

Editor's Note: EPA and DOJ jointly revised the interim model language relating to contribution protection and rights included in this 3/16/2009 memorandum in the "Revisions to 2009 ARC Memo and Issuance of Revised CERCLA Past Cost, Peripheral, De Minimis, De Micromis, and Municipal Solid Waste Settlement Models" issued 9/26/14. See <http://www2.epa.gov/enforcement/guidance-revisions-2009-arc-memo-and-issuance-cercla-payment-models>.



U.S. ENVIRONMENTAL PROTECTION AGENCY



U.S. DEPARTMENT OF JUSTICE

March 16, 2009

MEMORANDUM

SUBJECT: Interim Revisions to CERCLA Judicial and Administrative Settlement Models to Clarify Contribution Rights and Protection from Claims Following the *Aviall* and *Atlantic Research Corporation* Decisions

FROM: Marcia E. Mulkey, Director /s/
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency

Bruce S. Gelber, Chief /s/
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
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
Director, Office of Environmental Stewardship, Region I
Director, Environmental Accountability Division, Region IV
Regional Counsel, Regions II, III, V, VI, VII, IX, and X
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

A. Background and Purpose

With this memorandum, EPA's Office of Site Remediation Enforcement (OSRE) and the U.S. Department of Justice's Environment and Natural Resources Division (DOJ) are issuing interim revisions to the judicial and administrative settlement models issued under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA), 42 U.S.C. § 9601, *et seq.*, to clarify certain contribution rights and protection from claims and certain other language following the Supreme Court's decisions in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) (*Aviall*), and *United States v. Atlantic Research Corporation*, 551 U.S. 128 (2007) (*ARC*). In *Aviall*, the Supreme Court held that the plain language of Section 113(f)(1) of CERCLA allows a potentially responsible party (PRP) to seek contribution only "during or following" a "civil action" under Section 106 or 107(a) of CERCLA. The Court also stated that Section 113(f)(3)(B) of CERCLA provides a second 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. In *ARC*, the Supreme Court considered the interplay between Section 113(f) and Section 107(a)(4)(B) and found that PRPs that have incurred site-related costs may, in certain circumstances, seek recovery of those costs from other PRPs under Section 107(a)(4)(B) of CERCLA. The *ARC* decision could lead PRPs to seek site costs from settling parties despite the protection from claims afforded by Section 113(f)(2) (and, for *de minimis* settlements, Section 122(g)(5), and for administrative settlements for response costs, Section 122(h)(4)).

EPA and DOJ issued interim revisions to our CERCLA administrative settlement models in response to the *Aviall* decision on August 3, 2005 for the "work" models, and on September 21, 2006 for the "response cost" models.¹ We have reexamined these interim revisions and our other CERCLA settlement models in light of the *Aviall* and *ARC* decisions, and we now believe that additional modifications are needed to address some of the potential ramifications and ambiguities that arise from these decisions. We will make specific, line-by-line language changes to each of our CERCLA settlement models and post them on EPA's Web site.² The

¹ See "Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)" (August 3, 2005), available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>, and "Interim Revisions to CERCLA Section 122(h) Past Cost Recovery and Peripheral Party Cashout Model Administrative Agreements to Clarify Contribution Rights and Protection Under Section 113(f)" (September 21, 2006), available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-22h-aviall-mem.pdf>.

² EPA has already issued *ARC*-related changes to its CERCLA model notice letters. On April 30, 2008, EPA issued interim modifications to six *de minimis*, ability to pay, and general model notice letters as well as revisions to the 1993 "Superfund and Small Waste Contributors" (continued...)

changes, and the specific reasons for making them, are summarized below. We will continue to evaluate our model settlement language and consider the utility of additional revisions as case law continues to develop in this area.

B. Changes to Contribution Provision of CERCLA Settlement Models (additions shown in red double underlining; deletions shown in blue strikeout)

1. Model Language

[For judicial CDs begin with the following:]

The Parties agree, and by entering this Consent Decree this Court finds, that this settlement constitutes a judicially-approved settlement for purposes of Section[s] 113(f)(2) [for *de minimis* CDs: “and 122(g)(5)”] of CERCLA, 42 U.S.C. §[§] 9613(f)(2) [and 9622 [(g)(5)]], and that each Settling Defendant is entitled, as of the “date of entry / Effective Date,” to protection from contribution actions or claims as provided by Section[s] 113(f)(2) [and 122(g)(5)] of CERCLA, 42 U.S.C. §[§] 9613(f)(2) [and 9622(g)(5)], or as may be otherwise provided by law, for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are

