**MODEL CERCLA ABILITY TO PAY PROVISIONS FOR USE IN**

**DE MINIMIS SETTLEMENTS WITH ABILITY TO PAY AND**

**NON-ABILITY TO PAY PARTIES**

This document provides recommended language for settling with ability to pay *de minimis* parties in accordance with Section 122(g)(7) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. § 9622(g)(7). It sets forth the specific changes to be made to the model Section 122(g) *de minimis* contributor consent decree (CD) and administrative settlement agreement and order on consent (ASAOC) when entering into such a settlement with both ability to pay (ATP) and non-ATP potentially responsible parties.

All references in this document are to the language and numbering of the September 2014 “Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree” and the “Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Settlement Agreement and Order on Consent.” When inserting text from this document into a model, ALWAYS use the “Paste Special” function. Press Ctrl-Alt-V; in the pop-up menu, click “Unformatted Text” and OK.

The changes set forth below may also be tailored for use in any *de minimis* landowner CD or ASAOC entered into with an ATP party in the event that such settlement calls for a cash payment. If a *de minimis* landowner settlement with an ATP party calls for the United States to be paid a percentage of the proceeds of the future sale of land, language may be found in the September 2014 “Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree” or “Model CERCLA Section 122(h) Cashout Settlement Agreement for Ability to Pay Peripheral Parties,” as appropriate.

All ability to pay settlements must be based on an ability to pay analysis and require payment of an appropriate ability to pay amount, in accordance with the “General Policy on Superfund Ability to Pay Determinations” (Sept. 30, 1997; available at <http://www2.epa.gov/enforcement/guidance-superfund-ability-pay-determinations>).

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

**1. STATEMENT OF PURPOSE**

**Make the following changes to the Statement of Purpose (Section V, Paragraph 4, of the CD and Section III, Paragraph 5, of the ASAOC). Changes are shown in redline/strikeout:**

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

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

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

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

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

**2. DEFINITIONS**

**Add the following two or three definitions, as appropriate, to the Definitions Section (Section IV of the CD and Section IV of the AOC):**

“Financial Information” shall mean those financial documents provided to EPA by [Settling ATP Defendant/Respondent [**if multiple insert name**]] identified in Appendix \_\_ [**if multiple use separate Appendix for each settlor]**.

**[NOTE: With regard to each ATP settlor, the negotiating team should, where appropriate, request and review copies of any applicable insurance policies and any other information relating to potential insurance coverage (including sending each such ATP settlor a specific CERCLA § 104(e) information request targeted at insurance coverage), and should consult with the Office of Site Remediation Enforcement’s (OSRE’s) insurance team regarding approaches to recovery under applicable insurance policies. When insurance information is reviewed, insert the following definition.]**

“Insurance Information” shall mean those insurance documents provided to EPA by [**Settling ATP Defendant/Respondent [if multiple insert name**]] identified in Appendix \_\_ [**if multiple use separate Appendix for each settlor]**.

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

[**NOTE: The defined term “Settling Defendants/Respondents” includes both the ATP settlors and the non-ATP settlors.**]

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

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

In accordance with Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), EPA has reviewed the Financial Information [and Insurance Information] submitted by each Settling ATP Defendant to determine whether it has an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such party to pay response costs and still maintain its basic business operations, including its overall financial condition and demonstrable constraints on its ability to raise revenues. Based upon this Financial Information [and Insurance Information], EPA has determined that each Settling ATP Defendants qualifies for a reduction in settlement amount and/or an alternative payment method within the meaning of Section 122(g)(7) of CERCLA and is able to make the payment(s) [**use plural if installments**] specified in Section VI (Payment).

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

**[ADDITIONAL STATEMENT OF FACT/Insert after Paragraph 12]** The United States has reviewed the Financial Information [and Insurance Information] submitted by each ATP Respondent to determine whether it has an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such party to pay response costs and still maintain its basic business operations, including its overall financial condition and demonstrable constraints on its ability to raise revenues.

**[ADDITIONAL DETERMINATION/Insert after Paragraph 14(h)]** Based upon the Financial Information [and Insurance Information] provided by each ATP Respondent, the United States has determined that each ATP Respondent qualifies for a reduction in settlement amount and/or an alternative payment method within the meaning of Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and is able to make the payment(s) [**use plural if installments**] specified in Section VII (Payment).

