic understanding of any risks posed by releases or threatened releases from the site to human health and the environment.
- A removal action, conducted to reduce any immediate threat to the environment or human health.
- A Remedial Investigation (RI) to identify the Site characteristics and to define the nature and extent of soil, air, surface water, and groundwater contamination at the Site and the risks posed by the Site.
- Remedial Design and Remedial Action (RD/RA) to design and implement the EPA approved cleanup action for the Site.
- Activities to monitor, operate and maintain the cleanup action after the cleanup is completed.]

Eligibility for a *De Minimis* Settlement

Based on the information EPA has collected, the Agency believes that, although [you or company name] may have liability under CERCLA as [a/an] [*insert language identifying PRP class that letter recipient falls into: owner/operator, generator, or transporter (e.g., “arranging for the disposal of the hazardous substance TCE”)*] at [site name], [you or company name] are eligible for a special *de minimis* settlement with EPA.¹ Under CERCLA § 122(g), whenever practicable and in the public interest, EPA may offer special settlements to parties whose waste contribution to a site is minimal in volume and toxicity, that is, *de minimis* parties. [*For de minimis waste contributors, Regions may want to add language about why the PRP is potentially liable and why it is a de minimis party (e.g., “Shipping receipts for the Site show that you arranged for the shipment of only 2 barrels of TCE to the Site among the hundreds of barrels of TCE that were disposed of at the Site. Over the years, these barrels have deteriorated and leaked TCE into the ground, and eventually into the groundwater.”)*] [*For de minimis landowners, the letter should include the following language: “In addition, an owner of the real property on which the facility is located may qualify for a de minimis settlement if: (1) such owner did not conduct or permit the generation, transportation, storage, treatment, or disposal of*

¹ EPA’s offer is based on information currently available and will be voided if [you or company name] have failed to disclose all information fully and accurately.

any hazardous substances at the facility; and (2) the owner did not have actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.”]

[*For de minimis waste contributors, add the following paragraph:* “EPA has designated parties contributing less than [insert pounds/gallons] of waste to the [site name] as *de minimis* waste contributors. EPA considers [you or company name] a *de minimis* party because EPA’s analysis indicates that the volume and nature of hazardous substances that you disposed of, or had disposed of, at the Site are below [insert pounds/gallons] and are, therefore, minimal compared to the other hazardous substances at the Site. Accordingly, based on currently available information, EPA believes that [you or company name] are eligible for a *de minimis* settlement.”]

[*For de minimis landowners, add the following paragraph:* “EPA has determined that [you have or company name has] demonstrated that [you or company name] satisfy all of the requirements for settlement as a *de minimis* landowner under CERCLA § 122(g). Accordingly, you are eligible to receive a *de minimis* landowner settlement.”]

An individual or business that resolves its Superfund liability as a *de minimis* party is not typically required to perform site cleanup. [*For de minimis contributors, add the following:* “Instead, EPA typically requires *de minimis* parties to enter into a settlement with EPA under which they pay their fair share of all cleanup costs at a site, plus a “premium” that accounts for, among other things, uncertainties associated with the costs of work to be performed in the future.”] [*For de minimis landowners, add the following:* “Instead, EPA typically requires *de minimis* landowners to enter into a settlement with EPA under which they provide [insert language regarding provisions likely to be included in the settlement agreement, such as access, institutional controls, due care, cooperation and, if any, cash payment.”] In return, *de minimis* settlers receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against the settling party for the specific matters addressed in the settlement; and (2) protection from contribution claims, which provides a settling party with protection from being sued in a contribution action by other responsible parties for the specific matters addressed in the settlement. (The matters addressed in a *de minimis* settlement are typically all cleanup actions and all cleanup costs at the particular site.)

The protection from contribution suits for *de minimis* settlers is based on Sections 113(f)(2) and 122(g)(5) of the CERCLA law, which provide that a person “who has resolved its liability to the United States” in an administrative or judicially approved settlement “shall not be liable for claims for contribution regarding matters addressed in the settlement.” This protection against contribution claims, however, may not extend to claims by third parties that have incurred their own response costs and seek to recover them under Section 107(a)(4)(B). See United States v. Atlantic Research Corporation, 127 S.Ct. 2331, 168 L.Ed. 2d 28 (June 11, 2007) (in certain situations, a liable party who has incurred cleanup costs at a site can sue other liable parties under CERCLA Section 107(a)(4)(B)).

Opportunity to Settle

*[Add the next four paragraphs if a specific settlement amount is offered in this letter: “By this letter, EPA is offering [you or company name] a *de minimis* settlement at the [site name] for the amount of [\$_____]. If [you or company name] would like to participate in the settlement, please complete the signature page of the enclosed settlement and return the signed settlement agreement to [name and address of regional contact]. In addition, please be prepared to remit payment of [\$_____] to EPA as directed in the enclosed settlement agreement. We suggest that [you or company name] keep a copy of the entire settlement for your files. If we do not receive your signed copy by **[insert deadline date in bold]**, we will assume that [you or company name] are not interested in settling at this time.”*

Unless it has already been determined that the recipients of the letter have the ability to pay the settlement amount, add the following language: “EPA is aware that the financial ability of some PRPs to contribute toward the payment of response costs at a site may be substantially limited. If you believe and can document that [you or company name] fall within this category, please contact [insert name] at [insert phone number] for information on "Ability to Pay Settlements." You will receive a package of information about such settlements and a form to fill out with information about your finances and will be asked to submit financial records including business [and personal] federal tax returns. If EPA concludes that [you have or company name has] a legitimate inability to pay the full amount, EPA may offer a schedule for payment over time or a reduction in the principal payment.”

“Please note that some or all of the costs associated with this offer may be covered by current or past insurance policies issued to [you or company name]. Most insurance policies will require that you timely notify your carrier(s) of a claim against you. To evaluate whether [you or company name] should notify your insurance carrier(s) of this demand, you may wish to review current and past policies, beginning with the date of your or your company’s first contact with the [insert Superfund site name], up to the present. Coverage depends on many factors, such as the language of the particular policy and state law.”

“Final approval of the settlement is subject to the review of authorized EPA [*unless site costs are less than \$500,000, include the following:* and United States Department of Justice (DOJ)] officials.² If you have any questions about the [site name], EPA’s *de minimis* determination, the terms of the settlement, or how to respond to this settlement offer, please contact [name and phone number of regional contact].”

*[Add one of the following if a specific settlement amount is not offered in this letter: “EPA intends to provide [you or company name] with a *de minimis* settlement offer at a later time. If you have any questions about the [site name], EPA’s *de minimis* determination, or anything else in this letter, please contact [insert name and number of regional contact].” or “If you would like to enter into a *de minimis* settlement with EPA, please contact [insert name and number of regional contact] before **[insert date in bold]**.”]*

² After the offer close date of final EPA [insert date] and DOJ approval, EPA will publish the settlement for public comment and, barring any unforeseen circumstances, will notify you of the effective date of the settlement shortly thereafter.

[If recipient is likely a small business, insert: “Finally, enclosed with this letter is a fact sheet about the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), which includes information that may be helpful to small businesses.”] Thank you for your prompt attention to this matter.

Sincerely,

Enclosure(s)



Appendix B

MODEL NOTICE APPROVING REDUCTION IN SETTLEMENT AMOUNT BASED ON INABILITY TO PAY

[insert date]

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[PRP Name]
[Address]
[City, State, Zip Code]

Re: Results of EPA Analysis of Ability-To-Pay Claim and Offer of
[if applicable, insert "De Minimis"] Settlement Regarding the
[site name] in [site location]

Dear [PRP Name]:

Thank you for [your or company name] recent correspondence dated [insert date] and the information you provided regarding [your or company's name] inability, or limited ability, to pay response costs at the [site location] ("the Site"). [If applicable, insert: "In a [insert date] letter, EPA offered to resolve [your or company's name] potential liability at the Site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the federal Superfund law. In response to that letter, [you or company name] informed EPA that you were unable to pay the settlement or "cashout" amount of [\$_____] without suffering undue financial hardship and provided EPA with written information to support [your or company's name] financial hardship claim."]

