



ENVIRONMENTAL PROTECTION AGENCY

U.S. DEPARTMENT OF JUSTICE

NOV - 6 2002

MEMORANDUM

**SUBJECT:** Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties

**FROM:** Barry Breen, Director  
Office of Site Remediation Enforcement  
U.S. Environmental Protection Agency

Bruce S. Gelber, Chief  
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  
Assistant Section Chiefs, Environmental Enforcement Section, U.S.

On January 11, 2002, President Bush signed into law the *Small Business Liability Relief and Brownfields Revitalization Act* (SBLRBRA), Public Law No. 107-118. Among its provisions the law added a new Section 107(o) to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(o), which provides a qualified exemption from liability for de micromis parties, as defined therein. Section 107(o) provides a statutory exemption for de micromis parties that is similar, but not identical, to the protection previously afforded by the United States Environmental Protection Agency (EPA) and United States Department of Justice (DOJ) policy regarding settlements with de micromis parties at Superfund sites. The purpose of this memorandum is to revise that policy in light of this statutory change. This policy also revises the model contribution waiver language that has been used in CERCLA agreements to waive private contribution claims against parties that contributed only very small amounts of waste.

This settlement policy addresses the United States' position regarding those parties that fall within the statutory definition of de micromis (referred to herein as "exempt de micromis parties"), and those parties that fall outside the statutory definition, but who may be deserving of similar treatment based on case-specific factors (referred to herein as "non-exempt de micromis parties"). Non-exempt de micromis parties fall outside the protection of the de micromis exemption under Section 107(o), even though their waste volume is extremely small compared to the traditional *de minimis* party's volume addressed by Section 122(g). EPA believes such non-exempt de micromis parties should not be pursued or otherwise compelled to expend transaction costs to resolve potential CERCLA liability. For these parties, the administrative costs of determining and verifying the party's share, if any, and the cost of collecting the small payment, usually far exceed that share. Therefore, as a matter of national policy, EPA intends to use its enforcement discretion, as necessary, to achieve settlements that provide appropriate relief for those non-exempt de micromis parties that are being sued in contribution or threatened with a suit by responsible parties.

This policy supersedes the "Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors" (June 3, 1996), and "Inclusion of Contribution Waiver by Private Parties in CERCLA Administrative and Judicial Settlements" (October 2, 1998).<sup>1</sup> It consists of a

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<sup>1</sup> In 1995, EPA announced Superfund Administrative Reform 3-14: Revised De Micromis Guidance. The intent of the reform was to discourage responsible parties from bringing contribution litigation against the smallest volume waste contributors at Superfund sites (referred to as de micromis waste contributors) by entering into settlements with de micromis parties, when appropriate, to resolve their liability, and provide them with contribution protection. For de micromis waste contributors covered by EPA reform policies, the Agency recognized that legal and other transaction costs may actually exceed a party's settlement share of response costs. Under the reform, if private parties sued or threatened to sue these parties, EPA would consider entering into settlements providing contribution protection. To implement this reform, EPA and DOJ jointly issued guidance on how to help protect these parties from

memorandum and five attachments designed to provide guidance on using CERCLA, 42 U.S.C. § 9601, *et seq.*, settlement authorities to resolve the liability of non-exempt de micromis parties. This policy document is not intended to affect current guidances addressing settlements with *de minimis* parties and is not applicable to owners or operators of Superfund sites.

## **II. CERCLA De Micromis Party Exemption**

The de micromis exemption enacted by Congress is similar to, and largely drawn from EPA/DOJ's de micromis party settlement policy. Section 107(o) amends CERCLA to provide a qualified statutory exemption from liability for response costs for de micromis parties where: 1) the total amount of material containing hazardous substances contributed by the party to a site was less than 110 gallons of liquid materials or less than 200 pounds of solid materials; 2) the site is listed on the NPL; and 3) all or part of the party's disposal, treatment, or transport occurred before April 1, 2001.<sup>2</sup>

The exemption does not apply, however, if the President determines that: 1) the person sent materials that contributed or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration; 2) the person has failed to comply with an information request or administrative subpoena; 3) the person has impeded, through action or inaction, a response action or natural resource restoration;<sup>3</sup> or 4) the person has been convicted of a criminal violation for conduct related to the exemption. For more specifics on the de micromis exemption to CERCLA liability, please refer to Section 107(o).