[For administrative settlements begin with the following:]

The Parties agree that this settlement constitutes an administrative settlement”] for purposes of Section[s] 113(f)(2) [for *de minimis* settlements: “and 122(g)(5)”] [for administrative settlements containing response cost payments pursuant to Section 122(h)(1): “and 122(h)(4)”] of CERCLA, 42 U.S.C. §[§] 9613(f)(2) [and] [122(g)(5)] [122(h)(4)]”, and that each [Settling Party]³ is entitled, as of the [capitalize if defined term: “effective date”], to protection from contribution actions or claims as provided by Section[s] 113(f)(2) [include 122(g)(5) or (h)(4) if included above] of CERCLA, 42 U.S.C. §[§] 9613(f)(2) [and 9622(g)(5) / (h)(4)], or as may be otherwise provided by law, for “matters addressed” in this [Settlement

²(...continued)

brochure. These changes correct language, relating to the protection from claims afforded by *de minimis* settlements, that is overly broad and potentially misleading after the *ARC* decision. See “Interim Revisions to CERCLA Notice Letters and Update of Superfund and Small Waste Contributors Brochure to Notify Potential Settlers about *Atlantic Research Corporation* Decision” (April 30, 2008), available on EPA’s Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/arc-notice-ltrs-broch-mem.pdf>.

³ Insert the name given to the settling parties by the definitions section of the specific model.

Agreement]⁴. The “matters addressed” in this [Settlement Agreement] are

[For judicial CDs and administrative settlements continue with one of the next three brackets, as appropriate:]

[for cost recovery settlements end with: “Past Response Costs.”]

[for partial work / cost settlements end with, e.g.: “the Work, Past Response Costs, and Future Response Costs.”]

[for site-wide settlements end with: “all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person” [if State has a claim relating to the Site that is not being resolved through the settlement, continue with, “, except for the State”] ~~The “matters addressed” in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendants coming within the scope of such reservations. “; provided, however, that if the United States exercises rights under the reservations in Section ____ (Covenant Not to Sue by [for CDs: “Plaintiff(s)”/ [for Settlement Agreements: “EPA”]), other than in Paragraphs ____ (claims for failure to meet a requirement of the settlement), ____ (criminal liability), [if reservation concerning violations of law is included in settlement: “, or ____ (violations of federal/state law during or after implementation of the [Remedial Action / Work]),”]~~ the “matters addressed” in this [Consent Decree / Settlement Agreement] will no longer include those response costs or response actions [if the settlement includes a natural resource damages settlement: “or natural resource damages”] that are within the scope of the exercised reservation.”]

[For judicial CDs and administrative settlements, include the redlined additional sentence at the end of the Effect of Settlement paragraph. This paragraph precedes the “matters addressed” paragraph in each model and reads as follows:]

[Except as provided in Paragraphs ____ (cross-reference all paragraphs containing waivers of claims against other PRPs at the site, e.g. MSW Generators and Transporters, De Micromis Parties, *De Minimis* and Ability to Pay Parties, or all other PRPs if *de minimis* or peripheral party settlement)], [n]othing in this [Consent Decree / Settlement Agreement] shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this [Consent Decree / Settlement Agreement]. [Except as provided in Paragraphs ____ (cross-reference same paragraphs)], [e]ach of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this

⁴ Insert the name given to the settlement by the definitions section of the specific model.

[Consent Decree / 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).]

2. Explanation of Specific Changes

a. We are extending use of the statement, “this settlement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2),” to all administrative settlement models, and are adding the parallel “this settlement constitutes a judicially-approved settlement for purposes of Section 113(f)(2) of CERCLA” to all consent decree models as well. (We included it previously in the interim *Aviall* revisions for the administrative work and Section 122(h) cost settlements.) [For *de minimis* settlements, we are including the parallel reference to Section 122(g)(5), and for administrative settlements for response costs, we are also including the parallel reference to Section 122(h)(4).] Through this change, we hope to alleviate any doubt that a court might have that our CERCLA settlements are indeed settlements within the meaning of Section 113(f).

b. In addition to stating that settling parties, as of the effective date of the settlement, are entitled “to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA” for “matters addressed” in the settlement [with parallel references to Section 122(g)(5) for *de minimis* settlements and Section 122(h)(4) for administrative response cost settlements], we are adding “or as may be otherwise provided by law” to signify that, to the extent that other legal grounds for protection from contribution actions or claims for “matters addressed” exist in current or future law, we believe our settlors are entitled to that protection as well.

c. For site-wide settlements that contain broad “matters addressed” definitions, we are clarifying that “matters addressed” does not include state costs,⁵ unless the state is a party to the settlement and the settlement is intended to address state costs, as follows:

The “matters addressed” in this [Consent Decree / Settlement Agreement] are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person [if State has a claim relating to the Site that is not being resolved through this [Consent Decree / Settlement Agreement] insert, “, except for the State.”].