Based upon this financial information, EPA has determined that [you or company name] qualify for a reduction in settlement amount [if applicable, insert "and alternative payment method"]. This letter describes the results of EPA's analysis of [your or company's name] inability or limited ability to pay ("ATP") claim and extends a [if applicable, insert "revised"] [if applicable, insert "de minimis party"] settlement offer to you of [\$_____]. Details on the terms of this offer and how to accept it are provided below. Please note that the deadline for accepting the offer is **[insert deadline date in bold]**.

EPA's Analysis of ATP Claim

EPA recognizes that some potentially responsible parties (“PRPs”) may be unable to pay the entire [*if applicable, insert “de minimis”*] cashout settlement amount proposed by EPA. Therefore, the Agency is willing to resolve a PRP’s liability for a reduced settlement amount where a PRP demonstrates an inability, or limited ability, to pay. To ensure fairness among all PRPs, EPA carefully and critically considers the information provided regarding a claimant’s financial situation in accordance with CERCLA § 122(g)(7) and guided by the Agency’s September 30, 1997 policy on Superfund ATP determinations.¹

To obtain a settlement based on an ATP claim, a PRP must show that the payment amount requested is likely to cause undue financial hardship. Such undue financial hardship may be shown when the original payment amount would deprive a party of ordinary and necessary assets or render the party unable to pay for ordinary and necessary business expenses and/or ordinary and necessary living expenses. When making this determination, EPA considers a party’s overall financial condition and demonstrable limitations on the ability to raise revenues. EPA makes its determination based on the information provided by the party and, as necessary and appropriate, other publicly available information sources.

Based on this information, EPA has determined that [you or company name] qualify for a reduction in settlement amount [*if applicable, insert “and alternative payment method”*].² EPA has determined that you do not have sufficient cash flow, income, assets, and/or borrowing capacity to pay the full cashout amount of [\$_____] without significantly affecting [your or company’s name] ability to [*for businesses, insert “continue basic business operations.”*] [*for individuals, insert “meet ordinary and necessary living expenses.”*] A description of the basis of our determination on [your or company’s name] ATP claim is enclosed in Attachment 1.

Opportunity to Settle

Because we have found [your or company’s name] ATP claim valid, EPA is offering you a [*if applicable, insert “revised”*] [*if applicable, insert “de minimis”*] settlement for the [site name] for the amount of [_____]. This reduced settlement offer is [__%] of EPA’s original [insert date] offer.

As explained in our [insert date] letter, if [you or company name] choose to accept EPA’s revised settlement offer of [\$_____], [you or company name] will enter into a settlement directly with the EPA under which you will receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against [you or company name] at the Site for the

¹ See EPA’s “General Policy on Superfund Ability to Pay Determinations” (Sept. 30, 1997) which is available on EPA’s website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>.

² EPA’s decision is based on information currently available and will be voided if [you or company name] have failed to disclose all information fully and accurately.

specific matters addressed in the settlement; and (2) protection from contribution claims, which provides [you or company name] with protection from being sued in a contribution action by other responsible parties at the Site for the specific matters addressed in the settlement. [*If de minimis, insert, “The matters addressed in a de minimis settlement are typically all cleanup actions and all cleanup costs at the particular site.”*]

The protection from contribution suits for [*if applicable, insert “de minimis”*] ability to pay settlors is based on Section[s] 113(f)(2) [*if de minimis, insert “and 122(g)(5)”*] of the CERCLA law, which provide[s] that a person “who has resolved its liability to the United States” in an administrative or judicially approved settlement “shall not be liable for claims for contribution regarding matters addressed in the settlement.” This protection against contribution claims, however, may not extend to claims by third parties that have incurred their own response costs and seek to recover them under Section 107(a)(4)(B). See *United States v. Atlantic Research Corporation*, 127 S.Ct. 2331, 168 L.Ed. 2d 28 (June 11, 2007) (in certain situations, a liable party who has incurred cleanup costs at a site can sue other liable parties using CERCLA Section 107(a)(4)(B)).

If [you or company name] would like to accept EPA’s offer of [\$_____] and participate in the settlement, please complete the signature page of the enclosed settlement and return the signed settlement agreement to [name and address of regional contact]. In addition, please be prepared to remit payment of [\$_____] to EPA as directed in the enclosed settlement agreement. We suggest that [you or company name] keep a copy of the entire settlement for your files. If we do not receive your signed copy by [**insert deadline date in bold**], we will assume that [you or company name] are not interested in pursuing a [*if applicable, insert “de minimis”*] settlement with EPA for this Site.

If [you or company name] believe that the revised settlement offer amount is still too high, [you or company name] may submit additional financial information to EPA. EPA will only consider such new information if it shows a significant change in circumstances since [your or company’s name] last submission, or if it includes a potentially significant piece of information that [you or company name] did not include in your first submission.

Final approval of the settlement is subject to the review of authorized EPA [unless site costs are less than \$500,000 include the following: “and United States Department of Justice (DOJ)”] officials.³ If [you or company name] have any questions about the [site name], EPA’s ATP determination, the terms of the settlement, or how to respond to this settlement offer, please contact [name and phone number of regional contact].

³ After final EPA [insert date] and DOJ approval, EPA will publish the settlement for public comment and, barring any unforeseen circumstances, will notify you of the effective date of the settlement shortly thereafter.

[If recipient is likely a small business, insert: “Finally, enclosed with this letter is a fact sheet about the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), which includes information that may be helpful to small businesses.”] Thank you for your prompt attention to this matter.

Sincerely,

Enclosure(s)

Attachment 1

BASIS OF INABILITY TO PAY DETERMINATION

[The attachment should list:]

Site Name and Location

Name of the Party Subject to the Ability to Pay (“ATP”) Analysis

Party Identification Number

Proposed Settlement Amount

Documents Submitted by the ATP Candidate that Formed the Basis of the ATP Determination. Such documents include *[list the documents provided by party]* –

- A. The Initial Inability to Pay Request
 - B. Five Most Recent Years of Individual Federal Income Tax Returns or Corporate Federal Income Tax Returns
 - C. Five Most Recent Years of Business Financial Statements
 - D. Individual Financial Data Form or Municipal Financial Data Form or Financial Questionnaire Developed by Region
 - E. Other Financial Information, including *(list all that apply)*:
 - Loan Applications
 - Financial Information Relating to Businesses owned by the ATP Candidate
 - Individual or Corporate State Income Tax Returns
 - Fair Market Value of Assets Owned by the ATP Candidate
 - Insurance Policies
- Other Sources of Funds Available to the ATP Candidate, including *(list all that apply)*: (a) for individuals, income and assets not in the name of the ATP Candidate, but that are available to the ATP Candidate, such as income from, and assets in, trusts and other related entities as well as the financial holdings of the ATP Candidate’s spouse; (b) for businesses, financial information relating to other entities owned by the business and/or shareholders or directors

of the business, financial information for a period of time greater than five years, and information that might assist in estimating the fair market value of assets, liabilities, income, and expenses of the ATP Candidate; and (c) for municipalities, annual audited financial statements; general obligation bond prospectuses, and annual budgets for [insert number] years.

Analysis. This section should discuss the documents submitted by the ATP Candidate and state a decision based upon the documents. For example:

“In support of [his/hers/its] inability or limited ability to pay claim, [the PRP] submitted the documents identified above. Our analysis of the submitted documentation indicates that, as of [date of latest documentation, such as latest federal tax return], [the PRP] lacks sufficient [specify any or all of the following: cash flow, income, assets, and/or borrowing capacity] to pay the entire proposed settlement amount of [\$_____] without suffering undue financial hardship.]

