

## **INTERIM REVISIONS TO CERCLA SECTION 122(h) PAST COST RECOVERY AND PERIPHERAL PARTY CASHOUT MODEL AGREEMENTS TO CLARIFY CONTRIBUTION RIGHTS AND PROTECTION ARISING UNDER SECTION 113(f)**

This document provides interim language for modifying EPA's three model CERCLA Section 122(h) administrative agreements to address issues arising under Section 113(f). These models are the: 1) February 6, 2003 "Revised Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs" (Past Cost Model) (changes shown in Section I); 2) January 8, 2004 "Revised Model CERCLA Section 122(h)(1) Agreement for Peripheral Party Settlements Not Based on Ability to Pay" (Non-ATP Model) (changes shown in Section II); and 3) January 8, 2004 "Revised Model CERCLA Section 122(h)(1) Agreement for Peripheral Party Settlements Based on Ability to Pay" (ATP Model) (changes also shown in Section II). All changes are shown in redline/double underlining and strikeout and refer to the section and paragraph numbering of the original documents. The full model documents and all guidance documents referenced herein are available on EPA's Web site at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

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

### **I. CHANGES TO 122(h) PAST COST MODEL**

#### **A. CAPTION**

Change the title to "**Settlement** Agreement for Recovery of Past Response Costs" and, throughout the model, change all references to the title from "Agreement" to "**Settlement** Agreement."

#### **B. DEFINITIONS**

1. Delete definition (a), "Agreement," in Section IV, Paragraph 9, and add a new "Settlement Agreement" definition based on the same language:

\_\_\_ "Settlement Agreement" shall mean this **Settlement** Agreement [and any attached appendices]. In the event of conflict between this **Settlement** Agreement and any appendix, this **Settlement** Agreement shall control.

2. Add a new "Effective Date" definition in Section IV, Paragraph 9, and use it throughout

the model:

—. “Effective Date” shall mean the effective date of this Settlement Agreement as provided by Section XV.”

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

**1. Change the title of Section X (here and in Table of Contents) from “EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION” to “EFFECT OF SETTLEMENT/CONTRIBUTION.”**

**2. Modify Paragraphs 24, 25 and 26 as follows (Paragraphs 27 and 28 are unchanged, except for changing “Agreement” to “**Settlement** Agreement”):**

24. [Insert if applicable, “Except as provided in Paragraphs \_\_ (Non-Exempt De Micromis Waiver), and \_\_ (De Minimis Waiver), and (MSW Waiver)”],<sup>1</sup> [n]othing in this **Settlement** Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this **Settlement** Agreement. [Insert if applicable, “Except as provided in Paragraphs \_\_ (Non-Exempt De Micromis Waiver), and \_\_ (De Minimis Waiver), and (MSW Waiver)”], [t]he Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

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

26. The Parties agree that this Settlement Agreement constitutes an administrative

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<sup>1</sup> Insert cross-reference to any of the three waivers that are included in the settlement. Please note that Section IX of the Past Cost Model does not include the MSW waiver introduced in the August 20, 2003, “Interim Guidance on the Municipal Solid Waste Exemption.” The updated waiver language and accompanying MSW definition are included as an Appendix to this document for your convenience.

settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Settling Parties [and Settling Federal Agencies] are entitled, as of the effective date of this Agreement **Effective Date**, 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 **Settlement** Agreement. The “matters addressed” in this **Settlement** Agreement are Past Response Costs.<sup>2</sup> **The Parties further agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Settling Parties have, as of the Effective Date, resolved their liability to the United States for Past Response Costs.**

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<sup>2</sup> Note that the scope of “matters addressed,” Past Response Costs, is identical to the scope of the Covenant Not to Sue by EPA in Paragraph 19.

## II. CHANGES TO 122(h) PERIPHERAL PARTY NON-ATP AND ATP MODELS

### A. CAPTION

Change the title to “**Settlement** Agreement” and, throughout the Non-ATP and ATP Models, change all references to the title from “Agreement” to “**Settlement** Agreement.”

