



U.S. ENVIRONMENTAL PROTECTION AGENCY



U.S. DEPARTMENT OF JUSTICE

SEP 26, 2014

## MEMORANDUM

**SUBJECT:** Revisions to 2009 *ARC* Memo and Issuance of Revised CERCLA Past Cost, Peripheral, *De Minimis*, *De Micromis*, and Municipal Solid Waste Settlement Models

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U.S. Department of Justice  
Chief, Deputy Chief, Assistant Chiefs, Environmental Defense Section,  
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### I. INTRODUCTION

The purposes of this memorandum, which is jointly issued by the Office of Site Remediation Enforcement (OSRE) of the U.S. Environmental Protection Agency (EPA) and the Environmental Enforcement Section (EES) of the U.S. Department of Justice (DOJ), are as follows:

1) We are revising, for purposes of all EPA settlement models issued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, certain language included in the March 16, 2009 *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* ("ARC Memo").<sup>1</sup>

<sup>1</sup> The *ARC* Memo is available at <http://www2.epa.gov/enforcement/guidance-interim-revisions-superfund-settlement-models-clarify-contribution-rights-and>.

2) We are issuing 13 revised CERCLA judicial and administrative settlement models and two additional documents containing ability to pay (ATP) inserts for the *de minimis* contributor models. These model documents, which comprise all of the CERCLA models in which the primary form of consideration to be provided by potentially responsible parties (PRPs) is a “payment,” rather than performance of response action, are: the past cost recovery consent decree (CD) and settlement agreement (SA); the peripheral party ability to pay and non-ability to pay CD and SA; the *de minimis* contributor and landowner CD and administrative settlement agreement and order on consent (ASAOC) (including the separately issued model ability to pay provisions for the *de minimis* contributor CD and ASAOC); the *de micromis* contributor CD and ASAOC; and the municipal solid waste (MSW) CD. The full names of these model documents are provided in the attached Appendix. Each of these models supersedes the prior issued version of the same model.

3) We are superseding in full the *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)(2)* (Sept. 21, 2006) (“2006 Interim Revisions Memo”), as those models are among the 13 that we are reissuing in full today. We are also superseding the *Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)(2)* (Aug. 3, 2005) (“2005 Interim Revisions Memo”) to the extent that this memorandum makes changes to the model language set forth therein.<sup>2</sup> We are working on incorporating today’s revisions into those three removal response action models and will be reissuing them as well.

Section II of this memorandum highlights the key substantive changes that we are making to all CERCLA models, including the payment model documents, to help insure that they are interpreted by courts to provide the contribution protection and rights intended by the United States and settling parties. Section II.A specifically describes all changes that we are making to model language introduced by the ARC Memo. All of these changes are effective today, but we will incorporate them into each judicial and administrative response action settlement model as it is updated as well. Additional minor but noteworthy changes to the payment model documents are described in the attached Appendix.

## **II. KEY CHANGES TO MODELS GENERALLY**

### **A. Changes Relating to Contribution Protection and Rights Provisions Announced by the ARC Memo**

On March 16, 2009, EPA and DOJ issued the ARC Memo, which included interim revisions to the CERCLA settlement models to clarify contribution rights and protection from claims 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*”). The ARC Memo included general language for use in all models and

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<sup>2</sup> The 2005 Interim Revisions Memo is available at <http://www2.epa.gov/enforcement/guidance-cercla-removal-rifs-and-rd-aoc-model-revisions-clarify-contribution-rights>.

promised future issuance of specific, line-by-line language changes for each CERCLA settlement model. As explained above, we are now issuing specific language updates for our CERCLA settlement payment model documents, and, at the same time, we are updating the 2009 general ARC Memo language (as well as, as explained in Section II.B below, the effective date of our model covenants not to sue) for use in all judicial and administrative settlements in response to developments in the case law. The model language included in the ARC Memo is superseded by this memorandum.