As previously mentioned, Section 107(o) is largely consistent with the goals of EPA's de micromis reform effort; however, Section 107(o) defines a de micromis party more narrowly than the definition used in EPA/DOJ guidance.<sup>4</sup> For example:

- (a) The law codified EPA/DOJ's numerical guidelines of 110 gallons and 200 pounds, but it did not include the additional eligibility guideline of 0.002% of total volume of the

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CERCLA liability [See guidances cited above].

<sup>2</sup> As with other exempt parties under CERCLA, these newly exempt parties are not "orphans" and, therefore, their assigned share in an allocation would not be eligible for consideration under EPA's "Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 3, 1996).

<sup>3</sup> This policy addresses CERCLA costs only and does not address natural resource damages.

<sup>4</sup> Because the definition of a person eligible for the de micromis exemption is not identical to the definition provided for in past EPA/DOJ de micromis policies, EPA is amending its use of the term "de micromis contributor" to apply only to statutorily exempt de micromis parties under Section 107(o).

- materials containing hazardous substances also used in past guidance;
- (b) The statutory exemption is available only at NPL sites, while EPA/DOJ's de micromis policy also applied to non-NPL sites; and
  - (c) The statutory exemption does not apply when any disposal, treatment, or transport occurred after April 1, 2001, while EPA/DOJ's policy had no such limitation.

### **III. Settlement Authority**

CERCLA Section 122(g)(1)(A) provides discretionary authority to enter into administrative and judicial settlements with certain *de minimis* contributors of hazardous substances.<sup>5</sup> To qualify for a *de minimis* settlement under Section 122(g)(1)(A), the settling party's contribution of hazardous substances must be minimal in its amount and toxicity in comparison to other hazardous substances at the facility. In addition, the statute requires that each party's settlement involve only a minor portion of the total response costs at the site. Finally, the settlement must be practicable and in the public interest.<sup>6</sup>

The United States considers settlements with non-exempt *de micromis* parties to be a subset of *de minimis* settlements under CERCLA Section 122(g)<sup>7</sup>. They are appropriate for parties that contributed very small amounts of hazardous substances to a site, but who are not protected by the statutory *de micromis* exemption of Section 107(o). Like other *de minimis* settlements, the non-exempt *de micromis* settlement generally will contain an immediately effective covenant not to sue by EPA for past and future liability at the facility under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, and, where appropriate, Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973. In addition, the settlement will provide contribution protection for matters addressed as set forth in Sections 113(f) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f) and 9622(g)(5). Further, in accordance with Section 122(g)(8)(A) of CERCLA, 42 U.S.C. § 9622(g)(8)(A), the non-exempt *de micromis* settlement will include a waiver of CERCLA claims against all other PRPs at the site.

A non-exempt *de micromis* settlement may be done administratively or judicially under Section 122(g). Typically, a judicial consent decree should be used if the settling party has already been named as a defendant in a contribution action or if the United States has already initiated a CERCLA judicial action with respect to other parties at the site. In other situations, resolution by administrative settlement is often preferable because it usually can be accomplished more quickly and inexpensively than judicial settlements. The following models

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<sup>5</sup> A Section 122(g) settlement entered into by the United States does not preclude a State from asserting its own Section 107 claim for State response costs.

<sup>6</sup> For additional information on existing *de minimis* guidances, visit EPA's web page at <http://www.epa.gov/compliance/resources/policies/cleanup/index.html>.

<sup>7</sup> See, e.g., United States v. Keystone Sanitation Co., Inc., et al., No. 1:CV-93-1482 (M.D. Pa. Apr. 29, 1996).

are attached to assist staff with drafting non-exempt de micromis settlements: Attachment 1: Model CERCLA §122(g)(4) Non-Exempt De Micromis Party Administrative Order on Consent (AOC); Attachment 2: Model CERCLA §122(g)(4) Non-Exempt De Micromis Party Consent Decree (CD); Attachment 3: Model CERCLA §122(i) Non-Exempt De Micromis Party Federal Register Notice; and Attachment 4: Federal Register Typesetting Request Form. The AOC and CD are brief in length, are written in plain English, and are designed to be self-explanatory and non-threatening to the potential settlor. These attachments are designed to increase the efficiency of the non-exempt de micromis party settlement process. We encourage staff to adhere as closely as possible to their terms.

#### **IV. Policy Discussion**<sup>8</sup>

Because Section 107(o) provides a qualified de micromis exemption to de micromis parties, there is no need for de micromis settlements where the exemption applies. We will, however, enter into a settlement with non-exempt de micromis parties if (1) they are sued in contribution, or threatened with a suit; (2) contributed very small amounts of hazardous substances to a site (smaller than the traditional *de minimis* party's volume); and (3) based on case-specific factors may be deserving of similar treatment to that given to exempt de micromis parties.