Conclusion. This should be one sentence that restates the decision set forth in the analysis, such as:

“Based upon the documentation enumerated in paragraph 5 above, EPA has determined that [the PRP] is not able to pay the proposed settlement amount of [\$_____] without [*for businesses*: “jeopardizing the maintenance of basic business operations.”][*for individuals*: “significantly affecting their ability to meet ordinary and necessary living expenses.”] [*Insert if PRP is able to pay a portion of the proposed settlement amount*: “However, [the PRP] is able to pay a revised settlement amount of [\$_____] without having this effect.”]



Appendix D

MODEL NOTICE DENYING REDUCTION IN SETTLEMENT AMOUNT BASED ON INABILITY TO PAY

[insert date]

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[PRP Name]
[Address]
[City, State, Zip Code]

Re: Results of EPA Analysis of Ability-To-Pay Claim and Offer of
[if applicable, insert "De Minimis"] Settlement Regarding the
[site name] in [site location]

Dear [PRP Name]:

Thank you for [your or company name] recent correspondence dated [insert date] and the information you provided regarding [your or company's name] inability, or limited ability, to pay response costs at the [site location] ("the Site"). [if applicable, insert "In a [insert date] letter, the United States Environmental Protection Agency's ("EPA" or "the Agency") offered to resolve [your or company's name] potential liability at the Site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the federal Superfund law. In response to that letter, [you or company name] informed EPA that you were unable to pay the settlement or "cashout" amount of [\$ _____] without suffering undue financial hardship and provided EPA with written information to support [your or company's name] financial hardship claim."]

Based upon this information, EPA has determined that [you or company name] do not qualify for a reduction in settlement amount [if applicable, insert "or alternative payment method"]. This letter describes the results of EPA's analysis of [your or company's name] inability or limited ability to pay ("ATP") claim [if applicable, insert "and renews EPA's [if applicable, insert "de minimis"] party settlement cashout offer of [\$ _____]. Details on the terms of this offer and how to accept it are provided below. Please note that the deadline for accepting the offer is **[insert deadline date in bold]**."]

EPA's Analysis of ATP Claim

EPA recognizes that some potentially responsible parties ("PRPs") may be unable to pay the entire [if applicable, insert "de minimis"] cashout settlement amount proposed by EPA. Therefore, the Agency is willing to resolve a PRP's liability for a reduced settlement amount where a PRP demonstrates an inability, or limited ability, to pay. To ensure fairness among all PRPs, EPA carefully and critically considers the information provided regarding a claimant's financial situation in accordance with CERCLA § 122(g)(7) and guided by the Agency's September 30, 1997 policy on Superfund ATP determinations.¹

To obtain a settlement based on an ATP claim, a PRP must show that the payment amount requested is likely to cause undue financial hardship. Such undue financial hardship may be shown when the original payment amount would deprive a party of ordinary and necessary assets or render the party unable to pay for ordinary and necessary business expenses and/or ordinary and necessary living expenses. When making this determination, EPA considers a party's overall financial condition (including any applicable insurance policies) and demonstrable limitations on the ability to raise revenues. EPA makes its determination based on the information provided by the party and, as necessary and appropriate, other publicly available information sources.

Based on this information, EPA has determined that [you or company name] do not qualify for a reduction in settlement amount [if applicable, insert "or alternative payment method"]. EPA has determined that you have sufficient cash flow, income, assets, and/or borrowing capacity to pay [if applicable, insert "the full cashout amount of [\$_____]"] without significantly affecting [your or company's name] ability to [for businesses, insert "continue basic business operations."] [for individuals, insert "meet ordinary and necessary living expenses."] [If the ATP determination is based, in part, upon of the availability of insurance, insert the following: "This determination is based, in part, on the conclusion that you likely have current or past insurance policies that cover all or a portion of the cashout amount proposed by EPA. Please note that most insurance policies will require that you timely notify your carrier(s) of a claim against you."] A description of the basis of our determination on [your or company's name] ATP claim is enclosed in Attachment 1.

[If EPA is renewing an earlier settlement offer, insert the following section:

Opportunity to Settle

EPA is renewing its earlier [insert date] [if applicable, insert "de minimis"] settlement offer for the [site name] for the amount of [_____]. As explained in our [insert date] letter, if [you or company name] choose to accept EPA's [if applicable, insert "de minimis"] settlement offer of [\$_____], [you or company name] will enter into a settlement directly with the EPA under which you will receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against [you or company name] at the Site for the specific matters

¹ See EPA's "General Policy on Superfund Ability to Pay Determinations" (Sept. 30, 1997) which is available on EPA's website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>.

addressed in the settlement; and (2) protection from contribution claims, which provides [you or company name] with protection from being sued in a contribution action by other responsible parties at the Site for the specific matters addressed in the settlement. [If *de minimis*, insert, “The matters addressed in a *de minimis* settlement are typically all cleanup actions and all cleanup costs at the particular site.”]

The protection from contribution suits for [if applicable, insert “*de minimis*”] ability to pay settlors is based on Section[s] 113(f)(2) [if *de minimis*, insert “and 122(g)(5)”] of the CERCLA law, which provide[s] that a person “who has resolved its liability to the United States” in an administrative or judicially approved settlement “shall not be liable for claims for contribution regarding matters addressed in the settlement.” This protection against contribution claims, however, may not extend to claims by third parties that have incurred their own response costs and seek to recovery them under Section 107(a)(4)(B). See United States v. Atlantic Research Corporation, 127 S.Ct. 2331, 168 L.Ed. 2d 28 (June 11, 2007) (in certain situations, a liable party who has incurred cleanup costs at a site can sue other liable parties using CERCLA Section 107(a)(4)(B)).

If [you or company name] would like to accept EPA’s offer of [\$ _____] and participate in the settlement, please complete the signature page of the enclosed settlement and return the signed settlement agreement to [name and address of regional contact]. Please be prepared to remit payment of [\$ _____] to EPA as directed in the settlement instructions included with this settlement offer. We suggest that [you or company name] keep a copy of the entire settlement for your files. If we do not receive your signed copy by [insert deadline date in bold], we will assume that [you or company name] are not interested in pursuing a [if applicable, insert “*de minimis*”] settlement with EPA for this Site.

If [you or company name] continue to believe that the settlement offer amount is too high, [you or company name] may submit additional financial information to EPA. EPA will only consider such new information if it shows a significant change in circumstances since [your or company’s name] last submission, or if it includes a potentially significant piece of information that [you or company name] did not include in your first submission.

Final approval of the settlement is subject to the review of authorized EPA [unless site costs are less than \$500,000 include the following: “and United States Department of Justice (DOJ)”] officials.² If [you or company name] have any questions about the [site name], EPA’s ATP determination, the terms of the settlement, or how to respond to this settlement offer, please contact [name and phone number of regional contact].]

² After final EPA [insert date]and DOJ] approval, EPA will publish the settlement for public comment and, barring any unforeseen circumstances, will notify you of the effective date of the settlement shortly thereafter.

[If recipient is likely a small business, insert: “Finally, enclosed with this letter is a fact sheet about the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), which includes information that may be helpful to small businesses.”] We encourage your prompt attention and response to this matter.