## 1. Changes to Contribution *Protection* Language

The contribution *protection* language announced in the ARC Memo includes an agreement by the parties (and for judicial settlements, a finding by the court) that the settlement constitutes an administrative or judicially-approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that each settlor is entitled, as of the effective date of the settlement, to protection from contribution actions or claims as provided by Section 113(f)(2), or as may be otherwise provided by law, for “matters addressed” in the settlement.

We are modifying the ARC Memo contribution protection language to add a statement that the settlement “resolves liability” to the United States within the meaning of Section 113(f)(2). Section 113(f)(2) provides that, “[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.” We believe that contribution protection is provided by CERCLA § 113(f)(2) when its terms are met and that explicit settlement language to this effect is not strictly necessary. However, our settlements have long stated that, upon their effective date, the parties are entitled to contribution protection as provided by the statute. The ARC Memo revised our prior model contribution protection language to explicitly state the United States’ view that our settlements meet the requirements of Section 113(f)(2) and give rise to contribution protection. The language stated specifically that “the settlement constitutes a judicially-approved settlement for purposes of Section 113(f)(2).” However, the revised language we are issuing today is even clearer in this regard because it is more consistent with the text of Section 113(f)(2). The revised language for all CERCLA judicial and administrative settlements is as follows, redlined against the ARC Memo language:

### **Revised Judicial Consent Decree (CD) Text:**

The Parties agree, and by entering this Consent Decree this Court finds, that this ~~settlement~~Consent Decree constitutes a judicially-approved settlement pursuant to which each Settling Defendant has, as of the Effective Date, resolved liability to the United States ~~for purposes~~within the meaning 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,<sup>2</sup> to protection from contribution actions or claims as provided by Section[s] 113(f)(2) [~~and 122(g)(5)~~] of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are [~~insert appropriate definition from relevant model~~].

### **Revised Administrative Settlement Text:**

The Parties agree that this Settlement Agreement constitutes an administrative settlement pursuant to which each [Settling Party/Respondent] has, as of the Effective Date, resolved liability to the United States for purposes within the meaning 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]~~ is entitled, as of the ~~[capitalize if defined term: “Effective dDate”]~~, 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 the “matters addressed” in this Settlement Agreement. The “matters addressed” in this Settlement Agreement are [**insert appropriate definition from relevant model**].

### **2. Changes to Contribution *Rights* Language**

We are also modifying the standard language relating to contribution *rights* used in our CERCLA administrative settlements<sup>3</sup> to provide that the settlement resolves liability “within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B),” rather than for the matters addressed in the settlement. This is because, unlike Section 113(f)(2), which provides that a settlor “shall not be liable for claims for contribution regarding matters addressed in the settlement,” Section 113(f)(3)(B) simply says that, “A person 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 from any person who is not party to a settlement referred to in paragraph [113(f)](2).” Nothing in Section 113(f)(3)(B) limits the scope of the right to the matters addressed in the settlement. The revised language for administrative settlements is as follows:

### **Revised Administrative Settlement Text:**

The Parties further agree that this Settlement Agreement constitutes an administrative settlement ~~for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B)~~, pursuant to which each [Settling Party/Respondent] has, as of the Effective Date, resolved ~~their~~ liability to the United States ~~for [the matters addressed]~~ within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

In addition, we are including this same type of contribution *rights* language in our judicial CDs. When we issued the ARC Memo, we did not believe that it was necessary to note in our CDs that a settling defendant satisfies both available avenues for acquiring contribution rights under

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<sup>3</sup> The contribution rights language was introduced in the 2005 and 2006 Interim Revisions Memos. See also ARC Memo at note 1.

CERCLA, Section 113(f)(1), 42 U.S.C. § 9613(f)(1), and Section 113(f)(3)(B). We explained our position as follows:

While our administrative settlement models . . . 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. *ARC Memo*, at 6.