##### **A. NPL Sites**

At NPL sites, parties that meet the requirements of the Section 107(o) de micromis exemption will not be pursued by EPA and should no longer be pursued by PRPs. As a result, EPA will not need to enter into settlements with de micromis parties who fall within the scope of the exemption.<sup>9</sup>

The United States still retains its enforcement discretion under Section 122(g), based on site-specific factors, to settle with any potentially liable party who meets the *de minimis* settlement criteria. Thus, at certain NPL sites, EPA may determine it to be appropriate, based on factors concerning the site, to enter into a settlement with non-exempt de micromis parties who disposed of waste in excess of the numerical cutoffs provided by the statutory de micromis exemption. For instance, in a case in which a minuscule volume waste contributor at a NPL site disposed of waste in excess of the numerical cutoffs provided by the statutory de micromis

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<sup>8</sup> EPA does not intend to reopen any agreements or settlements with the United States. Pursuant to Section 103 of SBLRBRA, Section 107(o) does not apply to "concluded actions," which are defined by the Act to include any settlement lodged in, or judgment issued by, a United States District Court, or any administrative settlement or order entered into or issued by the United States or any State prior to January 11, 2002.

<sup>9</sup> Under SBLRBRA, PRPs have the burden of proof and are subject to attorney fees and costs for unsuccessful efforts to pursue these exempt parties.

exemption, EPA may determine, based on factors surrounding the site, such as total waste volume sent to the site, that a non-exempt de micromis settlement is nevertheless appropriate.

## **B. Non-NPL Sites**

At non-NPL sites, EPA generally intends to exercise its enforcement discretion not to pursue parties who satisfy the requirements for exempt status under Section 107(o), except for the requirement that the site in question be listed on the NPL. These parties could be pursued in contribution by other PRPs because they do not qualify for the statutory exemption to CERCLA liability. When this occurs, the United States expects to enter into Section 122(g) settlements with these parties to provide contribution protection, where otherwise appropriate.

## **C. Offer Protection Only if Threatened**

EPA's Regional offices have discretion to decide whether and when to offer a non-exempt de micromis settlement to parties that have contributed extremely small amounts of waste to a site. As previously mentioned, EPA believes non-exempt de micromis parties should not be pursued, and as a matter of national policy, EPA intends to use its enforcement discretion, as necessary, to achieve settlements that provide appropriate relief for those non-exempt de micromis parties. For purposes of applying this policy at Superfund sites, the Region should consider offering a settlement to non-exempt de micromis parties only if: (1) such parties have been sued by other PRPs at the site; or (2) such parties face the concrete threat of litigation from other PRPs at the site.

## **V. Non-Exempt De Micromis Settlement Procedures**

### **A. Eligibility**

The Region should consider several factors in determining if a party is eligible for a non-exempt de micromis settlement under Section 122(g) of CERCLA. Regions should consider the criteria described in the de micromis exemption language found in Section 107(o), and summarized above in Section II (CERCLA De Micromis Party Exemption). With regard to volume, Regions have the flexibility to consider cutoff amounts higher than 110 gallons or 200 pounds, on a site-specific basis, for settlements at either non-NPL or NPL sites. For example, there may be a case in which a party contributed more than 110 gallons or 200 pounds of materials containing hazardous substances, but the facts of the case warrant a settlement nonetheless (*e.g.*, in situations where a party's contribution is still a minute percentage of the total waste volume sent to the site). It may also be appropriate to consider a settlement with a party whose disposal, treatment or transport occurred after April 1, 2001.

Other factors the Region should consider include: a settlor's contribution of hazardous substances in relation to the total volume of waste at the site, the toxic or other hazardous effects of such hazardous substances, and the effect of multiple non-exempt de micromis settlements on the remaining parties at the site.

Consistent with the model administrative order and consent decree attached to this memorandum, the Regions should generally not require any monetary payment as part of a non-exempt de micromis settlement. This approach reflects EPA's position that it would be inequitable to require parties sending such small volumes of waste to participate in financing or performing cleanup at the site because their allocable share of cleanup costs is negligible at most. Moreover, because a non-exempt de micromis party's actual connection to the site is extremely small, the administrative costs of executing a settlement will likely equal or exceed the non-exempt de micromis party's proportional share of response costs at the site, if any. Given this inequity, it is fair, and thus, in the public interest, for Regions to offer a zero dollar settlement to non-exempt de micromis parties.