Sincerely,

Enclosure(s)

Attachment 1

BASIS OF INABILITY TO PAY DETERMINATION

[*The attachment should list:*]

Site Name and Location

Name of the Party Subject to the Ability to Pay (“ATP”) Analysis

Party Identification Number

Proposed Settlement Amount

Documents Submitted by the ATP Candidate that Formed the Basis of the ATP Determination: Such documents include [*list the documents provided by party*] –

- A. The Initial Inability to Pay Request
- B. Five Most Recent Years of Individual Federal Income Tax Returns or Corporate Federal Income Tax Returns
- C. Five Most Recent Years of Business Financial Statements
- D. Individual Financial Data Form or Municipal Financial Data Form or Financial Questionnaire Developed by Region
- E. Other Financial Information, including (*list all that apply*):
 - Loan Applications
 - Financial Information Relating to Businesses owned by the ATP Candidate
 - Individual or Corporate State Income Tax Returns
 - Fair Market Value of Assets Owned by the ATP Candidate
 - Insurance Policies
 - Other Sources of Funds Available to the ATP Candidate, including (*list all that apply*): (a) for individuals, income and assets not in the name of the ATP Candidate, but that are available to the ATP Candidate, such as income from, and assets in, trusts and other related entities as well as the financial holdings of the ATP Candidate’s spouse; (b) for businesses, financial information relating to other entities owned by the business and/or shareholders or directors of the business, financial information for a period of time greater

than five years, and information that might assist in estimating the fair market value of assets, liabilities, income, and expenses of the ATP Candidate; and (c) for municipalities, annual audited financial statements; general obligation bond prospectuses, and annual budgets for [insert number] years.

Analysis. This section should discuss the documents submitted by the ATP Candidate and state a decision based upon the documents. For example:

“In support of [his/hers/its] inability or limited ability to pay claim, [the PRP] submitted the documents identified above. Our analysis of the submitted documentation indicates that, as of [date of latest documentation, such as latest federal tax return], [the PRP] has sufficient [specify any or all of the following: cash flow, income, assets, and/or borrowing capacity] to pay the entire proposed settlement amount of [\$_____] without suffering undue financial hardship.”

Conclusion. This should be one sentence that restates the decision set forth in the analysis, such as:

“Based upon the documentation enumerated in paragraph 5 above, EPA has determined that [the PRP] is able to pay the entire proposed settlement amount of [\$____] without depriving you of ordinary and necessary assets or significantly affecting your ability to meet ordinary and necessary living expenses and/or pay for ordinary and necessary business expenses. EPA has determined that [the PRP] is able to pay the revised settlement amount of [\$____] without [*for business*: “jeopardizing the maintenance of basic business operations.”][*for individuals*: “significantly affecting your ability to meet ordinary and necessary living expenses.”]



Model "First Point of Contact" Letter for Use with *De Minimis* Parties

United States Environmental Protection Agency
Region []
[Address]

Re: [Site Name, Address or Location of Site]

Dear Sir or Madam:

The United States Environmental Protection Agency (EPA) is currently working to clean up the [name] facility, which is a Superfund site located in [county, state]. Superfund is a federal program administered by EPA that is designed to clean up hazardous substances ("waste") that may pose a threat to human health or the environment. (The full name of the Superfund law is the Comprehensive Environmental Response, Compensation, and Liability Act, or "CERCLA.") Attached is a fact sheet with further information about the site and EPA's efforts to date.

[Attach a site fact sheet and any available remedy selection information.]

EPA is sending this information to you because you are potentially responsible for (contributing or transporting) a small amount of the waste to the site. EPA has based this determination on **[list sources of information utilized]**. **[Include attachments if appropriate.]**

Under the Superfund program, EPA has the authority to take actions at sites such as the [name of site] site to protect public health, welfare, and the environment. In addition, this law permits EPA to request that parties who are responsible for the waste pay to clean up the site.

Potentially Responsible Parties

Those parties who may be responsible for the waste at sites are referred to as "potentially responsible parties" or Superfund "PRPs." PRPs include individuals, businesses, governmental agencies, and other types of organizations. You may be a PRP if you are:

1. a current owner or operator of the site;
2. a former owner or operator of the site during the period of waste disposal;
3. a party that arranged for the treatment, disposal, or transportation of hazardous substances to the site; or
4. a party that transported hazardous substances to a site you selected.

“De Minimis” Settlements

Because EPA believes you may have contributed only a small amount of waste in comparison to the total amount of waste at the site, you may be considered a “*de minimis*” PRP. Under Superfund, EPA may offer special settlements to *de minimis* PRPs, which provide many benefits to settling parties. Through a *de minimis* settlement, you receive:

1. **“Covenant Not to Sue”** – This provision is a promise that the EPA will not bring any future legal actions against you regarding the site and the specific matters named.
2. **“Contribution Protection”** – This provision offers you protection from being sued in a contribution action by other PRPs at the site. Frequently, major waste contributors will sue many small waste contributors in contribution under Section 113(f) of CERCLA to recover cleanup costs. A *de minimis* settlement provides protection from such contribution suits that extends to all matters covered by the settlement. (You should note, though, that a settlement may not be able to protect you from all future claims by other PRPs. A recent Supreme Court case has held that in certain situations, a PRP who has incurred cleanup costs at a site can sue other PRPs under CERCLA Section 107(a)(4)(B). These claims may not be barred by the contribution protection provided by a settlement.)

The amount a *de minimis* settlor may pay as part of the settlement varies from site to site. In general, the payment amount is the sum of a basic payment and a premium payment. The basic payment is calculated from the estimated cost to clean up the site and the amount of the *de minimis* party’s waste (as a percentage of the total waste at the site). The premium payment varies according to a variety of factors specific to both the site and the settlement. See the enclosed brochure entitled “Superfund and Small Waste Contributors” for more information. [Enclose brochure.]

Taken together, contribution protection, the covenant not to sue, and other *de minimis* settlement terms can provide you with the most certainty that EPA can offer that your responsibilities to EPA at a site are fulfilled, and that you are protected from future contribution actions related to the matters addressed in the settlement. To date over 30,000 individuals, small businesses, and others have entered into over 580 *de minimis* settlements with EPA to address their Superfund liability at more than 269 sites across the country.

Information to Assist Potentially Responsible Parties

EPA encourages good faith negotiations between PRPs and EPA, as well as among PRPs. To assist in this effort, we have attached a list of the names and addresses of individuals who have received this letter, or previous letters, because they are potentially responsible for cleaning up the waste at the [name of site] Site. It may be useful to talk to or meet with other *de minimis* parties at the site before talking to EPA or to other non-*de minimis* PRPs. **[In the attachment, note which PRPs are *de minimis* to facilitate the formation of a *de minimis* group.]** It is important to note that this list is preliminary; it is not a final determination of the parties that may be responsible for the cost of cleaning up the site. EPA may modify this list of PRPs at any time.

[A Region should also attach the following, if available.] To the extent such information is available, EPA has also enclosed a list of the volume of the waste materials contributed by each party. Note that this list is also preliminary, and does not constitute a final determination of contribution or liability.]

[A Region may incorporate this section where the use of ADR is either being contemplated or is already underway at this site.]

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is a collection of methods commonly used to resolve legal disputes out of court. ADR normally involves the use of a neutral third party who is skilled in a variety of ADR approaches to increase the effectiveness of settlement discussions.

Due to **[the particular circumstances of the case: e.g., large number of parties, history of unsuccessful negotiations, short timeframe, etc.]**, EPA believes that the services of a facilitator may be useful in this matter. A meeting is planned for **[date, time]** at **[location]** which will provide an opportunity for you to explore settlement options with other *de minimis* and non-*de minimis* PRPs. We hope you will attend.

To help you explore ADR options, we have asked **[name of facilitator/mediator]**, a neutral professional from **[name of ADR firm]** (a national provider of alternative dispute resolution services) to be present at this meeting. **[Name of facilitator/mediator]** will be available to discuss ADR options and meet with you at your request. If you have questions about the use of ADR in this matter that you would like to ask prior to this scheduled meeting, you may reach **[him; her]** at **[phone]**. **[The EPA ADR liaison at Headquarters, David Batson, will help identify an appropriate neutral professional to reference in this letter.]**

Information about the Site

EPA encourages you to become familiar with the site. To assist you in this effort, EPA has compiled certain key documents about the site. Copies of these documents are located at [EPA Regional Office] and **[location on/near site]**, and are **[will be]** available to the public for inspection and comment.