### B. DEFINITIONS

1. Delete definition (a), “Agreement,” in Section V, Paragraph 10, of the Non-ATP Model / Paragraph 11 of ATP Model, and add a new “Settlement Agreement” definition based on the same language:

—. “**Settlement** Agreement” shall mean this **Settlement** Agreement [and any attached appendices]. In the event of conflict between this **Settlement** Agreement and any appendix, this **Settlement** Agreement shall control.

2. Add a new “Effective Date” definition in Section V, Paragraph 10, of the Non-ATP Model/Paragraph 11 of the ATP model, and use it throughout the models:

—. “**Effective Date**” shall mean the effective date of this Settlement Agreement as provided by Section XV.”

### C. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

1. Change the title of Section XI (here and in Table of Contents) from “EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION” to “EFFECT OF SETTLEMENT/CONTRIBUTION .”

2. Modify Paragraphs 25 and 26 as follows (Paragraphs 27 is unchanged):

25. Except as provided in Paragraph 24,<sup>3</sup> [n]othing in this **Settlement** Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this **Settlement** 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. Nothing in this Settlement Agreement diminishes the right of the United States,

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<sup>3</sup> Recall that Paragraph 24 contains Settling Parties’ waiver of claims for all matters relating to the Site, including for contribution, against any other person, with an exception that permits an individual settlor to assert defenses, claims, or causes of action against any person who asserts a claim against that particular Settling Party.

pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

26. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Settling Parties<sup>4</sup> [and Settling Federal Agencies] are entitled, as of the ~~effective date of this Agreement~~ Effective Date, 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 Settlement Agreement. The “matters addressed” in this Settlement Agreement are all response actions taken or to be taken and all response costs incurred and to be incurred, at or in connection with the Site, by the United States or by any other person.<sup>5</sup> The “matters addressed” in this Settlement Agreement do not include those response costs or response actions as to which EPA has reserved its rights under this Settlement Agreement (except for claims for failure to comply with this Settlement Agreement), in the event that EPA asserts rights against Settling Parties [or Settling Federal Agencies] coming within the scope of such reservations. In the event that a Settling Party’s waiver of claims becomes inapplicable in accordance with Paragraph 24,<sup>6</sup> the Parties further agree that this Settlement Agreement constitutes an administrative settlement pursuant to which Settling Parties [and Settling Federal Agencies] have resolved their liability to the United States, as of the Effective Date, for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), for “matters addressed” as defined above.

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<sup>4</sup> If there is only one settling party (as is the case under the ATP Model as written), use the singular “Settling Party” throughout Paragraph 26.

<sup>5</sup> Note that “matters addressed” is broadly defined so as to reflect the site-wide scope of the Covenant Not to Sue by EPA in Paragraph 19 of the ATP Model / Paragraph 18 of the Non-ATP Model.

<sup>6</sup> See *supra* note 3.

## APPENDIX

**DEFINITION OF “MUNICIPAL SOLID WASTE” AND WAIVER OF CONTRIBUTION RIGHTS AGAINST CERTAIN MSW PARTIES FOR USE IN PAST COST MODEL AT SITES CONTAINING MSW**

**[NOTE: Insert the following definition in Section IV, Paragraph 9, if the Settlement Agreement contains the waiver of contribution rights against certain MSW parties at the Site in Section IX, Covenant Not to Sue by Settling Parties.]**

\_\_\_ “Municipal solid waste” shall mean waste material: (i) generated by a household (including a single or multifamily residence); or (ii) generated by a commercial, industrial or institutional entity, to the extent that the waste material – (I) is essentially the same as waste normally generated by a household; (II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

**[NOTE: Insert the following two paragraphs at the end of Section IX, Covenant Not to Sue by Settling Parties, if there is MSW at the Site, unless a broader waiver of CERCLA claims against all persons is already included in the Settlement Agreement.]**

\_\_\_ Settling Parties agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person’s liability to Settling Parties with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of Municipal Solid Waste (MSW) at the Site, if the volume of MSW disposed, treated or transported by such person to the Site did not exceed 0.2 percent of the total volume of waste at the Site.

\_\_\_ The waiver in Paragraph \_\_\_ above shall not apply with respect to any defense, claim, or cause of action that a Settling Parties may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Settling Party. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines that: (a) the MSW contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; (b) the person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. § 9604(e) or § 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927; or (c) the person impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site.