## **B. Site-Specific Information**

The Region should evaluate the following site information before pursuing a non-exempt de micromis settlement: (1) information regarding the hazardous substances sent to the site by the non-exempt de micromis party, and (2) the total estimate of waste at the site. The Region may use a variety of site-specific information to evaluate the appropriateness of a settlement with a party. Sources of information include: state records, manifests, site records, canceled checks, interviews, waste-in lists, other allocation documents, or Section 104(e) information request responses. The Region may not have to produce a waste-in list prior to entering into a settlement if the Region has sufficient information in its possession to determine that a non-exempt de micromis settlement is appropriate. However, the Region should use a prepared waste-in list if it is available and complete.

## **C. Consultation with EPA Headquarters and DOJ**

Regardless of the small amount of waste contributed, a CERCLA Section 122(g) settlement is not appropriate where the toxic or other hazardous effects of the contributor's waste are not minimal in comparison to the other hazardous substances at the facility. Furthermore, under Section 107(o)(2), EPA may pursue enforcement action against parties at NPL sites who claim to qualify for the Section 107(o) statutory de micromis exemption where their waste contributed significantly to the cost of cleanup or natural resource restoration. If a Region determines that a party falls under the Section 107(o)(2) exceptions to the de micromis exemption provision, consultation with the Director of the Regional Support Division, Office of Site Remediation Enforcement, is required prior to proceeding with an enforcement action against that party.<sup>10</sup>

In addition, DOJ must approve all administrative non-exempt de micromis settlements where total site costs are expected to exceed \$500,000 and all non-exempt de micromis consent decrees. If the settlement requires DOJ approval, the Region should consult with DOJ as early in

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<sup>10</sup> At the time of publication of this policy, the OSRE contact is Victoria van Roden. She can be reached by phone at 202-564-4268 or by e-mail at [vanroden.victoria@epa.gov](mailto:vanroden.victoria@epa.gov).

the process as possible, and keep the Department apprised of progress toward settlement and any significant departures from this policy or its attachments. Within thirty days of receiving the Region's referral of the proposed settlement, DOJ will advise the Region whether the settlement is approved.

## **VI. Waiver of Claims Against Non-Exempt De Micromis Parties**

### **A. Background**

The EPA and DOJ guidance entitled "Inclusion of Contribution Waiver by Private Parties in CERCLA Administrative and Judicial Settlements," dated October 2, 1998, encouraged routine use of a waiver of private party contribution claims against parties that contributed only very small amounts of waste. The use of this waiver was encouraged not only in RD/RA consent decrees, but in other types of CERCLA agreements, as well, in order to maximize protection for the small waste volume parties, thereby reducing their transaction costs. On May 18, 2000, EPA and DOJ issued a revised model Remedial Design/Remedial Action (RD/RA) Consent Decree. One of the important changes contained in this revision, and carried forward into the June 15, 2001 RD/RA model revision as well, was the inclusion of a waiver of private party contribution claims against parties that contributed only very small amounts of waste (see Paragraph 100 of the revised RD/RA model). The inclusion of this waiver in settlement documents represented an important component of EPA's Administrative Reform efforts to protect those parties that are on the periphery of the liability scheme. EPA guidance provided that the government would exercise enforcement discretion and decline to pursue these parties, but this did not insulate such parties from contribution actions by other PRPs at the site.

The waiver provision of the 2000 and 2001 RD/RA model consent decree contained two components: (1) a waiver of claims against certain municipal solid waste (MSW) or municipal sewage sludge (MSS) contributors (Subparagraphs a. and b.); and (2) a waiver of claims against very small volume hazardous substance-only contributors (Subparagraph c.).

### **B. Waiver Language for NPL Sites and Non-NPL Sites**

The parties that meet the requirements of Section 107(o) are protected by the statute and should no longer be pursued by PRPs. Such parties no longer need to be protected from contribution claims; therefore, EPA and DOJ generally should not require a waiver of claims against exempt de micromis parties at NPL sites.

However, in exercising enforcement discretion, Regions may negotiate a contribution waiver at any site (both NPL and non-NPL) for any volume amount if the settling parties consensually agree to waive these rights. EPA retains its right to determine which liable parties to pursue, based on site-specific factors. For instance, in a case involving a very small volume waste contributor at a NPL site that disposed of waste in excess of the numerical cutoff amount provided in the statutory de micromis exemption, EPA might determine, based on factors surrounding the site, that a contribution waiver in a settlement with major waste contributors is



nevertheless appropriate. Therefore, Regions have the flexibility to consider other cutoff amounts (e.g., higher than 110 gallons or 200 pounds), on a site-specific basis, in the contribution waiver language for settlements at either non-NPL or NPL sites. In addition to this waiver, negotiators should also evaluate whether the waiver of contribution claims against *de minimis* parties in paragraph 101 of the model RD/RA CD and waivers of claims against any other parties (e.g., inability-to-pay settlers) are appropriate for the case. Accordingly, we have not changed the optional waiver of claims against *de minimis* parties found in Paragraph 101 of the Model RD/RA CD (see Attachment 5).