[In closing, include a contact name and phone number for further information, as well as information about whatever next steps are appropriate, e.g., upcoming meeting, date for participating in negotiations, etc.]

A *de minimis* settlement may be in your best interest. EPA encourages you to read carefully the enclosed fact sheet about the site and about *de minimis* settlements. [Please contact EPA by **[date]** to indicate your interest in participating in future negotiations at this site. You may respond individually or through a group or committee, if such a group has been formed.] If you have any questions concerning this letter, please contact (or direct your attorney to contact) **[name of regional attorney]**.



Superfund And Small Waste Contributors

Office of Site Remediation Enforcement

Have you been contacted by the U.S. Environmental Protection Agency or another party regarding your possible involvement with a Superfund site? If you believe the waste that you contributed to the site was minimal, you should learn about “de minimis settlements.”

This pamphlet describes what Superfund is, who potentially responsible parties are, and why a de minimis settlement may be to your advantage.

How did I become a potentially responsible party?

"Potentially responsible parties" (PRPs) are individuals or companies who may be responsible for all or part of the contamination at a site. PRPs include individuals, businesses, local, state, or federal governmental agencies, and other types of organizations. You may be identified as a PRP if you are:

- 1) a current owner or operator of the site;
- 2) a former owner or operator of the site during the period of disposal;
- 3) a party that arranged for the treatment, disposal, or transportation of hazardous substances to the site;
- 4) a party that transported hazardous substances to a site you selected.

If you fit one of these descriptions, you may be a PRP even if you were unaware that your waste was disposed of at the site, or did not dispose of it yourself.

What does “de minimis” mean?

At many sites there are PRPs who may have contributed only a very small amount of waste to a site. EPA may consider these parties "de minimis" because their contribution is minimal compared to the other waste at the site. For example, an individual who contributed one percent or less of the waste at a site may be considered a *de minimis* party.

In recognition of their relatively small contribution of waste, and to help ensure that these *de minimis* parties do not get drawn into lengthy and expensive lawsuits, EPA may offer a special type of settlement to these types of parties.

Whether and how individuals qualify for a *de minimis* settlement depends on a variety of site-specific factors. However, in general, you may qualify for a *de minimis* settlement if:

- the amount of waste you contributed is minimal in comparison to the other hazardous substances at the site;
- the toxic or other hazardous effects of the waste you contributed are minimal in comparison to the other hazardous substances at the site; and
- the settlement is in the public interest, and involves only a minor portion of the response costs at the site.

Or, if you are the owner of a site, you may qualify for another type of *de minimis* settlement if:

- as the owner of the site, you did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substances at the facility; and
- at the time of purchase, you did not know, or had no reason to know, that the property was used for the generation, transportation, storage, treatment, or disposal of a hazardous substance.

What are the benefits of this type of settlement?

Although EPA may go to court to require PRPs to pay for (or perform) a cleanup, the Agency often prefers to settle its claims without resort to expensive court action. Settlements save both time and money for all parties involved.

De minimis settlements can provide several benefits, including:

“*Covenant Not to Sue*” – This provision is a promise that the EPA will not bring any future legal actions against the *de minimis* party regarding the site and the specific matters named.

“*Contribution Protection*” – This provision offers protection to the *de minimis* settlor from being sued in a contribution action by other PRPs at the site. Frequently, major waste contributors will sue many small waste contributors in contribution under Section 113(f) of CERCLA to recover their cleanup costs. A *de minimis* settlement provides protection from such contribution suits that extends to all matters covered by the settlement. (You should note, though, that a settlement may not be able to protect you from all future claims by other PRPs. A recent Supreme Court case has held that in certain situations, a PRP who has incurred cleanup costs at a site can sue other PRPs under CERCLA Section 107(a)(4)(B). These claims may not be barred by the contribution protection provided by a settlement.)

Taken together, contribution protection, the covenant not to sue, and other *de minimis* settlement terms provide settlors with the most certainty that EPA can offer that their responsibilities to EPA at the site are fulfilled, and that they are protected from future contribution actions related to those matters addressed by the settlement. To date over 30,000 individuals, small businesses, and others have entered into over 580 *de minimis* settlements with EPA to address their Superfund liability at more than 269 sites across the country.

What other settlement provisions are important?

“Payments and Premiums” - Although the amount a *de minimis* settlor may pay varies from site to site, in general, the payment amount is calculated by combining a basic payment and a premium payment. The basic payment is based on the estimated cost to clean up the site and the amount of the *de minimis* party's waste as a percentage of the total waste at the site.

The premium payment is associated with the protection from further EPA lawsuits that is provided by the "covenant not to sue." Premium amounts vary according to a variety of factors specific to both the site and the settlement, but typically range from 50 – 100 percent of the basic payment.

“Reopeners” - If you enter into a *de minimis* settlement with EPA, you will likely be asked to certify that your waste contribution is the amount (and type) that you claim. After the settlement is finalized, if new information indicates that your contribution is actually greater than you originally certified, the settlement may be "reopened" for renewed consideration. Other types of reopeners may also be included.

What is Superfund?

Superfund is a federal program, administered by the Environmental Protection Agency, which is designed to clean up hazardous substances (or “waste”) that may pose a threat to human health or the environment. The full name of the law is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Many Superfund sites are frequently areas or facilities where solvents, sludges, heavy metals, or other wastes have been disposed. These sites range in size from a quarter-acre metal plating shop to a 250-square mile mining complex. Contamination from these sites is often found in the soil, groundwater, and/or nearby streams and lakes.

Who pays for cleanups?

When Congress enacted Superfund, it intended to "make the polluters pay" for the cost of cleaning up these sites. To achieve this goal, EPA seeks to hold those parties who contributed to the contamination responsible for the cost of cleanup. Such parties may be asked to help pay for the cleanup of a site even if they acted in full accordance with the law at the time they disposed of the waste.

Superfund encourages EPA to settle with these responsible parties outside of court, but also authorizes the Agency to bring actions in court to require responsible parties to pay for (or perform) the cleanup.

In some cases, when no responsible parties can be identified, the cost is borne by the taxpayers. At these sites, the cleanup is paid for out of a Trust Fund set up by Congress to address this problem.

What Is Alternative Dispute Resolution?

Alternative Dispute Resolution (ADR) is a collection of methods to resolve legal disputes outside of court. ADR normally involves the use of neutral third parties who are skilled in a variety of ADR approaches to increase the effectiveness of settlement discussions.

At sites where numerous *de minimis* parties have been identified, it may be most efficient for such parties to coalesce into a group and appoint a representative to negotiate with EPA and/or the other PRPs at the site. A neutral ADR professional can assist greatly in the formation of a *de minimis* group, in the dissemination of information, and most importantly, in the negotiations process.

Where can I get more information?

To find out more about *de minimis* settlements, and how you might be involved, contact the nearest Regional U.S. Environmental Protection Agency Superfund program office. Ask to speak to the attorney, project manager, or, community relations representative assigned to your site. Information on *de minimis* settlements is also available on EPA's Web site from the Superfund enforcement policy and guidance database at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund>.



SAMPLE GENERAL NOTICE LETTER

GENERAL NOTICE LETTER

URGENT LEGAL MATTER

PROMPT REPLY NECESSARY

CERTIFIED MAIL: RETURN RECEIPT REQUESTED *[If demand for costs is included, send letter by Federal Express Next Day Delivery.]*

[Date]

[PRP Name]

[Address]

[City, State, Zip Code]

Re: General Notice Letter for the [Site Name] in [Site Location]

Dear [PRP Name] :

[If a Section 104(e) letter has been issued, insert the following paragraph:] The U.S. Environmental Protection Agency (“EPA”) has received and reviewed your [insert date] response to its [insert date] Information Request, which was sent to [you or company name] in connection with the [site name] Site (“the Site”) located in [city, state]. Based on your response and other available information, EPA has determined that you may be responsible under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the federal “Superfund” law, for cleanup of the Site or costs EPA has incurred in cleaning up the Site.

