



U.S. ENVIRONMENTAL PROTECTION AGENCY



U.S. DEPARTMENT OF JUSTICE

August 3, 2005

MEMORANDUM

SUBJECT: Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)

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

With this memorandum, EPA's Office of Site Remediation Enforcement (OSRE) and the U.S. Department of Justice (DOJ) are issuing interim revisions to the three EPA model administrative orders on consent (AOCs) that provide for performance of removal response action. These models are the: (1) "Revised Model Administrative Order on Consent for Removal Actions" (Removal Model), July 9, 2001;

(2) “Revised Model Administrative Order on Consent for Remedial Investigation / Feasibility Study” (RI/FS Model), January 21, 2004; and (3) “Model Administrative Order on Consent for Remedial Design” (RD Model), January 6, 2005.

These interim revisions are meant to address concerns raised since the U.S. Supreme Court issued its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (Dec. 13, 2004). In *Aviall*, the Supreme Court held that the plain language of CERCLA § 113(f)(1) allows a potentially responsible party (PRP) to seek contribution only “during or following” a “civil action” under CERCLA § 106 or § 107(a). The Court also noted that CERCLA § 113(f)(3)(B) provides another avenue for contribution, under which a PRP “who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement” may seek contribution. Since the Supreme Court’s decision, PRPs have expressed concern that the current model AOCs do not clearly state that a settling PRP has resolved liability for response costs or response actions addressed in the order and that, as a result, their right to seek contribution from other parties to the extent provided by CERCLA § 113(f)(3)(B) is unclear. EPA and DOJ’s intent and position has been, and continues to be, that EPA’s AOCs resolve a settling PRP’s liability within the meaning of CERCLA § 113(f)(3)(B). These interim revisions are meant merely to clarify and confirm this intent.

The attachment to this memorandum includes specific, line-by-line language changes recommended for each of the three models. OSRE requests that EPA Regions incorporate the attached revisions into all Removal, RI/FS, and RD AOCs issued subsequent to this memorandum. Briefly summarized, the modifications:

- Change the name of the relevant model from “Administrative Order on Consent” to “Administrative Settlement Agreement and Order on Consent” and use “Settlement Agreement” as the shorthand internal reference to the title of the model.
- Modify slightly the language of the Covenant Not to Sue by EPA to provide consistency among the covenants in all three administrative models.
- Change the title of the Contribution Protection section to “Contribution” and add therein a statement that the Settlement Agreement:
 - constitutes an administrative settlement and resolves Respondents’ liability to the United States, as of the Effective Date, for purposes of CERCLA § 113(f)(3)(B), for the Work and Past and/or Future Response Costs (as applicable) and
 - pursuant to CERCLA §§ 113(f)(2) and (3), does not limit the right of the United States to pursue non-parties to the Agreement for additional response costs or response action, or

to enter into settlements providing contribution protection to such parties.¹

The language provided in these interim revisions is appropriate for situations where the liability resolved by the settlors is coextensive with EPA's covenant not to sue and the "matters addressed" under CERCLA § 113(f)(2), as will normally be the case. As evidenced by the language in EPA's previously issued Removal, RI/FS, and RD Model AOCs, EPA generally provides a covenant not to sue for, and defines "matters addressed" as, the "Work" required by the AOC and Past and/or Future Response Costs, as those terms are defined by the AOC. These interim revisions are not intended to change this general approach, and, in most cases, the liability resolved for purposes of CERCLA § 113(f)(3)(B) also will be the Work and Past and/or Future Response Costs. However, there may be instances in which EPA and Respondents intend to resolve liability other than the Work and Past and/or Future Response Costs. In such situations, the liability to be resolved should be specifically described to make clear that the right to contribution extends to that other liability. For example, the parties may wish to confirm that the Respondents have resolved their liability for work previously performed at the site under EPA supervision. In such instances, the Region should receive prior approval from OSRE.

Prior to modifying or omitting these interim revisions, a Region should receive prior approval from the Branch Chief in OSRE's Regional Support Division (RSD) overseeing *Aviall*-related issues, currently Benjamin Lammie.² To request such approval, a Region should email a copy of the draft AOC to Anne Berube (202-564-6065) and Joshua Epstein (202-564-6009) in RSD, along with a summary of the pertinent facts and/or the logic regarding the requested modification. RSD will promptly consult with DOJ and notify the Region of its approval or of any necessary revisions.