### **C. Revised Model Waiver Language for Settlements at Non-NPL Sites**

The United States is revising the model waiver provision for use in settlements concerning non-NPL sites in light of the language in Section 107(o) of CERCLA and this policy.<sup>11</sup> For all new agreements at non-NPL sites (such as removal AOCs, cost recovery settlements, etc.), Regions should include this revised waiver language to address the smallest volume hazardous substance contributors at Superfund sites.<sup>12</sup> This waiver is to protect parties at non-NPL sites that otherwise meet the requirements of the Section 107(o) *de minimis* exemption from contribution claims. Out of fairness and public interest, EPA would like to protect these non-exempt *de minimis* parties from private party lawsuits.

To be consistent with the Section 107(o) statutory exemption, the waiver language (1) has the presumptive numerical cutoff for material containing hazardous substances at less than 110 gallons or 200 pounds, (2) uses the April 1, 2001 cutoff date, and (3) contains the exceptions included in Section 107(o)(2). The revised waiver provision is shown in Attachment 5 of this memorandum.

## **VII. Disclaimer**

This policy and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Government. This policy is not a rule and does not create any legal obligations. Whether and how the United States applies the policy to

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<sup>11</sup> In accordance with the municipal solid waste exemption found in Section 107(p) of CERCLA, we have eliminated the special categories of MSW/MSS contributors contained in subparagraphs a. and b. of the model waiver. There is a separate workgroup that is currently analyzing enforcement discretion options for addressing the exemption for MSW/MSS contributors. We are deferring issues related to MSW/MSS to that workgroup, and any forthcoming guidance on the subject.

<sup>12</sup> Please note that Section 122(g)(8)(A) of CERCLA generally requires a broader waiver to be included in Section 122(g) *de minimis* settlements under which the settling *de minimis* parties waive CERCLA response cost claims against all PRPs at the site. EPA's peripheral party settlement models also include this broader waiver.

any particular site will depend on the facts at the site.

Attachments

1. Model AOC
2. Model CD
3. FR Notice Procedures and Model FR Notice
4. FR Typesetting Request Form
5. New Model Waiver



than a minuscule amount of hazardous substances to the Site, an amount which is so minor that it would be inequitable to require them to help finance or perform cleanup at the Site[.] **[Insert if applicable: "; and c) total past and projected response costs of the United States at the Site will not exceed \$500,000, excluding interest."]**

5. **Certification.** Each Settlor certifies that to the best of its knowledge it: a) has conducted a thorough, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, if any, which relates in any way to the generation, treatment, transportation, storage or disposal of a hazardous substance at or in connection with the Site; b) has not altered, destroyed or disposed of any records, reports, or information relating to its potential liability at the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site; and c) has and will continue to fully comply with any and all EPA requests for information concerning the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

6. **United States' Covenant Not to Sue.** In consideration of Settlor's agreement to this Consent Order, and except as specifically provided in Paragraph 7, the United States covenants not to sue or take administrative action against Settlor under Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,] relating to the Site.

7. **United States' Reservations of Rights.** The United States reserves the right to seek additional relief from any Settlor if: 1) information is discovered indicating that such Settlor's contribution of hazardous substances to the Site is of such greater amount or of such greater toxic or other hazardous effect that it no longer qualifies for settlement under the criteria stated in Paragraph 3; or 2) after Settlor signs this Consent Order, such Settlor becomes an owner or operator of the Site or undertakes any activity with regard to hazardous substances or solid wastes at the Site. The United States also reserves all rights which it may have as to any matter relating in any way to the Site against any person who is not a party to this Consent Order.

8. **Settlor's Covenant Not to Sue.** Settlor covenants not to sue and agree not to assert any claims against the United States or its contractors or employees with respect to the Site or this Consent Order. Settlor also covenants not to sue and agree not to assert any claims with respect to the Site against each other or against any other person who is a potentially responsible party under CERCLA at the Site.

9. **Contribution Protection.** Each Settlor is entitled to protection from contribution claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Order. The "matters addressed" in this Consent Order are all response actions taken and to be taken and all response costs incurred and to be incurred, in connection with the Site, by the United States or by any person who is a potentially responsible party under CERCLA at the Site, except for those limited areas in

Paragraph 7 for which the United States has reserved its rights.