[If a Section 104(e) letter has not been issued, insert the following paragraph:] Under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the federal “Superfund” law, the U.S. Environmental Protection Agency (“EPA”) is responsible for responding to the release or threat of release of hazardous substances, pollutants or contaminants into the environment – that is, for stopping further contamination from occurring and for cleaning up or otherwise addressing any contamination that has already occurred. EPA has documented that such a release has occurred at the [site name] Site (“the Site”) located in [city, state]. EPA has spent, or is considering spending, public funds to investigate and control releases of hazardous substances or potential releases of hazardous substances at the Site. Based on information presently available to EPA, EPA has determined that [you or company name] may be responsible under CERCLA for cleanup of the Site or costs EPA has incurred in cleaning up the Site.

Explanation of Potential Liability

Under CERCLA, specifically Sections 106(a) and 107(a), potentially responsible parties (“PRPs”) may be required to perform cleanup actions to protect the public health, welfare, or the environment. PRPs may also be responsible for costs incurred by EPA in cleaning up the Site, unless the PRP can show divisibility or any of the other statutory defenses. PRPs include current and former owners and operators of a Site, as well as persons who arranged for treatment and/or disposal of any hazardous substances found at the site, and persons who accepted hazardous substances for transport and selected the site to which the hazardous substances were delivered.

Based on the information collected, EPA believes that [you or company name] may be liable under Section 107(a) of CERCLA with respect to the [insert site name] Site, as [a/an] [*select from the following:*] (1) arranger, who by contract or agreement, arranged for the disposal, treatment or transportation of hazardous substances at the Site; (2) current or previous owner and/or operator of the Site; (3) transporter, who by contract or agreement, accepted hazardous substances for transportation and disposal at, and selected the Site. [*Additional information as to the nature of the PRP’s liability may be added. For example, if TCE is the contaminant of concern at a Site: “Specifically, EPA has reason to believe that [you or your company] [contributed TCE to the Site as an [owner/operator, transporter]] OR [arranged for the disposal, treatment, or transportation of TCE to the Site].”*]

To date, EPA [and the State/Commonwealth of _____] [has/have] taken [several] response action[s] at the Site under the authority of the Superfund Program. Below is a brief description of the actions taken at the Site. [*Insert brief description, including dates of Site activities such as:*]

- A Preliminary Assessment (“PA”) and Site Investigation (“SI”) in order to gain a basic understanding of any risks posed to human health and/or the environment by releases or threatened releases from the Site.
- A Removal Action, conducted to reduce any immediate threat to the environment or human health posed by the Site.
- A Remedial Investigation (RI) to identify the Site characteristics and to define the nature and extent of soil, air, surface water, and groundwater contamination at the Site and the risks posed by the Site.
- A Feasibility Study (“FS”) to evaluate different cleanup options for the Site.
- Remedial Design and Remedial Action (“RD/RA”) to design and implement the EPA-approved cleanup action for the Site.
- Activities to monitor, operate and maintain the cleanup action after the cleanup is completed.

[If the Region has sufficient information to conclude that the PRP may be eligible for a *de minimis* settlement, use the “Model Notice of Eligibility to Receive a De Minimis Party Settlement” letter, issued as Appendix A to the “Interim Guidance on the Ability to Pay and De Minimis Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act,” instead of this letter. [Appendix A has been modified and is available from the Superfund enforcement policy and guidance document database at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund>] If the Region has insufficient information on which to reach this conclusion, but believes it is appropriate to notify the PRP of the existence of *de minimis* settlements, include the following section.]

De Minimis Settlements

Under Section 122(g) of CERCLA, whenever practicable and in the public interest, EPA may offer special settlements [for a waste contributor PRP, insert, “to parties whose waste contribution to a site is minimal in volume and toxicity, that is, *de minimis* parties.”] [for a landowner, insert “to owners of real property if: (1) such owner did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substances at the Superfund facility; and (2) the owner did not have actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.”]

Individuals or businesses resolving their Superfund liability as *de minimis* parties are not typically required to perform site cleanup. Instead, EPA requires *de minimis* settlers to pay their fair share of cleanup costs incurred, plus a “premium” that accounts for, among other things, uncertainties associated with the costs of work to be performed in the future. In return, *de minimis* settlers receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against the settling party for the specific matters addressed in the settlement; and (2) protection from contribution claims, which provides a settling party with protection from being sued in a contribution action by other responsible parties for the specific matters addressed in the settlement. (The matters addressed in a *de minimis* settlement are typically all cleanup actions and all cleanup costs at the particular site.) Participation in a *de minimis* settlement means that you are settling directly with EPA as soon as it is possible to do so.

The protection from contribution suits for *de minimis* settlers is based on Sections 113(f)(2) and 122(g)(5) of the CERCLA law, which provide that a person “who has resolved its liability to the United States” in an administrative or judicially approved settlement “shall not be liable for claims for contribution regarding matters addressed in the settlement.” This protection against contribution claims, however, may not extend to claims by third parties that have incurred their own response costs and seek to recover them under Section 107(a)(4)(B). See United States v. Atlantic Research Corporation, 127 S.Ct. 2331, 168 L.Ed. 2d 28 (June 11, 2007) (in certain situations, a liable party who has incurred cleanup costs at a site can sue other liable parties under CERCLA Section 107(a)(4)(B)).

If [you or company name] believe[s] that [you/it] may be eligible for a *de minimis* settlement at this Site, please contact [name of attorney/RPM/enforcement specialist] at

[address/phone number] for additional information on “*De Minimis Settlements.*” [Optional: Additional information will be sent to you, and you may be asked to respond in writing to questions about your involvement with the Site to assist EPA in making a determination as to whether you may be eligible for such a settlement.]

[If the Region has sufficient information to conclude that the PRP may be eligible for an inability to pay settlement, use the “Model Notice Approving Reduction in Settlement Amount Based on Inability to Pay” letter, issued as Appendix B to the “Interim Guidance on the Ability to Pay and De Minimis Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act,” instead of this letter. [Appendix B has been modified and is available from the Superfund enforcement policy and guidance document database at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund.>] If the Region has insufficient information on which to reach this conclusion, but believes it is appropriate to notify the PRP of the existence of inability to pay settlements, include the following section.]

Financial Concerns/Ability to Pay Settlements

EPA is aware that the financial ability of some PRPs to contribute toward the payment of response costs at a site may be substantially limited. If you believe, and can document, that you fall within that category, please contact [name of attorney/RPM/enforcement specialist] at [address/phone number] for information on "Ability to Pay Settlements." In response, you will receive a package of information about the potential for such settlements and a form to fill out with information about your finances, and you will be asked to submit financial records including business [and personal] federal income tax returns. *[If appropriate, insert, “If EPA concludes that [you or company name] have a legitimate inability to pay the full amount of EPA’s costs, EPA may offer a schedule for payment over time or a reduction in the total amount demanded from you.”]*

Also, please note that, because EPA has a potential claim against you, you must include EPA as a creditor if you file for bankruptcy.

Information to Assist You

EPA would like to encourage communication between you, other PRPs, and EPA at the Site. *[Where appropriate, insert: “EPA recommends that all PRPs meet to select a "steering committee" that will be responsible for representing the group's interests. Establishing a manageable group is critical to successful negotiations with EPA. If this is not possible, EPA encourages each PRP to select one person from its company or organization to represent its interests to EPA.”]*

To assist you in your efforts to communicate, please find the following attached information:

1. A list of names and addresses of PRPs to whom this letter is being sent.
2. To the extent information is available, a list of the volume and type of substances contributed by each PRP to the Site to date. This is an initial list and subject to

change based upon new information.