**4. PAYMENT**

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

**First, if the settlement includes both ATP and non-ATP settling parties, modify Paragraph 5 of the CD and Paragraph 16 of the ASAOC to exclude the ATP settlor(s) from the lump sum payment obligation by adding the following redlined language:**

Within 30 days after the Effective Date, each [Settling Defendant/Respondent] who is not a [Settling ATP Defendant/ATP Respondent] shall pay to EPA [**insert either** “the amount set forth below” **or** ”the amount set forth in Appendix C to this [Consent Decree/Settlement Agreement”].

**Second, insert a new paragraph immediately following the above language outlining the installment payment obligations for the ATP settlors. The Regional attorney should discuss all proposed installment payment plans with the Regional Financial Management Office (and the DOJ attorney should also discuss any such plan with his/her Assistant Section Chief), including the minimum payment that may be processed, the minimum interval between payments, the maximum length of the payment schedule, and the calculation of interest. When drafting an installment payment plan, keep in mind that Interest is defined in Section IV, Paragraph 3, of the CD and Section IV, Paragraph 6, of the ASAOC**.

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

[Settling ATP Defendant/ATP Respondent] shall pay to EPA the principal sum of $\_\_\_\_\_\_. Payment of the principal amount shall be made in \_\_ installments. The first installment payment of $\_\_\_\_\_\_ is due within 30 days after the Effective Date and, if timely paid, shall include no interest. Subsequent installment payments of $\_\_\_\_\_\_ are due [**insert schedule for payments, such as:** “three months, six months, and nine months after the Effective Date” or “on each anniversary of the Effective Date” or “on [January 2] of each year following the Effective Date”]. Each installment payment shall also include an additional sum for Interest accrued on the unpaid portion of the principal amount calculated from the 30th day after the Effective Date until the date of payment. [**For CDs:** The Financial Litigation Unit (FLU) of the U.S. Attorney’s Office for the District of \_\_\_\_\_\_ shall send a calculation of the Interest due for each payment to Settling Defendant.] [**For ASAOCs:** EPA shall send a calculation of the Interest due for each payment to Respondent after the Effective Date.] [Settling Defendant/ Respondent] may pay any installment payment prior to the due date, but must contact [**for CDs:** the FLU] [**for ASAOCs: insert name and address of contact in Region**] in advance for a determination regarding the amount of Interest to be included with the payment. In the event any installment payment includes an overpayment, the amount of the overpayment shall be applied to the remaining principal.

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

[Settling ATP Defendants/ATP Respondents] shall make payments to EPA in the principal amounts and by the due dates set forth in Appendix \_\_. The first installment payment is due within 30 days after the Effective Date and, if timely paid, shall include no interest. Subsequent installment payments shall include an additional sum for Interest accrued on the unpaid portion of the principal amount calculated from the 30th day after the Effective Date until the date of payment. [**For CDs:** The Financial Litigation Unit (FLU) of the U.S. Attorney’s Office for the District of \_\_\_\_\_\_ shall send a calculation of the Interest due for each payment to Settling Defendants.] [**For ASAOCs:** EPA shall send a calculation of the Interest due for each payment to Respondents after the Effective Date.] [Settling Defendants/Respondents] may pay any installment prior to the due date, but must contact [**for CDs:** the FLU] [**for ASAOCs:** **insert name and address of contact in Region**] in advance for a determination regarding the amount of Interest to be included with the payment. In the event any installment payment includes an overpayment, the amount of the overpayment shall be applied to the remaining principal.

**5. FAILURE TO MAKE PAYMENT**

**Modify the Failure to Make Payment provision (Section VII, Paragraph 12, of the CD and Section VIII, Paragraph 23, of the ASAOC) as follows:**

[**Use for ATP and non-ATP settlors whose payment is a lump sum:** If any [Settling Defendant/Respondent] / [Settling ATP Defendant/ATP Respondent] fails to make the full payment required by Paragraph [5 of the CD/16 of the AOC] by the required due date, that [Settling Defendant/Respondent] / [Settling ATP Defendant/ATP Respondent] shall pay Interest on the unpaid balance, which shall accrue from the Effective Date until the date of payment.]