10. **[NOTE: Insert if total past and projected response costs at the site will exceed \$500,000, excluding interest.] Attorney General Approval.** The Attorney General has approved this settlement as required by Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4).

11. **Public Comment/Effective Date.** This Consent Order is subject to public comment under Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), and is effective on the date that EPA issues written notice that the public comment period has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order.

IT IS SO AGREED AND ORDERED:

U.S. Environmental Protection Agency

By: \_\_\_\_\_

[Name]

[Insert Title of Delegated Official]

\_\_\_\_\_

[Date]



**MODEL CERCLA SECTION 122(g)(4) NON-EXEMPT DE MICROMIS PARTY  
CONSENT DECREE**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF [\_\_\_\_\_] ]  
[\_\_\_\_\_] DIVISION<sup>1</sup>

_____ )	
UNITED STATES OF AMERICA, )	
)	
Plaintiff, )	
)	Civil Action No. _____
v. )	
)	Judge _____
[DEFENDANTS] )	
)	
Defendants. )	
_____ )	

**NON-EXEMPT DE MICROMIS PARTY CONSENT DECREE<sup>2</sup>**

A. **[NOTE: Insert explanation of procedural posture of the case. To the extent applicable, the following language may be used.]** The United States on behalf of the Environmental Protection Agency ("EPA") filed a complaint in this matter under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA" or "Superfund"), to recover costs it has spent for the cleanup of the **[insert site name]**. The defendants sued by the United States filed contribution actions against third-party defendants, some of whom are Settlers under this Consent Decree. Settlers do not admit any liability.

B. The **[insert site name]** ("the Site") is located at **[insert address or location]** in **[city, county, state]**, and is generally **[shown on/described by]** the **[map/property description]** attached to this Consent Decree as Attachment \_\_. Under Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has incurred **[approximately \$\_\_\_\_\_ in]** response costs at the Site and **[will/may]** incur additional costs. EPA currently estimates that total past and future response costs at the Site, including costs of EPA and CERCLA potentially responsible parties, will be **[insert either**

<sup>1</sup> Follow local rules for caption format.

<sup>2</sup> As a general rule, a judicial consent decree should only be used if the settlor has already been named as a defendant in a contribution action, or if the United States has already initiated CERCLA litigation at the site.

"\$ \_\_\_\_ " or "between \$ \_\_\_\_ and \_\_\_\_ " or "in excess of \$ \_\_\_\_ "]. Each Settlor may have contributed hazardous substances to the Site which are not in excess of **[insert number of pounds or gallons]** of materials containing hazardous substances **[or, stated as a percentage, \_\_\_\_% of the hazardous substances at the Site]** and which are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.

C. EPA has determined that: 1) in accordance with Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), it is practicable and in the public interest to reach this final settlement, involving only a minor portion of the response costs at the **[insert site name]** facility, with Settlers who may be potentially responsible parties who each may have contributed a minimal amount of hazardous substances to the Site, the toxic or other hazardous effects of which are minimal in comparison to other hazardous substances at the Site; and 2) Settlers are eligible for a non-exempt de micromis party settlement because they each contributed no more than a minuscule amount of hazardous substances to the Site, an amount which is so minor that it would be inequitable to require them to help finance or perform cleanup at the Site.

THEREFORE, with the consent of the parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

1. **Jurisdiction/Parties Bound.** This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9613(b) and also has personal jurisdiction over Settlers. Settlers consent to this Consent Decree and this Court's jurisdiction to enter and enforce this Consent Decree. This Consent Decree is binding upon the United States and upon the parties who are identified in Attachment \_\_ who are signatories to this Consent Decree ("Settlers").

2. **Purpose.** The purpose of this Consent Decree is to reach a final non-exempt de micromis party settlement with Settlers, which: a) resolves Settlers' potential civil liability to the United States under Superfund for payment of response costs and for performance of cleanup at the Site; and b) protects Settlers from any lawsuits seeking recovery of Site cleanup costs.

3. **Certification.** Each Settlor certifies that to the best of its knowledge it: a) has conducted a thorough, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, if any, which relates in any way to the generation, treatment, transportation, storage or disposal of a hazardous substance at or in connection with the Site; b) has not altered, destroyed or disposed of any records, reports, or information relating to its potential liability at the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site; and c) has and will continue to fully comply with any and all EPA requests for information concerning the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

4. **United States' Covenant Not to Sue.** In consideration of Settlers' agreement to this



Consent Decree, and except as specifically provided in Paragraph 5, the United States covenants not to sue or take administrative action against Settlor under Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,] relating to the Site.