3. A fact sheet that describes the Site.

EPA [has/will] establish[ed] an Administrative Record that contains documents that serve as the basis for EPA's selection of a cleanup action for the Site. The Administrative Record [is/will be] located at [address] and [is/will be] available to you and the public for inspection and comment. The Administrative Record [is also/will also be] available for inspection and comment at the Superfund Records Center, EPA Region [number and address].

Resources and Information for Small Businesses

As you may be aware, on January 11, 2002, President Bush signed into law the Superfund Small Business Liability Relief and Brownfields Revitalization Act. This Act contains several exemptions and defenses to CERCLA liability, which we suggest that all parties evaluate. You may obtain a copy of the law via the Internet at <http://www.epa.gov/swerosps/bf/sblrbra.htm> and review EPA guidances regarding these exemptions at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund>.

In addition, if you are a “service station dealer” who accepts used oil for recycling, you may qualify for an exemption from liability under Section 114(c) of CERCLA. EPA guidance regarding this exemption can be found on the Internet at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund>. If you believe you may qualify for the exemption, please contact [name and phone number of attorney/RPM/enforcement specialist] to request an application/information request specifically designed for service station dealers.

EPA has created a number of helpful resources for small businesses. EPA has established the National Compliance Assistance Clearinghouse as well as Compliance Assistance Centers which offer various forms of resources to small businesses. You may inquire about these resources at <http://www.epa.gov>. In addition, the EPA Small Business Ombudsman may be contacted at <http://www.epa.gov/sbo>. Finally, EPA developed a fact sheet about the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), which is enclosed with this letter.

Please give these matters your immediate attention and consider consulting with an attorney. If you have any questions regarding this letter, please contact [name and phone number of regional contact]. Thank you for your prompt attention to this matter.

Sincerely,

[Name/Title/Address of Individual Delegated
Signature Authority]

Enclosures

cc:



SAMPLE GENERAL NOTICE LETTER FOR A SITE AT WHICH THE SUPERFUND ALTERNATIVE APPROACH MAY BE USED

CERTIFIED MAIL: RETURN RECEIPT REQUESTED

[Date]

[PRP Name]

[Address]

[City, State, Zip Code]

RE: General Notice Letter for the [Site Name] in [Site Location] and Potential for the Superfund Alternative Approach

Dear [PRP Name]:

[If EPA issued a Section 104(e) letter, insert the following paragraph:]

The U.S. Environmental Protection Agency (EPA) received and reviewed your [insert date] response to its [insert date] Information Request, addressed to [you or company name] in connection with the [site name] Site (the Site) located in [city, state]. Based on your response and other available information, EPA has determined that you may be responsible under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the federal “Superfund” law, for cleanup of the Site or costs EPA has incurred in cleaning up the Site.

[If EPA did not issue a Section 104(e) letter, insert the following paragraph:]

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the federal “Superfund” law, the U.S. Environmental Protection Agency (EPA) responds to the release or threat of release of hazardous substances, pollutants or contaminants into the environment – that is, to stop additional contamination and to clean-up or otherwise address any prior contamination. EPA documented that such a release occurred at the [site name] Site (the Site) located in [city, state]. EPA spent, or is considering spending, public funds to investigate and control releases of hazardous substances or potential releases of hazardous substances at the Site. Based on information presently available to EPA, EPA has determined that [you or company name] may be responsible under CERCLA for cleanup of the Site or costs incurred by EPA in cleaning up the Site.

Explanation of Potential Liability

Under CERCLA, EPA may require potentially responsible parties (PRPs) to:

- (1) perform cleanup actions to protect the public health, welfare, or the environment, and
- (2) pay costs incurred by EPA in cleaning up the Site, unless the PRP successfully demonstrates any of the applicable statutory defenses.

PRPs include current and former owners and operators of a site, as well as persons who arranged for treatment and/or disposal of any hazardous substances found at the site, and persons who accepted hazardous substances for transport and selected the site to which the hazardous substances were delivered.

Based on the information collected, EPA believes that [you or company name] may be liable under Section 107(a) of CERCLA with respect to the [insert site name] Site, as [a/an] [*select from the following*]: (1) arranger, who by contract or agreement, arranged for the disposal, treatment or transportation of hazardous substances at the Site; (2) current or previous owner and/or operator of the Site; (3) transporter, who by contract or agreement, accepted hazardous substances for transportation and disposal at, and selected the Site. [*Additional information as to the nature of the PRP's liability should be added. For example, if TCE is the contaminant of concern at a Site: "Specifically, EPA has reason to believe that [you or your company] [contributed TCE to the Site as an [owner/operator, transporter]] OR [arranged for the disposal, treatment, or transportation of TCE to the Site]."*]

Actions Taken at the Site

To date, EPA [and the State/Commonwealth of _____] [has/have] taken [several] response action[s] at the Site using Superfund authority. Below is a brief description of the actions taken at the Site. [*Insert brief description, including dates of Site activities such as:*]

- A Preliminary Assessment (PA) and Site Investigation (SI) in order to gain a basic understanding of any risks posed to human health and/or the environment by releases or threatened releases from the Site. [Started/Completed [mm/yy].]
- An Expanded Site Investigation (ESI), to gather more detailed information on certain risks identified at the Site.
- A Removal Action, conducted to reduce any immediate threat to the environment or human health posed by the Site. [Started/Completed [mm/yy].]
- A Remedial Investigation (RI) to identify the Site characteristics and to define the nature and extent of soil, air, surface water, and groundwater contamination at the Site and the risks posed by the Site. [Started/Completed [mm/yy].]
- A Feasibility Study (FS) to evaluate different cleanup options for the Site. [Started/Completed [mm/yy].]

Potential for a Superfund Alternative Site Approach

EPA has two main paths to achieve cleanup at Superfund sites that require long-term remediation. The traditional path involves EPA listing the site on the National Priorities List (NPL), identifying the PRPs, and working with them to secure the cleanup or payment for cleanup. An alternative path is known as the Superfund Alternative approach (SA approach), which is designed to parallel the NPL path with the exception of listing the site on the NPL. The threshold criteria for a site to be eligible for the SA approach are:

- be eligible for inclusion on the NPL (*i.e.*, currently proposed to the NPL, or would have a Hazard Ranking score above 28.5);
- require long-term response action; and
- have financially viable and capable PRPs that the Region believes are willing to perform the cleanup work under an Administrative Order on Consent or a Consent Decree.

The EPA guidance on the SA approach, *Revised Response Selection and Settlement Approach for Superfund Alternative Sites* (6/17/04), provides more discussion of the SA approach. The Revised SAS Guidance is available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-sas-04.pdf>.

Sites where the SA approach is used should meet the same cleanup standards as NPL sites, and the negotiated SA approach agreements are very similar to agreements negotiated at NPL sites. SA approach agreements are eligible for the same settlement incentives as those available at NPL sites (*e.g.*, orphan share compensation, special account funds).

EPA Region ___ believes that the [Site name] qualifies for the SA approach. Accordingly, EPA is interested in discussing your willingness to perform a [*insert* “remedial investigation and feasibility study (RI/FS)” or “remedial design and remedial action (RD/RA)”] under the SA approach. If you are not interested in this approach, EPA will pursue the traditional NPL path. If negotiations for an SA approach agreement proceed and subsequently reach an impasse, EPA will consider how to proceed based on site-specific circumstances.

[If the Region has sufficient information to conclude that the PRP may be eligible for a de minimis settlement, use the “Model Notice of Eligibility to Receive a De Minimis Party Settlement” letter, issued as Appendix A to the “Interim Guidance on the Ability to Pay and De Minimis Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act,” instead of this letter. [Appendix A has been modified and is available from the Superfund enforcement policy and guidance document database at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund>.] If the Region has insufficient information on which to reach this conclusion, but believes it is appropriate to notify the PRP of the existence of de minimis settlements, include the following section.]