We still do not believe that this language is legally necessary, but to provide as much guidance as possible to a reviewing court, we are revising our judicial CDs to include a separate contribution rights paragraph containing this text as well:

**New Judicial CD Text:**

The Parties further agree, and by entering this Consent Decree this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which each Settling Defendant has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

**B. Change to Effective Date of the United States' Covenant Not to Sue**

It has been EPA and DOJ practice in CERCLA judicial and administrative settlements to make the United States' covenant not to sue not take effect until payment of any initial payment due under the settlement, usually a payment for defined "Past Response Costs" (generally due within 30 days), as well as any interest or stipulated penalties due as a result of late payment. While we do not believe that it is necessary for the United States' covenant to take effect on the effective date of the settlement in order for contribution protection and rights to attach on that date, to forestall any argument that liability is not resolved as of the effective date for purposes of Section 113(f)(1), (f)(2), or (f)(3)(B), we are revising all of our settlement models to make the covenant effective on the effective date of the settlement. This approach makes the resolution of liability to the United States through the covenant track the language our settlements have long included for contribution protection, which takes effect on the effective date of the settlement. The revised effective date of covenant language, using the past cost CD as an example, is as follows:

**Revised Text:**

Covenant for Settling Defendants by United States. Except as specifically provided in Section VIII (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon ~~receipt by EPA of all payments required by Section V, Paragraph 4 (Payment of Response Costs) and any amount due under Section VI (Failure to Comply with Consent Decree)~~ the Effective Date. This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

Similarly, the covenants in the *de minimis* contributor and peripheral party models issued with this memorandum have been revised, in pertinent part, to state, “With respect to present and future liability, these covenants shall take effect upon ~~receipt of the cashout payment~~ the Effective Date.” Further, we are revising the Remedial Design/Remedial Action CD by separate memorandum to state, “Except with respect to future liability, these covenants shall take effect upon ~~receipt of the past cost payment~~ the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of Completion of the Remedial Action by EPA.” Settlements that do not include any initial payment will continue to take effect on the effective date of the settlement.

**III. EFFECTIVE DATE / CONTACTS FOR FURTHER INFORMATION**

The attached revised models are effective upon the date of this memorandum. They should be used for all new negotiations, and negotiations already commenced should incorporate their changes to the extent feasible.

Any questions about this memorandum or the attached revised models 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 EES. This document is available on EPA’s website at <http://www2.epa.gov/enforcement/guidance-revisions-2009-arc-memo-and-issuance-cercla-payment-models>. All of the affected models are available in Word format on EPA’s website in the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>.

**IV. DISCLAIMER**

This memorandum and its attached models are intended as guidance for employees of EPA and DOJ. They are not rules and do not create any legal obligations. The extent to which EPA or DOJ will apply them in a particular case will depend on the facts of the case.

Attachment

cc: Mary Kay Lynch, Associate General Counsel, OGC/SWERLO  
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**APPENDIX**

**TITLES OF / NOTEWORTHY CHANGES TO REVISED MODEL DOCUMENTS**

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## **A. TITLES OF REVISED MODEL DOCUMENTS**

### **1. Past Cost Recovery Models**

- a. Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs (Past Cost CD)
- b. Model CERCLA Section 122(h) Settlement Agreement for Recovery of Past Response Costs (Past Cost SA)

### **2. Peripheral Party Models**

- a. Model CERCLA Peripheral Party Ability to Pay Cashout Consent Decree (Peripheral Party ATP CD)
- b. Model CERCLA Section 122(h)(1) Cashout Settlement Agreement for Ability to Pay Peripheral Parties (Peripheral Party ATP SA)
- c. Model CERCLA Peripheral Party Cashout Consent Decree for Peripheral Party Settlements Not Based on Ability to Pay (Peripheral Party Non-ATP CD)
- d. Model CERCLA Section 122(h)(1) Cashout Settlement Agreement for Peripheral Party Settlements Not Based on Ability to Pay (Peripheral Party Non-ATP SA)