5. **United States' Reservations of Rights.** The United States reserves the right to seek additional relief from any Settlor: 1) if information is discovered indicating that such Settlor's contribution of hazardous substances to the Site is of such greater amount or of such greater toxic or other hazardous effect that it no longer qualifies for settlement under the criteria stated in Paragraph B; or 2) after signing this Consent Decree, such Settlor becomes an owner or operator of the Site or undertakes any activity with regard to hazardous substances or solid wastes at the Site. The United States also reserves all rights which it may have as to any matter relating in any way to the Site against any person who is not a party to this Consent Decree.

6. **Settlor's Covenant Not to Sue.** Settlor's covenant not to sue and agree not to assert any claims against the United States or its contractors or employees with respect to the Site or this Consent Decree. Settlor's also covenant not to sue and agree not to assert any claims with respect to the Site against each other or against any other person who is a potentially responsible party under CERCLA at the Site.

7. **Contribution Protection.** Each Settling Defendant is entitled to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are all response actions taken and to be taken and all response costs incurred and to be incurred, in connection with the Site, by the United States or by any person who is a potentially responsible party under CERCLA at the Site, except for those limited areas in Paragraph 5 for which the United States has reserved its rights.

8. **Public Comment/Effective Date.** The United States will lodge this Consent Decree with the Court for a period of not less than 30 days for public notice and comment. Provided that the United States does not withdraw the Consent Decree following such public notice and comment, this Consent Decree shall be effective on the date of entry by this Court.

9. **Service.** For all matters relating to this Consent Decree, each Settlor will personally receive service of process by mail sent to the name and address provided on the attached signature page, unless such Settlor provides the name and address of an agent for service of process on the attached signature page. Settlor's agree to accept service in this manner and to waive the formal service requirements of Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_.

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United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the \_\_\_\_\_ Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: \_\_\_\_\_

\_\_\_\_\_  
[Name]  
Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530

\_\_\_\_\_  
[NAME]  
United States Attorney  
[Address]

\_\_\_\_\_  
[NAME]  
Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the \_\_\_\_\_ Superfund Site.

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[Name]  
Regional Administrator, Region [ ] U.S.  
Environmental Protection Agency  
[Address]

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[Name]  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
[Address]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the \_\_\_\_\_ Superfund Site.

FOR SETTLOR [ \_\_\_\_\_ ]

Date: \_\_\_\_\_

\_\_\_\_\_  
[Name and address of Settlor or Settlor's signatory]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

**[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.]**

**MODEL CERCLA SECTION 122(i) NON-EXEMPT DE MICROMIS PARTY  
FEDERAL REGISTER NOTICE**

Proper format is very important for a Federal Register notice. The format is shown in the following model. The notice should be typed on plain paper, not EPA letterhead stationery. Each page, including the first, should be consecutively numbered. The notice should be double-spaced and single-sided. Heading titles may not be varied. The official format requires the top, bottom and right margins to be one inch wide and the left margin to be one and a half inches wide, but minor variations in margin size will not result in rejection of the notice. Legal citations should be written as, e.g., 42 U.S.C. 9622(i) (do not include a section symbol [§] or the word "section.") The notice should be signed by a Regional official authorized to submit documents for publication in the Federal Register by EPA Delegation 1-21. The name and title of the official signing the notice should be typed on the notice. If an acting official will be signing for the authorized official, the acting official's name and the acting official's title, e.g., "Acting Regional Administrator," must be typed on the notice.

To publish the notice, the Region should send 1) the original signed notice, 2) four single-sided copies of the signed notice, 3) a disk containing the file for the notice, and 4) a completed Federal Register Typesetting Request (EPA Form 2340-15) to: Vickie Reed or Leona Proctor, U.S. EPA Headquarters, Mail Code 1806A, Office of Policy, Economics & Innovation, Regulatory Management Staff, 1200 Pennsylvania Avenue, NW, Washington, D.C., 20460. When filling out the Federal Register Typesetting Request, publication costs should be billed to the site-specific Superfund account number. The formula for calculating publication costs on the Typesetting Request is as follows: two double-spaced pages equals one column, and one column costs \$155.00 (half pages and half columns should be rounded up; if a disk is not provided, the per column cost increases to \$166.00).

Questions about these procedures should be directed to Vickie Reed at (202) 564-6562 or Leona Proctor at (202) 564-6463.

**[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.]**

ENVIRONMENTAL PROTECTION AGENCY

[ ] [NOTE: Leave brackets to left blank.]