OSRE commits to revisiting the necessity of this approval process as experience is gained with incorporating these interim revisions. In addition, OSRE will continue to review its model agreements and developing law and, in coordination with DOJ, issue further changes to those models if necessary.

Any questions about this memorandum or these AOCs generally may be directed to Janice Linett (202-564-5131) or Anne Berube (202-564-6065) in OSRE or Leslie Allen (202) 514-4114 in DOJ/EES. This document is available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>. General information about EPA's work on issues related to *Aviall* may be found on EPA's Web site at <http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/aviall-faqs.html>.

¹ This language simply clarifies and confirms EPA's position, consistent with the language of CERCLA.

² The approval process for modifying these interim revisions is separate from, and does not take the place of, any other approval, concurrence, or consultation that may be required by OSRE and/or DOJ. For example, this approval process is separate from the necessary Attorney General approval of an administrative settlement of cost recovery claims at a site where the U.S. response costs exceed \$500,000.

Attachment

cc: Scott Sherman, Associate General Counsel for Solid Waste and Emergency Response
Office of Regional Counsel Branch Chiefs, Regions I-X

**INTERIM REVISIONS TO CERCLA REMOVAL, RI/FS AND RD
AOC MODELS TO CLARIFY CONTRIBUTION RIGHTS AND PROTECTION
ARISING UNDER SECTION 113(f)**

This document provides interim language for modifying EPA's three model AOCs for removal response action to address issues arising under Section 113(f). These models are the: 1) July 9, 2001 "Revised Model Administrative Order on Consent for Removal Actions" (Removal Model) (changes shown in Section I); 2) January 21, 2004 "Revised Model Administrative Order on Consent for Remedial Investigation/Feasibility Study" (RI/FS Model) (changes shown in Section II); and 3) July 6, 2005 "Model Administrative Order on Consent for Remedial Design" (RD Model) (changes shown in Section III). 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://www.epa.gov/compliance/cleanup/superfund/index.html>.

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

I. CHANGES TO REMOVAL AOC

A. CAPTION

Change the title to "Administrative Settlement Agreement and Order on Consent for Removal Action."

B. JURISDICTION AND GENERAL PROVISIONS

Modify Section I, Paragraph 1, as follows and, throughout the Removal Model, change all references to the title from "Order" to "Settlement Agreement":

1. This Administrative Settlement Agreement and Order on Consent ("~~Order~~ Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and [insert names or attach list of Respondents] ("Respondents"). This ~~Order~~ Settlement Agreement provides for performance of a removal action . . . [remainder of paragraph unchanged].

C. DEFINITIONS

Delete definition (m), “Order,” in Section III, Paragraph 8, and add a new “Settlement Agreement” definition based on the same language:

___ “~~Order~~ Settlement Agreement” shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXXI). In the event of conflict between this ~~Order~~ Settlement Agreement and any appendix, this ~~Order~~ Settlement Agreement shall control.

D. ORDER

Change the title of Section VI (here and in Table of Contents) to “SETTLEMENT AGREEMENT AND ORDER.”

E. COVENANT NOT TO SUE BY EPA

Modify the first sentence of Section XIX, Paragraph 56, Alternatives 1 and 2, as follows. The remainder of the paragraph is unchanged:

For Alternative 1 (Payment of Past and Future Response Costs):

In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this ~~Order~~ Settlement Agreement, and except as otherwise specifically provided in this ~~Order~~ Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for ~~performance of the Work~~ and for recovery of Past Response Costs, ~~and Future Response Costs~~.

For Alternative 2 (Payment of Future Response Costs Only):

In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this ~~Order~~ Settlement Agreement, and except as otherwise specifically provided in this ~~Order~~ Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for ~~performance of the Work and for recovery of Future Response Costs~~.