### **3. *De Minimis* and *De Micromis* Models**

- a. Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree (*De Minimis* Contributor CD)
- b. Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Settlement Agreement and Order on Consent (*De Minimis* Contributor ASAOC)
- c. Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay Parties Only
- d. Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay and Non-Ability to Pay Parties
- e. Model CERCLA Section 122(g)(4) *De Minimis* Landowner Consent Decree (*De Minimis* Landowner CD)
- f. Model CERCLA Section 122(g)(4) *De Minimis* Landowner Administrative Settlement Agreement and Order on Consent (*De Minimis* Landowner ASAOC)
- g. Model CERCLA Non-Exempt *De Micromis* Consent Decree (*De Micromis* CD)
- h. Model CERCLA Non-Exempt *De Micromis* Administrative Settlement Agreement and Order on Consent (*De Micromis* ASAOC)

### **4. Model CERCLA Municipal Solid Waste Generator/Transporter Consent Decree (MSW CD)**

## B. NOTEWORTHY CHANGES TO REVISED MODEL DOCUMENTS

### 1. Changes to Past Cost Models

The Past Cost CD and SA were last issued on February 6, 2003. The Past Cost CD and SA that we are issuing with this memorandum supersede the 2003 models and the interim revisions relating to them included in the 2006 Interim Revisions Memo and contain the contribution and covenant changes explained above. They also contain the following additional noteworthy updates:

- **Property Requirements:** For settlements with owner potentially responsible parties (PRPs), the models replace the very limited site access provision with a comprehensive “Property Requirements” section covering all “Affected Property,” which is defined as “all real property at the Site and any other real property, owned or controlled by Owner Settling Party,<sup>1</sup> where EPA determines, at any time, that access or land, water, or other resource use restrictions are needed to implement response actions at the Site. . . .” The new section includes, for use as needed, model language for access, use restrictions, notice to successors-in-title, and for reaching agreements with proposed transferees relating to access and use restrictions. A definition of “Transfer” is also provided.
- **Payment Instructions:** The models provide updated payment instructions in the payment of response costs and stipulated penalties provisions.
- **Access to Information:** For improved procedural clarity, with regard to EPA access to records, the models split “Privileged and Protected Claims” and “Business Confidential Claims” into separate paragraphs. The “Privileged and Protected Claims” paragraph replaces “attorney client privilege or any other privilege recognized by federal law” with “privileged or protected as provided by federal law.” Attorney work product is classified under the Federal Rules of Evidence (F.R.E.) as a “protection” not a “privilege.” See F.R.E. 502. We have also made a clarification regarding the prohibition against raising privilege or protection claims regarding certain site records. That prohibition is now limited to “the portion of any . . . Record that evidences conditions around the Site” and “the portion of any Record that Settling Parties are required to create or generate pursuant to the [settlement].” This change makes clear that the prohibition does not bar privilege claims regarding documents that are not required to be privileged, such as cover letters and emails from attorneys to their PRP clients.
- **Retention of Records:** The models adopt the less restrictive record retention requirements from the August 1, 2011 CERCLA Model Remedial

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<sup>1</sup> References in this Appendix to “Settling Party” include “Settling Defendant,” as used in judicial CDs, “Settling Party,” as used in SAs, and “Respondent,” as used in ASAOs.

Design/Remedial Action Consent Decree (2011 RD/RA CD),<sup>2</sup> in that they only require retention of “non-identical” copies of records, including records in electronic form, and only require settlors who are potentially liable as owners or operators to retain records relating to the CERCLA liability of *other* persons with respect to the site. Similarly, like the 2011 RD/RA CD, the certification that the settlor has not altered or destroyed any records excludes “identical copies;” it is also modified to be triggered by the notification of potential liability regarding the site by the United States or a state.