It has never been our intention to include state claims in the “matters addressed” definition. To obviate any possible misinterpretation post-ARC, we are including this exception for state

⁵ “State costs” do not include Hazardous Substance Superfund (Trust Fund) costs that have been provided to the State through a contract or cooperative agreement with EPA and for which EPA retains the responsibility for cost recovery.

response actions and costs.

d. We are making non-*ARC/Aviall*-related changes to the reservations pertaining to the “matters addressed.” As previously worded, the language was unclear, and it was over-inclusive. The language now clearly states that if the United States exercises rights under any reservation included in the settlement, except for failure to comply, criminal liability, or (if included in the relevant model) violations of federal or state law during or after implementation of the response action, the “matters addressed” will no longer include those response costs or response actions (or natural resource damages if included in the covenant not to sue) that are within the scope of the exercised reservation. These three reservations are excluded because they relate to enforcement actions by the United States for potential violations of the settlement or other applicable laws, which are within the exclusive jurisdiction of the United States and should not automatically expose the settling parties to contribution actions that would otherwise be barred by the settlement.

e. While our administrative settlement models (*see supra* note 1) expressly state that they constitute settlements for purposes of Section 113(f)(3)(B), our judicial consent decree models do not include this statement or make reference to the United States having filed a Section 106 and/or 107(a) civil action for purposes of Section 113(f)(1). Such language is unnecessary. It is self-evident that 1) a civil action has been filed in these cases and thus that settlors have a right to file a contribution action under Section 113(f)(1), and that 2) a consent decree, having been entered by a federal district court, is a judicially-approved settlement within the meaning of Section 113(f)(3)(B) and thus that defendants also have a right to seek contribution under that section.

We are adding to the judicial consent decree models (and to the administrative settlement models not covered by the interim *Aviall* revisions), however, the sentence from the interim *Aviall* revisions that states that nothing in the settlement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, to pursue non-parties to the settlement for additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2). We believe it is appropriate to restate these statutory rights in both our judicial and administrative settlement models.

C. Changes to “Waivers of Claims” in CERCLA Settlement Models

1. Minor Party Settlements

In settlements with minor parties (*de minimis*, de micromis, municipal solid waste (MSW) generator / transporter, and peripheral party),⁶ we are clarifying that we intend the minor settling

⁶ Recall that Section 122(g)(8) of CERCLA, 42 U.S.C. § 9622(g)(8), requires *de minimis* and ATP settling parties to “. . . as a condition for settlement . . . waive all of the claims

(continued...)

party's waiver of claims against other PRPs at the site to encompass not only Section 113 contribution claims, but also Section 107(a) claims to recover response costs. The revised portion of the waiver is as follows:

[Settling Defendants / Settling Parties] agree not to assert any claims and to waive all claims or causes of action (including ~~claims for contribution under CERCLA~~ but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site against each other or any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a [Settling Defendant / Settling Party] may have against any person if such person asserts or has asserted a claim or cause of action relating to the Site against such [Settling Defendant / Settling Party].

2. Major Party Settlements

a. MSW, Non-Exempt De Micromis, and De Minimis Waivers

In settlements with major parties, we are revising our MSW, Non-Exempt De Micromis, and *De Minimis* Waivers with the same change as described above for the minor party settlements, namely, clarifying that we intend the settling party's waiver of claims against other PRPs at the site to encompass not only Section 113 contribution claims, but also Section 107(a) claims to recover response costs. In each case, the introductory clause now reads:

[Settling Defendants / Settling Parties] agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site, ~~including for contribution,~~ against any person where . . . [continue with specific criteria for each waiver].

b. De Minimis Waiver

We are also substantively enlarging the scope of the *de minimis* waiver in two ways:

i) We are expanding the waiver to include final ability to pay (ATP) settlements. This is consistent with the scope of Section 122(g)(7), 42 U.S.C. § 9622(g)(7), "Reduction in settlement amount based on limited ability to pay," which recognizes ATP as an additional form of expedited settlement. The *de minimis* and ATP components of the waiver are now bracketed so that they may be used together or individually depending upon whether there are *de minimis* or ATP PRPs at the site, or both.