F. CONTRIBUTION PROTECTION

1. Change the title of Section XXIII (here and in Table of Contents) from “CONTRIBUTION PROTECTION” to “CONTRIBUTION.”

2. Modify Paragraph 67 as follows:

a. 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 Respondents are entitled, as of the 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 Order Settlement Agreement.** The “matters addressed” in this Order Settlement Agreement are the Work [, Past Response Costs,] and Future Response Costs.

b. The Parties 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 Respondents have, as of the Effective Date, resolved their liability to the United States for the Work [, Past Response Costs,] and Future Response Costs.**¹

c. ~~[Insert if applicable, “Except as provided in Section XXI, Paragraph[s] 62 [and 63] __, of this Order (Non-exempt De Micromis [and, De Minimis], and MSW Waivers),]~~² [n]othing in this Order Settlement Agreement precludes the United States or Respondents from asserting any claims, causes of action, or demands **for indemnification, contribution, or cost recovery** against any persons not parties to this Order Settlement Agreement ~~for indemnification, contribution, or cost recovery.~~ **Nothing herein diminishes the right of the United States, pursuant to Sections 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).**

¹ In most cases the liability resolved, for purposes of Section 113(f)(3)(B), will be the same as the liability covered by the covenant not to sue and the “matters addressed,” *i.e.*, the Work required by the AOC and the Future and/or Past Response Costs, as applicable. However, there may be instances in which EPA and Respondents intend to resolve other liability, in which case the Region should describe the liability resolved in some other fashion. For example, Respondents may have performed response action or paid response costs prior to the effective date of the Settlement Agreement, which work or costs EPA believes should be recognized as liability “resolved” under the Settlement Agreement. Possible fact patterns include actions preparatory to the “work” required under the settlement, work undertaken voluntarily at the site, or work completed under a unilateral administrative order issued by EPA. Where such work or costs have not been expressly recognized as “resolved” in a prior EPA settlement, and EPA and DOJ agree that such recognition is appropriate in this agreement, the prior work/costs should be described with specificity in one or more paragraphs, and the end of Paragraph 67(b) should include the additional clause, “and for those response actions taken or costs paid prior to the effective date of this Settlement Agreement and described in **[insert relevant paragraph numbers describing the additional work]** of this Settlement Agreement.”

² Please note that the de micromis/MSW/MSS waiver contained in Paragraph 62 of the Removal Model has been superseded by new waiver language introduced in the November 6, 2002 “Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties” and the August 20, 2003 “Interim Guidance on the Municipal Solid Waste Exemption.” The updated waiver language is already included in Section XXI, Covenant not to Sue by Respondents, of the RI/FS Model and RD Model.

II. CHANGES TO RI/FS AOC

A. CAPTION

Change the title to “Administrative **Settlement Agreement and** Order on Consent for Remedial Investigation/Feasibility Study,” and reference only Sections 104, 107 and 122 of CERCLA as provided in the model.

B. JURISDICTION AND GENERAL PROVISIONS

Modify Section I, Paragraph 1, as follows and, throughout the RI/FS Model, change all references to the title from “Order” to “Settlement Agreement”:

1. This Administrative **Settlement Agreement and** Order on Consent (“~~Order~~ **Settlement Agreement**”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and [insert names or attach list of Respondents], (“Respondents”). The ~~Order~~ **Settlement Agreement** concerns the preparation and performance of a remedial investigation and feasibility study [remainder of paragraph unchanged].

C. DEFINITIONS

Delete definition (j), “Order,” in Section IV, Paragraph 11, and add a new “Settlement Agreement” definition based on the same language:

___ “~~Order~~ **Settlement Agreement**” shall mean this Administrative **Settlement Agreement and** Order on Consent, the SOW, all appendices attached hereto (listed in Section XXVII) and all documents incorporated by reference into this document including without limitation EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become a part of the ~~Order~~ **Settlement Agreement** upon approval by EPA. In the event of conflict between this ~~Order~~ **Settlement Agreement** and any appendix or other incorporated documents, this ~~Order~~ **Settlement Agreement** shall control.

D. ORDER

Change the title of Section VII (here and in Table of Contents) to “**SETTLEMENT AGREEMENT AND ORDER.**”

E. COVENANT NOT TO SUE BY EPA

Modify the first sentence of Section XIX, Paragraph 81, Alternatives 1 and 2, as follows. The remainder of the paragraph is unchanged:

For Alternative 1 (Payment of Past and Future Response Costs):

In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this ~~Order~~ Settlement Agreement, and except as otherwise specifically provided in this ~~Order~~ Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work ~~performed under this Order and for recovery of~~ Past Response Costs, and Future Response Costs.

For Alternative 2 (Payment of Future Response Costs Only):

In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this ~~Order~~ Settlement Agreement, and except as otherwise specifically provided in this ~~Order~~ Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work ~~performed under this Order and for recovery of~~ Future Response Costs.