- **Tolling of Statute of Limitations (SOL):** The Past Cost SA includes a new provision under which Settling Party agrees that the time period between the date of signature and the date of payment shall not be included in computing any SOL potentially applicable to the “matters addressed” in the SA, and that, in any action brought by the United States related to the “matters addressed,” Settling Party will not assert any defense based on the passage of time during such period.
- **Settlements with Federal PRPs:** The models’ optional language for settlements with federal PRPs (who are referred to as “Settling Federal Agencies”) has been revised to conform to language first introduced in the October 1, 2009 *Revised CERCLA Model Remedial Design/Remedial Action Consent Decree* (“2009 RD/RA CD”). Also, because such settlements sometimes include payments by federal PRPs to the private settling parties, the models add a definition for “Settling Parties’ Past Response Costs,” and use the definition, as needed, in optional language within the payment, covenants, and contribution sections.
- **Contribution Protection:** The models include a new footnote that provides guidance on the scope of “matters addressed” in past cost settlements.
- **Minor Party Waivers:** The past cost models introduce a restructuring of the “minor party” waivers (*de micromis*, MSW, and *de minimis*/ability to pay (ATP)) that also applies to the 2011 RD/RA CD (and is being included in it by separate memorandum) and our other settlements with “major parties.” The purpose of the restructuring is to reduce the duplication of language that exists because the three waivers share many elements, but are currently written as three separate, lengthy waivers. These waivers were discussed in the ARC Memo, but they were modified in part by the 2011 RD/RA CD. Although the waivers appear editorially quite different from the 2011 RD/RA CD, the only substantive change is that the user note allowing settlors to exclude specifically identified contractual indemnification claims from the scope of the waiver, which formerly only applied to the MSW and *de micromis* waivers, now applies to the *de minimis*/ATP waiver as well.

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<sup>2</sup> The 2011 RD/RA CD and the 2012 version, which includes a minor update, are available for EPA employees at <http://intranet.epa.gov/oeca/osre/documents/supside.html>. We are revising the RD/RA CD by separate memorandum.

## 2. Changes to Peripheral Party Models

The Peripheral Party ATP and Non-ATP CDs were last issued on January 11, 2001, and the Peripheral Party ATP and Non-ATP SAs were last issued on January 8, 2004. The four peripheral party models that we are issuing with this memorandum supersede these models and the 2006 Interim Revisions Memo. Each contains the contribution and covenant changes explained in Section II of the memorandum as well as the first five past cost model updates noted in Part 1 of this Appendix. Additional noteworthy changes unique to the peripheral party models are as follows:

### a. Additional Changes to ATP Peripheral Models

- **Insurance:** The models include a new definition for “Insurance Information;” revise the ATP determination to note that the United States has reviewed financial and insurance information in determining that Settling Party has limited financial ability to pay; revise the note relating to adding a provision for recovery of future insurance proceeds; add insurance and indemnity information to Settling Party’s certification that it has made full disclosure; and add new language conditioning the United States’ covenant not to sue on the veracity of the disclosure and reserving rights in the event of false or inaccurate disclosure.
- **Lump Sum and Installment Payments:** With regard to lump sum payments, the models remove the optional language requiring payment of interest from the date of the last cost summary through the date of payment and instead specify that, if timely made, no interest is due. With regard to installment payments, the models clarify interest accrual, acceleration of payments, and handling of overpayments.
- **Proceeds of Sale of the Site or Other Property:** The models contain an extensively revised “Payment of Net Proceeds of Sale of Property” provision, including a revised “Transfer” definition and clarification of the land appraisal process, payment of costs of maintenance (taxes, water/sewer bills) pending sale, rental income pending sale, marketing of the property, use of best efforts to sell the property, approval of the sales contract, calculation of “net sales proceeds” (replacing the former “Net Sales Proceeds” definition), optional provision for public auction in the event of non-sale, release of CERCLA federal lien upon sale, and, in the judicial CD, filing of a judgment lien pending sale, exception for involuntary transfers, and continued obligation to enforce the United States’ right of access to the property subsequent to transfer.
- **Covenant by United States:** The models remove from the covenant by United States the provision under which all payments made under the settlement are automatically forfeited, and the covenant and contribution protection are automatically rendered null and void, if the financial or insurance information provided to EPA, or the financial, insurance, or indemnity certification made by Settling Party under the settlement, is determined by EPA to be false or, in any material respect, inaccurate. We believe that these provisions are not necessary

because, even without them, 1) the United States' covenant is still expressly conditioned on the veracity and completeness of the information provided to EPA and the certification made by Settling Party, and 2) the United States' right to seek additional relief from Settling Party in the event of such false submission or certification is still expressly preserved.