Proposed CERCLA Administrative Non-Exempt De Micromis Party Settlement; [Insert name of settling party, or if there are multiple settling parties, insert site name -- capitalize first letter of each word]

AGENCY: Environmental Protection Agency

ACTION: Notice; request for public comment

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SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C.

9622(i), notice is hereby given of a proposed administrative non-exempt de micromis party settlement concerning the [insert site name] site in [insert site location] with the following settling party(ies): [insert names here or reference list included in Supplementary Information portion of notice]. The settlement is designed to resolve fully [the/each] settling party's liability at the site through a covenant not to sue under Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607[, and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973]. For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at [insert address of information repository at or near site] and [insert address of Regional public docket]. [If Section 7003 covenant is included insert, "Commenters may request an opportunity for a public meeting in the affected area in

accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).”]

DATES: Comments must be submitted on or before [insert 30 days from date of publication]. [NOTE: Do not fill in date; just type DATES sentence, including bracketed portion, exactly as it appears here.]

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available for public inspection at [insert address of Regional public docket or other Regional office location]. A copy of the proposed settlement may be obtained from [insert name, address, and telephone number of Regional docket clerk or other Regional representative]. Comments should reference the [insert site name, location] and EPA Docket No. \_\_\_ [insert EPA docket number for settlement] and should be addressed to [insert name and address of Regional docket clerk or other Regional representative designated to receive comments].

FOR FURTHER INFORMATION CONTACT: [Insert name, address, and telephone number of Regional representative who has knowledge of settlement].

SUPPLEMENTARY INFORMATION: [Use this optional section to, e.g., list parties too numerous to list in Summary portion of notice or to provide further details about settlement].

\_\_\_\_\_  
[Insert typed name and  
title of Regional official]

\_\_\_\_\_  
Date

[Insert billing code]

United States  
**Environmental Protection Agency**  
 Washington, DC 20460

**FEDERAL REGISTER TYPESETTING REQUEST**

Requestor: Complete Items 1, 2, 7, 8, 9, 10, 11, 12, and 13. Retain copy number 7 and submit the balance with manuscript copy to the Hq. Federal Register office.  
 HQ Federal Register Office: Complete items, 3,4 ,5, and 6. Retain copy number 6 and submit balance to Hq. Printing Management.

1. TITLE			
2. SUBMITTING AGENCY		3. ASSIGNED FRL NUMBER (include alpha & numeric characters for identification)	
4. OPEN REQUISITION NUMBER		5. BILLING CODE <span style="float:right">6560-50-P</span>	
6. FORWARDED TO GSA, NARS - SIGNATURE			DATE
7. NUMBER OF MANUSCRIPT PAGES	8. ESTIMATED NUMBER OF COLUMNS	9. ESTIMATED COST <span style="float:right">\$</span>	
10. SIGNATURE: (a) REQUESTING OFFICER		11. SIGNATURE: (a) FEDERAL REGISTER DESIGNEE	
(b) DATE	(c) TELEPHONE NUMBER	(b) DATE	(c) TELEPHONE NUMBER
12. FUNDS ARE AVAILABLE		PHONE	
NAME OF FUNDS CERTIFYING OFFICER		SIGNATURE OF FUNDS CERTIFYING OFFICER	
		NUMBER OF FUNDS CERTIFYING OFFICER	

13. Financial and Accounting Data

Line	DCN (Max 6)	Budget/FYs (Max 4)	Appropriation Code (Max 6)	Budget Org/Code (Max 7)	Program Element (Max 9)	Object Coass (Max 4)	SFO
1							(Max 2)
2							
3							

Line	Amount (Dollars)	(Cents)	Site Project (Max 8)	Cost/Org/Code (Max 7)
1				
2				
3				



## ATTACHMENT 5

### NON-EXEMPT DE MICROMIS WAIVER LANGUAGE FOR ALL AGREEMENTS AT NON-NPL SITES

100.1 Settling [Defendants/Respondents] 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 Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

100.2. The waiver in Paragraph 100.1 shall not apply with respect to any defense, claim, or cause of action that a Settling [Defendant/Respondent] 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 [Defendant/Respondent]. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

(a) that such person has failed to comply with any EPA requests for information or administrative subpoenas 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 has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

(b) that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

**[Use as appropriate if a de minimis settlement has been concluded at the Site.]**

101. Settling [Defendants/Respondents] 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 that has entered into a final CERCLA § 122(g) de minimis settlement with EPA with respect to the Site as of the effective date of this [Consent Decree/Consent Order/Agreement]. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling [Defendant/Respondent] may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling [Defendant/Respondent].