[**Use for any ATP settlors whose payment is in installments:** If any [Settling ATP Defendant/ATP Respondent] fails to make any payment under Paragraph \_\_ [**reference ATP installment plan paragraph(s)**] by the required due date, all remaining installment payments and all accrued Interest for such [Settling ATP Defendant/Respondent] shall become due immediately upon such failure, and if such [Settling ATP Defendant’s/Respondent’s] first payment is not timely paid, Interest shall accrue from the Effective Date. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.]

[**Use for all settlors:** In addition, if any [Settling Defendant/Respondent] or [Settling ATP Defendant/Respondent] fails to make any payment in the amount and by the due date required by Paragraph [5 of the CD/16 of the ASAOC] or Paragraph \_\_ [**reference ATP installment plan paragraph(s)**], as applicable, the United States may, in addition to any other available remedies or sanctions, bring an action against that [Settling Defendant/Respondent] seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(*l*) of CERCLA, 42 U.S.C. § 9622(*l*), for failure to make timely payment.]

**6. CERTIFICATION**

**Add the following additional paragraph to the Certification provision (insert after Section XII, Paragraph 26, of the CD and Section IX, Paragraph 24, of the ASAOC):**

Each [Settling ATP Defendant/ATP Respondent] further certifies individually that it [a)] has submitted to EPA Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the financial information was submitted to EPA and the time [Settling ATP Defendant/ATP Respondent] executes this [Consent Decree/Settlement Agreement] [**when applicable:** ; and b) fully disclosed any information regarding the existence of any insurance policies or indemnity agreements that may cover claims relating to cleanup of the Site, and submitted to EPA upon request such insurance policies, indemnity agreements, and information].

**7. COVENANTS BY UNITED STATES**

**Make the following changes to the Covenants by United States (Section VIII, Paragraph 13, of the CD and Section X, Paragraph 26, of the ASAOC):**

Except as specifically provided in Section [IX of the CD/XI of the ASAOC] (Reservations of Rights by United States), the United States covenants not to sue or take administrative action against any of the [Settling Defendants/ Respondents] pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607 [, and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973], relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for each [Settling Defendant/Respondent] upon the Effective Date. With respect to [Settling Defendants/Respondents] individually, this covenant not to sue is conditioned upon: a) the satisfactory performance by each [Settling Defendant/Respondent] of all obligations under this [Consent Decree/Settlement Agreement], including but not limited to, payment of all amounts due under Section [Section VI of CD/VII of ASAOC] (Payment); and b) the veracity of the information provided to EPA by [Settling Defendant/Respondent] relating to [Settling Defendant’s/Respondent’s] involvement with the Site. With respect to [Settling ATP Defendants/ATP Respondents] individually, this covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information [and the Insurance Information] provided to EPA by each [Settling ATP Defendant/ATP Respondent] and the financial [, insurance, and indemnity] certification made by each [Settling ATP Defendant/ATP Respondent] in Paragraph [26 of the CD/24 of the ASAOC]. This covenant not to sue extends only to [Settling Defendants/ Respondents] and does not extend to any other person.

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

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

Notwithstanding any other provision of this [Consent Decree/Settlement Agreement], the United States reserves, and this [Consent Decree/Settlement Agreement] is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action against any individual [Settling ATP Defendant/ATP Respondent] seeking relief other than as provided in this [Consent Decree/Settlement Agreement], if the Financial Information [or the Insurance Information] provided by any such [Settling ATP Defendant/ATP Respondent], or the financial [insurance, or indemnity] certification made by any such [Settling ATP Defendant/ATP Respondent] in Section [XII of the CD/IX of the AOC] is false or, in any material respect, inaccurate.

**Second, note that the cost overrun reopener (in Paragraph 16(b) of the CD and 29(b) of the ASAOC) may be excluded for ATP settlors even if they are unable to pay a premium in the percentage required, or by the due date required, of the non-ATP settlors, if the inability to pay the premium is supported by the ATP analysis.**

**9. INTEGRATION/APPENDICES**

**In the Integration/Appendices provision (Section XIV, Paragraph 29, of the CD and Section XIV, Paragraph 40, of the ASAOC), include references to all additional appendices used, which may include:**

1. the list of financial documents submitted to EPA by each [Settling ATP Defendant/ATP Respondent];
2. the list of insurance documents submitted to EPA by each [Settling ATP Defendant/ATP Respondent];
3. the list of [Settling ATP Defendants/ATP Respondents]; and
4. the payment schedules for the [Settling ATP Defendants/ATP Respondents].