**b. Additional Changes to Non-ATP Peripheral Models**

- **Settlements with Federal PRPs:** The models' optional language for settlements with federal PRPs ("Settling Federal Agencies") has been revised to conform to language updated by the 2009 RD/RA CD. Also, because such settlements sometimes include payments by federal PRPs to the private settling parties, the models add definitions for "Settling Parties' Past Response Costs" and "Settling Parties' Future Response Costs" and use the definitions in optional language within the payment section.
- **Additional Response Cost Disputes:** The optional "Payment of Additional Response Costs" billing provision, now moved from an Appendix to the body of the models, has been modified to clarify the dispute process and to include an updated standard of review (based on the standard for Future Response Costs bills introduced in the 2009 RD/RA CD), which provides that settlors "may dispute all or part of a bill for Additional Response Costs if they determine that EPA has made a mathematical error or included a cost item that is not within the definition of Additional Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the National Contingency Plan."

**c. Additional Changes to ATP and Non-ATP Peripheral Models**

- **Reservation for Ownership, Operation, Transportation, Treatment, Storage, or Disposal of Hazardous Substances/Solid Wastes at the Site after Signature:** The models adopt the 2011 RD/RA CD language, which splits ownership or operation of the site commencing after signature into a separate general reservation from transportation, treatment, storage or disposal of hazardous substances/solid wastes at the site commencing after signature.
- **Waiver of Claims Against Other Persons:** The peripheral models, unlike the past cost and other "major party" models, have always contained a waiver of claims against all other persons relating to the Site. We have narrowed the waiver, however, from "all matters relating to the Site, including for contribution," to "response costs relating to the Site," and we have added the note already in the 2011 RD/RA CD allowing Settling Party to reserve any contractual indemnification claims that it may have.

- **Duty to Notify of Contribution Actions:** In addition to the contribution protection and rights changes explained in Section II.A. of the memorandum, we are also adding a duty to notify the United States if Settling Party initiates a contribution action or is sued in contribution.<sup>3</sup>

### 3. Changes to *De Minimis* and *De Micromis* Models

The *De Minimis* Contributor CD and ASAOC were last issued on August 12, 2003; the *De Minimis* Landowner CD and ASAOC were last issued on May 13, 2004; and *De Micromis* CD and ASAOC were last issued on November 6, 2002. Separate ability to pay provisions for use with the *de minimis* contributor CD and ASAOC were issued on August 12, 2003. The six *de minimis* and *de micromis* models (and the revised ATP provision for the *de minimis* contributor models) that we are issuing with this memorandum supersede these prior models. Each contains the contribution and covenant changes explained in Section II of the memorandum as well as the following additional minor but noteworthy changes:

#### a. Additional Changes to *De Minimis* Contributor Models

- **Settling Federal Agency Settlement Language:** The models add optional language for use when Settling Federal Agencies (federal PRPs) are settling *de minimis* parties, including the updated requirement to pay interest if payment is not received within 120 days after the effective date.
- **Payment Language/Instructions:** The models include updated payment instructions.
- **Reservation for Ownership, Operation, Transportation, Treatment, Storage, or Disposal of Hazardous Substances/Solid Wastes at the Site after Signature:** Like the peripheral party models, the revised *de minimis* contributor models split ownership or operation of the site into a separate general reservation from transportation, treatment, etc. after signature. Unlike the peripheral models, the ownership/operation reservation applies here whether the ownership or operation occurred before or after signature because the settling parties have qualified for a CERCLA § 122(g)(1)(A) settlement based on their *de minimis* “contributor” liability as an arranger or transporter under CERCLA § 107(a).
- **Waiver of Claims Against Other Persons:** Like the peripheral party models, the *de minimis* models have always contained a waiver of claims against all other persons relating to the Site. Also like the peripheral models, we have narrowed the waiver from “all matters relating to the Site, including for contribution,” to

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<sup>3</sup> The 2006 Interim Revisions Memo to the peripheral party models limited the contribution rights text to situations in which the settling party’s waiver of contribution claims against all other site PRPs has been voided by the filing of an action against the settlor by another site PRP. *See* 2006 Interim Revisions Memo at 5. We have not included that limitation in the revised peripheral party models because CERCLA confers the right of contribution through Section 113(f)(3)(B) as soon as the settlor enters into a qualifying settlement. The ability of the settlor to exercise that statutory right, however, is circumscribed by its simultaneous agreement in the settlement to waive claims for response costs relating to the Site against other site PRPs, unless the circumstance for the exception is met.