⁶(...continued)

(including a claim for contribution under this chapter) that the party may have against other potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that the waiver would be unjust."

ii) We are also expanding the waiver to include future as well as concluded *de minimis* and ATP settlements, with the future component intended for use at sites at which there are known or potential *de minimis* and/or ATP PRPs with whom the United States has not yet settled. When this is the case, the bracketed “or in the future enters” clause shown below should be used. We believe it is both appropriate and essential for the United States to protect such future *de minimis* and ATP settling parties. Such a waiver does not affect the major parties’ right to oppose entry of any such future settlements through the public comment process. Where there are no concluded *de minimis* or ATP settlements at the site and no potential future settlements of either type, the revised waiver need not be included. The revised waiver reads as follows:

—. Waiver of Claims Against *De Minimis* and Ability to Pay Parties. [Settling Defendants / Settling Parties] agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site, ~~including for contribution,~~ against any person that has entered [if non-settling *de minimis* or ATP PRPS, insert, “or in the future enters”] into [a final CERCLA § 122(g) *de minimis* settlement] [, or] [a final settlement based on limited ability to pay] [,] with EPA with respect to the Site ~~as of the Effective Date.~~ This waiver shall not apply with respect to any defense, claim, or cause of action that a [Settling Defendant / Settling Party] may have against any person if such person asserts a claim or cause of action relating to the Site against such [Settling Defendant / Settling Party].

D. Change to Notice of Filing of Suit or Claim

We are making a minor change to the provisions in the settlement models that require the settling party to notify the United States of any suit or claim brought by them or against them for matters relating to the settlement. We are changing “claim for contribution” to just “claims” so that claims, however styled, will be brought to our attention. The language reads as follows:

1. For Major Party settlements only (because minor party settlements do not include this provision since they require the waiver of claims against all other PRPs at the site), modify as follows:

[Settling Defendants shall] [Settling Parties shall agree that], with respect to any suit or claim ~~for contribution~~ brought by them for matters related to this [Consent Decree / Settlement Agreement], notify the United States [and the State] in writing no later than 60 days prior to the initiation of such suit or claim.

2. For all settlements that include the following provision, modify (and for those administrative settlements that do not currently include the following provision, add) as follows:

[Settling Defendants shall] [Settling Parties shall agree that], with respect to any suit or claim ~~for contribution~~ brought against them for matters related to this [Consent Decree / Settlement Agreement], notify in writing the United States [and the State] within ten days of service of the

complaint on [Settling Defendants / Settling Parties]. In addition, [Settling Defendants / Settling Parties] shall notify the United States [and the State] within ten days of service or receipt of any Motion for Summary Judgment and within ten days of receipt of any order from a court setting a case for trial.

E. Procedures / Contacts for Further Information

Upon issuance of this memorandum, Regions should use the interim revisions as written without case-specific approval by OSRE's Regional Support Division (RSD) or DOJ. If a Region deviates from this model language, 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 language to Carl Garvey (garvey.carl@epa.gov; 202-564-4236) and Tina 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.

Any questions about this memorandum generally may be directed to Janice Linett (linett.janice@epa.gov; 202-564-5131) in OSRE or Leslie Allen (leslie.allen@usdoj.gov; 202-514-4114) in the Environmental Enforcement Section of DOJ. This document is available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-settle-arc-mem.pdf>. 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>. All of the affected models are available in PDF format on EPA's Web site in the Superfund cleanup policy and guidance document database at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>. All of the settlements models are available in WordPerfect or Word format from OSRE's intranet at <http://intranet.epa.gov/oeca/osre/documents/models.html>.



This memorandum is intended as guidance for employees of EPA and DOJ. It is not a rule and it does not create any legal obligations. The extent to which EPA or DOJ will apply it in a particular case will depend on the facts of the case.

cc: John Michaud, Acting Associate General Counsel for Solid Waste and
Emergency Response
Office of Regional Counsel Branch Chiefs, Regions I-X
Regional *ARC* Contacts
Ann Pontius, Chief, Policy, Planning and Evaluation Division, Office of Site
Remediation