De Minimis Settlements

Under CERCLA Section 122(g), whenever practicable and in the public interest, EPA may offer special settlements [for a waste contributor PRP, insert, “to parties whose waste contribution to a site is minimal in volume and toxicity, that is, *de minimis* parties.”] [for a landowner, insert “to owners of real property if: (1) such owner did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substances at the Superfund facility; and (2) the owner did not have actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.”]

Individuals or businesses resolving their Superfund liability as *de minimis* parties are not typically required to perform site cleanup. Instead, EPA requires *de minimis* settlers to pay their fair share of cleanup costs incurred, plus a “premium” that accounts for, among other things, uncertainties associated with the costs of work to be performed in the future. In return, *de minimis* settlers receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against the settling party for the specific matters addressed in the settlement; and (2) protection from contribution claims, which provides a settling party with protection from being sued in a contribution action by other responsible parties for the specific matters addressed in the settlement. (The matters addressed in a *de minimis* settlement are typically all cleanup actions and all cleanup costs at the particular site.) Participation in a *de minimis* settlement means that you are settling directly with EPA as soon as it is possible to do so.

The protection from contribution suits for *de minimis* settlers is based on Sections 113(f)(2) and 122(g)(5) of the CERCLA law, which provide that a person “who has resolved its liability to the United States” in an administrative or judicially approved settlement “shall not be liable for claims for contribution regarding matters addressed in the settlement.” This protection against contribution claims, however, may not extend to claims by third parties that have incurred their own response costs and seek to recover them under Section 107(a)(4)(B). See United States v. Atlantic Research Corporation, 127 S.Ct. 2331, 168 L.Ed. 2d 28 (June 11, 2007) (in certain situations, a liable party who has incurred cleanup costs at a site can sue other liable parties under CERCLA Section 107(a)(4)(B)).

If [you or company name] believe[s] that [you/it] may be eligible for a *de minimis* settlement at this Site, please contact [name of attorney/RPM/enforcement specialist] at [address/phone number] for additional information on *de minimis* settlements. [Optional: Additional information will be sent to you, and you may be asked to respond in writing to questions about your involvement with the Site to assist EPA in making a determination as to whether you may be eligible for such a settlement.]

[If the Region has sufficient information to conclude that the PRP may be eligible for an inability to pay settlement, use the “Model Notice Approving Reduction in Settlement Amount Based on Inability to Pay” letter, issued as Appendix B to the “Interim Guidance on the Ability to Pay and De Minimis Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act,” instead of this letter. [Appendix B has been modified and is

available from the Superfund enforcement policy and guidance document database at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund>.] If the Region has insufficient information on which to reach this conclusion, but believes it is appropriate to notify the PRP of the existence of inability to pay settlements, include the following section.]

Financial Concerns / Ability to Pay Settlements

EPA is aware that the financial ability of some PRPs to contribute toward the payment of response costs at a site may be substantially limited. If you believe, and can document, that you fall within that category, please contact [name of attorney/RPM/enforcement specialist] at [address/phone number] for information on “ability to pay settlements.” In response, you will receive information about the potential for such settlements and a listing of information you will need to provide, including financial records and business [and personal] federal income tax returns. [If appropriate, insert, “If EPA concludes that [you or company name] have a legitimate inability to pay the full amount of EPA’s costs, EPA may offer a schedule for payment over time or a reduction in the total amount demanded from you.”]

Also, please note that, because EPA has a potential claim against you, you must include EPA as a creditor if you file for bankruptcy.

Information to Assist You

EPA encourages communication between you, other PRPs, and EPA concerning the Site. [Where appropriate, insert: “EPA recommends that all PRPs meet to select a “steering committee” that will be responsible for representing the group's interests. Establishing a manageable group is critical to successful negotiations with EPA. If this is not possible, EPA encourages each PRP to select one person from its company or organization to represent its interests to EPA.”]

To assist you in your efforts to communicate, please find the following attached information:

- A list of names and addresses of PRPs to whom this letter is being sent.
- To the extent information is available, a list of the volume and type of substances contributed by each PRP to the Site to date. This is an initial list and subject to change based upon new information.
- A fact sheet that describes the Site.

[Insert the appropriate report: The Preliminary Assessment (PA) Report, Site Investigation (SI) Report, Expanded Site Investigation (ESI) Report] is/are also available for your review as part of the Administrative Record. General information on [these reports / this report] and on the Hazard Ranking System (HRS) can be found on the “HRS Toolbox” page at <http://www.epa.gov/superfund/sites/npl/hrsres/index.htm>. The HRS Toolbox page provides current guidance documents that may be used to determine if a site is a candidate for inclusion on the National Priorities List.

EPA [has/will] establish[ed] an Administrative Record that contains documents that serve

as the basis for EPA's selection of a cleanup action for the Site. The Administrative Record [is/will be] located at [address] and [is/will be] available to you and the public for inspection and comment. The Administrative Record [is also/will also be] available for inspection and comment at the Superfund Records Center, EPA Region [number and address].

Additional Information

The Superfund Small Business Liability Relief and Brownfields Revitalization Act contains several exemptions and defenses to CERCLA liability, which we suggest that all parties evaluate. You may obtain a copy of the law via the Internet at <http://www.epa.gov/swerosps/bf/sblrbra.htm> and review EPA guidance regarding these exemptions at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund>.

Insert if appropriate. In addition, if you are a “service station dealer” who accepts used oil for recycling, you may qualify for an exemption from liability under Section 114(c) of CERCLA. EPA guidance regarding this exemption can be found on the Internet at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund>. If you believe you may qualify for the exemption, please contact [name and phone number of attorney/RPM/enforcement specialist] to request an application/information request specifically designed for service station dealers.

Insert if appropriate. EPA has a number of resources for small businesses, including the National Compliance Assistance Clearinghouse and Compliance Assistance Centers which offer various forms of resources to small businesses. You may inquire about these resources at www.epa.gov. In addition, the EPA Small Business Ombudsman may be contacted at www.epa.gov/sbo. Finally, an EPA fact sheet about the Small Business Regulatory Enforcement Fairness Act is enclosed with this letter.

Please give these matters your immediate attention and consider consulting with an attorney. Please contact [name and phone number of regional contact] within 30 calendar days of the date of this letter regarding: (1) your willingness to enter into negotiations consistent with the Superfund Alternative approach, or (2) information about why you may not be a PRP (*e.g.*, you qualify for an exemption), or the size of your waste contribution to the Site, or your financial status. If you have any questions about this letter, please contact [name of regional contact.]

Thank you for your prompt attention to this matter.

Sincerely,

[Name/Title/Address of Individual Delegated Signature Authority]

Enclosures
cc:

**Online Resources Cited in this General Notice Letter & Others Relevant to this Letter
(Region should modify as appropriate)**

EPA	www.epa.gov
EPA Region []	www.epa.gov/region[]
Superfund Alternative Approach Guidance	www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-sas-04.pdf
General information on the Superfund Alternative Approach	www.epa.gov/compliance/cleanup/superfund/saa.html
General information on Superfund enforcement authorities, liability and settlements	www.epa.gov/compliance/cleanup/superfund/index.html
For guidance and information on a variety of Superfund enforcement topics, including <i>de minimis</i> settlements, ability-to-pay issues, service station dealers, you can search this data base by subject, key word, or chronologically.	http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/
General information on the Superfund cleanup process, methods and standards	www.epa.gov/superfund/
HRS Toolbox – information on PA, SI, and ESI reports, and HRS scoring	www.epa.gov/superfund/sites/npl/hrsres/index.htm
For information on Brownfields and Redevelopment	www.epa.gov/compliance/cleanup/redevelop/index.html
National Compliance Assistance Clearinghouse	http://cfpub.epa.gov/clearinghouse/
EPA Compliance Assistance Centers	www.epa.gov/compliance/assistance/centers/index.html