“response costs relating to the Site,” and we have added the note from the 2011 RD/RA CD allowing Settling Parties to reserve any contractual indemnification claims that they may have.

- **Duty to Notify of Contribution Actions:** We are also adding a duty to notify the United States if Settling Party initiates a contribution action or issued in contribution.
- **Certification:** The models update the certification that the settlor has not altered or destroyed any records to, like the 2011 RD/RA CD, exclude “identical copies” and to be triggered by the notification of potential liability regarding the site by the United States or a state.
- **Ability to Pay Provisions:** We have updated the “Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay Parties Only” and the “Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay and Non-Ability to Pay Parties” to use the revised *De Minimis* CD and ASAOC language as the “base” language and the revised Peripheral Party ATP CD and SA language as the ATP inserts, adapted as needed for the *de minimis* model context.

#### **b. Additional Changes to De Micromis Contributor Models**

- **Note on When to Use Model:** A new note references relevant guidance and when use of a de micromis settlement may be appropriate.
- **Note on Federal Natural Resource Claims:** A new footnote explains that under previously-issued guidance, the federal natural resource trustees have agreed to waive the natural resource damage claim against de micromis settlors whose monetary consideration is \$1.00 or less, subject to a right to withdraw that consent in a given case.
- **Certification:** Same as for *de minimis* contributor in Part B.3.a of this Appendix.
- **Waiver of Claims Against Other Persons:** The standard de micromis waiver of claims against all other persons relating to the site has been modified to include the exception (also present in the peripheral and *de minimis* models) that the waiver becomes inapplicable if such other person asserts a claim against a Settling Party. We have also added the note allowing Settling Parties to reserve any contractual indemnification claims that they may have.

#### **c. Additional Changes to *De Minimis* Landowner Models**

- **Property Requirements:** The models include the revised provisions described in the changes relating to past cost models in Part B.1 of this Appendix.

- **Payment Language/Instructions:** The models include updated payment instructions.
- **Reservation for Ownership, Operation, Transportation, Treatment, Storage, or Disposal of Hazardous Substances/Solid Wastes at the Site after Signature:** The models replace the reservation for “future arrangement for disposal or treatment of a hazardous substance, pollutant or contaminant at the Site after the effective date” with the two 2011 RD/RA CD reservations, one for ownership or operation of the site commencing after signature, and one for transportation, treatment, storage or disposal of hazardous substances/solid wastes at the site commencing after signature.
- **Waiver of Claims Against Other Persons:** Same as for *de minimis* contributor in Part B.3.a of this Appendix.
- **Duty to Notify of Contribution Actions:** Same as for *de minimis* contributor in Part B.3.a of this Appendix.

#### 4. Changes to MSW CD

The MSW CD was last issued on April 4, 2000, and is superseded by the revised model issued with this memorandum. The new model contains the contribution and covenant changes explained in Section II of the memorandum, all of the additional changes relating to the *De Minimis* contributor models listed in Part B.3.a of this Appendix, as well as one additional minor but noteworthy change:

- **Definition of MSW:** The model’s definition was updated to conform to the standard MSW definition in the 2011 RD/RA CD and all other CERCLA models that contain the optional MSW waiver, which is based on the definition in Section 107(p)(4) of CERCLA, 42 U.S.C. § 9607(p)(4).
- **Definition of Remedial Action (RA):** The model’s definition was updated to provide that the RA is the RA selected in the record of decision for the site. The new definition is in conformance with changes being made by separate memorandum to the definition of RA in the model RD/RA CD.