F. CONTRIBUTION PROTECTION

1. Change the title of Section XXIII (here and in Table of Contents) from “CONTRIBUTION PROTECTION” to “CONTRIBUTION.”

2. Modify Paragraph 91 as follows:

a. 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 Respondents are entitled, as of the 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 Order~~ Settlement Agreement. The “matters addressed” in this ~~Order~~ Settlement Agreement are the Work [, Past Response Costs,] and Future Response Costs.

b. The Parties 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 Respondents have, as of the Effective Date, resolved their liability to the United States for the Work [, Past Response Costs,] and Future Response Costs.³

c. ~~[Insert if applicable, “{Except as provided in Section XXI-(Covenant Not to Sue by Respondents), Paragraph(s) ____ {and ____}, of this Order~~ Settlement Agreement (Non-Exempt De Micromis, {and De Minimis, and MSW Waivers}, and Paragraphs ____ and ____ (MSW Waiver)] [n]othing in this ~~Order~~ Settlement Agreement precludes the United States or Respondents from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any persons not parties to this ~~Order~~ Settlement Agreement for indemnification;

³ See *supra* note 1.

~~contribution, or cost recovery.~~ Nothing herein diminishes the right of the United States, pursuant to Sections 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).

III. CHANGES TO RD AOC

A. CAPTION

Change the title to “Administrative Settlement Agreement and Order on Consent for Remedial Design.”

B. JURISDICTION AND GENERAL PROVISIONS

Modify Section I, Paragraph 1, as follows and, throughout the RD Model, change all references to the title from “Order” to “Settlement Agreement”:

1. This Administrative Settlement Agreement and Order on Consent (“~~Order~~ Settlement Agreement”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and [insert names or attach list of Respondents] (collectively “Respondents”). This ~~Order~~ Settlement Agreement provides that Respondents shall undertake a Remedial Design [remainder of paragraph unchanged].

C. DEFINITIONS

Delete definition (k), “Order or Consent Order,” in Section III, Paragraph 10, and add a new “Settlement Agreement” definition based on the same language:

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

D. ORDER

Change the title of Section VI (here and in Table of Contents) to “SETTLEMENT AGREEMENT AND ORDER.”

E. COVENANT NOT TO SUE BY EPA

In Section XIX, Paragraph 85, Alternatives 1 and 2, modify the first sentence as follows. The remainder of the paragraph is unchanged:

For Alternative 1 (Payment of Past and Future Response Costs):

In consideration of the actions that Respondents will perform and the payments that Respondents will make under the terms of this ~~Order~~ Settlement Agreement, and except as otherwise specifically provided in this ~~Order~~ Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42

U.S.C. §§ 9606 and 9607(a), for the Work performed under this Order and for recovery of Past Response Costs, and Future Response Costs.

For Alternative 2 (Payment of Future Response Costs Only):

In consideration of the actions that Respondents will perform and the payments that Respondents will make under the terms of this ~~Order~~ Settlement Agreement, and except as otherwise specifically provided in this ~~Order~~ Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work performed under this Order and for recovery of Future Response Costs.

F. CONTRIBUTION PROTECTION

1. Change the title of Section XXIII (here and in Table of Contents) from “CONTRIBUTION PROTECTION” to “CONTRIBUTION.”

2. Modify Paragraph 96 as follows:

a. 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~~ Respondents are entitled, as of the 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 ~~Order~~ Settlement Agreement. The “matters addressed” in this ~~Order~~ Settlement Agreement are the Work [, Past Response Costs,] and Future Response Costs.

b. The Parties 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 Respondents have, as of the Effective Date, resolved their liability to the United States for the Work [, Past Response Costs,] and Future Response Costs.⁴

c. [Insert if applicable, “Except as provided in Section XXI, Paragraph(s) ____, of this ~~Order~~ Settlement Agreement (Non-Exempt De Micromis, *De Minimis*, and MSW Waivers),”] [N]othing in this ~~Order~~ Settlement Agreement precludes the United States or Respondents from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any persons not parties to this ~~Order~~ Settlement Agreement ~~for indemnification, contribution, or cost recovery~~. Nothing herein diminishes the right of the United States, pursuant to Sections 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).

⁴ See *supra* note 1.